Cecil C. Humphreys School of Law

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THE FRAGILE FORTRESS

The University of Memphis Law Review Symposium Friday April 7, 2017

Judicial Independence in the 21st Century

Voices from the Bench, Academy and Bar

THE UNIVERSITY OF MEMPHIS | Cecil C. Humphreys School of Law

2017 INSTITUTE FOR HEALTH LAW & POLICY SYMPOSIUM

Uncertain Care: The Future of the Affordable Care Act. Click here to read more.

News

COLD CASE: JUSTICE FOR ELBERT WILLIAMS, PRESENTED BY JIM EMISON

On Tuesday, March 21, at noon in Wade Auditorium, Jim Emison, a renowned and award winning courtroom lawyer of 43 years, will present, "Cold Case: Justice for Elbert Williams." Lunch will be provided for attendees. The program is sponsored by the Memphis Law Office of Diversity and the Black Law Students Association. Click here to read more.

MEMPHIS LAW LAUNCHES STRATEGIC CODE ENFORCEMENT ACADEMY

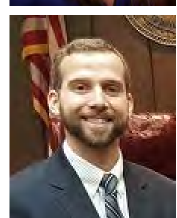
Memphis Law, in collaboration and partnership with Neighborhood Preservation, Inc. and support from The Kresge Foundation, will launch the new Strategic Code Enforcement Academy in May. The new program will examine ways to streamline the process of cleaning up vacant and blighted properties. Click here to read more.

UNCERTAIN CARE: THE FUTURE OF THE AFFORDABLE CARE ACT

The 2017 Institute for Health Law & Policy Symposium will strive to give an overview of the accomplishments and challenges of the Affordable Care Act, an update on its status and a brief summary of "repeal and replace" options. A number of local and national experts will discuss what "repeal and replace" means locally and what leaders from various key perspectives consider critical elements to any efforts to amend or replace the current law.

PROFESSOR KATE SCHAFFZIN SELECTED TO SERVE ON UOM BOARD OF TRUSTEES

Memphis Law professor Katharine Traylor Schaffzin has been selected by the University of Memphis Faculty Senate to serve as the faculty representative on the inaugural Board of Trustees for the University of Memphis. Professor Schaffzin will serve as a Trustee for a two-year term. Please click here to read more.



ADVANCED MOOT COURT PROBLEM WINS NATIONAL AWARD

Last year's Memphis Law Advanced Moot Court problem won the inaugural Judith S. Kaye Writing Competition, a competition hosted by New York University School of Law to select the best student-written moot court problem in the country. Click here to read more about the problem itself, written by William Cranford, as well as the award.

ELDER LAW CLINIC HIGHLIGHTED IN PERSPECTIVE MAGAZINE

The University of Memphis Cecil C. Humphreys School of Law Elder Law Clinic, led by Professor Donna Harkness, is highlighted in the new issue of Perspective magazine, a publication of the Young Lawyers Section of the NY State Bar Association. Memphis Law and Elder Law Clinic alum Adam Cooper co-authored the article, which details his experience in the Memphis Law Elder Law Clinic, alongside the experiences of other law students from various other law schools. **To read the complete article, please click here.**

VIRTUAL TOUR OF MEMPHIS LAW

Introducing a new way to experience Memphis Law. Take a virtual tour of our historic home and see for yourself why we were recognized as having the "Best Law School Facilities" in the nation by preLaw magazine. **CLICK HERE TO TAKE THE FULL VIRTUAL TOUR.**

MEMPHIS LAW - BEST VALUE LAW SCHOOL

Memphis Law is proud to once again be recognized as a Best Value Law School by preLaw Magazine. Click here to read more about the reasons that our law school is consistently recognized as one of the best values in legal education.

MEMPHIS LAW NAMED AS BEST FACILITY

PreLaw magazine and National Jurist have named Memphis Law as having the best law school facilities in the nation! Click here to read the full digital edition!

READ MORE NEWS>>

Events

UP TO DATE INFORMATION ON EVENTS

For a full roundup of all upcoming law school events and activities, please visit our informal events blog, On Legal Grounds for the most up-to-date information.

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EVENT CALENDARS

ON LEGAL GROUNDS

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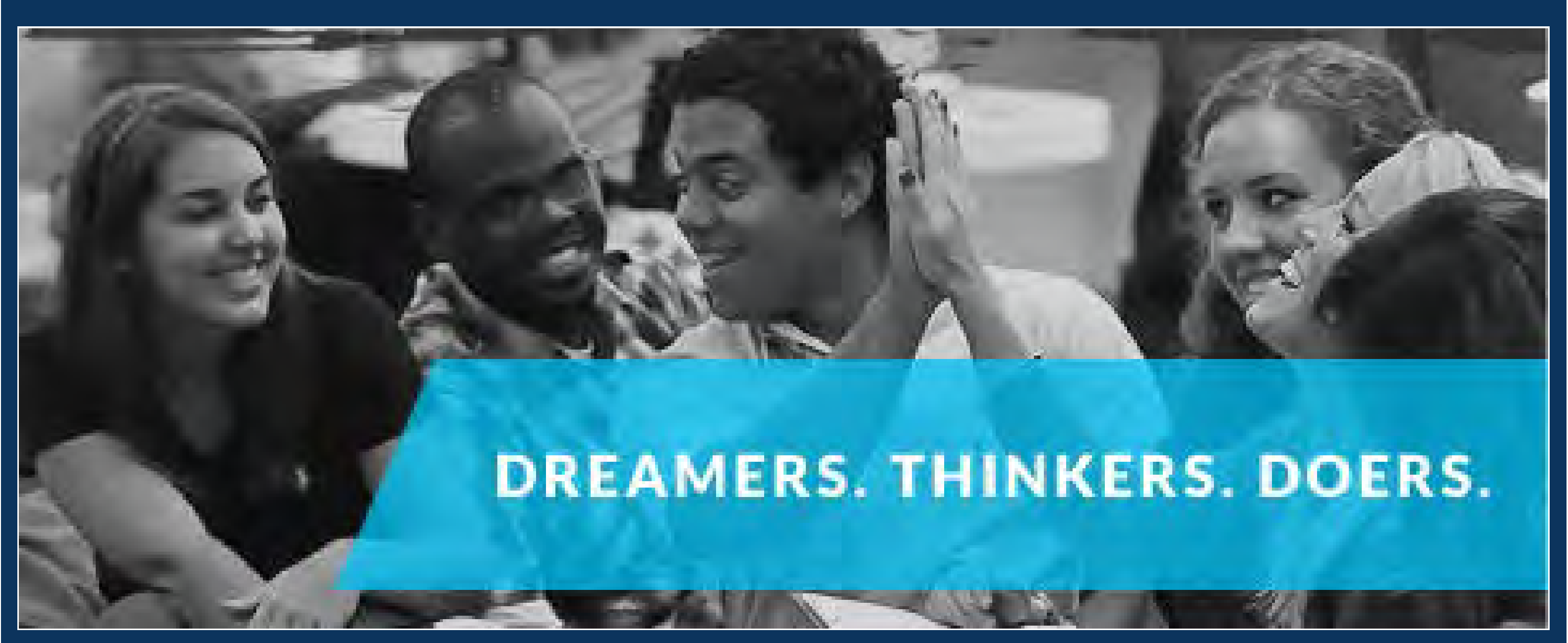

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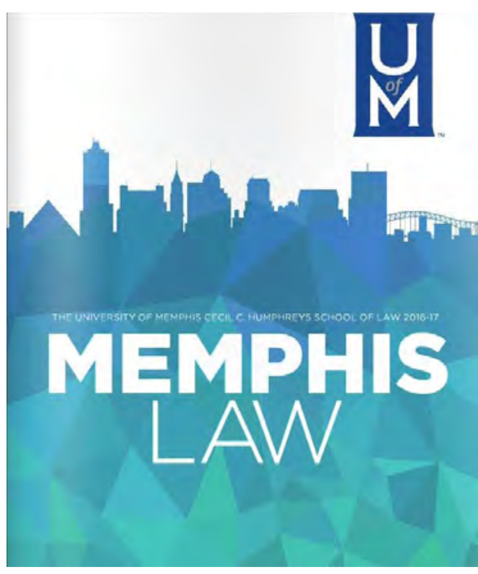
About

Memphis Law has the #1 ranked facility in the nation.

It makes it easier to be inspired when you are surrounded by the finest technology and facilities in the entire U.S. legal education system*. Located in downtown Memphis, the Cecil C. Humphreys School of Law is simply jaw dropping. But it's the education and rich experiences you will receive here that will transform you. Being located in the nation's 20th largest city puts us in a position of influence. As the only law school in Memphis and one of the largest in Tennessee, Memphis Law gives students unparalleled opportunities for success. Memphis is home to several major corporate world headquarters, three Fortune 500 companies, a dynamic healthcare community including 25 hospitals and one of the world's leading healthcare research facilities, and an extensive and diverse legal community, including some of nation's and region's most prominent law firms.

Memphis Law's location will impact the education and experience you receive during your three years here; in turn, that education and experience will help you succeed wherever you go after law school. Memphis makes the difference. Memphis Law is an exceptional **HOME** and **LOCATION, DEDICATED** to student-focused, experiential learning. We're **ENGAGED** with the community and offer you a tradition of **SUCCESS.**

**PreLaw*, 2014



Accreditations and Memberships

The University of Memphis is accredited by the Southern Association of Colleges and Schools Commission on Colleges to award bachelor's, first professional, master's, educational specialist's, and doctoral degrees. Contact the Commission on Colleges at 1866 Southern Lane, Decatur, Georgia 30033-4097 or call 404-679-4500 for questions about the accreditation of the University of Memphis.

The University of Memphis Cecil C. Humphreys School of Law is accredited by the American Bar Association (ABA) and is a member of the Association of American Law Schools (AALS). The ABA may be contacted at: Council of the Section of Legal Education and Admission to the Bar, 321 N. Clark Street, Chicago, IL 60654-7598, telephone 312.988.6738. The AALS may be contacted at 1614 20th Street, NW; Washington, DC 20009, telephone 202.296.8851; http://www.aals.org/.

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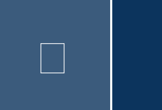
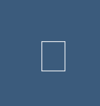
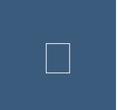
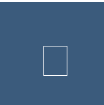
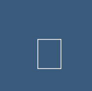
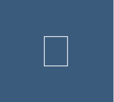

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Cecil C. Humphreys School of Law

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Admissions

Admissions

Take a fresh look at the University of Memphis Cecil C. Humphreys School of Law and discover what continues to drive us forward. Whether it's our location, faculty, diversity, success, great value or ability to make a difference in Memphis, we are delighted to share with you all that Memphis Law has to offer.

Memphis is a city known for doing things its own way and at Memphis Law, we're driven to do the same. We look at legal education differently to help you learn, grow and find success in your chosen field. Please scroll below to learn a bit more or reach out to our admissions team if you have any questions.

Your Admissions Team:

Sue Ann McClellan, Assistant Dean for Law Admissions, Recruiting, & Scholarships, Phone: (901) 678-5403, Office: Law 253
Kara Phillips, Assistant Director for Law Admissions; Phone (901) 678-5403; Office: Law 252
Jacqueline O'Bryant, Law School Diversity Coordinator, Phone: (901) 678-2078,
Penny Rogers, Administrative Assistant, Law Admissions, Phone: (901) 678-5403, Office: Law 252

Contact our Office of Admissions for more information, take a look at our official Viewbook, or Apply Today if you're ready to join the Memphis Law community!

- PreLaw magazine named Memphis Law as having the best law school facility in the nation! Click here to read more.
- Memphis Law's downtown location puts us within walking distance from state and federal courts, numerous government offices and law firms.
- Memphis Law hosts an average of 68 conferences, professional networking receptions, and continuing legal education seminars every year in our building.
- Our location in the heart of downtown and the legal community allows us to develop unique and innovative partnerships throughout a variety of sectors and industries.

- Memphis is the sixth most affordable city in America, according to Forbes.
- The city has a cost of living that is 14% below the national average.
- Memphis was named the "Next Hot Southern City" by Travel & Leisure Magazine.
- The Wall Street Journal named Memphis as a Top 4 Market for Millenials with the right Live/Work/Play environment.

- Our curriculum is designed to serve both the student who has an interest or passion for a particular speciality, as well as the student who is seeking a more general legal education.
- 100% of our academic certificates incorporate hands-on learning through externships and legal clinics.
- Our small, first-year sections have just 60 students in each section.
- We have a 12:1 Faculty to Student ratio.
- 100+ law students were placed in a legal externship in Memphis last year.

- Memphis Law graduates have exceeded the Tennessee state bar passage rate for more than 15 consecutive years.
- On average, 86% of our graduates are employed within just ten months of graduation.
- There are Memphis Law alumni practicing in 48 states across the nation.

- Memphis Law students completed 10,182 pro bono service hours last year.
- Over 750 cases involving blighted buildings in Memphis were handled by students in our Neighborhood Preservation Clinic last year.
- Our Medical-Legal Partnership (MLP) Clinic handled over 40 cases last year in all five of the IHELP areas identified by the National Center for Medical Legal Partnership.
- Law students in our Volunteer Income Tax Assistance Program (VITA) filed over 70 federal tax returns last year.
- Over 150 clients were helped in 2016 by students taking part in Memphis Law's Alternative Spring Break Program.

- Our 330+ students come from 86 different undergraduate institutions across the nation.
- Memphis Law was named a Top 5 Best Regional Law School for Black Students by Lawyers of Color Magazine.
- Our Tennessee Institute for Pre-Law (TIP) Program is a unique admissions by performance program for Tennessee and border county residents from diverse backgrounds and circumstances.

- Memphis Law is proud to once again be recognized as a Best Value Law School by preLaw Magazine. Click here to read more about the reasons that our law school is consistently recognized as one of the best values in legal education.
- We are the Most Affordable law school in Tennessee.
- Memphis Law is the 10th Least Expensive law school in all 50 states for non-residents.

Important Links

- Guide to Applying
- Apply Now
- 2016 Viewbook
- Request a Viewbook

Important Contacts

- Sue Ann McClellan, Assistant Dean for Law Admissions, Recruiting, & Scholarships, Phone: (901) 678-5403, Office: Law 253
- Kara Phillips, Assistant Director for Law Admissions; Phone (901) 678-5403; Office: Law 252
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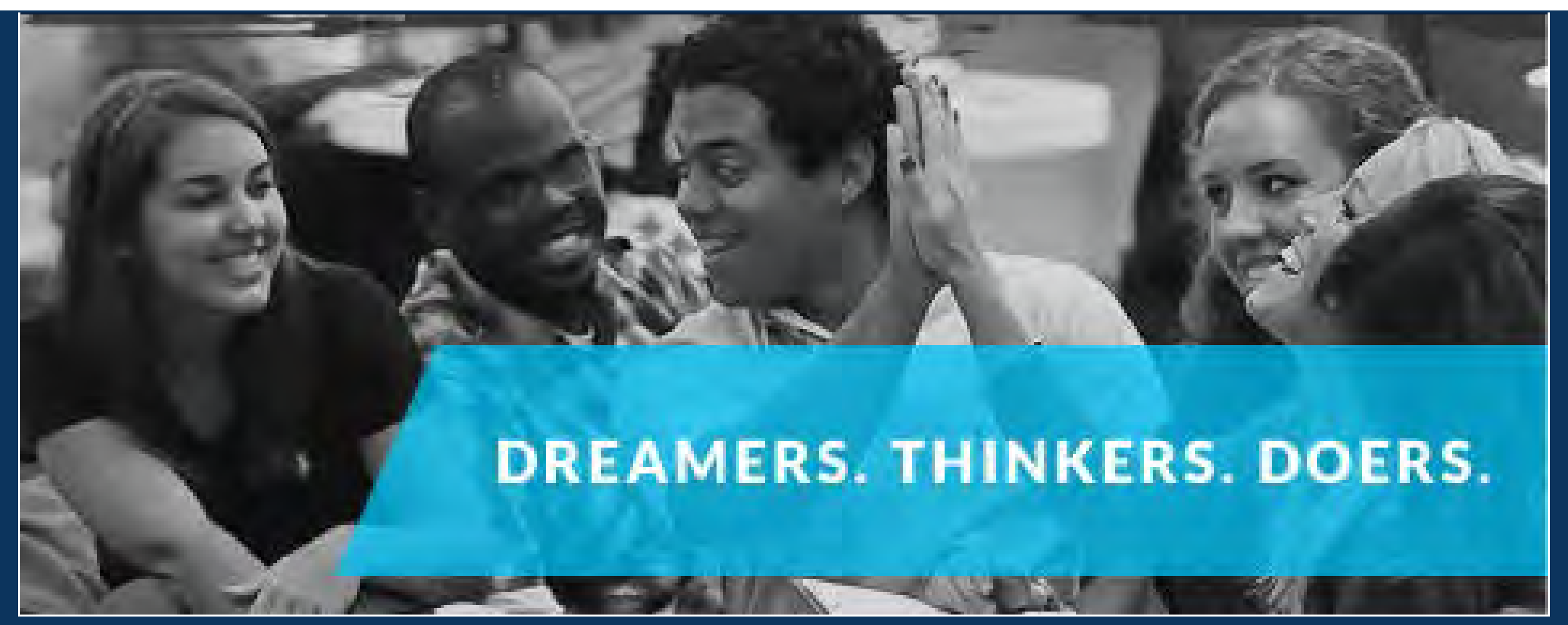

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Academic Programs

We invite our students to take advantage of the various classroom, mentoring, programmatic, co-curricular, externship and clinical opportunities available to all Memphis Law students.

This section contains everything you'll need to know about our various degree programs, professional certificate programs, co-curricular opportunities, advocacy program, centers and institutes, as well as legal clinics and experiential learning programs.

Please see below for more information on all of these academic programs and opportunities.

- Degree Programs
- Certificate Programs
- Experiential Learning
- Academic Journals
- Advocacy Programs
- Institute for Health Law & Policy
- Legal Writing
- International Law Programs

Important Contacts

- Steve Mulroy, Associate Dean for Academic Affairs; smulroy@memphis.edu; Office: Law 269; Phone: (901) 678-4494
- Meredith Aden, Assistant Dean for Law Student Affairs; maden@memphis.edu; Office: Law 258; Phone: (901) 678-2528
- Jamie Johnson, Registrar; jmagdvtz@memphis.edu; Office: Law 264; Phone: (901) 678-2660

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Cecil C. Humphreys School of Law

Current Students

Welcome to the University of Memphis Cecil C. Humphreys School of Law Current Students webpage. This portion of the site is dedicated to providing you with information that will enrich your experience at the Law School and facilitate the practical aspects of receiving an education here.

Within this site, you can find information on the following:

Registrar

- Course and Class Information
- Course Catalog
- Academic Curriculum
- Registration
- Calendars
- Special Degree Programs
- Certificate Programs
- Records Requests
- Graduation Requirements
- Academic Regulations
- Student Advising
- Bar Exam Information

Student Affairs

- Academic Success Program
- Bar Exam Information

Bookstore
- Commencement
- Counseling Services
- Information Technology
- Law School ID Cards
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- Student Advising

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Financial Information

Honor Council

Pro Bono

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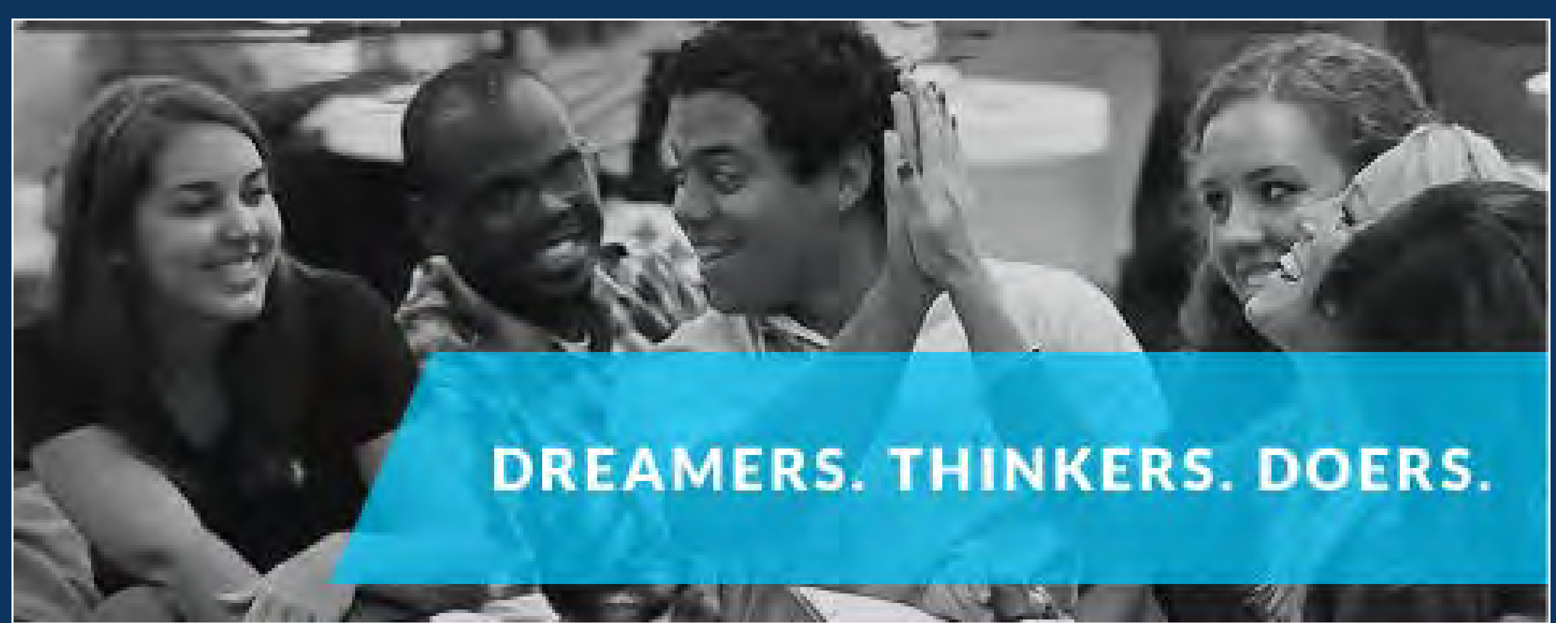

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Cecil C. Humphreys School of Law

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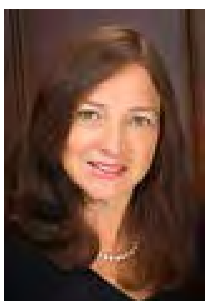

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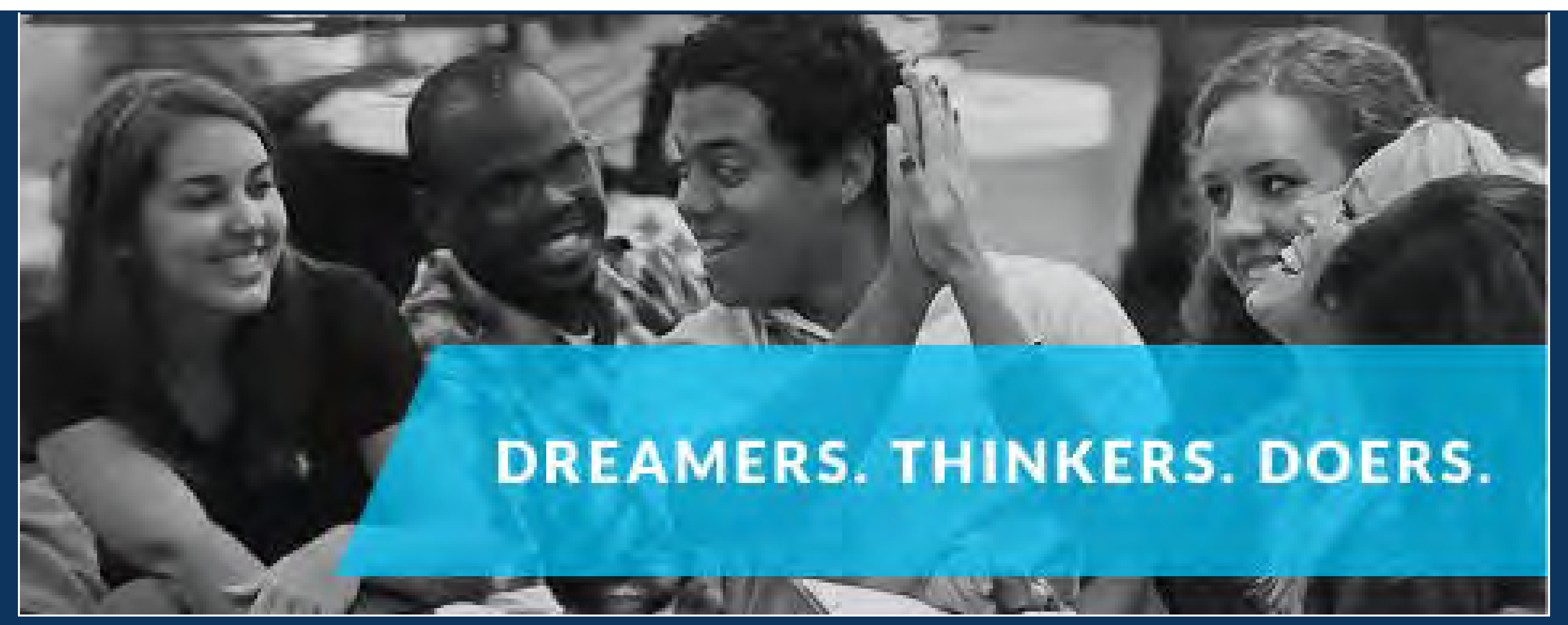

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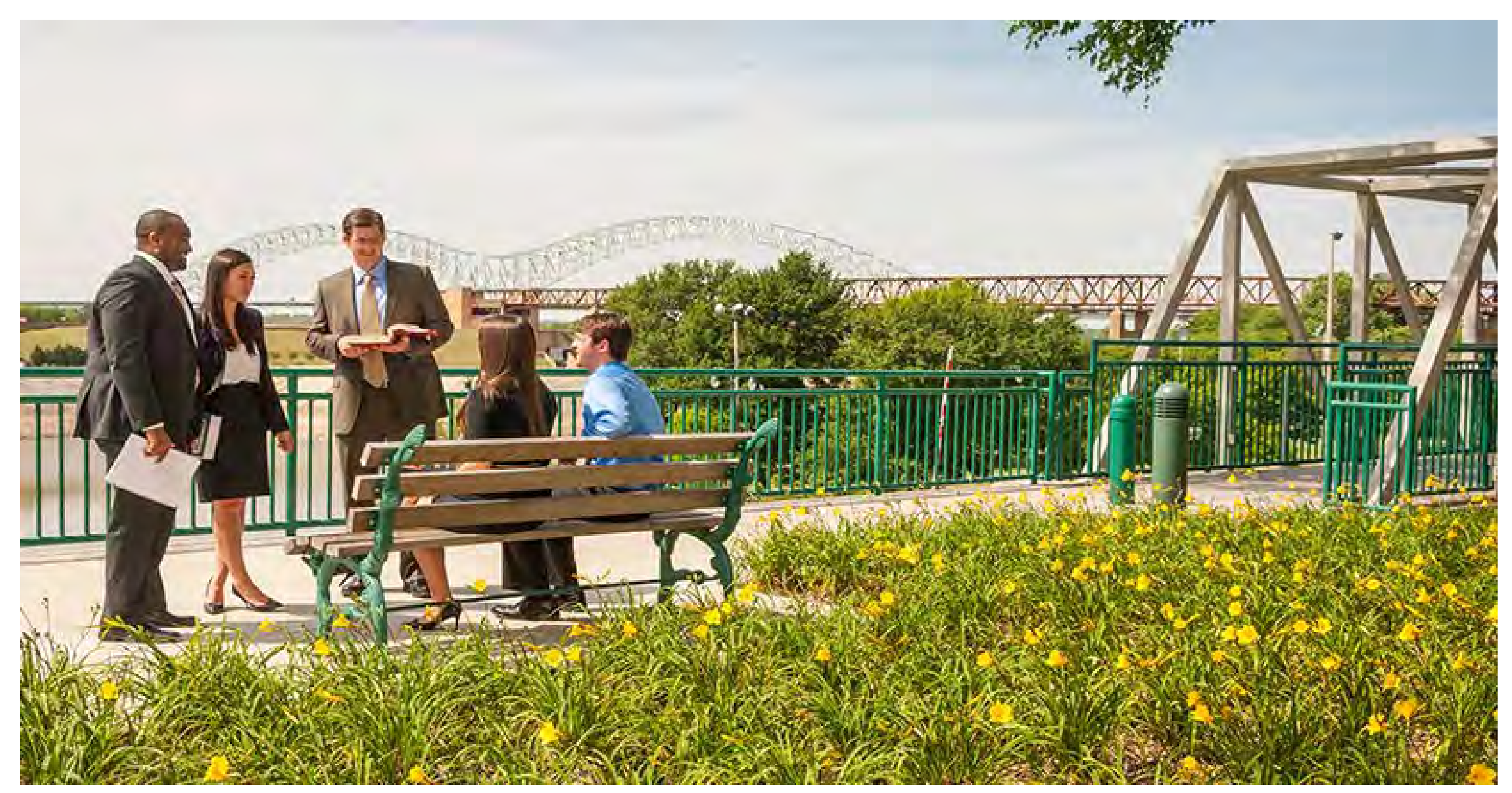
Career Services



Career Services Office

The Career Services Office (CSO) is committed to assisting students and graduates of Memphis Law with job search and professional development needs.

Our staff strives to maximize employment by marketing to employers and promoting placement opportunities. Our office does not guarantee jobs or placement services, but works with students and alumni to ensure that they possess the skills necessary to conduct a successful job search at any point in their career.

ABA Employment Summaries

- Class of 2013
- Class of 2014
- Class of 2015

NALP Reports

- Class of 2010
- Class of 2011
- Class of 2012
- Class of 2013

- Class of 2014
- Class of 2015

Information regarding race, gender, and ethnicity has been redacted from the above NALP reports.

Career Services Office
Cecil C. Humphreys School of Law
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E-mail: lawcareerservices@memphis.edu
Office Hours: Monday – Friday, 8:30 a.m. – 5 p.m.

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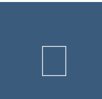
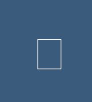
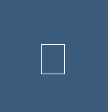
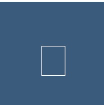
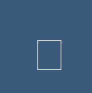
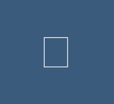

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Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities which receive Federal financial assistance. Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance..." 20 U.S.C. § 1681 - To Learn More, visit Title IX and Sexual Misconduct.

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JOURNAL TITLES

DATABASES

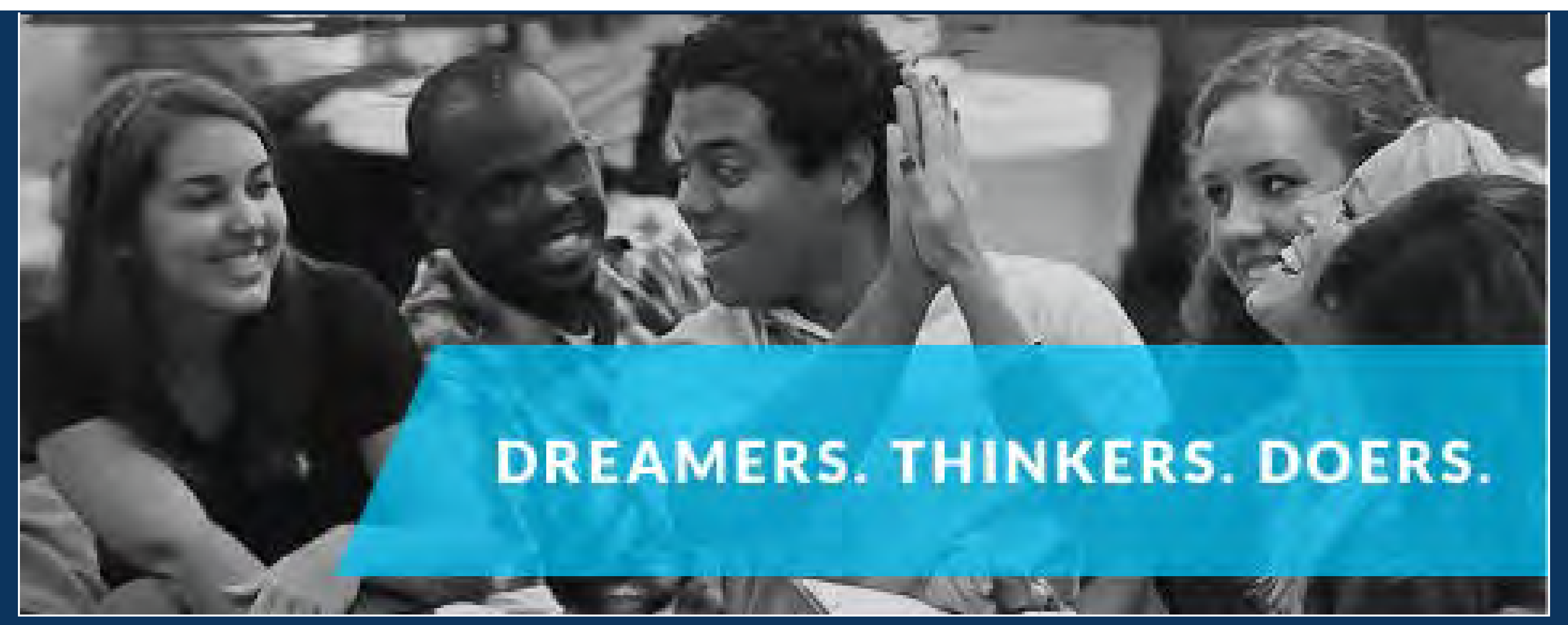
Welcome to the Cecil C. Humphreys School of Law Library!

Cecil C. Humphreys School of Law
Law Library
1 North Front Street
Memphis, TN 38103-2189
Telephone: (901) 678-2426 Fax: (901) 678-5293
Email: lawcirc@memphis.edu

Hours: Monday - Friday, 7:30 a.m. - 6 p.m. (Faculty, staff, and students have 24/7 access.)

Library Spotlights

The Law Library is a selective depository library. Documents can be found in our catalog. Please ask for assistance with documents at the Circulation and Reference Desk. The McWherter Library on the main campus of the University of Memphis is a regional depository; the government publications department is Uncle Sam.



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INSTITUTE FOR HEALTH LAW & POLICY SYMPOSIUM

The University of Memphis
Institute for Health Law & Policy
4th Annual Symposium

UNCERTAIN CARE:
THE FUTURE OF THE AFFORDABLE CARE ACT

Our new administration seeks substantial changes to the nation's healthcare system, but what will that change ultimately look like?

This symposium will strive to give an overview of the accomplishments and challenges of the Affordable Care Act, an update on its status, and a brief summary of "repeal and replace" options. A number of local and national experts will discuss what the push to "repeal and replace" means for our local community, and what leaders from various key perspectives consider critical elements to any efforts to amend or replace current law.

Join us as we seek to move from a reactive posture to proactively crafting an agenda for reform that seeks to ensure continued access to affordable, quality care in our community.

Friday, March 31, 2017
9:00 a.m. - 4:00 p.m.

Cecil C. Humphreys School of Law, Wade Auditorium
1 North Front Street, Memphis, Tennessee 38103

CLE Credit Requested.
Registration information to follow.

More information about the Symposium and how to register will be available soon, so please check back.

Spring 2016 Symposium

- An ACE in the Hand of Policy Reform; Loading the Deck for a Trauma-informed Juvenile Justice System
- Featuring presentations by:
    - KEYNOTE SPEAKER: Mark Soler, Executive Director, Center for Children's Law and Policy, Washington, D.C.
    - Stephen Bush, Shelby County Public Defender
    - Chris Peck, State Coordinator, Tennessee ACE Project
    - The Hon. Dan Michael, Chief Shelby County Juvenile Court Magistrate
    - Sen. Mark Norris, State of Tennessee Senate Majority Leader
    - Altha J. Stewart, MD, Director, Center for Health in Justice Involved Youth, University of Tennessee Health Science Center, College of Medicine

Spring 2015 Symposium

- Building Blocks for a Healthier Community
- Featuring presentations by:
    - Sharon Z. Roerty, MCRP - Senior Program Officer, Robert Wood Johnson Foundation
    - Marice Ashe, JD, MPH - Founder and CEO of ChangeLab Solutions
    - Elizabeth Tobin-Taylor, JD, MA - Assistant professor of family medicine, Alpert Medical School and Assistant Professor of health services, policy and practice, Brown University School of Public Health
- To see a video of the entire symposium, visit our YouTube page by clicking here.

Spring 2014 Symposium

- Race, Research, and Rights: The Legacy of the Tuskegee Syphilis Studies
- Special guests – Fred Gray And James Jones
- The Spring 2014 Health Law Symposium featured events at the newly re-opened National Civil Rights Museum, as well as a day-long symposium featuring presentations and panels from leading experts on the Tuskegee studies and topics ranging from public health to medical ethics.

- To see photos from the event, click here.
- To view a comprehensive video playlist of the day's activities, visit our YouTube page HERE.

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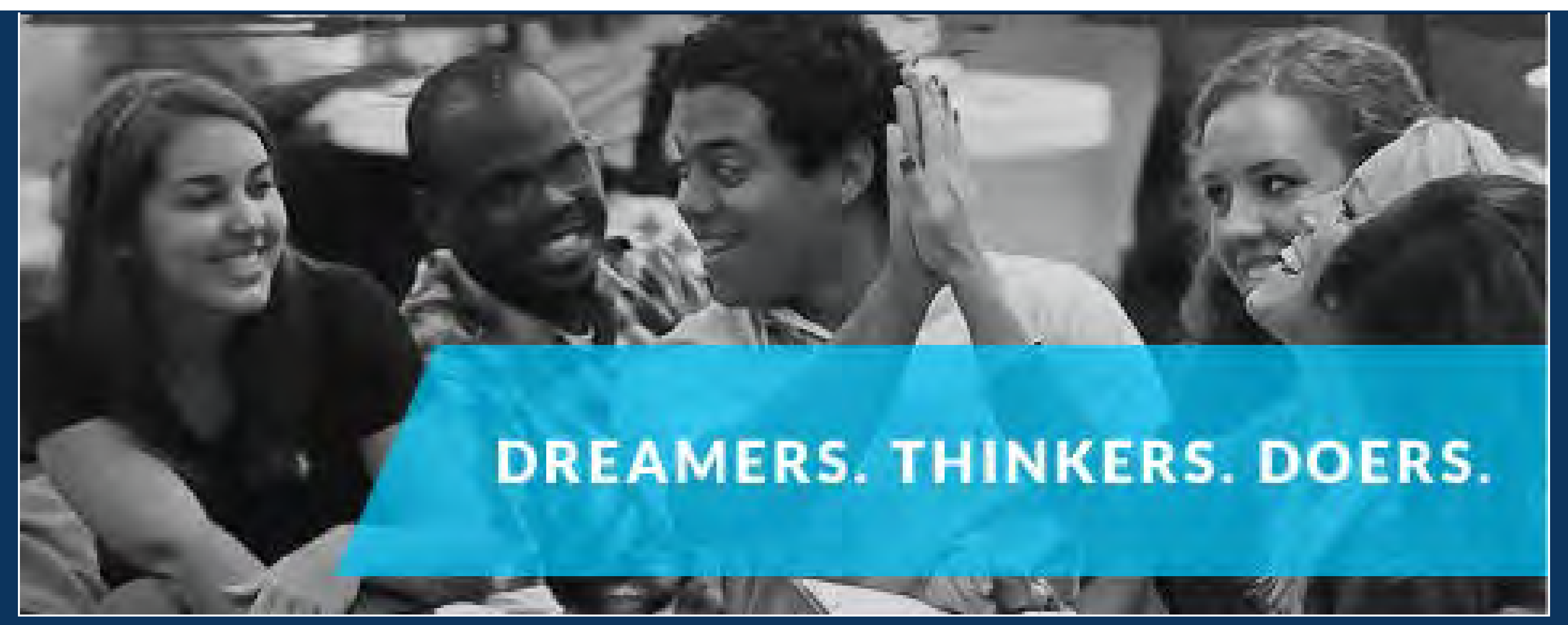

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Cecil C. Humphreys School of Law

LATEST NEWS*

BLSA UNITY IN DIVERSITY SCHOLARSHIP BANQUET

The Black Law Students Association hosted the inaugural Unity in Diversity Scholarship Banquet on Thursday, Feb. 23 at The Guest House at Graceland, with keynote speaker, Robert Grey, the former ABA president and current president of the Leadership Council on Legal Diversity. The event raised over $100,000 for diversity scholarships at the University of Memphis School of Law.

ASST. DEAN MULROY'S RESEARCH CITED IN DOJ REPORT

Associate Dean Steve Mulroy's article "Hold" On: The Remarkably Resilient, Constitutionally Dubious 48-Hour Hold was recently cited in a Department of Justice Civil Rights Division report. His focus on the issue of "48 hour holds" was the main focus of the investigation and the main basis for finding a pattern and practice of discrimination. To read the full DOJ report, please click here.

PROFESSOR CHRISTINA ZAWISZA NAMED MEMPHIS ATTORNEY FOR JUSTICE

Professor Chris Zawisza was recognized as a Memphis Attorney for Justice by Tennessee Supreme Court Justices Jeffrey S. Bivins and Holly Kirby at the Memphis Bar Association Annual Meeting on Dec. 8, 2016. The recognition is awarded to all attorneys who have given 50 or more hours of pro bono service each year.

JACQUELINE O'BRYANT RECEIVES BEN F. JONES PRESIDENT'S AWARD

Jacqueline O'Bryant, law school diversity coordinator at the University of Memphis School of Law, has been named as the honored recipient of the National Bar Association, Ben F. Jones Chapter, President's Award. This award was presented at the Ben F. Jones Chapter 2016 Barrister's Ball, which also marked the 50th anniversary of the Ben F. Jones chapter.

PROFESSOR DANIEL SCHAFFZIN - AALS CLINICAL SECTION EXEC. COMMITTEE

Professor Daniel Schaffzin was recently nominated to the executive committee of the American Association of Law School's section for Clinical Legal Education for 2017. Schaffzin currently chairs the clinical section's Externship Committee through May 2017 and has previously served on the Planning Committee for the 2016 AALS Annual Conference on Clinical Legal Education, the Awards Committee and the Teaching Innovations Committee.

IHELP POLICY LAB: ACE INITIATIVE LAUNCHED

The University of Memphis Cecil C. Humphreys School of Law is proud to announce the launch of the Institute for Health Law and Policy ("iHeLP") Policy Lab: ACE Initiative, thanks to generous support from the ACE Awareness Foundation. Please click here for more information about the policy lab and it's work with the ACE Awareness Foundation and their collaboration.

MEMPHIS LAW HOSTS IMPLICIT BIAS CONFERENCE

Memphis Law recently hosted the conference, Implicit (Unconscious) Bias: A New Look at an Old Problem, on Friday, Nov. 18. For more information and a rundown of the full program, please click here.

JOHN NEWMAN ON CNBC CLOSING BELL

Professor John Newman appeared on the CNBC show "Closing Bell" to discuss the transparency issues surrounding Facebook and Google as it pertains to advertisers. Click here to watch the debate.

U.S. COURT OF APPEALS FOR SIXTH CIRCUIT VISITS MEMPHIS LAW

The United States Court of Appeals for the Sixth Circuit conducted oral arguments in our Historic Courtroom in November. The panel, consisting of Judge Merritt, Judge Siler, and Memphis Law alum Judge Bernice Donald heard oral arguments in Andrew Thomas, Jr. v. Bruce Westbrooks, on Wednesday, November 2nd. This was a rare event for the Sixth Circuit and marks the first time the Court has visited Memphis Law to hear an argument.

LISA GEIS HIRED TO LEAD NEW CHILDREN'S DEFENSE PROGRAM

The University of Memphis Cecil C. Humphreys School of Law is proud to announce our most recent addition to our faculty, Professor Lisa Geis, who will lead our new Children's Defense Program. Please click here to read more about Professor Geis.

PILLARS OF EXCELLENCE AWARDS DINNER

The Memphis Law Alumni Chapter honored Justice Holly Kirby and other Memphis legal community pillars at the annual Pillars of Excellence Awards Dinner. Please click here to read more about the event and the night's honorees.

ELECTORAL COLLEGE DEBATE

The Federalist Society Student Chapter & Memphis Lawyers Chapter recently hosted a debate and discussion on the Electoral College featuring John L. Ryder (General Counsel to the Republican National Committee, Litigation Counsel) and Hon. Robert E. Cooper, Jr. (former Counsel to democratic Gov. Phil Bredesen and the 26th Attorney General and Reporter of Tennessee), for a discussion and debate on whether the Electoral College has a place in contemporary society. Click here for a recap.

PROF. DANNY SCHAFFZIN HAS SCHOLARSHIP CITED IN WASHINGTON POST

A recent Washington Post piece cited Professor Danny Schaffzin's article, "Warning! Attorney Advertising May Be Hazardous to Your Health," (8 CHARLESTON L. REV. 319 (Winter 2013- 14) (by invitation), reprinted in 63 DEFENSE L. J. 3 (2014)). The op-ed piece, written by the President of the U.S. Chamber Institute for Legal Reform and entitled "How lawyers scare people out of taking their meds," can be found by clicking here.

HOUSING ADJUDICATION CLINIC NAHRO AWARD

As a result of its partnership with Memphis Law's Housing Adjudication Clinic, the Memphis Area Housing Authority will receive a Merit Award from the National Association of Housing and Redevelopment Officials (NAHRO) industry organization for the Housing Choice Voucher program enhancements that the clinic helped to establish and implement.

PROF. MCCLURG AUTHORS NEW CASEBOOK

Professor and Herff Chair of Excellence Andrew McClurg has co-authored with Professor Brannon Denning (Cumberland School of Law, Samford University) a new casebook, Guns and the Law: Cases, Problems, and Explanation (Carolina Academic Press 2016). Click here to read more about this exciting new book.

PROF. D.R. JONES APPOINTED TO DALIC COMMITTEE

Professor D.R. Jones was appointed to serve on the American Association of Law Libraries' Digital Access to Legal Information Committee (DALIC), a national committee. She previously served as chair of the DALIC State Online Legal Information sub-committee.

JUSTICE HOLLY KIRBY HONORED AT PILLARS OF EXCELLENCE DINNER

The Cecil C. Humphreys School of Law Alumni Chapter honored Tennessee Supreme Court Justice Holly Kirby (BSME '79, JD '82) as Special Distinguished Alumna at the 2016 Pillars of Excellence Awards Dinner recently. Please click here to read more.

ARTICLE BY PROF. STEVE MULROY CITED IN SCOTUS CASE WRIT

In a recent petition for writ of certiorari filed with the United States Supreme Court, a Tennessee defendant represented by Kirkland & Ellis, has presented a direct challenge to the Memphis Police Department's once-pervasive "48-hour hold" policy. The defendant's cert. petition draws heavily on legal scholarship published by Daniel Horwitz and by University of Memphis Law Professor Steven Mulroy in 2015 and 2013, respectively. To read more, please click here.

PROF D.R. JONES RECENT NEWS ITEMS

Prof. Jones presented a paper topic, "Edicts of Government: Copyright and State Laws" at the 2016 Works-Progress Intellectual Property Colloquium (WIPIP) held at the University of Washington School of Law and at the 2016 Intellectual Propery Scholars Conference (IPSC) held at Stanford University School of Law. Prof. Jones also was an invited participant in the 2016 Privacy Law Scholars' Conference held at George Washington University School of Law.

Finally, Prof. Jones was named to the Board of Directors and serves as the Secretary of the Mid-America Library Consortium (MALLCO). This consortium promotes and encourages cooperative endeavors among its 27 member academic law libraries from 13 states.

BRITTANY WILLIAMS NAMED NEIGHBORHOOD PRESERVATION FELLOW

The University of Memphis Cecil C. Humphreys School of Law and the City of Memphis have hired Brittnay Williams as the first "City of Memphis Neighborhood Preservation Fellow." Please click here to read more about Brittany, as well as the Neighborhood Preservation Fellowship.

PROFESSOR AMY CAMPBELL ON THE CHANGING HEALTHCARE INDUSTRY

Professor Amy Campbell, director of the University of Memphis Institute for Health Law & Policy, recently spoke on a Table of Experts panel about the changing landscape of the healthcare industry and how to navigate those changes and challenges in healthcare. To read more, please click here for the full article and discussion.

UOFM RECEIVES URBAN CHILD INSTITUTE GRANT TO HELP VULNERABLE CHILDREN

The Urban Child Institute has awarded the UofM a $2 million grant to support the ACE (Adverse Childhood Experiences) Prevention Project. The initiative will involve, among other areas, several Medical/Legal ACE Initiatives, including the Memphis CHiLD Clinic (Children's Health Law Directive), a collaboration between the School of Law, Memphis Legal Services and Le Bonheur providing legal services and advocacy for families in need, and iHeLP ACE Policy Lab, a year-long practicum where law students investigate how existing laws can be used to advance health and reveal gaps where new laws may be needed. Click here to read more.

MEMPHIS LAW GRAD TESTIFIES BEFORE U.S. SENATE

Meredith Stewart (JD '11) recently testified before the U.S. Senate at a hearing on the impact of H-2B Temporary Foreign Worker Program on the labor market. Please click here to view the full hearing, including Ms. Stewart's testimony.

PROF. ROMANTZ SPEAKS AT LEGAL WRITING INSTITUTE CONFERENCE

In July 2016, Prof. David Romantz moderated a panel at the Legal Writing Institute's bi-annual conference in Portland, Oregon. The panel consisted of current and former deans and associate deans who teach or taught legal writing. The panelists discussed leadership positions in law schools and offered guidance on

how legal writing professors can (and should) be leaders in the academy.

50 STUDENTS ENROLLED IN 2016 SUMMER EXTERNSHIPS

Fifty Memphis Law students are enrolled in externships this summer, gaining experience in a wide number of fields, concentrations, practices, and courtrooms. Click here to read more about all of our field placements and impressive experiential learning program.

ROGER PAGE (JD '84) SWORN IN AS TN SUPREME COURT JUSTICE

The Hon. Roger Page (JD '84) was recently sworn in by Governor Bill Haslam as the newest Tennessee Supreme Court Justice at an investiture ceremony in his hometown of Mifflin, Tenn. Click here to read more about the event and view photos and video from the ceremony.

PROFESSOR EUGENE SHAPIRO RETIRES

Professor Eugene Shapiro retired from Memphis Law at the end of the 2015 Academic Year. He was a faculty member here for 40 years and was an outstanding teacher to thousands of students, as well as an exemplary scholar.

ML - SPRING 2016 ISSUE

The newest issue of ML is out now and features stories on Bitcoin, Digital Healthcare Technology, Courtroom Sketch Artists and more! Click here to read the full issue online.

PROF. ZAWISZA APPOINTED TO INDIGENT REPRESENTATION TASK FORCE

Professor Christina Zawisza has been appointed to the Tennessee Supreme Court's Indigent Representation Task Force, which will study the court appointed counsel system in Tennessee. To read more, please click here.

2016 CLEA AWARD

Recent Memphis Law graduate Jeffrey T. Slack has received this year's CLEA Outstanding Student Award. Please click here to read more about this award and Jeff's accomplishments.

STUDENTS TACKLE BLIGHTED HOTEL

Students in our Neighborhood Preservation Clinic were instrumental in demolishing a longstanding eyesore in downtown Memphis. Read more here and in this accompanying article.

UNIV. OF MEMPHIS AND MEMPHIS SHELBY CRIME COMMISSION FORM NEW INSTITUTE

The University of Memphis and the Memphis Shelby Crime Commission have partnered to create the new Public Safety Institute, which will be lead by former Shelby County District Attorney Bill Gibbons. To read more about the new Public Safety Institute, please click here.

2016 KENNETH COX CEREMONY

The Cecil C. Humphreys School of Law Black Law Students Association (BLSA) recently honored law students at The Kenneth Maurice Cox Donning of the Kente Ceremony which was held Friday, May 13th, 2016. Please click here to read more about the event and the graduates.

PALS HOSTS FIRST ONLINE PRO BONO CLINIC

The Public Action Law Society (PALS) recently held its first online pro bono clinic and helped 18 clients in just one hour. Click here to find out more about the online clinic and how you can participate.

PROF. JODI WILSON ELECTED TO ALWD BOARD

Professor Jodi Wilson, Director of Legal Methods and Associate Professor of Law at the University of Memphis School of Law, has been named to the Board of the Association of Legal Writing Directors (ALWD).

THE HON. ANN PUGH, ONE OF MEMPHIS' FIRST FEMALE JUDGES, PASSES AWAY

Judge Ann Pugh, Memphis Law alum and one of the areas first female judges, passed away recently. To read more about Judge Pugh and her life on the bench, please click here.

ROGER PAGE (JD '84) CONFIRMED AS TN SUPREME COURT JUSTICE

The Hon. Roger Page (JD '84) has been confirmed as a new Tennessee Supreme Court Justice. Page previously served as a judge on the Tennessee Court of Criminal Appeals since December 2011 and joins fellow Memphis Law alum the Hon. Holly Kirby (JD '82) on the Tennessee Supreme Court. Please click here

to read more.

ML - ISSUE #4

Memphis Law is excited to present the fourth edition of ML, our official law school magazine. Click here to read the full digital edition and take a look at past issues.

MEMPHIS LAW ALUM ARIEL ANTHONY (JD '15)

Ariel Anthony is an attorney with Husch Blackwell. She joined the firm in 2015 and is profiled in this article in the Hamilton County Herald. Click here to read the full article.

MEMPHIS LAW MOURNS FORMER PROFESSOR JANET RICHARDS

The law school community was saddened to learn about the loss of former professor Janet Richards. Professor Richards served as the Cecil C. Humphreys Professor of Law at Memphis Law, where she joined the faculty in 1978 and served for more than three decades. Click here to read more.

TERRELL TRAVELING TO EUROPE WITH INNS OF COURT

Recent Memphis Law alum William Terrell is traveling to Europe as part of an International Study Program with the Inns of Court. Please CLICK HERE to read more about Will and his upcoming trip abroad, as well as a look at how important mentoring, and the advice given to him by his mentor Richard Glassman, was in helping him achieve success.

DEAN LETSOU'S TAKE ON THE LEGAL MARKET

Dean Peter Letsou recently wrote about how Memphis Law is adapting to the changing realities of the legal market. Read his full op-ed in the Commercial Appeal by clicking here.

MEMPHIS LAW PROFESSOR ADDRESSES RECENT LEGAL ISSUES IN THE MEDIA

Associate Dean and Professor of Law Steve Mulroy spoke with several media outlets regarding a number of recent issues in the news, such as the recent Supreme Court of the United States decisions regarding the

Affordable Healthcare Act, the Court's ruling on gay marriage equality, the removal of a Confederate statue from a local park and several issues surrounding the recent deaths of citizens in the Mid-South who were in police custody at the time of their passing.

BLSA HOLDS CANDLELIGHT VIGIL FOR CHARLESTON VICTIMS

Community members and Memphis Law students, in a candlelight vigil organized by our BLSA chapter, gathered in Tom Lee Park to honor and remember the victims of the Charleston shooting. Great work by Regina Thompson and BLSA members on this touching tribute. Click here to view the full news clip.

ML - SPRING 2015 ISSUE

The newest issue of our law school magazine is out now! Click here to read the full issue online and for past issues.

2015 CLEA AWARD

Recent Memphis Law graduate Bill Hardegree was awarded the 2015 Clinical Legal Education Association (CLEA) Outstanding Student Award. Click here to read more.

Professor Alena Allen has been selected to participate in the 2015 Maxine Smith Fellows Program of the Tennessee Board of Regents (TBR). Click here to read more about this impressive accomplishment.

Recent Memphis Law grad Jennifer Mayham was honored with this year's TBA Law Student Volunteer of the Year for her work with Memphis Area Legal Services. To read more, please click HERE.

Memphis Law alumna Amy Amundsen was recently elected into the American College of Family Trial Lawyers as a Diplomate. Click HERE to read more.

The Annual Francis Gabor Memorial Lecture took place on Monday, February 2, 2015 in the Historic Court Room. Dr. Ralph Wilde (University College London), gave a lecture titled "Dilemmas in promoting global economic justice through law: A case study of the 'Maastricht Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights' and their associated Commentary."

Memphis Law is proud to have been named one of the top 25 most impressive law school buildings in the world and as the 15th most impressive in the U.S. To read more, please click HERE.

Citing our own Professor Katherine Schaffzin prominently, the Supreme Court of New Jersey, in the case O'Boyle v. Borough of Longport, broadly adopted the common interest doctrine. Click here to read more about the case.

The Memphis Law Housing Adjudication Clinic has been named one of the Top 15 Most Innovative Clinics in the nation by The National Jurist and preLaw magazine. Read more HERE.

The law school is proud to announce the launch of our new Neighborhood Preservation Clinic. To read more about this unique legal clinic and how students will work to remove blighted properties throughout Memphis, click here to read more.

***Older faculty news is archived on our website. Please click here to view older archived news.**

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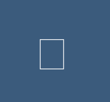
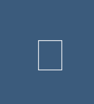
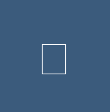
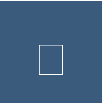
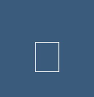
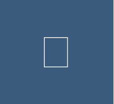

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SCHAFFZIN ON UM BOARD OF TRUSTEES

Memphis Law professor Katharine Traylor Schaffzin has been selected by the University of Memphis Faculty Senate to serve as the faculty representative on the inaugural Board of Trustees for the University of Memphis. Professor Schaffzin will serve as a Trustee for a two-year term.

"The UofM has a strong leadership foundation in place, and we could not be more pleased with the announcement of Katharine Schaffzin as the ninth member of the Board of Trustees. Her professional background and unparalleled commitment to our University will bring insightful perspectives to our Board," said University of Memphis President M. David Rudd.

Schaffzin is in her eighth year as a professor at the University of Memphis Cecil C. Humphreys School of Law. She previously taught at the University of North Dakota School of Law and Temple University Beasley School of Law. Before she began teaching, Schaffzin represented clients as a construction litigation associate at Pepper Hamilton, LLP, in Philadelphia, and Mazur, Carp & Rubin, P.C., in New York. She also served as a law clerk to U.S. District Judge James Knoll Gardner.

Schaffzin earned a juris doctor and a master of laws degree from Temple University and a Bachelor's degree from LaSalle University.

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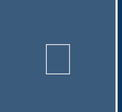
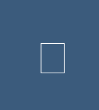
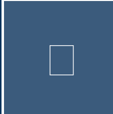
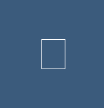
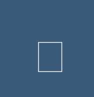
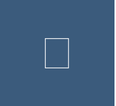

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Cecil C. Humphreys School of Law

ADVANCED MOOT COURT PROBLEM AWARD

Last year's Memphis Law Advanced Moot Court problem won the inaugural Judith S. Kaye Writing Competition, a competition hosted by New York University School of Law to select the best student-written moot court problem in the country.

All congratulations go to William Cranford, last year's Associate Justice for Advanced, who wrote the problem. The problem, Charlie Utter v. State of South Lakota, raised the questions of whether an ordinance prohibiting solicitations for donations in a limited geographic area violates the First Amendment and whether a person has a reasonable expectation of privacy in belongings left in a public area where he is living. According to the New York Law School Moot Court Board announcement, "The competition saw 'many well-written, thoroughly researched, and frankly amazing problems,' and that each problem went through 'multiple rounds of vetting and selection."

The award is a cash prize and publication in New York Law School's book of moot court problems.

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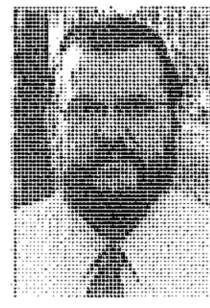
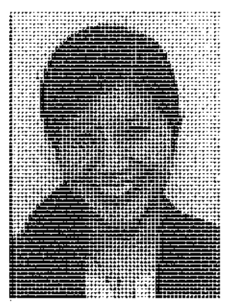
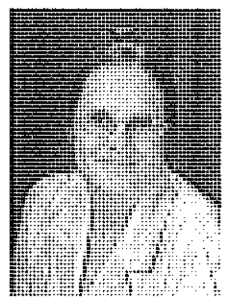
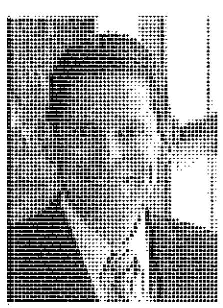
Advantages of the Elder Law Clinic Experience

By Emily Bensco, Adam Cooper, and Kristen Chang
With Deirdre Lok, Donna Harkness and Matthew Andres

Attorneys who practice Elder Law know that being a successful and effective advocate for elderly clients requires more than just a thorough understanding of the substantive law. Elderly clients present a unique set of vulnerabilities which can manifest as problems with communication, ambulation, diminished mental capacity, and potential abuse. These specific vulnerabilities demand a combination of patience, sensitivity, zeal and ingenuity, creating a stimulating and rewarding experience for students. Since working with elderly clients requires so much of attorneys, and since 10,000 Americans are reaching retirement age every day, taking an Elder Law clinic in law school is an invaluable opportunity for aspiring lawyers.

There are approximately 30 Elder Law clinics at law schools throughout the country, where students are given the opportunity to represent older adult clients in a variety of contexts. This article includes perspectives from three students who each participated in one of those clinics: Adam, from The University of Memphis Elder Law Clinic; Kristen from the Elder Financial Justice Clinic (EFJC) at the University of Illinois College of Law, and Emily, from the Helping Elders through Litigation and Policy (HELP) clinic at Brooklyn Law School.

Each clinic deals with a different area of law, but as these students found, the most important lessons were universal. This article contains the students' thoughts on the various obstacles they faced, and specific situations they experienced which contributed to their learning.

The students immediately learned the importance of acting practically and thoughtfully before any legal issues are even presented. Many older adults are not able to ambulate easily, which can present challenges ranging from office meetings, courtroom access and safety and health concerns. Learning to create an inviting and accommodating atmosphere for clients is a critical skill for any attorney providing direct client services.

> Adam—*Our clinic encouraged us to make home visits for some of our clients who had difficulty getting to the office. It was valuable to see and appreciate the various situations that clients can be in when they turn to a clinic for help. This was an experience that helped me to put myself in the older client's place in a way I might not have been able to in the course of an office visit.*

> Emily—*We also were encouraged to make home visits, which always proved helpful. Since all of our clients were facing eviction, sometimes a home visit was necessary to assess the situation. I found that my relationship with clients whose homes I visited was even stronger because there was an increased sense of trust and familiarity which became helpful later in the representation.*

> Kristen—*Two of the cases that my partner and I handled involved clients who had difficulties driving and walking, which resulted in their inability to physically visit the EFJC office. This was a challenge in itself, but having limited mobility also makes a senior more susceptible to abuse. As a result, we were always sensitive to the effects of mobility challenges on different aspects of a client's life.*

Communication with older adult clients can also present challenges. Hearing impairments, speech impediments, vision loss, language barriers, reliance on technology, and stressful situations can make standardized attorney-client meetings difficult. Sensitivity to and awareness of each of these potential obstacles are necessary, and will continue to serve clinic students in their careers as new lawyers, regardless of practice area.

> Emily—*Several of our clients were non-English speakers, which made some communication difficult. Even though our office had access to a telephone translating service, dealing with a combination of barriers, including language, generation, and technology, made it difficult to establish and maintain a close relationship with some clients.*

Adam—*Since many of our clients came to us for help with trusts and estates, our clinic taught us how to speak frankly but sensitively with clients, about life and death and the distribution of possessions.*

Kristen—*Though communication can sometimes be a challenge for both the client and the attorney, having a representative who is willing to listen will have a positive effect on the client. As students assisting elderly clients at the EFJC, we were prepared to listen patiently to elders about topics that were tangential to the case. Sometimes, the elder simply needed a listening ear. Some form of validation is particularly crucial to building rapport and developing the client's trust so as to be able to investigate the case. The opportunities to speak with the senior also gave us a better impression of the senior's values and priorities.*

Many elderly clients will sometimes include other family members in the representation and decision making processes. This can be very helpful, but is also cause for wariness by an attorney. The students had differing experiences with this particular obstacle. Familiarity with the ethical issues that often arise in the course of legal proceedings can be helpful as clinic students move forward in their careers.

Emily—*Several of our clients usually had their adult children as a support system. I found working with a client's adult child to be a great asset in helping the client to fully understand the litigation process. I also found our clients to seem more at ease in the courtroom with a familiar face.*

Adam—*In one particularly difficult situation, my client was a 92-year-old lady who claimed that she had been forced to move to a nursing home where she felt isolated from her church and friends. Her family claimed that she was incompetent, but I found her to be competent and to complicate matters, it seemed that there had been some financial improprieties on the part of some of her family members. These cases were instructive regarding the need for attorneys to help older adults avoid being preyed upon by the people they trust.*

Kristen—*On a practical level in the clinic, involving family members in representation raised questions for us as students about who our client was, when an individual accompanying the senior could stay with the client during otherwise privileged meetings, and how to best reach a resolution that did not result in unintended consequences or repercussions for the elderly client's relationships with his or her close ties. In some ways, these ethical questions affect aspects of the client's life far beyond the scope of the legal issues in the case.*

While older adult clients may bring routine legal problems, there is a heightened possibility of some degree of cognitive impairment that needs to be addressed. Cognitive impairments present on a wide spectrum, and can be caused by a number of diseases that are often present in aging adults. As the students experienced, gaining a level of comfort in this area helps to hone listening and issue-spotting skills.

Emily—*In our weekly seminar we were able to learn about various illnesses that may have an impact on an aging person's mental capacity. Although we should be cognizant of any potential issues such as dementia, it is also important to remember that we are not experts in the field and cannot make diagnoses.*

Kristen—*My clinic partner and I found that symptoms of cognitive impairment may have made some elders more susceptible to financial abuse. Moreover, the limited memory or mental capacity of some clients may make it harder to conduct fact investigation and prepare clients to testify, which can make dire situations even harder to resolve.*

Adam—*Although dealing with a client who may have diminished capacity is challenging, I found that it helped refine some important skills. I became a keen observer of my clients' behavior—and I believe that made me a better interviewer.*

In many cases, seniors are identified as easy targets for many forms of abuse—physical, emotional, financial and even sexual. The students were all confronted with this harsh reality in some way in their clinics, and all found the experience informative and impactful.

Kristen—*In the context of dealing with elderly clients who may be financially, emotionally, or physically vulnerable, the consequences of moving forward without strategically examining contingencies and ramifications may be very grave. Elders most often face financial exploitation by those closest to them—their longtime friends, adult children or grandchildren, and caretakers. This puts elderly clients in a uniquely vulnerable situation when they arrive at the EFJC. Additionally, some of our elderly clients had psychological or emotional ties to their abusers, causing the client to feel dependent upon or beholden to the abuser due to the client's vulnerabilities.*

> Adam—*Unfortunately some of our clients appeared to be victims of abuse. One client, the 92-year-old woman that I spoke of previously, seemed to have been the victim of financial abuse perpetrated by family members. Ultimately we were able to return the client's funds. While rectifying a situation of abuse was not the original goal of that representation, the experience taught us the positive impact an attorney-client relationship can have for a victim of abuse, and showed us that seniors are especially at risk.*

> Emily—*In our field work, we focused primarily on housing, but our seminar, allowed us to take a different focus, that of elder abuse. Our professor, who is Assistant Director and General Counsel at an elder abuse shelter, presented us with an opportunity to screen for elder abuse as part of a legal intake process. The legal intake process is a perfect opportunity for such a screening because lawyers, or legal assistants, are already addressing serious problems with older adult clients, and questions that may help identify instances of abuse could be easily integrated into the process.*

Clinics often provide students their first experiences with the actual practice of law, and thus, especially when dealing with such delicate yet demanding issues, case-related tasks may take students more time than they would take experienced attorneys. However, elder law attorneys sometimes must work quickly, particularly if clients are sick or at risk of losing memories or capacity. Learning to generate high quality work under strict time constraints is a cornerstone of building a successful legal career.

> Kristen—*Aside from the stress of these situations, working with elders also requires strategizing around timelines that bring remedies efficiently and effectively. For example, one of our EFJC clients brought up that a later trial would interfere with his potential cancer treatment timeline. Sometimes an older adult client cannot afford his or her cost of living after suffering financial abuse, or a client's ailing health can jeopardize the chance for the client to receive justice in what can be a slow legal process. We learned to be very conscious of the litigation timetable. Since most seniors are retired, we also learned to expect frequent calls from clients and to be prepared to provide clients with frequent updates. The case is often the senior's main priority, and while this may be the case with other litigation clinic clients too, the desire for frequent contact with student attorneys and the potential mismatch between student schedules and client schedules seemed especially pronounced with elders.*

> Adam—*Because these cases may be especially sensitive and complex, I continued to work with some clients after the semester had ended, over the winter break and into the next term, instead of leaving it for another intern.*

> Emily—*Since all of our clients were facing eviction, the pressure was on to resolve cases quickly so they could feel secure in their homes. Stalling a case may be a useful tactic in some areas of law, but an older adult client's peace of mind and sense of stability was of the utmost importance at the HELP clinic.*

All three clinics discussed here are categorized under the "elder law" rubric, and Adam, Kristen, and Emily shared many of the same insights. However, elder law is also unique in that it can encompass so many areas of substantive law. Having the opportunity to participate in an elder law clinic can afford law students with any number of novel educational experiences. Emily and the students at the HELP clinic were faced with problems that expand outside of an individual client's representation:

> Emily—*Working with the HELP Clinic, we were in a unique position at the intersection of crises not just for our clients, but for the entire city. New York City is currently dealing with a rise in its older adult population coupled with a serious lack of affordable housing. According to NYC.gov, "Adults age 65 and older occupy almost 60% of the city's rent controlled units…and as the population of older New Yorkers continues to grow, the demand for affordable housing will undoubtedly increase as well." Working with the Elder Law unit at South Brooklyn Legal Services, we were directly addressing problems right in the middle of serious political and social issues troubling the city. Dealing with these problems first-hand at SBLS, not only were we able to make a real positive impact for our individual clients, but with our combined efforts, we felt like advocates for broader social change.*

Kristen and students at the EFJC learned that representing a client may require attorneys to come up with inventive solutions:

> Kristen—*One EFJC client who was cheated by unlicensed roofers managed to obtain a judgment in her favor. However, the defendant filed for bankruptcy, and the skimpy sum the bankruptcy court ordered him to pay the EFJC client would have left the client with an inadequate sum to fix her roof. Throughout the semester, the EFJC students helping this client looked for ways to raise money or set up a crowd-fund through a third-party to bring the client a quicker, tangible resolution*

while arguing her case in bankruptcy court. Students should always consider solutions short of litigation. Since financial exploitation often involves family and close relationships, if amicable resolutions can be reached without going to court then it may help maintain family bonds and decrease the likelihood of a bitter breakdown. As in any case, the priority is the client, and EFJC students try to muster all possible resources to find a viable solution for their senior clients.

Adam and students at the University of Memphis were given the opportunity to learn about many different areas of law in one setting, which has been especially instructive as Adam starts his career as an attorney.

Adam—*Working with elders brought me into contact with a wider array of legal issues than other legal clinics might handle. For example, I helped with estate, medical, family, and debt issues. I was able to appear in court on a debt issue and managed to negotiate a favorable resolution for the client. I am now working as an attorney in general practice. Although elder law is just a small part of my caseload, I still find myself using skills I was able to develop through working in the University of Memphis Elder Law Clinic and referring back to my experiences there.*

Organizationally, the programs sponsoring these clinics are all passionate about exposing a new generation of lawyers to the engaging, cutting-edge issues involved in working with older adults. The Harry and Jeanette Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale and the Elder Law Unit at South Brooklyn Legal Services, cosponsors of the HELP clinic at Brooklyn Law School, view educating newly minted attorneys about issues surrounding elder abuse and older adult housing insecurity as a core element of their mission. Students carry a caseload advocating for older adults in Brooklyn Housing Court and participate in a seminar exploring the legal ramifications of aging in our society. Students receive cases via the Assigned Counsel Project (ACP), which provides legal representation and an assigned social worker to individuals over 60 who are engaged in eviction proceedings. To supplement their direct client experience, students also participate in a weekly seminar, which covers a variety of legal arenas including capacity, guardianship, family court, ethics, and access to justice and the unique ways in which older adults interact with these areas of the law. Over the course of the semester, each student completes a project related to larger social policy issues facing older adults in New York City.

The Elder Law Clinic at the University of Memphis Cecil C. Humphreys School of Law is a "live client" clinic staffed by upper division law students who are specially admitted to practice by the Tennessee Supreme Court. The Clinic works in partnership with Memphis Area Legal Services, a Legal Services Corporation-funded nonprofit legal services provider serving the low-income population of Memphis and the surrounding four-county area. Under the supervision of the Clinic Director, who is a licensed attorney, the students provide direct representation to indigent clients age 55 and over in a variety of civil matters, ranging from wills, advanced directives, consumer protection issues and financial exploitation to government benefits, housing and real property ownership, conservatorship and family law issues.

The University of Illinois College of Law's Elder Financial Justice Clinic is the first law school clinic in the country focused exclusively on combating elder financial exploitation. The clinic provides free legal services in Illinois to people 60 and over and vulnerable adults who have been victims of any type of financial fraud or abuse, and works for systemic change, including proposing and advocating for legislation, to improve the lives of financially abused seniors. The 44 students who have enrolled in the EFJC since it began three years ago are leaving the College of Law with a skill set and knowledge base that makes them uniquely qualified to continue to advocate for seniors. They have also hopefully gained an enthusiasm for public interest law that will encourage them to continue to serve disadvantaged populations once they enter practice.

In conclusion, for professors the field of elder law is an exciting and rewarding area in which to educate students. And for professors who are also elder law practitioners, it is fulfilling to be part of a constantly evolving legal field. Although the students' experiences represent the challenges and rewards of working in elder law, these experiences have made them better equipped to practice not just elder law, but any legal area.

Emily Bensco is from New Jersey. She attended Temple University, where she majored in English and French and currently is a student at Brooklyn Law School.

Adam Cooper is a graduate of the University of Memphis Cecil C. Humphreys School of Law and works in a general practice law firm in Memphis, TN handling bankruptcies, divorces, wills and estates, and other matters. Prior to earning his law degree, Adam studied and was a teacher of Jewish law and philosophy for 10 years in New York, where he also served as assistant rabbi in a small congregation for many of those years. Adam also holds a B.A. in Psychology from the University of Memphis, and has a passion for medieval history and literature as well as early music and jazz.

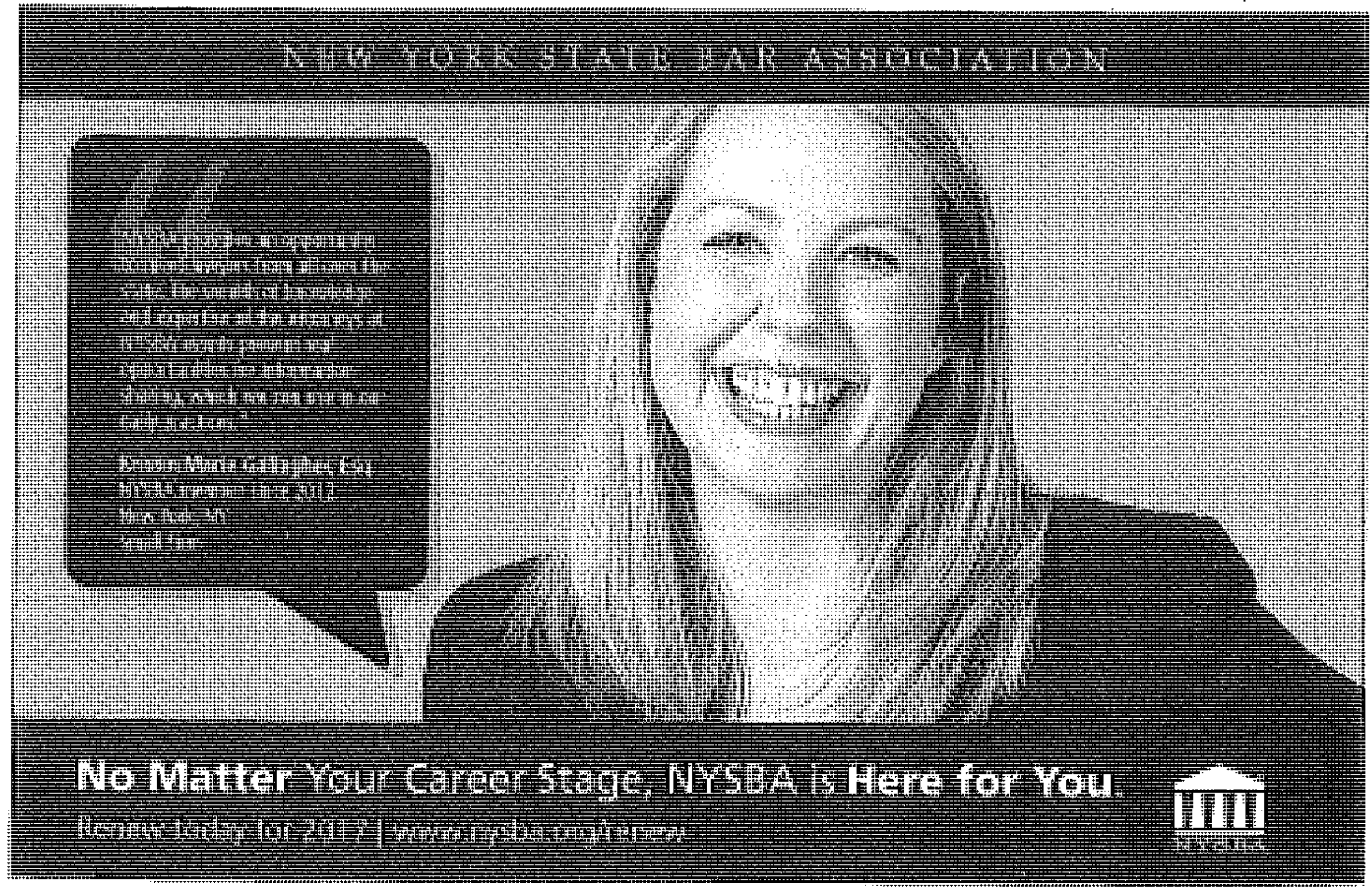
Kristen Chang participated in the Elder Financial Justice Clinic in Fall 2015 under the instruction of Professor Matthew Andres. She graduated from the University of Illinois College of Law, and she is currently working as a law clerk at Hall, Render, Killian, Heath & Lyman, P.C. She holds a Master of Public Administration degree focused on Health Policy from the George

Washington University and a Bachelor's degree in Biological Sciences with a minor in Political Science from the University of the Pacific.

Deirdre M.W. Lok, Esq. is the Assistant Director and General Counsel for The Harry and Jeanette Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale, the nation's first emergency shelter for elder abuse victims. Ms. Lok manages the operations of the shelter, including providing legal services to victims in Supreme Court, Housing Court and Family Court. An Adjunct Professor at Brooklyn Law School, Ms. Lok currently co-directs the law school's HELP (Helping Elders through Litigation and Policy) Clinic. Ms. Lok is a frequent speaker on the issue of elder abuse and the law, and has guest lectured at Penn State Dickinson School of Law, Cardozo Law School, Touro Law, Hofstra Law School and CUNY Law School and has provided training to attorney's through the New York State's Judicial Institute, the Queens Bar Association, and the Bronx Bar Association. Ms. Lok was appointed by Mayor Bill de Blasio to the Age-Friendly NYC Commission, is co-chair of the American Bar Association's Senior Lawyer's Division, Elder Abuse Prevention Taskforce, and serves as Chair of the Policy and Procedure Subcommittee of the New York State Committee on Elder Justice. Prior to joining The Weinberg Center, Ms. Lok was a Deputy Prosecuting Attorney in Oahu, Hawaii and an Assistant District Attorney in the Queens County District Attorney's Office where she focused on domestic violence cases.

Donna S. Harkness is Professor of Clinical Law at the University of Memphis Cecil C. Humphreys School of Law and Director of the Elder Law Clinic. She is certified as a specialist in Elder Law by the National Elder Law Foundation and is a member of the National Academy of Elder Law Attorneys. Ms. Harkness earned her B.A. degree, *cum laude*, from the University of Memphis and her J.D. degree from Vanderbilt University. She is a frequent lecture to various professional groups on elder law and ethical issues, and has published a number of articles on elder law issues. Ms. Harkness is a member of the American Bar Association, Senior Lawyers Division, as well as being a member of the Tennessee Bar Association, the Association for Women Attorneys, and the Memphis Bar Association.

Matt Andres is an Associate Clinical Professor at the University of Illinois College of Law and the Director of the Elder Financial Justice Clinic. Prior to starting the Elder Financial Justice Clinic, Matt taught in law school clinics helping domestic violence victims at the University of Cincinnati College of Law and Cooley Law School, was a prosecutor in Milwaukee, Wisconsin, and Oakland County, Michigan, and was a litigation associate at Foley & Lardner in Milwaukee. He earned his J.D. from University of Michigan Law School and a B.A. from Michigan State University.



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Level 1

Main lobby, student lounges, bookstore, auditorium, and the library main level entrance and circulation area are on Level 1.

Level 2

You'll find two large classrooms, administrative offices and library stacks, and study rooms on this level.

Level 3

Level 3 is home to the historic courtroom, a practice courtroom, two large classrooms, and faculty offices, as well as additional library stacks.

Level 4

Come here to see the magnificent river view from the Ball Reading Room, the Law Review suite, and learning commons and offices.

Legal Clinic and Student Rec. Area

The lower level is home to our Legal Clinic with exterior entrance, student locker area and mailboxes, student organization offices, and the library stacks.

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Historic Courtroom

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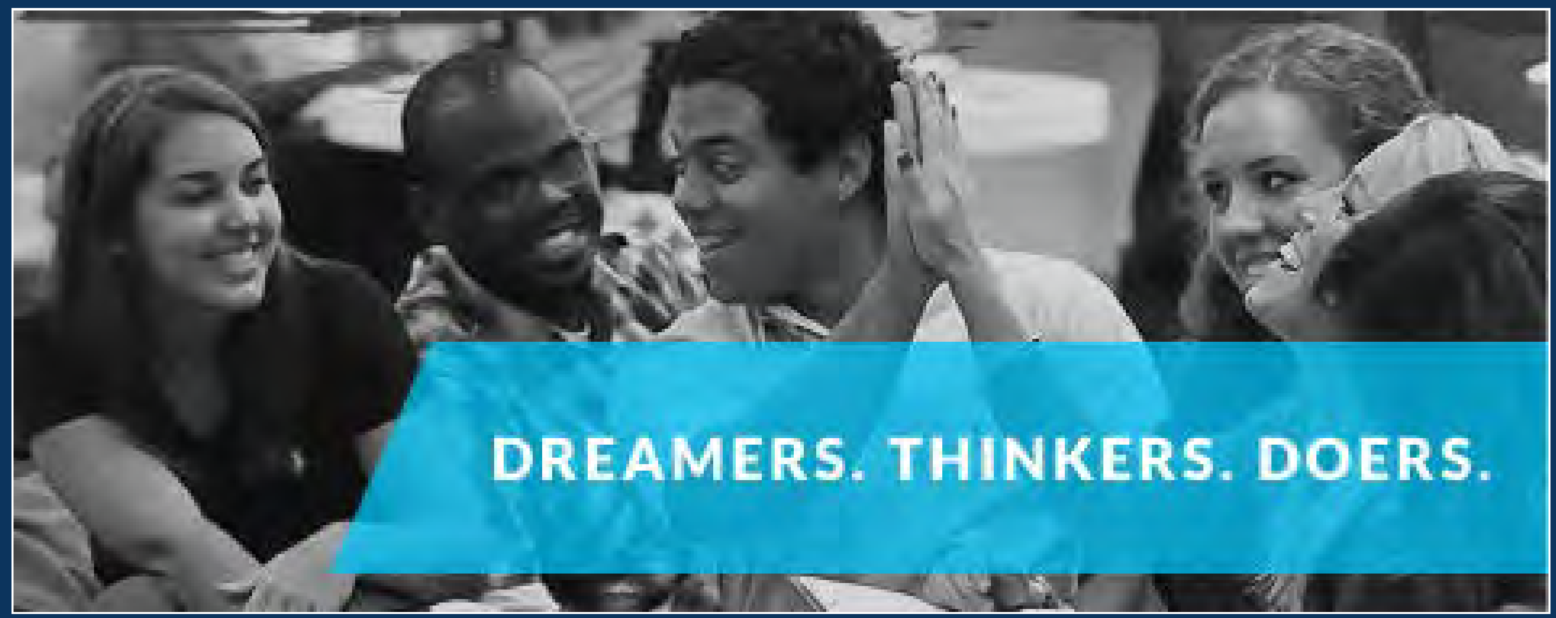

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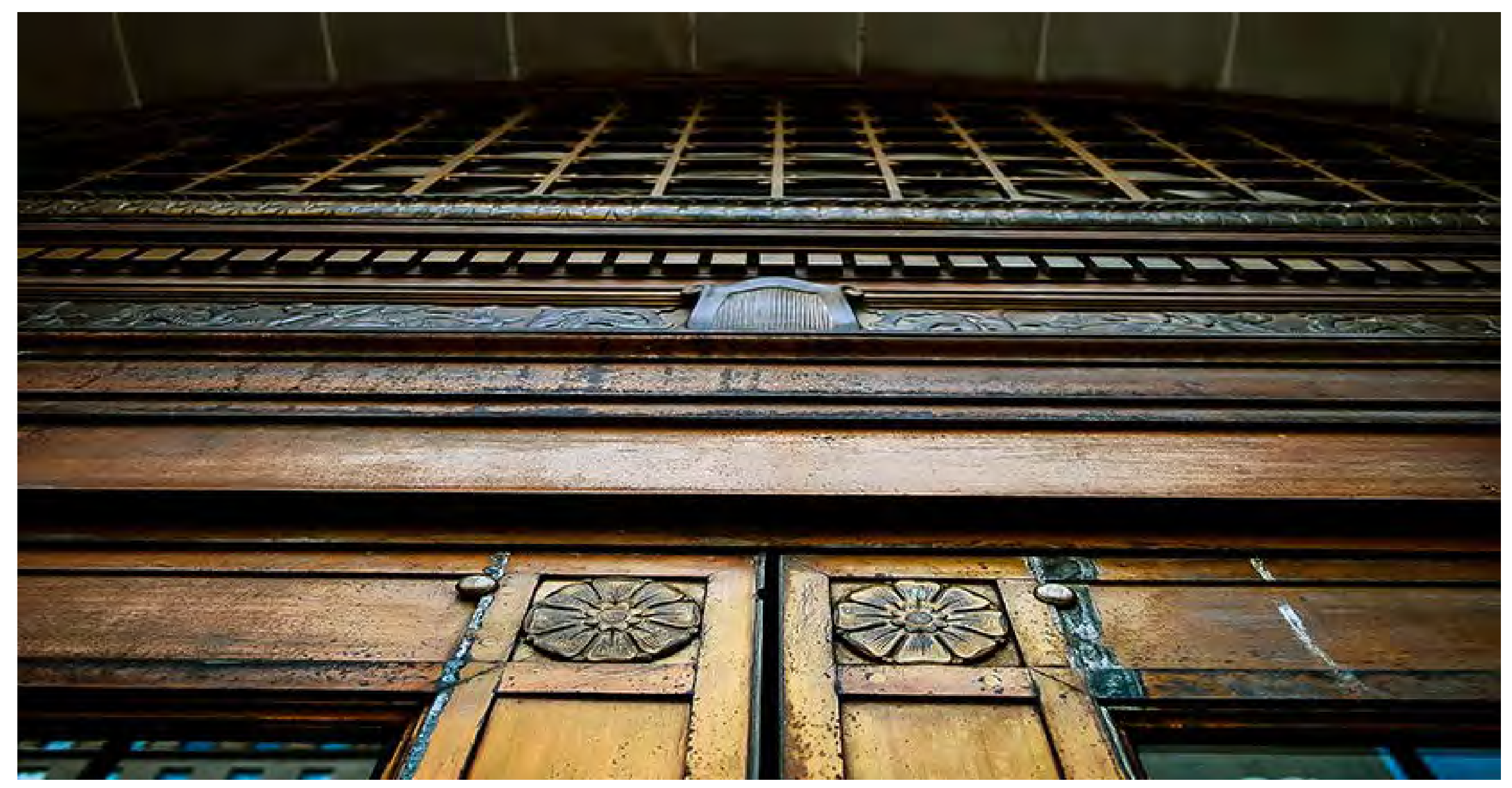

News & Events

The Office of Communications at Memphis Law provides strategic communication to the law school's various audiences, in order to keep them informed about the Law School, its mission and various events geared towards educating our students and the Memphis community.

Find out more in this section about what's happening at the Law School with our students, faculty, staff or alumni, or contact Ryan Jones if you have questions, media inquiries or updates.

Important links:

- Latest Law School News
- Events Calendar
- On Legal Grounds Blog
- ML - Memphis Law Magazine

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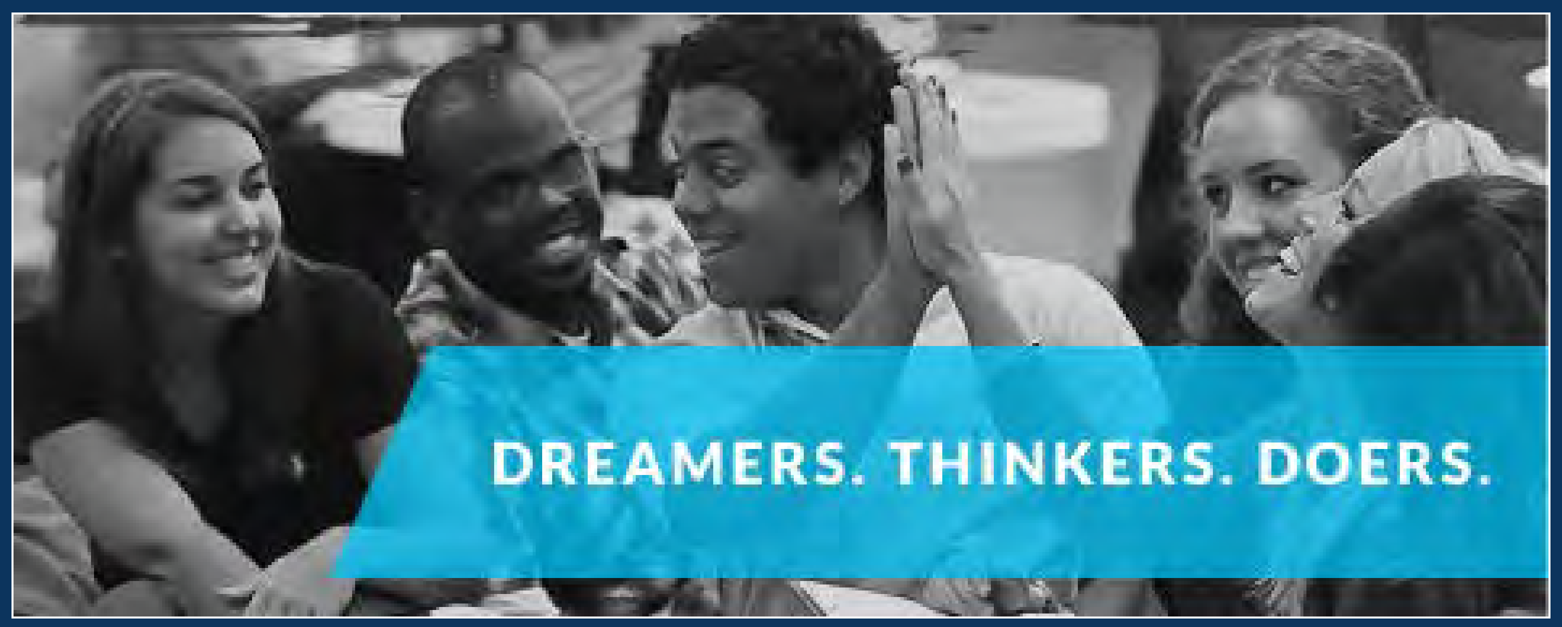
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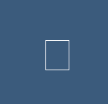
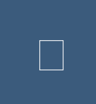
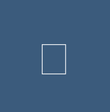
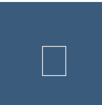
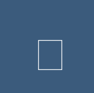
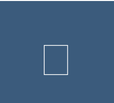

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Cecil C. Humphreys School of Law

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ALUMNI & SUPPORT

Even after students graduate from law school, they're still a valuable part of the Memphis Law community as alumni. Additionally, the many individuals, businesses and law firms that support Memphis Law financially, through volunteering, or by promoting the law school to others are also valuable members of our Memphis Law community.

Update Your Information

If you'd like to update your mailing address, email address, name, title, or place of employment, please click here to update your records with the University of Memphis.

Law School Alumni Chapter

The University of Memphis Cecil C. Humphreys School of Law Alumni Chapter is your primary means of involvement and activities with law school alumni. The chapter is under the umbrella of the greater University of Memphis Alumni Association and is run by the Law Alumni Chapter Board of Directors. If you would like more information about upcoming Law School Alumni activities or if you would like to be involved the law alumni chapter, please visit their webpage by Clicking Here.

The Law School Alumni Chapter is on Facebook as well. Follow them here!

Law School Development & Support

If you are interested in donating or supporting the law school or any of its initiatives, please visit our Giving and

Support page by clicking here, or feel free to contact Joanna Curtis at jecurtis@memphis.edu or 901-678-5274.

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ABA REQUIRED DISCLOSURES

Download our ABA Standard 509 Report

Download our ABA Employment Summaries:

- Class of 2013
- Class of 2014
- Class of 2015

View our Transfer of Credit Policy

TRANSFER OF CREDIT POLICY

Credit for law school work competed at law schools other than at The University of Memphis Cecil C. Humphreys School of Law will be credited toward fulfilling graduation requirements only after individual consideration by the Dean. No credit, however, will be given for work completed in a United States Law School which is not ABA approved. Advanced standing will be granted only for work done after the student has completed a Baccalaureate degree.

To be eligible for transfer, credit earned in each course considered for transfer credit must be at least equal to the overall grade point average required for graduation at the University of Memphis, Cecil C. Humphreys School of Law.

In conformity with the Association of American Law Schools (AALS), the University of Memphis School of Law may grant a transfer student academic credit up to the equivalent of three semesters for full-time students or up to the equivalent of four semesters for part-time students for work successfully completed at another AALS-accredited law school, and two semesters for full-time students or 2.6 semesters for part-time students for work successfully completed at a non-AALS school.

*Information regarding race, gender, and ethnicity has been redacted from the above NALP reports.

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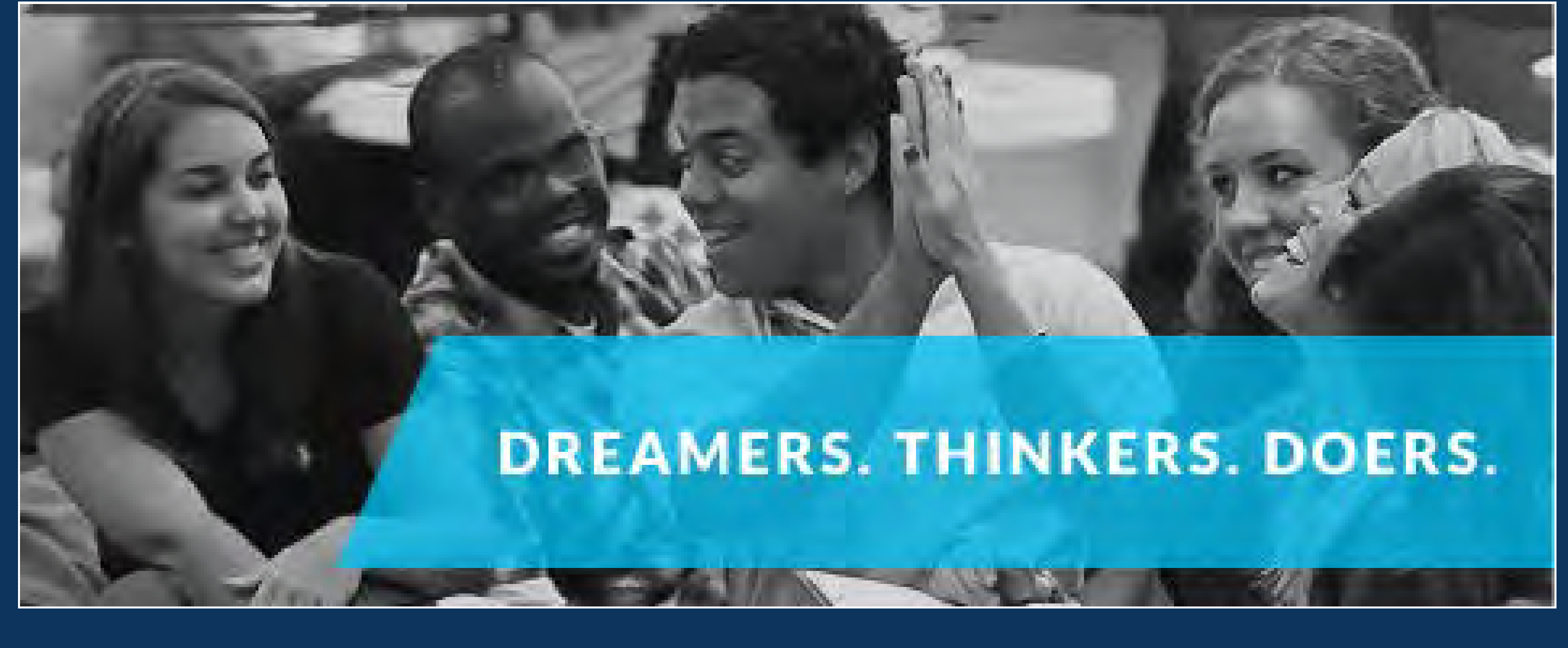

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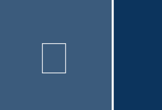
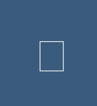
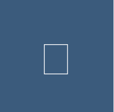
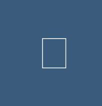
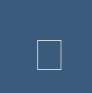
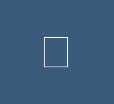

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CALENDARS

On Legal Grounds Events-only Calendar

Internal Calendar for students, faculty, & staff

- Students, faculty, & staff can view the law school calendar and request space using: https://emsws.memphis.edu/virtualems/
  - Students making bookings (as "RSO"s – registered student organizations) can find more information about how to use the booking system HERE.
- Instructions on how to use this calendar can be found HERE.

External Calendar for general public

- For external audiences who don't have University of Memphis log-in credentials: http://www.memphis.edu/lawcalendar

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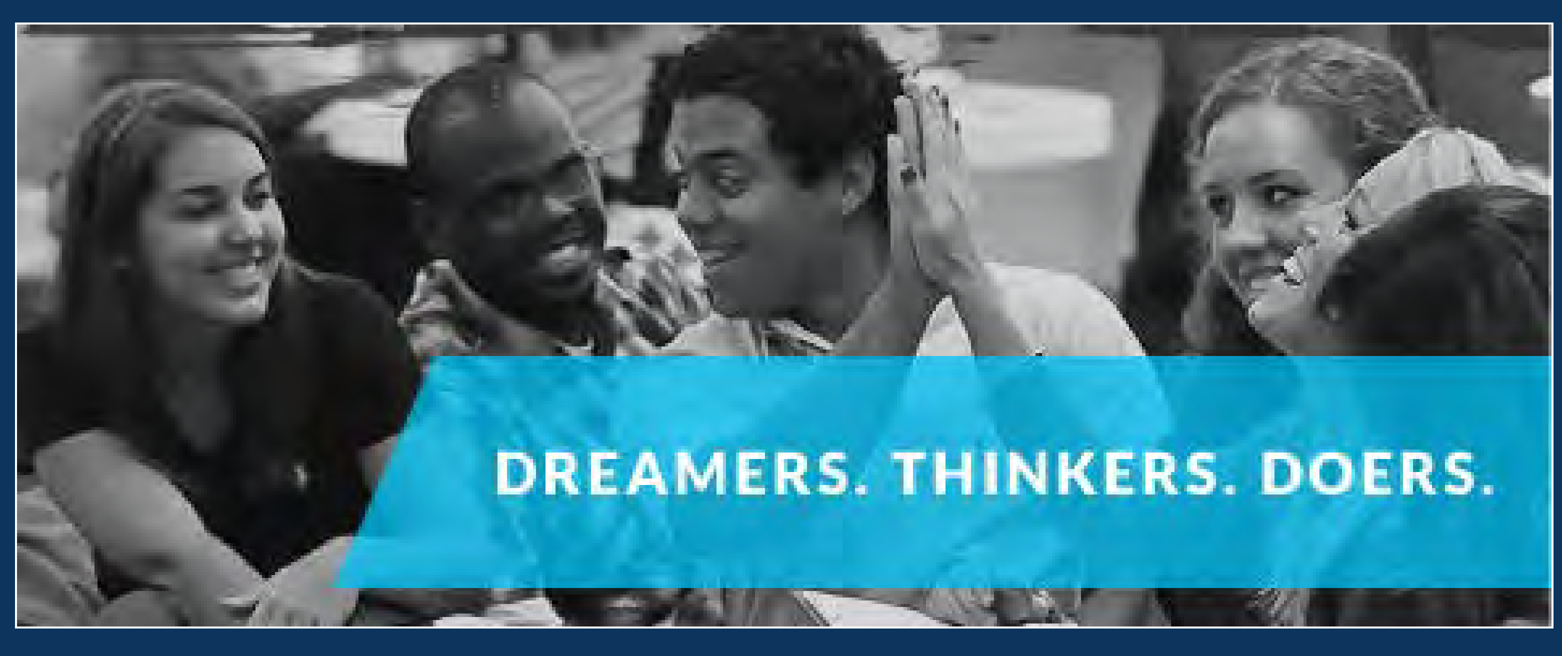

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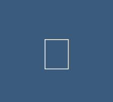
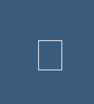
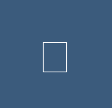
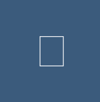
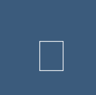
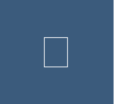

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GUIDE TO APPLYING

The University of Memphis School of Law welcomes applications for admission to its 2017 entering class. The application is currently open, and there is no application fee. The priority application deadline is March 15th. Apply here.

A significant factor in the admission decision process is the admission index, which is based on the undergraduate grade point average and the LSAT score. The undergraduate grade point average used in the admission index is the cumulative grade point average found on the Credential Assembly Service (CAS) report produced by LSAC. Also considered are factors deemed to be predictive of success in law school as set forth in the application, personal statement, letters of recommendation, and the applicant's CAS report. Such factors may include, but are not limited to overall academic record, co-curricular activities, community involvement, employment, and other life experiences.

Applicants can access our application at LSAC (Law School Admission Council). Applicants will be sent an email indicating their applications have been received. Applicants will also receive instructions on how view the status of their applications. An email will be sent notifying applicants their files are complete.

It is the applicant's responsibility to take the necessary steps to ensure that all supporting documents required to complete the application are submitted on or before the March 15th deadline. Failure to complete the application by

the deadline may reduce the applicant's chance for admission. Applicants are encouraged to begin the application process and submit all the required documents as early as possible. **February and June LSAT scores will be reviewed for fall admission.**

The application components are:

□ **Application (Required)**

The application may be accessed through LSAC. Be sure to complete all questions accurately. Include your name and LSAC account number on any addenda. The priority application deadline is March 15th.

□ **Credential Assembly Service (CAS) (Required)**

Applicants for the 2017 entering class must have an LSAT score that is current and taken between June 2012 and February 2017. LSAC will not release a CAS report until they receive an original transcript from every undergraduate institution you have attended, including summer sessions and study abroad programs. It is the applicant's responsibility to monitor the status of his/her LSAC account. Once your application is complete, the admissions office will send a completion status e-mail. Applicants can also monitor their Memphis application status on-line through LSAC.

□ **Personal Statement (Required)**

Each applicant is required to submit a personal statement. This statement provides you the opportunity to describe your background and any unique experiences, characteristics or circumstances you want the admissions committee to consider. You should explain your desire to study law, why you believe you will be a successful law student, and what you plan to do with your law degree. You are encouraged to explain your interest in attending our law school and may discuss any information not otherwise apparent from your application, including family members who are graduates of the University of Memphis School of Law. Limit your personal statement to no more than 1,000 words. NOTE: If you want to include relevant information explaining a low undergraduate grade point average or low LSAT score, we encourage you to submit an addendum separate from your personal statement.

□ **Admonitory Action Explanation (Required if Applicable)**

Applicants must answer questions in the Admonitory Action section of the application. If an applicant answers "yes" to any of the questions, he/she should provide an addendum detailing the date and location of the event and an explanation of what occurred. Applicants are encouraged to include related court documents.

□ **Letters of Recommendation/Evaluations (optional)**

Applicants are encouraged to submit up to three letters of recommendation addressing their potential for academic

success. When possible, letters should come from professors if you are currently in college or have recently graduated. The letters should be sent to LSAC to be included with your CAS report. If a file is complete by March 15th, file review will not be delayed if letters have not been received. For more information visit the LSAC Letters of Recommendation webpage.

□ **TIP Statement (Required for all TIP applicants)**

Applicants interested in being considered for the Tennessee Institute for Pre-Law Program are required to submit a TIP statement. The statement should address how they have contributed to the overall diversity and/or how they might have been economically disadvantaged. The TIP Program is an alternative admission summer program for Tennessee and border county residents from diverse backgrounds who are not admitted through the regular admissions process, but who show potential for the study of law.

□ **Financial Aid and Scholarships**

Applicants are encouraged to complete the application for Federal Student Aid (FAFSA) by March 15th. Memphis Law's code is 003509. Most entering scholarships are awarded based on the merits of the applicant's credentials. Some scholarships have special requirements. For those scholarships, please review the scholarship list for first-year students.

□ **Decision Timeline (January – April)**

Our online application is available through LSAC. Applicants applying to the University of Memphis School of Law will receive an email with a link to our website and a code to establish an account to check the status of their application. Hence forth, the applicant can check their application status on-line. Applicants will also receive an email once the application is complete. Once a decision is rendered, the online status will read: decision rendered. Final decisions are mailed to the applicants' current address. Most decisions are made between January and April.

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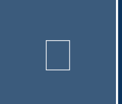
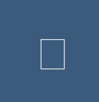
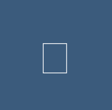
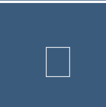
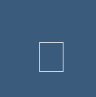
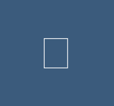

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Cecil C. Humphreys School of Law

REQUEST A VIEWBOOK

Information Request for Admissions to the Cecil C. Humphreys School of Law

You must fill in all Marked (*) fields to Receive More Information About The University of Memphis

First Name:*

Middle Initial:*

Last Name:*

Mailing Address:*

Number and Street

* ***City*** ***State***

Zip Code

Birthdate:* ***Month*** ***Day*** ***Year***

Contact Phone: (10 digits - no spaces or dashes)*

Race (Optional)

Expected Enrollment:*

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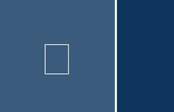
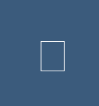
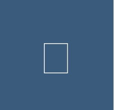
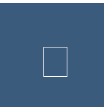
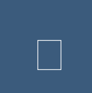
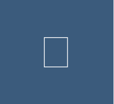

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Current Students

DEGREE PROGRAMS

Memphis Law offers students two optional dual-degree programs, one joint-degree program and a part-time program.

Dual-degree:

- JD/MBA
- JD/MA in Political Science
- JD/MPH
- Fast Track MPH

Part-time Program

Students interested in pursuing these options should review the information provided on the website and can contact the Law Admissions Office by email or at (901) 678-5403.

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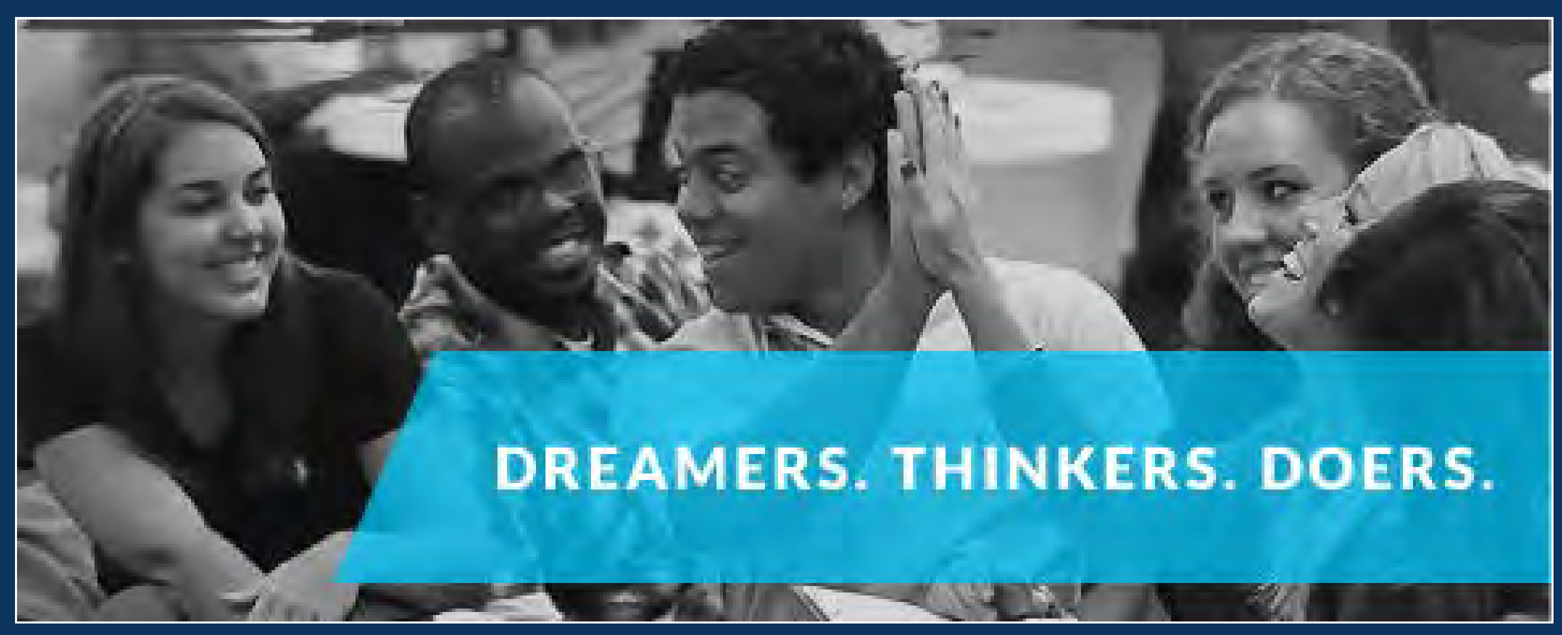

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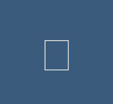
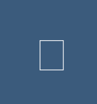
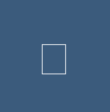
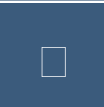
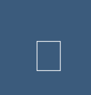
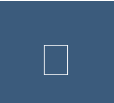

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Cecil C. Humphreys School of Law

Current Students

CERTIFICATE PROGRAMS

The certificate programs provide students with both specialized and focused study and increased marketability in their respective fields. Students enrolled in the certificate programs take specialized course tracks and receive mentoring and guidance from faculty certificate advisors. Faculty certificate advisors have discretion to certify that particular work satisfies requirements, including requirements for a certificate with honors. Certificate program faculty advisors would have the discretion, for good cause, to alter the written certificate requirements in specific cases.

Students interested in a specific certificate program should contact the program advisor to discuss the program and its requirements. First-year students are encouraged to begin researching the certificate programs in the spring semester of their first year of study.

- Certificate in Advocacy
- Certificate in Business Law
- Certificate in Health Law
- Certificate in Tax Law

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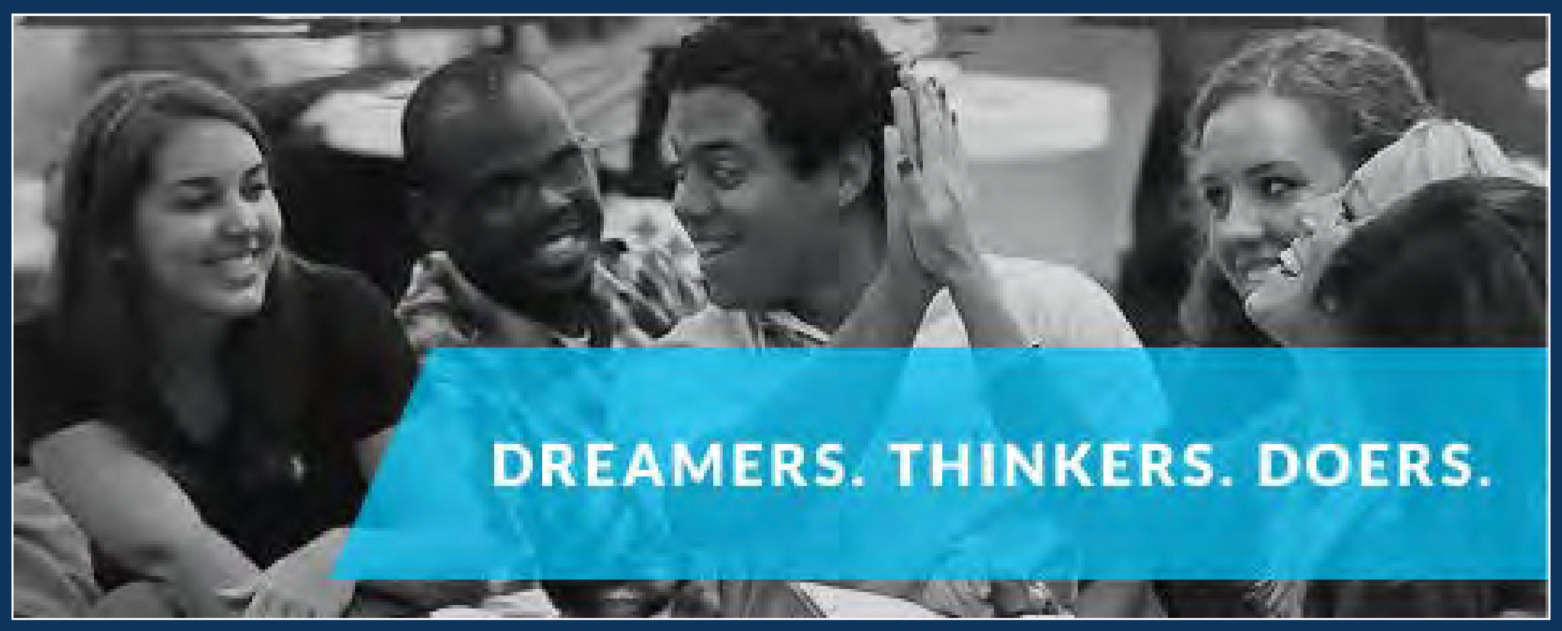

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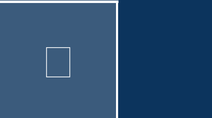
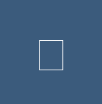
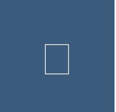
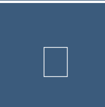
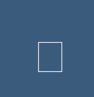
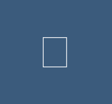

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Cecil C. Humphreys School of Law

Programs

EXPERIENTIAL LEARNING

A strength of the University of Memphis School of Law is its commitment to graduating students who are prepared to practice law. Within Memphis Law's Experiential Learning Curriculum, upper-level students build upon the foundation of core doctrinal course work by immersing themselves in supervised legal activities designed to further develop essential lawyering skills and professional values.

Download the Spring 2017 Legal Clinic Course Application Here.

Download the Spring 2017 Externship Clinic Application Here.

The Experiential Learning Curriculum centers around two academic programs:

- The University of Memphis Legal Clinic
- The University of Memphis Externship Program

The University of Memphis Legal Clinic

The University of Memphis Legal Clinic is an academic program and professional law office housed within the walls of the law school. Working under the direct and ongoing supervision of licensed faculty members, clinic student

attorneys represent clients in a wide variety of lawsuits and other legal matters, maintaining primary responsibility for all aspects of the cases to which they are assigned. Through their case-related work and simultaneous participation in a faculty-led, weekly seminar, clinic student attorneys further hone essential legal skills and take an important step toward becoming strategic, reflective, and self-aware attorneys.

The following clinics will be offered during the Spring 2017 semester:

- Children's Defense Clinic
- Civil Litigation Clinic: Child and Family
- Elder Law Clinic
- Housing Adjudication Clinic
- Medical-Legal Partnership Clinic
- Mediation
- Neighborhood Preservation Clinic

For more information about the University of Memphis Legal Clinic, please see:

In-House Clinical Programs

The University of Memphis Externship Program

The University of Memphis Externship Program offers upper-level law students the opportunity to earn academic credit for carefully supervised legal work they perform in a variety of practice settings throughout the Memphis area. Stepping outside the traditional classroom, externship students learn by doing and observing, further developing essential research and writing skills, communication abilities, and problem-solving techniques under the direction of local judges and attorneys. To maximize this experiential learning opportunity, externship students simultaneously participate in a faculty-led seminar designed to introduce the essential habits of the reflective practitioner and assessment of the skills, relationships, issues, and mindsets that prevail in the practice setting.

Field placements through the Externship Program include the U.S. Court of Appeals for the Sixth Circuit, U.S. District Court, U.S. Bankruptcy Court, Tennessee Supreme Court, Tennessee Court of Appeals, Shelby County Circuit Court, U.S. Attorney's Office, Federal Public Defender's Office, Shelby County District Attorney General's Office, Shelby County Public Defender's Office, the National Labor Relations Board, and Memphis Area Legal Services.

For more information about the University of Memphis Externship Program, please see:

- Externships
- Externship News

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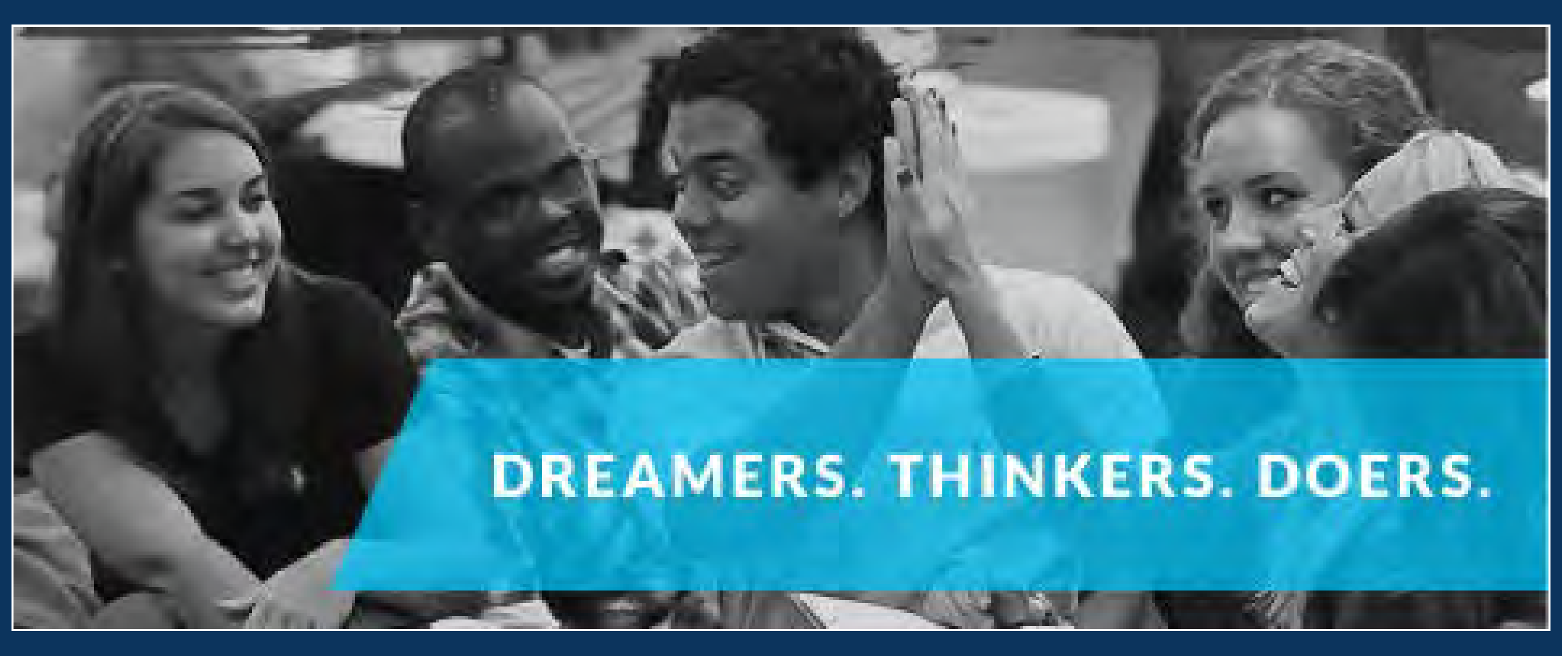

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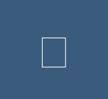
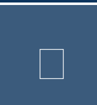
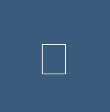
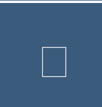
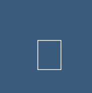
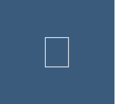

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UNIVERSITY OF MEMPHIS LAW REVIEW

The University of Memphis Law Review is a student-run organization whose primary purpose is to publish a journal of legal scholarship. The Law Review is published four times per year, and is roughly 1000 pages per volume. Student editors make all editorial decisions and, together with a faculty advisory, carry out the vision of the publication.

The Law Review is an important academic forum for legal scholarship, publishing articles by professors, judges, and practitioners from around the country. Additionally, the journal is designed to be an effective research tool for practicing lawyers and students of the law. The Law Review also provides opportunities for student editors to develop their own editing and writing skills.

All articles—even those by the most respected authorities—are subjected to a rigorous editorial process designed to sharpen and strengthen substance and tone.

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- Masthead
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- Virtual Tour of the Law Review Suite

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- Abstracts for upcoming articles
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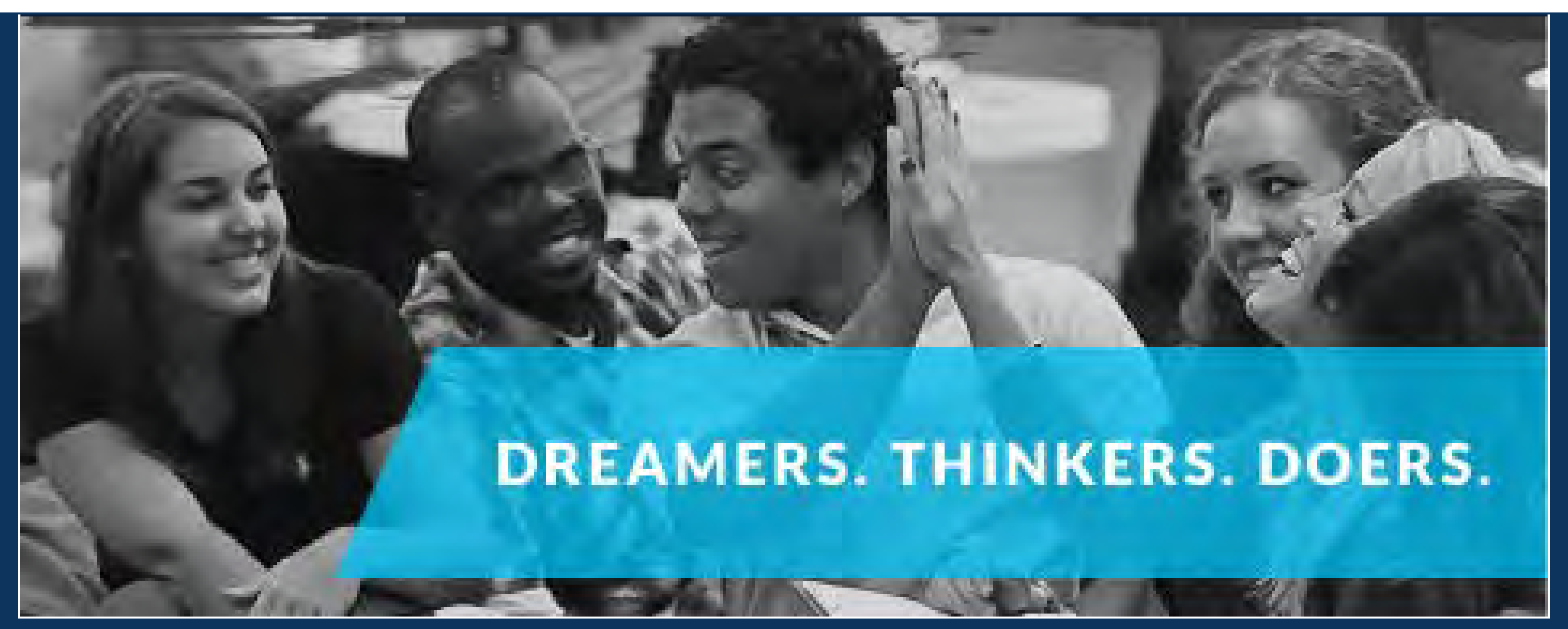

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Cecil C. Humphreys School of Law

Programs

MOOT COURT BOARD

The Moot Court Board of the Cecil C. Humphreys School of Law of the University of Memphis is dedicated to recognizing and fostering excellence in both appellate and trial advocacy. The Moot Court Board consists of twenty, third-year law students who the outgoing Board selects from the most qualified applicants. The incoming board is announced during the spring semester prior to the Freshman Moot Court Competition.

The Moot Court Board is primarily responsible for organizing and coordinating all in-school competitions. The Board also fields teams for travel team competitions. The traveling teams have been consistently competitive with some of the most prestigious schools in the country and have proudly represent the University of Memphis every year.

2016 - 2017 Executive Board:

- Kendra Lyons, Chief Justice
- Devon Muse, Associate Chief Justice
- Elizabeth Booker, Associate Justice for Advanced Moot Court
- Bob Huddleston, Associate Justice for Mock Trial
- Erica Coleman, Associate Justice for First Year Competition

Faculty Advisor:

Barbara Kritchevsky, Director of Advocacy

Click here to see the full 2015-2016 Moot Court Board Masthead.

Contact Moot Court Board

Email: MootCourt@memphis.edu
Office: Memphis Law Moot Court Board, 1 N. Front St., Memphis, TN 38103
Phone: (901) 678-2679

If you are interested in judging a Moot Court or Mock Trial competition at the law school, please email MootCourt@memphis.edu.

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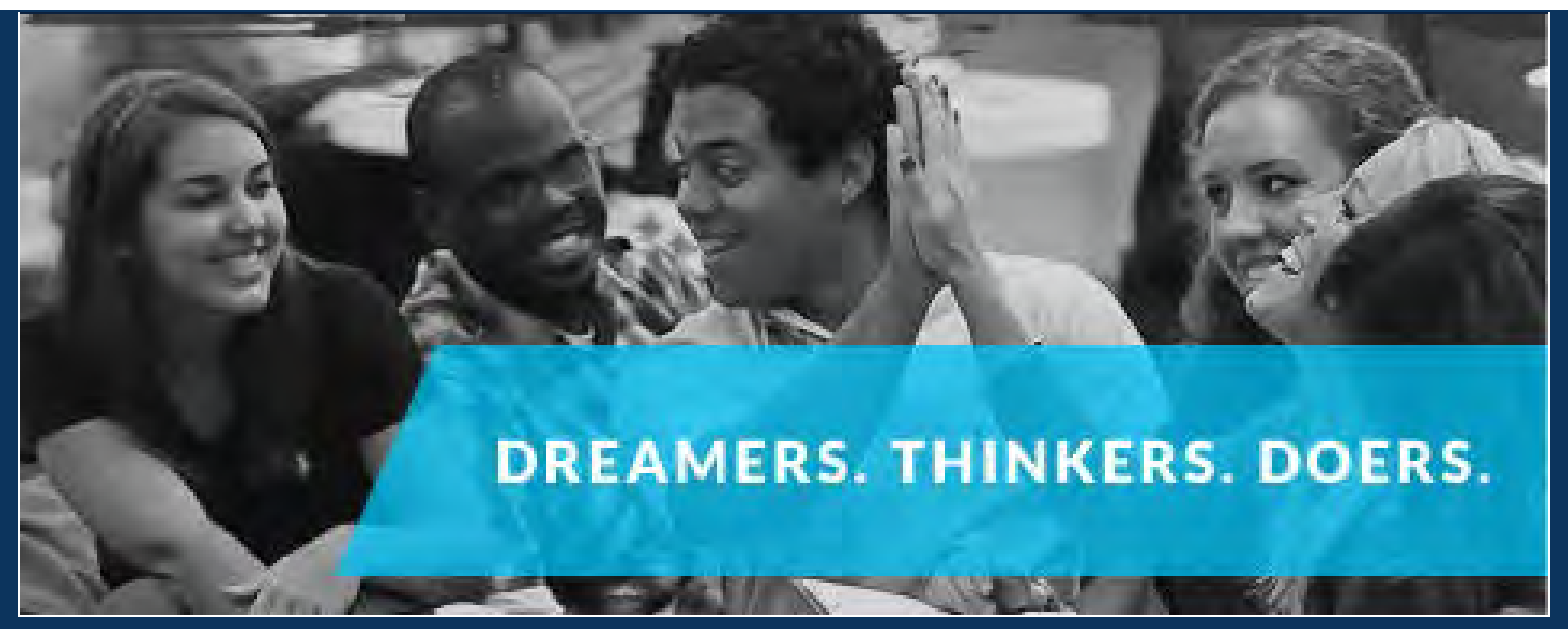

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INSTITUTE FOR HEALTH LAW & POLICY

The mission of the Institute for Health Law & Policy covers three prongs: Education, Scholarship, and Service. Each area is grounded by an overarching mission to use law and policy to advance health.

Educational goals focus on developing competencies and skills in law students for interdisciplinary, client- and mission-driven practice via traditional coursework, externships and other skills-based opportunities, and scholarship. Focus areas cover traditional health law practice, as well as public health and health system policy and science/biotechnology. Faculty have expertise in a diverse array of health law fields, and are also drawn from the surrounding community – who bring a critical practice-based orientation to education.

Scholarship opportunities open up for students the possibility for self-directed and faculty-sponsored research, both within and transcending the law school's boundaries, to include, for example, collaboration with affiliated faculty with the School of Public Health and the School of Nursing at the University of Memphis, and the University of Tennessee Health Science Center.

Service extends iHeLP's reach into the community, where the Institute endeavors to: address unmet health law issues of local organizations and communities, host community forums on health law and policy issues, and work with community leaders to proactively address health policy needs.

DOWNLOAD THE FULL iHeLP INFORMATIVE PAMPHLET HERE

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www.facebook.com/HLSMemphis

MBA Health Law Section's Twitter:
@MBA_HealthLaw

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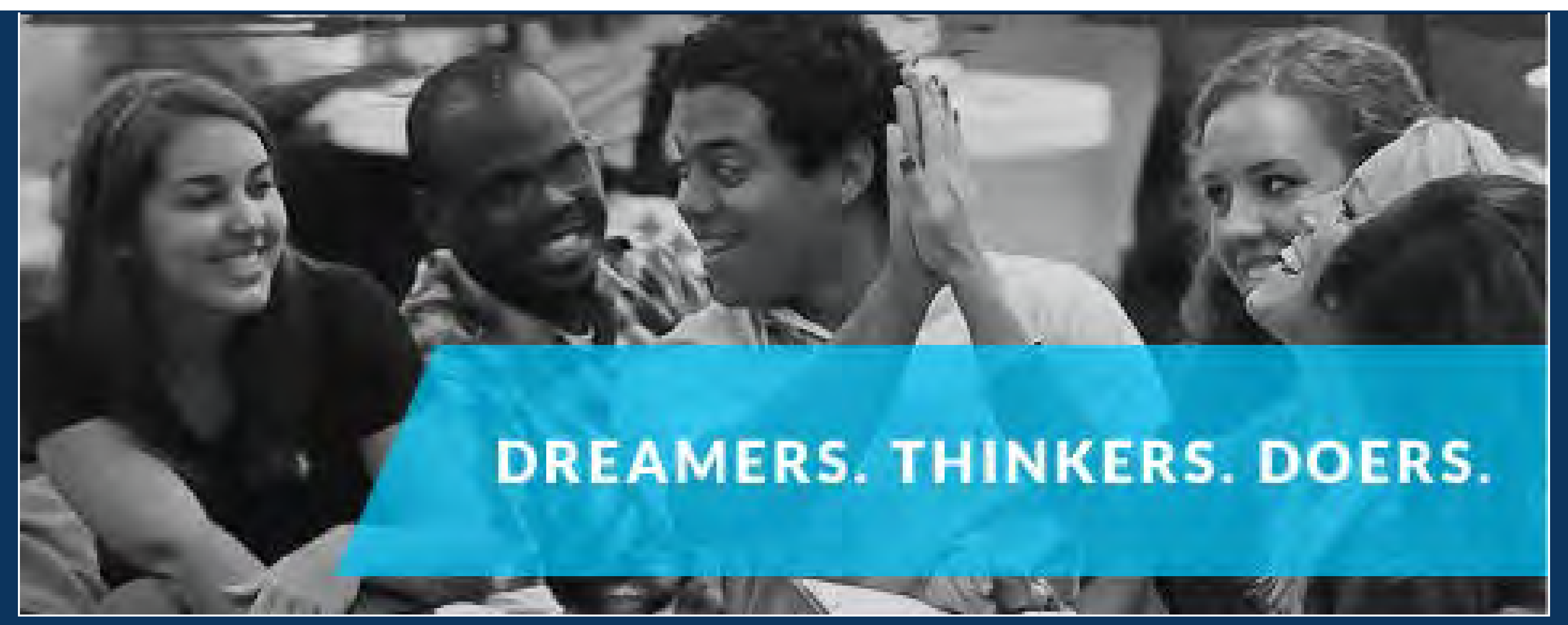

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Cecil C. Humphreys School of Law

Programs

INTERNATIONAL LAW PROGRAMS

The University of Memphis School of Law offers a range of programs focused on international and comparative law. The law school sponsors an active local branch of ILSA – the International Law Students Association. In addition, the law school has hosted a number of speakers, including academics and policymakers working in international law, international trade, and international business. A list of these activities is available here:

- International Law Students Association (ILSA)
- Jessup International Law Moot Court Competition (Jessup)
- Roundtable on Private International Law (January 2013)
- Study Abroad
- Career Pathways

In addition, the law school maintains an active scholarly program in the domain of transnational law.

- Francis Gabor Memorial Speaker Series
  - Dr. Akbar Rasulov, International Law in the Long 1990s (February 2013)
- Faculty Colloquium
  - Dr. John D. Haskell, An Anti-biography of Francis Lieber (April 2013)
- Visiting Scholar Program
  - Professor Luwam Dirar (Summer 2013). Prof. Dirar is a J.S.D. candidate and a Berger International Studies Fellow at Cornell Law School. Prof. Dirar interests include international

trade law and human rights. Prof. Dirar is originally from Eritrea.

- Professor Hou Xianming (October 2013), an associate professor at Ludong University in Shandong, China. Prof. Xianming studies commercial law and securities law. Prof. Xianming will be here from October 2013 through September 2014.
- Professor Osamu Hirasawa (April 2013-March 2014) from Chuo Gakuin University, Department of Law in Chiba, Japan. Prof. Hirasawa teaches criminal law and procedure and intends to research American criminal law.

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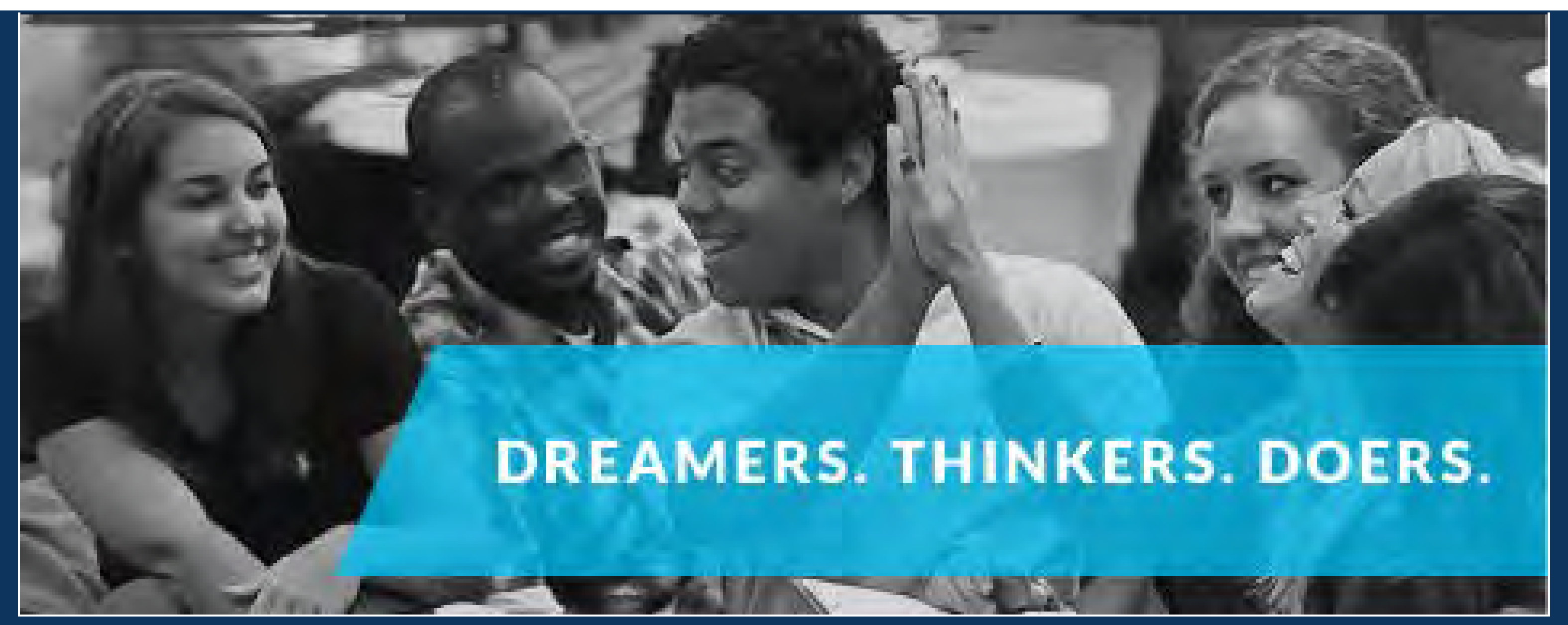

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Below you will find calendars, class grid, exams schedules, etc.

Academic Calendars

- 2016-2017 Academic Calendar
- 2017-2018 Academic Calendar

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- First Assignments
- Booklist
- Course Schedule
- Course Grid
- Exam Schedule
- Registrar Memorandum
- Deadline Calendar

Summer 2017

- Course/Exam Schedule
- Registrar Memorandum
- Deadline Calendar

Fall 2017

- Course Schedule
- Course Grid
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- Deadline Calendar

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- TENTATIVE Course Grid

Exam4 Instructions (Spring 2017 midterm)

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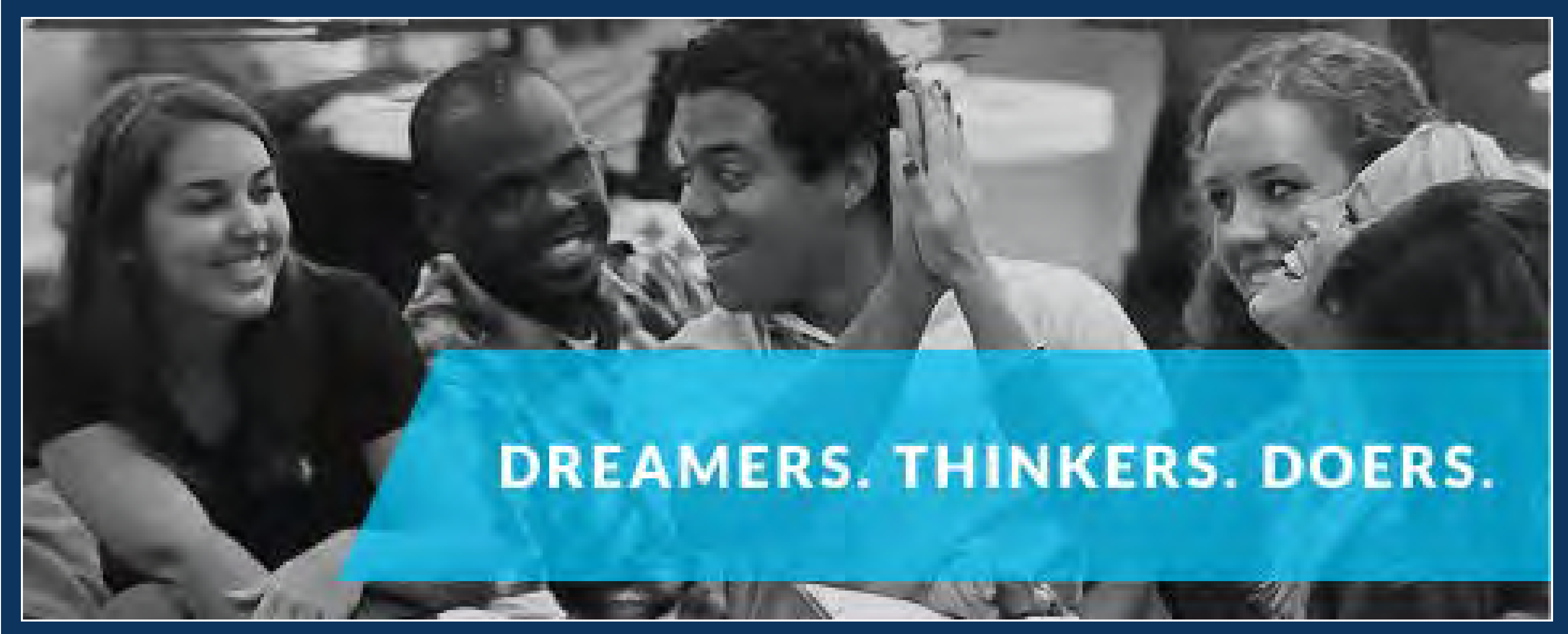

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Cecil C. Humphreys School of Law

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COURSE CATALOG

Below students can find information about required, elective and specialized courses offered at Memphis Law.

- Numerical Course List
- Alphabetical Course List
- Electives & Specialized Areas of Study
- Upper-level Research & Skills Requirement
- Degree Programs
- Certificate Programs

Alphabetical Course List

A | B | C | D | E | F | G | H | I | J | K | L | M | N | O | P | Q | R | S | T | U | V | W | X | Y | Z

•Skip to Electives and Specialized Areas of Study

Administrative Law

Course 311

3-hour practice foundation menu course

Administrative agencies execute law affecting almost every aspect of daily life, including labor and employment, environmental, intellectual property, insurance, transportation, and health laws. This course does not focus on the substantive law of any particular agency; it instead examines principles and procedures common to all agencies, derived in large part from the U.S. Constitution and the Administrative Procedure Act. The course will examine the sources of agency authority, the limitations on agency actions, the procedures that agencies must use in rulemaking and adjudication, and the availability and scope of judicial review of agency actions.

Admiralty and Maritime Law

Course Number 312

2-hour elective course

This 2-hour course will focus on traditional admiralty and maritime law concepts, including an examination of the Jones Act, unseaworthiness, the Longshore and Harbor Workers' Compensation Act, and the general maritime law. The course will also cover issues relating to maritime contracts and liens, limitation of liability, issues relating to collisions, allisions, and breakaways, fleeter's liability, and issues relating to admiralty jurisdiction. The course will also review the available defenses and damages. While the concepts taught are applicable to all areas of maritime practice, the primary focus will be on maritime law as it applies to the inland waterways of the United States. There are no prerequisites.

Advanced Appellate Advocacy

Course 523

1- or 2-hour skills course

Advanced Appellate Advocacy is a skills course for students participating on Moot Court Travel Teams. It focuses on developing and practicing skills in brief-writing and oral advocacy. Students who both write a competition brief and argue orally are eligible for two credits. It is a non-classroom course and students should enroll during the semester in which they compete in an inter-school competition. Students are able to take the course more than once, if they compete in more than one inter-school competition. The Director of Advocacy may award grades of Excellent, Pass, or Fail, based on the recommendation of the team's coach.

Advanced Brief Writing Seminar

Course 453

2-hour research/writing course

This class is designed to offer students who have some experience with writing briefs the opportunity to hone their brief-writing skills. The class will discuss how to research an issue in depth and present a case persuasively, considering issues such as developing a theory of the case, arguing thematically, using the components of the brief effectively, using precedent effectively, and structuring the argument persuasively. Students will have substantial latitude in selecting an issue to brief. Students will write a brief to a court of last resort and will present the case orally. This course satisfies the Advanced Research/Writing requirement.

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Advanced Constitutional Law: Freedom of Speech
Course 396
3-hour elective course
This course examines many of the principal doctrines which have evolved with regard to the First Amendment's protection of "the freedom of speech." Among the areas discussed are the values served by this guarantee, the Supreme Court's process of categorizing unprotected speech, the issues of content and manner regulation, the forum, prior restraints, the right not to speak, and the consequences of governmental employment or support of speech.

Advanced Trial Advocacy
Course 524
1-hour skills course
Advanced Trial Advocacy is a skills course for students participating on mock trial travel teams. It focuses on developing and enhancing the skills necessary to put on a basic trial. It is a non-classroom course and students should enroll during the semester in which they compete in an inter-school competition. Students are able to take the course more than once, if they compete in more than one inter-school competition. The Director of Advocacy may award grades of Excellent, Pass, or Fail, based on the recommendation of the team’s coach. This course satisfies the upper-level skills requirement.

ADR-Labor
Course 315
2-hour skills course
This course offers Negotiations and Mediation skills to prepare the student to properly represent clients in labor mediation and other alternative dispute resolution techniques. This course satisfies the upper-level skills requirement.

Prerequisite (Recommended): Professional Responsibility and Evidence

ADR-Mediation
Course 316
2-hour skills course
This course offers negotiation and mediation skills to prepare the student to properly represent clients in mediation. While students will likely gain insight into how the mediator conducts a mediation session, the goal of the course is lawyering skills in mediation, not skills as a mediator. This course satisfies the upper-level skills requirement.

Prerequisites (Required): Professional Responsibility and Evidence, prior to or concurrently

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Antitrust Law
Course 318

3-hour elective course

Antitrust law is concerned with how firms compete in the marketplace. Given its broad focus on market competition, the study of antitrust allows students to better understand how modern economies function and why businesses (large and small) behave the way they do. The primary strategies addressed are monopolistic conduct, cartel behavior, mergers and acquisitions, and joint-venture activities. Particular areas of focus include amateur-sports regulation, regulatory capture of state licensing boards, and evolving healthcare and pharmaceutical markets.

Appellate Advocacy

Course 309

3-hour skills course

Appellate Advocacy is a writing skills course that builds on Legal Methods II. The course covers the basics of appellate advocacy: analyzing an issue on appeal, writing an appellate brief, and preparing and delivering an oral argument. The course offers instruction in brief writing through regular writing assignments, culminating in an appellate brief. It also offers instruction in how to prepare and deliver an oral argument. Students write a brief and give and judge oral arguments. Grades are based on the written work, oral arguments, and other aspects of class participation.

This course is integrated with the Advanced Moot Court Competition, although class members are not required to compete. The Advanced Moot Court problem will be the basis of class discussion. The Advanced Moot Court brief will be the draft brief for the course. Students will rewrite that brief for the final grade. The Advanced Moot Court Competition will give students the opportunity to practice their arguments for the final in-class argument.

The course will be scheduled around the Advanced Moot Court Competition. Classes will focus on brief-writing until the Advanced brief is due. Classes from the time the brief is due until the competition starts will discuss oral argument. Class will not meet during the Advanced Competition so students can devote their attention to competing. Students who complete the Advanced Moot Court Competition and one other competition are eligible for one credit in addition to the two credits for this course.

All students are highly encouraged to take this course to learn the basics of appellate advocacy and develop writing skills. This course is extremely important for students who wish to participate on moot court competition teams or become a member of the moot court board. This course satisfies the upper-level skills requirement.

Bar Preparation Course

Course 721

2-hour course

Effective August 2017, this course is a required upper-level course for graduation. Students may apply to the Associate Dean for a waiver of this requirement.

This is a course to help graduating students prepare for the Bar Exam both by reviewing some substantive law and instructing on how successfully to navigate multiple choice, essay, and Multistate Performance Test questions. The class reviews substantive criminal law, constitutional law, and tort law. Students answer simulated multistate and essay questions and receive regular feedback on their performance. There will be graded mid-term and final

examinations and a graded Multistate Performance Test. *This course is in addition to, not a substitute for, a summer bar preparation course.*

Bioethics & the Law
Course 304
2-hour elective course
This course examines the legal pillars of contemporary medical ethics and, more broadly, "bioethics." It will focus particularly on [a] informed consent, [b] end of life, [c] medical research, and [d] the financial challenges of modern health care. The materials and discussion will emphasize the ways in which, historically, bioethics is rooted heavily in case law and the difficult human stories those cases addressed. And they will emphasize the day-to-day clinical realities that must be understood if difficult bioethical/legal questions are to be addressed insightfully and appropriately.

Business Organizations I
Course 211
3-hour practice foundation menu course
This course is a survey of agency law and selected statutory provisions, common law doctrines, and administrative regulations related to the formation, operation, and dissolution of general partnerships, limited partnerships, and corporations, along with the rights and responsibilities of the primary internal stakeholders of these entities. Class discussions of cases include both ethical issues associated with practicing law within the context of business situations, and practical perspectives to forward students' development of lawyering skills while mastering terminology and substance. Although the broad framework of business serves as a backdrop for the legal doctrine, the course is designed to be accessible to students without a business background.

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Children's Defense Clinic
Course 569
4-hour skills course
In the Children's Defense Clinic, supervised student attorneys will provide legal representation to youth facing criminal charges in delinquency proceedings in the Shelby County Juvenile Court. Concurrent with their case work, Clinic students will complete a curriculum designed to provide training in the handling of delinquency cases, to enhance the vital lawyering skills students will use in their casework and in practice beyond, and to expose students to the complex legal, policy, social, and economic issues that arise in the juvenile justice and criminal defense settings. The Clinic will emphasize team practice and collaboration, and, where possible, develop and seize on interdisciplinary partnerships to provide broadly focused, multi-systemic advocacy for Clinic clients.

Civil Litigation Clinic: Children and Families
Course 509
4-hour skills course
This clinic offers student attorneys the opportunity to develop the core legal skills determined by the ABA's

MacCrate Report to be fundamental to the successful practice of law. This is foremost a litigation clinic, which allows student to practice essential skills necessary in a litigation practice, in the context of representing children. Due to the nature of a child and family law practice, this Clinic has a strong interdisciplinary bent.

Student attorneys primarily represent children as court-appointed Guardians ad Litem in juvenile court in child abuse and neglect or termination of parental rights proceedings. There is a great demand for court-appointed attorneys in juvenile courts in Tennessee, both in child representation and parent representation, and this Clinic prepares graduates to undertake these roles. In addition, student attorneys might represent a child in education matters, delinquency hearings, adoption, guardianships, conservatorships, administrative matters such as children's SSI, or miscellaneous other problems that might take the student to chancery, probate, or circuit court, to administrative agencies, or even to the appellate courts. Through giving a vulnerable population 'voice' in the legal system, the Child and Family Litigation Clinic awakens within students who will be tomorrow's litigators, advocates, lawmakers and judges a spirit of compassion, a sense of fairness, and an understanding of equal justice. This course satisfies the upper-level skills requirement.

Prerequisite (Required): Professional Responsibility and Evidence
Prerequisite (Recommended): Juvenile Law and Trial Advocacy

Civil Procedure I
Course 114
3-hour required course
Civil Procedure provides an overview of the procedural issues involved in the filing and adjudication of civil suits, primarily in federal court. Over two semesters (Civil Procedure I in the fall, Civil Procedure II in the spring), we will study: jurisdiction over the parties and the subject matter; venue; the applicable law; pleadings; joinder of parties and claims; discovery; adjudication without trial; principles of trial by jury; the preclusive effects of former adjudication; and, if time permits, additional advanced topics.

A subset of the above-listed topics is covered in Civil Procedure I (fall semester). Please check with the instructor for a list of the specific topics covered.

Civil Procedure II
Course 124
2-hour required course
Civil Procedure provides an overview of the procedural issues involved in the filing and adjudication of civil suits, primarily in federal court. Over two semesters (Civil Procedure I in the fall, Civil Procedure II in the spring), we will study: jurisdiction over the parties and the subject matter; venue; the applicable law; pleadings; joinder of parties and claims; discovery; adjudication without trial; principles of trial by jury; the preclusive effects of former adjudication; and, if time permits, additional advanced topics.

A subset of the above-listed topics is covered in Civil Procedure II (spring semester). Please check with the

instructor for a list of the specific topics covered.

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Civil Rights
Course 322
3-hour elective course
This course covers § 1983 litigation and aims to make students familiar with issues that arise in prosecuting or defending a § 1983 action. TOPICS: Action under color of state law, statutory claims, Fourth Amendment, Eighth Amendment, Due Process, Immunities, Municipal Liability, Eleventh Amendment, and if time allows, Recovery (including attorney's fees), and Jurisdictional issues.

Prerequisite (Required): Constitutional Law
Prerequisite (Recommended): Criminal Procedure

Commercial Law
Course 700
4-hour elective course
This course examines core concepts of the Uniform Commercial Code, focusing on Sales (Article 2), Negotiable Instruments (Article 3), and Secured Transactions (Article 9). Related areas of law (i.e., bankruptcy, payment systems, consumer law, etc.) and aspects of commercial and business practices will be discussed as required. This course is intended to provide an overview of commercial law for students who will not be enrolling in each of the commercial law trilogy (Sales, Commercial Paper, and Secured Transactions), but who wish to obtain a significant exposure to the structure and operation of the Uniform Commercial Code, as well as to fundamental commercial law and business practices.

Note: Students who already have completed two or more of the commercial law menu courses will not be permitted to enroll in Commercial Law Survey. Students who have completed Commercial Law Survey may take one of the other commercial law courses in order to gain in-depth knowledge about the chosen area; the student may take both Commercial Law Survey and one other commercial law course in the same semester.

Commercial Paper
Course 323
2- or 3-hour statutory menu course
The law of commercial paper is concerned with the facilitation of banking and other commercial transactions through the use of negotiable paper. The course focuses on Articles 3, 4, and 4A of the Uniform Commercial Code and on relevant federal legislation affecting payment systems.

Comparative Law Seminar

Course 441
2-hour research/writing course
Despite accelerating globalization, the world remains governed by an overlapping set of fragmented legal regimes. This seminar will survey a number of non-U.S. national legal traditions from historical, critical, and comparative perspectives. Topics of current interest will include studies of horizontal and vertical legal harmonization and regionalism. This course satisfies the Advanced Research/Writing requirement.

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Conflict of Laws
Course 324
3-hour elective course
Bar course
When an Arkansas driver is involved in an accident in Tennessee, which state's law applies? Are states ever required to recognize out-of-state divorces or apply foreign laws? When and how can contracting parties choose a particular set of laws to govern their relationship? This course will prepare you to address the issues that arise when a matter may be governed by more than one legal system. Particular areas of focus include horizontal (state-versus-state) choice-of-law approaches, constitutional limits on horizontal choice of law, and recognition and enforcement of out-of-state judgments, and vertical (federal-versus-state) conflicts.

Constitutional Law
Course 212
4-hour required course
The objective of this course is to become familiar with major topics of constitutional debate and to learn to make a constitutional argument. Coverage: Article III, Commerce Clause, Dormant Commerce Clause, Articles IV & VI, Due Process, Equal Protection and (time allowing) First Amendment freedoms of speech and religion.

Contracts
Course 121
4-hour required course
This course addresses contract formation and breach of contract. Coverage includes: the meaning of the word “contract”; the doctrine of consideration and when promises may be unenforceable due to the absence of bargained-for exchange; the elements of and the subtle twists associated with offer and acceptance; the requirement of a writing for certain types of contracts; the extent to which courts “police” the substance of a bargain to prevent unfairness and limit contract enforcement; the process of defining the scope of a contract; and the interpretation of contract language.

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Copyright
Course 325

2- or 3-hour elective course

This course covers the subject matter of copyright, limitations on the subject matter of copyright, infringement of copyright, and defenses to infringement. This course will teach concepts fundamental to Copyright Law so that students will understand and be able to apply them to analysis of issues arising in factual settings.

Corporate Finance

Course 384

2-hour elective course

This course is designed to familiarize the student with basic concepts of corporate finance, including certain valuation methodologies, related accounting concepts and legal and administrative requirements. It will focus on the lawyer's role in corporate practice, dealing primarily with public companies, debt and equity financings and the terms and provisions of relevant instruments, such as preferred stock, subordinated debentures, warrants, stock options and various classes of common and preferred stock. It also will cover various aspects of mergers and acquisitions, tender offers and anti-takeover defenses.

Prerequisites: Business Organizations; Mergers and Acquisitions is helpful but not required.

Corporate Governance and Compliance

Course 720

2-hour elective course

This course covers corporate governance and compliance. "Corporate Governance" refers to the processes by which decisions are made within firms, including the roles played by shareholders, directors, and executives. "Corporate Compliance" refers to the processes by which an organization seeks to ensure that employees and others conform to applicable norms, which can include either the requirements of laws or regulations or the internal rules of the organization. Covered compliance mechanisms include internal enforcement, as well as the role played by regulators, prosecutors, whistleblowers, and attorneys.

Corporate Law Seminar

Course 440

2-hour research/writing course

This course provides an in-depth discussion of the law, theory and policy of corporate governance. The course will be taught in a seminar format and will require the completion of a paper. This course satisfies the Advanced Research/Writing requirement.

Corporate Tax

Course 334

3-hour statutory menu course

The course focuses on the federal income tax aspects of corporate formation, capital structure, distributions to shareholders, redemptions of shareholders, liquidations, taxable acquisitions and reorganizations, and nontaxable reorganizations.

Prerequisite (Required): Basic Income Tax

Criminal Law
Course 126
3-hour required course
This course introduces students to basic principles of substantive criminal law (under the common law and one Model Penal Code), the principals of criminal culpability and the analysis of criminal statutes. Topics include: the criminal act, mens rea, homicide, attempt, complicity, conspiracy and defenses.

Criminal Procedure I
Course 223
3-hour practice foundation menu course
An examination of principles of constitutional criminal procedure, with a focus on search and seizure, the right to counsel, the law governing interrogation and confessions, and pre-trial identification procedures and other selected issues.

Criminal Procedure II
Course 326
2-hour elective course
Covers all aspects of criminal procedure from pre-arrest through post-conviction and habeas corpus. Upon completion of course, students should have a thorough and practical understanding of criminal procedure, particularly Tennessee Rules of Criminal Procedure.

Prerequisite (Recommended): Criminal Procedure I is recommended, but not required. Primarily statutory, but some practice emphasis. Although not specifically listed as a topic that is bar tested, some bar questions in the past have included matters covered by this class.

Debtor-Creditor Law
Course 327
3-hour elective course
Debtor-Creditor Law is a foundational course that addresses the question of what to do when there's not enough money to go around. It provides a brief introduction to state and federal debt collection laws before diving into federal bankruptcy law. The emphasis is on the consumer side because that is most often the context in which these questions arise, but also explores concepts such as fraudulent conveyances and preferential transfers that are encountered in business contexts as well, The course serves as an excellent review of concepts learned in secured transactions that are likely to be encountered on the bar exam. It is a must for both transactional lawyers who want to draft documents that adequately address the possibility of financial default and litigators who want to know what to do once a judgment is entered.

It is strongly recommended, but not required, that students complete Secured Transactions before taking this course.

Decedents' Estates

Course 213
3-hour required course
Coverage includes intestate succession, wills, nonprobate assets, and a brief introduction to trusts. Objectives include mastery of fundamental principles under the Uniform Probate Code, the Tennessee Code, and case law.

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Discovery
Course 377
2-hour skills course
This course covers the pre-trial practices used by one party to obtain facts and information about a case from another party in order to assist the party's preparation for trial. Students study depositions, interrogatories, production of documents, requests for admissions, and other pre-trial discovery practices. The course is hands-on and requires students to draft pleadings, conduct discovery activities, and participate in a mediation. The course also includes electronic discovery and discusses counsel's duty to properly identify, preserve, collect, review, and produce electronically stored information (ESI), as well as on the basic technological knowledge litigation counsel should possess. The course covers the growing case law in the area and prepares students through exercises in mock depositions, and exercises in proper written discovery practice and an exercise in a mock mediation. The course satisfies the upper-level skills requirement.

There are no prerequisites.

Divorce Law Practicum
Course 305
3-hour skills course
The Divorce Law Practicum is a semester-long course designed to convey the essential principals, skills, and values that a lawyer must embrace and master in order to provide competent counsel in the practice of divorce law. Working in the context of a simulated case file and related mock writing and advocacy opportunities, students will consider the potential effects of the substantive law, procedural rules and ethical guidelines, as well as the accepted customs and practices of lawyers.

Designed for students who have completed the fundamental Family Law survey course, the 3-hour Divorce Law Practicum will closely examine the primary areas of divorce practice.

Prerequisite (Required): Civil Procedure, Evidence and Family Law

Economic Analysis of the Law
Course 346
3-hour elective course
The objective of the course is to expose students to the economic analysis of the law. The course covers at a basic level various economic principles and considers application of those principles to basic areas of law, ie; tort, contract, and property.

Education & Civil Rights

Course 310

3-hour elective course

This course explores the intersection of education law and policy as it meets constitutional and equal protection law. Students will be asked to consider policy decisions that impact civil rights in various areas, including student assignment, student admissions, and student instruction, and relate them to disparities across lines of race, ethnicity, gender, native language, and religion.

Elder Law

Course 374

3-hour elective course

Coverage includes ethical issues, age discrimination in employment, income maintenance, health care, long-term care, housing, guardianship, health care decision making, elder abuse and neglect, and basic estate planning. The objective is to provide an overview of principal issues facing the practitioner of Elder Law.

Prerequisites (Required): First-year courses.

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Elder Health Law Advocacy Clinic

Course 535

4-hour skills course

The Elder Health Law Advocacy Clinic will provide students with the opportunity to 1) represent low income elderly patients facing legal issues related to health care, such as advanced health care decision making, Medicaid and Medicare eligibility, nursing home quality of care and residents' rights issues, hospice care, and medical futility; 2) engage in collaborative health policy discussions and initiatives with aging network providers; and 3) conduct community education efforts targeting health law issues of concern to the elderly. During orientation, student attorneys will interface with the Long Term Care Ombudsman for West Tennessee and various other aging network health care providers, while also becoming acquainted with pertinent ethical issues, substantive health law issues affecting elders, administrative law relating to TennCare and Medicare appeals and Clinic office procedures.   After the initial three weeks of orientation, students will participate in weekly case review meetings with their supervising clinical professor and other class members to discuss issues and progress in their cases, policy initiatives and community education efforts. Students are expected to devote 15 hours per week (which includes seven office hours and a weekly one-hour twenty-minute case review session) on Clinic activities.

Prerequisites: Professional Responsibility and Evidence
Recommended: Health Law, Administrative Law and Elder Law

Elder Law Clinic

Course 510

4-hour elective course

The Elder Law Clinic is a live client clinic, where students will have the opportunity to provide legal representation to actual persons to whom they will owe a professional responsibility. Ideally, each student will represent between 4-6 clients during the semester, with cases ranging from wills, durable powers of attorney for finances, affidavits of heirship, qualified income trusts, and other document preparation, to consumer protection, contract matters, financial exploitation, governmental benefits, housing and real property law, custody, adoption, and uncontested divorce. Depending on their caseload, students will have the opportunity to develop skills in interviewing, factual development, legal research and writing, case management, problem solving, community legal education, client counseling and negotiation and should expect some litigation and courtroom experience.

Prerequisites: Professional Responsibility and Evidence
Recommended: Decedents' Estates and Elder Law

Employee Benefits
Course 371
3-hour elective course
With employee benefits issues, laws, and regulations changing so rapidly and at the forefront of the news, business and legal worlds, employee benefits law has become one of the fastest growing and most critical areas of the law today. Employee benefits issues affect not just traditional “pension” lawyers but also affect the practices of many practicing lawyers, including the corporate lawyer, the domestic relations lawyer, the litigation lawyer, the estate planning lawyer and the general practitioner. This course will provide an introduction to ERISA-governed employee benefit plans (including the impact of the Affordable Care Act on such plans), welfare benefit plans, and executive compensation plans. It will be an applied problem method of instruction with emphasis on questions, issues and problems involving employee benefit plans likely to arise in a general litigation or business transaction practice.

Environmental Law
Course 328
3-hour elective course
This survey course provides a broad, practical understanding of several important federal environmental statutes and related case law. The course is designed to introduce students to the variety of environmental challenges addressed by environmental laws, the difficult policy issues surrounding environmental problems, the legal complexities of environmental regulatory and administrative schemes, and issues associated with compliance and enforcement. The course focuses on the following federal acts: the National Environmental Policy Act (NEPA), the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

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Estate Planning and Transfer Taxation
Course 329

3-hour elective course

Analysis of all aspects of Wills, probate procedures, trusts, Living Wills, Guardianships, Durable Powers of Attorney, Irrevocable Trusts, Estate Tax savings techniques, generation skipping techniques, life insurance in estate planning and probate avoidance techniques.

Prerequisites (Required): Decedents' Estates

Evidence

Course 221

4-hour required course

Considers the presentation of and admissibility of factual information in the trial of a case: including the determination of relevance; proof of writings and other real evidence; qualification, examination and impeachment of witnesses; privileges; opinion testimony; and the application of the hearsay rule. Emphasis is on the Federal Rules of Evidence.

Externships

Fair Employment Practices

Course 330

3-hour statutory menu course

Focuses on statutes banning discrimination in employment and other fair employment issues. Federal and state laws dealing with discrimination on the basis of race, sex, age, religion, disability, and national origin will be examined. Questions regarding affirmative action and "reverse discrimination" will be discussed. The course will also look at the recent erosion of the employment at will doctrine and a variety of special employment-related topics.

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Family Law

Course 331

3-hour practice foundation menu course

Bar Course

This is a survey course in Family Law that focuses primarily on marriage, divorce, and issues related to dissolution of a marriage. There is an emphasis on Tennessee law.

Prerequisite (Required): Constitutional Law

Family Law Seminar

Course 421

2-hour research/writing course

This seminar examines current topics in family law with an emphasis on reproductive rights, the establishment of

the parent-child relationship, and the evolving definition of family.

Students will write and present a substantial, publishable quality paper. This seminar satisfies the Advanced Research/Writing requirement.

Prerequisites (Required): Constitutional Law and Family Law

Federal Courts
Course 333
3-hour elective course
This course addresses the constitutional and statutory provisions, as well as the judicially-created doctrines, that shape and limit the role that federal courts play in our system of government. It pays particular attention to issues implicating the separation of powers and federalism and to contending visions of the functions federal courts should perform in American society. Selected topics include the nature of the federal judicial function, standing and justiciability doctrines, congressional control of federal court jurisdiction, Supreme Court review of state court decisions and the relationship between state and federal law, the federal question jurisdiction of the federal district courts, judicial abstention doctrines and the power of federal courts to enjoin state court proceedings, and state sovereign immunity from suit in federal and state court.

Prerequisite (Required): Civil Procedure and Constitutional Law

Federal Discrimination Seminar
Course 444
2-hour elective course
This seminar looks at current topics in federal discrimination law. Topics include disparate impact analysis, affirmative action, gay rights, voting rights issues, and others. Reading assignments are included in a packet provided by the professor and average 30-40 pages per week. The packet includes excerpts from cases, law review articles, congressional testimony, and newspaper and magazine articles, as well as several short writing exercises. Students will write one 25-page research paper, and present that paper in a class toward the end of the semester. This course satisfies the Advanced Research/Writing requirement.

Food and Drug Law
Course 388
3-hour elective course
The primary focus of this class will be on the Food, Drug and Cosmetic Act generally and the FDA, in particular. The course covers such contemporary issues as protecting against unsafe or mislabeled food, controlling carcinogens, color additives, expediting approval of AIDS and cancer drugs, assuring the safety of prescription drugs before and after marketing, importing drugs from abroad, switching drugs from prescription to nonprescription status, balancing the benefits and risks of breast implants, the compassionate use of experimental products, regulating complex new medical device technology, control of such biotechnology techniques, requiring adequate consumer and professional labeling for FDA-regulated products, and the relationship among

international, federal and state regulatory enforcement. There are no prerequisites, but Administrative Law is recommended.

Franchising Law

Course 706

2-hour elective course

The impact of franchising is very significant, as franchised businesses contribute to over 11% of all private sector economic output, create over 15% of all private sector jobs, and account for approximately 3.4% of the gross domestic product of the United States. With over 3,000 franchise businesses and 900,000 franchise establishments, there are nearly 9.5 million jobs in franchised businesses in our country. It is most likely that practicing attorneys will have some meaningful involvement with franchising throughout their careers.

This course will cover all relevant aspects of US franchise law, including: its history; the impact of trademark , trade secret, and antitrust laws on franchising; the governing federal and state registration laws; the unique franchise sales process and required documentation; and the typical contractual, business and real-life issues that arise with franchising.

The focus of the course will be on the practical side of providing legal assistance to franchisors and franchisees. The intent of this course is to prepare the participants to be able to render meaningful and proper advice to clients in this highly regulated and pitfall-ridden business arena. Along with providing a basic understanding of the entire franchise process, this course will offer specific guidance on gauging the viability of franchise opportunities, gleaning relevant information from franchise disclosure documents, negotiation of franchise agreements and related documents, and handling the day-to-day issues most common to franchise relationships. There are no prerequisites for this course and no prior experience in Intellectual Property is required.

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Government Relations & Lobbying

Course 710

2-hour elective

This course will cover the statutory requirements on becoming a lobbyist at the federal level, as well as applying it to interactive scenarios using real examples. This course is geared toward the practical practice of lobbying, whether in law firms, corporations, or government bodies.

Guns and the Law

Course TBA

2- or 3-hour elective course

This course explores a variety of legal issues related to the contentious issues of guns and gun violence in America, including current federal and state gun laws, major constitutional cases, post-*Heller* Second Amendment litigation, modern self-defense rules such as Stand Your Ground laws, civil liability, gun laws in other countries, legal solutions to gun violence, and issues of guns and race, alienage, culture, and gender.

Health Care Insurance & Regulation Seminar

Course 434

2-hour research/writing course

In this seminar, students will engage in detailed investigation of how the health care system is designed post-enactment of the Patient Protection & Affordable Care Act ("ACA"). It will use ACA as a vehicle through which to gain deeper understanding of how health insurance is structured in the U.S., and how ACA impacts (or is likely to impact) the "experience" of health care, at an individual or population – and private or public – level via federal and downstream state law and regulation. The primary intent will be to equip students with the knowledge to better understand the short- and long-term implications of ACA vis-à-vis the health care "system," and the skills to analyze policy developments to more effectively practice in an ever-changing health law landscape.

Students will be expected to write a substantial, publishable quality paper, and to present their work to the class. This seminar will satisfy the Advanced Research/Writing requirement.

Prerequisite (Recommended): Health Law (can be taken concurrently)

Health Law Survey

Course 722

3-hour elective course

This course provides broad coverage of health law issues, suitable for all students with an interest in health law while also serving as a foundation for those students seeking to concentrate their studies in health law. The course will seek to expose students to leading components of what health law practitioners consider to be health law. The first part of the course will cover Quality and Access issues, where topics will include: access to health care and the "duty to treat," licensing of health professionals and institutions, informed consent and confidentiality, and health care professional and institutional liability. The second part will cover major bioethical issues in health care, including abortion, the right to die, and regulation of human research subjects. The third part of the course will cover topics in public health law, such as immunization and reducing medical errors. The fourth part will then move to Organization and Finance topics, including: funding of health care through private and public insurance, including Medicare and Medicaid and as expanded through the Affordable Care Act; fraud and abuse laws, including the False Claims Act, the Anti-Kickback law and STARK; and antitrust law.

Health Policy Practicum (offered fall and spring semesters)

Course 705

3-hour skills course

In the Health Policy Practicum ("Practicum"), students will work in teams alongside community partners to address a real-world policy issue negatively impacting health. Specific projects may change from year to year, and more may be added or amended, depending on community needs at a given time. Types of projects may include (non-exclusive list, all as relate to health law/policy issues):

- a literature review and analysis;
- a needs assessment to develop health policy priorities;
- an education module on a law/policy issue for non-lawyer audiences;
- a position paper for a community stakeholder entity;
- prepared testimony for presentation to a governmental body;
- a piece of legislation or regulation, or comments to regulation; or

• an analysis of existing policies to identify gaps, funding needs for effective implementation, necessary adjustments to achieve policy goals, etc.

The course will include a weekly seminar (1 hour-50 minute) that will focus on building core understanding of legal issues implicated by a given year's policy project(s), in addition to skills of policy-making and community engagement, and an opportunity to present work, learn from affected stakeholders and brainstorm options. Out-of-class work will include drafting exercises and topical research, and community-based project work under the supervision of a lead Community Supervisor as determined in consultation with Practicum faculty and community partners. Overarching supervision, and final grade assessment, will reside in Practicum faculty.

Students will receive 3 "SKILLS" academic credits for the course on a graded basis (A/B/C/D/F). This course meets the experiential course requirement for students seeking the Health Law Certificate.

Prerequisites: Health Law or Public Health Law (prior to or concurrently). (Recommended: Administrative Law or Legislation (prior to or concurrently).)

Health Law Seminar

Course 400

2-hour research/writing course

In this course, students will write and present a paper on a topic in healthcare law. The purpose of this seminar is to provide each student with writing instruction and exposure to the health law literature. Students have the flexibility to choose from a wide variety of topics but, ultimately, the topic must fall under the umbrella of "health law." Students will also practice writing well by following a strict schedule to organize their thoughts and then learn about critique by presenting their topics to an audience. The seminar will guide students through topic selection, the writing process, reading health law articles, and finishing a first draft. By the end of the semester, students will do a presentation on their paper and turn in a final draft. This course fulfills the upper-level writing requirement.

Corequisite: Must have taken or be currently enrolled in Public Health Law, Health Law I, or Bioethics.

Housing Adjudication Clinic

Course 501

4-hour skills course

Students enrolled in the Housing Adjudication Clinic will have the unique opportunity to study law and lawyering from the standpoint of the administrative law judge rather than that of direct client representative. Working under faculty supervision, students will be assigned to investigate, research, hear, adjudicate, and issue written opinions ruling on administrative appeals involving participants in the Memphis Housing Authority's Housing Choice Voucher Program who have challenged adverse decisions affecting their public housing assistance. To complement their work as adjudicators, Clinic students will participate in a twice-weekly classroom seminar designed to survey substantive fair housing law, explore administrative law and procedure, provide skills training, and consider issues of ethics and professionalism that arise in the context of the hearings to which they are assigned. This course satisfies the upper-level skills requirement.

Immigration Law

Course 337

3-hour elective course

The subject matter of Modern Immigration Law and Policy. OBJECTIVES: To teach concepts fundamental to Immigration Law so that students will understand and be able to apply them to analysis of issues arising in factual settings.

Income Tax
Course 214
3-hour statutory menu course
This course covers concepts of gross income, exclusions from gross income, deductions, capital gains, timing, and tax systems. An important objective of the course is to develop the skill of reading statutes and applicable regulations.

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Insurance Law
Course 339
3-hour elective course
This course will focus on traditional insurance law concepts and cutting edge legal issues affecting insurance law theory and practice. The course work will include an examination of insurance history and fundamental concepts, insurance contract law, government regulation, insurable interest requirements, limitations of risk, defenses and duties of policy holders after loss. The course will include a review of property, liability, life, health, disability, automobile and other forms of insurance coverage. We will spend a considerable time with insurance coverage that attorneys will be called upon to consider and understand in most all types of practices.

Intellectual Property Survey
Course 395
3-hour elective course
This course covers the basics of intellectual property law relating to trade secrets, patents, copyrights, and trademarks.

International Business Transactions
Course 399
3-hour elective course
This course consists of two parts. The first part introduces the student to the environments within which transnational business operations take place. Within this framework a basic introduction to Public International Law will be followed by a concise examination of the leading institutions of the World Economic Environment such as the World Trade Organization and the International Monetary Fund. On the transactional level the corporate actors in the transnational business environment will be introduced focusing on the special role of the multinational enterprise. A comparative law overview of transnational legal practice opportunities will lead to a more comprehensive discussion on international litigation strategies covering forum selection, choice of law, international commercial arbitration, and other practical private international law problems. The second part of this course presents problem exercises in transnational business, such as drafting and consulting on transnational sales, distributorship agreements, and licensing

agreements.

International Economic Law

Course 397

3-hour elective course

This course examines the legal and economic frameworks of international trade. The course focuses on the arguments for and against free trade and on the law of the World Trade Organization.

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International Human Rights Law

Course 306

2-hour elective course

This course provides an introduction to international and regional laws and mechanisms for the protection and promotion of human rights. Students will begin by studying the history and evolution of basic principles of international human rights law. Through a critical examination of the development and effectiveness of international and regional international human rights mechanisms, students will have the opportunity to explore contemporary human rights issues in more detail. Selected topics may include: The Role of Non-governmental Organizations, Socio-Economic Rights Litigation, Gender, Humanitarian Intervention and Refugees.

International Law

Course 340

3-hour elective course

Introduction to public international law that also explores selected private transnational legal problems. Covers the nature and sources of international law, jurisdiction of states over persons and territory, recognition of states and governments, governmental immunities, the law of treaties and principles of state responsibility. Special emphasis is on the study of the international protection of human rights, legal controls on the use of force and selected transnational economic problems.

Jurisprudence

Course 342

2-hour elective course

General survey of jurisprudential subjects, including stare decisis, methods of legal analysis; methods of judging; legislative intent; Natural Law; Positive Law; Legal Realism; Sociological Jurisprudence; Critical Legal Studies; Feminist Jurisprudence; and Critical Race Theory.

Juvenile Law and Practice

Course 303

3-hour skills course

This is a three credit survey course that covers doctrine, practice, and procedure regarding children's rights, juvenile delinquency, juvenile dependency (abuse, neglect, and abandonment), and termination of parental rights. Because the right to family integrity on the civil side and a child's potential loss of liberty on the delinquency side serve as bedrocks for juvenile statutes and rules, the course, of necessity, dwells on constitutional law principles.

Practice in Tennessee courts will be highlighted. Students will be required to observe three hours of proceedings in the Juvenile Court of Memphis and Shelby County and write a reflection paper. During the first five weeks of the semester, doctrine and drafting will be emphasized. During the last two weeks of the semester, trial skills will be emphasized, and students will be expected to conduct a mock juvenile trial. Students will be graded on two written drafting exercises, their performance in the mock trial, and on a one (1) hour closed book examination.

Labor Relations
Course 343
3-hour elective course
This course is a study of labor relations law, with a special focus on the federal statutes. Primary emphasis is placed on union organization, employer responses, union economic weapons (strikes, picketing, and boycotts), internal union discipline of members, collective bargaining, and the role of the National Labor Relations Board. The problems involved in balancing the interests of management and labor, the individual and the group, and the state and federal governments will also be discussed.

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Land Use Law
Course 344
2-hour elective course
Land use law governs the way our cities are developed and redeveloped. This two-hour course will focus on land use as practiced in Tennessee by examining pertinent case law, statutes and legal concepts related to the fields of planning, zoning and subdivision regulations. The course will also cover federal statutes that affect local zoning, including Section 1983 of the Civil Rights Act of 1871, the Civil Rights Act of 1968 and the Telecommunications Act of 1996, as well as pertinent sections of the United States Constitution and the seminal opinions they have promulgated.
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Law Review
Courses 912, 913, 914
3- or 4-hour research/writing course
The University of Memphis Law Review is the law school's scholarly journal, publishing articles written by law professors, judges, and practitioners, as well as student "Notes" written by members of the law review. Students serving as staff members or editors earn credit writing their notes, editing and cite-checking articles, and fulfilling the other obligations necessary to publish 4 issues of the law review each year. Students are selected to become law review staff members through a "write-on" competition held in the summer after the first year of law school that considers their performance on the write-on competition paper, their score on a legal citation style (i.e., Bluebook) test, and other factors. In their second year of law school, staff members interested in becoming editors may apply in the Spring semester for positions on the editorial board. A minimum GPA of 2.50 is required to participate in and remain eligible for law review. Successful completion of the Law Review Note satisfies the research/writing requirement.

Legal Argument and Appellate Practice

Course 347
*2- or 3-hour research/writing **OR** skills course*
This is a practical course which focuses on the skills involved in taking a first appeal. Students will work with a real trial transcript. The class will focus on identifying issues for appeal and will cover topics such as preservation of error, plain error, harmless error, and standards of review. Students will write a brief to a court of appeals and argue the appeal orally. This course will satisfy the upper-level skills requirement **or** the research/writing requirement, but not both.

Legal Drafting: Litigation Drafting
Course 513
2-hour skills course
This course is designed to provide second- and third- year law students with the skills and knowledge necessary to draft client letters, pleadings, and motions involved in civil litigation. Students will be challenged to refine their writing skills and strategic analysis of pre-trial issues in this practical based course. This course satisfies the upper-level skills requirement.

Legal Drafting: Contracts
Course 597
2-hour skills course
This course is a transactional drafting course for second- and third- year law students. The course is designed to provide students with the analytic skill of translating the business deal into contract concepts, and an understanding of the rules and techniques for good transactional drafting to enhance clarity and avoid ambiguity. Students will be challenged to learn to think like lawyers and develop skills in translating that thinking into the contracts they draft, utilizing a variety of contracts and transactional practice areas. This course satisfies the upper-level skills requirement.

Legal Ethics Seminar
Course 447
2-hour research/writing course
This seminar gives the students an opportunity to gain a deeper understanding of selected issues in professional responsibility and professionalism. Coverage will include confidentiality, conflicts of interest, litigation tactics, perjury, the client-lawyer relationship, counseling clients, competence, admission to practice, professional discipline, delivery of legal services, and legal education. Students research and write a paper on a selected professional responsibility or professionalism issue. This course satisfies the Advanced Research/Writing requirement.

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Legal Methods I
Course 113
3-hour required course

Objective: To produce competent practitioners using a guided approach to legal research, legal drafting, and legal analysis. This course focuses on the process of legal research, the objective analysis of legal issues, and the substance and form of objective legal memoranda.

Legal Methods II
Course 123
2-hour required course
The objective of this course is to produce competent advocates. LM II covers persuasive advocacy. Building on LM I's emphasis on research, analysis, and objective writing, students further refine these skills by drafting a persuasive brief and arguing before a mock court.

Legislation
Course 348
3-hour statutory course menu course
Many law school courses focus on judge-made law and appellate opinions. The vast majority of American law, however, is enacted law—statutory and regulatory law. This course is designed to teach students how legislatures enact law. Studying Article I of the U.S. Constitution as well as House and Senate standing rules, students explore how Congress is structured and how it operates to make law and policy. The course also discusses courts' relationship with statutory law and the canons of statutory construction. Finally, the course teaches students how to draft legislation—at the end of the term the class will sit as a mock legislature debating bills drafted by students.

Mass Incarceration Seminar
Course 502
2-hour Research/writing course
This seminar will encourage students to explore the rise of mass incarceration and its consequences for U.S. law and society. The following topics will likely be explored as they relate to mass incarceration: origins and causes; sentencing; the "War on Drugs"; disability and mental health; race and poverty; penal confinement & conditions; effectiveness in crime reduction; effect on families and labor markets; rehabilitation & recidivism; the purpose of penal punishment; and penal reform. Assigned reading will include various sources including case law, summaries of existing research, books, legal scholarship and research papers in other disciplines. Assessment for the class will be based on in-class participation and a research paper.

Prerequisites: Constitutional Law, Criminal Law

Mediation Clinic
Course 502
4-hour skills course

Students in the University of Memphis Mediation Clinic will study mediation from the inside-out, analyzing in detail the communicative, strategic, and ethical dimensions of specific interventions that mediators make in the context of particular cases. The Clinic will primarily focus on the students as the mediators, but the

students will also be asked to consider the issues from other points of view: as the disputant, as an attorney representing a client in mediation, and in the capacity of advising an organizational client about dispute resolution options. The Mediation Clinic has four primary components: (1) The training that is required by Tennessee Supreme Court Rule 31 before one may become listed as a Rule 31 General Civil Mediator; (2) Ongoing student observation of mediations conducted by Rule 31 Mediators in General Sessions Court cases, Federal Court cases, and other administrative proceedings; (3) Student participation as co-mediator (when available with clients' permission) with Rule 31 Mediators in Shelby County General Sessions Court cases (or other agencies); and (4) Weekly classroom seminar and participation in simulations designed to give students further training and feedback throughout the course of the semester.

Medical-Legal Partnership Clinic
Course 595
4-hour skills course
Housed in both devoted hospital space and the law school Clinic offices, law students participating in the MLP Clinic provide legal assistance to the low-income patients of Le Bonheur Children's Hospital and their families under the supervision of experienced MLP faculty, lawyers, and healthcare providers. Among other case-related assignments, MLP Clinic students conduct intake interviews, develop case strategies, conduct legal research, prepare legal documents, counsel clients, and provide representation in court and administrative proceedings pursuant to applicable student practice rules. Among other areas of focus, the MLP Clinic assists clients in cases involving housing and landlord-tenant issues, public benefits, public and private health insurance, wills and health power of attorneys, guardianships, and conservatorships and educational law services.
To complement their casework, Clinic students will participate in a weekly interdisciplinary classroom session designed to explore the legal work they are performing, the legal, policy, and ethical issues that affect patients' health, and the ways that health outcomes and health care access for low-income children can be enhanced by bringing health and legal professionals together. Throughout their Clinic semester, students have the opportunity to work collaboratively with the faculty and staff of Le Bonheur Children's Hospital and to participate in joint class sessions with medical students and students from other health disciplines.
Prerequisites: Professional Responsibility and Evidence preferred, although not required.

Mental Health Law
Course 394
3-hour elective course
This course begins with a discussion of mental disorders from the medical perspective. Next, attention is turned to the role of mental health experts in legal matters, with special emphasis on that to which they can and cannot testify and when a defendant is entitled to the assistance of an expert. In this area, many of the cases involve the insanity defense, including those with the death penalty at stake.
The focus then turns to civil commitment, which is the largest part of the course. In short, a person can be involuntarily hospitalized if he or she has a mental illness and as a result of that mental illness is either dangerous to himself/herself or others. Both the substantive and procedural aspects of civil commitment are covered. To see these in practice, students have the opportunity to observe civil commitment hearings, which are closed to the public.
Some time is also spent on the issue of competency and the appointment of a guardian or conservator.

Finally, students examine what mental issues are required to be disclosed on the Tennessee Bar Application, and the consequences of those disclosures.

Mental Health Law Seminar
Course 402
3-hour research/writing course
Students will write and present a paper of publishable quality on a topic involving mental health law, the specific topic to be selected by the student with the approval of the instructor. Students will perform in-depth research and will participate in an intensive, supervised writing process. Significant time will be spent on instruction regarding academic writing and in editing the student's own work and, occasionally, the work of other students. In addition, the seminar will provide an opportunity to examine current topics in mental health law through reading assignments coupled with rigorous analysis and vigorous discussion amongst the seminar students under the guidance of the instructor. Approximately ten reading assignments will provide the material for analysis and discussion. Reading assignments will comprise excerpts from cases, law review articles and other periodicals, and newspapers and magazines. The seminar will take place across both the fall and spring semesters. The class will meet for two hours each week in the fall semester and for one hour each week in the spring semester with a final, overall grade being assigned at the end of the spring semester. The fall semester will focus on topic selection, the writing process, editing, and the reading assignments, and will culminate in a high-quality first draft of the paper. The second semester will focus on revising the paper and also will involve making a presentation to the seminar class based upon the paper.
Papers that earn a grade of C or better will satisfy the Advanced Research/Writing Requirement.

Mergers & Acquisitions
Course 301
2- or 3-hour elective
This course introduces students to the legal principles that underlie mergers and acquisitions. The advantages and disadvantages of various acquisition forms, such as mergers, asset acquisition, stock purchases, and tender offers are discussed. Significant focus is also given to the fiduciary duties and other obligations of company boards of directors, the role of shareholder voting, externalities arising from some merger/acquisition transactions, state anti-takeover statutes, disclosure requirements arising from the securities laws, and the effects of mergers and acquisitions on other constituencies (beyond shareholders and management). Prerequisite: Business Organizations.

Moot Court
Course 811
1- or 2-hour elective
Students can receive one or two credits for Moot Court by successfully completing intra-school moot court or mock trial competitions. A student who successfully completes two competitions is eligible for one credit. A student who successfully completes four competitions is eligible for two credits. Students generally register for credits in their final semester of study.

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National Security Law

Course 308
2-hour elective course
This course is designed for upper level students, particularly those interested in employment opportunities in the significant number of positions with the U.S. Government, U.S. Military, or private practice. Major areas to be covered will include the constitutional and legislative framework for Presidential power and the powers of Congress, using armed force abroad, detaining "enemy combatants" (terrorist suspects), intelligence gathering, Homeland Security, and future threats to national security. Significant current events also will influence the scope of the course schedule.

Negotiation and Mediation
Course 317
2-hour skills course
This course offers an introduction to negotiation theory and provides the opportunity to apply that theory in various negotiating contexts. Students will be exposed to basic concepts of principled and strategic negotiation and engage in in-class negotiating exercises. Students will also learn about the mediation process and how to negotiate effectively as advocates in mediation through role playing in mock mediation exercises at the end of the semester. This course is team taught with another section.

Non-Profit Organization Tax
Course 370
3-hour elective course
This course covers the state law requirements regarding the organization and operation of nonprofit organizations. In addition, a heavy emphasis is placed on the federal income tax treatment of nonprofit organizations, including the requirements for obtaining and maintaining tax-exempt status, the distinction between a public charity and a private foundation, the private foundation excise taxes, and the unrelated business income tax.
Prerequisites (Required): Income Tax.
Prerequisites (Recommended): Business Organizations.

Partnership Tax
Course 352
3-hour elective course
The course focuses on the federal income tax aspects of partnership formation, operations, sales and exchanges of partnership interests, operating distributions, liquidations and S Corporations.
Prerequisite (Required): Basic Income Tax
Prerequisite (Recommended): Corporate Tax

Patent Law
Course 390
3-hour elective course
This course covers the substantive requirements for obtaining a patent on an invention and enforcing patent rights in federal court. Topics include: patentable subject matter; utility; disclosure; novelty; nonobviousness; claim construction; infringement; defenses; and remedies. A technical background is not required for this

course.

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Pre-Trial Litigation Practice

Course 551

3-hour skills course

An intensive simulation-course designed for students who plan to be civil litigators. Through a case file assigned at the beginning of the semester, students are encouraged to explore how lawyers strategically use each step in the pretrial litigation process to advance their clients' interests. Among other things, students will analyze the law, investigate the facts of the assigned case file, draft relevant pleadings, prepare and respond to discovery, take and defend depositions, brief and argue a pretrial motion and engage in settlement negotiations with an opposing party, all while maintaining client relations and expectations.

Prerequisites (Required): Civil Procedure & Evidence

Problems in Bankruptcy

Course 354

2-hour elective course

Addressing, discussing, and solving selective bankruptcy problems involving, for example, home mortgages, trustee's avoidance powers, relief from stay, plan confirmation utilizing applicable Code and Rule provisions and decisional law.

Products Liability

Course 357

2-hour elective course

A complete review of the current status of product liability law, including an examination of the bases of liability (warranty, misrepresentation, negligence and strict liability); issues relating to proximate cause; issues related to industry liability, market share and enterprise liability; a review of defenses available (comparative negligence, assumption of the risk, product misuse; product alteration, governmental standards pre-emption, statutes of limitations and statutes of repose, learned intermediary doctrine, idiosyncratic reaction); a review of damages issues peculiarly related to product liability law; evidentiary problems such as those related to expert witnesses and spoliation; an examination on the type of entities who are liable under presently existing product liability law (employers, lessors, bailors, franchisors, used product sellers, real estate vendors, landlords and personal service providers); and an examination in detail of the Tennessee Product Liability Act of 1978.

Professional Responsibility

Course 224

2-hour required course

Bar course

This course examines issues of professionalism and ethics, with a particular focus on the ABA Model Rules of Professional Conduct. This required course may be taken in the 2L or 3L year.

Property I

Course 115

3-hour required course

Coverage includes personal property, private interests in land, and the sale of land. Objectives include mastery of principal concepts of acquisition, retention, and transfer of property rights.

Property II

Course 125

3-hour required course

Coverage includes personal property, private interests in land, and the sale of land. Objectives include mastery of principal concepts of acquisition, retention, and transfer of property rights.

Public Health Law

Course 702

3-hours elective course

This course will offer a survey perspective of key issues at the intersection of public health (as distinguished from individual health or clinical treatment) and the law. It will examine the complex interplay between government's role in protecting and promoting population health, and individual liberties, privacy, commercial speech, and property rights. It will begin by discussing the foundations of legal involvement in public health and traditional government powers (e.g., infectious disease control and surveillance, vaccination, food and water safety, environmental safety). A substantial amount of time will then be spent on legal, policy, and ethical issues raised by evolving notions of those governmental powers, including the power of government (including through use of tort law) to promote "healthy" behaviors (e.g., anti-obesity efforts), and to regulate "non-valued" behaviors (e.g., smoking, alcohol use; decisions not to be vaccinated or comply with infection control). A small part of the course will also touch on recent efforts related to bioterrorism, responses to natural disasters, and public health genetics. While US-focused, there will be opportunities to discuss global public health.

Public International Law seminar

Course 404

2-hour research/writing course

Public international law is concerned with the law governing relations between States (i.e., U.S., China, Germany) as legal entities. This 2 hour seminar course is not bar tested, and is not a menu course, but it is an indispensable course for anyone who wants to understand global power structures. Week-by-week, we will cover a range of foundational doctrines in international law, including the doctrines of sources, jurisdiction, sovereign immunity, treaty law, and various remedial mechanisms and processes. over the course of the semester, students will prepare a seminar paper on an international law topic of their choice. While there are no prerequisites for the course, success in the course will require immersion in current events and heightened awareness of major global developments.

This course satisfies the Advanced Research/Writing requirement.

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Realty Transactions
Course 358
2-hour elective course
This course covers transactional aspects of the buying, selling and financing of real property including real estate contracts; title insurance, surveys, environmental issues and other pre-closing due diligence; conveyance documents and settlement statements; mortgages and other real estate finance documents; foreclosures; bankruptcy and tax implications; and ethical considerations.

Remedies
Course 368
3-hour elective course
Bar course
This course studies the nature and measurement of the judicial remedies to which a party is entitled after establishing that a substantive right has been violated. It focuses on Coercive Remedies (injunctions, specific performance), Damages (compensatory, punitive) and Restitution.

Research I
Course 711
1-hour elective
Independent Research is intended to permit students with an avid interest in a particular topic to explore that topic at length under the supervision of a faculty member. Accordingly, it is contemplated that students will generate the topic based upon the student's interests. In other words, it is not the purpose of Independent Study to enable a student to fill a gap in the student's schedule or to satisfy graduation requirements. Independent Study does not satisfy the advanced writing requirement, in whole or in part. Students may enroll in Independent Research for not more than one credit hour. In addition, permission of a supervising faculty member (who shall be a full-time, tenured or tenure-track faculty member) is required, as is approval by the Associate Dean for Academic Affairs.

Sales
Course 359
3-hour statutory menu course
Bar course
This course covers Article 2, and to some intent, Articles 2A, 5, and 7.
Prerequisites (Recommended): Contracts I and II

Secured Transactions
Course 222
3-hour statutory menu course
General survey of topics relating to the creation, perfection, and priority of security interests, as well as topics relating to the identification of types of collateral and rights upon default. This course is recommended as an introductory commercial law class which introduces the student to the Uniform Commercial Code.

Securities Regulation
Course 361

3-hour elective course

This course considers federal regulation of the registration, issuance, and trading of securities in national, regional and private markets for securities. Materials in the course will examine the 1933 and 1934 Acts and other federal statutory provisions (for example, The Dodd-Frank Act of 2010) and their effects on markets for issuance and trading of securities.

Prerequisites (Recommended): Business Organizations I

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Sports Law

Course 372

2-hour elective course

This course is designed to introduce students to the legal, business and policy issues and disputes that arise in the world of amateur and professional sports. The course will approach topics from the perspective of various players in the sports industry, such as the sports lawyer, the corporate counselor, the university administration, team management, various sports regulatory bodies, the athletes and even the fans. In addition, we will discuss and dissect current events in the world of sports.

Tax Seminar

Course 431

2-hour research/writing course

Assigned readings on various tax policy topics are discussed in class. In addition, each student prepares a research paper on a selected tax policy topic and presents that paper to the class. To further enhance writing skills, each student edits two other students' research papers. This course satisfies the Advanced Research/Writing requirement.
Prerequisite (Required): Basic Income Tax

Tennessee Civil Procedure Seminar

Course 429

2-hour research/writing course

The Tennessee Civil Procedure Seminar addresses the subject matter jurisdiction of Tennessee's various courts; judicial jurisdiction with emphasis on Tennessee's long arm statutes; venue; statutes of limitation and repose; pleadings; pre-trial motion practice; discovery; trial practice including jury selection, opening statements , presentation of evidence and objections under the Tennessee Rules of Evidence, jury instructions, closing arguments, verdicts, and post trial motions; and appeals under the Tennessee Rules of Appellate Procedure. Ethics issues as they relate to Tennessee Civil Procedure will be addressed as will enforcement of judgments. General Sessions Court and Juvenile Court practice.
Course materials will be made available on TWEN.

Students enrolled in this seminar will prepare original research papers on a topic of Tennessee Civil Procedure, which may include topics regarding civil trial practice, rules of evidence, appellate practice, and ethics, among other topics. It is expected that student papers will be of a quality worthy of publication as a

Note in a law review such as the UM Law Review. Students will be expected to prepare initial and final drafts of their papers. Papers that earn a grade of C or better will satisfy the Advanced Research/Writing Requirement.

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Tennessee Constitutional Law Seminar

Course 445

2-hour research/writing course

This seminar will explore state constitutional doctrine. While development under the Constitution of Tennessee will be a principal focus, selected issues in other states will be examined as well, as will the methodology of state constitutional analysis. This course satisfies the Research/Writing requirement.

Prerequisites (Required): Constitutional Law

Torts I

Course 112

3-hour required course

Torts addresses civil wrongs, other than breaches of contract, for which the law provides a monetary remedy. Torts I begins with coverage of the basic intentional torts (battery, assault, false imprisonment, intentional infliction of emotional distress, trespass to land, trespass to chattels, and conversion) and the privileges or defenses to the intentional torts. Most of the course, however, is devoted to the broad tort of negligence. Simplistically, negligence law is the study of liability for accidental injuries.

Torts II

Course 122

3-hour required course

Torts II picks up where Torts I leaves off, with further consideration of the tort of negligence. Other topics that may be covered include strict liability (of which products liability is the largest component), wrongful death, tort damages, and defamation and privacy.

Prerequisite (Required): Torts I

Trade Secrets

Course 707

2- or 3-hours elective course

Trade secrets are one of the four core areas of intellectual property law and the one most likely to be encountered in legal practice by non-specialists, as trade secret issues arise in areas as diverse as employment law, business formation, mergers and acquisitions, licensing, franchising, venture financing, development of new technologies, and contractual relationships of all sorts between competitors, joint venturers and vendors.

This course will cover the laws protecting trade secrets and confidential business information, including the various related doctrines that govern the ownership and use of information between employers and employees, fiduciary

duties, non-compete agreements, and assignment agreements concerning new inventions and discoveries.

The focus of the course will be on the Uniform Trade Secrets Act now in effect in almost every state (including Tennessee), as well as the federal Economic Espionage Act. The "hot" topics in current trade secret practice, including what does and does not constitute an actual trade secret, the doctrine of inevitable disclosure, and real-world contractual restrictions on employee mobility through non-competes and non-solicitation covenants, will be covered in depth. Alongside this practice-oriented approach, the course will also explore certain public policy concerns, including the effect of trade secret laws on employee rights and on technological innovation. There are no prerequisites for this course and no prior experience in Intellectual Property is required.

Trademarks
Course 366
2-hour elective course
Considers legal and policy problems in the law of trademarks through case analysis and examination of the Lanham Act. Topics include marks subject to protection, the federal registration process, likelihood of confusion, 'palming off,' and remedies.

Prerequisite (Recommended): IP Survey

Trial Advocacy
Course 516
3-hour skills course
Trial Advocacy is a simulation course wherein students will learn about the various phases of jury trial in civil and criminal contexts, as well as the differences between jury and non-jury trials. Students will simulate jury selection, opening statements, direct and cross examinations, and closing arguments, and will learn how to introduce exhibits, present expert testimony, raise and respond to objections, and deal with problem witnesses. Students will have weekly simulation assignments and, in most sections, will conduct a full trial at the end of the semester. This course satisfies the upper-level skills requirement.

Prerequisite (Required): Evidence, may be taken concurrently

Trust Law
Course 392
2-hour elective course
A comprehensive, theoretical study of the law of trusts, including the history, the necessary elements of a trust, beneficiary rights, Trust administration, trustee roles and liability.
Prerequisites (Required): Decedents' Estates
Prerequisites (Recommended): Estate Planning

U.S. Taxation of International Income
Course 385
3-hour elective course

The course will examine U.S. tax rules applicable to business and investment activities of foreign individuals and corporations in the United States (“inbound transactions”) and U.S. tax rules applicable to U.S. taxpayers who invest and conduct business abroad (“outbound transactions”. Specific topics will include sourcing and characterization of items of income and deductions, the branch profits tax, foreign investment in U.S. real estate, the foreign tax credit, property transfers, controlled foreign corporations, and U.S. tax treaties. Federal Taxation of Business Entities is a prerequisite but it may be taken concurrently.

Prerequisite (Required): Basic Income Tax
Prerequisite (Recommended): Partnership Tax

Voting Rights & Election Law
Course 704
2-hour elective course
Voting Rights & Election Law covers the law involving voting rights, election administration, and campaign finance. Topics covered will include one-person, one-vote; political and racial gerrymandering; alternative electoral systems; election challenges and recounts; voter enfranchisement and disenfranchisement; and the regulation of campaign finance. Both constitutional and statutory issues will be covered.

White Collar Crime
Course 703
2-hour elective course
This course will introduce students to the scope and significance of white collar crime in the United States and educate students about the substance and procedure of federal white collar crime prosecutions, with an emphasis on health care crimes. Students who take the course will become familiar with fundamental procedures of federal criminal investigation, prosecution and sentencing. Substantively, they will develop an understanding of the most frequently used federal white collar criminal statutes and those statutes most often used to prosecute health care crimes.

Prerequisite (Recommended): Criminal Procedure

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Electives & Specialized Areas of Study

Memphis Law's curriculum provides many elective courses which cover a wide range of substantive legal knowledge and lawyering skills. The upper level curriculum permits students to take courses in specialty areas of law, develop fundamental lawyering skills, and concentrate their legal education in particular areas of interest. These elective courses are listed by basic specialty areas.

Commercial Law

Bankruptcy Externship

Commercial Paper

Debtor-Creditor

Problems in Bankruptcy

Sales

Constitutional Law

Civil Rights

Education & Civil Rights

Federal Courts A

Federal Courts B

Tennessee Constitutional Law Seminar

Corporate/Business Law

Antitrust

Business Organizations II

Mergers & Acquistions

Securities Regulation

Secured Transactions

Unfair Trade Practices

Domestic Relations Law

Child and Family Litigation Clinic

Divorce Law Practicum

Family Law

Juvenile Law

Juvenile Law and Practice

Estate Planning and Probate Law

Elder Law

Elder Law Clinic

Estate Planning

Trust Law

Health Law

Health Law Survey

Health Law Seminar

Health Policy Practicum

Intellectual Property Law

Copyright

Cyber Law
Patent Law

International and Comparative Law
Comparative Law Seminar
Immigration Law
International Business Transactions
International Economic Law

Jurisprudence, Interdisciplinary Study and Public Policy
Education/Civil Rights
Federal Discrimination Seminar
Gun Control/Gun Rights Seminar
Jurisprudence
Law and Accounting
Law and Economics
Legal History
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Labor and Employment Law
Fair Employment Practices
Labor Relations
NLRB (National Labor Relations Board) Externship

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Negotiation and Mediation
Advanced Appellate Advocacy
Appellate Advocacy
Child and Family Litigation Clinic
Criminal Justice Externship
Discovery
Elder Law Clinic
Ethics Seminar
General Sessions Civil Litigation Clinic
Judicial Externship
Legal Argument and Appellate Practice
Legislation
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Pre-Trial Litigation
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Professional Responsibility
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Environmental Law
Environmental Law Seminar
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Estate and Gift Tax
Federal Taxation of Business Enterprises
Non-Profit Organization Tax
Partnership Tax
Tax Seminar

Torts/Product Liability Law

Insurance Law
Privacy Law Seminar
Products Liability

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Upper-level Research Requirement & Skills Requirement

To graduate, a student must successfully complete the upper-level research requirement and the skills requirement. See Academic Regulation 16.c.

Skills Course: A student must have **two-credits of skills** credit to satisfy the Skills Requirement.

- ADR/Arbitration
- ADR/Labor
- ADR/Mediation
- ADR/Negotiation
- Advanced Clinic
- Business Planning
- Clinic
- Disability Law & Practice
- Discovery
- Divorce Law Practicum
- Externship
- Juvenile Law and Practice
- Legal Argument & Appellate Practice (satisfies either Skills or Upper-level Research/Writing, but not both)
- Legal Drafting: Litigation
- Legal Drafting: Contracts
- Trial Advocacy
- Appellate Advocacy
- Advanced Appellate Advocacy
- Advanced Trial Advocacy

Upper-level Research/Writing Requirement: A student must have **two-credits of research/writing credits** to satisfy the Upper-level Research/Writing Requirement.

- Successful completion of the Law Review Note
- Legal Argument & Appellate Practice (satisfies either Skills or Upper-level Research/Writing, but not both)
- Seminar

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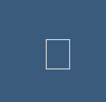
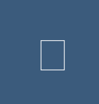
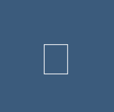
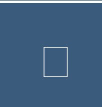
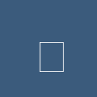
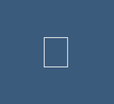

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ACADEMIC CURRICULUM

Memphis Law offers both a full-time day program and a part-time day program. The part-time program is for a limited number of students whose other responsibilities make full-time study difficult. Our curriculum is designed to challenge students and prepare them for the practice of law. The curriculum reflects a commitment to traditional legal education with the emphasis on fundamental lawyering skills and core areas of knowledge.

Memphis Law operates on the semester system and requires 90 semester hours for the J.D. degree. A full-time student is required to enroll in at least 12 hours each semester. Students in the full-time program normally graduate in three years. Summer classes are sometimes available and students can graduate after five semesters and two summer sessions of full-time study.

Part-time students normally will graduate in four or four-and-one-half years (including summer semesters). Graduation requirements for those students enrolled in the part-time program are the same as for those students enrolled in the full-time program. A part-time student is required to enroll in at least eight hours, but may enroll in no more than 11 hours, each semester.

CLICK HERE FOR CURRICULUM SUMMARY

CLICK HERE FOR COURSE CATALOG

Transferred Credit

Credit for law school work competed at law schools other than at The University of Memphis Cecil C. Humphreys School of Law will be credited toward fulfilling graduation requirements only after individual consideration by the Dean. No credit, however, will be given for work completed in a United States Law School which is not ABA approved. Advanced standing will be granted only for work done after the student has completed a Baccalaureate degree.To be eligible for transfer, credit earned in each course considered for transfer credit must be at least equal to the overall grade point average required for graduation at the University of Memphis, Cecil C. Humphreys School of Law.

Determination of Credit Hours for Coursework

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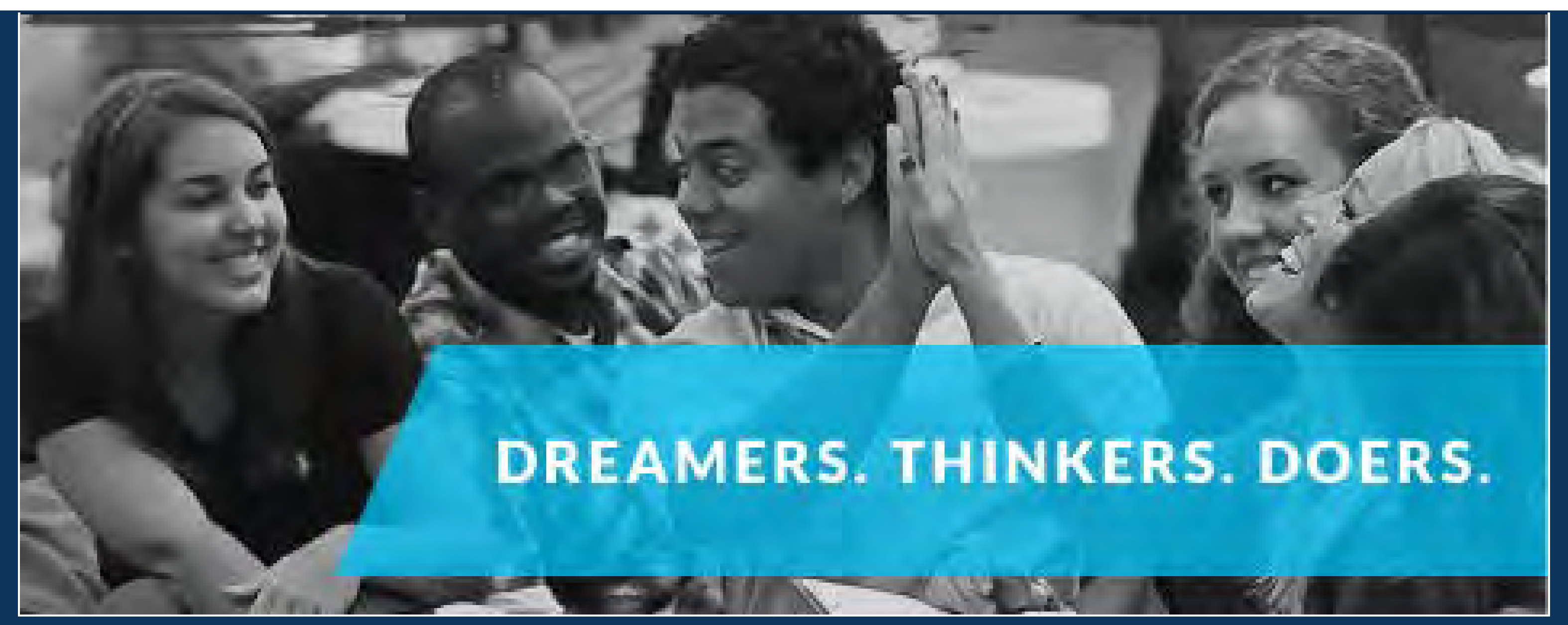

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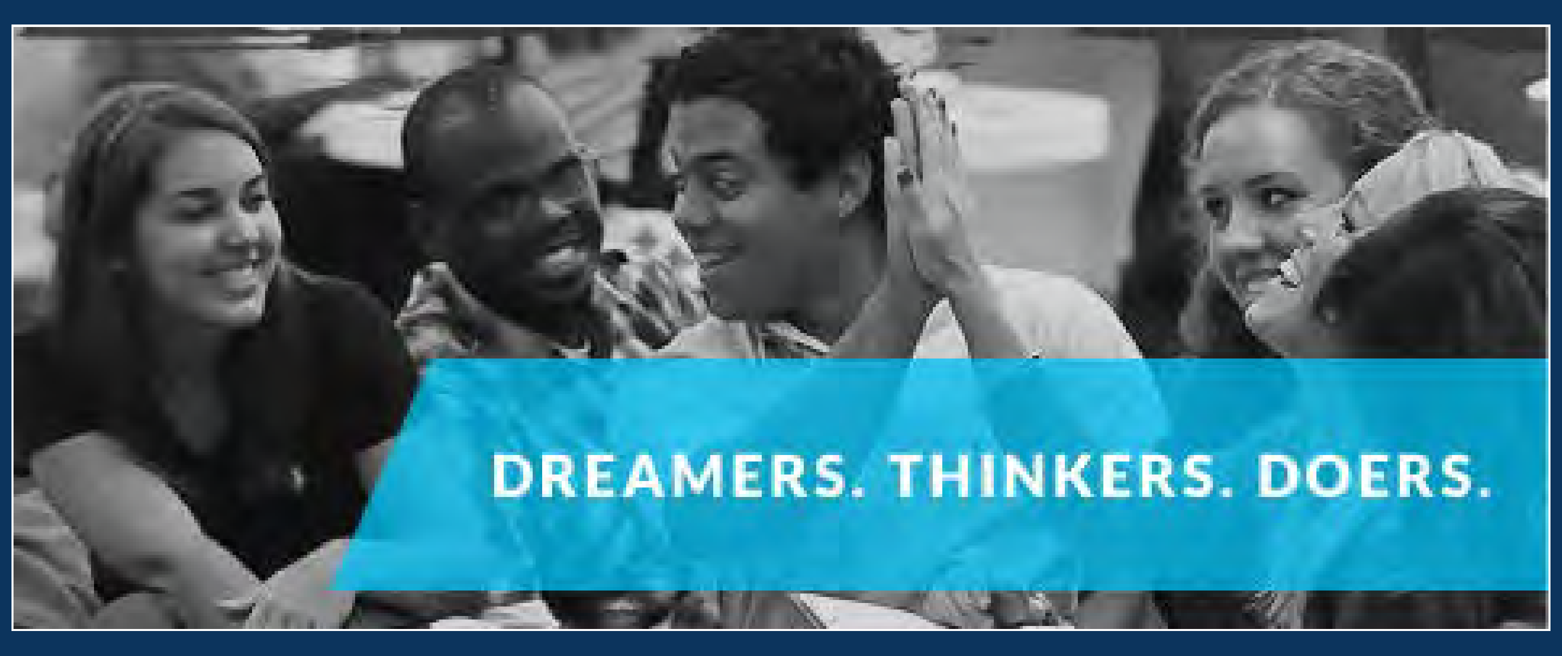

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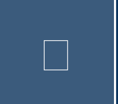
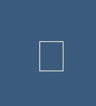
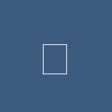
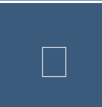
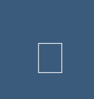
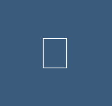

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RECORDS REQUEST

The procedures for obtaining both official and unofficial transcripts are listed below. Note that official transcripts are available only through the University of Memphis Registrar's Office on main campus, not through the Law School.

Official Transcripts for Current Students and Alumni

Official transcripts must be requested from the University of Memphis Registrar's office. Please note that normal processing time is five business days.

- Go to the UofMemphis Registrar's website for an explanation of the process.
- Complete this Transcript Request form.
- Current students may bring the form to the Registrar's office at Memphis Law to be faxed.
- If you plan to request your transcript in person, there is a separate form to complete in the UofMemphis Registrar's office.
- If you have already requested or are requesting more than a total of 20 transcripts, a fee of $5.00 per transcript charge will apply to quantities over 20.

Unofficial Transcripts for Current Students and Alumni

- Current students and recent alumni may view and print an unofficial transcript in Student Self Service.

- Alumni entering the Law School in Fall 1988 or later may print an unofficial transcript; see instructions on this page.
- Alumni entering the Law School prior to Fall 1988 must request an official transcript; unofficial transcripts are not available.

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ACADEMIC REGULATIONS

The Academic Regulations at Memphis Law govern the Academic Affairs of all students enrolled at the School of Law. All references to these Academic Regulations shall be deemed to include Appendix I. It is the responsibility of each student to be familiar with the terms contained herein and each student shall be deemed to be so. For the purposes of these Academic Regulations, any place where approval of the Dean is required, it shall be taken to mean the Dean or the Dean's designate such as the Associate Dean or an Assistant Dean.

ACADEMIC YEAR 2016 - 2017

The 2016 - 2017 Academic Regulations can be viewed and downloaded in full by CLICKING HERE.

ACADEMIC YEAR 2015 - 2016

The 2015 - 2016 Academic Regulations can be viewed and downloaded in full by CLICKING HERE.

A helpful "Academic Regulations FAQ" document can be found by CLICKING HERE.

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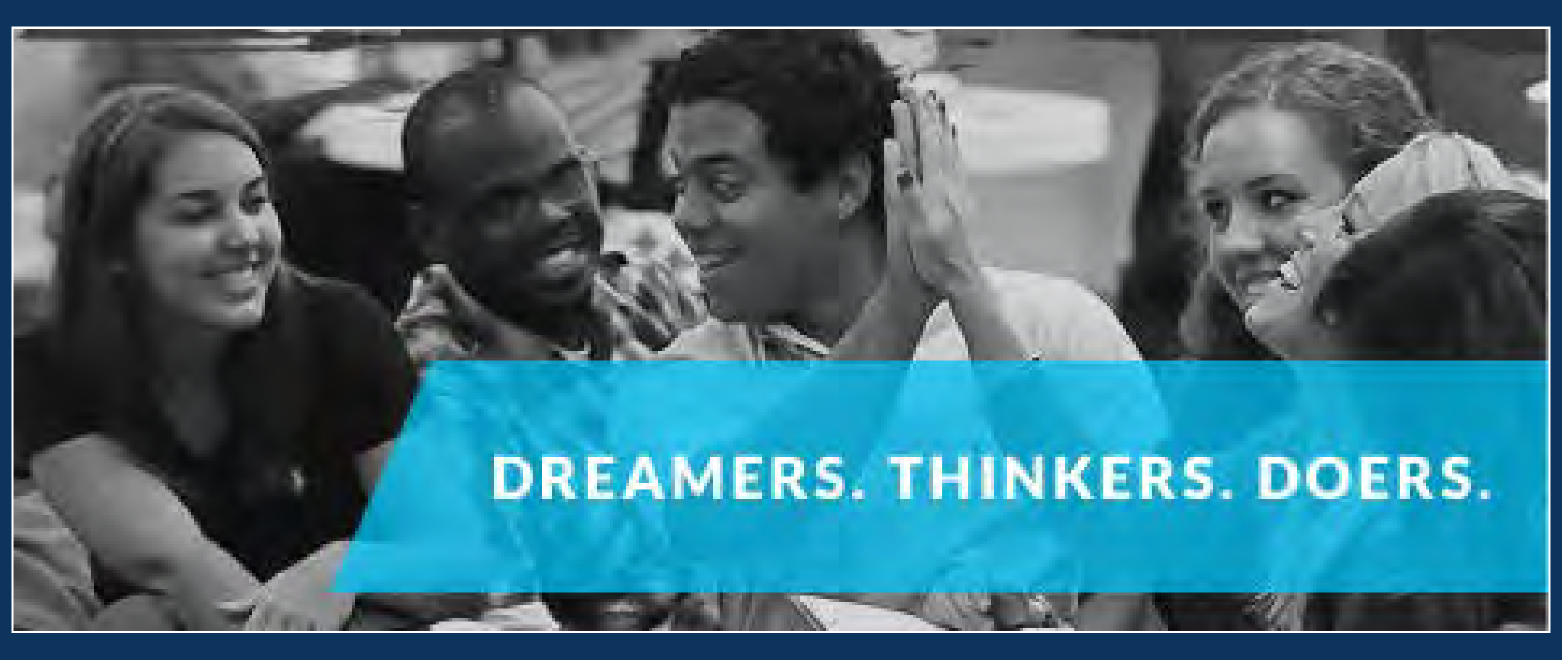

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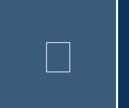 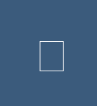 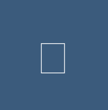

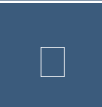 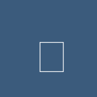 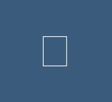

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STUDENT ADVISING

Dean Mulroy, Dean Aden, and Law School Registrar, Jamie Johnson, are available by appointment for students who need academic advising.

A summary of information students should know in selecting courses can be found here.

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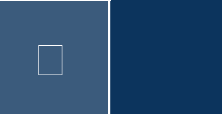
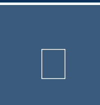
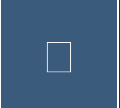
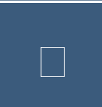
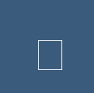
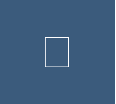

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BAR EXAM INFORMATION

On this page, you can find information for the various Bar examinations and deadlines that are applicable to your situation. Please read the information thoroughly, paying special attention to required deadlines and fee information. Various required forms are linked throughout the page for easy download.

Character & Fitness

In addition to a bar examination, there are character, fitness, and other qualifications for admission to the bar in every U.S. jurisdiction. Applicants are encouraged to determine the requirements for any jurisdiction in which they intend to seek admission by contacting the jurisdiction. Addresses for all relevant agencies are available through the National Conference of Bar Examiners.

Multistate Professional Responsibility Exam (MPRE)

Test Dates, Deadlines, and Fees:

2017 MPRE Test Dates, Registration Deadlines, and Fees

Test Date*	Regular Registration Deadline ($95)	Late Registration Deadline** ($190)
Saturday, March 18, 2017	January 26, 2017	February 2, 2017
Saturday, August 12, 2017	June 22, 2017	June 29, 2017
Saturday, November 4, 2017	September 14, 2017	September 21, 2017

* Applicants whose religious beliefs preclude them from taking the MPRE on a Saturday may apply with LSAC to take the exam on the designated alternate date, usually the following Monday. To apply, you must provide a letter to LSAC on official stationery from your cleric confirming your affiliation with a recognized religious entity that observes its Sabbath throughout the year on Saturday. Email a copy of the letter to LSAC at MPREInfo@LSAC.org. The letter must be received at LSAC by the late registration deadline or you will not be

allowed to test.

** ADA Accommodations Requests: All ADA accommodations requests must be RECEIVED by the late registration deadline; NO exceptions.

You can find additional information about the MPRE here.

Tennessee Bar Exam

Students wishing to take the Tennessee Bar Exam should consult the Board of Law Examiners of Tennessee and the National Conference of Bar Examiners for information on completing the bar application and preparing for the bar exam. This page contains some general information about the Tennessee Bar exam obtained from these sources.
Please note that the Tennessee Board of Law Examiners has a new website, http://www.tnble.org/.

TN Bar Application

Tennessee applicants must file bar applications with the Tennessee Bar. The Board of Law Examiners uses an electronic application, and application instructions are available here.

Your bar application will require a notary. Brigitte Boyd, Sandy Love and Cheryl Edwards are all notaries at the law school. They are available to notarize applications for University of Memphis law students at no cost. Please schedule an appointment to meet with a notary and make sure to bring your student ID card for identification purposes.

Make sure that you complete the Law Degree or Dean's Certification form and turn it in to Cheryl Edwards, the Administrative Assistant to the Law School Registrar in Room 262 as soon as possible.

Disclose any admonitory actions before turning in your application. If you failed to disclose an admonitory action such as an act of academic dishonesty or an arrest before law school or you were involved in an admonitory while in law school, contact Steve Mulroy, Associate Dean for Academic Affairs, as soon as possible.

Information about laptop testing versus hand-writing the bar exam is available here.

TN Bar Exam

The Tennessee Bar exam, a two-day exam, consists of

- The six-hour Multistate Bar Exam (MBE)
- Nine (9) Tennessee essay questions, and
- The Multistate Performance Test (MPE).

Copies of past Tennessee essay questions are available here.

The following subjects may be tested on the Tennessee bar exam:

- Constitutional law (United States and Tennessee);
- Criminal law (substantive and procedural);
- Contracts;
- Torts;
- Property (real and personal);
- Evidence;
- Civil procedure (United States and Tennessee);
- Business organizations (including agency, partnerships and corporations);
- Commercial transactions (Articles 1, 2, and 9 of the Uniform Commercial Code);
- Wills and estates;
- Family law (husband and wife, parent and child, marriage and divorce, etc.);
- Professional responsibility;
- Restitution and remedies; and
- Conflicts of law.

Other State Bar Exams

If you are taking the bar examination in another state, contact information for each state is available here through the National Conference of Bar Examiners. Additional information is also available in the 2016 Edition of the Comprehensive Guide to Bar Admissions Requirements, a joint publication of the National Conference of Bar Examiners and the ABA Section of Legal Education and Admissions to the Bar.

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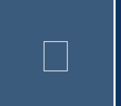
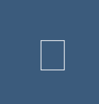
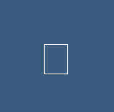
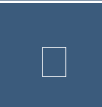
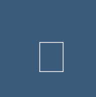
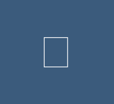

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STUDENT AFFAIRS

The Office of Student Affairs assists law students in a variety of ways:

- Overseeing the Academic Success Program.
- Hosting student activities such as 1L Orientation, Commencement and Student Organization Fairs.
- Overseeing Student Organizations and keeping an up-to-date Student Organization roster and calendar (On Legal Grounds).
- Acting as a liaison between the law school and the Office of Student Affairs on our main campus institution.
- Working with Disability Resources for Students to provide classroom accommodations for students with disabilities.
- Being available to meet one-on-one with students to discuss and assist with student needs.
- Overseeing law student logistical needs, such as locker rentals, student ID cards, parking, and counseling services.

If you have a question related to student affairs, please do not hesitate to contact the Assistant Dean of Student Affairs, Meredith Aden.

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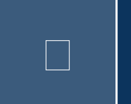
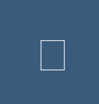
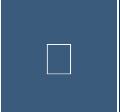
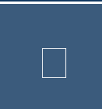
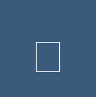
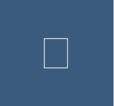

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ACADEMIC SUCCESS PROGRAM

Memphis Law offers an Academic Success Program (ASP) for first-year and upper-level students.

First Year Students

The ASP program helps first-year students get off to a strong start with a variety of resources that are essential to success in their first year of study. The program is free and is open to all first-year students.

First-year ASP consists of two components: a workshop series and individual tutorials. The "Lunch and Learn" workshop series begins early in the fall and assists students in areas such as class preparation, case briefing, study skills, and exam preparation. Lunch is provided for students while the program director presents some of the basic skills needed for success at Memphis Law.

One-on-one tutorials are offered to first-year students who have questions concerning their classes or want to improve their study skills. Tutorials are conducted in individual meetings led by highly accomplished upper-level students.

Upper-Level Students

The ASP program is also available to upper-level students. Students can meet with Dean Aden, Director of the Academic Success Program, to seek assistance. In addition, students can meet with the ASP graduate assistants for help with study skills, exam prep, outlining, etc. The program is free and is open to all upper-level students.

If you would like to make an appointment with Dean Aden, please see the instructions here on how to send a calendar invite.

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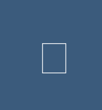
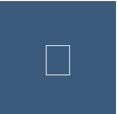
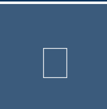
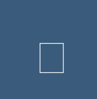
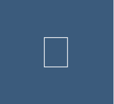

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COMMENCEMENT INFORMATION

Memphis Law celebrates all graduates with three annual commencement ceremonies, in May, August, and December. (August and December commencements are held with the University's main ceremony).

May 2017 Commencement Information

Saturday, May 13, 2017 at 5:00 p.m.
The Orpheum Theater
203 S. Main Street
Memphis, TN 38103

Graduation is expected to last until approximately 7:00 p.m.

Seating

We will have general seating at graduation with the exception of several reserved front rows. Your guests do not need to purchase or use tickets for graduation. There is no limit to the number of guests who may attend.

Photographers

There will be professional photographers taking photos at graduation. Each graduate will be photographed on stage as he or she is being hooded and during the handshake. In addition, each graduate will have the opportunity to take an additional formal graduation photo during the graduation ceremony. Information about how to purchase photographs will be available at the ceremony.

Invitations

The law school will not have an official invitation, but graduates can order invitations through the University or on their own. To order through the University, please contact Balfour at 1-800-278-7644 or visit the law school landing page on their website. Be sure to use this link to ensure you are on the law school landing page and not the main university landing page.

More information will be available closer to the date.

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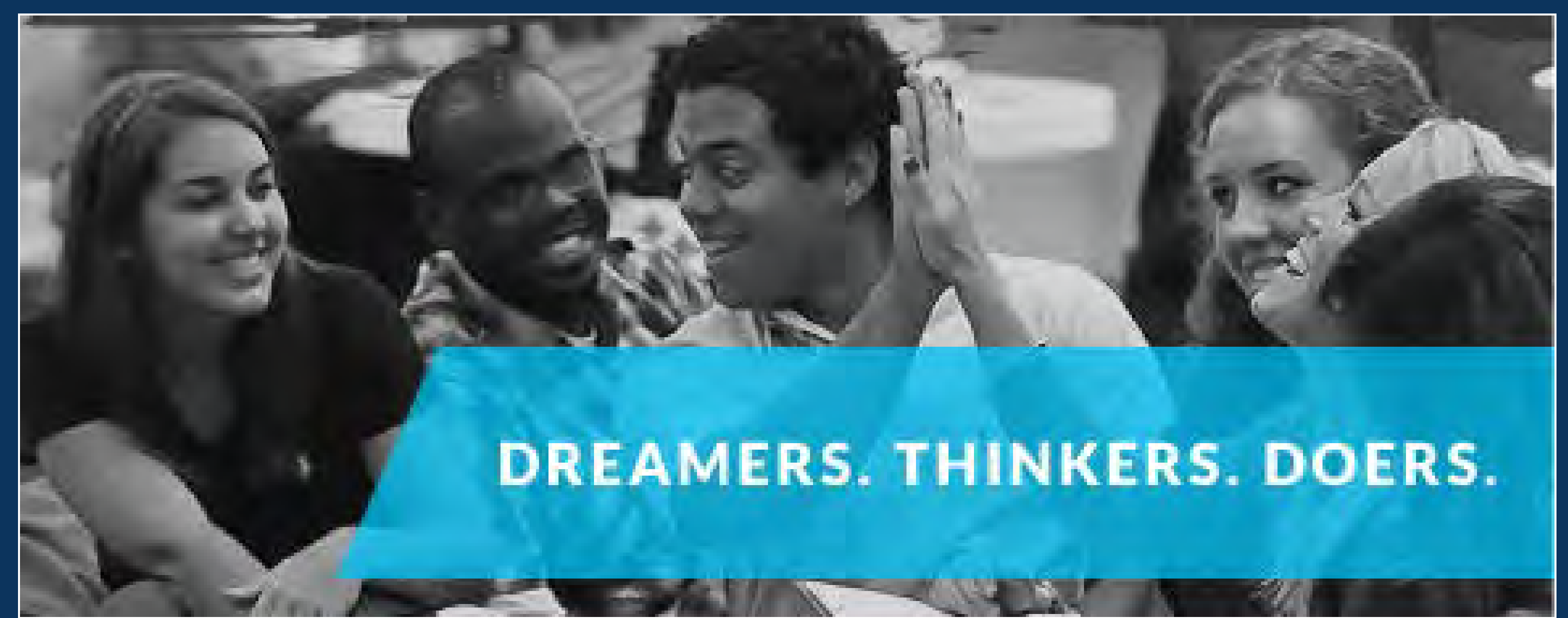

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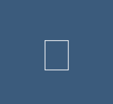
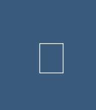
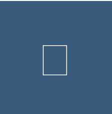
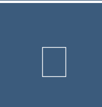
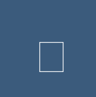
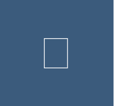

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COUNSELING SERVICES

The University of Memphis Counseling Center provides free counseling, wellness, and psychiatric services for University of Memphis students, including law students.

The Counseling Center is located on the main campus in Room 214, Wilder Tower. And, the Counseling Center now provides free parking to law students utilizing counseling services.

If you want to take advantage of the free parking for the Counseling Center, you should park in the Zach Curlin garage, attend your counseling appointment or meeting, and request a single-use parking voucher at the end of the session. Each voucher can be used one time to exit the Zach Curlin parking garage with no charge.

At this time, the single-use vouchers are only available for students using the Counseling Center.

You can learn more about the University Counseling Center and the services available to students here:

http://www.memphis.edu/cpcc/

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TECHNOLOGY

University Technology Resources are available to all UofM students, staff, and faculty. This includes law students and the law building even though we are not on the main campus. This is the ITD resources page that links to the technology that is available including identity management, e-mail, wireless, printing and all university resources. Here are a few of the highlights of what would be useful to law students:

- myMemphis portal (formerly Spectrum) brings together the university's technology resources in one place. The myMemphis Portal personalizes information it displays to each user, as well as allows the user to customize information.
- iAM identity management website allows students, staff, and faculty to manage their computer account password and display name.
- iPrint Kiosks are located throughout campus. Students, staff, and faculty can print from their laptop to any iPrint kiosk. For a list of iPrint locations, visit the Technology Resource Locator. iPrint kiosks in the law building are located on the labs in rooms 205 and 432. Instructions for installing iPrint.
- Wireless Network (Safe Connect) Access is available to connect to the University wireless for portable technology devices, including laptops. Students, staff, and faculty can register their portable technology device once and then use the university's wireless network anytime.
- Get started with Email. The University of Memphis has a "cloud based" Microsoft Live@EDU system. Email can be accessed via the web from on or off campus. Students, staff, and faculty are each given 10gb mailboxes under this system.

Help desk staff are available to answer your technology-related questions 24-hours a day, 7 days a week, excluding university holidays. Please call 901-678-8888 for assistance.

- Law students have 24/7 access to the law building. All classrooms have wireless, projectors, and screens. The law library houses 2 computer labs; rooms 205 and 432. Westlaw and Lexis printers are available for student use.

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ID CARD REPLACEMENT

University of Memphis Law School IDs are available for law students who want to replace a lost or stolen ID Card. The cost is $10, which is only payable by credit card here via an online payment system.

Once you have completed the online payment, please print a copy of your payment confirmation page and bring it to the law school business officer in Room 267 on the second floor of the Law School in the Deans' Administrative Wing.

After confirming payment, we will take your picture and send it off for your card to be made.

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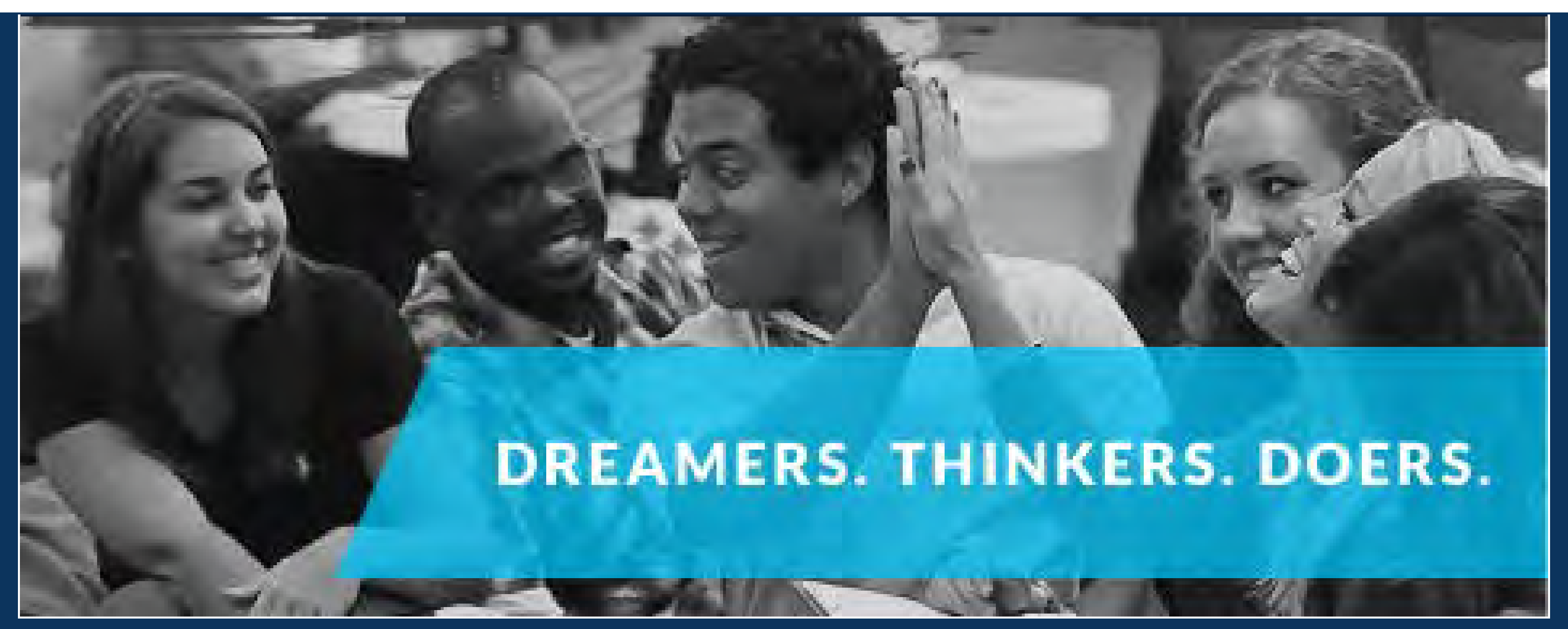

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LOCKER RENTALS

Lockers are available for law students who want to have a secure location to keep personal belongings during the school year. Lockers are optional, and the cost is $5/semester.

To rent a locker:

- Complete the online payment process and locker rental agreement here. (Note that cash and checks will no longer be accepted - all lockers must be rented using the online payment system).
- Bring a copy of your payment confirmation to Brigitte Boyd in the Student Affairs office. She will assign you a locker number and provide you with a lock (included in the rental fee).

For questions, please contact Brigitte Boyd.

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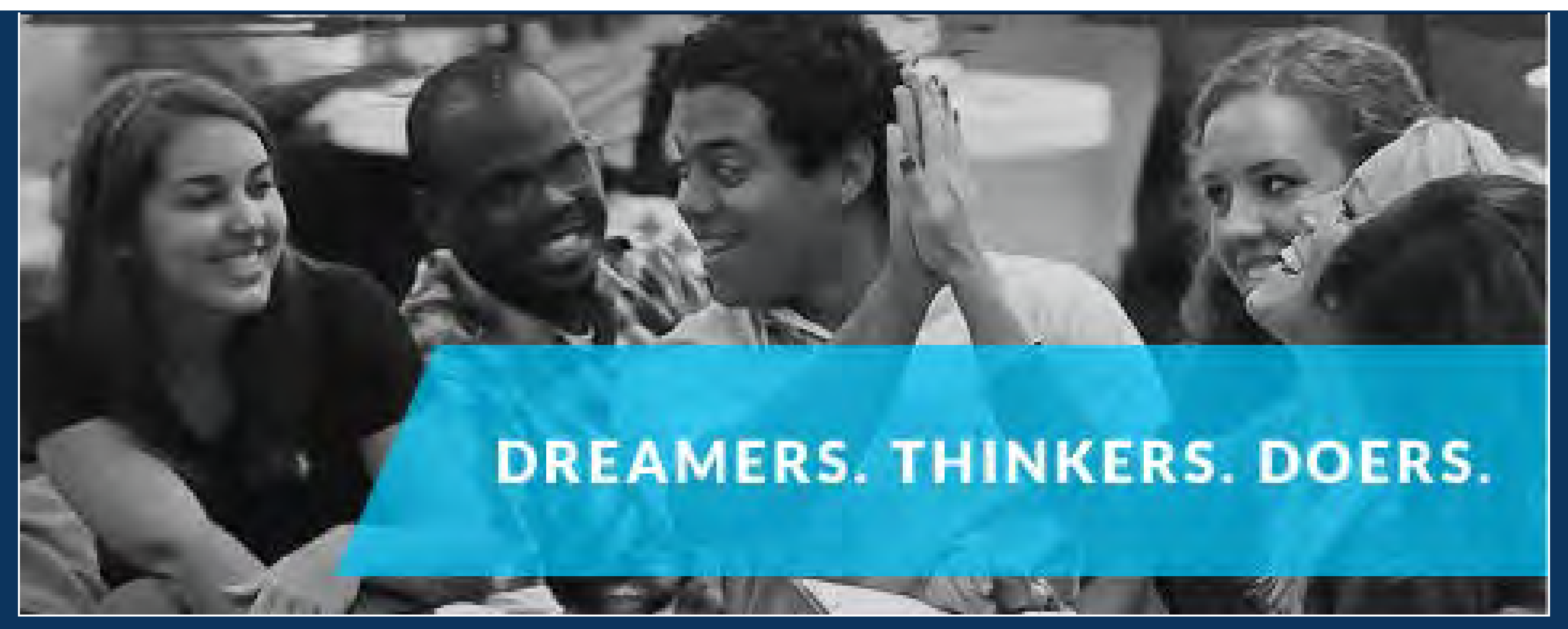

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NEW STUDENT ORIENTATION

Before classes begin, all first-year students participate in an orientation program to ease the transition into law school. This year's orientation will take place from August 8 - August 12, 2016.

There are numerous opportunities to interact with professors and fellow students. Upper level students will serve as Peer Mentors to small groups of 10-12 students. There will be opportunities to discuss essential study skills, workload, school policies, community involvement opportunities, and other topics of interest.

You will receive an orientation to our excellent facility and information about our downtown location, housing, and parking. Finally, you will attend your first Legal Methods class to begin your legal education.

The information below will remain on this page for the duration of the academic year, so that you can access it as needed during your time at Memphis Law.

2016 Orientation Details

- Orientation Schedule
- 1L Pre-Orientation Checklist
- Welcome Reception at the Belz Museum Invitation
- Social Events Invitation
- Pre-Orientation Survey
- Financial Responsibility Statement
- Post-Orientation Survey
- Lawyering Fundamentals

2016-2017 Academic Information

- 2016-2017 Academic Calendar for Law School
- Academic Regulations
- First Class Assignments
- 1L Book List
- Registration Instructions for Westlaw, TWEN and TWEN Course
- Registering for Lexis Access and Web Course on Blackboard

Student Services Information

- Bookstore Advance Payment Plan (BAPP) Information
- Career Services: Handout for New Students
- Financial Aid
- Information Technology
- Law Library
- Law School Floorplans
- Locker Rental Information
- Parking Information

- Oath of Professionalism
- Student Health Insurance
- TigerText Information
- University of Memphis Map

Video Introductions to Law School Offices

- Registrar's Office
- Career Services Office
- Law Library
- Police Services
- Office of Diversity
- Counseling Services

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- ASP Information
- ASP Schedule

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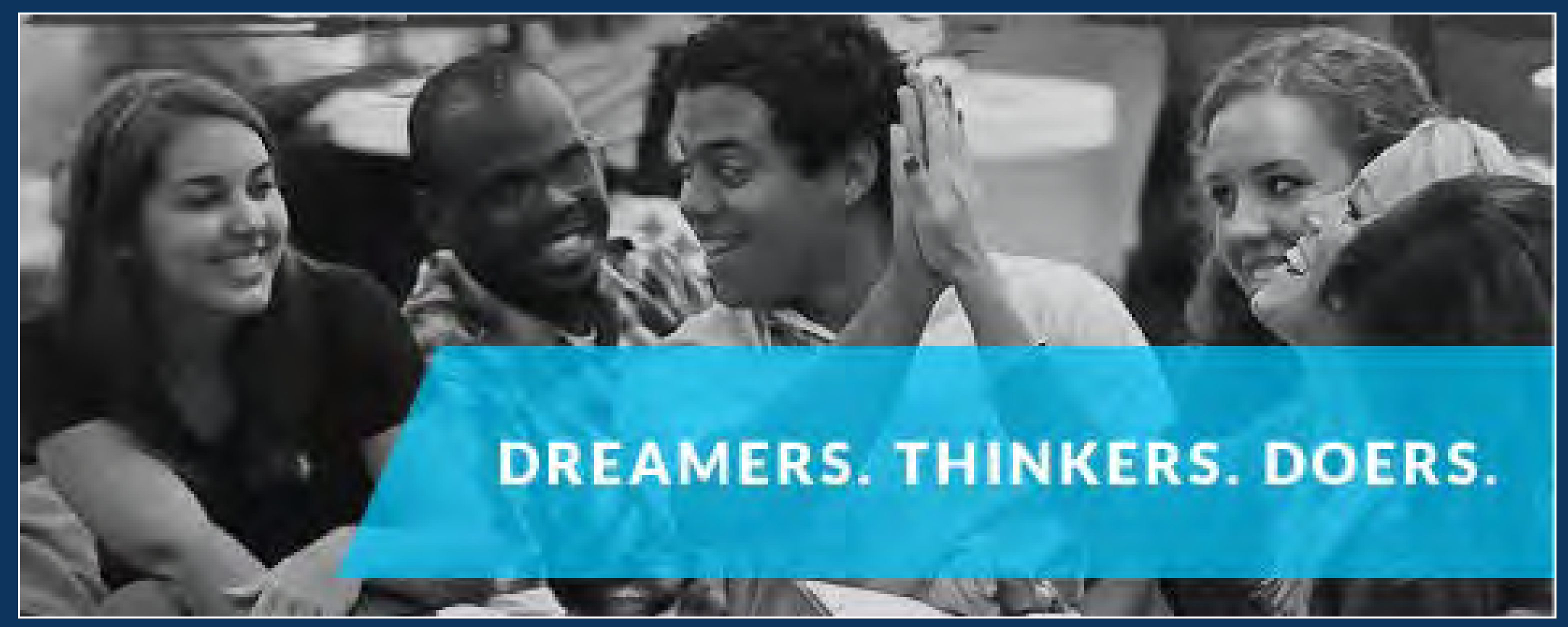

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PARKING

Student parking for the Law School is available at all downtown parking garages and public parking venues. The University has negotiated reduced parking rates for law students at nearby garages listed here. Please contact the garages directly for any parking-related questions.

The Law School does not provide any on-campus parking for law students. Students may not park in the University-designated faculty/staff parking areas on Court Avenue or next to the Law School building.

Of course, you may choose to seek other options for parking. A good place to start is www.downtownmemphis.com. Click on the parking map link.

Main Campus Parking

Parking passes are available for law students who have an occasional need for services on the main campus such as the following:

- The Counseling Center
- Disability Resources for Students
- The Student Health Center
- Tiger Copy & Graphics
- The Bookstore
- The Bursar's Office
- The Financial Aid Office
- IT
- Testing Center
- Student government meetings (for our law school representatives)
- Educational Help & Tutoring
- Libraries

These parking solutions are not available for students with other regular business on the main campus (such as students regularly visiting the rec center, playing intramural sports, or joint/dual-degree students). These students should make other parking arrangements, as Options 1 and 2 are meant for students who have only an occasional need to go to the main campus for student services.

Effective immediately, if you are utilizing the above services, you will have three options for free parking on the main campus:

1. Single-Use Passes for the Zach Curlin Garage

The law school has purchased a limited number of single-use parking passes. Students can stop by the Dean's suite and request a single-use parking pass from Brigitte Boyd. Students will be required to indicate a broad category of utilization so we will be able to track what services students are accessing with the parking passes. These passes are good for a single visit to the Zach Curlin garage.

2. University Hang Tags

The Law School has also purchased five (5) University of Memphis parking hang tags. These hang tags are meant for our students to share. They will provide access to general parking lots on the main campus. These lots are designated in yellow on this parking map. The hang tags can be checked out from Brigitte Boyd in the Dean's Suite according to the process set forth below. As with the single-use passes, students will be required to indicate a broad category of utilization so we will be able to track what services students are accessing with the parking passes.

3. Confidential Counseling Center Single-Use Passes

Students using the Counseling Center should not use Option 1 or 2 listed above but should instead use the single-use passes that are available upon request from the University Counseling Center. Students wishing to utilize these Counseling Center passes should park in Zach Curlin garage. You can request a single-use pass at the end of your counseling appointment. The single-use pass will enable you to exit the Curlin garage without charge. Students can request as many single-use passes as needed for counseling services.

Hang tags check-out procedure:

1. Location of Passes

Passes can be checked out during law school business hours (8:00 a.m. to 4:30 p.m.) from Brigitte Boyd in the Dean's Suite. Students will be required to indicate a broad category of utilization so we will be able to track what services students are accessing with the parking passes.

2. Time of Check-Out

Each pass is available to be checked out for two business days. Passes must be checked in and re-checked out after two business days. Students checking out a parking pass on Thursday have until Monday to return the parking pass.

3. Late & Lost Pass Fees

The University will not replace any hang tags that are lost or missing. Therefore, any tags that are lost or not returned will be unavailable for any students to use for the remainder of the semester. As a result, students who lose a parking pass or who are late returning a parking pass will lose parking privileges and will not be allowed to check out another hang tag or to receive another single-use pass from the Dean's suite unless they first reimburse the law school for the cost of the lost pass.

By checking out a parking pass or requesting a single-use pass, you are certifying that you are only using the

parking pass for the accepted uses set forth in this announcement. Students who abuse the parking pass usage policy may have their parking pass check-out privileges revoked.

Please contact Assistant Dean Meredith Aden if you have any questions about the parking passes.

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Cecil C. Humphreys School of Law

STUDY ABROAD

While Memphis Law does not currently host any study abroad programs, we encourage students to explore programs at other law schools. Study abroad is a great way to gain unique educational experiences and meet students from all over the world.

How to Apply for Study Abroad

Please review Academic Regulations 16.5 and learn about transfer credit for law school work completed at another law school. Credit will only transfer from an ABA-accredited law school. You first must request the permission of Steven J. Mulroy, Associate Dean for Academic Affairs, to enroll in the program. You must make a "C" or better in each course for the credit to transfer. The credit hours transfer, but the actual grade does not.

To receive permission from Dean Mulroy, you must submit a written memo requesting approval for transfer credit. The memo must provide sufficient information for Dean Mulroy to evaluate the transfer credit. The memo must be in hard copy (no emails) and must include the following information:

1. The name of the law school hosting the study abroad program. (Please note that the law school must be accredited by the ABA).

2. An official course description including the number of credit hours to be awarded. (Please note that links to a program are not sufficient - you must copy and paste the relevant information into your memo).

3. A description of how the the course(s) is examined (paper, final examination, etc.).

4. Information on how the course is graded (pass/fail, letter grades, etc.). Please note that pass/fail credits will not be accepted. If a course is pass/fail, you must contact the host school to make alternative grading arrangements and provide that documentation to Dean Mulroy.

5. Your signature.

Law schools from all over the country send Memphis Law information about upcoming study abroad opportunities, and we post this information on a bulletin board in the basement near the student mailboxes for you to view. In addition, this list is not exhaustive but contains additional information about international programs.

For example, Mississippi College School of Law is hosting programs in Mexico, Cuba, China, Germany, South Korea, and France this year. You can find more information about these programs here.

In addition, the ABA maintains as list of ABA-approved study abroad programs for law students. You can access that list here.

Also, students can apply for University scholarship funding for study abroad programs here. You can also use financial aid to pay for study abroad programs. Third party organizations, such as Go Overseas, also have

scholarships and funding available. I recommend searching for other study abroad scholarship opportunities.

If you have any questions about study abroad programs, please contact Assistant Dean for Law Student Affairs, Meredith Aden. She can be reached at maden@memphis.edu or by calling (901) 678-2528.

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STUDENT ORGANIZATIONS

Memphis Law has a number of active student organizations. Each organization is listed below with contact information. Throughout a student's law school career many find it extremely beneficial to be a part of one or a few student organizations.

Association for Women Attorneys

President: Ashley Finch

The Association for Women Attorneys student chapter is an organization dedicated to promoting the interests, education, and advancements of women attorneys. Along with the AWA professional chapter, the AWA student chapter regularly coordinates scholarship opportunities, speaking engagements, and meetings for members. Please contact the Memphis Chapter of the AWA or memphisawa@yahoo.com for further information.

Black Law Students Association
President: Dawn Campbell

Founded in 1966, the Black Law Students Association seeks to promote the professional needs of African-American law students through promoting professional competence and increasing awareness of the needs of the African American community. For further information, please contact The National BLSA.

Christian Legal Society
President: Dominique Winfrey

The Christian Legal Society is a non-denominational national organization dedicated to serving Jesus Christ and committed to offering law from a balanced, Christian perspective. Society activities include monthly meetings, guest speakers, and annual barbeques that provide further opportunities for Christian fellowship. For further information, please contact The Christian Legal Society.

Federal Bar Association
President: Jacob Brown

The Federal Bar Association is a national organization consisting of more than 16,000 attorneys and 1,200 federal judges. The student organization works closely with the Memphis Mid-South Chapter to foster a strong relationship between student members and local federal judges and attorneys. We host several speakers on campus and provide a number of networking opportunities with attorneys who practice in the federal system.

Federalist Society for Law and Public Policy Studies
President: Hunter Yoches

The Federalist Society is a group composed of conservatives and libertarians interested in promoting awareness of Federalist principles, including: that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. Please see The Federalist Society for further information.

Health Law Society
President: Kelsey Walton

The Health Law Society ("HLS") is dedicated to exploring the intersection between medical health care and the judicial system. The HLS examines not only the traditional areas of health law, but also delves deeper into local and national health policy concerns. The HLS strives to enhance the experience and knowledge of its members and the entire Memphis law community.

Hispanic Law Student Association
President: Esperanza King

HLSA membership is not limited by race or ethnicity. We are an organization geared towards helping students of all races and ethnicities excel throughout law school. Our goal as an organization is to make sure that you succeed in law school academically, culturally and socially. To accomplish this goal, we continually implement programming that addresses the needs of our diverse student body. Whether it is providing mentoring opportunities with the local minority bar association, various social outings, or hosting community service projects, we always have something planned to enrich your experience at the University of Memphis.

Honor Council

Chief Justice: Gale Robinson

The legal profession is a self-regulated profession; meaning judges and lawyers determine their own professional standards and enforce them. That tradition of self-regulation starts in the law school with the Honor Code and Honor Council. The Honor Code is a code of professional and academic standards. The Honor Council enforces the Honor Code. The Honor Council is composed of eleven law students elected by the student body. The Honor Council investigates and prosecutes alleged violations of the Honor Code. All first-year law students will take an oath at law school orientation to honor the values reflected in the Code.

More detailed information about the Honor Code can be found in the Academic Regulations and on the Honor Council homepage here.

International Law Students Association
President: Alessandra Davey

The International Law Students Association is committed to educating students and lawyers, from all over, in the principles and purposes of international law, international organizations and institutions, and comparative legal systems. We hope to achieve this by encouraging communication among students and lawyers from different parts of the world, promoting international understanding and cooperation, and by advancing the legal education of members in general. We also strive to provide opportunities for law students and lawyers to learn about other cultures and legal systems in a system of critical dialogue and international cooperation.

The University of Memphis Law Review
Editor-in-Chief: Lyle Gruby

The Law Review is a student publication committed to producing a scholarly, legal journal. All of the articles published in the journal are selected by students and edited by students. The notes and comments selected for publication are also written and edited by students. The goal is to provide a publication that will benefit practitioners, judges, professors, students, and others that use this journal in their practice, on the bench, in the classroom, or in their legal research.

Memphis Law+

President: Vanessa Murtaugh

Moot Court Board

Chief Justice: Kendra Lyons

The Moot Court Board is dedicated to recognizing, coordinating and fostering excellence in both the appellate and trial advocacy. Duties of the Board include advertising, organizing, and coordinating all intraschool competitions.

National Lawyer's Guild
President: Nathaniel Bishop

The National Lawyers Guild Student Chapter at Memphis Law aspires to facilitate the discussion of many current issues while ensuring that multiple perspectives of a given issue are heard. The NLG is dedicated to the need for basic change in the structure of our political and economic system. We seek to unite the lawyers, law students, legal workers and jailhouse lawyers to function as an effective force in the service of the people, to the end that human rights shall be regarded as more sacred than property interests. Our aim is to bring together all those who recognize the importance of safeguarding and extending the rights of workers, women, LGBTQ people, farmers, people with disabilities and people of color, upon whom the welfare of the entire nation depends; who seek actively to eliminate racism; who work to maintain and protect our civil rights and liberties in the face of persistent attacks upon them; and who look upon the law as an instrument for the protection of the people, rather than for their repression.

Outlaw
President: Mel Borelli

OUTLAW is a law student organization geared specifically towards gay, bisexual, lesbian, and trans-gendered legal issues. The Gay-Straight Alliance promotes equality and civil rights while maintaining visibility in the Memphis legal community as a resource for the gay population. For more information, please contact the Human Rights Campaign website or the Memphis Gay and Lesbian Community Center.

Phi Alpha Delta Law Fraternity
Chapter Justice: Chris Miller

With over 300,000 members, Phi Alpha Delta is the nation's largest co-ed professional law fraternity. It exists to promote the welfare of each member as well as the community by fostering lasting relationships between teachers and students of law, promoting the ideals of liberty and equal justice under the law, stimulating excellence in scholarship, inspiring virtues of compassion and courage, and fostering integrity and professional competence. For further information, please visit Phi Alpha Delta Law Fraternity's national website.

Public Action Law Society
President: Danielle Salton

The Public Action Law Society (PALS) at the University of Memphis is a student-led organization that seeks to promote volunteerism, community service, and a pattern of activities that will instill in participants a desire to continue in pro bono work after becoming attorneys. PALS coordinates volunteers for a number of different organizations. Volunteers are connected to community service organizations that match the students' interests and abilities.

Sports & Entertainment Law Society (SELS)

President: Tanner Ball

SELS is a student-run organization dedicated to providing information, career support, and social activity for law students interested in careers within the sports and entertainment industry. We are committed to increasing student exposure to the industry. We plan to arrange guest speakers to provide industry insight and examine topical issue in sports and entertainment law. Through these events, our organization aims to provide a realistic introduction to the entry level sports and entertainment law market for today's law student. For more information, follow @MemphisLaw_SELS on Twitter.

Street Law

President: Shrushti Kothari

Student Bar Association
President: Sydney Van Winkle-Trujilo

The Student Bar Association (SBA) is dedicated to connecting all University of Memphis School of Law students into one body to foster fellowship and cooperation as well as advance the aims and purposes of the School of Law. Duties of the association include creating forums to resolve student issues, plan students activities, and partner with other university departments for the advancement of common interests. All students enrolled in the School of Law are automatically members of the SBA.

Tennessee Association of Criminal Defense Lawyers (Student Chapter)

President: Nicole Franco

The Tennessee Association of Criminal Defense Lawyers (TACDL) at the University of Memphis is the student chapter that focuses on education and support to lawyers representing citizens accused of crime. TACDL members also acts as advocates for a fair and effective criminal justice in the courts, the legislature, and wherever justice demands. TACDL will hold events particularly pertaining to criminal defense, private practice, and indigent clients. TACDL strives to enhance the experience and knowledge of its members and the entire Memphis law community.

Additional Information:

- In addition to law school student organizations, law students are welcome to be a part of the University of Memphis Graduate Student Organization.
- All law school student organizations must register through Student Leadership and Involvement to become a Registered Student Organization.

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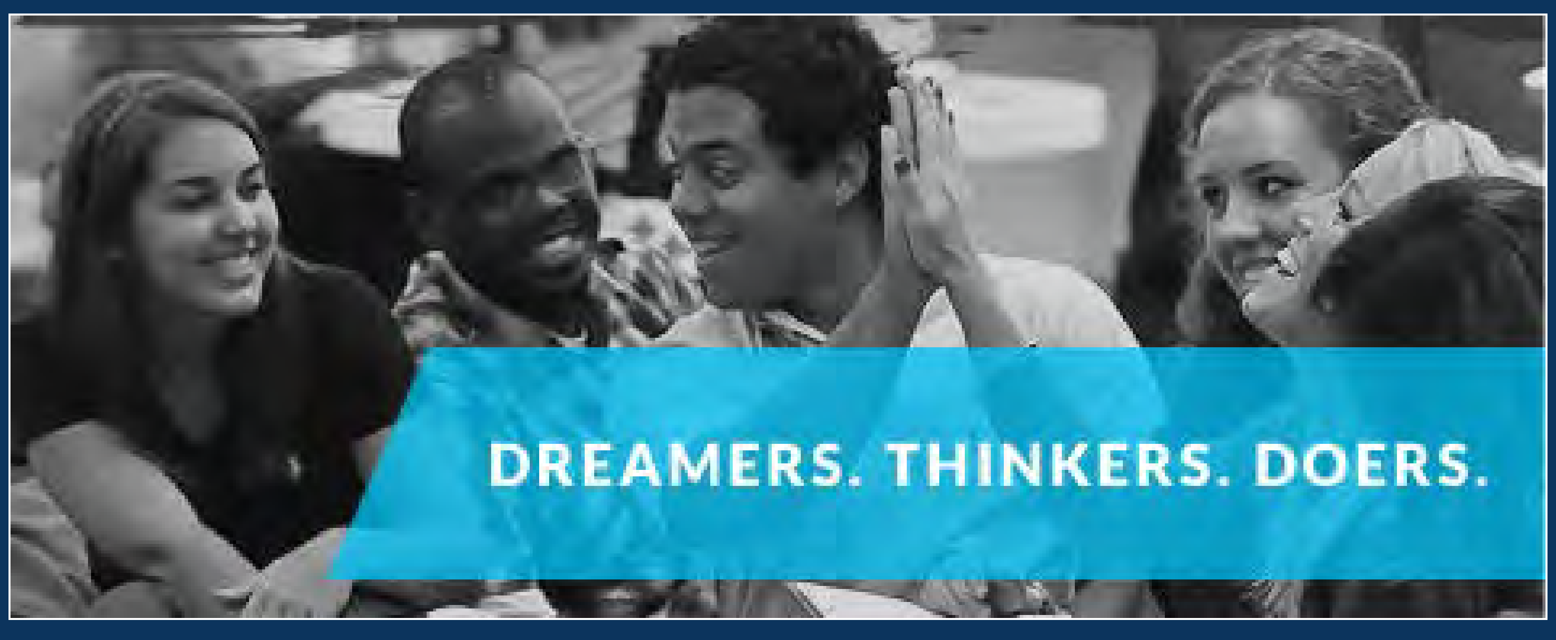

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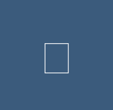
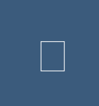
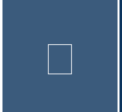
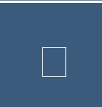
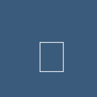
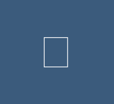

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TUITION, FINANCIAL AID & SCHOLARSHIPS

Tuition

The estimated costs for the 2016-2017 academic year (Fall & Spring Semesters) are as follows:

	In-State	Out-of-State
Tuition & Fees	$18,763*	$25,968*
Room & Board	$9,863	$9,863
Books/Supplies	$1,969	$1,969
Transportation	$2,509	$2,509
Misc./Personal	$3,235	$3,235
Loan Fees	$604	$604
Total	$36,943	$44,148

*Based on full-time enrollment for the academic year. Part-time tuition & fees are billed by the credit hour. Tuition and fees above includes a $20 per credit hour law library fee with no maximum (30 hours for entering students in the 2016-2017 academic year).

For more detailed information regarding Tuition and Fees, please visit the main Tuition Information Page.

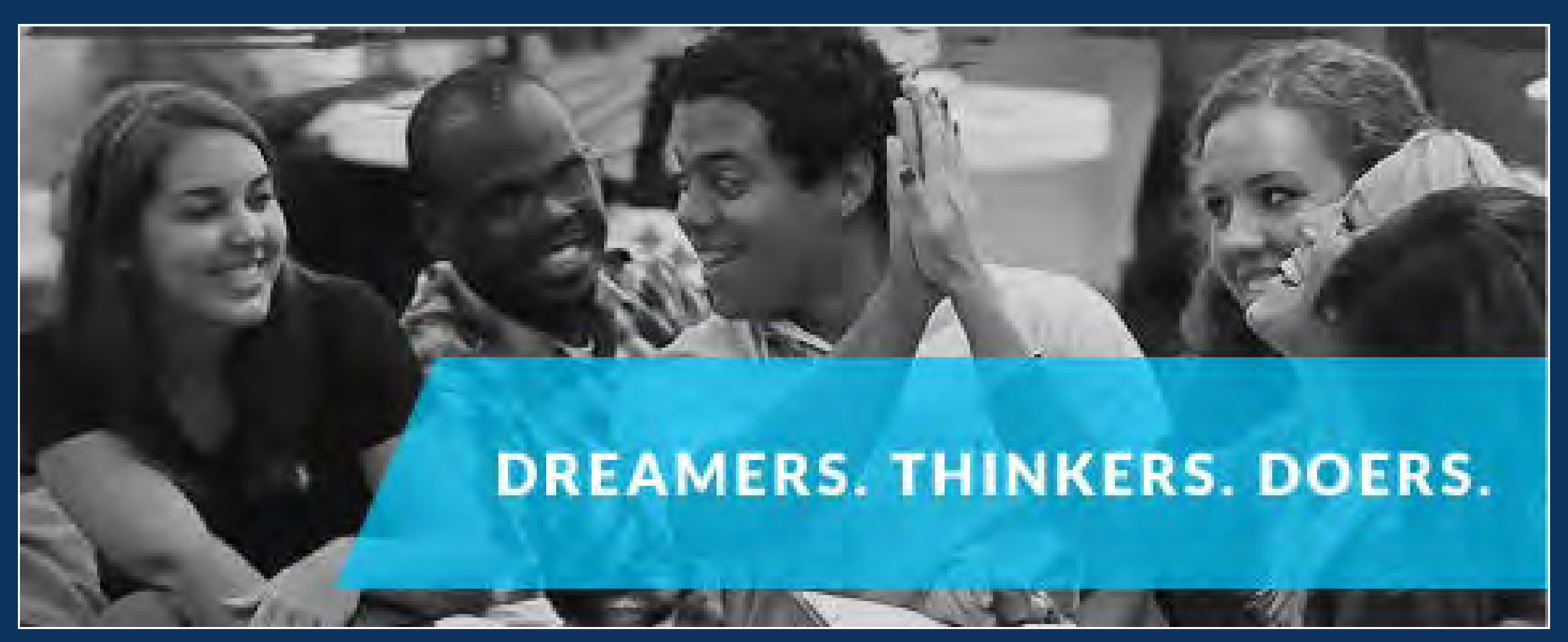
Financial Aid

Most of our students receive some sort of financial aid. Applicants should refer to our Financial Aid Guide or visit the University of Memphis Office of Financial Aid.

Scholarships

A number of scholarships are available to entering students, including academic merit awards, diversity awards, and awards for students with demonstrated financial need. Some scholarship awards are based on the information in the application, while others require additional information. If you are interested in being considered for first-year scholarships, you are encouraged to complete the optional application questions and submit any necessary information. Scholarship award letters are usually sent by April 1.

For more information about additional scholarships and specifics about the application process, please visit our Main Scholarship Page.



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HONOR COUNCIL

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More detailed information about the Honor Code can be found in the Academic Regulations.

PLEASE CLICK HERE TO VIEW THE 2012-2013 HONOR COUNCIL REPORT

PLEASE CLICK HERE TO VIEW THE 2013-2014 HONOR COUNCIL REPORT

PLEASE CLICK HERE TO VIEW THE 2014-2015 HONOR COUNCIL REPORT

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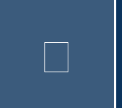
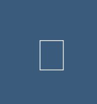
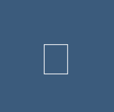
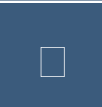
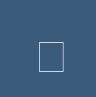
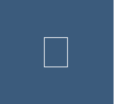

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Career Services

PRO BONO

Memphis Law is committed to instill within its students the very heart of the legal profession — providing equal justice under the law. Because equal justice comes at a cost, lawyers have a unique and rewarding obligation to provide pro bono services to those unable to pay. Memphis Law's Pro Bono Program is designed to nurture this ethical obligation and provide students with the opportunity to gain a practical, hands-on experience while helping improve the lives of the under-represented.

PRO BONO PROGRAM

Memphis Law is one of a select group of law schools in the country that requires students to engage in pro bono work during law school. Students entering in the fall of 2012 and thereafter are required to complete 40 hours of supervised pro bono work in order to graduate. For more information on the program and to see a list of pre-approved placements, please click the links below.

- Pro Bono Program Handbook
- Pre-approved Pro Bono Placements
- Steps To Receive Pro Bono Credit

Pro Bono Forms

- Supervisor Certification Form: students or supervisors must submit this form in order for students to

receive pro bono credit.

- Student-Initiated Project Form: this form is required for students who wish to perform work at a placement that is not on the Pre-approved Pro Bono Placements list located above.
- Placement Inquiry Form: organizations or individual attorneys may submit this form if they wish to host law student volunteers.

New York's 50 Hour Pro Bono Requirement

Students interested in sitting for the New York state bar must perform 50 hours of pro bono services. For more information on this requirement, please visit the New York Court's website.

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Faculty & Staff

Alena Allen

ASSOCIATE PROFESSOR OF LAW

PHONE (901) 678-3227
EMAIL amallen5@memphis.edu
FAX

OFFICE Office 368
OFFICE HOURS

CV

About Professor Allen

Professor Allen joined the Memphis law faculty in 2010. She teaches Torts I, Torts II, Health Law Organization and Finance, Health Law Survey, and a Health Law Seminar. Professor Allen was voted Professor of the Year in 2013. Her research interests includes health policy, pharmaceutical regulation, and medical malpractice. Professor Allen's work was one of only four articles chosen for presentation at the American Society of Health Medicine and Ethics/ SLU Law Health Scholars workshop in 2012.

Education

J.D., Yale Law School, 2003; B.A., magna cum laude with honors in Psychology, Loyola University, 1999.

Admitted

State Bar of Texas, DC Bar.

Experience

Assistant Professor of Law, 2010-Present; Healthcare/FDA Associate, Arnold & Porter LLP, 2007-2009; Law Clerk, The Honorable Paulette Delk, Federal Bankruptcy Judge, Memphis, TN, 2006-2007; Law Clerk, The Honorable Samuel H. Mays, Jr., Federal District Court Judge, Memphis, TN, 2005-2006; Employee Benefits Associate, Baker Botts LLP, Houston, TX, 2003-2005; Summer Associate, Allen & Overy, London, England, Summer 2002; Summer Associate, Vinson & Elkins LLP, Houston, TX, Summer 2002; Summer Associate, Mayer, Brown, Rowe & Maw, Houston, TX, Summer 2001; Student Clerk, Dept. of Justice, Executive Office for Immigration Review, New Orleans, LA, 1997-2000; Research Assistant, Department of Psychology, Dr. Kim Ernst, Loyola University, New Orleans, LA, 1999.

Honors and Awards

Professor Alena Allen has been selected to participate in the 2015 Maxine Smith Fellows Program of the Tennessee Board of Regents (TBR). Click here to read more about this impressive accomplishment.

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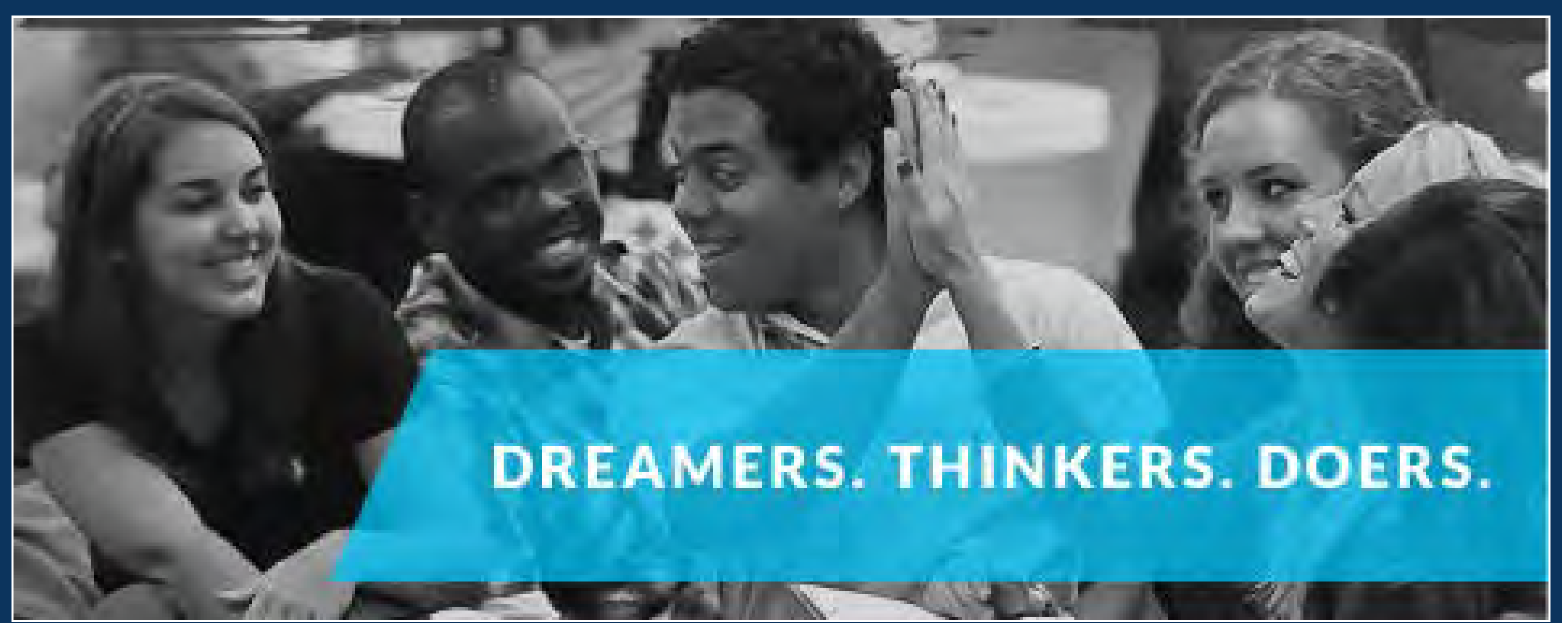

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Cecil C. Humphreys School of Law

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Lynda Black

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About Professor Black

Lynda Wray Black has practiced law in New York City and Memphis, primarily focused in the areas of estate planning, probate and trusts. Her practice also has encompassed representation of not-for-profit organizations, contracts, sureties law and domestic relations.

Education

J. D., Yale Law School, 1989; B.A., (summa cum laude with honors in Philosophy), University of Memphis, 1986.

Admitted

New York, Tennessee.

Experience

Assistant Professor of Law, 2010-Present; Visiting Assistant Professor of Law, Cecil C. Humphreys School of Law, 2000-2001 and 2008–2010; Adjunct Professor of Law, Cecil C. Humphreys School of Law, 1999-2008; Associate, Black, McLaren, Jones, Ryland & Griffee,1997-2008; Associate, Cravath, Swaine & Moore,1989-1994.

Teaching Interests

Estate Planning, Decedents' Estates, Business Organizations, Family Law, Secured Transactions and Trust Law.

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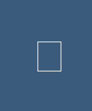
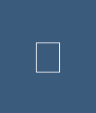
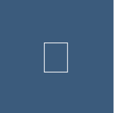
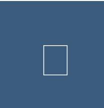
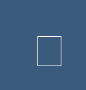
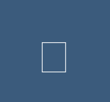

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About Professor Bock

Using empirical techniques and theoretical models, Prof. Bock studies the legal, organizational, and behavioral considerations that underlie the various dysfunctional, inefficient, or otherwise socially-undesirable aspects of

patent litigation. His research often takes an interdisciplinary approach, drawing on lessons from behavioral economics, cognitive psychology, and management science.

Education

J.D., Univ. of California, Berkeley, School of Law; S.B., M.Eng., Massachusetts Institute of Technology (Electrical Engineering & Computer Science)

Admitted

2000, U.S. Patent & Trademark Office (Reg. No. 45,482)
2004, California
2006, District of Columbia

Experience

Prior to joining the faculty, Prof. Bock was a Research Fellow and Senior Visiting Scholar at the Berkeley Center for Law & Technology at the Univ. of California, Berkeley, School of Law. He has also worked in-house at a multinational semiconductor company, litigated patent cases in various federal district courts and before the U.S. International Trade Commission, and clerked for Judge Alan D. Lourie at the U.S. Court of Appeals for the Federal Circuit.

Teaching Interests

Patent Law, Civil Procedure.

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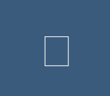
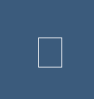
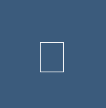
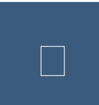
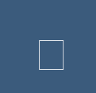
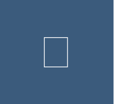

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About Professor Brashier

Ralph Brashier is a Professor of Law and holds a Cecil C. Humphreys Chair at the University of Memphis School of Law, where he teaches Decedents' Estates, Elder Law, and Property. A native of Mississippi, he received his bachelor's degree from Florida State University, his master's degree from the Eastman School of Music, his J.D. from Ole Miss (where he was Editor-in-Chief of the Missisisppi Law Journal), and his LL.M. from Yale. Before joining the faculty at Memphis, he practiced in New York City with Cadwalader, Wickersham & Taft. He is the author of numerous articles and two books on decedents' estates and elder law. His elder law book is on the required or recommended reading list or serves as the course book for classes in elder law at several schools. At the University of Memphis, he has received the University of Memphis Distinguished Teaching Award, the Alumni Excellence in Teaching Award, and the Farris Bobango Faculty Scholarship Award. On eight occasions, the members of the law school graduating class have named him Law School Professor of the Year.

Education

B.M., 1979, summa cum laude, Florida State University; M.A., 1982, Eastman School of Music; J.D., 1986, magna cum laude, University of Mississippi; LL.M., 1990, Yale University.

Admitted

Mississippi, New York.

Experience

Cadwalader, Wickersham & Taft, New York City, 1986-89; joined the University of Memphis School of Law faculty in 1990.

Teaching Interests

Property, Decedents' Estates, and Elder Law.

Publications

Author of articles on decedents' estates or elder law in various law journals including Boston University Law Review, Case Western Reserve Law Review, Louisiana Law Review, South Carolina Law Review, Southern Methodist Law Review, Temple Law Review, and Utah Law Review; member, Tennessee Uniform Probate Code Commission (1995-1997); former contributing editor to bi-monthly column, "Keeping Current," in Probate & Property (ABA).

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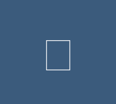
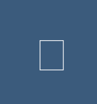
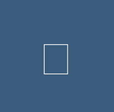
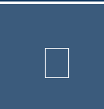
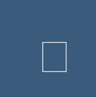
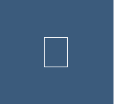

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Amy Campbell

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About Professor Campbell

Professor Campbell is an Associate Professor of Law at the University of Memphis Cecil C. Humphreys School of

Law, and serves as the director of the Institute for Health Law & Policy at the University of Memphis. She also serves as Adjunct Faculty in the Center for Bioethics and Clinical Leadership of the Union Graduate College-Mount Sinai School of Medicine Bioethics Program.

Education

MBE, University of Pennsylvania, 2003. J.D., Yale Law School, 1997; B.A., summa cum laude History/Peace Studies, University of Notre Dame, 1993.

Admitted

New York State Bar (active). State of Pennsylvania Bar (inactive status).

Experience

Associate Professor of Bioethics and Humanities (primary), SUNY Upstate Medical University 2013; Associate Professor, Department of Psychiatry (secondary), SUNY Upstate Medical University, 2013; Assistant Professor of Bioethics (Adjunct (Associate) Faculty), The Center for Bioethics and Clinical Leadership, Union Graduate College-Mount Sinai School of Medicine Bioethics Program, Schenectady, NY, 2009-2013; Assistant Professor of Law, Syracuse University College of Law, 2009-2013; Assistant Professor of Bioethics and Humanities, SUNY Upstate Medical University, 2008-2013; Assistant Professor, Department of Psychiatry, SUNY Upstate Medical University, 2011-2013; Adjunct Senior Instructor, Division of Medical Humanities, University of Rochester School of Medicine & Dentistry, 2003-2009; Assistant Provost, Office for Human Subject Protection, University of Rochester, 2005-2006; Senior Instructor, Department of Psychiatry, University of Rochester School of Medicine & Dentistry, 2002-2005.

Teaching Interests

Health Law, Bioethics

Publications

Teaching Law in Medical Schools: First, Reflect. Journal of Law, Medicine & Ethics. 2012 (Summer); 40(2): 301-310.; The Context for Government Regulation of Obesity Around the Globe: Implications for Global Policy Action. World Medical & Health Policy. 2012; 4(2): Article 4.; Using Therapeutic Jurisprudence to Frame the Role of Emotion in Health Policymaking. Phoenix Law Review 2012; 5(4): 676-704. (Inaugural issue on Comprehensive Law and Therapeutic Jurisprudence; with peer review); Bioethics in the Public Square: Reflections on the How. Journal of Medical Ethics. 2012; 38:439-441.

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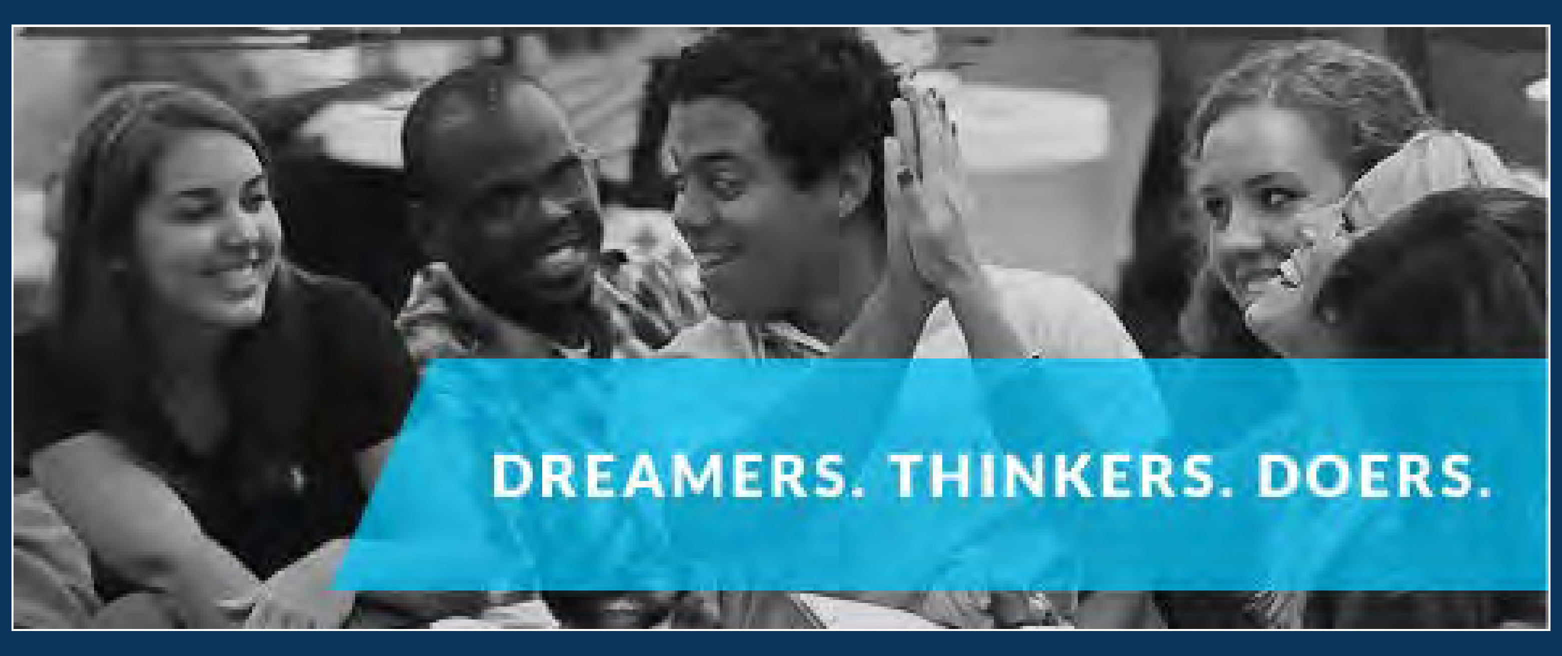

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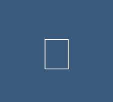
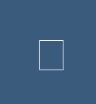
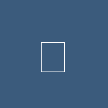
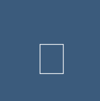
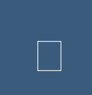
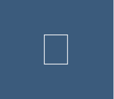

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About Professor Frank

Demetria D. Frank joined the Memphis Law faculty in 2013. She currently teaches courses in Evidence, Federal Courts, Trial Practice and Pretrial Litigation. Prior to joining Memphis Law, Professor Frank was a member of the University of Wyoming College of Law faculty where she also taught courses in Torts and Appellate Advocacy. Professor Frank also teaches Torts in the Tennessee Institutive for Pre-Law Students, a program devoted to increasing the diversity of Memphis Law's student body through performance based admission. Professor Frank also serves as advisor to the Ben F. Jones Chapter of the Black Law Students' Association and has been a mock trial team coach for several of its members.

Professor Frank's scholarship and speaking interests are in the areas of civil and criminal courtroom evidence, systemic discrimination and federal court litigation practice. Her most recent publication, The Proof is in the Prejudice: Implicit Racial Bias, Uncharged Act Evidence & the Colorblind Courtroom, was published in the Harvard Journal on Racial & Ethnic Justice and addresses the role of implicit bias in admitting uncharged act evidence against racially diverse criminal defendants. Professor Frank has presented on a number of issues related to race in courtroom, systemic disparity, implicit bias and mass incarceration.

Prior to law teaching, Professor Frank attended the University Of Texas School Of Law receiving her J.D., in 2005. Following law school, she was a toxic tort attorney where she represented injured plaintiffs in products liability lawsuits. Professor Frank has also served as a Community Prosecutor in the Dallas City Attorney's Office and as an Associate Judge for the City of Dallas and the City of Houston.

Education

The University of Texas School of Law, 2005; University of Houston (cum laude).

Admitted

State Bar of Texas

Experience

University of Wyoming College of Law, Assistant Professor of Law (2011-2013), Brent Coon & Associates, PC, Litigation Manager (2009-2011); The City of Dallas, Associate Municipal Court Judge, Assistant City Attorney (2007-2009); Waters & Kraus, LLP, Associate (2005-2007)

Teaching Interests

Evidence, Federal Courts, Pretrial Litigation, Torts and Trial Practice

Publications

The Medical Device Federal Preemption Trilogy: Salvaging Due Process for Injured Patients. 35 S. Ill.U. L.J. 453 (2011).

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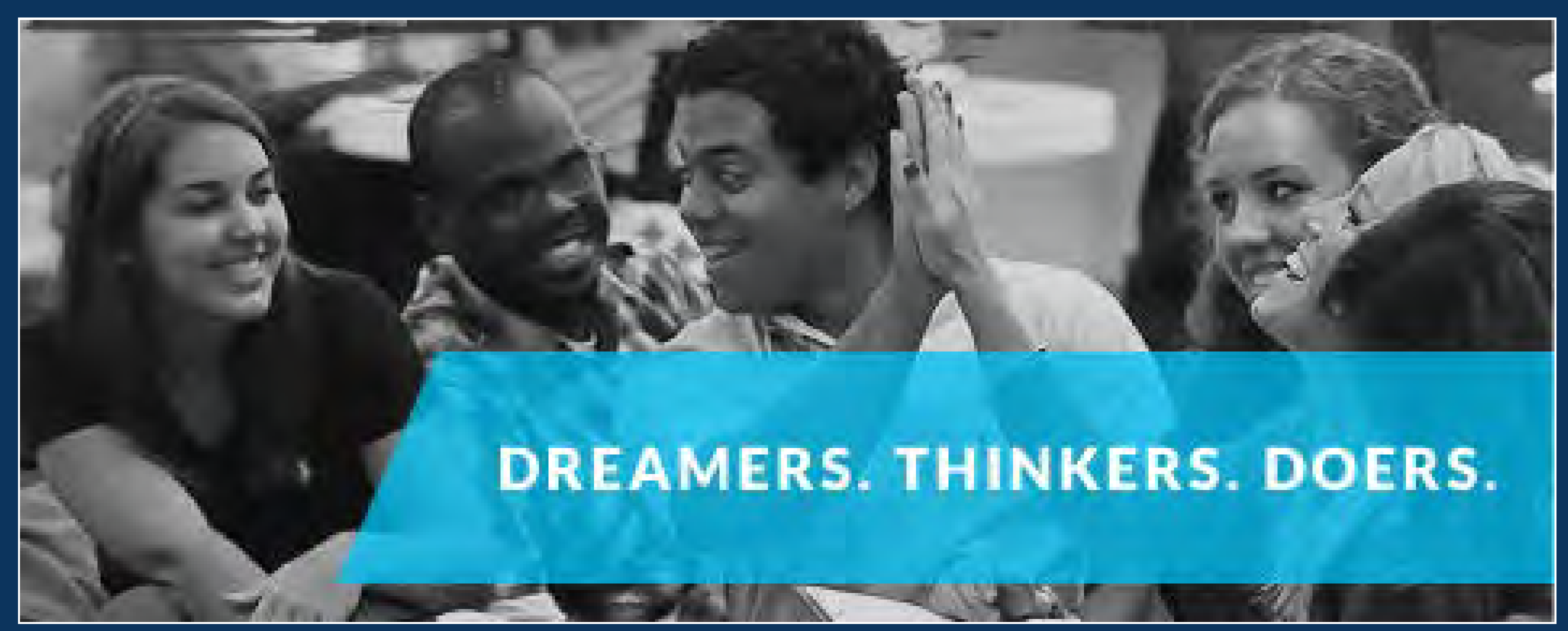

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About Professor Harkness

Donna S. Harkness is currently Professor of Clinical Law and Director of both the Elder Law Clinic and the Elder Health Law Advocacy Clinic. She is a National Law Foundation certified elder law attorney.

Education

B.A., University of Memphis, Philosophy, magna cum laude, 1974; J.D. Vanderbilt, 1980.

Admitted

Tennessee and Florida.

Experience

1993 – present, Cecil C. Humphreys School of Law/University of Memphis Legal Clinic; 1990-93, Staff Attorney, Housing Opportunities Corp.; 1985-87, District Legal Counsel, Florida Dept. of Health and Rehabilitative Services; 1980-84, Staff Attorney, Legal Services of Middle Tennessee.

Teaching Interests

Elder Law Clinic, Elder Health Law Advocacy Clinic, Elder Law and Professional Responsibility

Publications

Professor Harkness is the author of one book, Elder Law Essentials (Knowles, updated 2013), which provides a basic overview of the substantive law, ethical issues, and practice concerns that confront attorneys representing elderly clients. Professor Harkness's articles have appeared in the Elder Law Journal, Marquette Elder's Advisor, and the Georgetown Journal on Poverty Law and Policy. She has also authored four elder law case files for the National Institute of Trial Advocacy (NITA) involving a will contest, elder abuse, predatory lending and wrongful death in a long term care institution.

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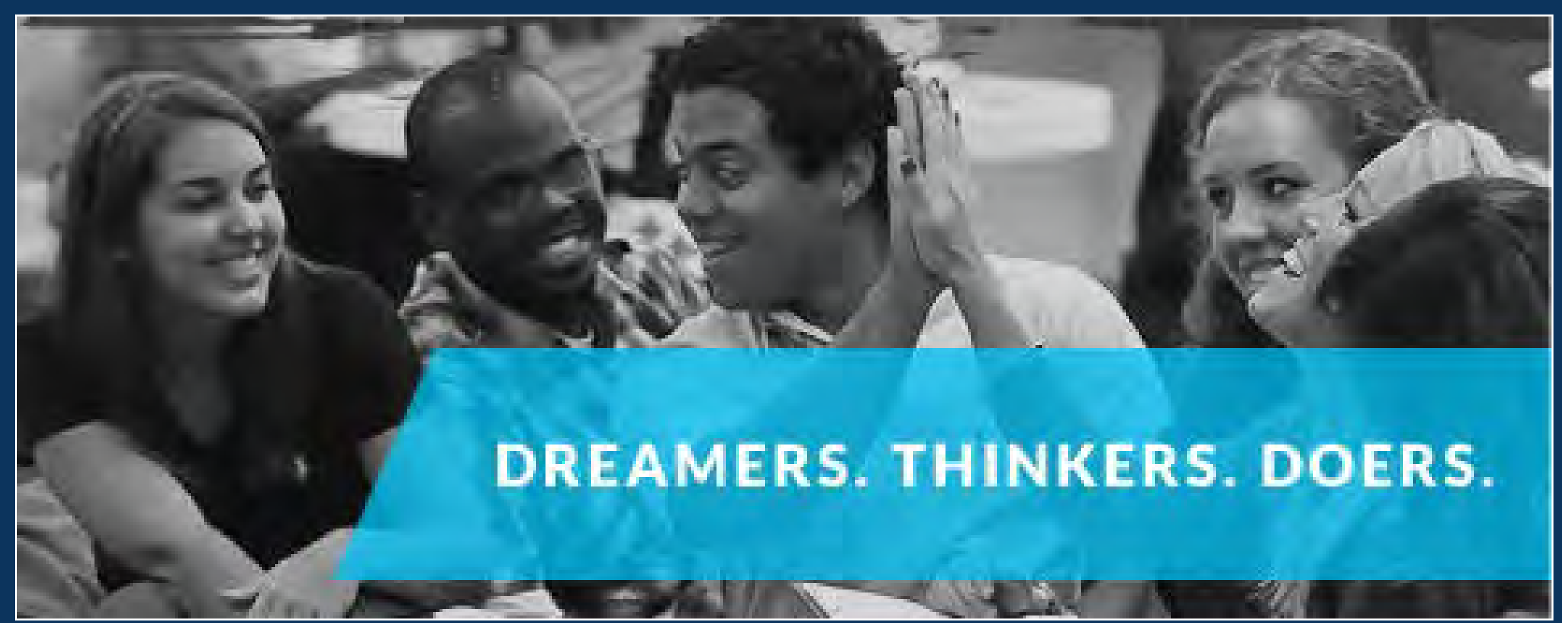

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Cecil C. Humphreys School of Law

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Lee Harris

FEDEX PROFESSOR OF LAW

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About Professor Harris

Lee Harris has been a member of the Memphis faculty since 2005. He teaches Contracts, Corporations, and Mergers & Acquisitions. He writes about the various ways investors influence the firm. His work has been selected

for presentation at the Stanford/Yale Junior Faculty Forum and featured in prominent media outlets, like The Economist magazine. In addition to his appointment at Memphis, Harris has held visiting appointments at the George Washington School of Law in Washington DC and the Grenoble Ecole de Management in France. Prior to coming to Memphis, Professor Harris worked at Baker Donelson, a large corporate law firm. He has also held teaching fellowships in the Economics Department at Yale University and at Yale Law School. Professor Harris graduated from Yale Law School and Morehouse College in Atlanta, GA. He has also been a visiting student at the London School of Economics.

Education

B.A., Morehouse College, 2000; Visiting Student, London School of Economics and Political Science, 1998-1999, J.D., Yale Law School, 2003.

Admitted

Tennessee (inactive)

Experience

2009-present, Associate Professor of Law, Cecil C. Humphreys school of Law; 2005-2009, Assistant Professor of Law, Cecil C. Humphreys School of Law; 2003-2005, Associate, Baker, Donelson, Bearman, Caldwell & Berkowitz; Coker Fellow, Yale Law School, 2002-2003.

Teaching Interests

Business Organizations, Contracts, Corporations, Law and Economics, Social Welfare Policy

Publications

1. CORPORATIONS AND OTHER BUSINESS ENTITIES: A PRACTICAL APPROACH (Aspen 2011)

2. MASTERING CORPORATIONS & OTHER BUSINESS ENTITIES (Carolina Academic Press 2008)

Selected Articles

- Corporate Elections and Tactical Settlements, 39 J. CORP. L. 221 (2014)
- CEO Retention, 24 FLA. L. REV. 1753 (2013)
- The Politics of Shareholder Voting, 86 NYU L. REV. 1761 (2011)
- Shareholder Campaign Funds: A Campaign subsidy Scheme for Corporate Elections, 58 UCLA L. REV. 167 (2010)
- Missing in Activism: Retail Investor Absence in Corporate Elections, 2010 COLUM. BUS. L. REV. 101 (2010), discussed in The Economist.
- A Critical Theory of Private Equity, 35 DEL. J. CORP. L. 259 (2010), reprinted in 2 FINANCIAL FRAUD L. REPORT 262 (March 2010)

- Tort Reform as Carrot-and-Stick, 46 HARVARD J. LEGIS 163 (2009), reprinted in A. POPPER, TORT REFORM: ESSAYS, CASES & MATERIALS (2010) and selected for 2007 Yale-Stanford Junior Faculty Forum

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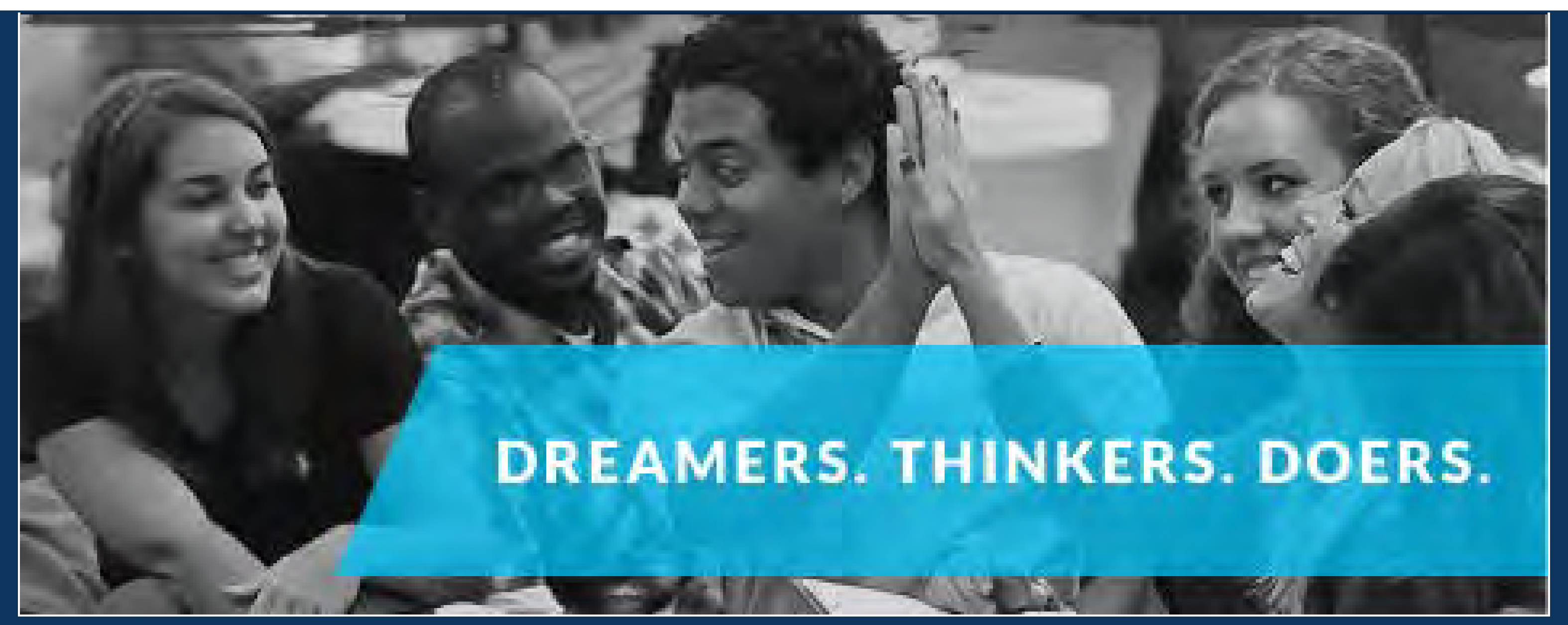

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Lisa M. Geis

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About Professor Geis

Professor Lisa Geis leads our new Children's Defense Program. Most recently, Professor Geis served as a Clinical Professor and Supervising Attorney in the DC Students in Court Program, an organization that serves several Washington, D.C. area law schools.

Education

LL.M., University of the District of Columbia - David A. Clarke School of Law, 2014; JD, Rutgers School of Law, 2010; B.A., The Catholic University of America, 1988.

Admitted

2011, State of New Jersey.
2012, United States District of New Jersey
2012, District of Columbia Bar
2015, United States Supreme Court

Experience

Prior to joining the faculty, Prof. Geis served as a Clinical Professor and Supervising Attorney in the DC Students in Court Program. Additionally, she was a clinical instructor and supervising attorney at the University of the District of Columbia, David A. Clarke School of Law, Juvenile & Special Education Law Clinic - Took Crowell Institute for At-Risk Youth and prior to that she was the John D. and Catherine T. MacArthur Foundation Models for Change Fellow at the Rutgers School of Law in its Juvenile Indigent Defense Action Network - Post Disposition Representation Project.

Teaching Interests

Juvenile Justice Clinic

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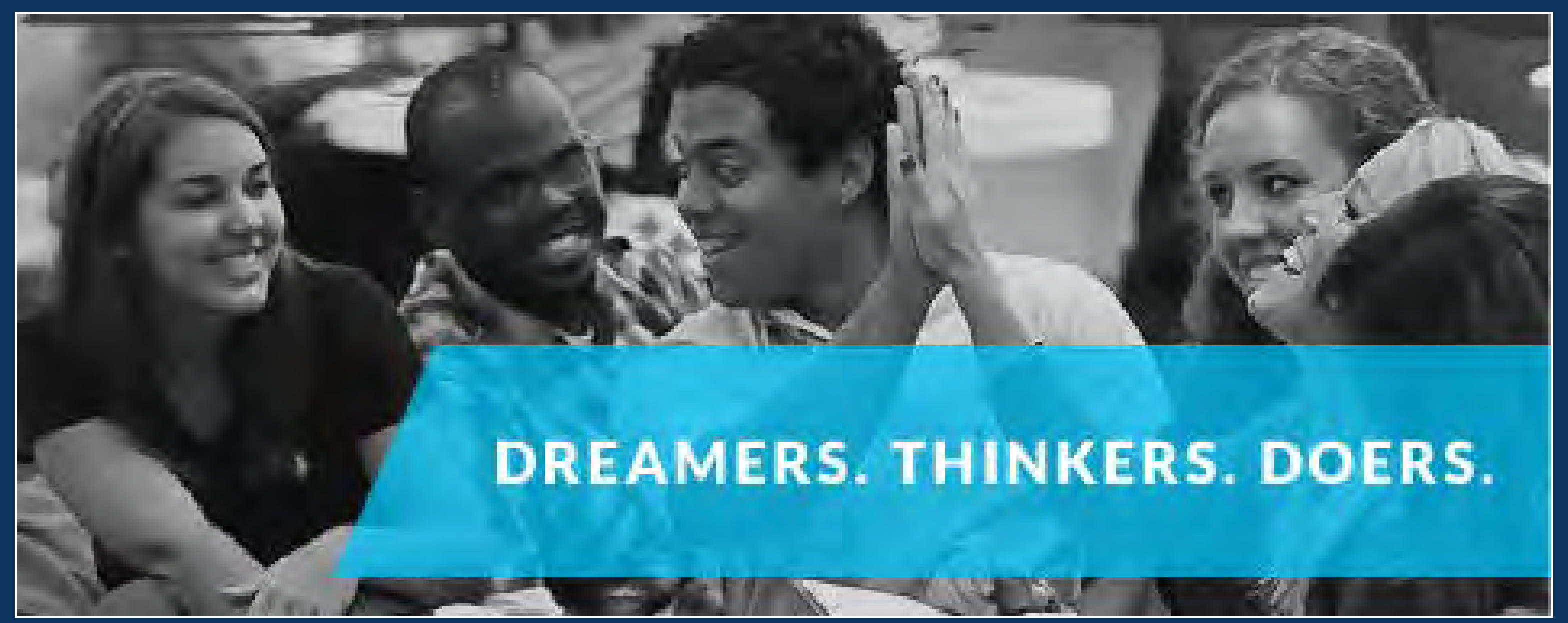

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Cecil C. Humphreys School of Law

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Janet Goode

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About Professor Goode

Janet Goode is a Visiting Assistant Professor of Law and director of the Medical-Legal Partnership Clinic, part of the Memphis Children's Health Law Directive (Memphis CHiLD). Memphis CHiLD is an innovative alliance between the Law School, Le Bonheur Children's Hospital, and Memphis Area Legal Services that provides legal services to low-income pediatric patients and their families.

Most recently Professor Goode served as the first Executive Director of Christian Legal Aid of Pittsburgh (CLA), a large pro bono community clinic, where she significantly shaped CLA's direction and clinic structure, represented clients, and managed a network of volunteer attorneys and law students. Professor Goode was the recipient of the 2013 Lorraine M. Bittner Public Interest Attorney Award and the 2014 Pennsylvania Bar Association Civil Legal Aid Attorney Award for her work with CLA.

Following law school, Professor Goode clerked for the Hon. Keith P. Ellison in the United States District Court for the Southern District of Texas. She then served as an Assistant District Attorney at the New York County District Attorney's Office where she handled a large caseload of both misdemeanor and felony offenses and was a

member of the Domestic Violence Unit. She has also worked as an associate at Kirkpatrick & Lockhart Preston Gates Ellis LLP (now K&L Gates).

In addition to her legal career, Professor Goode has served on the executive committee of the board of a community health center dedicated to providing quality, whole person, affordable heath care and was on the governing board of her church.

Education

Stanford Law School, 2002; B.A., New York University, History with Honors, Minor in French (magna cum laude), 1997.

Admitted

Tennessee, Pennsylvania, New York.

Experience

The University of Memphis Cecil C. Humphreys School of Law, Memphis Tennessee; Visiting Assistant Professor & Director, Medical-Legal Partnership Clinic, 2015 - present

Christian Legal Aid of Pittsburgh, Pittsburgh, Pennsylvania; Executive Director, 2008 - 2014

Kirkpatrick & Lockhart Preston Gates Ellis LLP, Pittsburgh, Pennsylvania; Associate Attorney, 2006 - 2008

New York County District Attorney's Office, New York, New York; Assistant District Attorney, 2003 - 2006

Law Clerk, 2002 - 2003, The Honorable Keith P. Ellison, U.S. District Court for the Southern District of Texas, Laredo Division

Publications

N/A

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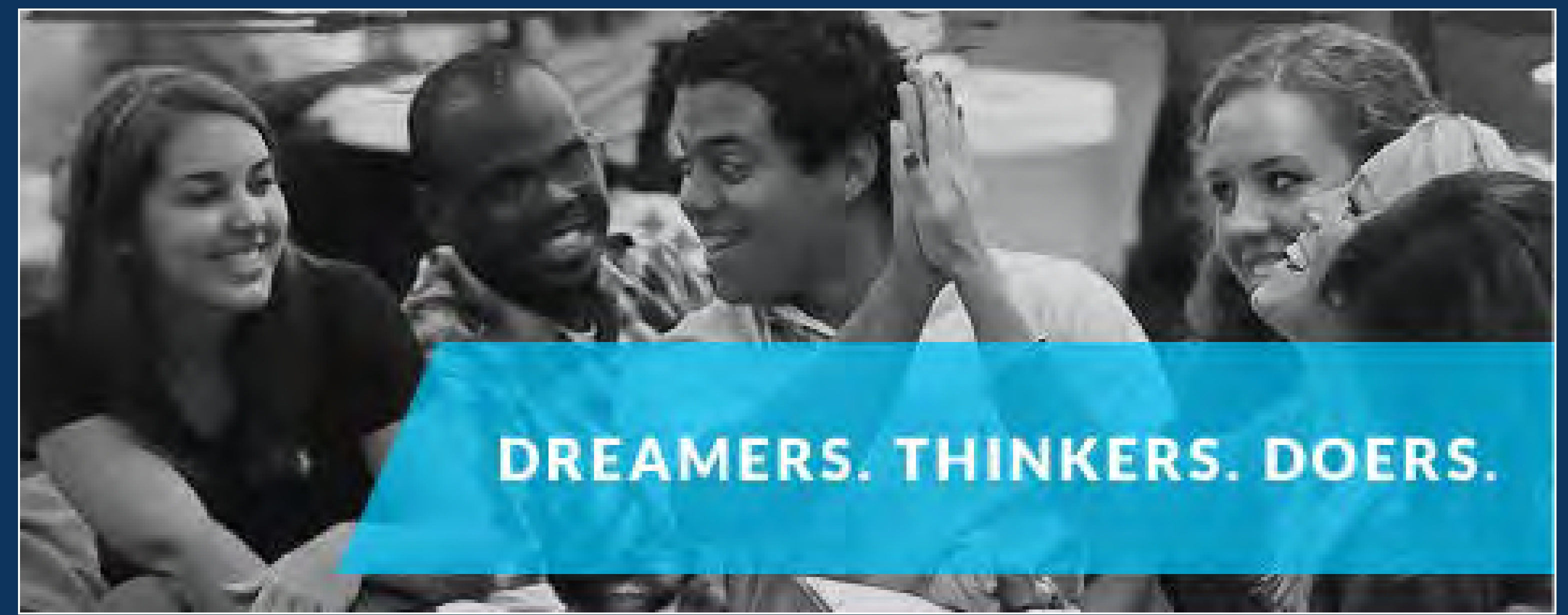

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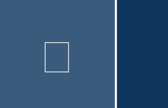
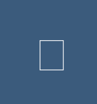
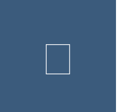
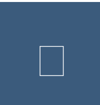
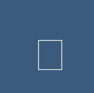
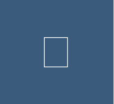

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About Professor Jones

Professor Jones joined the Memphis law faculty in 2008. She teaches Copyright law. Professor Jones's

scholarship explores copyright and privacy issues. She recently served as the Chair of the American Association of Law Libraries' Copyright Committee. This is a national committee that represents, promotes and advocates AALL's interests regarding copyright and other intellectual property issues.

Professor Jones has provided extensive professional service in law librarianship. She has served as Special Interest Section (SIS) Council Chair, a national level office in the American Association of Law Libraries; as the chair of one of the largest AALL SISs, and as President of one of the largest chapters of AALL in geographic coverage (ten states). She has shared her knowledge and experience by speaking on a variety of topics at numerous national, regional and state meetings and conferences, including the Conference for Law School Computing (CALI Conference).

Education

B.A. (summa cum laude), Mercer University; J.D. (cum laude), Mercer University School of Law; Master of Librarianship, with a certificate in law librarianship, University of Washington

Admitted

Georgia (inactive)

Experience

Deputy Director, Judge Ben C. Green Law Library, and Adjunct Assistant Professor of Law, Case Western Reserve School of Law, Cleveland, Ohio; Lawyering Skills I Instructor, University of San Diego School of Law, San Diego, California; Assistant Director for Reference Services, Boley Law Library, and Adjunct Professor of Law, Northwestern School of Law of Lewis and Clark College, Portland, Oregon; Attorney, Trotter, Smith and Jacobs, Atlanta, Georgia; Attorney, Kilpatrick and Cody, Atlanta, Georgia

Teaching Interests

Copyright Law.

Publications

Her recent publications are: Protecting the Treasure: An Assessment of State Court Rules and Policies for Access to Online Civil Court Records, 61 Drake Law Review 375 (2013), Locked Collections: Copyright and the Future of Research Support, 105 Law Library Journal 425 (2013) and Law Firm Copying and Fair Use: An Examination of Different Purpose and Fair Use Markets, 56 South Texas Law Review 313 (2014). The Locked Collections article won the American Association of Law Libraries Law Library Journal Article of the Year Award in July 2014. She has presented at a number of conferences, including the Annual Intellectual Property Scholars' Conference and the Works in Progress Intellectual Property (WIPIP) Colloquium. She has also been a participant in the Annual Privacy Law Scholars' Conference.

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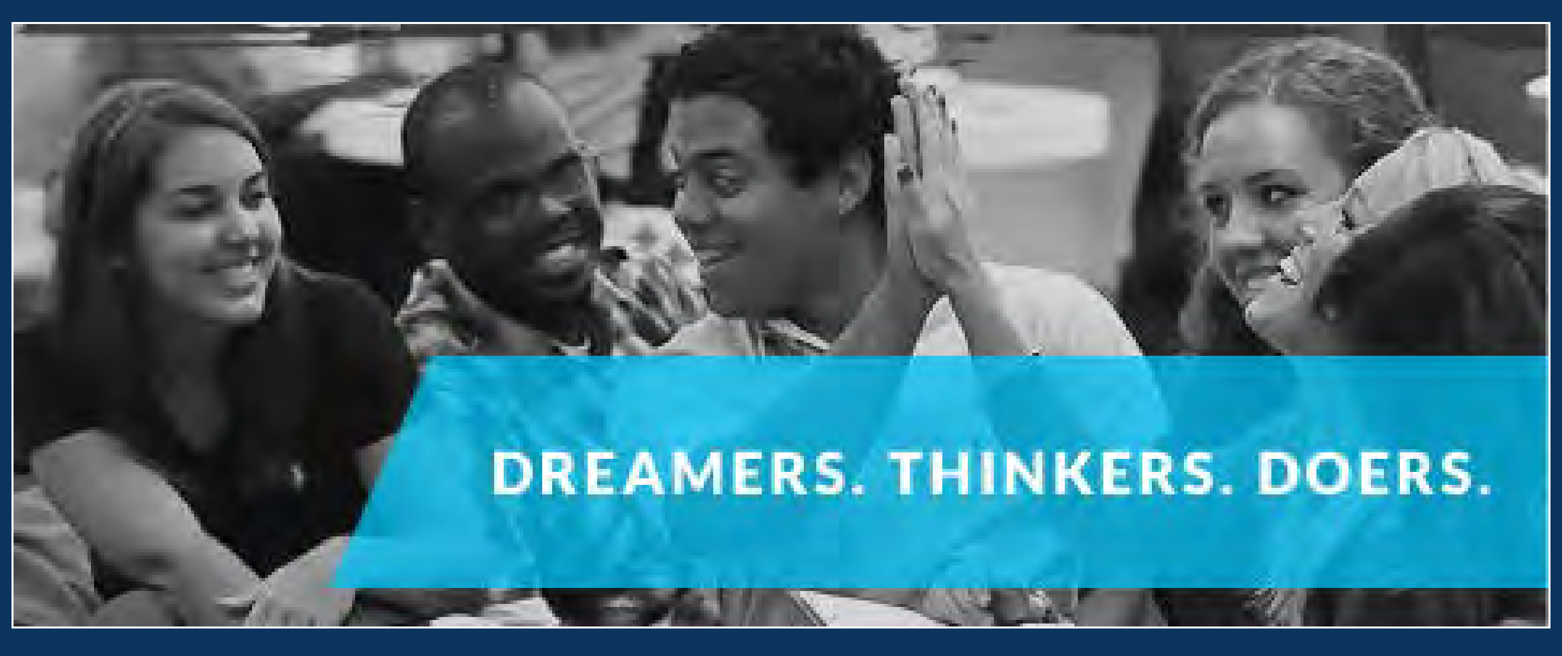

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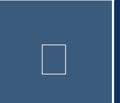
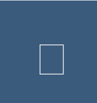
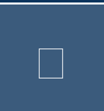
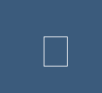
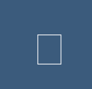
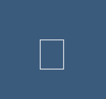

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Daniel Kiel

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About Professor Kiel

Professor Kiel's work centers on inequality in the education system, particularly along lines of race. His research examines efforts to reduce educational disparities, including both the historical era of desegregation and more modern efforts to reform the structure of public education.

In 2011, Prof. Kiel built upon his work on school desegregation in Memphis through an oral history project that culminated in The Memphis 13, a documentary film he wrote and directed sharing the stories of the first students to desegregate public schools in Memphis. The film premiered at the National Civil Rights Museum on the 50th anniversary of that historic event and has been featured at film festivals, universities, and museums across the country.

In addition to his scholarly writing listed below, Prof. Kiel has written op-eds for the Washington Post, USA Today, and the Memphis Commercial Appeal and has given numerous presentations on issues of race and education,

both locally and nationally. During the merger of school districts in Shelby County, Prof. Kiel was appointed to the Transition Planning Commission charged with crafting a plan for that merger, and served as co-chairperson of the group's Education Committee. For his work on schooling in Memphis, he has been cited in The New York Times, The Atlantic, and Education Week and was awarded the 2013 Dr. Martin Luther King, Jr., Human Rights Award by the University of Memphis.

In 2015, Prof. Kiel was awarded a Fulbright Fellowship to undertake comparative research on educational disparities in South Africa and was hosted during his months there at the University of the Free State. Prior to entering teaching, Prof. Kiel worked in private practice doing civil litigation at firms in Boston and Memphis. While in practice, he also represented criminal defendants in post-conviction matters at both the Sixth Circuit Court of Appeals and the Tennessee Court of Criminal Appeals. Prof. Kiel serves on the boards of Facing History and Ourselves and Just City, and was a founding steering committee member of Common Ground Memphis. On campus, he serves as a reviewer for the annual book award presented by the Benjamin Hooks Institute of Social Change.

Education

J.D., Harvard Law School, 2004; B.A., University of Texas at Austin, 2001

Admitted

Massachusetts, Tennessee

Experience

Cecil C. Humphreys School of Law (2008-present); Fulbright Scholar, The University of the Free State (South Africa) (2015); Adjunct Professor of Legal Methods, Cecil C. Humphreys School of Law (2006-2008); Associate, Burch, Porter & Johnson (2005-2008); Associate, Bingham McCutchen (2004-2005).

Teaching Interests

Education Law & Policy, Civil Rights, Property, Remedies, Constitutional Law, Law & Documentary Studies

Research & Publications

- The Memphis 13, documentary film (2011)
- The Endangered School District: The Promise and Challenge of Redistributing Control of Public Education, Boston University Public Interest Law Journal (2013)
- The Enduring Power of Milliken's Fences, The Urban Lawyer (2013)
- A Memphis Dilemma: A Half-Century of Education Reform from Desegregation to Consolidation, Univ. of Memphis Law Review (2011)
- An Ounce of Prevention is Worth a Pound of Cure: Reframing the Debate About Law School Affirmative Action, Denver Law Review (2011)
- It Takes a Hurricane: Might Hurricane Katrina Produce for New Orleans Students What Brown Once

Promised?, Journal of Law & Education (2011)
- Accepting Justice Kennedy's Dare: The Future of Integration in a Post-PICS World, Fordham Law Review (2010)
- Exploded Dream: Desegregation in the Memphis City Schools, Law & Inequality (2008)
- Lessons from the Memphis 13: What 13 First Graders Have to Teach About Life, Law, and the Legacy of Brown, Thurgood Marshall Law Review (2013)
- No Caste Here? Toward a Structural Critique of American Education, Penn State Law Review (2015)

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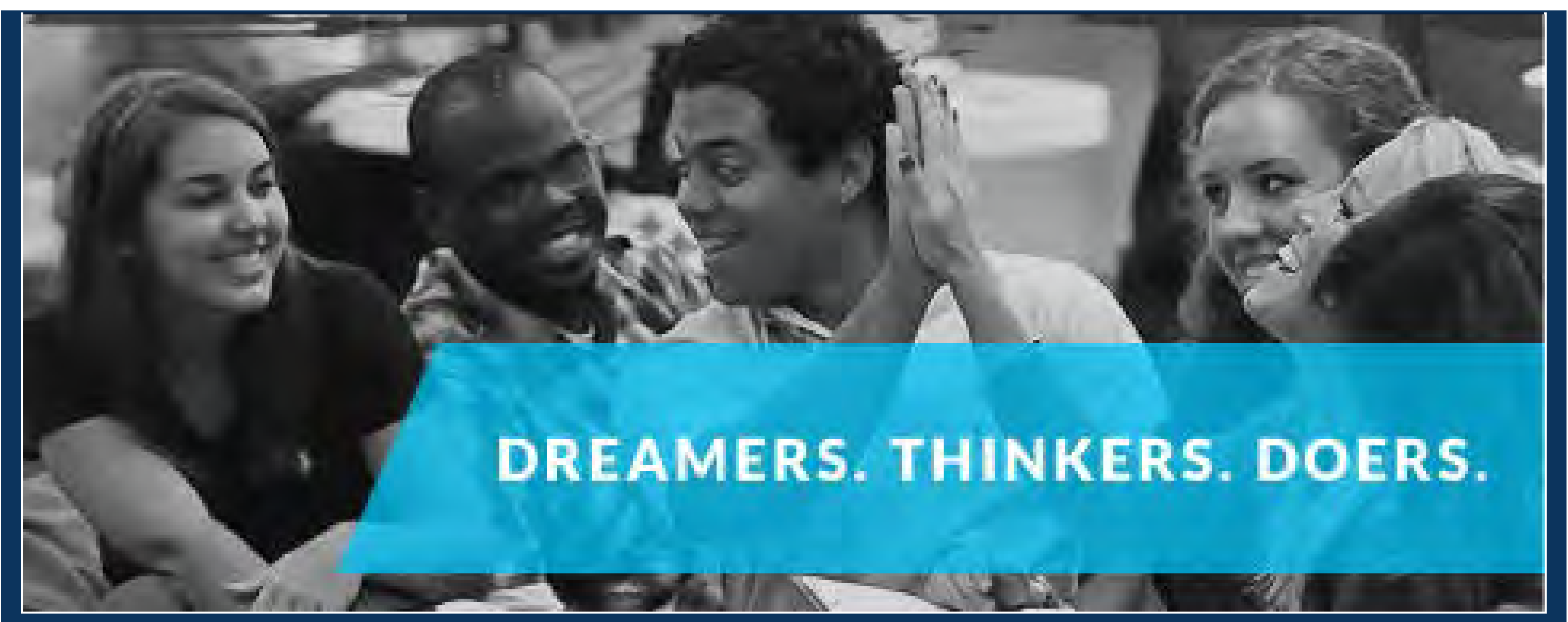

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About Professor Kratzke

Professor Kratzke has been on the faculty at Memphis Law since 1979 and has served in various roles, including Interim Dean of the Law School.

Education

B.A., 1971, University of Washington; J.D., 1974, Valparaiso University; LL.M.., 1977, Georgetown University Law Center.

Admitted

Washington.

Experience

Assistant Professor of Law, Oklahoma City University, 1977-79; joined The University of Memphis School of Law faculty in 1979; visiting Professor of Law, 1986-87, Santa Clara University.

Teaching Interests

Torts, Federal Income Taxation, Unfair Competition, and Economic Analysis of Law.

Publications

Co-author with Earl W. Kintner of three volumes of nine volumes treatise, Federal Antitrust Law (volume 6, 7, and 8); law review articles on trademark law, Federal Tort Claims Act, Tennessee administrative law, labor law, products liability law, and Russian law. He is a member of the American Law Institute. Fulbright Scholar, Spring 1997 and 2001-2002.

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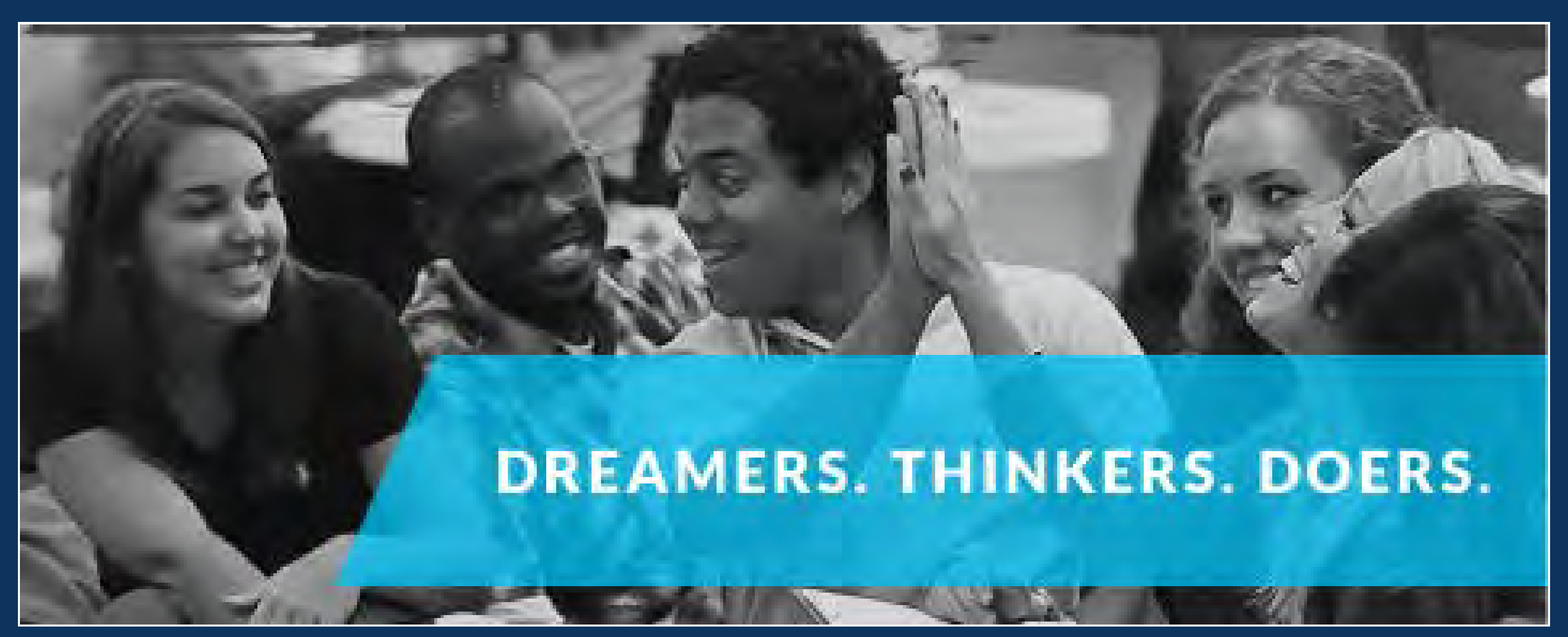

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Education

B.A. (summa cum laude), 1977, Middlebury College; J.D. (cum laude), 1980, Harvard University.

Admitted

Pennsylvania; Sixth Circuit Court of Appeals

Experience

Associate, 1980-83, Drinker, Biddle & Reath, Philadelphia, PA., Litigation; joined The University of Memphis School of Law faculty in 1983. Associate Dean 2001-2009. Director of Advocacy since 8/2009.

Teaching Interests

Administrative Law, Appellate Advocacy, Brief Writing, Civil Rights, Constitutional Law, Criminal Law, Federal Courts, Legal Argument and Appellate Practice, Torts.

Publications

Author of article on negligence per se in The Wisconsin Law Review (2009), articles on Section 1983 litigation in the UCLA Law Review (1988), Toledo Law Review (1991), George Washington Law Review (1992), Villanova Law Review (1996), the Urban Lawyer (1999 & 2005), Rutgers Law Journal (2004), and Cardozo Law Review (2004). Author of articles on state constitutional law, criminal law, moot court, and constitutional law in The University of Memphis Law Review. Coach: 2008 ABA National Appellate Advocacy Competition national finalists and best oral advocate and 2010 regional champions; 1996, 1994, and 1993 Wagner Moot Court national champions, 2003 and 1992 semifinalists; 2006 National Moot Court national finalists, 1999 and 1993 national quarter-finalists, and 2008-09 regional finalists. Officer or Executive Committee Member, Civil Rights Section, Association of American Law Schools (since 1/2002).

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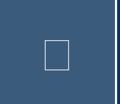
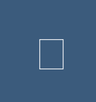
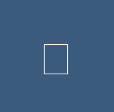
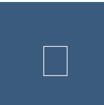
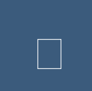
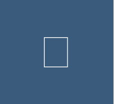

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Cecil C. Humphreys School of Law

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About the Dean

Peter Letsou joined the Memphis faculty upon his appointment as Dean in June 2013. Prior to coming to Memphis, Dean Letsou served as Dean and Wendt Chair in Business Law at Willamette University College of Law in Salem, Oregon; Professor of Law and Director of the Center for Corporate Law at the University of Cincinnati College of Law; and Associate and Assistant Professor of Law at George Mason University in Arlington, Virginia. In addition to his permanent appointments, Dean Letsou has held visiting professorships at University of Paris 1 Pantheon-Sorbonne (where he served as Chair of the Americas), the University of Connecticut School of Law, and Emory University School of Law. Before entering the academy in 1990, Dean Letsou practiced law in New York City with Cravath, Swaine & Moore and Christy & Viener, served as Associate Counsel to the United States Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, and clerked for the Honorable Walter R. Mansfield of the United States Court of Appeals for the Second Circuit. Dean Letsou received his J.D. with highest honors from the University of Chicago Law School and his B.A. in physics, magna cum laude, from Harvard University. Dean Letsou teaches and writes in the areas of corporate law, securities law, corporate finance and mergers and acquisitions. He is the author of two casebooks and numerous articles and essays.

Education

Harvard College, B.A. Physics 1983 (magna cum laude); The University of Chicago Law School, J.D. 1986 (with highest honors). Order of the Coif. Member, University of Chicago Law Review (1984-1986) Comment Editor, University of Chicago Law Review (1985-86); Olin Foundation Fellow in Law and Economics, 1984-86

Admitted

New York State Bar

Experience

Dean, Roderick & Carol Wendt Chair in Business Law & Director, Program in Law & Business (Isaac Van Winkle Melton Professor, 2002-2003; Wendt Chair since 2003-2013; Associate Dean 2006-2011; Dean 2011-2013) Willamette University College of Law, Salem, Oregon; Visiting Professor (Chair of the Americas) (Nov. 2009) University of Paris 1 Pantheon-Sorbonne, Paris, France; Professor of Law & Director, Center for Corporate Law (1997-2002) University of Cincinnati College of Law, Cincinnati, Ohio; Visiting Professor of Law (fall 2001) University of Connecticut School of Law
Hartford, Connecticut; Visiting Professor of Law (fall 1999) Emory University School of Law, Atlanta, Georgia; Associate Professor of Law (1994-1997; with tenure: 1996-97); George Mason University School of Law, Arlington, Virginia; Assistant Professor of Law (1990-1994) George Mason University School of Law, Arlington, Virginia;

Associate (1988-1990) Christy & Viener, New York, New York; Associate (1987-1988) Cravath, Swaine & Moore, New York, New York; Associate Counsel (1987) United States Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition Washington, D.C.; Law Clerk (1986-1987) The Honorable Walter R. Mansfield, United States Court of Appeals for the Second Circuit and Division of the United States Court of Appeals for the District of Columbia Circuit for the Purpose of Appointing Independent Counsels.

Teaching Interests

Business Organizations, Corporate Finance, Corporations, Mergers & Acquisitions, Quantitative Methods for Lawyers, and Securities Regulation.

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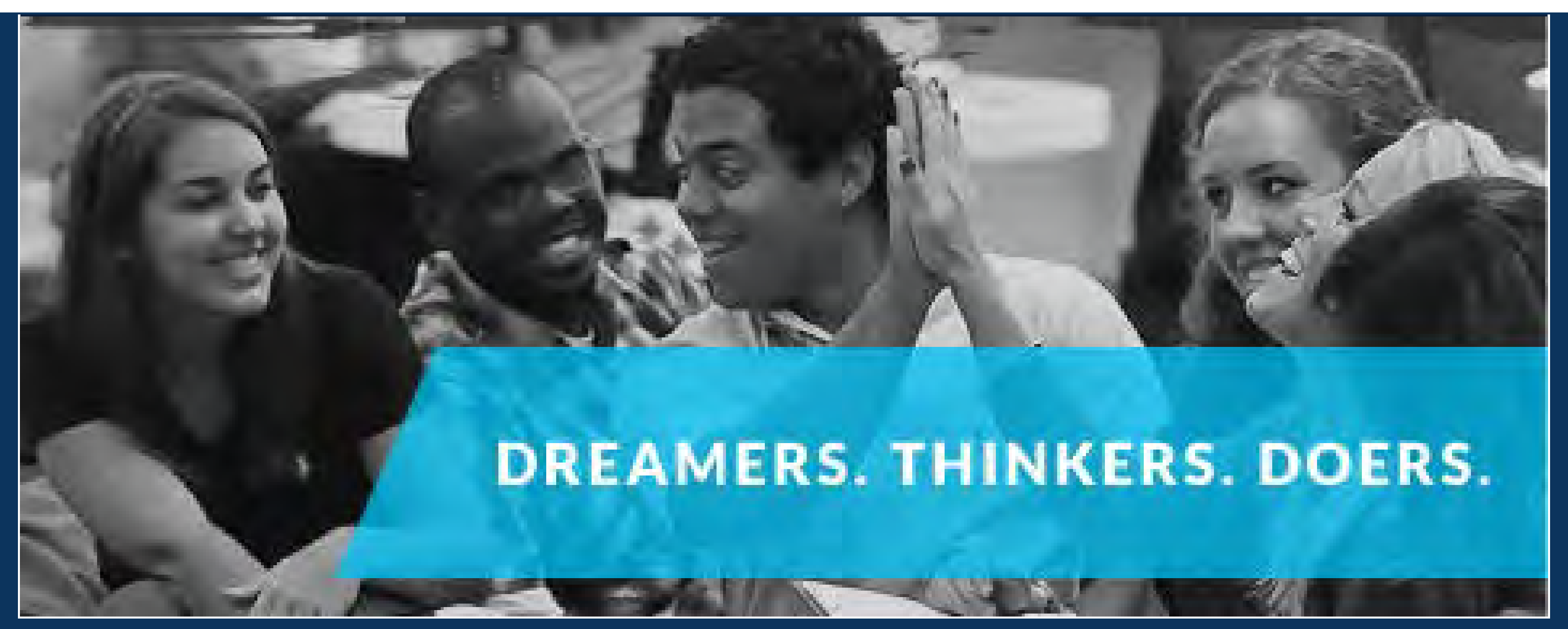

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Education

B.S. Ed., 1976, Northern Illinois University; M.A., 1981, J.D., 1984, University of Illinois.

Admitted

Illinois

Experience

Social Studies teacher, Glenbrook North High School, Northbrook, Illinois, (1977-81); Associate, Mayer, Brown & Platt, Chicago, Illinois (1984-88); joined The University of Memphis School of Law faculty in 1988.

Teaching Interests

Fair Employment Practices, Labor Law, Professional Responsibility.

Publications

Articles on professional responsibility and employment law in the Indiana Law Journal, Arkansas Law Review, Missouri Law Review, Kansas Law Review, and the Tennessee Law Review; currently serving on the Tennessee Bar Association's Professional Standards Committee.

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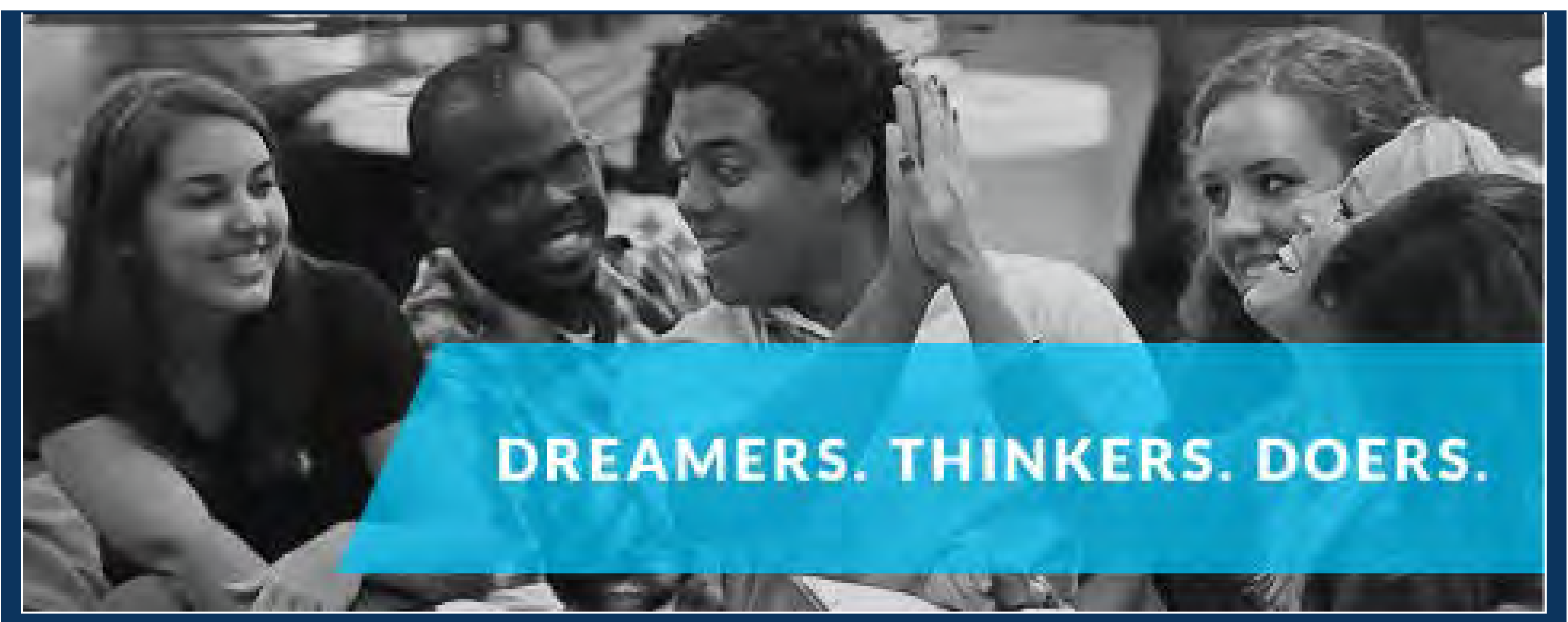

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About Professor Mamlyuk

Boris Mamlyuk joined the Memphis law faculty in 2011. He teaches first year Contracts, Public International Law, International Business Transactions, and leads the Comparative Law seminar. Professor Mamlyuk earned his J.D.

from the University of California (Hastings) in 2005. After admission to the bar, Professor Mamlyuk practiced in the Irvine, CA office of Watt, Tieder, Hoffar & Fitzgerald, representing clients in complex commercial litigation. In 2007, Mamlyuk returned to academia to pursue doctoral work at the CLEI Centre, a research center founded by Cornell Law School and the University of Turin, Faculty of Law. During the course of his doctoral studies, Mamlyuk held a number of joint appointments, including as visiting scholar at Columbia University's Harriman Institute for Russian, Eurasian and Eastern European Studies, and as a visiting scholar at Cornell Law School. In 2008-09, Prof. Mamlyuk served as a Fulbright Fellow, studying Russian law and transition at the Institute of State and Law in Moscow. While in Russia, Mamlyuk taught courses on Civil Society and Russian Law and Politics at Moscow's Higher School of Economics.

Education

Ph.D., University of Torino, Faculty of Law, 2011; J.D., University of California (Hastings), 2005; B.A., California State University (Fullerton), 2002.

Admitted

California

Experience

2011-present, Assistant Professor of Law; 2010-2011, Visiting Assistant Professor of Law, Ohio Northern University; 2009-2010, Visiting Scholar, Cornell Law School; 2005-2007, Associate, Watt, Tieder, Hoffar & Fitzgerald, LLP.

Teaching Interests

Contracts, Commercial Law, International and Comparative Law

Publications

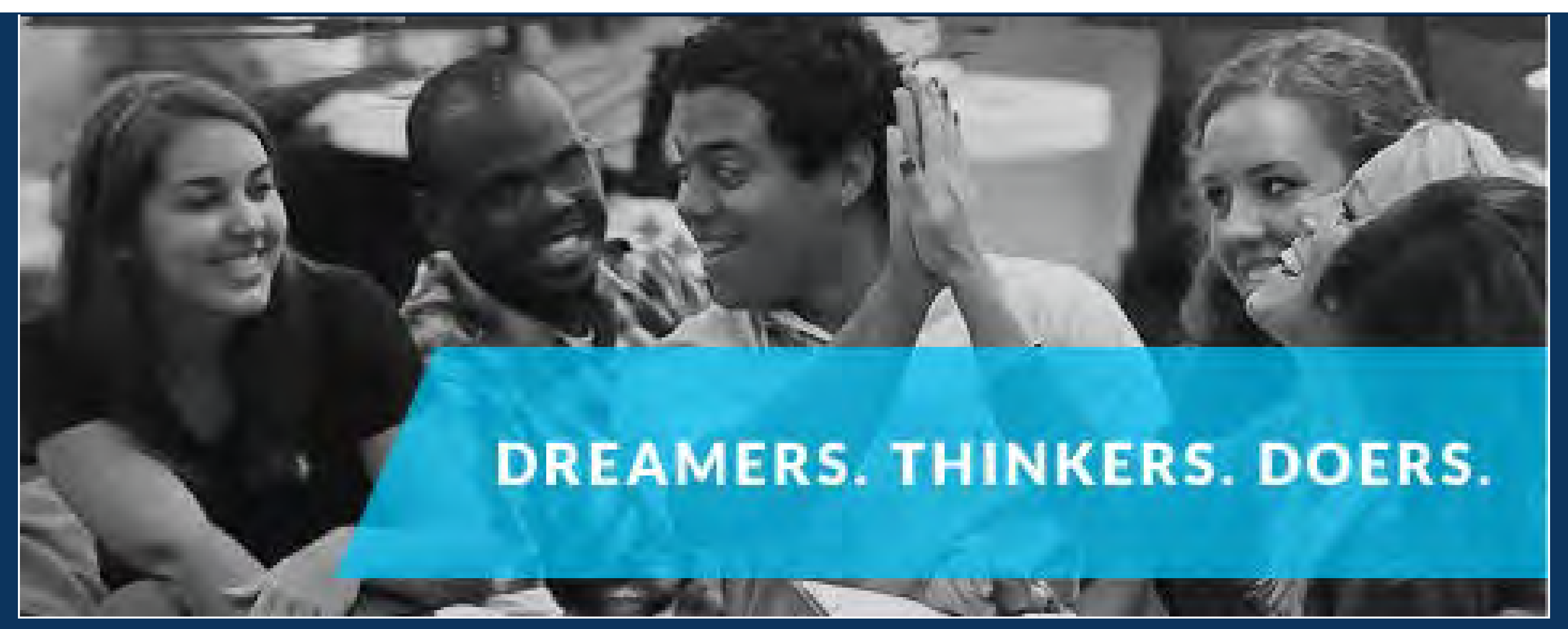
Mamlyuk's research interests include international legal theory, law and development, and issues of legal transition and Rule of Law reforms in developing and post-socialist states. His current research project focuses on Russia's attempts to harmonize domestic legal structures in light of WTO accession. Mamlyuk has delivered numerous conference presentations on these topics in more than five countries. His work has been selected for presentation at the Yale Comparative Law Works-in-Progress Workshop and he has served as a participant at the annual Institute for Global Law and Policy workshop, hosted by Harvard Law School. Since 2013, Prof. Mamlyuk also serves on the advisory board of CleanApp, a global open-source, wiki-based civic complaint reporting application.

Representative Publications:

- Russian International Law and Indeterminacy: Cold War and Post-Soviet Dynamics, in The Legal Dimension in Cold War Interactions: Some Notes from the Field (William Simons, Tatiana Borisova,

eds., M. Nijhoff 2012).

- Comparative International Law, 36 Brooklyn J. Int'l L. 385 (2011) (with Ugo Mattei).
- Russia & Legal Harmonization: an Historical Inquiry into IP Reform as Global Convergence and Resistance, 10 Wash. U. Global Stud. L. Rev. 535 (2011).
- "Capitalism, Communism ... And Colonialism? A Critical Colonial Reading of 'Transitology' in the Former Soviet Union", 9(1) Global Jurist (2009), with John D. Haskell (SOAS) (reproduced at <http://www.bepress.com/gj/vol9/iss2/art7/>)



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About Professor McClurg

Professor McClurg holds the Herbert Herff Chair in Excellence in Law. A nationally recognized scholar and teacher, McClurg has taught at six law schools and received numerous awards for both his teaching and research.

McClurg has published seven books and dozens of scholarly articles, which have been cited in more than 500 law journals. His popular law school prep book, *1L of a Ride: A Well-Traveled Professor's Roadmap to Success in the First Year of Law School* (West 2d ed. 2013), is assigned as required or recommended reading at law schools throughout the country. He is also the author of The *"Companion Text" to Law School: Understanding and*

Surviving Life with a Law Student (West 2012), the only book that prepares the loved ones of law students for the law school experience.

McClurg is Series Editor for Carolina Academic Press's series of comparative law books: The Contextual Approach Series. He is co-author of the first entry in the series: *Practical Global Tort Litigation: United States, Germany, and Argentina* (2007) (with Koyuncu and Sprovieri).

In addition to his scholarly writings, McClurg is the author/editor of two legal humor books, editor of Lawhaha.com (an academically oriented humor blog), and a former monthly humor columnist for the *American Bar Association Journal.*

He has been interviewed and quoted as a legal expert by National Public Radio, Time, *U.S. News and World Report*, *the New York Times, Wall Street Journal, Washington Post*, and dozens of other media sources.

Prior to joining academia, McClurg served as a law clerk to U.S. District Judge Charles R. Scott (M.D. Fla.) and worked four years as a litigation associate. He graduated Order of the Coif from the University of Florida College of Law, where he was a member of the Florida Law Review.

Education

B.S., University of Florida; J.D. (journalism, with honors), University of Florida (Order of the Coif).

Admitted

Florida

Experience

Professor and Herbert Herff Chair of Excellence in Law (2006-present) and Associate Dean for Faculty Development (2008-2011), Cecil C. Humphreys School of Law, University of Memphis; Professor, Florida International University College of Law, 2002-2006; Nadine H. Baum Distinguished Professor of Law, University of Arkansas at Little Rock William H. Bowen School of Law (Baum Prof. 1998-2002; Prof. 1992-1998; Assoc. Prof. 1989-92; Asst. Prof. 1986-89); Visiting Professor, Wake Forest University School of Law, Spring 2000; Visiting Professor, Golden Gate University School of Law, 1991-92 academic year and Spring 1997; Visiting Professor, University of Colorado School of Law, Summer 1994; Associate, Bedell, Dittmar, DeVault & Pillans, Jacksonville, Florida, 1982-1986; Judicial Law Clerk, Honorable Charles R. Scott, United States District Judge, Middle District of Florida, 1980-82.

Teaching Interests

Tort Law, Products Liability, Privacy Law, Firearms Policy.

Publications

Books

Guns and the Law: Cases and Materials (Carolina Academic Press, forthcoming 2016) (with Brannon Denning).

1L of a Ride: A Well-Traveled Professor's Roadmap to Success in the First Year of Law School (West 2d ed. 2013).

The "Companion Text" to Law School: Understanding and Surviving Life with a Law Student (West 2012).

1L of a Ride: A Well-Traveled Professor's Roadmap to Success in the First Year of Law School (West 2009).

Practical Global Tort Litigation: United States, Germany, and Argentina (Carolina Academic Press 2007) (with Adem Koyuncu and Luis Eduardo Sprovieri).

Amicus Humoriae: An Anthology of Legal Humor (Carolina Academic Press 2003) (with Robert M. Jarvis and Thomas E. Baker).

Gun Control and Gun Rights (New York University Press 2002) (with David B. Kopel and Brannon P. Denning).

The Law School Trip (the Insider's Guide to Law School) (Trafford 2001).

Law Journal Articles

The Second Amendment Right to be Negligent, 68 Florida Law Review ___ (forthcoming 2016).

In Search of the Golden Mean in the Gun Debate, 58 Howard Law Journal ___ (forthcoming 2015) (invited symposium participant).

Preying on the Graying: A Statutory Presumption to Prosecute Elder Financial Exploitation, 65 Hastings Law Journal 1099-1144 (2014).

Firearms Policy and the Black Community: Rejecting the "Wouldn't You Want A Gun If Attacked?" Argument, 45 Connecticut Law Review 1773–1808 (2013) (invited submission).

Why Can't We Be Friends: Improving Doctor-Lawyer Relationships Out of Mutual Self-Interest, 24 Health Lawyer 38-47 (2012) (journal of the ABA Health Law Section, invited submission).

Fixing the Broken Windows of Online Privacy through Private Ordering: A Facebook Application, 1 Wake Forest Law Review Online 74-85 (2011) (invited submission).

Fight Club: Doctors vs. Lawyers – A Peace Plan Grounded in Self-Interest, 83 Temple Law Review 309-67 (2011).

Neurotic, Paranoid Wimps – Nothing has Changed, 78 University of Missouri-Kansas City Law Review 1049-61 (2010) ("1L Stories" issue with introduction by Scott Turow, author of ONE L).

Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality, 74 University of Cincinnati Law Review 887-940 (2006).

Dead Sorrow: A Story About Loss and A New Theory of Wrongful Death Damages, 85 Boston University Law Review 1-51(2005).

Sound-Bite Gun Fights: Three Decades of Presidential Debating About Firearms, 73 University of Missouri-Kansas City Law Review 1015-45 (2005) (invited symposium participant).

Thousand Words are Worth a Picture: A Privacy Tort Response to Consumer Data Profiling, 98 Northwestern University Law Review 63-144 (2003).

Lock, Stock and Barrel: Civil Liability for Allowing Unauthorized Access to Firearms, 14 Journal on Firearms and Public Policy 137-60 (2002) (invited submission).

The Public Health Case for the Safe Storage of Firearms: Adolescent Suicides Add One More 'Smoking Gun', 51 Hastings Law Journal 953-1001 (2000).

Armed and Dangerous: Tort Liability for the Negligent Storage of Firearms, 32 Connecticut Law Review 1189-1245 (2000) (invited symposium participant).

Child Access Prevention Laws: A Common Sense Approach to Gun Control, 18 St. Louis University Public Law Review 47-78 (1999) (invited symposium participant).

"Lotts" More Guns and Other Fallacies Infecting the Gun Control Debate, 11 Journal on Firearms and Public Policy 139-76 (1999) (invited submission).

Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Police Lying, 32 University of California-Davis Law Review 389-453 (1999).

Poetry in Commotion: Katko v. Briney and the Bards of First-Year Torts, 74 Oregon Law Review 823-48 (1995).

The Tortious Marketing of Handguns: Strict Liability is Dead, Long Live Negligence, 19 Seton Hall Legislative Journal 777-820 (1995) (invited symposium participant).

Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places, 73 North Carolina Law Review 989-1088 (1995).

The Rhetoric of Gun Control, 42 American University Law Review 53-113(1992).

Strict Liability for Handgun Manufacturers: A Reply to Professor Oliver, 14 University of Arkansas at Little Rock Law Journal 511-29 (1992).

Handguns as Products Unreasonably Dangerous Per Se, 13 University of Arkansas at Little Rock Law Journal 599-619 (1991).

It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases, 66 Notre Dame Law Review 57-116 (1990).

Your Money or Your Life: Interpreting the Federal Act Against Patient Dumping, 24 Wake Forest Law Review 173-237 (1989).

Logical Fallacies and the Supreme Court: A Critical Analysis of Justice Rehnquist's Decisions In Criminal Procedure Cases, 59 University of Colorado Law Review 741-844 (1988).

Comparative Law Book Series Editor

Aya Gruber, Vicente de Palacios & Piet Hein van Kempen, Practical Global Criminal Procedure: United States, Argentina, and the Netherlands (Carolina Academic Press 2012).

Janet Leach Richards, Chen Wei & Lorella dal Pezzo, Practical Global Family Law: United States, China, and Italy (Carolina Academic Press 2009).

Andrew J. McClurg, Adem Koyuncu & Luis Eduardo Sprovieri, Practical Global Tort Litigation: United States, Germany, and Argentina (Carolina Academic Press 2007).

Monthly Columnist

American Bar Association Journal, 1997-2001. Author of *Harmless Error: A Truly Minority View of the Law*, satirical column that ran for fifty-one months on the Obiter Dicta page of the A.B.A. Journal.

Book Chapters

Minimizing Medical Malpractice Exposure (with Robert W. Bailey and Philip M. Gerson) in The Sages Manual of Quality, Outcomes & Patient Safety, Society of Gastrointestinal & Endoscopic Surgeons 553–67 (D. Tichansky et

al. eds 2012).

The Ten Commandments of [The First-Year Course of Your Choice] and Paying Respects to Law School's First Year in Techniques for Teaching Law 6, 23 (Gerald F. Hess & Steve Friedland eds. 1999).

The Danger Posed by Handguns Outweighs Their Effectiveness, in Gun Control 176-81 (Bruno Leone, Bonnie Szumski, Carol Wekesser & Charles P. Cozic eds. 1992).

Other Publications

Fight Club: Doctors v. Lawyers, Chicago Medicine, June 2012, at8 (cover story).

Book Review: Philip K. Howard, Life without Lawyers: Restoring Responsibility in America, 52 American Journal of Legal History 387 (2012).

Children of the World v. Santa Claus, in A Family Christmas 104-05 (Caroline Kennedy ed. 2007) (Christmas anthology collected by Caroline Kennedy including works by Charles Dickens, Robert Frost, Mark Twain, and many others).

Remembering Law School's Torments, UF Law Magazine, Summer 2007, at 42-44 (University of Florida College of Law alumni magazine).

Online Lessons on Unprotected Sex, Washington Post, Aug. 15, 2005, at A15 (op-ed).

In ID Theft, Customer Becomes the Commodity, Miami Herald, May 28, 2005, at 19A (op-ed).

Book Review: Joyce Lee Malcolm, Guns and Violence: The English Experience, 46 American Journal of Legal History 507 (2004).

Why I Teach, The Law Teacher, Spring 2004, at 16.

Risky Business: The Dangers of Using Humor, Orange County Lawyer, June 2003, at 32.

The Risks of Being Funny, GPSolo, Apr. 2003, at 60 (magazine of the ABA's General Practice, Solo & Small Firm Section).

Book Review: John Grisham, The Testament, 10 Bimonthly Review of Law Books 3 (Sept.-Oct. 1999).

Supreme Court Extends Daubert to All Expert Testimony, ATLA (Arkansas Trial Lawyers Association) Docket, Summer 1999, at 11.

Fourth Amendment Standing? – Take A Seat, ATLA Docket, Spring 1999, at 20.

Book Review: Grif Stockley, Blind Judgment, 10 Bimonthly Review of Law Books 1 (Jan.-Feb. 1999).

Final Footnote To Foster Tragedy: Supreme Court Recognizes Posthumous Attorney-Client Privilege, ATLA Docket, Winter 1998, at 4.

Supreme Court Gives Green Light To Police Chases, ATLA Docket, Summer 1998, at 6.

Of Mice and Men: Supreme Court Sets Standard of Review for Daubert Rulings, ATLA Docket, Spring 1998, at 6.

Ten Really Important Things To Know About Arguing In the U.S. Supreme Court, ATLA Docket, Winter 1998, at 4.

Mass Tort Class Actions: May They Rest In Pieces, ATLA Docket, Fall 1997, at 8.

Dear Employer . . ., Journal of Legal Education, June 1997, at 267.

Bryan County Commissioners v. Brown: Supreme Court Shrinks Municipal Liability for Police Brutality, ATLA Docket, Summer 1997, at 20.

Rungful Suits, A.B.A. Journal, June 1997, at 98.

A Day in the Life of Justice Antonin Scalia, ATLA Docket, Spring 1997, at 7.

A Review of the 1995-96 U.S. Supreme Court Term: The Effects on Trial Lawyers, ATLA Docket, Winter 1997, at 14.

Poetry In Commotion: Katko v. Briney and the Bards of First-Year Torts, The Law Teacher, Fall 1996, at 1.

Wheels of Misfortune: The Supreme Court Approves Pretextual Automobile Stops, ATLA Docket, Fall 1996, at 22.

BMW, Inc. v. Gore: The Supreme Court Finishes a "$2 Million Paint Job," ATLA Docket, Summer 1996, at 4.

Blue Process: Or How I Lost my Car Because My Husband's a Jerk, ATLA Docket, Spring 1996, at 25.

The World's Greatest Law Review Article, A.B.A. Journal, Oct. 1995, at 84 (also published in the United Kingdom in the New Law Journal, Aug. 18, 1995, at 1274.

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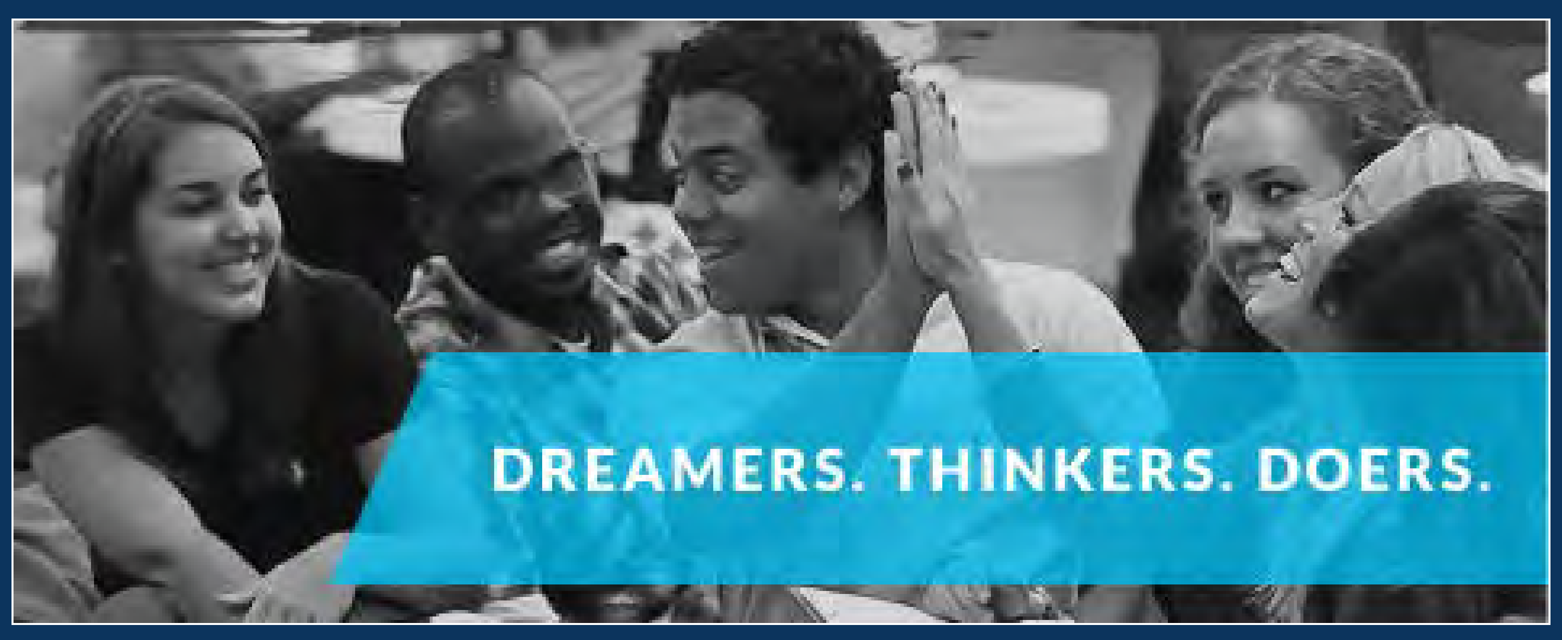

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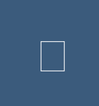
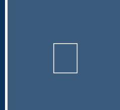
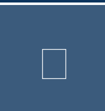
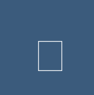
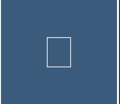

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About Professor Mulroy

As a law professor, Professor Mulroy has participated in the litigation of over a dozen cutting-edge cases in the above areas (mostly pro bono) which inform his scholarship, including the challenge to the Palm Beach County, Florida "butterfly ballot" in the 2000 presidential election; the first-ever federal court injunction against a state senate's ongoing internal election recount proceedings; litigation establishing the legal standard for coram nobis challenges to criminal convictions in Tennessee; the first commutation of a death sentence in Tennessee in 40 years; the first federal case imposing "cumulative voting" as a non-district remedy for minority vote dilution under the Voting Rights Act; and a 2014 Sixth Circuit decision overturning a death sentence. He is a frequent commentator in local media on legal issues, and has been quoted by such media organizations as the Associated Press, USA Today, the Washington Post, the Dallas Morning News, Public Radio International, and the Nashville Tennesseean.

Prof. Mulroy served as an elected Shelby County Commissioner from 2006 through 2014, drafting, inter alia, the county's first ethics code, animal welfare ordinance, and first legislation at any level in Tennessee to provide discrimination protection for the LGBT community. He has served on the board of the Memphis Bar Association and is a Memphis Bar Fellow, and for over ten years has served on the board of the Community Legal Center, which provides free legal services to the working poor.

Education

B.A., 1986, Cornell University; J.D., 1989, William & Mary.

Admitted

District of Columbia (Inactive); Tennessee.

Experience

Law Clerk to U.S. District Court Judge Hon. Roger Vinson, (N.D. Fla.), 1989-1991; Attorney, Civil Rights Division, U.S. Dept. of Justice, 1991- 2000; U.S. Attorney's Office. E.D. Va., 1999-2000; Law professor, University of Memphis, Cecil C. Humphreys School of Law, 2000-present (currently Professor of Law); Visiting Professor, William & Mary Law School, 2003.

Teaching Interests

Constitutional Law, Criminal Law, Election Law, Civil Rights, Civil Liberties, Criminal Procedure.

Publications

Professor Mulroy has published over 20 articles or book chapters in such journals as the Harvard Civil Rights-Civil Liberties L. Rev., North Carolina L. Rev., George Mason Law Review, Tulane Law Review, Tennessee Law Review, Florida State Law Review, and other journals on constitutional law, criminal law, election law, and criminal procedure. He was awarded the 2009 Democracy Innovator Award by the national Fairvote organization for his advocacy and scholarship on voting rights and election law issues.

Blood Type/Chirpy Personal Motto: B Positive.

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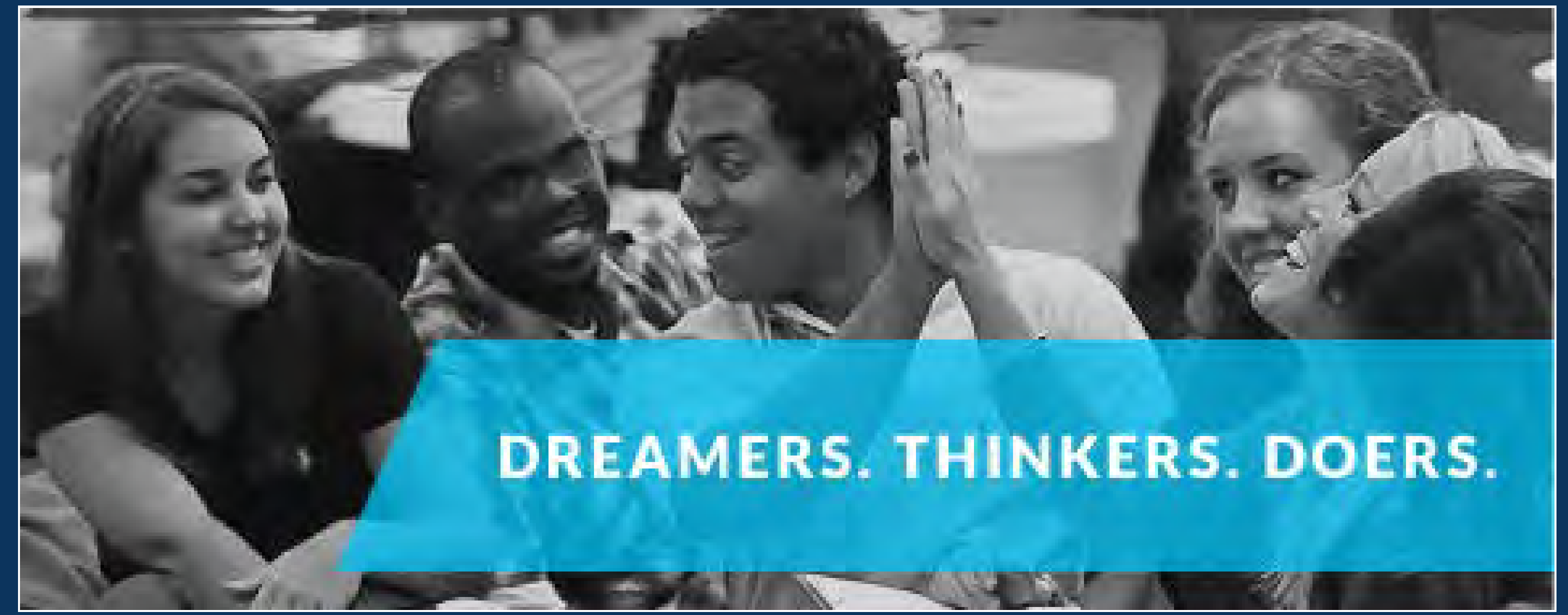

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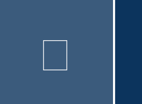
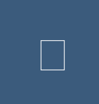
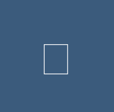
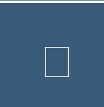
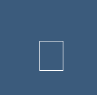
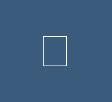

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About Professor Newman

Professor Newman currently teaches Contracts I and II, Conflict of Laws, and Antitrust Law. Prior to joining the University of Memphis law faculty, he practiced as a trial attorney with the U.S. Department of Justice in Washington, D.C. His primary practice involved civil antitrust litigation, analyzing the competitive effects of mergers and acquisitions, and investigating potential antitrust conduct violations. He also maintained an active pro bono practice, representing low-income tenants in litigation and alternative dispute resolution and advising a start-up on intellectual-property licensing issues.

Professor Newman's scholarship focuses on competition and innovation policy in technology markets. His articles have appeared the University of Pennsylvania Law Review, Washington University Law Review, Vanderbilt Law Review, Maryland Law Review, and Florida State University Law Review. He has also been published by and quoted in popular press sources, including Business Insider, Bloomberg, and New Scientist magazine.

While earning a J.D. from the University of Iowa College of Law, Professor Newman served as research assistant to Herbert Hovenkamp, was managing editor of the Iowa Law Review, and published student notes in journals at the University of Iowa and the University of Virginia.

Education

J.D., University of Iowa College of Law (2011); B.A., Iowa State University of Science & Technology (2007).

Selected Publications

- Antitrust in Zero-Price Markets: Applications, 94 WASH. U. L. REV. __ (forthcoming 2016).
- Antitrust in Zero-Price Markets: Foundations, 164 U. PA. L. REV. 149 (2015).
- Copyright Freeconomics, 66 VAND. L. REV. 1409 (2013).
- Personal Jurisdiction and Choice of Law in the Cloud, 73 MD. L. REV. 313 (2013) (with Damon Andrews).
- Anticompetitive Product Design in the New Economy, 39 FLORIDA ST. U. L. REV. 681 (2012).

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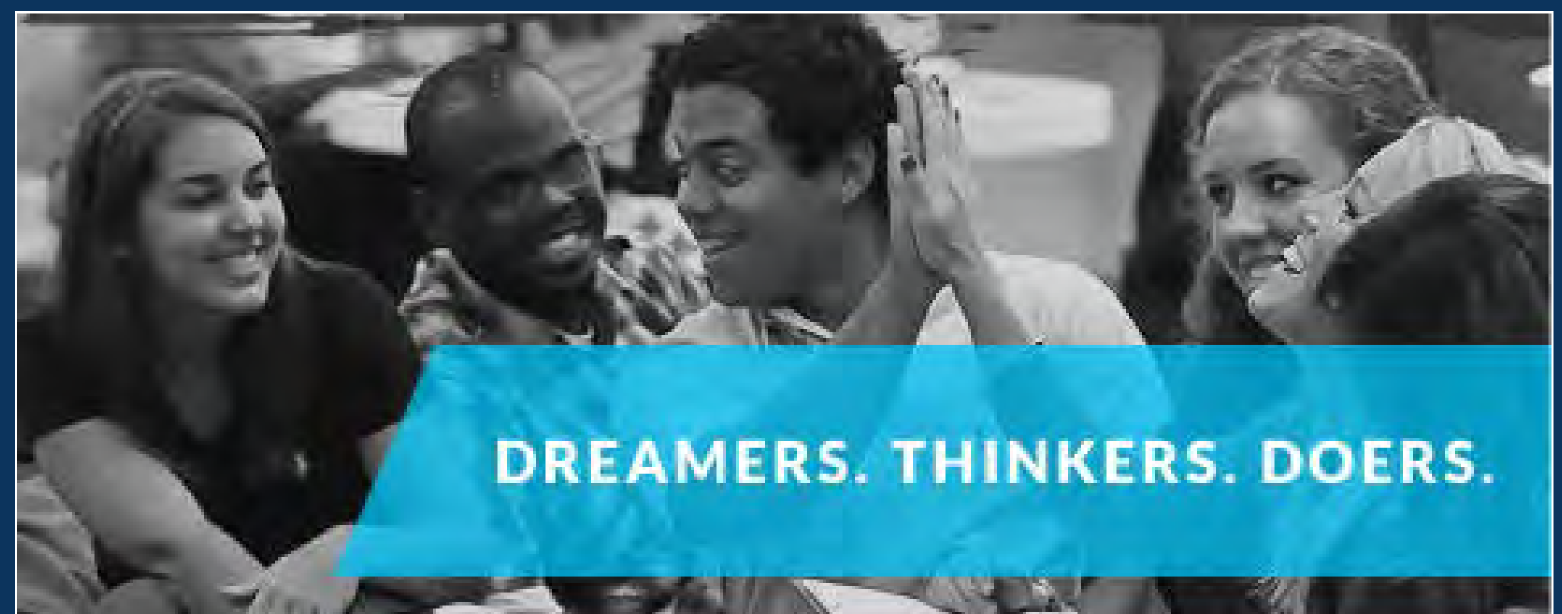

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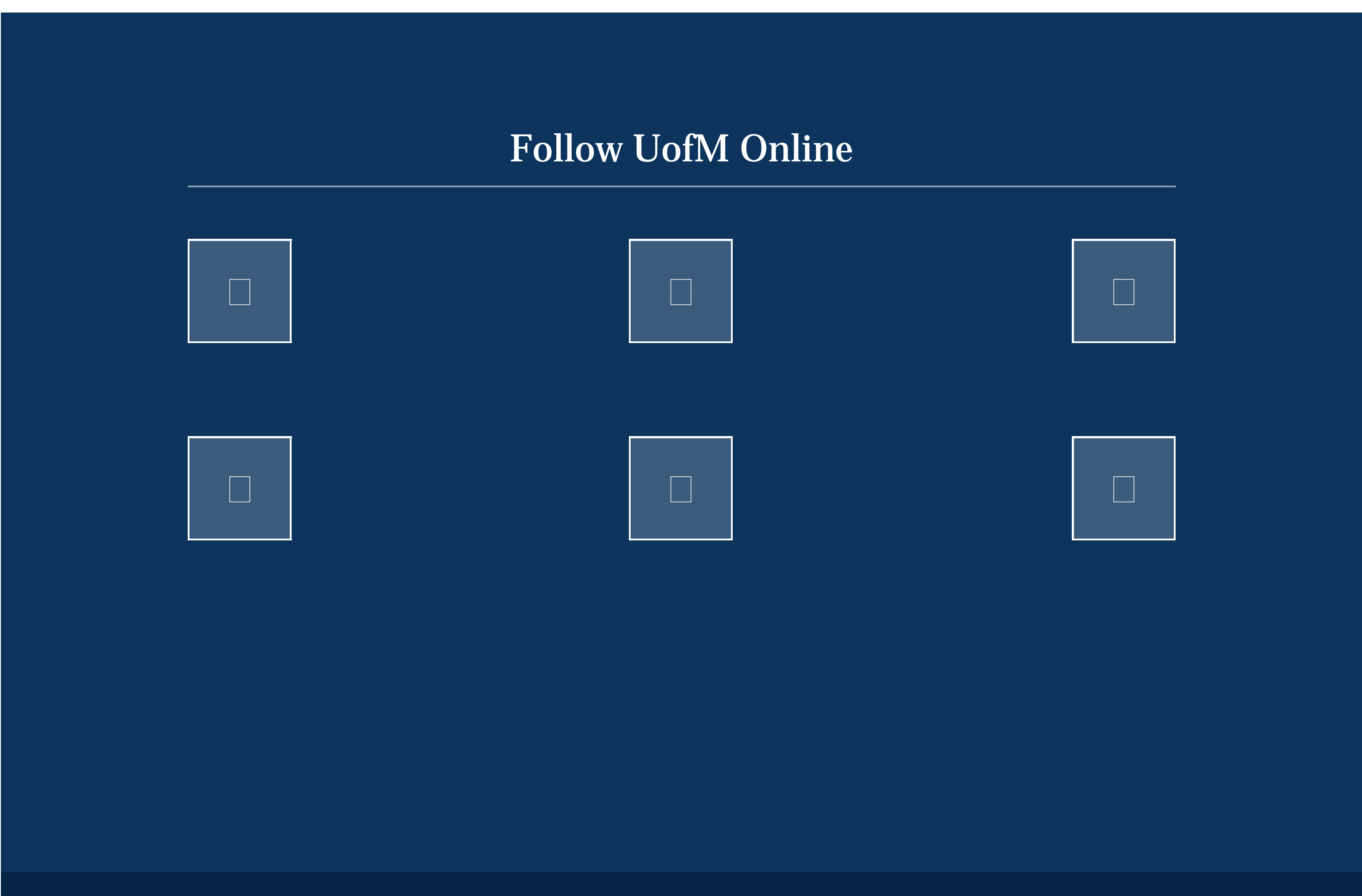

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About Professor Romantz

Professor Romantz has served on the faculty at Memphis Law since 1999. He has served as the Associate Dean for Academic Affairs since 2010. He is the faculty advisor for the Student Bar Association and the Hispanic Law Students Association.

Education

B.A., 1987 University of Michigan; J.D. (with honors), 1995, Suffolk University Law School

Admitted

Massachusetts (1995); New York (1997).

Experience

1995-1996, Assistant District Attorney (Special), Essex County Massachusetts; 1996-1998, Instructor of Law, Legal Practice Skills Program, Suffolk University Law School

Teaching Interests

Legal Method, Legal Argument, Advocacy, Drafting, and Legislation

Publications

Professor Romantz recently published, "You Have the Right to Remain Silent": A Case for the Use of Silence as Substantive Proof of the Criminal Defendant's Guilt, 38 Ind. L. Rev. 1 (2005 (lead article), and The Truth About Cats & Dogs: Legal Writing Courses and the Law School Curriculum, 52 Kan. L. Rev. 105 (2003). He has also published in the Stetson Law Review, Perspectives: Teaching Legal Research and Writing, and the Suffolk University Law Review. He co-authored a book titled, Legal Analysis: The Fundamental Skill (1998, Carolina Academic Press) and formerly served as editor of Martindale-Hubbell's Massachusetts Law Digest. Professor Romantz has spoken at a variety of regional and national conferences, including the Legal Writing Institute Conference, New England Legal Writing Consortium, the Rocky Mountain LRW Conference, and the Central Regional LRW Conference. Professor Romantz serves on the Board of Directors for the Association of Legal Writing Directors and the Community Legal Center.

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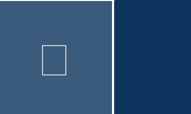
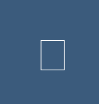
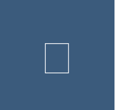
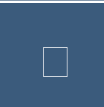
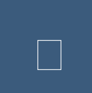
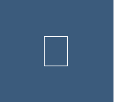

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About Professor Schaffzin

Now in his seventh year at The University of Memphis Cecil C. Humphreys School of Law, Professor Schaffzin is an Assistant Professor of Law and the Law School's Director of Experiential Learning. Professor Schaffzin co-directs and teaches the Neighborhood Preservation Clinic . He also directs the Externship Program and teaches the Externship Seminar. Previously, Professor Schaffzin has taught the Civil Litigation Clinic, the Housing Adjudication Clinic, Trial Advocacy, and Contracts I and II. In 2014, National Jurist magazine recognized the Housing Adjudication Clinic as one of the 15 most innovative law school clinical courses in the country. Since arriving at the Law School, Professor Schaffzin has additionally served as the coach of the National Trial Team. In 2013, the Trial Team won its regional championship and finished as National Semifinalists (final four out of 320 teams) in the prestigious National Trial Competition.

Professor Schaffzin is an active contributor to the national clinical teaching community. Presently, he serves on the Planning Committee for the 2016 AALS Clinical Conference and is chairing the Planning Committee for the 2015 Southern Clinical Conference. He also serves as co-chair of the AALS Externships Committee and is a member of the Clinical Legal Education Association's Externships Committee.

Prior to joining the Law School faculty, Professor Schaffzin was a Visiting Assistant Professor of Law at the University of North Dakota School of Law, instructing the school's Housing and Employment Litigation Clinic. While at the University of North Dakota Law School, he also coached the school's National Trial Team. In both 2008 and 2009, the UND team won its Regional Championship and advanced to the National Final rounds of the National Trial Competition.

Professor Schaffzin began his career at Pepper Hamilton LLP in Philadelphia. At Pepper, he worked for five years as an associate in the firm's Health Effects Litigation Practice Group and focused his practice on pharmaceutical and medical device products liability litigation. Professor Schaffzin also maintained an active pro bono practice, including work on a successful death penalty appeal under the Pennsylvania Post-Conviction Relief Act. He received the Pennsylvania Bar Association Pro Bono Award in 2005.

In 2005, Professor Schaffzin joined GlaxoSmithKline (GSK) as Counsel in the pharmaceutical company's U.S. Legal Operations group. At GSK, Professor Schaffzin served on the Sales, Marketing, and Managed Care Legal Team, providing guidance to the company's diabetes franchise and pediatric vaccines product teams, as well as to several sales regions, concerning product promotion, fraud and abuse, and general regulatory compliance issues.

Before starting his legal career, Professor Schaffzin served as a public affairs officer at the Embassy of Israel in Washington, D.C.

Education

J.D. Temple University, 2000 (cum laude); B.A., Temple University, Journalism (magna cum laude), 1996.

Admitted

Tennessee, Pennsylvania (inactive), New Jersey (retired), North Dakota (inactive).

Experience

Assistant Professor of Law and Director of Experiential Learning, University of Memphis Cecil C. Humphreys School of Law (January 2011-Present); Visiting Assistant Professor of Law, University of Memphis Cecil C. Humphreys School of Law (August 2009-December 2010); Visiting Assistant Professor of Law, University of North Dakota School of Law (August 2007-May 2009); Counsel, GlaxoSmithKline (2005-2007); Associate, Pepper Hamilton LLP (2000-2005).

Courses Taught

Current Courses: Neighborhood Preservation Clinic, Externship Course

Other Courses Taught: Civil Litigation Clinic, Housing Adjudication Clinic, Trial Advocacy, Contracts

Publications

So Why Not an Experiential Law School . . . Starting With Reflection in the First Year?, 7 ELON L. REV. 383 (March 2015) (by invitation).

Teamwork: Doctors and Lawyers Working Together Could Be Cure for Many, 51 TENN. B. J. 12 (Jan. 2015) (with E. Lay, C. McDaniel, L. Mutrie, A. Seamon, L. Seely, E. Todaro).

Warning! Lawyer Advertising May Be Hazardous to Your Health: A Call to Limit Commercial Solicitation of Clients in Pharmaceutical Litigation, 8 CHARLESTON LAW REVIEW 319 (Winter 2013-14) (by invitation), reprinted in 63 DEFENSE LAW JOURNAL 3 (2014).

Preaching to the Trier: Why Judicial Understanding of Law School Clinics is Essential to Continued Progress in Legal Education, 17 CLINICAL L. REV. 515 (2011) (with M. Jackson).

Landlord Weapon or Tenant Shield? A Proposal to Reform North Dakota's Residential Security Deposit Statute, 85 N.D. L. REV. 251 (2009) (lead article).

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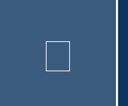
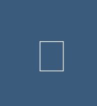
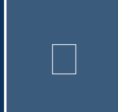
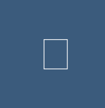
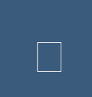
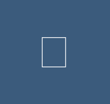

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About Professor Schaffzin

Professor Schaffzin joined the faculty of the University of Memphis Cecil C. Humphreys School of Law in 2009, after serving for three years as Assistant Professor at the University of North Dakota School of Law. Prior to her services at UND, she was an Abraham L. Freedman Fellow & Lecturer in Law at Temple University Beasley School of Law. She practiced law for three years in the area of construction litigation in New York and Philadelphia. As a transition from practice to law teaching, she clerked for the Honorable James Knoll Gardner in the United States District Court for the Eastern District of Pennsylvania.

In addition to her scholarly interests, Professor Schaffzin is deeply committed to teaching students trial advocacy skills. She is certified by the National Institute of Trial Advocacy as a Teacher of Trial Advocacy Skills. At the University of North Dakota School of Law, she coached the Trial Team to consecutive regional championships and

to the National Trial Competition. While practicing and clerking, she coached the Trial Team at Franklin Learning Center in Philadelphia, PA, to several city championships and to the state competition. In addition to her other courses at Memphis, Schaffzin teaches Trial Advocacy. She has also been invited to address the Advisory Committee on Evidence Rules.

Education

LLM, Temple University Beasley School of Law, Philadelphia, PA; JD, Temple University Beasley School of Law, Philadelphia, PA; BA, LaSalle University, Philadelphia, PA

Admitted

New York (inactive); New Jersey; Pennsylvania (inactive); United States District Court for the Eastern District of Pennsylvania; United States Tax Court.

Experience

Professor of Law, Director of Faculty Development, Cecil C. Humphreys School of Law, University of Memphis (present); Assistant Professor of Law, University of North Dakota School of Law (2006-2009); Abraham L. Freedman Fellow & Lecturer in Law, Temple University Beasley School of Law (2004-2006); Judicial Law Clerk, Honorable James Knoll Gardner, United States District Judge for the Eastern District of Pennsylvania (2003-2004); Associate, Mazur, Carp & Rubin, P.C., New York, NY (2002-2003); Associate, Pepper Hamilton, LLP, Philadelphia, PA (2000-2002).

Teaching Interests

Evidence, Civil Procedure, Professional Responsibility, and Trial Advocacy

Publication and Research

Professor Schaffzin focuses her research on the intersection of evidence, civil procedure, and professional responsibility, with an emphasis on the issue of privilege. Her work has been published in the UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM, the BOSTON UNIVERSITY PUBLIC INTEREST LAW JOURNAL, the NORTH DAKOTA LAW REVIEW, THE TENNESSEE LAW REVIEW, THE CHARLESTON LAW REVIEW and the TEMPLE LAW REVIEW. Her course package reflects her interest in the area of her scholarship.

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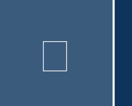
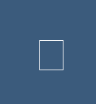
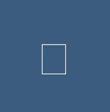
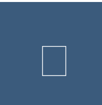
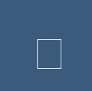
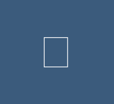

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Cecil C. Humphreys School of Law

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Education

B.A., 1968, Harpur College, S.U.N.Y. Binghamton; J.D., 1972, University of Virginia; LL.M. (Cr. J), 1973, New York University.

Admitted

New York Bar.

Experience

Associate Appellate Counsel, 1974-76, The Legal Aid Society, New York, NY; Attorney National Labor Relations Board; joined The University of Memphis School of Law faculty in 1976.

Teaching Interests

Constitutional Law, Criminal Procedure, Criminal Law.

Publications

Professor Shapiro's articles on Constitutional Law and Criminal Procedure have appeared in the Arizona Law Review, Seton Hall Law Review, South Carolina Law Review, Tennessee Law Review, Valparaiso Law Review, Oklahoma Law Review, and the West Virginia Law Review. In 1982, he co-authored TENNESSEE CRIMINAL PROCEDURE with Orrin K. Ames.

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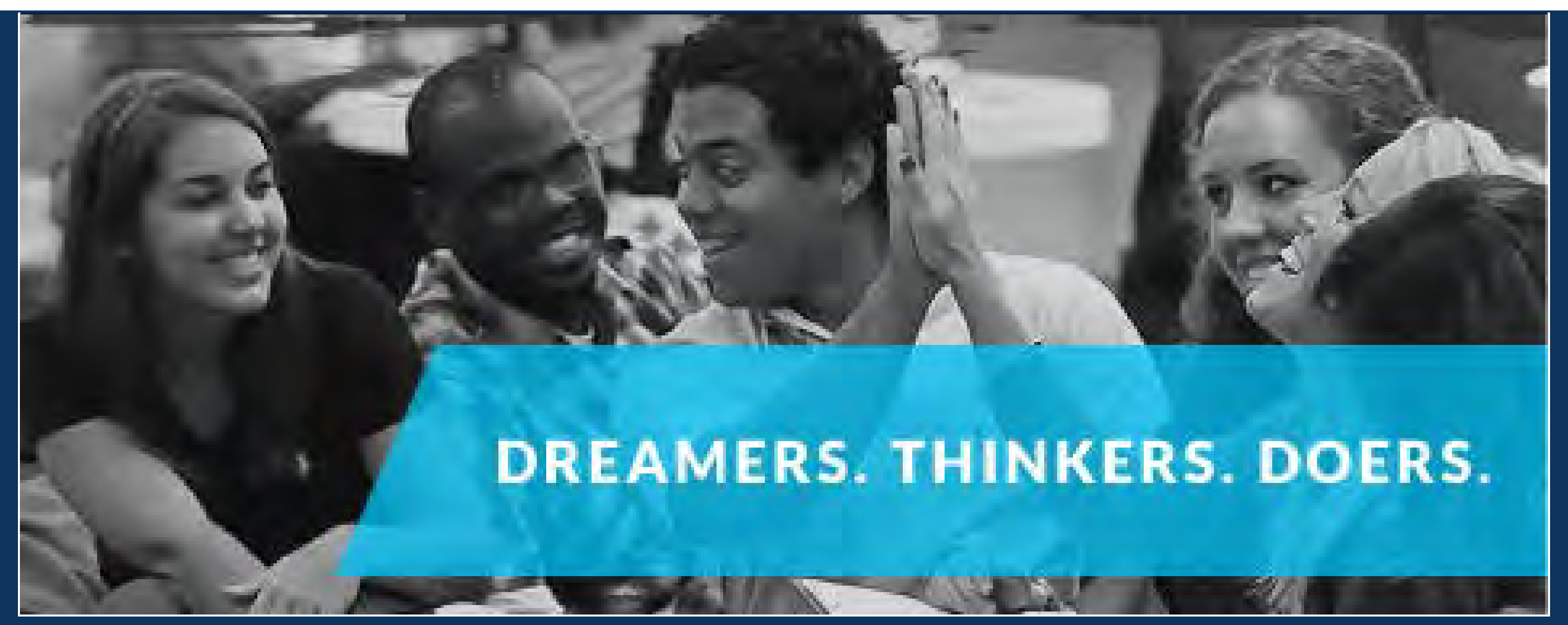

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Kevin H. Smith

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About Professor Smith

Professor Smith has served on the Memphis Law faculty since 1993. He served as Dean of the law school from 2007-2012, overseeing the law school's move downtown to the historic building at 1 North Front Street in the former U.S. Custom House/Federal Courthouse/U.S. Post Office.

Education

B.A., 1977, Drake University; M.A., 1981, J.D., 1983, Ph.D., 1994, The University of Iowa.

Admitted

Iowa and Maryland (on inactive status).

Experience

Visiting Associate Professor, Notre Dame Law School, August 2000 to May 2001, Visiting Assistant Professor, Chicago-Kent College of Law, 1990-93; Visiting Assistant Professor, Department of Political Science, Northern Illinois University, Spring 1991; Associate Attorney, Cook, Howard, Downes & Tracy, Towson, Maryland, 1984-88; joined The University of Memphis School of Law faculty in 1993.

Research Interests

Secured Transactions, Commercial Paper, Jurisprudence, Business Organizations, Social Science and Statistics in the Law, and Law, Science, and Technology.

Publications

Professor Smith has published on topics such as disability law, Supreme Court certiorari decision making, secured transactions, law school pedagogy, and legal reasoning in the Akron Law Review, the Albany Law Review, the Denver Law Review, the Hofstra Law Review, the Law Review of Michigan State University--Detroit College of Law, the Loyola University Chicago Law Journal, the Oklahoma Law Review, the Seton Hall Law Review, the University of Kansas Law Review, the University of Memphis Law Review, and the Wayne Law Review.

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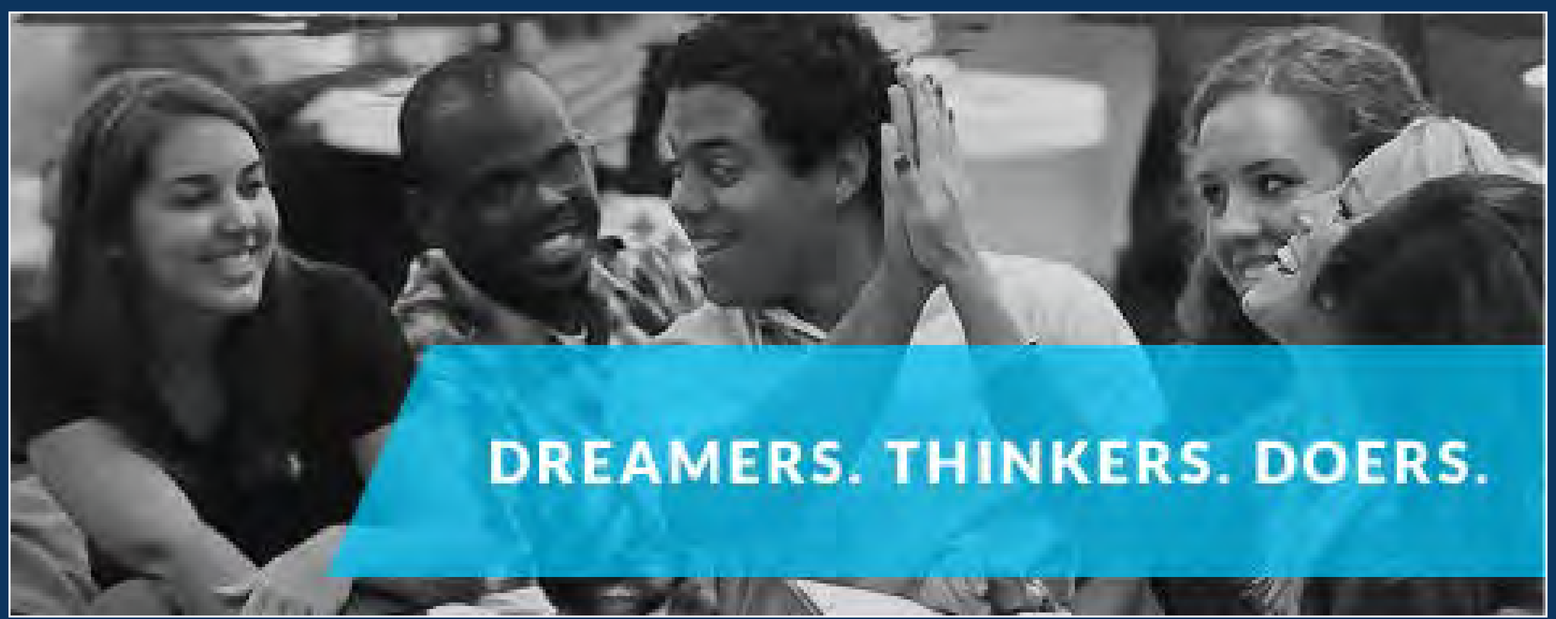

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About Professor Wilson

Professor Wilson came to the University of Memphis to accept the Director of Legal Methods position in 2009. Prior to joining the faculty at the University of Memphis, she was a litigator with a national civil litigation and arbitration practice, focusing on business disputes and securities industry arbitrations. In 2002, the American Academy of Otolaryngology - Head & Neck Surgery presented Prof. Wilson with the Board of Governors Chair Award in honor of her work in health care litigation on behalf of physicians and other health care providers.

As a member of the community, Prof. Wilson has provided pro bono legal services through Memphis Area Legal Services and the Community Legal Center. In connection with her pro bono work, Memphis Area Legal Services awarded her the Advocate Circle Award for Individuals in 2006.

Prof. Wilson graduated first in her class at the Washington University School of Law and was inducted into the Order of the Coif. During law school, she was a staff member of the Washington University Law Quarterly and a member of the Environmental Law National Moot Court Team.

Education

B.A., University of Arkansas, with honors; J.D., Washington University, with honors.

Admitted

Tennessee; Illinois (inactive); Missouri (inactive); U.S. District Court for the Western District of Tennessee; U.S. District Court for the Southern District of Illinois; U.S. Court of Appeals for the Ninth Circuit.

Experience

Assistant Professor of Law and Director of Legal Methods, Cecil C. Humphreys School of Law (2009-present); Adjunct Professor of Legal Methods, Cecil C. Humphreys School of Law (2007-2009); Associate, Bass, Berry & Sims, PLC (2007-2009); Associate, Tate, Lazarini, Brady & Davis, PLC (2005-2007); Associate, Cates, Kurowski, Bailey & Shultz, LLC (2003-2005); Associate, Carr, Korein, Tillery, Kunin, Montroy, Cates, Katz & Glass, LLC (and successor firms) (2001-2003).

Teaching Interests

Legal Methods, Advocacy, Alternative Dispute Resolution, Professional Responsibility

Publications

Please see professor Wilson's SSRN page for details about her scholarly research.

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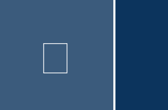
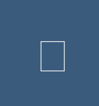
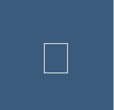
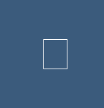
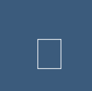
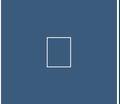

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About Professor Zawisza

Chris Zawisza is a nationally recognized expert and practitioner in the field of children's law. She was a founder and director of Children First (now Florida's Children First), an innovative statewide law reform project to enhance children's legal rights by taking into consideration their medical, educational and social needs. She has represented children at all levels of the court system from administrative levels to the United States Supreme Court and has practiced extensively before the Florida Legislature on behalf of children and families.

Among her achievements are: litigation and settlement of a class action lawsuit, M.E.v. Bush, on behalf of 45,000 dependent and delinquent children in Florida to obtain necessary mental health treatment; representation of foster children in challenging the gay adoption ban in Florida in Lofton v. Florida Department of Children and Families, 157 F.Supp. 2d 1372 (S.D. Fla. 2001), 358 F.3d 804 (11th Cir. 2004), 543 U. S. 1081 (cert. denied 2005); drafting

and advocacy to create a funded relative caregiver program in Florida; drafting of the Florida constitutional amendment providing universal pre-kindergarten education to four year olds; and representation of Amici Curiae before the Tennessee Supreme Court in In re A. M. H., 215 S.W. 3d 793 (Tenn. 2007), which resulted in a unanimous decision clarifying termination of parental rights requirements and the concept of substantial harm.

Most recently, Professor Zawisza had developed and delivered a Juvenile Court Practice Series on behalf of the Tennessee Administrative Office of the Courts. Titles in this PowerPoint series include: Trial Skills for Children in the Courtroom; Expert Witnesses in Juvenile Court; Ethics Refresher for Juvenile Court Practice; and Cross-Cultural Competency.

As the faculty advisor for the Public Action Law Society, Professor Zawisza has mentored students in the Alternative Spring Break (ASB) Project, which in 2010 sent 15 law students to Miami to assist Haitians caught in Miami after a hurricane to achieve temporary protected status. In 2011, 30 law students from around the country will participate in ASB at Memphis Law and will work on pro se divorce, advanced directives, and non-profit projects.

Education

B.A., magna cum laude, State University of New York at Albany, M. A. in Public Policy, the University of Wisconsin, J.D., the University of Virginia

Admitted

Tennessee, New York and Florida

Experience

Professor of Clinical Law and Director, Child and Family Litigation Clinic, University of Memphis Cecil C. Humphreys School of Law, 2009 - present.

Associate Professor of Clinical Law and Director, Child and Family Litigation Clinic, University of Memphis Cecil C. Humphreys School of Law, 2004 to 2009.

Over 30 years of legal practice in the area of juvenile and family law in Florida and Tennessee, 19 years as a Legal Services attorney; Director, Children First and Clinic Instructor, Nova Southeastern University Shepard Broad Law Center, 1996
-2002.

Teaching Interests

Child Advocacy, Clinical Legal Education, Juvenile Law, Disability Law and Practice

Publications

Professor Zawisza has presented poster sessions at AALS clinical conferences and has organized and moderated panel discussions at AALS Global Alliance for Justice Education Conferences in Poland and in Argentina. She writes in the area of child welfare law and practice and clinical teaching methodologies; her most recent publication is "Storied Anna Mae He Decision Clarifies Law But Leaves Unanswered Questions," 38 U. Mem. L. Rev. 637 (2008), which tracks the seven year custody battle between Chinese birth parents and American foster parents. She currently serves on the Tennessee Supreme Court Dependency Court Improvement Task Force and the Tennessee Children's Justice Task Force. Professor Zawisza has received numerous honors and awards, including the American Bar Association Young Lawyers National Child Advocacy Award. She has been interviewed and quoted extensively on children's legal issues in print and broadcast media, including The New York Times, Brian Williams, then of MSNBC, and the Associated Press.

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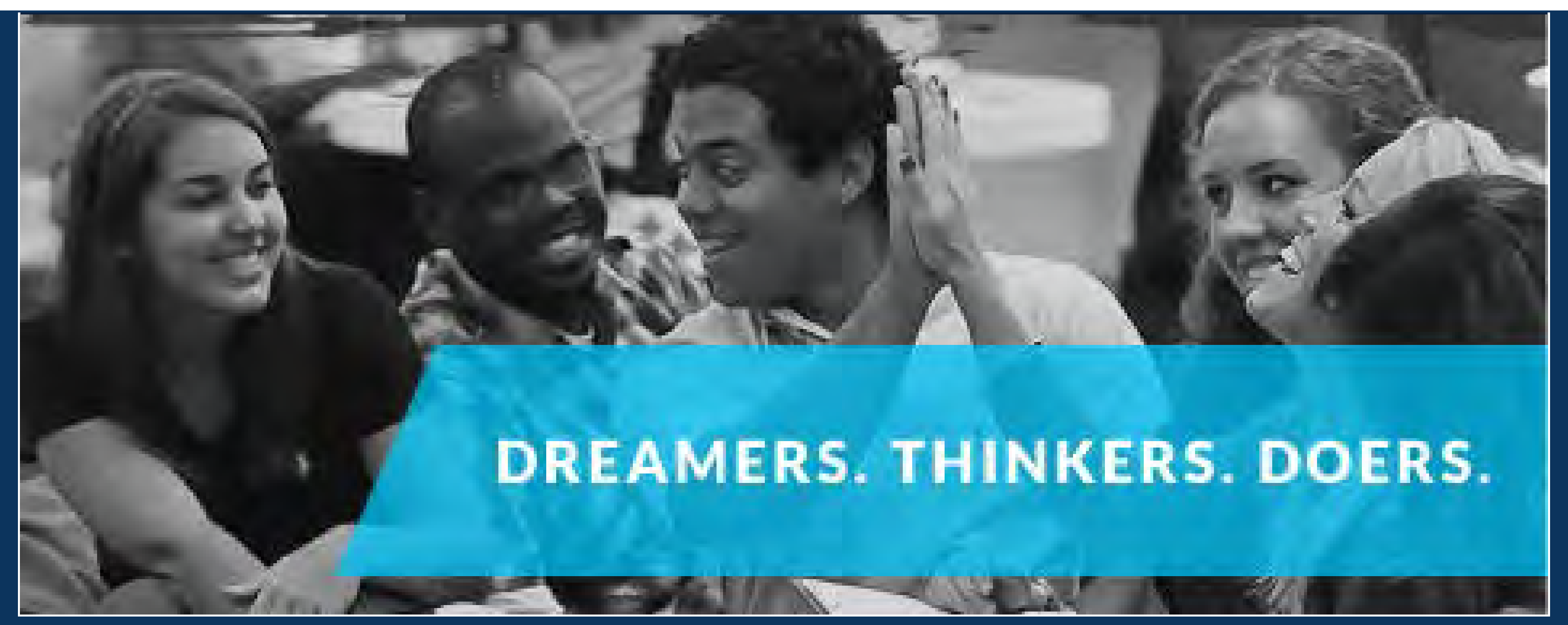

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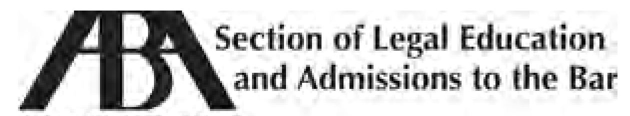

EMPLOYMENT SUMMARY FOR 2013 GRADUATES

EMPLOYMENT STATUS	FULL TIME LONG TERM	FULL TIME SHORT TERM	PART TIME LONG TERM	PART TIME SHORT TERM	NUMBER
Employed - Bar Passage Required	76	2	4	5	87
Employed - J.D. Advantage	6	0	0	2	8
Employed - Professional Position	6	1	0	0	7
Employed - Non-Professional Position	0	0	1	0	1
Employed - Undeterminable	0	0	0	0	0
Pursuing Graduate Degree Full Time					0
Unemployed - Start Date Deferred					1
Unemployed - Not Seeking					4
Unemployed - Seeking					14
Employment Status Unknown					2
Total Graduates					124

LAW SCHOOL/UNIVERSITY FUNDED POSITIONS	FULL TIME LONG TERM	FULL TIME SHORT TERM	PART TIME LONG TERM	PART TIME SHORT TERM	NUMBER
Employed - Bar Passage Required	0	0	0	0	0
Employed - J.D. Advantage	0	0	0	0	0
Employed - Professional Position	0	0	0	0	0
Employed - Non-Professional Position	0	0	0	0	0
Total Employed by Law School/University	0	0	0	0	0

EMPLOYMENT TYPE	FULL TIME LONG TERM	FULL TIME SHORT TERM	PART TIME LONG TERM	PART TIME SHORT TERM	NUMBER
Law Firms					
Solo	1	0	2	1	4
2 - 10	30	0	0	0	30
11 - 25	7	1	0	0	8
26 - 50	6	0	0	0	6
51 - 100	2	0	0	0	2
101 - 250	2	0	0	0	2
251 - 500	4	0	0	0	4
501 +	0	0	0	0	0
Unknown Size	0	0	0	1	1
Business & Industry	13	1	1	1	16
Government	11	0	1	0	12
Pub. Int.	1	1	1	3	6
Clerkships - Federal	5	0	0	0	5
Clerkships - State & Local	5	0	0	0	5
Clerkships - Other	0	0	0	0	0
Education	1	0	0	1	2
Employer Type Unknown	0	0	0	0	0
Total	88	3	5	7	103

EMPLOYMENT LOCATION	STATE	NUMBER
State - Largest Employment	Tennessee	88
State - 2nd Largest Employment	Arkansas	3
State - 3rd Largest Employment	Virginia	3

Employed in Foreign Countries	0

- **Employed – Bar Passage Required.**

A position in this category requires the graduate to pass a bar exam and to be licensed to practice law in one or more jurisdictions. The positions that have such a requirement are varied and include, for example, positions in law firms, business, or government. However, not all positions in law firms, business, or government require bar passage; for example, a paralegal position would not. Positions that require the graduate to pass a bar exam and be licensed after beginning employment in order to retain the position are included in this category. Judicial clerkships are also included in this category.

- **Employed – J.D. Advantage.**

A position in this category is one for which the employer sought an individual with a J.D., and perhaps even required a J.D., or for which the J.D. provided a demonstrable advantage in obtaining or performing the job, but which does not itself require bar passage or an active law license or involve practicing law. Examples of positions for which a J.D. is an advantage include a corporate contracts administrator, alternative dispute resolution specialist, government regulatory analyst, FBI agent, and accountant. Also included might be jobs in personnel or human resources, jobs with investment banks, jobs with consulting firms, jobs doing compliance work in business and industry, jobs in law firm professional development, and jobs in law school career services offices, admissions offices, or other law school administrative offices. Doctors or nurses who plan to work in a litigation, insurance, or risk management setting, or as expert witnesses, would fall into this category, as would journalists and teachers (in a higher education setting) of law and law related topics. It is an indicator that a position does not fall into this category if a J.D. is uncommon among persons holding such a position.

- **Employed – Professional Position.**

A position in this category is one that requires professional skills or training but for which a J.D. is neither required nor a demonstrable advantage. Examples of persons in this category include a math or science teacher, business manager, or performing arts specialist. Other examples include professions such as doctors, nurses, engineers, or architects, if a J.D. was not demonstrably advantageous in obtaining the position or in performing the duties of the position.

- **Employed – Non-Professional Position.**

A position in this category is one that does not require any special professional skills or training.

- **Short-term.**

A short-term position is one that has a definite term of less than one year. Thus, a clerkship that has a definite term of one year or more is not a short-term position. It also includes a position that is of an indefinite length if that position is not reasonably expected to last for one year or more.

A position that is envisioned by the graduate and the employer to extend for one year or more is not a short-term position even though it is conditioned on bar passage and licensure. Thus, a long-term position that is conditioned on passing the bar exam by a certain date does not become a short-term position because of the condition.

- **Long-term.**

A long-term position is one that does not have a definite or indefinite term of less than one year. It may have a definite length of time as long as the time is one year or longer. It may also have an indefinite length as long as it is expected to last one year or more. The possibility that a short-term position may evolve into a long-term position does not make the position a long-term position.

- **Full-time.**

A full-time position is one in which the graduate works a minimum of 35 hours per week. A full-time position may be either short-term or long-term.

- **Part-time.**

A part-time position is one in which the graduate works less than 35 hours per week. A part-time position may be either short-term or long-term.

Submitted On 3/17/2014 11:19:56 AM

Last Updated 3/17/2014 10:52:16 AM

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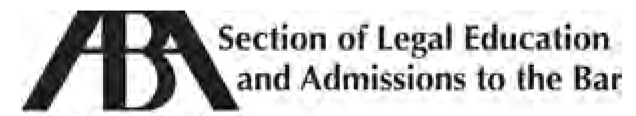

EMPLOYMENT SUMMARY FOR 2014 GRADUATES

EMPLOYMENT STATUS	FULL TIME LONG TERM	FULL TIME SHORT TERM	PART TIME LONG TERM	PART TIME SHORT TERM	NUMBER
Employed - Bar Passage Required	75	1	1	2	79
Employed - J.D. Advantage	6	1	0	1	8
Employed - Professional Position	7	1	0	1	9
Employed - Non-Professional Position	4	1	3	1	9
Employed - Undeterminable	0	0	0	0	0
Pursuing Graduate Degree Full Time					2
Unemployed - Start Date Deferred					1
Unemployed - Not Seeking					3
Unemployed - Seeking					20
Employment Status Unknown					0
Total Graduates					131

LAW SCHOOL/UNIVERSITY FUNDED POSITIONS	FULL TIME LONG TERM	FULL TIME SHORT TERM	PART TIME LONG TERM	PART TIME SHORT TERM	NUMBER
Employed - Bar Passage Required	0	0	0	0	0
Employed - J.D. Advantage	0	0	0	0	0
Employed - Professional Position	0	0	0	0	0
Employed - Non-Professional Position	0	0	0	0	0
Total Employed by Law School/University	0	0	0	0	0

EMPLOYMENT TYPE	FULL TIME LONG TERM	FULL TIME SHORT TERM	PART TIME LONG TERM	PART TIME SHORT TERM	NUMBER
Law Firms					
Solo	6	0	0	0	6
2 - 10	32	0	0	2	34
11 - 25	3	1	0	0	4
26 - 50	4	0	0	0	4
51 - 100	3	0	0	0	3
101 - 250	2	0	0	0	2
251 - 500	0	0	0	0	0
501 +	2	0	0	0	2
Unknown Size	2	0	0	0	2
Business & Industry	13	3	2	1	19
Government	9	0	1	1	11
Pub. Int.	2	0	1	1	4
Clerkships - Federal	5	0	0	0	5
Clerkships - State & Local	5	0	0	0	5
Clerkships - Other	0	0	0	0	0
Education	4	0	0	0	4
Employer Type Unknown	0	0	0	0	0
Total	92	4	4	5	105

EMPLOYMENT LOCATION	STATE	NUMBER
State - Largest Employment	Tennessee	74
State - 2nd Largest Employment	Arkansas	3
State - 3rd Largest Employment	Texas	2

Employed in Foreign Countries	1

- **Employed – Bar Passage Required.**

A position in this category requires the graduate to pass a bar exam and to be licensed to practice law in one or more jurisdictions. The positions that have such a requirement are varied and include, for example, positions in law firms, business, or government. However, not all positions in law firms, business, or government require bar passage; for example, a paralegal position would not. Positions that require the graduate to pass a bar exam and be licensed after beginning employment in order to retain the position are included in this category. Judicial clerkships are also included in this category.

- **Employed – J.D. Advantage.**

A position in this category is one for which the employer sought an individual with a J.D., and perhaps even required a J.D., or for which the J.D. provided a demonstrable advantage in obtaining or performing the job, but which does not itself require bar passage or an active law license or involve practicing law. Examples of positions for which a J.D. is an advantage include a corporate contracts administrator, alternative dispute resolution specialist, government regulatory analyst, FBI agent, and accountant. Also included might be jobs in personnel or human resources, jobs with investment banks, jobs with consulting firms, jobs doing compliance work in business and industry, jobs in law firm professional development, and jobs in law school career services offices, admissions offices, or other law school administrative offices. Doctors or nurses who plan to work in a litigation, insurance, or risk management setting, or as expert witnesses, would fall into this category, as would journalists and teachers (in a higher education setting) of law and law related topics. It is an indicator that a position does not fall into this category if a J.D. is uncommon among persons holding such a position.

- **Employed – Professional Position.**

A position in this category is one that requires professional skills or training but for which a J.D. is neither required nor a demonstrable advantage. Examples of persons in this category include a math or science teacher, business manager, or performing arts specialist. Other examples include professions such as doctors, nurses, engineers, or architects, if a J.D. was not demonstrably advantageous in obtaining the position or in performing the duties of the position.

- **Employed – Non-Professional Position.**

A position in this category is one that does not require any special professional skills or training.

- **Short-term.**

A short-term position is one that has a definite term of less than one year. Thus, a clerkship that has a definite term of one year or more is not a short-term position. It also includes a position that is of an indefinite length if that position is not reasonably expected to last for one year or more.

A position that is envisioned by the graduate and the employer to extend for one year or more is not a short-term position even though it is conditioned on bar passage and licensure. Thus, a long-term position that is conditioned on passing the bar exam by a certain date does not become a short-term position because of the condition.

- **Long-term.**

A long-term position is one that does not have a definite or indefinite term of less than one year. It may have a definite length of time as long as the time is one year or longer. It may also have an indefinite length as long as it is expected to last one year or more. The possibility that a short-term position may evolve into a long-term position does not make the position a long-term position.

- **Full-time.**

A full-time position is one in which the graduate works a minimum of 35 hours per week. A full-time position may be either short-term or long-term.

- **Part-time.**

A part-time position is one in which the graduate works less than 35 hours per week. A part-time position may be either short-term or long-term.

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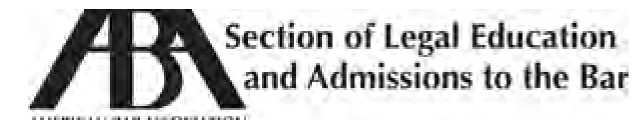

EMPLOYMENT SUMMARY FOR 2015 GRADUATES

EMPLOYMENT STATUS	FULL TIME LONG TERM	FULL TIME SHORT TERM	PART TIME LONG TERM	PART TIME SHORT TERM	NUMBER
Employed - Bar Passage Required	58	3	3	4	68
Employed - J.D. Advantage	15	0	1	2	18
Employed - Professional Position	1	0	1	0	2
Employed - Non-Professional Position	1	1	1	1	4
Employed - Law School/University Funded	1	0	0	0	1
Employed - Undeterminable	0	0	0	0	0
Pursuing Graduate Degree Full Time					0
Unemployed - Start Date Deferred					2
Unemployed - Not Seeking					3
Unemployed - Seeking					10
Employment Status Unknown					0
Total Graduates					108

EMPLOYMENT TYPE	FULL TIME LONG TERM	FULL TIME SHORT TERM	PART TIME LONG TERM	PART TIME SHORT TERM	NUMBER
Law Firms					
Solo	1	0	3	2	6
2 - 10	33	0	1	2	36
11 - 25	5	1	0	0	6
26 - 50	3	2	0	0	5
51 - 100	0	0	0	0	0
101 - 250	3	0	0	0	3
251 - 500	2	0	0	0	2
501 +	2	0	0	0	2
Unknown Size	1	0	0	0	1
Business & Industry	4	1	1	2	8
Government	10	0	0	0	10
Pub. Int.	2	0	1	0	3
Clerkships - Federal	2	0	0	0	2
Clerkships - State & Local	3	0	0	0	3
Clerkships - Other	1	0	0	0	1
Education	2	0	0	1	3
Employer Type Unknown	2	0	0	0	2
Total	76	4	6	7	93

LAW SCHOOL/UNIVERSITY FUNDED POSITIONS	FULL TIME LONG TERM	FULL TIME SHORT TERM	PART TIME LONG TERM	PART TIME SHORT TERM	NUMBER
Employed - Bar Passage Required	1	0	0	0	1
Employed - J.D. Advantage	0	0	0	0	0
Employed - Professional Position	0	0	0	0	0
Employed - Non-Professional Position	0	0	0	0	0
Total Employed by Law School/University	1	0	0	0	1

EMPLOYMENT LOCATION	STATE	NUMBER
State - Largest Employment	Tennessee	78
State - 2nd Largest Employment	Arkansas	3
State - 3rd Largest Employment	Mississippi	3

Employed in Foreign Countries	0

- **Employed – Bar Passage Required.**

  A position in this category requires the graduate to pass a bar exam and to be licensed to practice law in one or more jurisdictions. The positions that have such a requirement are varied and include, for example, positions in law firms, business, or government. However, not all positions in law firms, business, or government require bar passage; for example, a paralegal position would not. Positions that require the graduate to pass a bar exam and be licensed after beginning employment in order to retain the position are included in this category. Judicial clerkships are also included in this category.

- **Employed – J.D. Advantage.**

  A position in this category is one for which the employer sought an individual with a J.D., and perhaps even required a J.D., or for which the J.D. provided a demonstrable advantage in obtaining or performing the job, but which does not itself require bar passage or an active law license or involve practicing law. Examples of positions for which a J.D. is an advantage include a corporate contracts administrator, alternative dispute resolution specialist, government regulatory analyst, FBI agent, and accountant. Also included might be jobs in personnel or human resources, jobs with investment banks, jobs with consulting firms, jobs doing compliance work in business and industry, jobs in law firm professional development, and jobs in law school career services offices, admissions offices, or other law school administrative offices. Doctors or nurses who plan to work in a litigation, insurance, or risk management setting, or as expert witnesses, would fall into this category, as would journalists and teachers (in a higher education setting) of law and law related topics. It is an indicator that a position does not fall into this category if a J.D. is uncommon among persons holding such a position.

- **Employed – Professional Position.**

  A position in this category is one that requires professional skills or training but for which a J.D. is neither required nor a demonstrable advantage. Examples of persons in this category include a math or science teacher, business manager, or performing arts specialist. Other examples include professions such as doctors, nurses, engineers, or architects, if a J.D. was not demonstrably advantageous in obtaining the position or in performing the duties of the position.

- **Employed – Non-Professional Position.**

  A position in this category is one that does not require any special professional skills or training.

- **Short-term.**

  A short-term position is one that has a definite term of less than one year. Thus, a clerkship that has a definite term of one year or more is not a short-term position. It also includes a position that is of an indefinite length if that position is not reasonably expected to last for one year or more.

  A position that is envisioned by the graduate and the employer to extend for one year or more is not a short-term position even though it is conditioned on bar passage and licensure. Thus, a long-term position that is conditioned on passing the bar exam by a certain date does not become a short-term position because of the condition.

- **Long-term.**

  A long-term position is one that the employer expects to last one year or more. A law school/university funded position that the law school expects to last one year or more may be considered long-term for purposes of this definition only if the graduate is paid at least $40,000 per year. The possibility that a short-term position may evolve into a long-term position does not make the position a long-term position.

- **Full-time.**

  A full-time position is one in which the graduate works a minimum of 35 hours per week. A full-time position may be either short-term or long-term.

- **Part-time.**

  A part-time position is one in which the graduate works less than 35 hours per week. A part-time position may be either short-term or long-term.

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The University of Memphis - Cecil Humphreys School of Law
Class of 2010 Summary Report

			Full-time Salaries				
	Number Reported	% of Reported	# with Salary	25th Percentile	Median	75th Percentile	Mean
Total Reported = 127							
Employment Status Known:							
Bar Passage Reqd	81	75.7	43	42,000	50,000	70,000	59,809
JD Preferred	4	3.7	.	.	.	.	.
Other Professional	5	4.7	.	.	.	.	.
Non-professional	2	1.9	.	.	.	.	.
Pursuing Degree FT	2	1.9	.	.	.	.	.
Unemployed-Seeking	12	11.2	.	.	.	.	.
Unemployed-Not Seeking	1	0.9	.	.	.	.	.
Subtotal	**107**	**100.0**					
Total Employed or Degree:							
Pursuing Degree FT	2	1.9	.	.	.	.	.
Employed	92	86.0	45	42,000	50,000	70,000	58,990
Subtotal	**94**	**87.9**					
Employment by Sector							
Private Sector	63	68.5	30	42,000	57,500	78,000	63,433
Public Sector	28	30.4	14	42,900	49,720	57,000	50,683
Subtotal	**91**	**98.9**					

Note: Categories with no graduates reported are not shown.
A minimum of five salaries is required for each salary analysis.

Table prepared by NALP, June 2011
Table reprinted by NALP on Wednesday, December 21, 2011

The University of Memphis - Cecil Humphreys School of Law
Class of 2010 Summary Report--Page 2

	Number Reported	% of Reported	# with Salary	Full-time Salaries 25th Percentile	Median	75th Percentile	Mean
FT/PT Jobs:							
Bar Passage Reqd-FT	75	81.5	.	.	.	.	.
Bar Passage Reqd-PT	6	6.5	.	.	.	.	.
JD Preferred-FT	3	3.3	.	.	.	.	.
JD Preferred-PT	1	1.1	.	.	.	.	.
Other Professional-FT	4	4.3	.	.	.	.	.
Other Professional-PT	1	1.1	.	.	.	.	.
Non-professional-FT	1	1.1	.	.	.	.	.
Non-professional-PT	1	1.1	.	.	.	.	.
Subtotal	**92**	**100.0**					
Employment Categories:							
Academic	6	6.5	.	.	.	.	.
Business	6	6.5	.	.	.	.	.
Judicial Clerk	10	10.9	7	36,000	54,000	57,000	49,286
Private Practice	57	62.0	29	42,000	65,000	78,000	63,897
Government	9	9.8	6	45,000	47,220	59,688	53,610
Public Interest	3	3.3	.	.	.	.	.
Subtotal	**91**	**98.9**					
Business Jobs							
Bar Passage Reqd	3	50.0	.	.	.	.	.
JD Preferred	1	16.7	.	.	.	.	.
Other Professional	1	16.7	.	.	.	.	.
Non-professional	1	16.7	.	.	.	.	.
Subtotal	**6**	**100.0**					
Size of Firm:							
2-10	31	54.4	13	40,000	40,000	65,000	53,923
11-25	12	21.1	7	50,000	50,000	78,000	59,429
26-50	1	1.8	.	.	.	.	.
51-100	3	5.3	.	.	.	.	.
101-250	2	3.5	.	.	.	.	.
251-500	2	3.5	.	.	.	.	.
501+	1	1.8	.	.	.	.	.
Unknown Size	1	1.8	.	.	.	.	.
Solo	4	7.0	.	.	.	.	.
Subtotal	**57**	**100.0**					

Note: Categories with no graduates reported are not shown. Categories for unknown job and employer types are not shown. A minimum of five salaries is required for each salary analysis.

Table prepared by NALP, June 2011
Table reprinted by NALP on Wednesday, December 21, 2011

The University of Memphis - Cecil Humphreys School of Law
Class of 2010 Summary Report--Page 3

			Full-time Salaries				
	Number Reported	**% of Reported**	**# with Salary**	**25th Percentile**	**Median**	**75th Percentile**	**Mean**
Type of Law Firm Job:							
Attorney	6	100.0	.	.	.	.	.
Subtotal	**6**	**100.0**					
Jobs Taken by Region:							
South Atlantic	4	4.4	.	.	.	.	.
E South Central	83	92.2	38	40,000	50,000	70,000	59,389
W South Central	2	2.2	.	.	.	.	.
Foreign	1	1.1	.	.	.	.	.
Subtotal	**90**	**100.0**					
Location of Jobs							
In-State	82	91.1	38	40,000	50,000	70,000	59,389
Out of State	8	8.9	6	50,000	54,500	70,000	59,295
Subtotal	**90**	**100.0**					
# States w/Employed Grads							
	7	.	.	.	.	.	.
Subtotal	**7**	**.**					
Timing of Job Offer							
After Bar Results	28	30.4	.	.	.	.	.
Before Graduation	44	47.8	.	.	.	.	.
Before Bar Results	20	21.7	.	.	.	.	.
Subtotal	**92**	**100.0**					

Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis. See Table 12 for information on job sources.

Table prepared by NALP, June 2011
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Class of 2010--The University of Memphis - Cecil Humphreys School of Law
Table 12
Source of Job by Employer Type

Source of Job by Employer Type	Academic		Business		Judicial clerkship		Law firms of 50 or fewer	
	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported
Fall OCI	0	0	0	0	2	20.0	1	2.1
Job listing	1	16.7	0	0	4	40.0	18	37.5
Pre-law school employer	0	0	0	0	0	0	1	2.1
Referral from friend	1	16.7	1	16.7	0	0	10	20.8
Letter/self-initiated	0	0	0	0	2	20.0	3	6.3
All other	4	66.7	5	83.3	2	20.0	15	31.3
TOTAL	6	100.0	6	100.0	10	100.0	48	100.0

Source of Job by Employer Type	Law firms of 51 or more		Government		Public interest		All Employer Types*	
	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported
Fall OCI	4	50.0	0	0	0	0	7	7.8
Job listing	3	37.5	1	11.1	0	0	27	30.0
Pre-law school employer	0	0	0	0	0	0	1	1.1
Referral from friend	0	0	2	22.2	1	33.3	15	16.7
Letter/self-initiated	1	12.5	3	33.3	2	66.7	11	12.2
All other	0	0	3	33.3	0	0	29	32.2
TOTAL	8	100.0	9	100.0	3	100.0	90	100.0

** Excludes jobs for which a source, employer type, or firm size was not reported.*
"Other" also includes job fairs, spring OCI, commercial websites, and the self-employed.

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Class of 2010--The University of Memphis - Cecil Humphreys School of Law
Table 13
Number of Jobs Reported Taken by State

Region	State	# of jobs	% of jobs
South Atlantic	Florida	1	1.1
	Georgia	2	2.2
	North Carolina	1	1.1
		4	*4.4*
E. South Central	Kentucky	1	1.1
	Tennessee	82	91.1
		83	*92.2*
W. South Central	Arkansas	1	1.1
	Texas	1	1.1
		2	*2.2*
Non US locations	Non U.S. locations	1	1.1
		1	*1.1*
TOTAL		*90*	*100.0*

Excludes employed graduates for whom job location was not reported.

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Table reprinted by NALP on Wednesday, December 21, 2011

Class of 2010--The University of Memphis - Cecil Humphreys School of Law
Table 14
Location of Instate Jobs

In-state location	# of Jobs	% of Jobs
Chattanooga	3	3.7
Clarksville	1	1.2
Jackson	2	2.4
Johnson City	1	1.2
Knoxville	2	2.4
Memphis	56	68.3
Murfreesboro	2	2.4
Nashville	8	9.8
Other/unknown Tennessee	7	8.5
	82	**100.0**

Excludes employed graduates for whom job location was not reported.

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Class of 2010--The University of Memphis - Cecil Humphreys School of Law
Table 15
Duration of Job by Employer Type

Duration of Job by Employer Type	Permanent		Temporary		All	
	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported
Academic	4	66.7	2	33.3	6	100.0
Business	5	83.3	1	16.7	6	100.0
Judicial clerkship	0	0	10	100.0	10	100.0
Law firm	53	93.0	4	7.0	57	100.0
Government	7	77.8	2	22.2	9	100.0
Public interest	3	100.0	0	0	3	100.0
Unknown employer type	1	100.0	0	0	1	100.0

This table excludes jobs for which duration was not reported.

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Class of 2010--The University of Memphis - Cecil Humphreys School of Law
Table 16
Full and Part-time Jobs by Employer Type

Full and Part-time Jobs by Employer Type	Full-time		Part-time		All	
	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported
Academic	4	66.7	2	33.3	6	100.0
Business	5	83.3	1	16.7	6	100.0
Judicial clerkship	9	90.0	1	10.0	10	100.0
Law firm	53	93.0	4	7.0	57	100.0
Government	8	88.9	1	11.1	9	100.0
Public interest	3	100.0	0	0	3	100.0
Unknown employer type	1	100.0	0	0	1	100.0

This table excludes jobs for which full or part-time information was not reported.

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The University of Memphis - Cecil Humphreys School of Law
Class of 2011 Summary Report

			Full-time Long-term Salaries				
	Number Reported	% of Reported	# with Salary	25th Percentile	Median	75th Percentile	Mean
Total Reported = 129							
Gender Reported:							
Bar Passage Required	83	76.9	45	45,000	57,408	65,000	58,863
JD Advantage	6	5.6	.	.	.	.	.
Other Professional	4	3.7	.	.	.	.	.
Non-professional	3	2.8	.	.	.	.	.
Pursuing Degree FT	1	0.9	.	.	.	.	.
Unemployed-Seeking	8	7.4	.	.	.	.	.
Unemployed-Not Seeking	3	2.8	.	.	.	.	.
Subtotal	**108**	**100.0**					
Total Employed or Degree:							
Pursuing Degree FT	1	0.9	.	.	.	.	.
Employed	96	88.9	49	42,000	55,000	65,000	57,432
Subtotal	**97**	**89.8**					
Employment by Sector							
Private Sector	65	67.7	28	45,000	60,000	84,000	64,357
Public Sector	30	31.3	21	40,000	50,000	57,408	48,199
Subtotal	**95**	**99.0**					

Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis. Employment by sector does not include graduates for whom employer type was not reported.

Table prepared by NALP, June 2012

The University of Memphis - Cecil Humphreys School of Law
Class of 2011 Summary Report--Page 2

			Full-time Long-term Salaries				
	Number Reported	% of Reported	# with Salary	25th Percentile	Median	75th Percentile	Mean
FT/PT Jobs:							
Bar Passage Reqd-FT	73	80.2	45	45,000	57,408	65,000	58,863
Bar Passage Reqd-PT	6	6.6	.	.	.	.	.
JD Advantage-FT	6	6.6	.	.	.	.	.
Other Professional-FT	2	2.2	.	.	.	.	.
Other Professional-PT	1	1.1	.	.	.	.	.
Non-professional-PT	3	3.3	.	.	.	.	.
Subtotal	**91**	**100.0**					
Employment Categories:							
Academic	1	1.0	.	.	.	.	.
Business	11	11.5	.	.	.	.	.
Judicial Clerk	13	13.5	9	50,000	51,024	57,408	50,472
Unknown Type	1	1.0	.	.	.	.	.
Private Practice	54	56.3	24	43,500	62,500	89,000	65,917
Government	13	13.5	9	40,000	47,000	59,000	47,881
Public Interest	3	3.1	.	.	.	.	.
Subtotal	**96**	**100.0**					
Academic Jobs:							
JD Advantage	1	100.0	.	.	.	.	.
Subtotal	**1**	**100.0**					
Business Jobs:							
Bar Passage Required	4	36.4	.	.	.	.	.
JD Advantage	3	27.3	.	.	.	.	.
Other Professional	1	9.1	.	.	.	.	.
Non-professional	3	27.3	.	.	.	.	.
Subtotal	**11**	**100.0**					

Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis.

Table prepared by NALP, June 2012

The University of Memphis - Cecil Humphreys School of Law
Class of 2011 Summary Report--Page 3

	Number Reported	% of Reported	Full-time Long-term Salaries				
			# with Salary	25th Percentile	Median	75th Percentile	Mean
Private Practice Jobs:							
Bar Passage Required	54	100.0	24	43,500	62,500	89,000	65,917
Subtotal	**54**	**100.0**					
Government Jobs:							
Bar Passage Required	8	61.5	6	47,000	58,800	60,000	52,600
JD Advantage	2	15.4	.	.	.	.	.
Other Professional	3	23.1	.	.	.	.	.
Subtotal	**13**	**100.0**					
Public Interest Jobs:							
Bar Passage Required	3	100.0	.	.	.	.	.
Subtotal	**3**	**100.0**					
Size of Firm:							
2-10	30	55.6	12	32,500	47,500	65,000	49,833
11-25	6	11.1	.	.	.	.	.
26-50	4	7.4	.	.	.	.	.
51-100	1	1.9	.	.	.	.	.
101-250	1	1.9	.	.	.	.	.
251-500	1	1.9	.	.	.	.	.
501+	4	7.4	.	.	.	.	.
Solo	7	13.0	.	.	.	.	.
Subtotal	**54**	**100.0**					
Type of Law Firm Job:							
Attorney	52	98.1	22	45,000	62,500	88,000	66,318
Law Clerk	1	1.9	.	.	.	.	.
Subtotal	**53**	**100.0**					
Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis.							

Table prepared by NALP, June 2012

The University of Memphis - Cecil Humphreys School of Law
Class of 2011 Summary Report--Page 4

			Full-time Long-term Salaries				
	Number Reported	% of Reported	# with Salary	25th Percentile	Median	75th Percentile	Mean
Jobs Taken by Region:							
W North Central	1	1.1	.	.	.	.	.
South Atlantic	3	3.2	.	.	.	.	.
E South Central	87	91.6	41	44,000	55,000	60,000	55,370
W South Central	3	3.2	.	.	.	.	.
Pacific	1	1.1	.	.	.	.	.
Subtotal	**95**	**100.0**					
Location of Jobs:							
In-State	85	89.5	39	42,000	55,000	60,000	53,389
Out of State	10	10.5	9	42,000	88,000	95,000	74,667
Subtotal	**95**	**100.0**					
# States and Territories w/Employed Grads:							
	10	.	.	.	.	.	.
Total	**10**	**.**					

Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis.

Table prepared by NALP, June 2012

	Number Reported	% of Reported
Source of Job		
Fall OCI	3	3.4
Job fair/consortia	1	1.1
Job Posting	10	11.5
Commercial Internet Site	3	3.4
Return to Prior Job	7	8.0
Referral	34	39.1
Start own practice	7	8.0
Self-initiated/letter	15	17.2
Temp Agency	1	1.1
Other	6	6.9
Subtotal	**87**	**100.0**
Timing of Job Offer		
After Bar Results	34	36.6
Before Graduation	37	39.8
Before Bar Results	22	23.7
Subtotal	**93**	**100.0**
Search Status of Employed Grads		
Seeking a different job	19	20.9
Not seeking a different job	72	79.1
Subtotal	**91**	**100.0**
Note: Figures are based on jobs for which the item was reported, and thus may not add to the total number of jobs.		

Table prepared by NALP, June 2012

	Jobs lasting a year or more			
	Total Number	Number of Indefinite Duration	Number of Fixed Duration	Number of Short-term Jobs
Duration of Jobs				
Academic	.	.	.	1
Business	10	10	.	1
Judicial Clerk	12	2	10	1
Unknown Type	1	.	.	.
Private Practice	54	53	.	.
Government	11	9	1	2
Public Interest	3	2	1	.
Total Reported	**91**	**76**	**12**	**5**
Number of Jobs Reported as Funded by Law School				
	1	.	.	.
Total Reported	**1**	**.**	**.**	**.**

Note: Figures for job duration are based on jobs for which the item was reported, and thus may not add to the total number of jobs.
The count of jobs funded by the law school is a total, regardless of duration.

Table prepared by NALP, June 2012

Class of 2011--The University of Memphis - Cecil Humphreys School of Law
Table 12
Source of Job by Employer Type

Source of Job by Employer Type	Academic		Business		Judicial clerkship		Law firms of 50 or fewer	
	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported
Fall OCI	0	0	0	0	1	7.7	1	2.4
Job listing	0	0	0	0	4	30.8	4	9.5
Pre-law school employer	0	0	4	40.0	0	0	1	2.4
Referral from friend	1	100.0	3	30.0	4	30.8	17	40.5
Letter/self-initiated	0	0	2	20.0	2	15.4	7	16.7
Temp agency or legal search	0	0	1	10.0	0	0	0	0
All other	0	0	0	0	2	15.4	12	28.6
TOTAL	1	100.0	10	100.0	13	100.0	42	100.0

Source of Job by Employer Type	Law firms of 51 or more		Government		Public interest		All Employer Types*	
	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported
Fall OCI	1	14.3	0	0	0	0	3	3.4
Job listing	0	0	2	18.2	0	0	10	11.5
Pre-law school employer	0	0	1	9.1	1	33.3	7	8.0
Referral from friend	4	57.1	4	36.4	1	33.3	34	39.1
Letter/self-initiated	0	0	3	27.3	1	33.3	15	17.2
Temp agency or legal search	0	0	0	0	0	0	1	1.1
All other	2	28.6	1	9.1	0	0	17	19.5
TOTAL	7	100.0	11	100.0	3	100.0	87	100.0

***** Excludes jobs for which a source, employer type, or firm size was not reported.*
"Other" also includes job fairs, spring OCI, commercial websites, and the self-employed.

Table prepared by NALP, June 2012

Class of 2011--The University of Memphis - Cecil Humphreys School of Law
Table 13
Number of Jobs Reported Taken by State

Region	State	# of jobs	% of jobs
W. North Central	Minnesota	1	1.1
		1	*1.1*
South Atlantic	Washington, DC	1	1.1
	Georgia	1	1.1
	Virginia	1	1.1
		3	*3.2*
E. South Central	Alabama	2	2.1
	Tennessee	85	89.5
		87	*91.6*
W. South Central	Arkansas	1	1.1
	Louisiana	1	1.1
	Texas	1	1.1
		3	*3.2*
Pacific	California	1	1.1
		1	*1.1*
TOTAL		*95*	*100.0*

Excludes employed graduates for whom job location was not reported.

Table prepared by NALP, June 2012

Class of 2011--The University of Memphis - Cecil Humphreys School of Law
Table 14
Location of Instate Jobs

In-state location	**# of Jobs**	**% of Jobs**
Bartlett	3	3.5
Chattanooga	1	1.2
Clarksville	1	1.2
Columbia	1	1.2
Jackson	6	7.1
Johnson City	1	1.2
Memphis	50	58.8
Murfreesboro	1	1.2
Nashville	9	10.6
Other/unknown Tennessee	12	14.1
	85	**100.0**

Excludes employed graduates for whom job location was not reported.

Table prepared by NALP, June 2012

Class of 2011--The University of Memphis - Cecil Humphreys School of Law
Table 15
Full and Part-time Jobs by Employer Type

Full and Part-time Jobs by Employer Type	Full-time		Part-time		All	
	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported
Academic	1	100.0	0	0	1	100.0
Business	7	63.6	4	36.4	11	100.0
Judicial clerkship	11	84.6	2	15.4	13	100.0
Law firm	48	96.0	2	4.0	50	100.0
Government	11	91.7	1	8.3	12	100.0
Public interest	3	100.0	0	0	3	100.0
Unknown employer type	0	0	1	100.0	1	100.0

This table excludes jobs for which full or part-time information was not reported.

Table prepared by NALP, June 2012

The University of Memphis - Cecil Humphreys School of Law
Class of 2012 Summary Report

			Full-time Long-term Salaries				
	Number Reported	**% of Reported**	**# with Salary**	**25th Percentile**	**Median**	**75th Percentile**	**Mean**
Total Reported = 134							
Gender Reported:							
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Subtotal	[illegible]	[illegible]					
Race Reported:							
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Subtotal	[illegible]	[illegible]					
Gender & Race Repted:							
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	-	-	-	-	-
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Subtotal	[illegible]	[illegible]					
Employment Status Known:							
Bar Passage Required	86	66.2	54	45,000	52,000	62,500	54,112
JD Advantage	16	12.3	10	40,000	47,500	60,000	53,420
Other Professional	7	5.4	-	-	-	-	-
Non-professional	1	0.8	-	-	-	-	-
Pursuing Degree FT	2	1.5	-	-	-	-	-
Start date after 2/15/13	1	0.8	-	-	-	-	-
Not employed-Seeking	14	10.8	-	-	-	-	-
Not employed-Not Seeking	3	2.3	-	-	-	-	-
Subtotal	**130**	**100.0**					
Total Employed or Degree:							
Pursuing Degree FT	2	1.5	-	-	-	-	-
Employed	110	84.6	69	42,500	52,000	62,500	53,815
Subtotal	**112**	**86.2**					
Employment by Sector							
Private Sector	85	77.3	52	41,250	55,000	65,000	54,875
Public Sector	25	22.7	17	44,600	50,000	57,408	50,575
Subtotal	**110**	**100.0**					

Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis. Employment by sector does not include graduates for whom employer type was not reported.

Table prepared by NALP, July 2013
Because of NALP's quality-control process and follow-up with schools, some figures in these tables may differ slightly from figures posted by the ABA.

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	Number Reported	% of Reported	Full-time Long-term Salaries # with Salary	25th Percentile	Median	75th Percentile	Mean
FT/PT Jobs:							
Bar Passage Reqd-FT	78	70.9	54	45,000	52,000	62,500	54,112
Bar Passage Reqd-PT	8	7.3	.	.	.	.	.
JD Advantage-FT	15	13.6	10	40,000	47,500	60,000	53,420
JD Advantage-PT	1	0.9	.	.	.	.	.
Other Professional-FT	7	6.4	.	.	.	.	.
Non-professional-FT	1	0.9	.	.	.	.	.
Subtotal	**110**	**100.0**					
Employment Categories:							
Academic	1	0.9	.	.	.	.	.
Business	16	14.5	12	41,500	59,000	62,500	54,833
Judicial Clerk	6	5.5	6	50,000	57,408	57,408	52,681
Private Practice	69	62.7	40	41,250	50,500	66,000	54,888
Government	12	10.9	8	43,400	46,000	52,500	48,085
Public Interest	6	5.5	.	.	.	.	.
Subtotal	**110**	**100.0**					
Academic Jobs:							
Other Professional	1	100.0	.	.	.	.	.
Subtotal	**1**	**100.0**					
Business Jobs:							
Bar Passage Required	2	12.5	.	.	.	.	.
JD Advantage	9	56.3	6	40,000	50,500	60,000	52,667
Other Professional	4	25.0	.	.	.	.	.
Non-professional	1	6.3	.	.	.	.	.
Subtotal	**16**	**100.0**					

Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis.

Table prepared by NALP, July 2013
Because of NALP's quality-control process and follow-up with schools, some figures in these tables may differ slightly from figures posted by the ABA.

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	Number Reported	% of Reported	Full-time Long-term Salaries # with Salary	25th Percentile	Median	75th Percentile	Mean
Private Practice Jobs:							
Bar Passage Required	69	100.0	40	41,250	50,500	66,000	54,888
Subtotal	**69**	**100.0**					
Government Jobs:							
Bar Passage Required	5	41.7	5	45,000	47,000	53,000	50,097
JD Advantage	5	41.7	-	-	-	-	-
Other Professional	2	16.7	-	-	-	-	-
Subtotal	**12**	**100.0**					
Public Interest Jobs:							
Bar Passage Required	4	66.7	-	-	-	-	-
JD Advantage	2	33.3	-	-	-	-	-
Subtotal	**6**	**100.0**					
Size of Firm:							
2-10	39	56.5	24	36,000	50,000	55,500	47,625
11-25	6	8.7	5	45,000	65,000	75,000	60,000
26-50	4	5.8	-	-	-	-	-
51-100	6	8.7	5	67,000	72,000	72,000	71,200
101-250	2	2.9	-	-	-	-	-
501+	1	1.4	-	-	-	-	-
Solo	11	15.9	-	-	-	-	-
Subtotal	**69**	**100.0**					
Type of Law Firm Job:							
Attorney	64	94.1	38	42,500	53,000	67,000	55,539
Law Clerk	4	5.9	-	-	-	-	-
Subtotal	**68**	**100.0**					

Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis.

Table prepared by NALP, July 2013
Because of NALP's quality-control process and follow-up with schools, some figures in these tables may differ slightly from figures posted by the ABA.

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	Number Reported	% of Reported	Full-time Long-term Salaries: # with Salary	25th Percentile	Median	75th Percentile	Mean
Jobs Taken by Region:							
E North Central	1	0.9	.	.	.	.	.
W North Central	1	0.9	.	.	.	.	.
South Atlantic	4	3.6	.	.	.	.	.
E South Central	98	89.1	59	42,200	50,000	62,500	53,108
W South Central	2	1.8	.	.	.	.	.
Mountain	1	0.9	.	.	.	.	.
Pacific	2	1.8	.	.	.	.	.
Foreign	1	0.9	.	.	.	.	.
Subtotal	**110**	**100.0**					
Location of Jobs:							
In-State	98	89.1	59	42,200	50,000	62,500	53,108
Out of State	12	10.9	10	43,000	59,000	65,000	57,991
Subtotal	**110**	**100.0**					
# States and Territories w/Employed Grads:							
	11	.	.	.	.	.	.
Total	**11**	.					

Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis.

Table prepared by NALP, July 2013
Because of NALP's quality-control process and follow-up with schools, some figures in these tables may differ slightly from figures posted by the ABA.

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	Number Reported	% of Reported
Source of Job		
Fall OCI	4	3.7
Job fair/consortia	1	0.9
Job Posting in CSO	12	11.0
Job posted online or in print	6	5.5
Return to Prior Job	5	4.6
Referral	38	34.9
Start own practice	11	10.1
Self-initiated/letter	11	10.1
Spring OCI	1	0.9
Other	20	18.3
Subtotal	**109**	**100.0**
Timing of Job Offer		
After Bar Results	39	36.4
Before Graduation	37	34.6
Before Bar Results	31	29.0
Subtotal	**107**	**100.0**
Search Status of Employed Grads		
Seeking a different job	29	26.4
Not seeking a different job	81	73.6
Subtotal	**110**	**100.0**
Note: Figures are based on jobs for which the item was reported, and thus may not add to the total number of jobs.		

Table prepared by NALP, July 2013
Because of NALP's quality-control process and follow-up with schools, some figures in these tables may differ slightly from figures posted by the ABA.

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Class of 2012 Summary Report--Page 6

	Jobs lasting a year or more			
	Total Number	**Number of Indefinite Duration**	**Number of Fixed Duration**	**Number of Short-term Jobs**
Duration of Jobs				
Academic	1	1	-	-
Business	15	15	-	1
Judicial Clerk	6	-	6	-
Private Practice	65	65	-	4
Government	9	9	-	3
Public Interest	5	5	-	1
Total Reported	**101**	**95**	**6**	**9**

Note: Figures for job duration are based on jobs for which the item was reported, and thus may not add to the total number of jobs.
The count of jobs funded by the law school is a total, regardless of duration.

Table prepared by NALP, July 2013
Because of NALP's quality-control process and follow-up with schools, some figures in these tables may differ slightly from figures posted by the ABA.

Class of 2012--The University of Memphis - Cecil Humphreys School of Law
Table 12
Source of Job by Employer Type

Source of Job by Employer Type	Academic		Business		Judicial clerkship		Law firms of 50 or fewer	
	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported
Fall OCI	0	0	0	0	0	0	2	3.3
Job listing	0	0	1	6.3	1	16.7	5	8.3
Pre-law school employer	0	0	2	12.5	0	0	2	3.3
Referral from friend	0	0	7	43.8	0	0	22	36.7
Letter/self-initiated	0	0	1	6.3	2	33.3	6	10.0
All other	1	100.0	5	31.3	3	50.0	23	38.3
TOTAL	1	100.0	16	100.0	6	100.0	60	100.0

Source of Job by Employer Type	Law firms of 51 or more		Government		Public interest		All Employer Types*	
	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported
Fall OCI	2	22.2	0	0	0	0	4	3.7
Job listing	2	22.2	2	16.7	1	20.0	12	11.0
Pre-law school employer	0	0	0	0	1	20.0	5	4.6
Referral from friend	3	33.3	5	41.7	1	20.0	38	34.9
Letter/self-initiated	1	11.1	1	8.3	0	0	11	10.1
All other	1	11.1	4	33.3	2	40.0	39	35.8
TOTAL	9	100.0	12	100.0	5	100.0	109	100.0

** Excludes jobs for which a source, employer type, or firm size was not reported.*
"Other" also includes job fairs, spring OCI, non-CSO job sites and postings, and the self-employed.

Table prepared by NALP, July 2013

Class of 2012--The University of Memphis - Cecil Humphreys School of Law
Table 13
Number of Jobs Reported Taken by State

Region	State	# of jobs	% of jobs
E. North Central	Illinois	1	0.9
		1	*0.9*
W. North Central	Minnesota	1	0.9
		1	*0.9*
South Atlantic	Florida	1	0.9
	Georgia	2	1.8
	North Carolina	1	0.9
		4	*3.6*
E. South Central	Tennessee	98	89.1
		98	*89.1*
W. South Central	Arkansas	1	0.9
	Louisiana	1	0.9
		2	*1.8*
Mountain	Colorado	1	0.9
		1	*0.9*
Pacific	California	1	0.9
	Washington	1	0.9
		2	*1.8*
Non US locations	Non U.S. locations	1	0.9
		1	*0.9*
TOTAL		*110*	*100.0*

Excludes employed graduates for whom job location was not reported.

Table prepared by NALP, July 2013

Class of 2012--The University of Memphis - Cecil Humphreys School of Law
Table 14
Location of Instate Jobs

In-state location	# of Jobs	% of Jobs
Bartlett	1	1.0
Chattanooga	2	2.0
Cleveland	1	1.0
Jackson	2	2.0
Knoxville	1	1.0
Memphis	53	54.1
Murfreesboro	1	1.0
Nashville	17	17.3
Other/unknown Tennessee	20	20.4
	98	**100.0**

Excludes employed graduates for whom job location was not reported.

Table prepared by NALP, July 2013

Class of 2012--The University of Memphis - Cecil Humphreys School of Law
Table 15
Full and Part-time Jobs by Employer Type

Full and Part-time Jobs by Employer Type	Full-time		Part-time		All	
	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported
Academic	1	100.0	0	0	1	100.0
Business	16	100.0	0	0	16	100.0
Judicial clerkship	6	100.0	0	0	6	100.0
Law firm	63	91.3	6	8.7	69	100.0
Government	12	100.0	0	0	12	100.0
Public interest	3	50.0	3	50.0	6	100.0

This table excludes jobs for which full or part-time information was not reported.

Table prepared by NALP, July 2013

The University of Memphis - Cecil Humphreys School of Law
Class of 2013 Summary Report

			Full-time Long-term Salaries				
	Number Reported	% of Reported	# with Salary	25th Percentile	Median	75th Percentile	Mean
Total Reported = 124							
Gender Reported:							
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Subtotal	[illegible]	[illegible]					
Race Reported:							
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Subtotal	[illegible]	[illegible]					
Gender & Race Repted:							
[illegible]	[illegible]	[illegible]	.	.	.	.	.
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Subtotal	[illegible]	[illegible]					
Employment Status Known:							
Bar Passage Required	87	71.3	58	45,000	51,000	60,000	57,010
JD Advantage	8	6.6	.	.	.	.	.
Other Professional	7	5.7	5	40,000	62,500	77,000	71,900
Non-professional	1	0.8	.	.	.	.	.
Start date after 2/14/14	1	0.8	.	.	.	.	.
Not employed-Seeking	14	11.5	.	.	.	.	.
Not employed-Not Seeking	4	3.3	.	.	.	.	.
Subtotal	**122**	**100.0**					

Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis. Employment by sector does not include graduates for whom employer type was not reported.

Table prepared by NALP, July 2014
NALP Summary Report data may vary slightly from the school-specific data published by the ABA because of definitional differences between the two organizations and because NALP's quality control process can result in changes made after the ABA data has been submitted. For more on this, see www.nalp.org/classof2013.

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Class of 2013 Summary Report--Page 2

			Full-time Long-term Salaries				
	Number Reported	% of Reported	# with Salary	25th Percentile	Median	75th Percentile	Mean
Total Employed or Degree:							
Employed	103	84.4	66	40,000	52,000	62,500	58,069
Subtotal	**103**	**84.4**					
Employment by Sector							
Private Sector	74	71.8	47	40,000	50,000	70,000	59,881
Public Sector	29	28.2	19	48,000	53,280	59,400	53,588
Subtotal	**103**	**100.0**					
FT/PT Jobs:							
Bar Passage Reqd-FT	78	75.7	58	45,000	51,000	60,000	57,010
Bar Passage Reqd-PT	9	8.7	.	.	.	.	.
JD Advantage-FT	6	5.8	.	.	.	.	.
JD Advantage-PT	2	1.9	.	.	.	.	.
Other Professional-FT	7	6.8	5	40,000	62,500	77,000	71,900
Non-professional-PT	1	1.0	.	.	.	.	.
Subtotal	**103**	**100.0**					
Employment Categories:							
Academic	2	1.9	.	.	.	.	.
Business	17	16.5	10	45,000	61,250	77,000	66,950
Judicial Clerk	10	9.7	9	52,400	53,280	58,000	54,276
Private Practice	57	55.3	37	40,000	50,000	70,000	57,970
Government	8	7.8	5	46,000	50,000	60,000	54,500
Public Interest	9	8.7	5	40,000	59,400	59,800	51,440
Subtotal	**103**	**100.0**					

Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis.

Table prepared by NALP, July 2014
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	Number Reported	% of Reported	Full-time Long-term Salaries # with Salary	25th Percentile	Median	75th Percentile	Mean
Academic Jobs:							
Bar Passage Required	1	50.0	.	.	.	.	.
JD Advantage	1	50.0	.	.	.	.	.
Subtotal	**2**	**100.0**					
Business Jobs:							
Bar Passage Required	5	29.4	.	.	.	.	.
JD Advantage	5	29.4	.	.	.	.	.
Other Professional	6	35.3	.	.	.	.	.
Non-professional	1	5.9	.	.	.	.	.
Subtotal	**17**	**100.0**					
Private Practice Jobs:							
Bar Passage Required	57	100.0	37	40,000	50,000	70,000	57,970
Subtotal	**57**	**100.0**					
Government Jobs:							
Bar Passage Required	6	75.0	.	.	.	.	.
JD Advantage	2	25.0	.	.	.	.	.
Subtotal	**8**	**100.0**					
Judicial Clerkships:							
Federal	5	50.0	.	.	.	.	.
State	5	50.0	5	50,000	52,400	53,000	51,336
Subtotal	**10**	**100.0**					

Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis.

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			Full-time Long-term Salaries				
	Number Reported	% of Reported	# with Salary	25th Percentile	Median	75th Percentile	Mean
Public Interest Jobs:							
Bar Passage Required	8	88.9	.	.	.	.	.
Other Professional	1	11.1	.	.	.	.	.
Subtotal	9	**100.0**					
Size of Firm:							
2-10	30	52.6	21	40,000	40,000	50,000	42,857
11-25	8	14.0	.	.	.	.	.
26-50	6	10.5	5	45,000	70,000	75,000	61,080
51-100	2	3.5	.	.	.	.	.
101-250	2	3.5	.	.	.	.	.
251-500	4	7.0	.	.	.	.	.
Unknown Size	1	1.8	.	.	.	.	.
Solo	4	7.0	.	.	.	.	.
Subtotal	57	**100.0**					
Type of Law Firm Job:							
Attorney	54	94.7	36	40,000	50,000	70,000	58,469
Law Clerk	2	3.5	.	.	.	.	.
Administrative	1	1.8	.	.	.	.	.
Subtotal	57	**100.0**					

Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis.

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			Full-time Long-term Salaries				
	Number Reported	% of Reported	# with Salary	25th Percentile	Median	75th Percentile	Mean
Jobs Taken by Region:							
E North Central	1	1.0	.	.	.	.	.
W North Central	1	1.0	.	.	.	.	.
South Atlantic	7	6.8	.	.	.	.	.
E South Central	89	86.4	60	40,000	50,000	59,900	54,726
W South Central	4	3.9	.	.	.	.	.
Pacific	1	1.0	.	.	.	.	.
Subtotal	**103**	**100.0**					
Location of Jobs:							
In-State	88	85.4	59	40,000	50,000	59,800	53,959
Out of State	15	14.6	7	71,500	90,000	115,500	92,714
Subtotal	**103**	**100.0**					
# States and Territories w/Employed Grads:							
	11	.	.	.	.	.	.
Total	**11**	**.**					

Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis.

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	Number Reported	% of Reported
Source of Job		
Fall OCI	6	5.8
Job fair/consortia	1	1.0
Job Posting in CSO	12	11.7
Job posted online or in print	11	10.7
Return to Prior Job	4	3.9
Referral	36	35.0
Start own practice	7	6.8
Self-initiated/letter	14	13.6
Spring OCI	1	1.0
Other	11	10.7
Subtotal	**103**	**100.0**
Timing of Job Offer		
After Bar Results	40	38.8
Before Graduation	34	33.0
Before Bar Results	29	28.2
Subtotal	**103**	**100.0**
Search Status of Employed Grads		
Seeking a different job	25	24.3
Not seeking a different job	78	75.7
Subtotal	**103**	**100.0**
Note: Figures are based on jobs for which the item was reported, and thus may not add to the total number of jobs.		

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	Jobs lasting a year or more			
	Total Number	Number of Indefinite Duration	Number of Fixed Duration	Number of Short-term Jobs
Duration of Jobs				
Academic	1	1	.	1
Business	14	13	1	3
Judicial Clerk	10	1	9	.
Private Practice	54	54	.	3
Government	8	8	.	.
Public Interest	6	6	.	3
Total Reported	**93**	**83**	**10**	**10**

Note: Figures for job duration are based on jobs for which the item was reported, and thus may not add to the total number of jobs.
The count of jobs funded by the law school is a total, regardless of duration.

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Class of 2013--The University of Memphis - Cecil Humphreys School of Law
Table 12
Source of Job by Employer Type

Source of Job by Employer Type	Academic		Business		Judicial clerkship		Law firms of 50 or fewer	
	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported
Fall OCI	0	0	0	0	1	10.0	1	2.1
Job listing	0	0	1	5.9	3	30.0	7	14.6
Pre-law school employer	1	50.0	2	11.8	0	0	1	2.1
Referral from friend	0	0	6	35.3	1	10.0	21	43.8
Letter/self-initiated	0	0	2	11.8	3	30.0	7	14.6
All other	1	50.0	6	35.3	2	20.0	11	22.9
TOTAL	2	100.0	17	100.0	10	100.0	48	100.0

Source of Job by Employer Type	Law firms of 51 or more		Government		Public interest		All Employer Types*	
	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported
Fall OCI	4	50.0	0	0	0	0	6	5.9
Job listing	0	0	0	0	1	11.1	12	11.8
Pre-law school employer	0	0	0	0	0	0	4	3.9
Referral from friend	0	0	2	25.0	6	66.7	36	35.3
Letter/self-initiated	0	0	2	25.0	0	0	14	13.7
All other	4	50.0	4	50.0	2	22.2	30	29.4
TOTAL	8	100.0	8	100.0	9	100.0	102	100.0

** Excludes jobs for which a source, employer type, or firm size was not reported.*
"Other" also includes job fairs, spring OCI, non-CSO job sites and postings, and the self-employed.

Table prepared by NALP, July 2014

Class of 2013--The University of Memphis - Cecil Humphreys School of Law
Table 13
Number of Jobs Reported Taken by State

Region	State	# of jobs	% of jobs
E. North Central	Illinois	1	1.0
		1	*1.0*
W. North Central	Minnesota	1	1.0
		1	*1.0*
South Atlantic	Florida	1	1.0
	Georgia	2	1.9
	Maryland	1	1.0
	Virginia	3	2.9
		7	*6.8*
E. South Central	Kentucky	1	1.0
	Tennessee	88	85.4
		89	*86.4*
W. South Central	Arkansas	3	2.9
	Texas	1	1.0
		4	*3.9*
Pacific	California	1	1.0
		1	*1.0*
TOTAL		*103*	*100.0*

Excludes employed graduates for whom job location was not reported.

Table prepared by NALP, July 2014

Class of 2013--The University of Memphis - Cecil Humphreys School of Law
Table 14
Location of Instate Jobs

In-state location	# of Jobs	% of Jobs
Chattanooga	1	1.1
Clarksville	1	1.1
Jackson	4	4.5
Knoxville	2	2.3
Memphis	55	62.5
Morristown	1	1.1
Murfreesboro	1	1.1
Nashville	12	13.6
Oak Ridge	1	1.1
Other/nnknown Tennessee	10	11.4
	88	100.0

Excludes employed graduates for whom job location was not reported.

Table prepared by NALP, July 2014

Class of 2013--The University of Memphis - Cecil Humphreys School of Law
Table 15
Full and Part-time Jobs by Employer Type

Full and Part-time Jobs by Employer Type	Full-time		Part-time		All	
	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported
Academic	1	50.0	1	50.0	2	100.0
Business	14	82.4	3	17.6	17	100.0
Judicial clerkship	10	100.0	0	0	10	100.0
Law firm	53	93.0	4	7.0	57	100.0
Government	7	87.5	1	12.5	8	100.0
Public interest	6	66.7	3	33.3	9	100.0

This table excludes jobs for which full or part-time information was not reported.

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	Number Reported	% of Reported	Full-time Long-term Salaries: # with Salary	25th Percentile	Median	75th Percentile	Mean
Total Reported = 131							
Subtotal							
Subtotal							
Subtotal							
Employment Status Known:							
Bar Passage Required	79	60.3	51	42,000	55,000	60,000	55,826
JD Advantage	8	6.1	5	65,000	67,500	75,000	66,300
Other Professional	9	6.9	7	49,750	50,000	70,000	56,250
Non-professional	9	6.9	.	.	.	.	.
Pursuing Degree FT	2	1.5	.	.	.	.	.
Start date after 3/15/15	1	0.8	.	.	.	.	.
Not employed-Seeking	20	15.3	.	.	.	.	.
Not employed-Not Seeking	3	2.3	.	.	.	.	.
Subtotal	**131**	**100.0**					

Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis. Employment by sector does not include graduates for whom employer type was not reported.

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			Full-time Long-term Salaries				
	Number Reported	% of Reported	# with Salary	25th Percentile	Median	75th Percentile	Mean
Total Employed or Degree:							
Pursuing Degree FT	2	1.5	.	.	.	.	.
Employed	105	80.2	65	45,000	55,000	61,000	55,532
Subtotal	**107**	**81.7**					
Employment by Sector							
Private Sector	77	73.3	44	42,000	57,500	68,750	56,552
Public Sector	28	26.7	21	45,879	53,208	60,000	53,393
Subtotal	**105**	**100.0**					
FT/PT Jobs:							
Bar Passage Reqd-FT	77	73.3	51	42,000	55,000	60,000	55,826
Bar Passage Reqd-PT	2	1.9	.	.	.	.	.
JD Advantage-FT	7	6.7	5	65,000	67,500	75,000	66,300
JD Advantage-PT	1	1.0	.	.	.	.	.
Other Professional-FT	8	7.6	7	49,750	50,000	70,000	56,250
Other Professional-PT	1	1.0	.	.	.	.	.
Non-professional-FT	5	4.8	.	.	.	.	.
Non-professional-PT	4	3.8	.	.	.	.	.
Subtotal	**105**	**100.0**					
Employment Categories:							
Academic	3	2.9	.	.	.	.	.
Business	19	18.1	12	47,000	62,500	70,000	55,850
Judicial Clerk	10	9.5	7	40,000	53,208	58,000	49,173
Private Practice	58	55.2	32	42,000	53,500	62,505	56,816
Government	11	10.5	10	49,750	60,000	61,000	59,404
Public Interest	4	3.8	.	.	.	.	.
Subtotal	**105**	**100.0**					
Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis.							

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	Number Reported	% of Reported	Full-time Long-term Salaries: # with Salary	25th Percentile	Median	75th Percentile	Mean
Academic Jobs:							
JD Advantage	1	33.3	.	.	.	.	.
Other Professional	1	33.3	.	.	.	.	.
Non-professional	1	33.3	.	.	.	.	.
Subtotal	**3**	**100.0**					
Business Jobs:							
Bar Passage Required	3	15.8	.	.	.	.	.
JD Advantage	5	26.3	.	.	.	.	.
Other Professional	5	26.3	.	.	.	.	.
Non-professional	6	31.6	.	.	.	.	.
Subtotal	**19**	**100.0**					
Private Practice Jobs:							
Bar Passage Required	55	94.8	32	42,000	53,500	62,505	56,816
JD Advantage	2	3.4	.	.	.	.	.
Non-professional	1	1.7	.	.	.	.	.
Subtotal	**58**	**100.0**					
Government Jobs:							
Bar Passage Required	8	72.7	8	50,440	60,000	60,500	59,287
Other Professional	3	27.3	.	.	.	.	.
Subtotal	**11**	**100.0**					
Judicial Clerkships:							
Federal	5	50.0	.	.	.	.	.
State	5	50.0	.	.	.	.	.
Subtotal	**10**	**100.0**					

Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis.

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			Full-time Long-term Salaries				
	Number Reported	% of Reported	# with Salary	25th Percentile	Median	75th Percentile	Mean
Public Interest Jobs:							
Bar Passage Required	3	75.0	.	.	.	.	.
Non-professional	1	25.0	.	.	.	.	.
Subtotal	**4**	**100.0**					
Size of Firm:							
1-10	38	65.5	22	40,000	49,000	60,000	48,841
11-25	4	6.9	.	.	.	.	.
26-50	4	6.9	.	.	.	.	.
51-100	3	5.2	.	.	.	.	.
101-250	2	3.4	.	.	.	.	.
501+	2	3.4	.	.	.	.	.
Unknown Size	1	1.7	.	.	.	.	.
Solo practitioner	4	6.9	.	.	.	.	.
Subtotal	**58**	**100.0**					
Type of Law Firm Job:							
Associate	47	82.5	28	42,000	57,500	67,500	58,254
Staff Attorney	6	10.5	.	.	.	.	.
Law Clerk	2	3.5	.	.	.	.	.
Paralegal	1	1.8	.	.	.	.	.
Administrative	1	1.8	.	.	.	.	.
Subtotal	**57**	**100.0**					

Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis.

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			Full-time Long-term Salaries				
	Number Reported	% of Reported	# with Salary	25th Percentile	Median	75th Percentile	Mean
Jobs Taken by Region:							
E North Central	1	1.0	.	.	.	.	.
South Atlantic	5	4.9	.	.	.	.	.
E South Central	89	87.3	58	45,000	55,000	60,009	54,964
W South Central	6	5.9	.	.	.	.	.
Mountain	1	1.0	.	.	.	.	.
Subtotal	**102**	**100.0**					
Location of Jobs:							
In-State	87	85.3	57	45,000	55,000	60,009	55,489
Out of State	15	14.7	8	40,000	51,375	75,750	55,833
Subtotal	**102**	**100.0**					
# States and Territories w/Employed Grads:							
	12	.	.	.	.	.	.
Total	**12**	**.**					
Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis.							

Table prepared by NALP, July 2015

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	Number Reported	% of Reported
Source of Job		
Fall OCI	8	8.3
Job Posting in CSO	7	7.3
Job posted online or in print	9	9.4
Return to Prior Job	7	7.3
Referral	34	35.4
Start own practice	5	5.2
Self-initiated/letter	14	14.6
Spring OCI	1	1.0
Temp Agency	1	1.0
Other	10	10.4
Subtotal	**96**	**100.0**
Timing of Job Offer		
After Bar Results	37	37.4
Before Graduation	33	33.3
Before Bar Results	29	29.3
Subtotal	**99**	**100.0**
Search Status of Employed Grads		
Seeking a different job	20	21.3
Not seeking a different job	74	78.7
Subtotal	**94**	**100.0**
Note: Figures are based on jobs for which the item was reported, and thus may not add to the total number of jobs.		

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	Jobs lasting a year or more			
	Total Number	Number of Indefinite Duration	Number of Fixed Duration	Number of Short-term Jobs
Duration of Jobs by Employer Type				
Academic	3	3	.	.
Business	15	13	.	4
Judicial Clerk	10	3	7	.
Private Practice	55	53	.	3
Government	10	8	.	1
Public Interest	3	3	.	1
Total Reported	**96**	**83**	**7**	**9**

Note: Figures for job duration are based on jobs for which the item was reported, and thus may not add to the total number of jobs.
The count of jobs funded by the law school is a total, regardless of duration.

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Class of 2014--The University of Memphis - Cecil Humphreys School of Law
Table 12
Source of Job by Employer Type

Source of Job by Employer Type	Academic		Business		Judicial clerkship		Law firms of 50 or fewer	
	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported
Fall OCI	0	0	0	0	0	0	3	7.0
Job listing	0	0	0	0	2	22.2	5	11.6
Pre-law school employer	0	0	3	16.7	0	0	1	2.3
Referral from friend	2	66.7	7	38.9	1	11.1	18	41.9
Letter/self-initiated	0	0	2	11.1	1	11.1	6	14.0
Temp agency or legal search	0	0	1	5.6	0	0	0	0
All other	1	33.3	5	27.8	5	55.6	10	23.3
TOTAL	3	100.0	18	100.0	9	100.0	43	100.0

Source of Job by Employer Type	Law firms of 51 or more		Government		Public interest		All Employer Types*	
	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported
Fall OCI	5	71.4	0	0	0	0	8	8.4
Job listing	0	0	0	0	0	0	7	7.4
Pre-law school employer	0	0	3	27.3	0	0	7	7.4
Referral from friend	1	14.3	4	36.4	1	25.0	34	35.8
Letter/self-initiated	0	0	2	18.2	2	50.0	13	13.7
Temp agency or legal search	0	0	0	0	0	0	1	1.1
All other	1	14.3	2	18.2	1	25.0	25	26.3
TOTAL	7	100.0	11	100.0	4	100.0	95	100.0

** Excludes jobs for which a source, employer type, or firm size was not reported.*
"Other" also includes job fairs, spring OCI, non-CSO job sites and postings, and the self-employed.

Table prepared by NALP, July 2015

Class of 2014--The University of Memphis - Cecil Humphreys School of Law
Table 13
Number of Jobs Reported Taken by State

Region	State	# of jobs	% of jobs
E. North Central	Wisconsin	1	1.0
		1	*1.0*
South Atlantic	Florida	1	1.0
	Georgia	1	1.0
	North Carolina	1	1.0
	Virginia	2	2.0
		5	*4.9*
E. South Central	Alabama	1	1.0
	Mississippi	1	1.0
	Tennessee	87	85.3
		89	*87.3*
W. South Central	Arkansas	3	2.9
	Louisiana	1	1.0
	Texas	2	2.0
		6	*5.9*
Mountain	Colorado	1	1.0
		1	*1.0*
TOTAL		*102*	*100.0*

Excludes employed graduates for whom job location was not reported.

Table prepared by NALP, July 2015

Class of 2014--The University of Memphis - Cecil Humphreys School of Law
Table 14
Location of Instate Jobs

In-state location	# of Jobs	% of Jobs
Chattanooga	3	3.4
Columbia	1	1.1
Jackson	3	3.4
Knoxville	3	3.4
Memphis	53	60.9
Murfreesboro	1	1.1
Nashville	5	5.7
Oak Ridge	1	1.1
Other/unknown Tennessee	17	19.5
	87	100.0

Excludes employed graduates for whom job location was not reported.

Table prepared by NALP, July 2015

Class of 2014--The University of Memphis - Cecil Humphreys School of Law
Table 15
Full and Part-time Jobs by Employer Type

Full and Part-time Jobs by Employer Type	Full-time		Part-time		All	
	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported
Academic	3	100.0	0	0	3	100.0
Business	16	84.2	3	15.8	19	100.0
Judicial clerkship	10	100.0	0	0	10	100.0
Law firm	56	96.6	2	3.4	58	100.0
Government	10	90.9	1	9.1	11	100.0
Public interest	2	50.0	2	50.0	4	100.0

This table excludes jobs for which full or part-time information was not reported.

Table prepared by NALP, July 2015

The University of Memphis - Cecil Humphreys School of Law
Class of 2015 Summary Report

			Full-time Long-term Salaries				
	Number Reported	% of Reported	# with Salary	25th Percentile	Median	75th Percentile	Mean
Total Reported = 108							
Gender Reported:							
Subtotal		100.0					
Race Reported:							
Subtotal		100.0					
Gender & Race Repted:							
			.	.	.	.	.
			.	.	.	.	.
Subtotal		100.0					
Employment Status Known:							
Bar Passage Required	71	65.7	40	45,000	54,707	67,000	58,907
JD Advantage	17	15.7	13	36,000	45,344	55,000	49,003
Other Professional	2	1.9	.	.	.	.	.
Non-professional	4	3.7	.	.	.	.	.
Start date after 3/15/16	1	0.9	.	.	.	.	.
Not employed-Seeking	10	9.3	.	.	.	.	.
Not employed-Not Seeking	3	2.8	.	.	.	.	.
Subtotal	**108**	**100.0**					

Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis. Employment by sector does not include graduates for whom employer type was not reported.

Table prepared by NALP, August 2016
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The University of Memphis - Cecil Humphreys School of Law
Class of 2015 Summary Report--Page 2

	Number Reported	% of Reported	# with Salary	25th Percentile	Median	75th Percentile	Mean
			Full-time Long-term Salaries				
Total Employed or Degree:							
Employed	94	87.0	54	44,000	52,750	66,000	56,404
Subtotal	**94**	**87.0**					
Employment by Sector							
Private Sector	69	73.4	36	42,000	55,000	73,500	59,089
Public Sector	23	24.5	18	45,344	51,750	55,000	51,036
Subtotal	**92**	**97.9**					
FT/PT Jobs:							
Bar Passage Reqd-FT	63	67.0	40	45,000	54,707	67,000	58,907
Bar Passage Reqd-PT	8	8.5	.	.	.	.	.
JD Advantage-FT	15	16.0	13	36,000	45,344	55,000	49,003
JD Advantage-PT	2	2.1	.	.	.	.	.
Other Professional-FT	1	1.1	.	.	.	.	.
Other Professional-PT	1	1.1	.	.	.	.	.
Non-professional-FT	2	2.1	.	.	.	.	.
Non-professional-PT	2	2.1	.	.	.	.	.
Subtotal	**94**	**100.0**					
Employment Categories:							
Academic	3	3.2	.	.	.	.	.
Business	8	8.5	.	.	.	.	.
Judicial Clerk	6	6.4	5	42,000	48,000	54,414	48,201
Private Practice	61	64.9	34	44,000	55,000	70,000	59,506
Government	11	11.7	10	45,344	52,000	55,000	50,014
Public Interest	3	3.2	.	.	.	.	.
Unknown Type	2	2.1	.	.	.	.	.
Subtotal	**94**	**100.0**					
Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis.							

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Class of 2015 Summary Report--Page 3

			Full-time Long-term Salaries				
	Number Reported	% of Reported	# with Salary	25th Percentile	Median	75th Percentile	Mean
Academic Jobs:							
JD Advantage	2	66.7	.	.	.	.	.
Other Professional	1	33.3	.	.	.	.	.
Subtotal	**3**	**100.0**					
Business Jobs:							
Bar Passage Required	1	12.5	.	.	.	.	.
JD Advantage	3	37.5	.	.	.	.	.
Non-professional	4	50.0	.	.	.	.	.
Subtotal	**8**	**100.0**					
Private Practice Jobs:							
Bar Passage Required	54	88.5	29	45,000	55,000	77,000	62,190
JD Advantage	7	11.5	5	36,000	37,500	45,000	43,940
Subtotal	**61**	**100.0**					
Government Jobs:							
Bar Passage Required	7	63.6	6	49,960	52,482	56,868	51,965
JD Advantage	4	36.4	.	.	.	.	.
Subtotal	**11**	**100.0**					
Judicial Clerkships:							
Federal	2	33.3	.	.	.	.	.
State	3	50.0	.	.	.	.	.
Local	1	16.7	.	.	.	.	.
Subtotal	**6**	**100.0**					

Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis.

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			Full-time Long-term Salaries				
	Number Reported	% of Reported	# with Salary	25th Percentile	Median	75th Percentile	Mean
Public Interest Jobs:							
Bar Passage Required	1	33.3	.	.	.	.	.
JD Advantage	1	33.3	.	.	.	.	.
Other Professional	1	33.3	.	.	.	.	.
Subtotal	**3**	**100.0**					
Size of Firm:							
1-10	40	65.6	24	40,000	46,500	58,500	51,863
11-25	6	9.8	.	.	.	.	.
26-50	5	8.2	.	.	.	.	.
101-250	3	4.9	.	.	.	.	.
251-500	2	3.3	.	.	.	.	.
501+	2	3.3	.	.	.	.	.
Solo practitioner	3	4.9	.	.	.	.	.
Subtotal	**61**	**100.0**					
Type of Law Firm Job:							
Associate	45	73.8	26	48,000	58,500	88,000	64,212
Staff Attorney	6	9.8	.	.	.	.	.
Law Clerk	5	8.2	.	.	.	.	.
Paralegal	3	4.9	.	.	.	.	.
Administrative	2	3.3	.	.	.	.	.
Subtotal	**61**	**100.0**					
Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis.							

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Class of 2015 Summary Report--Page 5

			Full-time Long-term Salaries				
	Number Reported	% of Reported	# with Salary	25th Percentile	Median	75th Percentile	Mean
Jobs Taken by Region:							
E North Central	2	2.1	.	.	.	.	.
South Atlantic	1	1.1	.	.	.	.	.
E South Central	82	87.2	48	44,500	51,750	67,000	56,916
W South Central	5	5.3	.	.	.	.	.
Mountain	2	2.1	.	.	.	.	.
Pacific	2	2.1	.	.	.	.	.
Subtotal	**94**	**100.0**					
Location of Jobs:							
In-State	78	83.0	46	45,000	52,750	68,000	57,467
Out of State	16	17.0	8	39,250	52,500	56,934	50,296
Subtotal	**94**	**100.0**					
# States and Territories w/Employed Grads:							
	12	.	.	.	.	.	.
Total	**12**	**.**					
Note: Categories with no graduates reported are not shown. A minimum of five salaries is required for each salary analysis.							

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	Number Reported	% of Reported
Source of Job		
Fall OCI	2	2.3
Job Posting in CSO	6	7.0
Job posted online or in print	5	5.8
Clerkship application process or Oscar	2	2.3
Return to Prior Job	10	11.6
Referral	36	41.9
Start own practice	5	5.8
Self-initiated/letter	11	12.8
Spring OCI	2	2.3
Other	7	8.1
Subtotal	**86**	**100.0**
Timing of Job Offer		
After Bar Results	31	34.8
Before Graduation	27	30.3
Before Bar Results	31	34.8
Subtotal	**89**	**100.0**
Search Status of Employed Grads		
Seeking a different job	23	27.7
Not seeking a different job	60	72.3
Subtotal	**83**	**100.0**
Note: Figures are based on jobs for which the item was reported, and thus may not add to the total number of jobs.		

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	Jobs lasting a year or more			
	Total Number	Number of Indefinite Duration	Number of Fixed Duration	Number of Short-term Jobs
Duration of Jobs by Employer Type				
Academic	2	2	.	1
Business	5	5	.	3
Judicial Clerk	6	1	5	.
Unknown Type	2	2	.	.
Private Practice	54	53	1	7
Government	11	11	.	.
Public Interest	3	3	.	.
Total Reported	**83**	**77**	**6**	**11**
Total Number of Jobs Reported as Funded by Law School				
	1	.	.	.
Total Reported	**1**	**.**	**.**	**.**

Note: Figures for job duration are based on jobs for which the item was reported, and thus may not add to the total number of jobs.
The count of jobs funded by the law school is a total, regardless of duration.

Table prepared by NALP, August 2016
NALP Summary Report data may vary slightly from the school-specific data published by the ABA because of definitional differences between the two organizations and because NALP's quality control process can result in changes made after the ABA data has been submitted. For more on this, see www.nalp.org/erssinfo.

Class of 2015--The University of Memphis - Cecil Humphreys School of Law
Table 12
Source of Job by Employer Type

Source of Job by Employer Type	Academic		Business		Judicial clerkship		Law firms of 50 or fewer	
	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported
Fall OCI	0	0	0	0	0	0	1	2.0
Job listing	0	0	0	0	2	33.3	4	7.8
Clerkship application process or Oscar	0	0	0	0	2	33.3	0	0
Pre-law school employer	1	33.3	4	57.1	0	0	5	9.8
Referral from friend	0	0	1	14.3	1	16.7	25	49.0
Letter/self-initiated	0	0	0	0	1	16.7	7	13.7
All other	2	66.7	2	28.6	0	0	9	17.6
TOTAL	3	100.0	7	100.0	6	100.0	51	100.0

Source of Job by Employer Type	Law firms of 51 or more		Government		Public interest		All Employer Types*	
	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported
Fall OCI	0	0	1	9.1	0	0	2	2.3
Job listing	0	0	0	0	0	0	6	7.0
Clerkship application process or Oscar	0	0	0	0	0	0	2	2.3
Pre-law school employer	0	0	0	0	0	0	10	11.6
Referral from friend	5	83.3	2	18.2	2	100.0	36	41.9
Letter/self-initiated	1	16.7	2	18.2	0	0	11	12.8
All other	0	0	6	54.5	0	0	19	22.1
TOTAL	6	100.0	11	100.0	2	100.0	86	100.0

**** Excludes jobs for which a source, employer type, or firm size was not reported.***
"Other" also includes job fairs, spring OCI, non-CSO job sites and postings, and the self-employed.

Table prepared by NALP, August 2016

Class of 2015--The University of Memphis - Cecil Humphreys School of Law
Table 13
Number of Jobs Reported Taken by State

Region	State	# of jobs	% of jobs
E. North Central	Indiana	1	1.1
	Ohio	1	1.1
		2	*2.1*
South Atlantic	Florida	1	1.1
		1	*1.1*
E. South Central	Alabama	1	1.1
	Mississippi	3	3.2
	Tennessee	78	83.0
		82	*87.2*
W. South Central	Arkansas	3	3.2
	Oklahoma	1	1.1
	Texas	1	1.1
		5	*5.3*
Mountain	Colorado	1	1.1
	Utah	1	1.1
		2	*2.1*
Pacific	California	2	2.1
		2	*2.1*
TOTAL		*94*	*100.0*

Excludes employed graduates for whom job location was not reported.

Table prepared by NALP, August 2016

Class of 2015--The University of Memphis - Cecil Humphreys School of Law
Table 14
Location of Instate Jobs

In-state location	# of Jobs	% of Jobs
Bartlett	2	2.6
Chattanooga	4	5.1
Clarksville	2	2.6
Jackson	3	3.8
Kingsport	1	1.3
Memphis	47	60.3
Murfreesboro	2	2.6
Nashville	6	7.7
Other/unknown Tennessee	11	14.1
	78	**100.0**

Excludes employed graduates for whom job location was not reported.

Table prepared by NALP, August 2016

Class of 2015--The University of Memphis - Cecil Humphreys School of Law
Table 15
Full and Part-time Jobs by Employer Type

Full and Part-time Jobs by Employer Type	Full-time		Part-time		All	
	Number Reported	% of Reported	Number Reported	% of Reported	Number Reported	% of Reported
Academic	2	66.7	1	33.3	3	100.0
Business	5	62.5	3	37.5	8	100.0
Judicial clerkship	6	100.0	0	0	6	100.0
Law firm	53	86.9	8	13.1	61	100.0
Government	11	100.0	0	0	11	100.0
Public interest	2	66.7	1	33.3	3	100.0
Unknown employer type	2	100.0	0	0	2	100.0

This table excludes jobs for which full or part-time information was not reported.

Table prepared by NALP, August 2016

IHELP POLICY LAB: ACE INITIATIVE

The University of Memphis Cecil C. Humphreys School of Law is proud to announce the launch of the Institute for Health Law and Policy ("iHeLP") Policy Lab: ACE Initiative, thanks to generous support from the ACE Awareness Foundation.

The result of a transformative investment by the ACE Awareness Foundation, the iHeLP Policy Lab: ACE Initiative will be a multi-disciplinary resource for policy research, policy advising and drafting of new policies to create a nationally-regarded, trauma-informed system, building on the foundation's goals to inform the community about the role of emotional trauma in mental, physical and behavioral health, and implement models that provide preventable and sustainable solutions to reducing toxic stress in family systems.

"The ACE Awareness Foundation is committed to creating a trauma informed community that comprehends the impact of toxic stress on child and adult health as well as the silent, long-term social and economic impact on our community," said Ellen Rolfes, Regional Director for the ACE Awareness Foundation. "We are most fortunate to have a partnership with the University of Memphis to develop multi-disciplined ACE curriculum with six academic areas and create a policy initiative with the law school to impact healthcare. Such powerful collaboration is essential to a better Memphis."

Dean Peter Letsou announced the ACE Awareness Foundation gift and the iHeLP Policy Lab: ACE Initiative earlier this year at iHeLP's 2016 symposium, An ACE in the Hand of Policy Reform: Loading the Deck for a Trauma-Informed System, attended by stakeholders, nationally recognized leaders, and local and state experts. The gift will enable iHeLP to demonstrate the valuable role it can play as a non-partisan partner with skills and expertise in crafting a policy landscape that sees law itself as an intervention.

"Thanks to the generosity and vision of the ACE Awareness Foundation, the law school has been able to spearhead the creation of the University's first multidisciplinary, collaborative ACE curriculum. The work done by the policy lab will build on local and statewide momentum around addressing adversity in the early childhood years and building family support," according to Dean Peter Letsou. "We will partner in efforts to drive system-level health policy change in the Mid-South community across Tennessee for the specific purpose of ACE (Adverse Childhood

Experiences), mitigation and recovery."

This foundation support will not only allow Memphis Law and iHeLP look locally at policy regarding ACEs in Shelby County, but will provide the policy lab with the potential to drive policy change at both the state and national levels. It will also allow Memphis Law to assume a leadership position in the state as the only law school doing this type of work.

As part of the policy lab's work, enrolled students and fellows will examine items that include, for example, substantial research into insurance reimbursement policies to help craft "bundled" payment models that incorporate prevention and wellness services promising culturally-sensitive family and parental-support practices and programs. It will also serve as policy advisor and support to the Building Strong Brains: Tennessee ACEs Initiative.

"Through this policy lab, I hope to see the Institute help to advance the law school's role in the community and the growing influence of public/private initiatives," said iHeLP Director, Professor Amy Campbell. "This will help create a variety of academic/public/private approaches to benefit our community's overall health and be representative of the Institute's mission to use law and policy to advance health."

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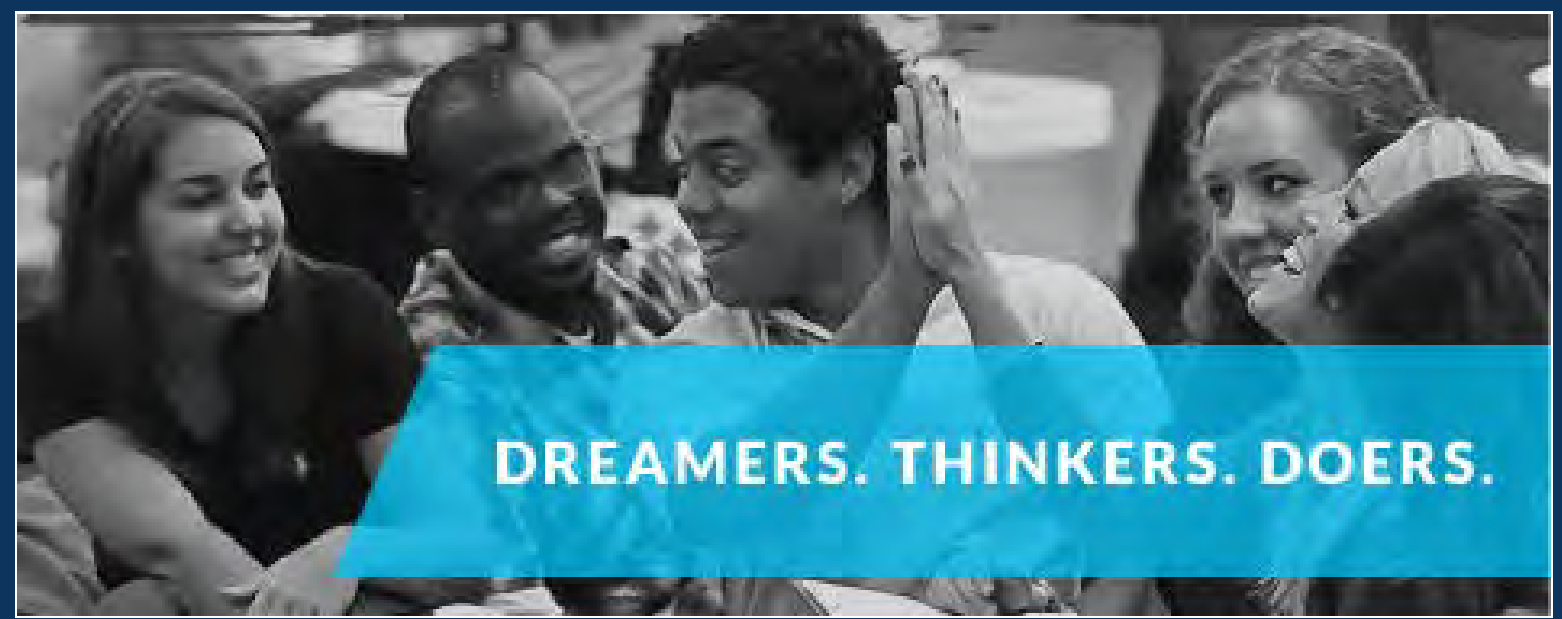

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IMPLICIT BIAS CONFERENCE

IMPLICIT (UNCONSCIOUS) BIAS CONFERENCE
FRIDAY, NOV. 18
8:00 A.M. - 5:00 P.M.
UNIV. OF MEMPHIS SCHOOL OF LAW
1 NORTH FRONT ST.

Thought by some to be an "old" problem, explicit bias continues to influence virtually all areas of American life including the business world, the media, education, and our justice systems. In addition, decision-makers may also be influenced by implicit (unconscious) bias. How implicit bias operates including strategies that will assist decision-makers in recognizing, shaping and managing its influence is the subject of this must-attend conference that will provide "A New Look At An Old Problem."

Explicit bias refers to bias that is a product of conscious, intentional discriminatory behaviors. In contrast, implicit bias refers to the more recent and controversial belief that automatic, unintentional biases and stereotypes people experience toward members of social groups or categories of people other than their own, can influence their decision-making and systemically and adversely affect members of certain groups. The importance of this topic is illustrated by the recent mandate by the U. S. Department of Justice requiring more than 33,000 of its agents and attorneys to undergo training to eliminate the influence of implicit bias in law enforcement decisions.

Non-Attorneys and government employees: $75; Attorneys: $125.

CLICK HERE TO REGISTER.

Nationally recognized experts will explore these timely and important topics, with the keynote address by Paulette Brown, Immediate Past President of the American Bar Association.

You may see the full program by clicking here.

This program is approved for 7 hours CLE (6 general, 1 dual) and 8 SHRM re-certification credits HRCI re-certification credits are pending.

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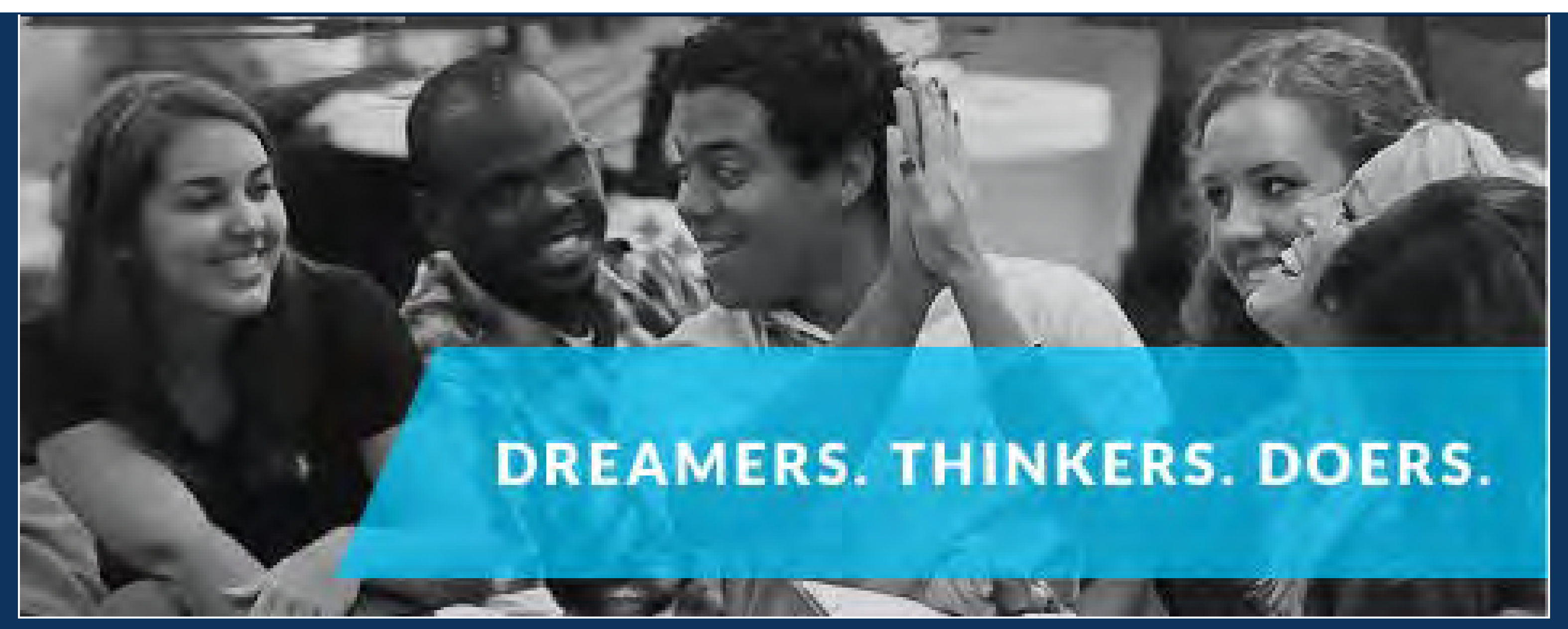

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CHILDREN'S DEFENSE CLINIC

The University of Memphis Cecil C. Humphreys School of Law new Children's Defense Clinic will offer supervised student attorneys the opportunity to provide legal representation to youth facing criminal charges in delinquency proceedings in the Shelby County Juvenile Court. Clinic students will complete a curriculum designed to provide training in the handling of delinquency cases, to enhance the vital lawyering skills students will use in their casework and in practice beyond, and to expose students to the complex legal, policy, social, and economic issues that arise in the juvenile justice and criminal defense settings. The clinic will emphasize team practice and collaboration, and, where possible, develop and seize on interdisciplinary partnerships to provide broadly focused, multi-systemic advocacy for Clinic clients.

It is anticipated that the Children's Defense Clinic will provide direct representation to children in all phases of delinquency cases. Students will also engage in systemic reform through policy advocacy and it is further hoped that the clinic will assist in the development of training materials and conduct training programs for practicing lawyers focused on best practices in juvenile criminal defense.

The Children's Defense Clinic is led by Professor Lisa Geis. Before joining the Memphis Law faculty, Professor Geis served as a Clinical Professor and Supervising Attorney in the DC Students in Court Program, an organization that serves several Washington, D.C. area law schools. She also taught at the University of the District of Columbia, David A. Clarke School of Law Juvenile & Special Education Law Clinic and was the John D. and Catherine T. MacArthur Foundation Models for Change Fellow at the Rutgers School of Law – Camden Children's Justice Clinic, where she worked on the Juvenile Indigent Defense Action Network (JIDAN-NJ).

Faculty: Lisa Geis, Visiting Assistant Professor of Law and Director, Children's Defense Clinic

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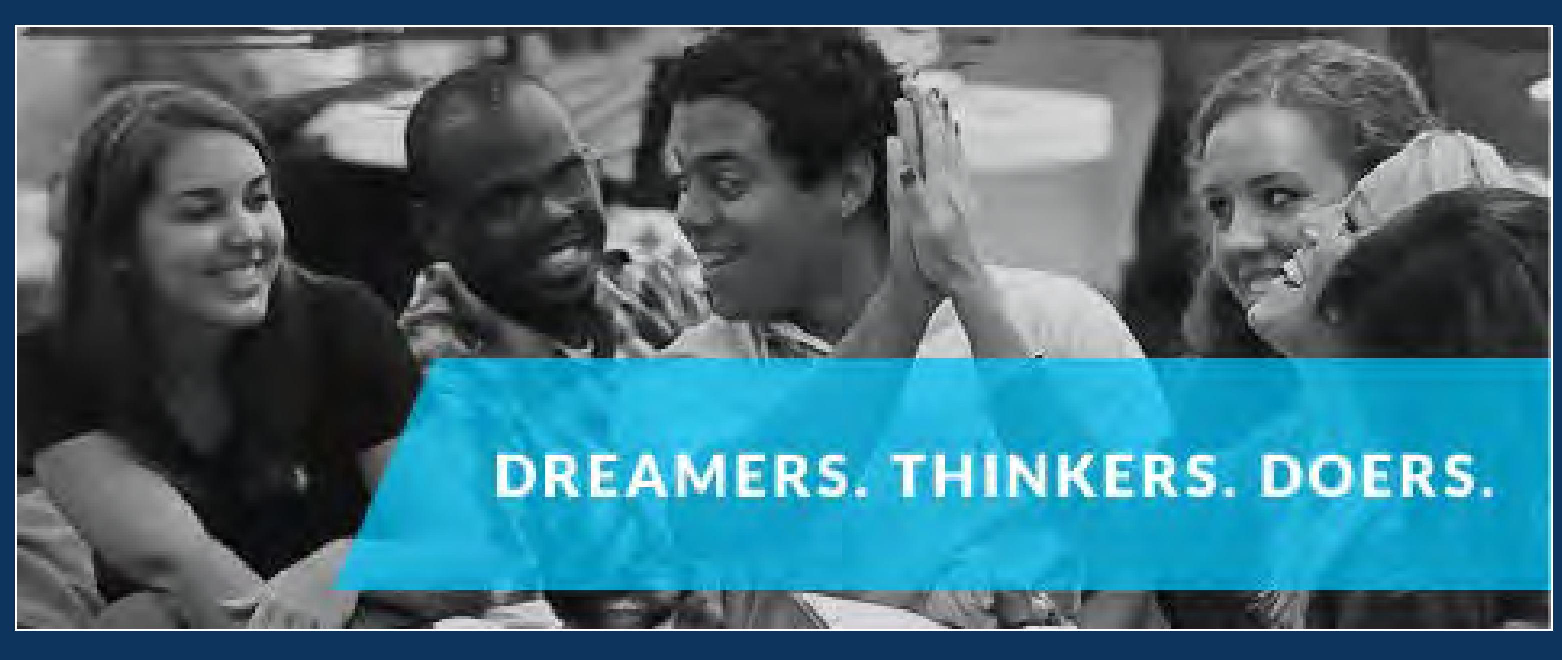

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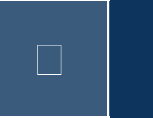
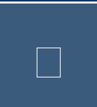
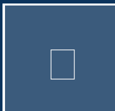
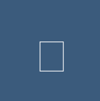
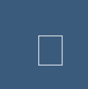
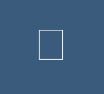

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2016 PILLARS OF EXCELLENCE AWARDS

The Cecil C. Humphreys School of Law Alumni Chapter honored eight individuals for their contributions to the law and to the community at its 2016 Pillars of Excellence dinner on Saturday, August 20, 2016 at the Holiday Inn on the University of Memphis campus.

The 2016 Pillars of Excellence honorees were G. Pat Arnoult, Saul Belz, John Dunlap, Jef Feibelman, Philip G. Kaminsky, Henry Klein and former Memphis Mayor A C Wharton. The Law Alumni Chapter also recognized Justice Holly Kirby (BSME '79, JD '82) as Special Distinguished Alumna.

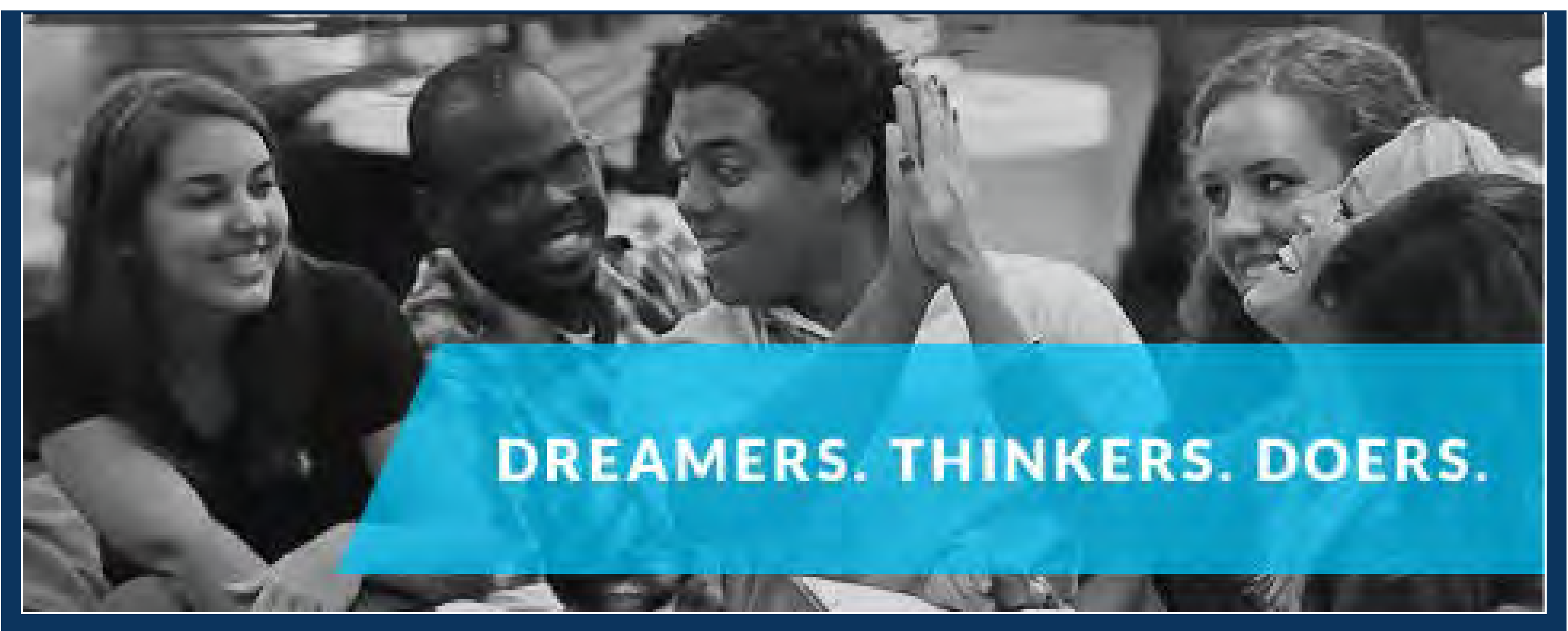
Justice Kirby (JD '82) is an associate justice on the Tennessee Supreme Court. She is the first Memphis Law graduate to serve as a member of the state Supreme Court, which now includes a second Memphis Law alumnus, Justice Roger Page. Justice Kirby was appointed to the court by Gov. Bill Haslam on Dec. 17, 2013 to fill the vacancy created by retirement of Justice Janice Holder. She assumed office on Sept.1, 2014. Justice Kirby is a former judge for the Tennessee Court of Appeals. She was appointed to this court by Gov. Don Sundquist in 1995 and was elected in August 1996.

Justice Kirby received her undergraduate degree in engineering from the University of Memphis and her JD from the University of Memphis Cecil C. Humphreys School of Law. She began her legal career in 1982 as a law clerk to Judge Harry Wellford of the United States Court of Appeals for the Sixth Circuit. She then worked as an attorney in private practice from 1983 to 1995 and later became a partner at the firm of Burch, Porter & Johnson. She was

appointed to the Court of Appeals in 1995 and was the first woman to serve on the Court of Appeals.

To see photos from the event, **please click HERE.**

Recipients of the Pillars of Excellence Award must be living at the time of selection; must have been admitted to the practice of law for more than 45 years; given significant service to the legal profession, including membership in bar associations and participation in bar association activities; given significant service to the community, including involvement in civic and charitable organizations; served in leadership roles in the legal and civic communities; made other significant contributions to the practice of law; and must be generally recognized among the Memphis Bar to possess the highest legal skills and ethical standards.



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PROF. ANDREW MCCLURG AUTHORS CASEBOOK

Professor and Herff Chair of Excellence Andrew McClurg has co-authored with Professor Brannon Denning (Cumberland School of Law, Samford University) a new casebook, Guns and the Law: Cases, Problems, and Explanation (Carolina Academic Press 2016).

McClurg is a longtime researcher, teacher, and presenter on issues of U.S. firearms policy, with a previous book and many law journal articles on the subject. He has been interviewed about firearms policy by sources such as National Public Radio, Time, U.S. News & World Report, the New York Times, Washington Post, and Politifact.

Asked what he sees as the primary strength of the new casebook, McClurg said: "Balance. Brannon is a pro-gun rights scholar and I'm pro-reasonable regulation. Together, as we did in our other book, we kept each other honest. The truth is that reasonable arguments exist on both sides of nearly every gun issue in America."

The book covers topics such as the book current federal and state gun laws, major constitutional cases, post-Heller Second Amendment litigation, modern self-defense rules such as Stand Your Ground laws, civil liability, gun laws in other countries, legal solutions to gun violence, and issues of guns and race, alienage, culture, and gender.

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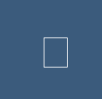
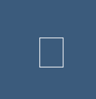
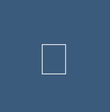
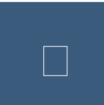
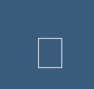
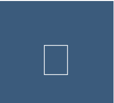

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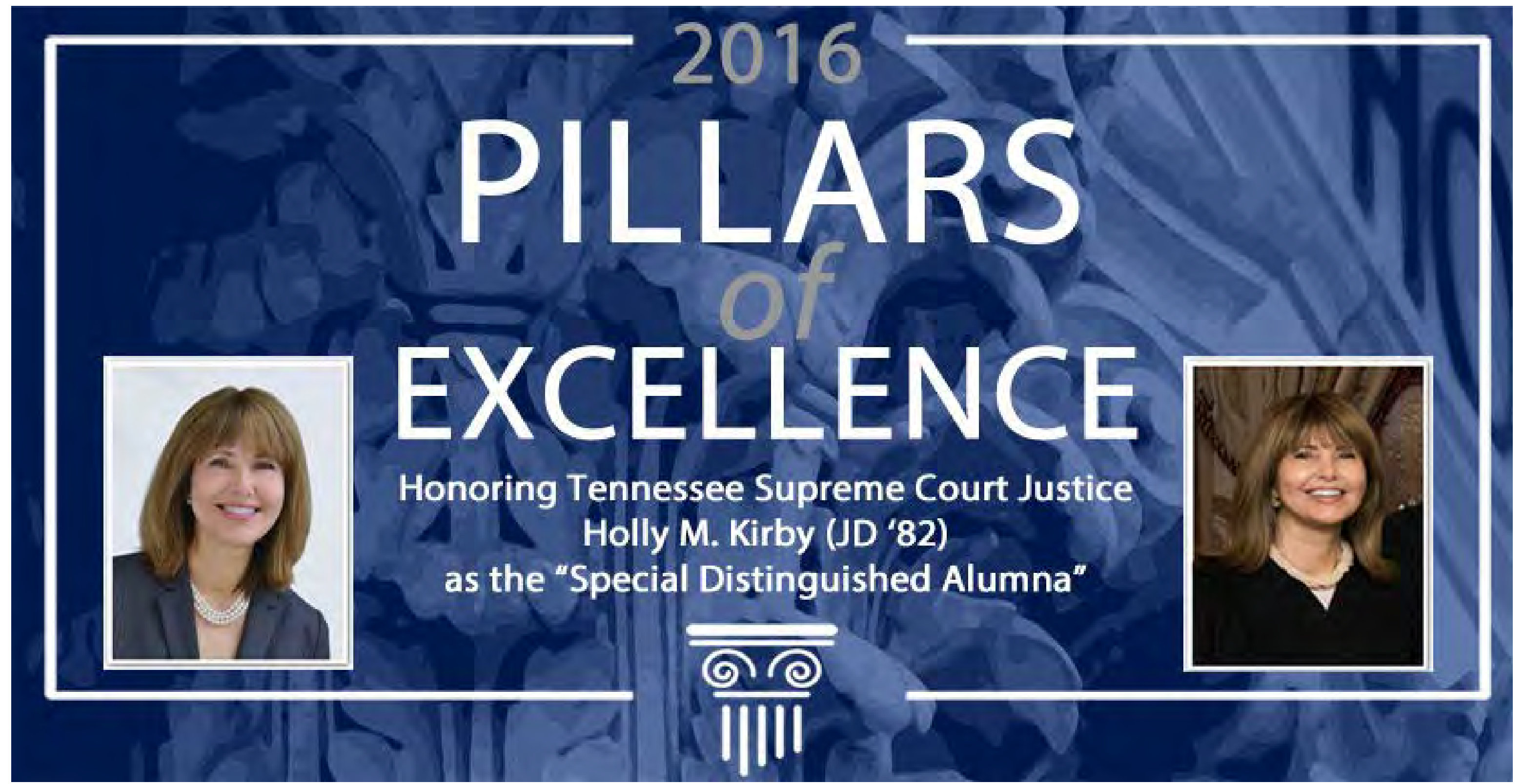

LAW ALUMNI HONOR JUSTICE HOLLY KIRBY

The Cecil C. Humphreys School of Law Alumni Chapter will honor Tennessee Supreme Court Justice Holly M. Kirby (JD '82) as the "Special Distinguished Alumna" at its 2016 Pillars of Excellence Awards Ceremony and Dinner. The event will be held Saturday, August 20, at the University of Memphis Holiday Inn. A VIP Meet & Greet will begin at 5:30 p.m., followed by a cocktail reception at 6:00 p.m., with dinner and awards at 7:00 p.m.

Justice Kirby (JD '82) is an associate justice on the Tennessee Supreme Court. She is the first Memphis Law graduate to serve as a member of the state Supreme Court, which now includes a second Memphis Law alumnus, Justice Roger Page. Justice Kirby was appointed to the court by Gov. Bill Haslam on Dec. 17, 2013 to fill the vacancy created by retirement of Justice Janice Holder. She assumed office on Sept.1, 2014. Justice Kirby is a former judge for the Tennessee Court of Appeals. She was appointed to this court by Gov. Don Sundquist in 1995 and was elected in August 1996.

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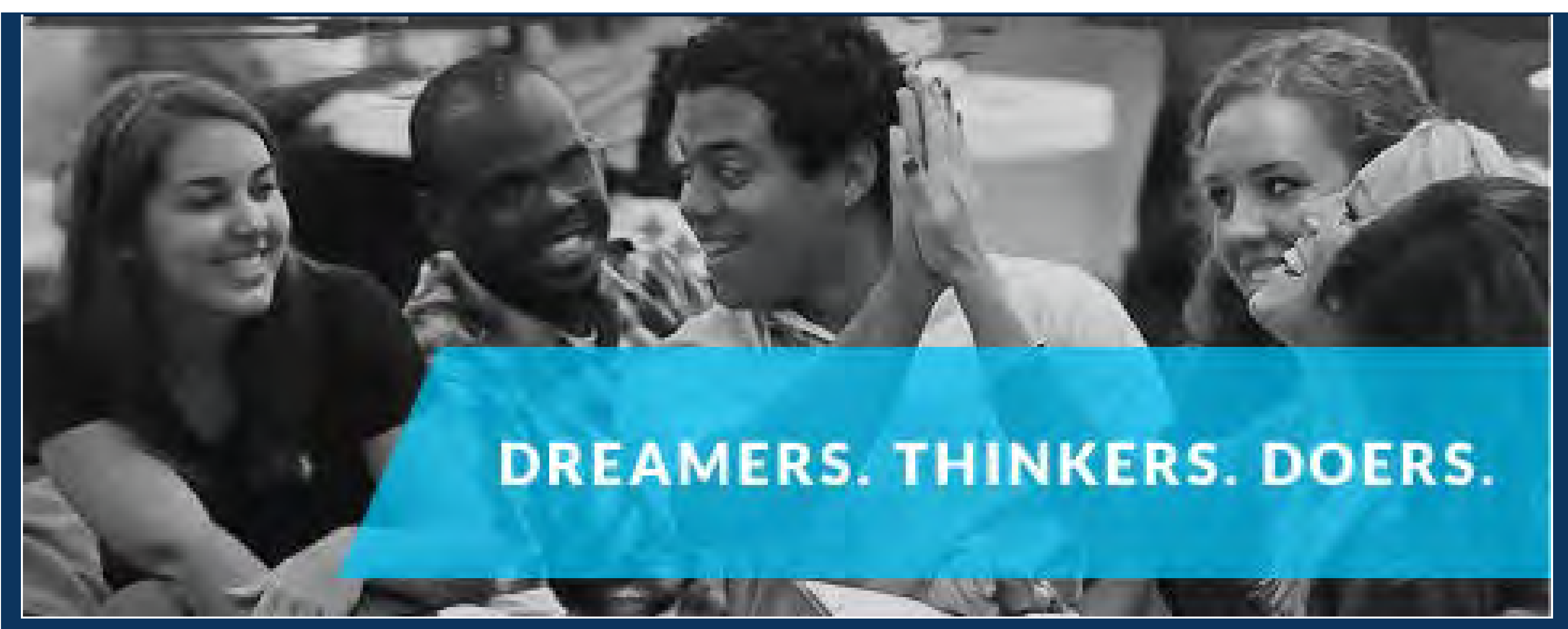
This year's other Pillar honorees are G. Pat Arnoult, Saul Belz, John Dunlap, Jef Feibelman, Philip G. Kaminsky,

Henry Klein and former Memphis Mayor AC Wharton.

For more information on the event, visit alumni.memphs.edu and click on the Pillars of Excellence link, or contact Marina Carrier at m.carrier@memphis.edu or 901-678-2461.

Recipients of the Pillars of Excellence Award must be living at the time of selection; must have been admitted to the practice of law for more than 45 years; given significant service to the legal profession, including membership in bar associations and participation in bar association activities; given significant service to the community, including involvement in civic and charitable organizations; served in leadership roles in the legal and civic communities; made other significant contributions to the practice of law; and must be generally recognized among the Memphis Bar to possess the highest legal skills and ethical standards.



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Cecil C. Humphreys School of Law

BRITTANY WILLIAMS NAMED NPC FELLOW

The University of Memphis Cecil C. Humphreys School of Law and the City of Memphis have hired Brittany Williams as the first "City of Memphis Neighborhood Preservation Fellow."

As a Fellow, Williams will assist in case handling and management for Neighborhood Preservation Act cases and other Environmental Court cases filed by the City. She will also draft and file lawsuits in Environmental Court, as well as communicate outside of court with defendants and attorneys for defendants regarding the status of all cases filed with Environmental Court or otherwise managed by the Neighborhood Preservation Clinic on behalf of the City. She will represent the City in litigation against owners of blighted property that violates City codes and will provide assistance to students enrolled in the University of Memphis Neighborhood Preservation Clinic in regards to case filing and management.

The City of Memphis provided the law school with $150,000 of funding to support this unique position through December 31, 2017, with proceeds from its Vacant Property Registry used to fund the unique partnership. As part of the agreement, the "Neighborhood Preservation Fellow" must be a Memphis Law graduate, with preference given to a graduate who has successfully completed a semester in the law school's Neighborhood Preservation Clinic, or participated in the anti-blight litigation externship with the City of Memphis Law Division.

Brittany Williams, a Class of 2015 Memphis Law graduate, was officially named the first Neighborhood Preservation Fellow in Summer 2016, only one year after successfully graduating from law school. Prior to her appointment as Fellow, Brittany worked for the law firm of Brewer & Barlow, PLC as a law clerk and in March 2016 was named the Interim Neighborhood Preservation Fellow before her official appointment in June of 2016.

"Our efforts with the City of Memphis to fight blight allow us to not only help the city itself, but also give our current students, and now our graduates like Brittany Williams, the ability to play a front-line role in this critical fight," said Dean Peter V. Letsou. "We are training our students to tackle a problem that lacked a focused solution before this partnership and, in doing so, we are helping to provide Memphis with specially trained attorneys to alleviate this blight epidemic."

The fellowship adds yet another component to the law school's and the City's dedicated fight against blight in the Mid-South. The law school and the City of Memphis last year announced the creation and launch of the Neighborhood Preservation Clinic, a partnership between the law school and the City's legal division that allows law students to earn real-world experience for law students in issues of blight, property abandonment, and neglect through the handling of cases in the Shelby County Environmental Court. The clinic is co-directed by local attorney and Memphis Law adjunct faculty member Steve Barlow and Assistant Professor of Law and Director of Experiential Learning Daniel Schaffzin. Over the past year, law students in the clinic have studied the laws concerning real property abandonment and neglect in Memphis, and worked with code enforcement officers to prosecute civil lawsuits filed pursuant to the Tennessee Neighborhood Preservation Act. The clinic and the City celebrated the filing of the City's 1,000th lawsuit against blighted property owners during the fall 2015 semester.

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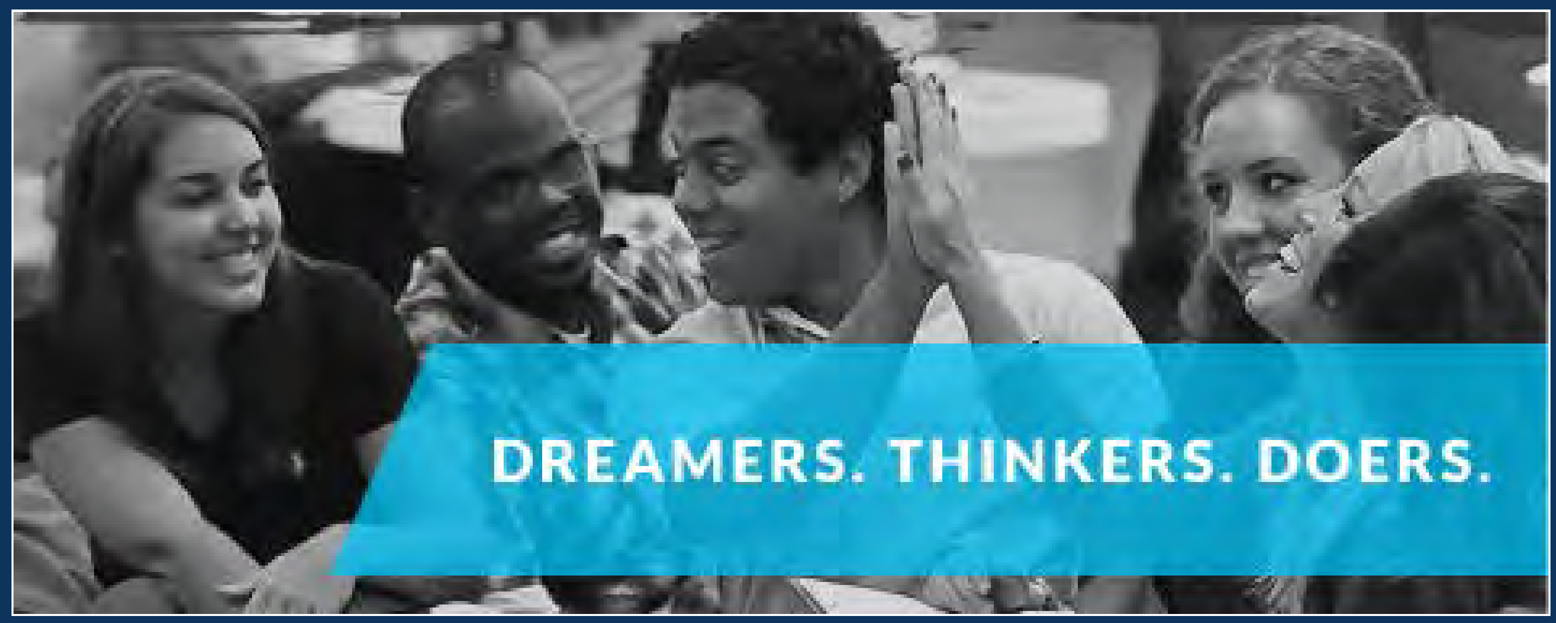

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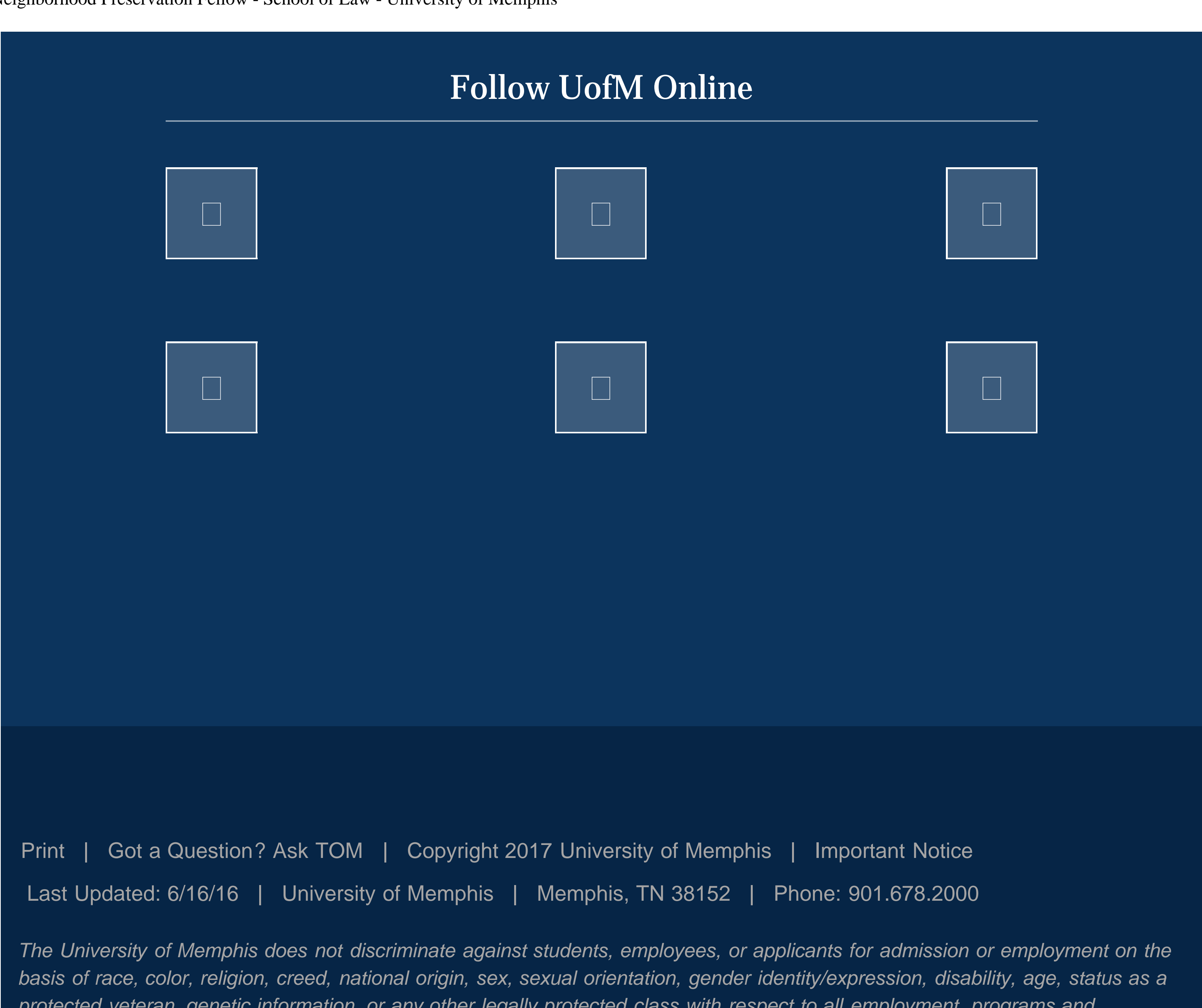

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— PAUL HOPKINS

JUNE 2016

HEALTH CARE

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MODERATOR

Dr. Kennard Brown
Executive Vice Chancellor/ Chief Operations Officer, The University of Tennessee Health Science Center

Brown holds the responsibility of coordinating the day-to-day administrative operations and the effective management of the campus central administration. Brown has been with the Health Science Center for 17 years and began his university service in the Office of the General Counsel.

He previously served as the director of the Office of Equity and Diversity, Office of Employee Relations and Center on Health Disparities. He serves as the Assistant Professor in the College of Pharmacy, Department of Surgery in the College of Medicine.

PANELISTS

Prof. Amy Campbell
Associate Professor of Law; Director of the Institute for Health Law and Policy, Cecil C. Humphreys School of Law

Campbell serves as adjunct faculty in the Center for Bioethics and Clinical Leadership of the Union Graduate College-Mount Sinai School of Medicine Bioethics Program. Campbell received her law degree from Yale Law School, master's in Bioethics from the University of Pennsylvania, and B.A. in History and Peace Studies from the University of Notre Dame.

Campbell serves on the Executive Committee of the Health Law Section of the Tennessee Bar Association and on the Board of the Memphis Bar Association's Health Law Section.

Paul Hopkins
CPA/Partner, Dixon Hughes Goodman LLP

Hopkins has more than 20 years of experience as a certified public accountant working primarily in the health care industry.

He is an assurance partner for Dixon Hughes Goodman LLP and has been with DHG since 2004. Within the health care industry, he serves hospitals and related entities, physician practices, skilled nursing facilities, independent and assisted living facilities and continuing care retirement communities.

With more than two decades' experience in health care, Hopkins brings skill and industry insight to his clients.

Jimmie Mancell
M.D, Methodist Le Bonheur Healthcare

Mancell is the chief of medicine and associate dean for Clinical Affairs at Methodist University Hospital and UT Methodist Physicians in Memphis.

In addition, he is an associate professor in the Department of Medicine at the University of Tennessee Health Science Center.

He is currently a team physician with the Memphis Grizzlies and is a member of the Strategy Committee and Cardiac Subcommittee of the NBA Physicians Association, and he is a consulting physician for the University of Memphis Athletics and the Memphis Redbirds.

Ron Rukstad
Chief Executive Officer, The Village at Germantown

Rukstad has 40 years of experience in the field of senior housing and services, and has served as the executive director of The Village at Germantown for the past four years.

Prior to that he was the executive vice president of operations for CRSA, a Memphis-based firm that specializes in the development, marketing and operation of life plan communities in 17 states. While in this capacity, his corporate staff oversaw the opening of many retirement communities and served as manager for 25 communities.

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Navigating changes and challenges in health care

Kennard Brown: As hospitals struggle with their bottom line, is it possible for a hospital to go out of business?

Jimmie Mancell: Unfortunately, this is the reality for some small community hospitals as well as regional hospitals. Their health care margin is so narrow; they have to be very good stewards of their resources to stay in business or change their business model. If they do not adapt to the changes in health care, they cannot survive. We have seen evidence of this within our own community.

Brown: In the past, hospitals were incentivized for volume. Today, they are incentivized on the quality of care. How is this changing hospitals?

Mancell: Even if paid less, one could just increase the volume to make up the difference. This is no longer the case. Now, hospitals and clinicians will be rewarded for the increased quality of care they provide and penalized if they do not meet set quality goals. Additionally, hospitals and clinicians are incentivized for preventive care as well as efficiently transitioning care from the inpatient to the outpatient setting.

Brown: How do physicians feel about payers setting the paradigm on the standard of care? How are they responding to those standards, such as the set time frame for readmissions?

Mancell: With a certain degree of anxiety and apprehension. However, these standards are not going away, therefore clinicians must be willing to collaborate with payers to agree to best practices to which we will hold ourselves accountable. As to the time frame for readmissions, it would seem straightforward, but this is not the case. Clinicians and hospitals can be penalized for a preventable complication causing readmission. This would seem to be a reasonable expectation. However, there are complications and/or medical events completely unrelated to the initial episode of care that require readmission. The hospital and clinicians would be penalized adversely for this readmission as well, which does not make sense.

Brown: There are challenges with the transparency and understanding of health care costs. How do we better understand health care costs and the unpredictability of hospital costs?

Paul Hopkins: It's a conundrum. We're getting a lot of calls about where health care is headed and how hospitals are going to be paid in the future. With the new value-based payment system, hospitals need to be able to become more risk-capable. This means taking on greater responsibility for the care of a defined patient population. Under a risk-capable payment model, providers are penalized or given a bonus for the quality of care they provide — and those payment models come in different forms. In the future, that transparency about the varying costs will become clearer as payments are made to treat an entire episode of care from start to finish. This puts hospitals and providers in riskier situations. So, at DHG Healthcare, we analyze the costs and help hospitals plan financially so as to not affect their bottom line.

Brown: The Affordable Care Act (ACA) can be confusing and complicated. What is expected to happen in health care with the new administration? Will the 'policy dust' ever settle?

Amy Campbell: It is very complex. And a lot of the complexity was also happening before the ACA, so some of these policies are more reactive, while others are proactive. The ACA addressed the complexity but also created more complexity. We have to figure out what law's role is in all of this. There are so many layers and unintended complexities. We must determine if the laws should be put in place to nudge a system toward wellness and out of the hospital and whether policies and laws should be reactive or proactive. And we have to figure that out by looking at both the negative and positive aspects we're seeing in health care.

Ron Rukstad: In retirement communities, we've been looking at how to prepare. We're going to get sicker people sooner and must take care of them in a patient-centered, state-of-the-art health care setting. As part of our partnership with Methodist Hospital, we are working on and preparing for that. This is partly because of the changes in health care reimbursement. The average a patient would stay at a rehab facility after a hip or knee procedure was 22-23 days. Now, the normal stay is seven days. So, we also have to change the way we manage patients and prepare them to be independent and ready to go home in just seven days as opposed to 23. Our focus is on rehab and doing it well and as quickly as possible.

Brown: Can you please explain what the seniors' Life Plan Community is?

Rukstad: Things have changed in senior housing. When I began work in this field, the entire emphasis was on convenience — seniors would not have to take care of a yard or cook meals or do housekeeping. Today, our residents expect a comprehensive plan of wellness and programs that will help them live longer with a higher quality of life. So, the focus is now more on wellness and related programming. In addition, the emphasis for retirement communities used to be on seniors' care when they were sick. If their health declined, we'd help take care of them. Today our Life Plan Community program focuses on the positive and takes a holistic approach to wellness to help them live at the highest quality of life. In a traditional nursing home, people think that once they enter the facility, they are there to stay. We want to rehabilitate at the highest level possible — with 87 percent of the seniors returning to highest level of functioning. The whole approach has changed — Life Plan focuses on the positive and staying healthy, not simply taking care of you while ill.

Brown: Where does the health care responsibility lie — with the federal government or on the state level?

Campbell: It's not an either/or situation. We rely on and depend on the state's ingenuity and how they respond to local resources, conditions and needs. States also have more flexibility than the federal government. But the federal government can be supportive to states by showing them how to invest and also by sharing best practices. Think of this as a two-legged stool: It might get off-kilter, but we do need interaction from both. And that also creates challenges of which is more dominant — states or feds? We have to value that health is as a state issue, but there is a role for the federal government. We have to find the balance, which is an ever-present challenge.

Brown: Should the payers devote more resources and pay more for populations with the poorest health or those who are sick more, such as geriatric and pediatric patients — or focus on trying to keep populations healthy?

Campbell: Historically, we've always paid more for the sick, and we've focused on a higher level of care for someone in the hospital. So, as we shift our policies, we still need to devote our resources to those ill populations, but we have to figure out how to do it more efficiently and effectively. Payers are realizing that it's not just the health system's job anymore, we have to help keep kids well and out of the ER. We could address mold in a household, for example. It's an odd health charge, but it will save health costs down the line. Payers also need to think about how what makes someone healthy isn't just about what happens in a hospital; they have to think in broader terms.

Hopkins: Employers are driving reform, too. Their health care costs have skyrocketed. So, they want to help their employees stay healthy, keep them out of the hospital and help manage their chronic care — doing so helps keep the employers' costs down.

Mancell: Employers are investing in prevention and wellness because this affects the health and subsequent productivity of their employees, creating savings for them. Insurance companies, as well as the federal and state payers, should have strategies around preventive care and wellness for specific populations and communities. There was a time when medical insurance would only pay for a visit if there was actually something wrong with the health of the patient. This mindset has to shift in the discussion of population health.

Brown: Should health care and insurance be attached to employment?

Campbell: I say no. With the ACA exchanges, there are trends where employers want to get out of that line of business. Historically, it's been an employer-based benefit. It's so complex for employers, they'd want to be rid of that responsibility; so, they are interested. But, we have to figure out what fills that vacuum. Is it public or private? State or federal? What we have is not working — so, what's the fix? That's the challenge.

Brown: You know the saying "First in cost, last in outcomes." How do we make people come to grips with this reality?

Hopkins: There's continued pressure for the

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health care industry to do more and to do better with less and with a finite amount of money. The ACA ignited industry reform, where everyone is questioning this now and saying, "We want better outcomes, but we don't want to pay as much." That's the challenge. So, we need more best practices. For example, in the past, we'd always discharge patients to a nursing home and they'd stay for an extended period of time. Now, to reduce some of the financial waste, we're looking at home health care or rehab when appropriate to help reduce costs. This takes everyone working together. Employers and the government are driving this – the "do more with less" attitude – by funneling it down at an accelerated pace.

Rukstad: We have to change traditional mindsets to be more efficient with less. How can we deal with new quality-centered reimbursement systems? We need to rethink how everything works. Working with Methodist has been a great experience, because we are working together as partners to identify procedures, to provide efficient health care to seniors.

Mancell: In the changing health care landscape, we are going to have to provide value by increasing quality while decreasing cost. Essentially doing more with less. At Methodist LeBonheur Healthcare, we are doing this by removing inefficiencies and waste. Some of this is through better use of technology, including the electronic medical record. However, there continues to be obstructions such as HIPAA. Due to occasions of over-interpretation of this law, there can be an inability to get medical records with vital information, test results or procedural reports, which forces clinicians to sometimes repeat unnecessary tests. This reality has to change.

Jimmie Mancell and Amy Campbell

ELLEN COLLIER | MBJ

Campbell: I tell my students, the HIPAA law is an intervention in many ways as a lived experience; as a practice, it does frustrate and stifle conversation and that wasn't the intent – but that's how it's being interpreted, used and applied. Law's responsibility is to work and navigate, so the law is achieving the intended result not creating barriers. This is an opening – address HIPAA and those kinds of laws.

Brown: Should we deal with tort reform? What risk are physicians in in terms of legal culpability and malpractice?

Campbell: There is a role for litigation and addressing serious errors. And there is a role for tort reform as we have more team-based care, where the physician has the prominent risk, but the physician isn't the only one with the risk – the liability is on a team, not just the doctor. Tort reform is for enhancing the quality of care. So, we have to figure out: How do we make sure the intent behind the law is being achieved?

Brown: To reduce hospital admissions and length of stays, wellness programs are being incentivized. Should entities take on more proactive measures to help to mitigate costs downstream?

Rukstad: New reimbursement systems are going to drive that, which is the expectation of payers and partners. The biggest incentive we have is to be in a preferred provider relationship, as we are with Methodist, Campbell Clinic, and MSK, which is a benefit to us. Wellness programs right now are only private pay. Our residents have access to our pool, track, therapists – they're part of the Life Plan Community. They have access to those things by being residents of the community. We are looking to expand that platform to our larger senior community.

Hopkins: Wellness becomes more important from the employer standpoint. By offering health club memberships and helping manage chronic conditions, employers are attempting to keep their employees healthy and total health care costs down, as well. Wellness programs will continue to expand to keep costs down. The benefit is reduced insurance costs to the employer. There should be some financial incentive because of the reduction in health care spending on the backend.

Brown: What can be done to orient the frontline physicians with the reality of the costs and economics of the medical industry?

Mancell: Physicians are going to have to become more actively involved in setting the standards for increasing the quality of care. This will require a better understanding of the costs associated with the care they provide. As we become more responsible for this cost, we are going to have to collaborate with each other as well as hospital management. At Methodist LeBonheur Healthcare, we have started this collaborative effort between hospital management and the medical staff by forming clinically integrated networks.

Brown: Should we indoctrinate medical students about the economics of the industry earlier – during medical school?

Mancell: Yes, we should. I have given a medical economics lecture to medical residents and students regarding the cost of what we do. During the lecture, I ask them to write down the costs they believe are associated with certain tests, X-rays and procedures they order. Then, we go over the actual cost of all of these items, which becomes a rather sobering moment. I believe teaching medical students early the costs associated with what they do will certainly improve the quality of care while reducing these expenditures.

Hopkins: It can be challenging for hospitals to tell you their true cost for an episode of care, but they know what they're going to get reimbursed. There must be transparency. But, there is confusion because hospitals can show what the charges are, but they don't necessarily show the contracted amounts they will be paid. The industry only works like this because of third-party payer involvement.

Brown: How can costs for the same procedures be so different at various hospitals? Is there any intent to set a standard for charges and reimbursement to establish predictability in the costs?

Hopkins: Some reimbursement variance is due to different markets, but sometimes it just says something to the skill of contract negotiators to get a higher reimbursement rate for their hospital.

Campbell: We should have consistency and less variation. Health care is a business, and we have some knowledge of what it will cost and reimbursements based on what we're providing. We all agree there are problems, but we're not changing. The ACA created some changes, but we still need more understanding, consistency and clarity. Would we be better off with just one payer that we negotiate across systems? Even from a business and accounting perspective, that would have benefits.

Rukstad: Medicare covers a growing segment of the population. There is Medicare A, Medicare B, supplemental insurance, long-term insurance – it is all a challenge to navigate. There are few geriatricians. We are fortunate at The Village at Germantown to have doctors and staff who understand Medicare and how the system works – they deal with it every day. There is a real need within the industry to understand the Medicare system and how to navigate it. It is extremely complex.

Brown: So, where do seniors go for help with the system?

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Rukstad: At The Village at Germantown, we have a social services staff to help navigate that. In conjunction with Methodist, we want to use our platform as a basis to provide education to the community, so we offer people access to the full extent of services they may need — hospice, home health, companion programs and education on how to use Medicare. Our goal is to provide care coordinators for seniors who take advantage of the new program we envision: Seniors will be able to pick up the phone and tell the coordinators what's happening and ask who to be in touch with regarding a specific issue. We want them to be able to say, "I'm concerned about this, who can help me?" We want to be a resource for seniors because so many experience that difficult problem: What do I do?

Brown: What does the medical industry's economic future look like?

Hopkins: That's difficult, because the health care industry is always changing. I'd say we're going to see more alternative payment models and more risk pushed from payers over to providers. Providers who are ready for it will thrive, others will fail in that system. The time to look at it is now. We are close to that tipping point of when it occurs. If we can get some of the waste out of the system, that will take some of the pressure off.

Mancell: We will continue to have to improve managing costs associated with all patient populations, including insured, underinsured and uninsured patients. One of our solutions has been providing preventative services through our Congregational Health Network, especially in the 38109 ZIP code, which has improved care in the outpatient setting and decreased the high cost of hospital utilization. All health care systems will have to be proactive using different and unorthodox methods to improve the health in our community.

Brown: Is the magnitude of the underinsured and uninsured population still significant?

Mancell: The magnitude does remain significant. In addition, we have to recognize the increased out-of-pocket expenses incurred by the insured population with high-deductible plans, many of whom are one significant illness away from bankruptcy. Now the burden includes patient populations without insurance as well as populations with insurance having to pay an increased out-of-pocket expense. This increases the magnitude of financial risk.

Campbell: The ACA had built-in assumptions that states would expand Medicaid and the presumption that we wouldn't have uninsured people, and it altered how health systems would be reimbursed. We didn't expect we'd still have uninsured people and that rates would change with out-of-pocket costs. Health isn't just a Methodist Hospital or a Baptist Hospital — it's the health systems like Congregational Health Network. We have to be thinking, what can schools do to promote health, what can be done about transportation? So many things impact health and health systems. Our communities need to know what their roles are in maintaining health.

Brown: States can create unintentional competition. When a medical helicopter from Mississippi flies a patient to a medical facility in Memphis, are communities expected to incur the costs of people who are not from that community? Are health systems and communities being negatively impacted by being a regional hub? And, who assumes financial responsibility for undocumented patients?

Paul Hopkins and Ron Rukstad

ELLEN COLLIER | MBJ

Campbell: This is another part of the state vs. federal roles. But, for certain trauma care and specialized care, which are necessary, it makes sense that there are just a few centers of excellence, rather than middling facilities. Memphis is a place that has centers of excellence and bears the burden of the cost of care from other communities, not just from within our own community. There can be a role there for the federal government to help ensure Memphis doesn't lose out because it did the right thing and served someone from Arkansas or Mississippi. We shouldn't have a system that says, we can't afford this. The federal government needs to help by playing a role with a fund to draw from to help offset those costs, for example.

Mancell: We experience this all the time. Being a regional referral center, we accept complex cases from multiple outlying communities. Whether they are insured, underinsured or uninsured, we can have significant difficulty returning them to their community. They may have limited family support or resources. This leads to very prolonged hospitalization with a high cost, for which we are typically not reimbursed. There are challenges unique to different states regarding the provision of care for patients from their communities and efforts to return them to those communities.

Brown: Where is the line drawn when cost is passed on to the health system? Who foots the bill for bad behavior such as eating fast food meals every day or choosing not to wear a helmet while riding a motorcycle? What about when cities pass laws banning 64 oz. sugary soft drinks for health reasons?

Campbell: We have to be careful here: How much can the law do and where does the law fit in? does it come before or after issues? With value-based insurance, if you don't do certain things, you have to pay more, and you'll pay less each month if you do those things. How much is willfully bad and how much is systemic? How can we address the environment — if someone can't join a gym because it's expensive, but they could exercise outside — can we put the responsibility on the person? If so, we have to be careful. How much is it the individual's clear, obstructed choice and how much is environmental? The law has to address those barriers that impact health. Policy is shifting to say that, with these value-based insurance plans, if you engage in behaviors that lead to unhealthy outcomes, you will pay more. If you smoke, for example, you'll have a surcharge. Within certain limits, surcharges are allowed.

Brown: Is a penalty for not having insurance okay?

Campbell: I'm okay with that — as long as we structure it correctly. For those who really can't afford it, can we craft ways to make sure the copays are affordable and the coverage is appropriate? There is a lot of focus on this idea: As an individual, I have rights when I get sick; I have needs. I think there has to be a shift in understanding that health is collectively felt and impacted. The system works best if we can figure out how to get everyone insured, perhaps by offering a sliding scale to make that mandate affordable.

Brown: Should the role of law be more embedded in the creation of health care legislation? Once a law is created, is the interpretation of the law up to the hospital, payers and providers? What if they have different interpretations rather than a common understanding? There should be more emphasis on how these laws are interpreted. The bastardization of HIPAA is a good example.

Campbell: I agree. When we're thinking about legislation or regulation, we should have doctors, CEOs, accountants — all people should be involved in an evidence-informed process. Law doesn't come from nothing. It's to address issues where it makes sense. We can't think of it as: Once we pass the law, we're done. Once it's passed, we must educate our health care partners about what the law means and the differences between a statute vs. a regulation. And we have to listen. If we hear or see there are problems, we have to think how we can fix the educational aspect or the actual law. There must be interdisciplinary collaboration in crafting, implementing, evaluating and amending as needed.

Brown: How do we keep young, bright people in the health care industry despite the challenges of policies and economics?

Mancell: We keep them interested by reminding them of the ultimate reward and satisfaction achieved by caring for our fellow man. It truly is a calling. There are going to be frustrations and challenges, as there are with most things in life, but to care for and improve the quality of life for our patients and their families is a true gift. We have to prepare them for these challenges to minimize their frustration.

Brown: From doctors to policy makers and social services, health care has a framework based on community. Would you say that we, as a community, have to be more involved in our health care system and industry?

Mancell: We have to be more involved to address the health care disparities we have in a significant portion of the communities we serve. We know the majority of our community wants good health, we just have to find ways to remove the barriers keeping them from achieving good health. We have to be mindful of the financial barrier contributing to poor health. For example, the cost associated with the therapy of some chronic conditions such as diabetes is more than the monthly rent or mortgage for several of the patients in our community.

Brown: If you could change one thing about health care, what would it be?

Rukstad: Our nurses are amazing — they input chart information into the computer; what they did with the patient; why they did that; the care plan — all to ensure everything is compliant. These nurses want to care for these patients but spend much time in documentation. We need compliance, but it is to the point of being difficult to provide the hours on care required and expected.

Mancell: Sensible accountability. Physicians and health care systems should be held accountable for the quality of care they provide and any preventable complication associated with that care. Currently, though, physicians and hospitals are held accountable for unrelated complications as well as readmissions for medical problems completely unrelated to prior episodes of care based solely on a predetermined period of time, 30 days. This absurdity is what continues to perpetuate pessimism and the reluctance to participate in meaningful change within payment systems. As a whole, we must be more engaged than ever to remove these arbitrary penalties and drive sensible accountability.

Hopkins: From an accounting and CPA standpoint, health care is highly regulated, and a lot of dollars are spent on compliance that could be spent on patient care. To make health care better, one thing I'd change is to find a way to effectively operate the industry as it should, but not spend so many dollars on compliance.

Campbell: When I'm working with students, I tell them that law does not operate in a vacuum. Law is a service profession of open dialogue with all the players in the system with the right balance of policy regulation and a spirit of humility. Early on, we need to start training people to think about how we can be more collaborative and do more listening. What's the problem I'm hearing that law could help with? Law should be more of a flexible partner than in a fixed state. It's hard to change laws without unintended consequences. We need law advancing health — its purpose is not an impediment to health. How do we get a unified mission to advance health, and what's the role of law: as informing; being a firm hand; to nudge; to be a silent partner when it needs to be? How do we strike that balance? It has to start in law school by opening our doors and learning alongside businesses and health systems and all the players. What is this system, and what's the pivot point for law?

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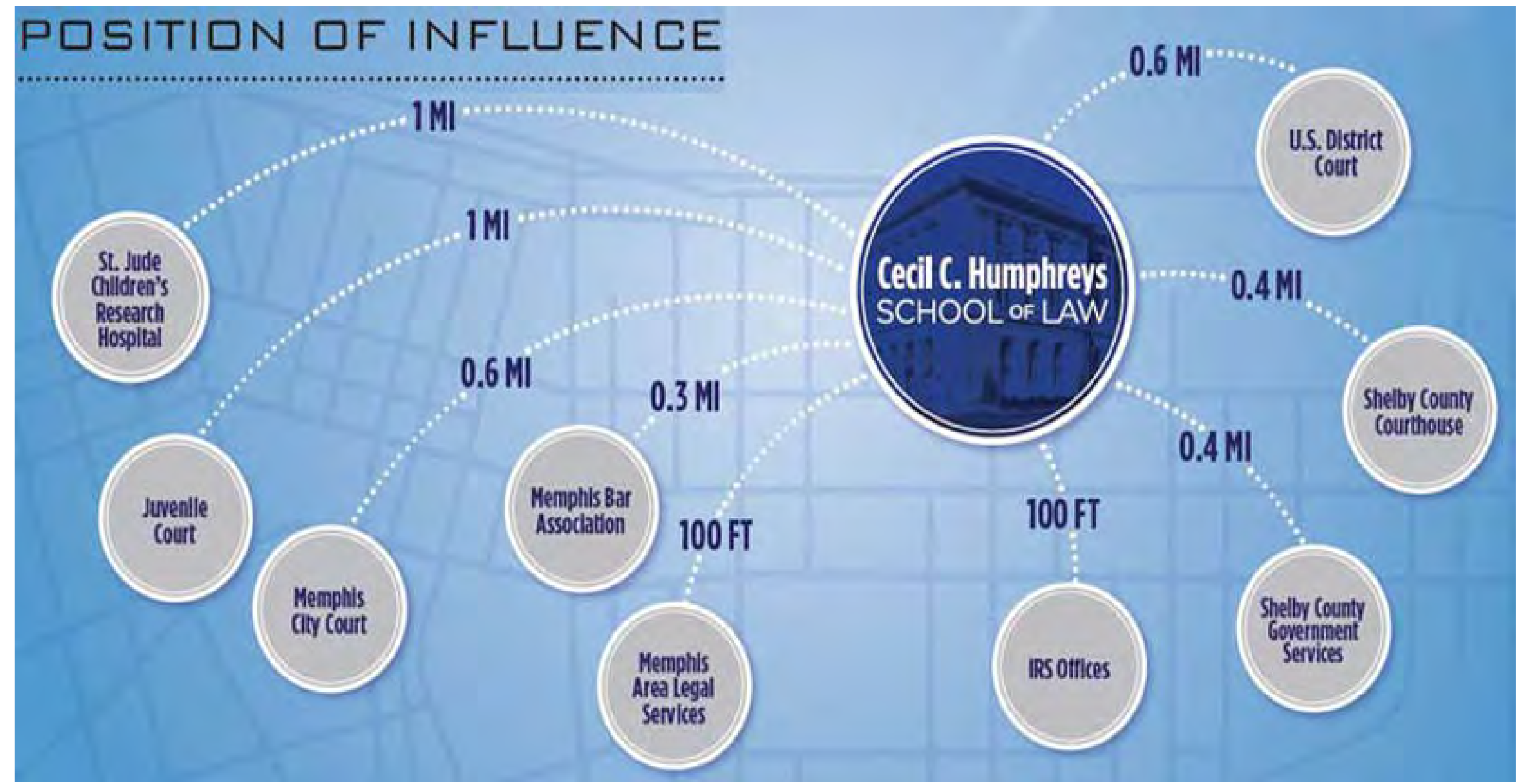

2016 SUMMER EXTERNSHIPS

During the Summer 2016 semester, 50 University of Memphis School of Law students are enrolled in the externship course, simultaneously earning academic credit and gaining valuable hands-on legal experience through field placement work performed under the supervision of federal and state judges on the appellate and trial court levels; federal and state attorneys' and public defenders' offices; federal and state government and administrative agencies; an educational institution; healthcare entities; and non-profit legal services providers.

"By taking advantage of the law school's experiential learning course offerings, including our field-based externships and in-house, live-client clinics, Memphis Law students move beyond the foundation of core doctrinal courses and immerse themselves in supervised legal activities designed to further develop essential lawyering skills and professional values," said Daniel Schaffzin, Assistant Professor of Law and Director of Experiential Learning. "Students emerge from experiential courses that much more ready to practice law and to meet the rightfully high expectations of the future clients and employers on whose behalf they will work following graduation."

"I highly recommend the externship course at the University of Memphis because it provides a necessary exposure to 'real world lawyering' beyond the walls of the law school building," said Bob Huddleston, a rising 3L student, who is a summer extern with the Equal Employment Opportunity Commission's Hearings Unit in Memphis. "An externship provides insight into practical lawyering skills by showing how the substantive material learned in the

traditional classroom translates into day-to-day legal practice. Additionally, the contacts, connections, and mentoring relationships made while working alongside supervising judges and practitioners serve the extern well in his or her future career, and, even better, are rewarding on a purely personal level."
As part of the Summer 2016 externship course, Memphis Law students are gaining for-credit learning and work experience opportunities through the following field placements:

Judicial Chambers

- Judge Bernice B. Donald, U.S Court of Appeals for the Sixth Circuit, Memphis, Tennessee
- Judge S. Thomas Anderson, U. S. District Court for the Western District of Tennessee, Memphis, TN
- Judge John T. Fowlkes, U. S. District Court for the Western District of Tennessee, Memphis, TN
- Magistrate Judge Tu M. Pham, U.S. District Court for the Western District of Tennessee, Memphis, TN
- Justice Holly Kirby, Tennessee Supreme Court, Memphis, TN
- Judge Camille McMullen, Tennessee Court of Criminal Appeals, Memphis, TN
- Judge Robert L. Childers, Shelby County Circuit Court, 30th Judicial District, Memphis, TN
- Judge Donna M. Fields, Shelby County Circuit Court, 30th Judicial District, Memphis, TN

Federal and State Government Law Offices

- City of Memphis Attorney's Office, Litigation Unit, Memphis. TN
- Office of the Desoto County District Attorney, Hernando, MS
- Office of the Dunklin County Prosecuting Attorney, Kennett, MO
- Office of the Federal Public Defender for the Western District of Tennessee, Memphis, TN
- Shelby County District Attorney General's Office, Memphis, TN
  - Honors Prosecution Externship (8 Students)
- Shelby County Public Defender's Officer, Memphis, TN
- Tennessee Office of the Post-Conviction Defender, Nashville, TN
- U.S. Attorney's Office for the Western District of Tennessee, Memphis, TN
- U.S. Attorney's Office for the Western District of Tennessee, Jackson, TN

Federal and State Administrative Agencies

- Centers for Disease Control and Prevention, Public Health Law Program, Atlanta, GA
- Memphis-Shelby County Airport Authority, Memphis, TN
- Tennessee Department of Environment and Conservation, Nashville, TN
- U.S. Equal Employment Opportunity Commission, Hearing Division, Memphis, TN

Educational Institutions

- University of Memphis Office of Athletic Compliance
- University of Memphis Office of Legal Counsel

Healthcare Entities

- Baptist Memorial Health Care Corporation, Memphis, TN
- Shelby County Health Department, Memphis, TN

Non-Profit Advocacy

- American Civil Liberties Union, Nashville, TN
- Community Legal Center, Immigration Justice Program, Memphis, TN
- Ducks Unlimited, Memphis, TN
- Financial Institution Regulatory Authority (FINRA), Atlanta, GA
- Justice for Our Neighbors, Nashville, TN
- Memphis Area Legal Services, Memphis, TN
    - Domestic Violence Unit
    - Low Income Taxpayer Unit
    - Partnership for Educational Advocacy and Parity
- University of Memphis Neighborhood Preservation Clinic

For more information about the Experiential Learning Program at the University of Memphis School of Law, please click here.

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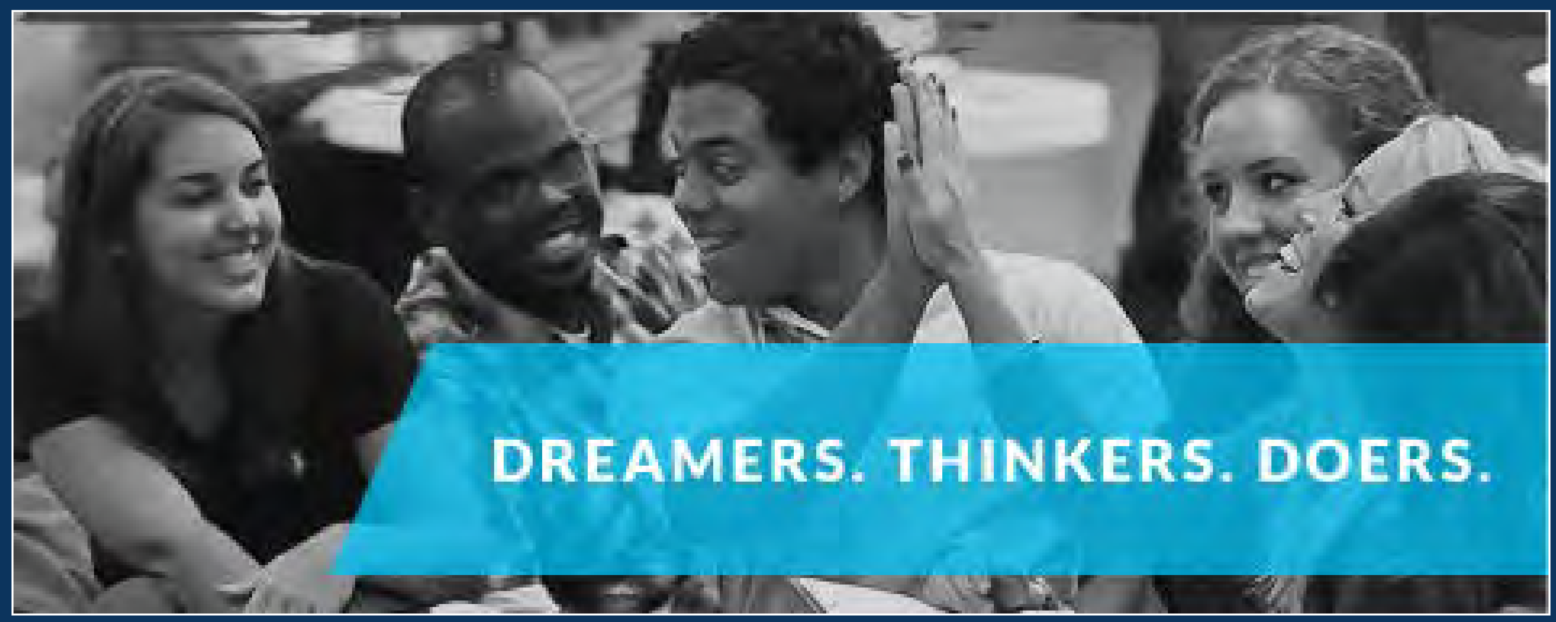

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Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities which receive Federal financial assistance. Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance..." 20 U.S.C. § 1681 - To Learn More, visit Title IX and Sexual Misconduct.

JUSTICE ROGER PAGE (JD '84) INVESTITURE

The Hon. Roger Page (JD '84) was recently sworn in by Governor Bill Haslam as the newest Tennessee Supreme Court Justice at an investiture ceremony in his hometown of Mifflin, Tenn. Page previously served as a judge on the Tennessee Court of Criminal Appeals since December 2011 and joins fellow Memphis Law alum the Hon. Holly Kirby (JD '82) on the Tennessee Supreme Court.

Page was the first Supreme Court nominee to have to be approved by the state legislature after the state changed the rules for how nominees were selected. The process added hours to an already laborious process, but Page had no trouble passing through the legislature, winning their unanimous approval, 132-0.

Several members of Justice Page's Memphis Law Class of 1984 attended the investiture to show their support. Among those class of 1984 guests were Judge Gina Higgins, Nan Barlow, Mary Thompson LeMense, and Judge J. Webster McCraw, all of whom are pictured below.

To read more about Justice Page's investiture ceremony, please click here for an article from the Jackson Sun.

To view a video of the ceremony, please click here.

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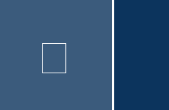
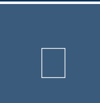
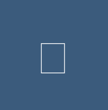
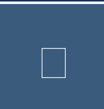
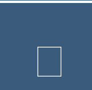
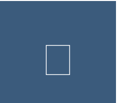

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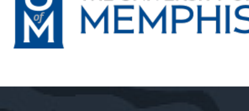

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2016 CLEA AWARD

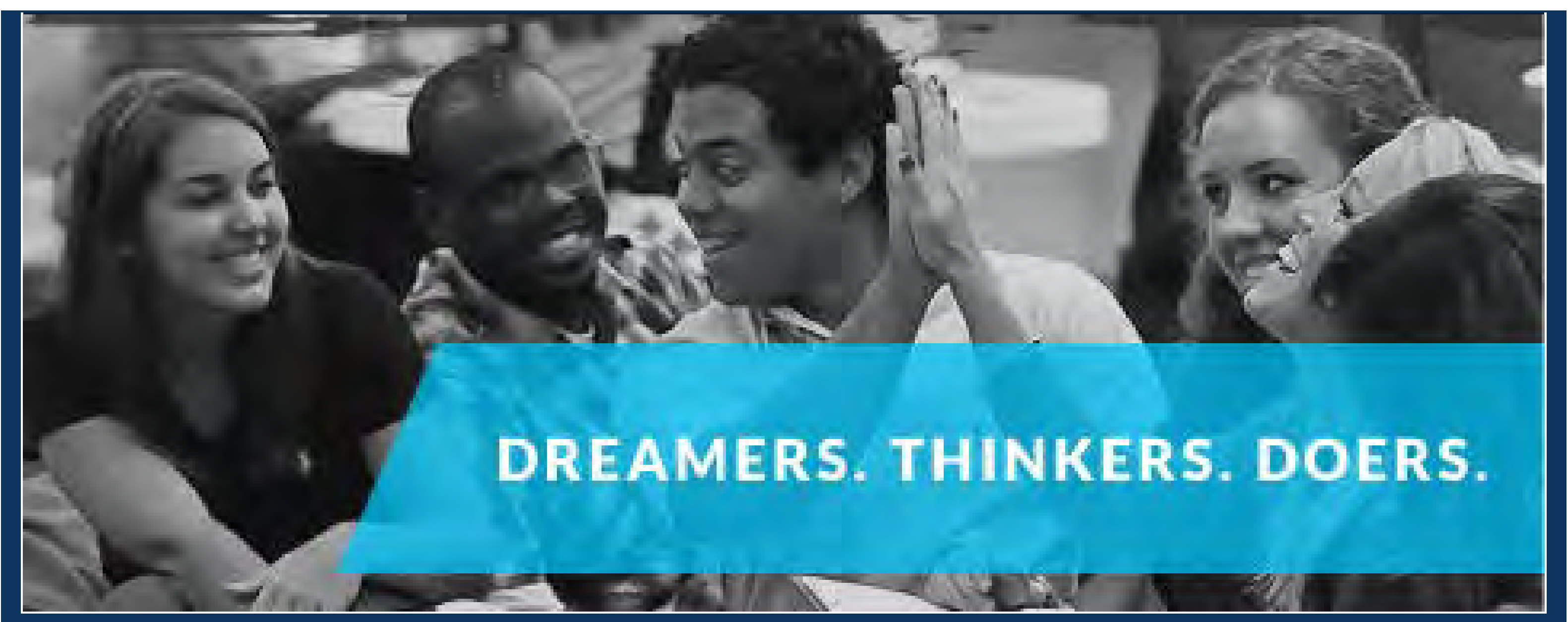
University of Memphis Cecil C. Humphreys School of Law recent graduate Jeffrey T. Slack (JD '16) was recently awarded the Clinical Legal Education Association (CLEA) Outstanding Student Award. Jeff was a student in both the Neighborhood Preservation Clinic during the Fall 2015 semester and the Elder Law Clinic in the Spring 2016 semester.

CLEA recognizes law students who have excelled in clinical fieldwork in law school by providing high quality representation to clients, and who have engaged in exceptionally thoughtful, self-reflective participation in an accompanying clinical seminar. The award is based on excellence in case work and the quality and extent of the student's contribution to the clinical community at his law school. Bill was lauded for, among other things, his ability to set the pace and the standard for his colleagues in his diligence, preparation, thoughtfulness, and motivation to be the best lawyer he can be.

Jeff's instructors noted that he treated all of his clients with the utmost respect and regard for their personal dignity and needs as vulnerable elders. He excelled in the seminar component of his clinical courses and made the most of the educational opportunities that were offered. Additionally, the faculty noted that Jeff distinguished himself throughout his clinical course by providing to his clients the kind of personal, caring service that exemplifies the "kinder, gentler" type of practice that elder lawyers are known for.

In their nomination letter for Mr. Slack, the Memphis Law clinical faculty noted several things about Jeff that make him the ideal candidate for this award. They states that as a student attorney enrolled in the Elder Law Clinic, Jeff treated all of his clients with the utmost respect and regard for their personal dignity and needs as vulnerable

elders. He has been vigilant concerning ethical issues and understands that his role as an attorney is to advance the cause of social justice. He excelled in the seminar component of the course, producing exceptional reflection papers and taking all assignments seriously, making the most of the educational opportunities that were being offered. Jeff was always willing to go the extra mile, whether it be by coming in to the clinic office over the weekend to review a 200 page packet of discovery obtained from the opposing party in a case defending a client against collection of credit card debt, or whether it be by driving out to meet with a client in the community to file documents with the county Register of Deeds, rather than requiring the client to make the trip downtown. Jeff distinguished himself throughout by providing to his clients the kind of personal, caring service that exemplifies the "kinder, gentler" type of practice that elder lawyers are known for.



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2016 KENNETH COX CEREMONY

The Cecil C. Humphreys School of Law Black Law Students Association (BLSA) recently honored law students at The Kenneth Maurice Cox Donning of the Kente Ceremony which was held Friday, May 13th, 2016. This ceremony was initiated in 2007 and recognizes each graduating BLSA member for their contribution to the law school's academic, cultural, and professional environment. It is also named in honor of one of the law school's first African-American graduates, Kenneth Maurice Cox. This year's ceremony marked the 50th anniversary of Kenneth Cox's graduation from the then Memphis State University School of Law. The guest speaker for this event was Attorney Ricky Wilkins.

In the photo above is each of this year's honorees. The honorees are (first row/from left) Rodrequez Watson, Lani Lester, LaKevia Perry, Crystal Johnson-Cathey, Regina Thompson, Jakeva Dotson, Faith Sanford, Erica Perry, (second row/from left) Brandon Boykin, Charlesa Stoglin, Angellika Campbell, and Corbin Carpenter. Not pictured is honoree Brittany Neal.
Graduation was held Saturday, May 14th, 2016 at the Orpheum Theatre.

The National Black Law Students Association (BLSA) is the nation's largest student-run organization representing nearly 6,000 minority law students from over 200 chapters and affiliates throughout the United States. Since its foundation in 1966, BLSA has sought to promote the professional needs of African-American and minority law

students by promoting professional competence and increasing awareness of the needs of the community.

The Benjamin L. Hooks Chapter of BLSA at the Cecil C. Humphreys School of Law is devoted to providing opportunities and benefits for students and the community. BLSA membership is available to all University of Memphis School of Law students and provides its members with professional networking opportunities, professional and academic mentorship, social engagement, and the opportunity to participate in community service and pro bono activities. In addition, the BLSA Thurgood Marshall Mock Trial Team and Frederick Douglass Moot Court Team continue to succeed and compete in the Southern Region BLSA competitions, as well as in national competitions.

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PALS HOSTS FIRST ONLINE PRO BONO CLINIC

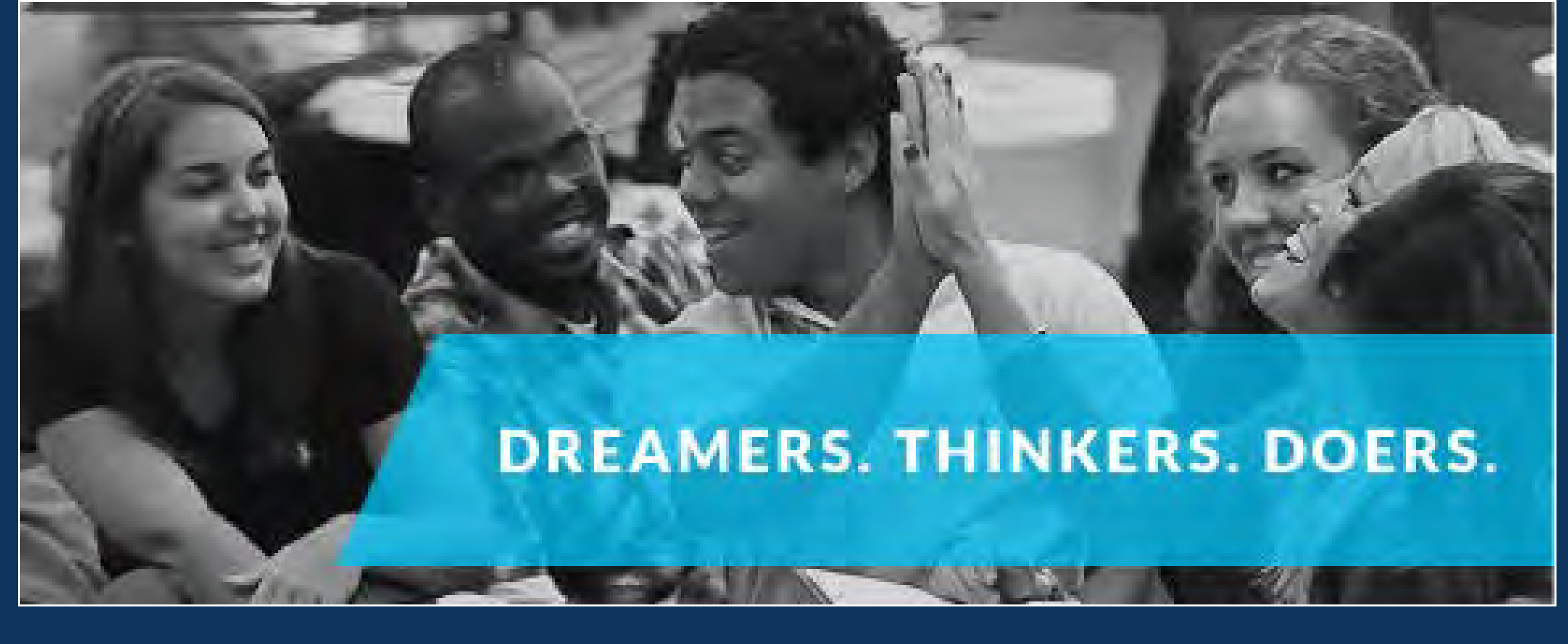
The Public Action Law Society (PALS) recently held its first online pro bono clinic. The volunteer attorneys paired off with law students and assisted clients through the Online Tennessee Justice website. In this forum, clients submit questions on a variety of topics including: landlord/tenant issues, small claims court concerns, questions regarding orders of protection, conflicts involving wills, and employment discrimination problems. Once approved, attorneys can login in and pick questions from the queue and respond with information on how the person in need can proceed in court, how to find relevant case law or codes, or where to go for more assistance.

In just one hour the law students and their supervising attorneys were able to assist eighteen clients! PALS hopes to make this a yearly event.

Interested licensed attorneys can sign up at http://www.onlinetnjustice.org/ to serve at any time. Not only is it a simple was to give back, but for every five hours of time spent on the site helping answer questions an attorney can receive one hour of CLE credit.

ABA Required Disclosures

Full sitemap



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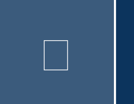
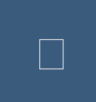
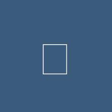
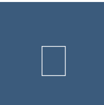
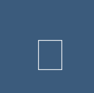
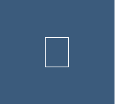

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ML

Memphis Law Magazine | Fall 2015

A publication of the University of Memphis Cecil C. Humphreys School of Law

RISE OF THE DRONES

THE UNIVERSITY OF MEMPHIS
Cecil C. Humphreys School of Law

THE LETTER(S) OF THE LAW (SCHOOL) + WATER WARS

Fall 2015 | Issue 4

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A Year of Bests and Firsts with More to Come!

Dear Friends,

The 2014-2015 academic year was a year of bests and firsts for Memphis Law.

PreLaw magazine recognized Memphis Law as having THE very best law school facilities in the nation. Better than Harvard. Better than Yale. And better than the 200 other ABA-approved Law Schools in the United States. This is something we in Memphis have long known. But it's still nice to see the news spreading across the country.

Memphis Law was also ranked among the very best law schools in the nation for bar preparation. This ranking was based on a comparison between predicted and actual bar passage rates for each ABA-approved law school. Only five law schools in the nation exceeded their predicted bar passage rates by wider margins.

Memphis Law reduced its out-of-state tuition by one of the largest percentages in the United States — 38% — taking tuition and mandatory fees for nonresidents from $38,706 to $25,907, while holding in-state tuition flat. With these steps, Memphis Law became the 10th least expensive law school in all 50 states for nonresidents and the least expensive for Tennessee residents.

With this combination of success and cost, it's no wonder that Memphis Law was named one of the 20 best values in legal education in the United States.

These bests were coupled with several firsts.

In 2014-2015, Memphis Law enrolled the most diverse class in the law school's history, with diverse students comprising more than 30% of the 1L class for the first time, up from 22% in 2013-2014 and 15% in 2012-2013.

Also in 2014-2015, Memphis Law partnered with the City of Memphis to launch a first-in-the-nation Neighborhood Preservation Clinic. This new clinic enables law students to play a leading role in the battle against blighted properties in Memphis, while continuing our tradition of leadership and innovation in experiential learning.

And 2014-2015 marked the first complete year of publication of ML—Memphis Law Magazine, a publication that is already winning awards and becoming a must-read in the Memphis legal community.

We're proud of these bests and firsts, but we're also excited by what lies ahead.

We spent much of the last year engaged, as a community, in strategic planning with a goal of identifying the special attributes of our law school and community that would enable us to enhance our ability to train lawyers, strengthen the reputation of our law school, and build on unique opportunities available to us here in Memphis.

The plan we've developed achieves these goals by, among other things, enhancing the roles of experiential learning and community service in our program of legal education.

We'll have more to say about our new plan later, but I'm pleased to say we're already moving forward with implementation.

In addition to the Neighborhood Preservation Clinic already mentioned, we've just begun a new Medical Legal Partnership at Methodist Le Bonheur Children's Hospital that puts our faculty and students in the hospital, working side-by-side with health care professionals, to remove legal obstacles that undermine the health of our community's children.

And we're just about to embark on a new juvenile justice clinic, in partnership with Shelby County, which will allow our law school to become a national leader in formulating new models for training lawyers to represent children.

We're excited by these new initiatives and hope they'll make you, our alumni and friends, even more proud of Memphis' law school.

Cordially,

Peter V. Letsou

Dean

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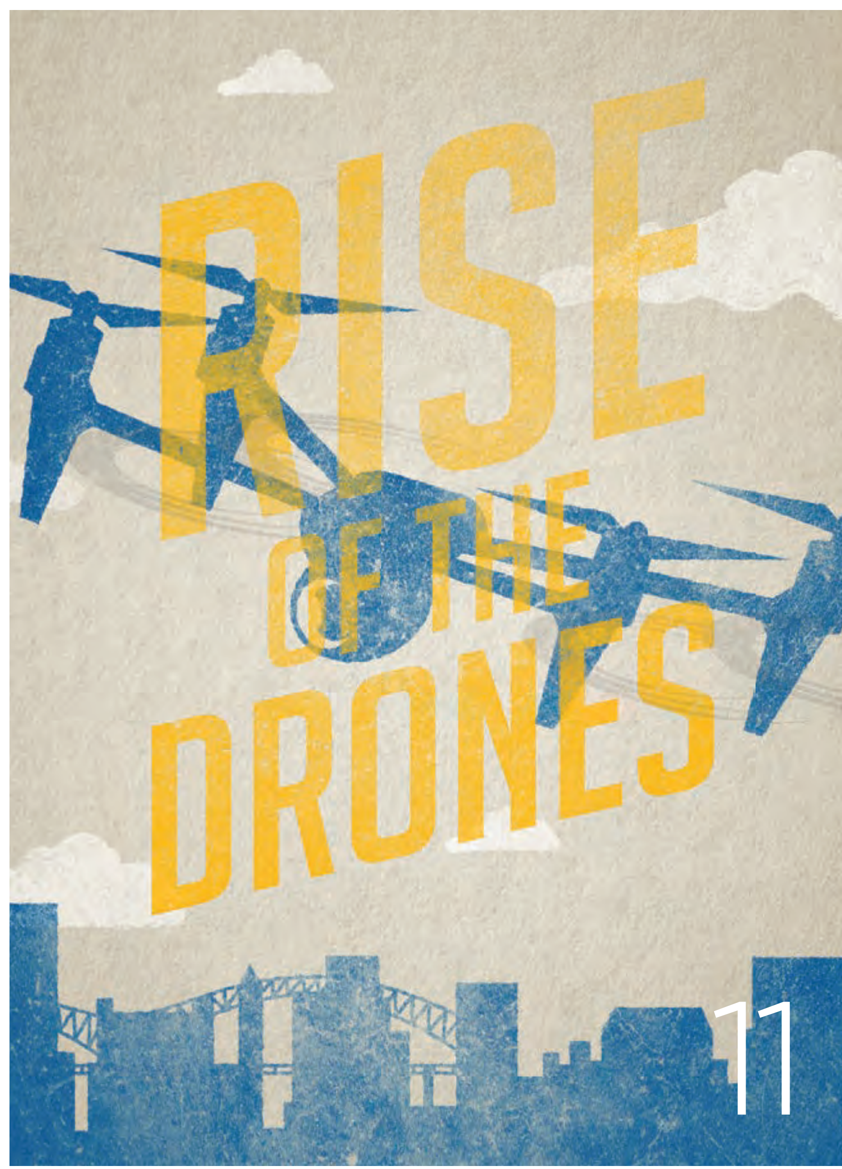

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Most of us grew up with the alphabet decorating the classrooms of our youth. In this feature, we've brought some of that theme to law school, with a touch of class, architectural history and sophistication that you can see for yourself as you take a linguistic journey through the halls of Memphis Law.

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ALWD @ MEMPHIS LAW

The Association of Legal Writing Directors hosted the 2015 Biennial Conference of the Association of Legal Writing Directors, entitled "Heart and Soul: LRW at the Center of Legal Education," at the law school in June. Over 160 faculty members from different law schools across the country attended the three-day conference, with activities ranging from an opening reception in the law school's Gordon Ball Scenic Reading Room, to a celebratory gala at the National Civil Rights Museum, and concluding with a night out with the Memphis Redbirds at AutoZone Park. The event, hosted by Memphis Law and overseen by our director of legal writing, Professor Jodi Wilson, was a wonderfully successful learning experience and showcase of the law school and our downtown community.

MEMPHIS CHILD LAUNCHED

The University of Memphis Cecil C. Humphreys School of Law, Memphis Area Legal Services (MALS) and Le Bonheur Children's Hospital have collaborated to create and launch Memphis CHiLD (Children's Health Law Directive), a medical-legal partnership, the first medical-legal partnership of its kind in the region, including all of Tennessee, Arkansas and Mississippi.

In addition to a variety of training programs and educational, bidirectional partnerships, Memphis CHiLD will also consist of an on-site legal clinic located at Le Bonheur Children's Hospital, where Memphis Law students, working under the supervision of Memphis Law clinical professor Janet Goode and a MALS staff attorney, will have devoted space to work on cases and referrals, meet with patients/clients, and conduct training sessions. Medical professionals and Le Bonheur residents will have access to the clinic as well, and will have direct involvement in the Memphis CHiLD Legal Clinic training sessions and learning opportunities available through the program.

FULBRIGHT AWARD TO PROFESSOR DANIEL KIEL

Professor Daniel Kiel received a fellowship from the Core Fulbright U.S. Scholar Program, which will enable him to spend the fall 2015 semester at the University of the Free State (UFS) in Bloemfontein, South Africa, working on his project, "Comparative Analysis of Educational Remedies in Destratifying Societies."

STANTON NOMINATED FOR FEDERAL JUDGESHIP

University of Memphis School of Law alumni Edward Stanton III, the U.S. Attorney for the Western District of Tennessee, has been named by President Obama to become a U.S. District Judge for the Western District of Tennessee.

BLSA CANDLELIGHT VIGIL

Community members and Memphis Law students, in a candlelight vigil organized by the Memphis Law BLSA chapter, gathered in Tom Lee Park to honor and remember the victims of the Charleston, South Carolina, shooting. Led by BLSA President Regina Thompson and other BLSA members, the tribute drew a large crowd and the majority of the Memphis media sources covered the event.

CLASS OF 2015 GRADUATION CEREMONY

The Class of 2015 celebrated its Commencement at the Cannon Center in downtown Memphis on Saturday, May 9. Family and friends of the 102 Memphis Law graduates attended the ceremony. Tennessee Court of Criminal Appeals Judge John Everett Williams was the Class of 2015 speaker. Professor Steve Mulroy received the Farris Bobango Faculty Scholarship Award at the ceremony. Professor Lynda Wray Black was named Professor of the Year by the Class of 2015.

CLASS OF 2015 COMMENCEMENT

ABA PRESIDENT VISITS MEMPHIS LAW

American Bar Association Immediate Past President William Hubbard, pictured above, visited Memphis Law in June for a reception, with brief remarks and a short Q&A session with faculty, staff and students. The event took place in the Gordon Ball Scenic Reading Room.

LYNDA WRAY BLACK APPOINTMENT

University of Memphis President M. David Rudd appointed Professor Lynda Wray Black as the NCAA Faculty Athletic Representative for the University of Memphis and as chair of the University's Faculty Athletic Committee. Professor Black represented the University at the American Athletic Conference Annual Meeting in Key Biscayne, Florida, in May 2015. The majority of Memphis media sources covered the event.

COX CEREMONY

The Memphis chapter of the Black Law Students Association (BLSA) honored graduating members at its annual Kenneth Maurice Cox Donning of the Kente Ceremony on May 8, 2015. Pictured left to right are De'Antwaine Moye, Jarrett Spence, Justin Rudd, Aurelia Patterson, Jana Mitchell, Ariel Anthony, LaTanyia Walker and Brittany Williams. Not pictured is Jerrick Murrell.

2015 PILLARS OF EXCELLENCE AWARDS

The University of Memphis School of Law Alumni Chapter honored the following individuals at the 2015 Pillars of Excellence Awards in August: The Hon. George H. Brown, Joe M. Duncan, The Hon. David S. Kennedy (J.D. '70), Arnold Perl, Julia S. Sayle (J.D. '70), The Hon. Donn A. Southern, Blanchard E. Tual, and Kathy and J.W. Gibson.

MULROY APPOINTED NEW ASSOCIATE DEAN

Professor Steve Mulroy accepted the position as the law school's new associate dean for academic affairs this summer, replacing Professor David Romantz, who dutifully served in the role for six years.

ELIZABETH RUDOLPH AND CAREER SERVICES

Elizabeth Rudolph has been hired on a full-time basis as the assistant dean for career services at Memphis Law. Ms. Rudolph served as the interim assistant dean for career services since spring 2015.

U.S. SENATOR CORKER VISITS MEMPHIS LAW

U.S. Senator Bob Corker spoke at the University of Memphis School of Law in September for a special "D.C. Update." Senator Corker spoke about current domestic and international events and issues, as they relate to his work in Washington as the chairman of the Foreign Relations Committee in the Senate, as well as his work on the banking committee and others.

MEMPHIS LAW AND BUTLER SNOW WELCOME BUSINESS COURT

The law school partnered with law firm Butler Snow for an information session and Q&A with the new Tennessee Business Court. Students, faculty, staff and the Memphis legal community were all invited to attend and get an informative introduction to the Tennessee Business Court – Davidson County Pilot Project. Guest speakers included Business Court Judge, The Hon. Ellen Hobbs Lyle, and Business Court Staff Attorney, Justin Seamon. The informational seminar was followed by a reception in the Gordon Ball Scenic Reading Room.

TENNESSEE DEAN'S TOUR

The Dean and other staff will be traveling across Tennessee in spring 2016. Be on the lookout for event details for receptions in Chattanooga, Jackson, Johnson City, Knoxville and Nashville. We hope you can connect with us and other alumni and potential students in your area.

GOODE

NEW VISITING PROFESSOR

The law school welcomed Janet Goode to the faculty this fall. Ms. Goode was hired as a visiting professor of law with the responsibility of overseeing our new medical legal partnership (Memphis CHiLD) and corresponding legal clinic (with Le Bonheur Children's Hospital and Memphis Area Legal Services).

A FOUNDATION OF HOPE

By Steve Barlow

Steve Barlow is a national and local leader in the anti-blight effort and has played a huge role in inspiring and launching the law school's Neighborhood Preservation Clinic. In addition to his continuing work with the City of Memphis and in private practice, Steve is codirecting the Neighborhood Preservation Clinic as an adjunct professor.

The great urbanist and architect Steve Mouzon once wrote, "The first prerequisite of community-building is hope because people without hope will not build." I would add to that sentiment: without hope, they will not stay. They will not invest. And they cannot thrive. Identifying and building upon community assets, while rooting out intractable challenges, is the only viable formula for community revitalization.

I have spent a large part of my academic and professional life, including my time as a student at the University of Memphis (Law School and Graduate School for Applied Urban Anthropology), attempting to understand and help repair these tears in the fabric of urban communities. Many complex factors lead to the abandonment of real estate, which in turn leads to neglect and decay; but whatever the cause, entire neighborhoods suffer when blighted properties are allowed to exist unabated. Properties lose value–people lose hope–and those who can, leave.

Public records reveal that there are at least 10,000 abandoned single-family houses and 3,000 abandoned multifamily units in the City of Memphis. Anecdotally, it is clear that Memphis contains hundreds, if not thousands, of abandoned commercial and industrial structures, not to mention the tens of thousands of abandoned vacant lots–enough to fill one third of the City of Washington, D.C.! Every single piece of abandoned

property represents an unfortunate rip in the fabric that holds our urban neighborhoods together. When any garment becomes too riddled with holes and tears, it can never fully be stitched back together. But it gets worse. Abandoned properties are "attractive nuisances"—inviting criminal behavior, vandalism, arson and other activity that depresses surrounding property values. And the cancer of abandonment spreads, triggering a spiral of further abandonment and neighborhood decay.

Fortunately, Memphis, while faced with a titanic challenge of abandonment, has abundant reasons for hope in the ongoing efforts to reclaim, redevelop and repopulate our core city neighborhoods. I believe the next front in the battle to reclaim our neighborhoods is giving tomorrow's lawyers the training they need today. That's why the School of Law, in partnership with the City of Memphis Law Division, launched the Neighborhood Preservation Clinic in January 2015. Memphis Law students get hands-on litigation experience in nuisance property cases, from investigating property ownership and property conditions, to working with code-enforcement officers, preparing civil lawsuits, and leading the prosecution of negligent property owners in front of Judge Larry Potter (J.D. '77) in the Shelby County Environmental Court.

Already, Memphis Law students have litigated over 200 cases in Environmental Court. As these students advance in their legal careers, their experience representing the City of Memphis in the battle against blighted properties will help to shape their perspectives and encourage them to take the work of helping neighborhoods personally.

The Neighborhood Preservation Clinic is the only one of its kind in the country. The scale of the problem in Memphis is immense, but every successful legal challenge unlocks enthusiasm and new opportunities. There are powerful legal tools at our disposal, and I am inspired by the potential of this clinic to bring about lasting positive change in Memphis.

Blighted properties are tearing Memphis apart. Left alone, the tears will continue to spread and rip through entire blocks and neighborhoods. Recognized and addressed swiftly, however, as a part of a comprehensive and community-involved strategy, communities can be made whole, healthy and livable again.

FORMER EXECUTIVE INN ON AIRWAYS BLVD.

By using the law to hold a nuisance property owner accountable, not only is a blighted property removed from a neighborhood, but a solid dose of hope is delivered as well. And that hope is the most essential community building tool of all.

INAUGURAL NEIGHBORHOOD PRESERVATION CLINIC STUDENTS WITH INSTRUCTORS AND MAYOR AC WHARTON

TOP 10 LESSONS LEARNED IN LAW SCHOOL

PHOTOS BY RHONDA COSENTINO & LINDSEY LISSAU

Time spent in law school can be summarized a number of ways. It can be fruitful, memorable, miserable, interesting, fun, depressing or a plethora of other adjectives. No matter what your law school experience is like though, it's nearly impossible to come away from it without learning a lesson or two of some kind. Whether it's in the classroom or in the community, students learn a great deal about themselves and the law during their time at 1 North Front Street. ML asked ten students to tell us about some of the most memorable and important lessons they've learned since walking through these doors and we've compiled a list of their Top 10 responses for you to enjoy (and learn from)!

10.

MOLLY GLASER

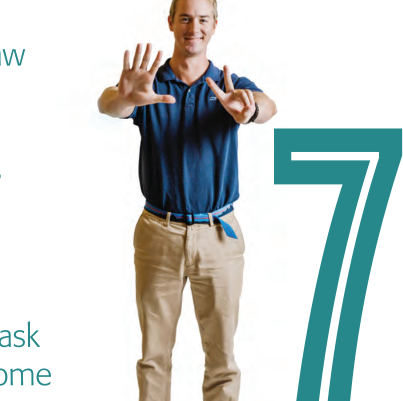
Seat choice at the beginning of the semester is critical. A seat too close or even all the way in the back might mean you are the easiest target for cold calls. Also, beware the aisle seats in McClurg's class!

9.

JOHN FLOYD

Pick a conclusion and stick by it. Judges really appreciate a confident position and conclusion, backed up with research, over a hedged bet. They know there are two (or more) plausible outcomes—otherwise they wouldn't be listening to you.

8.



SYDNEY VAN WINKLE

The professors and administration know all of the gossip. The law school is everyone's pride and joy, and all of the goings-on are some of the professors' and staffs' favorite personal pastimes. They know everything, from who was late and why, to who was dating whom. There are no secrets in law school.

7.

PATRICK QUINN

Get to know the older students and ask them for advice on class. They are some of the best resources.

6.

TUCKER MARSHBURN

I have learned through many meals and hours of research that Central BBQ does, in fact, have the best BBQ in Memphis.

5.

JAKE STRAWN

Participate in Alternative Spring Break. I'll always remember doing it my 1L year because it was the first chance I had to actually take what I had learned here in school and make it real. It's easy to get bogged down in work and forget why you chose to come to law school in the first place. ASB reminds you what it means to sit down with real people and help them through tough legal choices.

4.

DAWN CAMPBELL

Don't complain about your life prior to law school. Before law school, I might catch myself complaining about things like long days at work or being stuck in traffic while getting my kids to school. But, law school has a way of putting everything into perspective. Now, that hour sitting in traffic is often the only time I have together with my kids. I've learned to treasure every minute with them, even if it is spent sitting in traffic.

3.

CAITLIN O'CONNOR

Explore the city! I have learned how awesome Memphis actually is and how it truly has so much to offer. Take me to Earnestine and Hazel's and I'll love you forever.

2.

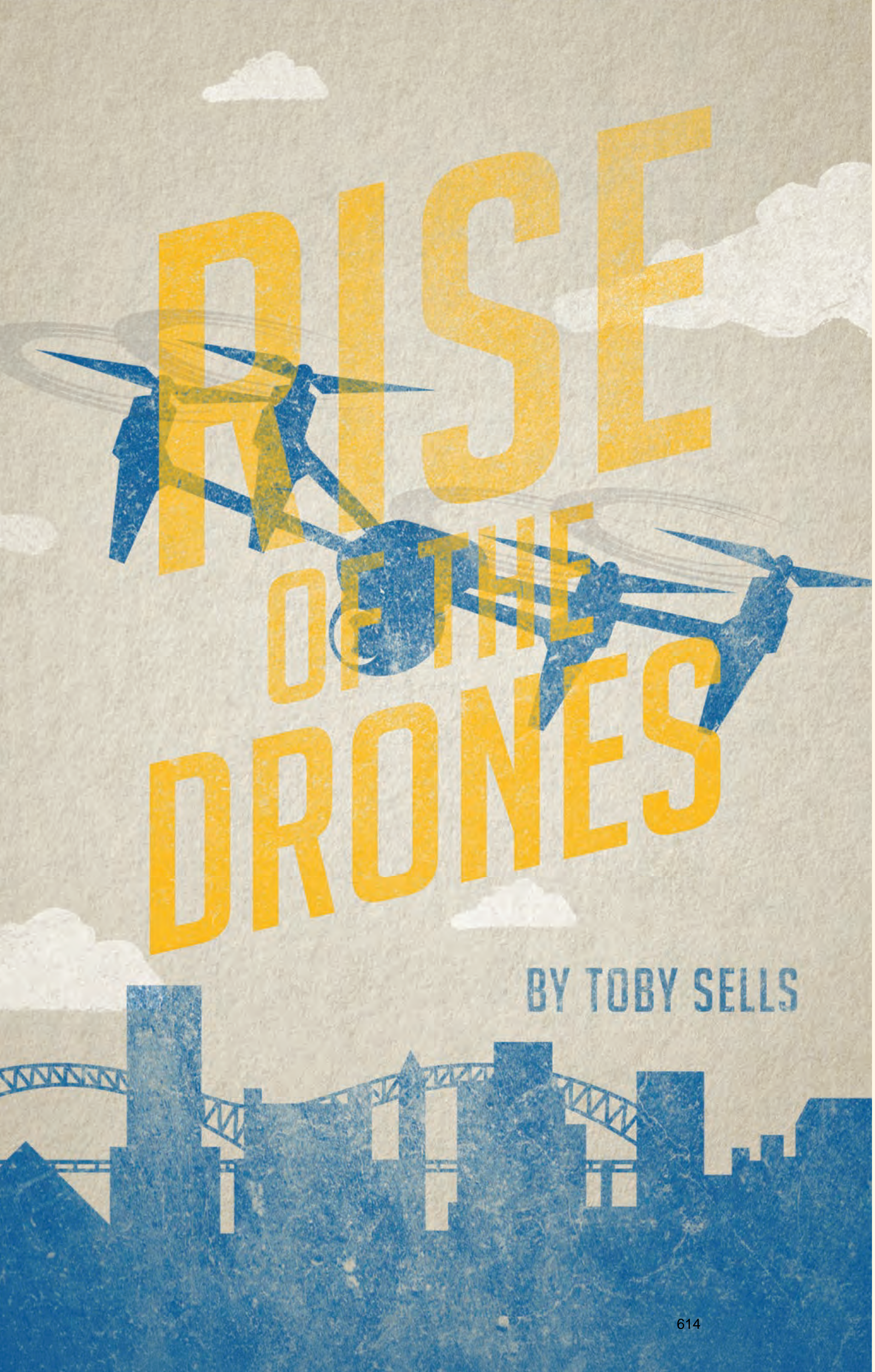
REGINA THOMPSON

I learned that my dream is a reality. I always said that I wanted to be an attorney and help others. I would dream of becoming a big-time attorney who went back to my community and changed things. I have remained on track to do what I said that I would. Despite some of the obstacles I've faced in life, I am closer to achieving my dream. I still have the passion in my heart for helping my community that I've had for years. Being in law school has made me more confident in my ability to shed light on the issues in Memphis and change them.

1.

BARRETT FREDERICK

Don't worry about other people's work. When you finish your exams, each and every one, get out of the building and do not look back. You have better things to do than hear what other people wrote on their exams.



Pilots log hours of time in the air and the classroom (and spend thousands of dollars) to get legally airborne. But if you want to pilot the friendly skies these days, all you really need is a credit card and an Amazon account.

American airspace is abuzz with hives of drones, unmanned aircraft piloted from the ground. They range from cheap, plastic toys for kids in the backyard to sophisticated, multi-million-dollar aircraft that deliver Hellfire missiles for the U.S. government.

Drone technology has developed aggressively over the last 20 years. This pushed their abilities further and drove their prices down, into the hands of the everyday consumer. All of this has quickly outpaced laws to govern drone use, both commercial and recreational.

The drone debate was sparked years ago, especially about their military uses. But a different debate continues in courthouses and state legislatures across the country. Civilian users of this cutting-edge technology are pushing it to the limits of their imaginations (and constantly into uncharted legal territory). Drone pilots are constantly proving drone technology as an agent of good and bad, showing it all on thousands of new YouTube videos uploaded every day.

A recent Friday in July yielded two news stories that perfectly illustrate both sides of the drone coin.

THE GOOD

On Friday, July 17, a drone hummed through the morning air in southwest Virginia. It was delivering much-needed medical supplies to a rural fairgrounds in Wise County, the heart of Appalachia. The 24 packages it delivered that day were the very first drone deliveries approved by the Federal Aviation Administration (FAA). Driving those packages would normally take an hour and half through the mountainous terrain. A one-way drone

flight took only a few minutes that Friday morning.

The flight would be remembered as a "Kitty Hawk" moment for drone use, according to the Los Angeles Times, and was a proving grounds for the use of drones in response to humanitarian crises.

Yes, the drone future looked bright.

THE BAD

Later that same Friday afternoon, a giant wildfire (called the North Fire) blazed through southern California, north of San Bernadino. It consumed multiple homes as it spread quickly through Cajon Pass and consumed cars as it jumped across Interstate 15.

Firefighting air units were sent in to drop their payloads and extinguish the roaring flames. But all of them were forced to jettison their loads elsewhere and land back at the airport.

Five drones were spotted in the skies above the fire on the interstate, apparently shooting video of the flames. They made that airspace unsafe for the rescue units, which were not allowed on the scene until the drones were grounded. The drones "definitely contributed" to the delayed response and broader fire damage, officials told Los Angeles television station KNBC. At 10:30 p.m. that same night, the North Fire had grown to 3,500 acres and was only five percent contained.

Yes, the drone future looked grim.

"It's an exciting time if you're in the drone industry, if you're looking to expand your business with the use of drones," said Robert Van de Vuurst (J.D. '86), an aviation attorney with Baker, Donelson, Bearman, Caldwell & Berkowitz, PC.

"It's also a very concerning time because the technology is fast outpacing the safety efforts and how society in general is going to look at these things in terms of safety and privacy."

The next five to ten years are going to be interesting ones for drones, he said, because, really, the national conversation about them is just beginning.

DEFINING A DRONE

At its heart, a drone is an aircraft without a pilot. This gives rise to the machines' other names like unmanned aerial vehicle, or unpiloted aerial vehicle, remotely piloted aircraft, or unmanned aircraft systems (UAS), which is their formal designation from the FAA. This variety of names shows the technology hasn't yet settled into our language or everyday culture. For instance, does anyone recall the Bankograph, the Bancomat, or the Docuteller? Likely not since these days most everyone just calls it an automated teller machine, or ATM.

Drones come in all shapes, sizes, prices and uses.

Large military drones look like small airplanes or helicopters. These can cost millions of dollars to buy, thousands of dollars to operate per hour, and can be used for everything from reconnaissance to delivering those Hellfire missiles—all while the pilot sits half a world away. The Center for the Study of the Drone at Bard College reports that the Pentagon plans $2.9 billion in spending this year for buying "unmanned systems," including 29 of the drab-gray MQ-9 Reaper drones, which should be familiar to anyone who has seen a military drone story on the nightly news.

But click around the Drone Store on Amazon.com and you'll find dozens of models available to anyone with a bank account or credit card. Most of them look like large science fiction insects. These are typically called "quadcopters" and usually have four horizontal rotors perched on arms above a central body and a set of legs. These drones have enough power to hoist at least a digital camera (and more). These are aimed at the serious

hobbyist and range in price from $380 to $3,300 on the Drone Store. Smaller, weaker quadcopters can be purchased for as little as $15.

As for uses, the sky really is the limit. Drones have been used as crop dusters and storm chasers, to monitor wildlife, jungles, and glaciers, to inspect danger zones like the Fukushima nuclear disaster, and for capturing aerial shots for big-budget movies. Experiments by drone hobbyists have ranged from the silly to the scary, outfitting drones with everything from Roman candles to handguns. There's even a Memphis-based company called Flyral which bills itself as a marketing company specializing in using advanced technology (specifically drones with high quality cameras) and a creative skill set to sell property, promote businesses, capture moments and more.

So it's safe to say that photography seems to be the largest commercial and personal use of drones going forward.

THE NOT-SO-FRIENDLY SKIES

Unmanned aircraft have been used in warfare since World War I. But drone use as we know it today began in earnest in the early 2000s.

For a time, they were strictly the purview of the U.S. military. The technology got smaller and cheaper and soon they hit the marketplace for companies and the general population. Since then, skies across America have been a sort of Wild West for drones.

People have flown them—without a license or permission—over huge concerts like Beale Street Music Festival, smaller concert venues like the Levitt Shell, NFL games, MLB games, Memphis Redbirds games, street festivals, parks, riots, weddings, beaches, real estate, car chases, wildfires, fireworks shows (more on that later), and almost anything else you can dream of.

And just like in the Wild West, some arrests have been made. In the middle of Manhattan, a man was arrested after his drone struck a skyscraper. Two men were arrested in New York after their drone flew too close to a medical helicopter. An Ohio man was arrested because his drone blocked a medical helicopter arriving at a car crash. Two drones have flown over the White House fence. One case was accidental and the pilot was not charged. The other was intentional and that pilot was arrested and awaits a hearing.

As Van de Vuurst explained,

"States and cities govern what happens on the ground, but the feds rule the skies."

For years, FAA rules were foggy on what pilots could and could not do with a drone. But in 2012, Congress passed the FAA Modernization and Reform Act, which required a plan to integrate civil drone use into the National Airspace System (NAS) by September 30, 2015. In mid-February 2015, the FAA lifted the fog on drones with a brand new set of rules.

RULES AND REGULATIONS

The new rules specifically targeted "small" drones, those under 55 pounds. The rules only cover nonrecreational drone flights, which was good news for hobbyists. But it was bad news for some businesses with active experimental drone programs, like Amazon's Prime Air delivery service.

The FAA rules said commercial drone operators must always be able to see their drones and see them with only the naked eye, glasses, or contact lenses (no binoculars). Drones can only be flown during daylight hours at less than 100 miles per hour and at a maximum altitude of 500 feet above the ground.

Commercial drone operators must be at least 17 years old. They have to pass an aeronautical knowledge test and obtain an FAA drone operator certificate (but not get a private pilot's license or a medical rating). To keep the drone license, drone pilots would have to pass the FAA knowledge test every two years.

Drone pilots must keep their aircraft away from manned aircraft and abandon any flight that poses risks to people, property, or other aircraft. Commercial drones cannot be flown over people, according

to the new rules, other than those directly involved with their flight.

Drone operators must keep their aircraft out of airport flight paths, and restricted airspace areas, and obey any FAA Temporary Flight Restrictions. The new rules maintain existing rules against "operating in a careless or reckless manner" and dropping objects from drones.

As of this writing, the new rules are proposals, a framework of regulations. When the government rolled out the rules back in February, Obama Administration officials stressed the need to keep those rules loose. For example, U.S. Department of Transportation Secretary Anthony Foxx said the rules must "accommodate innovation." FAA Administrator Michael Huerta spelled it out a little more clearly:

"We have tried to be flexible in writing these rules," Huerta said. "We want to maintain today's outstanding level of aviation safety without placing an undue regulatory burden on an emerging industry."

With that, few were surprised with what the FAA did next. It turned to the private sector for help.

"Like Uber and other ride-sharing services, drones are here to stay," McClurg said. "They are not going away, so we're going to have to learn to live with them."

BALANCING BUSINESS POTENTIAL AND PITFALLS

The same day the FAA unveiled its rules for commercial drones, the White House issued a presidential memo with a long, yet precise title: "Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems."

The title is a mouthful, but one that uncovers the tangled-up balancing act that comes with regulating drones for safety and privacy but not dousing their money-making potential. The Association for Unmanned Vehicle Systems International (AUVSI), a drone trade group, said drones are set to have an $82.1 billion economic impact in America between 2015 and 2025, creating more than 100,000 jobs.

Retail giant Amazon told the FAA in 2014 it was working on Amazon Prime Air, a "future delivery system from Amazon designed to safely get packages into customers' hands in 30 minutes or less using (drones)." At the time the company said "It looks like science fiction, but it's real. One day, seeing Prime Air vehicles will be as normal as seeing mail trucks on the road." The new FAA rules grounded parts of the Seattle-based research program and Amazon has warned it may move its drone research overseas, as a result.

At the time, Amazon's initial announcement drew laughs from industry leaders and from more than one late-night talk show host. Last year, FedEx® CEO Fred Smith told The Associated Press that the idea of delivering parcels by drone was "almost amusing" and questioned drones' abilities to make local deliveries efficiently.

But other companies are hard at work on drone research projects. Deutsche Post DHL has tested its "parcelcopters" since 2013. Google is at work on another drone project after scrapping its Project Wing design earlier this year. Back in 2014, Lakemaid Beer delivered some of its beers to Minnesota ice fisherman until the FAA shut the project down.

Still, as the presidential memo shows, drone use is as packed with potential as it is with possible pitfalls. But integrating new technology and new rules is not a brand new endeavor, according to Andrew Jay McClurg, a professor at the UofM law school and an expert in privacy law.

"Like Uber and other ride-sharing services, drones are here to stay," McClurg said. "They are not going away, so we're going to have to learn to live with them. In regulating drones, the key is striking the proper balance between protecting safety and privacy without impinging their beneficial uses."

Cont'd on pg 28

WATER

"Whiskey is for drinking; water is for fighting over." - Mark Twain

Drought has been a part of life in the western United States for decades. But, what if the water dried up and went away like a spigot was permanently shut off? With the current drought conditions and fights over water rights in California, it's not exactly a reality yet, but it's closer to a possibility than ever before.

Closer to home in Memphis, the water flows freely, pouring out of taps as what is considered some of the best drinking water in the world. Even during dry periods, the water in the Memphis Sands aquifer flows with no end in sight.

Could the U.S. Supreme Court render a decision that might alter that water flow, bringing California's water woes to the Bluff City? Mississippi has been waging a legal battle against Memphis for 10 years, saying the city is pumping water that belongs to it instead. The U.S. Supreme Court, in a June 29 order, said the state of Mississippi can proceed with its complaint against Memphis alleging that groundwater pumping by Memphis Light, Gas and Water Division from the Memphis Sands aquifer has caused water to flow from that state into Tennessee. Mississippi is seeking more than $615 million in damages rather than an equitable apportionment of aquifer water. This case has the potential to not only change the way we get our water in the Mid-South, but also the very definition of how the law views types of water.

WATER, WATER, EVERYWHERE

To better understand this Mid-South battle, it's important to examine the water wars in other regions.

To the southeast of Memphis in Georgia, a battle has raged for years over the water that is pumped out of Lake Lanier to supply the growing metropolis of Atlanta. That water use is causing the levels of streams and rivers in Alabama and Florida to drop. And more than just lower water levels, evidence is mounting that the declining water levels are having an adverse effect on the oyster beds along the Gulf Coast.

Back out West in Colorado, homeowners who want to reuse rainwater that falls onto their homes and runs down into water collection barrels are actually breaking the law. It all circles back to the needs of users downstream in Nevada, Arizona and California, where water rights go back to the 1800s, belonging to property owners who have held land for generations.

Across the United States there are individual water wars raging. Some involve states battling one another, while others pit state governments against their own residents. And the issue is only growing, particularly in regions where growth outpaces the amount of water available in surface sources. But with laws in place, what can be done?

By
Lance
Weidower

Drought in California and drastic water restrictions announced earlier this year there have made international headlines, with California facing one of the most severe droughts on record. In January, Gov. Edmund Gerald (Jerry) Brown Jr. declared a drought State of Emergency, directing state officials to take all actions to prepare for water shortages.

Water consumers have been told to reduce use by 25 percent. But it's really nothing new.

"California has been experiencing serious drought conditions for a number of years," said Randall B. Womack (J.D. '80), a member in the Memphis office of Glankler Brown PLLC who focuses his practice on environmental law. "This has put a great deal more stress on surface water sources, which in turn has caused even greater conflict among stakeholders. The drought conditions have also resulted in increased use of groundwater aquifers.

"The shortage of water has become so severe that earlier this year Gov. Jerry Brown issued mandatory restrictions on residents and businesses. The governor was criticized for exempting the agriculture industry from the cutbacks on water use. However, more recently, the state has taken action to reduce the volume of water taken for farming. In addition, a statute went into effect early this year that will result in greater management of groundwater sources at the state level."

Why not just be proactive in cutting water use well before things get dire?

"That's the trend," said Robert Steele, a shareholder in the Nashville office of Baker, Donelson, Bearman, Caldwell & Berkowitz PC, who has extensive experience in water rights issues. "People get all excited when the droughts hit and then it starts raining again and everybody forgets about it. But it would be appropriate for local governments who don't have abundant supplies to think about that within the extent of their powers and politics to urge conservation to require these land use measures that would preserve water supplies. It's difficult anywhere with the expectation of people. The urgency goes up during drought time."

While the current headlines in California are more pronounced, the story is not new, and with the state producing an abundance of agriculture used around the world, the reach is far. In early 2014, when President Barack Obama visited California's San Joaquin Valley, he stated the obvious about the importance of the Golden State's water issues, connecting the drought to climate change and the national interest. "California is our biggest economy," he said. "California is our biggest agricultural producer. Whatever happens here, happens to everybody."

The situation in California is complicated, although the problem can be simplified by examining where the water is consumed vs. where it comes from. A lengthy article in the February 2014 edition of The Atlantic titled "American Aqueduct: The Great California Water Saga" explores the water wars being waged there, with much of the frontlines occurring in the central valleys where water that falls in the northern reaches of the state and Sierra Nevada Mountains is funneled to the south through a detailed canal system. This massive State Water Project, completed in the 1960s, would send water to the dry areas where it was needed most. The story cites a state Department of Water Resources Annual Report that was released in 1968 just as the project neared completion. "California is in the midst of constructing an unprecedented water project for one essential reason–the state had no

alternative. Nature has not provided the right amount of water in the right places at the right times. Eighty percent of the people in California live in metropolitan areas from Sacramento to the Mexican border; however, 70 percent of the state's water supply originates north of the latitude of San Francisco Bay."

Western states have enormous competing interests for water: agriculture, drinking water and endangered species, all mixed in with a long history of court battles over water rights.

"Fundamentally, out West they move the water where people are instead of living where the water is," said Stephanie Showalter Otts, director of the National Sea Grant Law Center. "There [have] always been drought conditions but when it wasn't as severe or as much development they had enough to carry through. Now they've hit their limit. But the way they move water is inefficient. There is a lot of evaporation. For instance, in Lake Mead, there is a lot of water seepage through the bottom."

With population explosions in Southern California, Las Vegas and Arizona, the problem isn't going away, and it's only heightened during periods of drought, particularly during the current one of historic proportions.

EAST VS. WEST

Ah, water allocation. It's a foreign idea in the lush, green environments east of the Mississippi River where drought and dry conditions aren't common. And while there are water wars raging east and west of the Great River Divide, the rules on either side of the Mississippi are quite different.

With Western water law, there is something called prior appropriation doctrine. "You get there first, you claim it and you use it," Steele explained. "It's a property interest that is not necessarily based on society with all kinds of complications on how you use those rights. … Who cuts back? Why do I have to cut back everything when this guy who got his rights in 1890 doesn't have to cut back?"

"You get there first, you claim it and you use it," Steele explained. "It's a property interest..."

Imagine an abundance of water in a time of no drought. You're a rancher in Colorado with rights to all the water you need. Thanks to your great-grandparents owning the land and the water rights that come with it, you are entitled to the water, too. There is a simple philosophy governing it all, and it can be summed up as use it or lose it. Why would you turn off the water so that everyone else downstream can access it instead? The Colorado River helps supply some 40 million people across Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming. Now, water rights have been issued for more water than the river can provide.

"The West has always had a scarcity," Steele said. "First in land, first in right. You get there, you build your dam and have your gun and everyone else can wait."

So the first people to arrive in the American West were the first to gain rights to the water. And as the population has exploded, those property owners with long-held rights control the natural resources.

Eastern water laws are focused more on accommodating everyone.

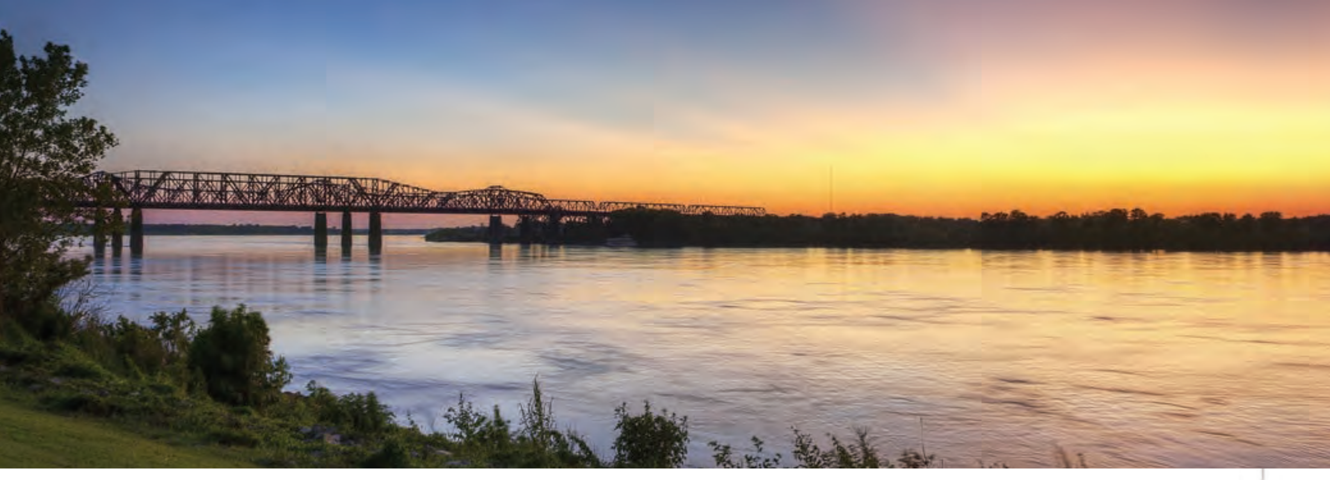
For the most part, water rights in areas east of the Mississippi River are based on the common law doctrine of "riparian rights" originally adopted by English courts. Under the riparian rights doctrine, use of surface water is limited to land owners whose property abuts a river, stream or lake. The property owner is entitled to the "natural flow" of the water across or by his or her land and is further entitled to the "reasonable use" of that water for domestic, agricultural, and manufacturing purposes.

However, a riparian landowner may not use surface water in a way that harms other riparian owners. For example, the landowner may not divert a stream from its normal course or diminish the amount of water that would usually flow in the stream.

A property owner whose family has been on the land for 150 years has just as much right to the water as the homeowner who just moved in six months ago. Everyone who lives near a river or lake has the same right to the water as the next person.

THEM'S FIGHTIN' WORDS

That brings everything to Memphis, where the drinking water is considered some of the best in the United States. The large Memphis Sands aquifer stretches under Tennessee, Mississippi and Arkansas, supplying quality groundwater to people of the Mid-South for everything from drinking water to agricultural uses, beer making, manufacturing and anything else where fresh water could be used.



The city of Memphis has been withdrawing water from the aquifer for municipal use since 1886. Mississippi believes Memphis is taking its unfair share. The state began a legal fight against Memphis and its water utility 10 years ago.

In Mississippi v. Tennessee, the state of Mississippi alleged that Memphis wrongfully pumped groundwater from the aquifer that is the state's sovereign property. All of MLGW's wells are within Tennessee, but three of them are near the state line and Mississippi alleged the water pumping has created an underground cone of depression under Memphis that extends into Mississippi. That cone of depression has caused groundwater to flow from Mississippi into Tennessee where it is pumped for use in Memphis. Mississippi claimed that the water levels in the part of the aquifer below the state are being reduced at a higher rate than can be replenished.

In 2005, Mississippi, through its attorney general, brought an action for trespass and wrongful conversion against MLGW in the United States District Court for the Northern District of Mississippi. The state of Tennessee was excluded.

The large Memphis Sands aquifer stretches under Tennessee, Mississippi and Arkansas, supplying quality groundwater to people of the Mid-South for everything from drinking water to agricultural uses, beer making, manufacturing and anything else where fresh water could be used.

In its complaint, Mississippi alleged that some portion of the groundwater that is pumped out of the aquifer by MLGW is Mississippi's sovereign property, and that Mississippi must therefore be compensated. The district court dismissed that action. The court concluded that, absent an equitable apportionment of the water in the aquifer between Mississippi and Tennessee, the court could not evaluate whether Memphis and MLGW had pumped water belonging to Mississippi. The court further explained that the relief requested by Mississippi would require the court to engage in a de facto apportionment of the aquifer, which would require joinder of Tennessee as a defendant, and that such a dispute would fall within the exclusive original jurisdiction of the Supreme Court.

In 2009, the U.S. Court of Appeals for the Fifth Circuit affirmed this decision, stating that the action could not proceed without Tennessee being listed as a party in the case, because the aquifer is an "interstate water source" that must be apportioned before any state may claim a judicially enforceable right to a share of it. The court of appeals explained that the aquifer flows, albeit very slowly, under several states and in that respect is indistinguishable from a river or lake bordered by several states. The court of appeals also affirmed that Tennessee could not be joined in the lawsuit without depriving the district court of subject matter jurisdiction. Mississippi then filed a petition for a writ of certiorari, which the Supreme Court denied the following year.

Simultaneous with filing its petition for a writ of certiorari, Mississippi filed a motion in the Supreme Court for leave to file a bill of complaint against Tennessee, the City of Memphis, and MLGW, seeking approximately $1 billion in damages. In addition to repeating its claims of trespass and conversion, Mississippi contended that an equitable apportionment was not necessary because there had already been an "inherent apportionment" of the groundwater in the aquifer upon Mississippi's admission to the Union in 1817. Mississippi requested an equitable apportionment as an alternative form of relief, but only if the Court determined that Mississippi did not own and control the aquifer resources within its borders. The Supreme Court denied Mississippi's motion without prejudice, which opened the door for Mississippi to refile at a later date.

SO WHAT CHANGED THIS TIME AROUND?

"Most of us observing thought that was correct because you have to know what each state should get," Showalter Otts said. "When Mississippi came

Cont'd on pg 31

THE LEGAL ENFORCER

STU GRIMSON (J.D. '05)

More and more law students are falling under the umbrella of being nontraditional these days. That can mean anything from being slightly older than your average law student, having a family and/or children, or embarking on a new career path.

Former National Hockey League player Stu Grimson (J.D. '05) is one of the more nontraditional students to graduate from Memphis Law in quite some time. After 17 years as a professional hockey player, 14 of those in the NHL, Grimson moved from the ice to the courtroom. He hasn't looked back since.

Known in hockey circles as an "enforcer," Grimson played in over 700 games with eight different teams during his time in the NHL, with over 2,113 penalty minutes from various fights and pummelings to show for it. He also had two trips to the Stanley Cup finals during his career, once in 1992 with the Chicago Blackhawks and again in 1995 with the Detroit Red Wings. He hung up his skates and gloves for good in 2001, however, when he suffered a serious concussion while playing for the Nashville Predators. But he didn't waste any time trying to figure out his next move.

"I've always had a serious approach to education and life after hockey," says the former "Grim Reaper" when asked about his choice to finish his education. He decided to finish his undergraduate degree in economics with the help of the NHL Players' Association program, Life After Hockey, which helps players adjust after they retire. He then set his sights on law school.

"Once I decided that law school was the direction I wanted to go in, I immediately began to realize how incredibly competitive the law school application and acceptance process was going to be," Grimson said. "My family and I were living in Nashville, but when I looked at where the best value was as far as a law school education is concerned versus costs, Memphis was just the best place for me. It was close enough to commute and they reached out to me early and made me feel comfortable."

Grimson notes that his situation was unique. Not only was he older than his typical classmate, he also commuted from Nashville for the week during law school. He spent four days in Memphis at school and drove back home every weekend. His competitive drive and devotion to his task were no different from when he was in the NHL though. "You really have to treat law school like a full-time job. It's really like a job and a half, to be honest," says Grimson. "Take it seriously."

"Law school, at the end of the day, helped ease the transition for me when I left the league," Grimson says of his life after the NHL. "It allowed me a to find a profession where traits of my personality carried over from the game to the classroom to the

courtroom, and provided me with a wider range of options for what I could do in the next phase of my life, so that I could continue to take care of my family."

After graduating from Memphis Law in 2005, Grimson went to work for the NHL as in-house counsel at the National Hockey League Players' Association (NHLPA) in their Labor Department. After several years with the NHLPA, Stu and his family returned to Nashville to work as a defense attorney with Kay, Griffin, Enkema & Colbert, PLLC until 2012. Since then, he's returned to the Nashville Predators organization, first as a color analyst on the Predators radio network and now as one of the primary analysts for the Predators Television Network.

When asked what was more challenging (or what was more exciting) amongst his career choices of hockey "enforcer" and attorney, Grimson notes "lawyers are sort of adversarial by nature," and that his personality traits carried over to the legal arena. In his playing days, part of his role was to step in and make sure anyone who slighted his team or his teammates paid for it. As an attorney, one of his favorite things is being an advocate for someone and helping that person when they need the assistance.

"There's nothing more challenging than being in front of a judge and advocating on a client's behalf and doing the best job you possibly can for them," said Grimson. And if you want to know which is more daunting—doling out a professional NHL beating or being in the legal profession—Grimson has something to say about that as well. "Nothing has ever come remotely close to the true courtroom experience for me," Grimson says about his trial experience. "Absolutely nothing is that challenging or as big of a rush, certainly in terms of the intellectual experience, preparation and challenge."

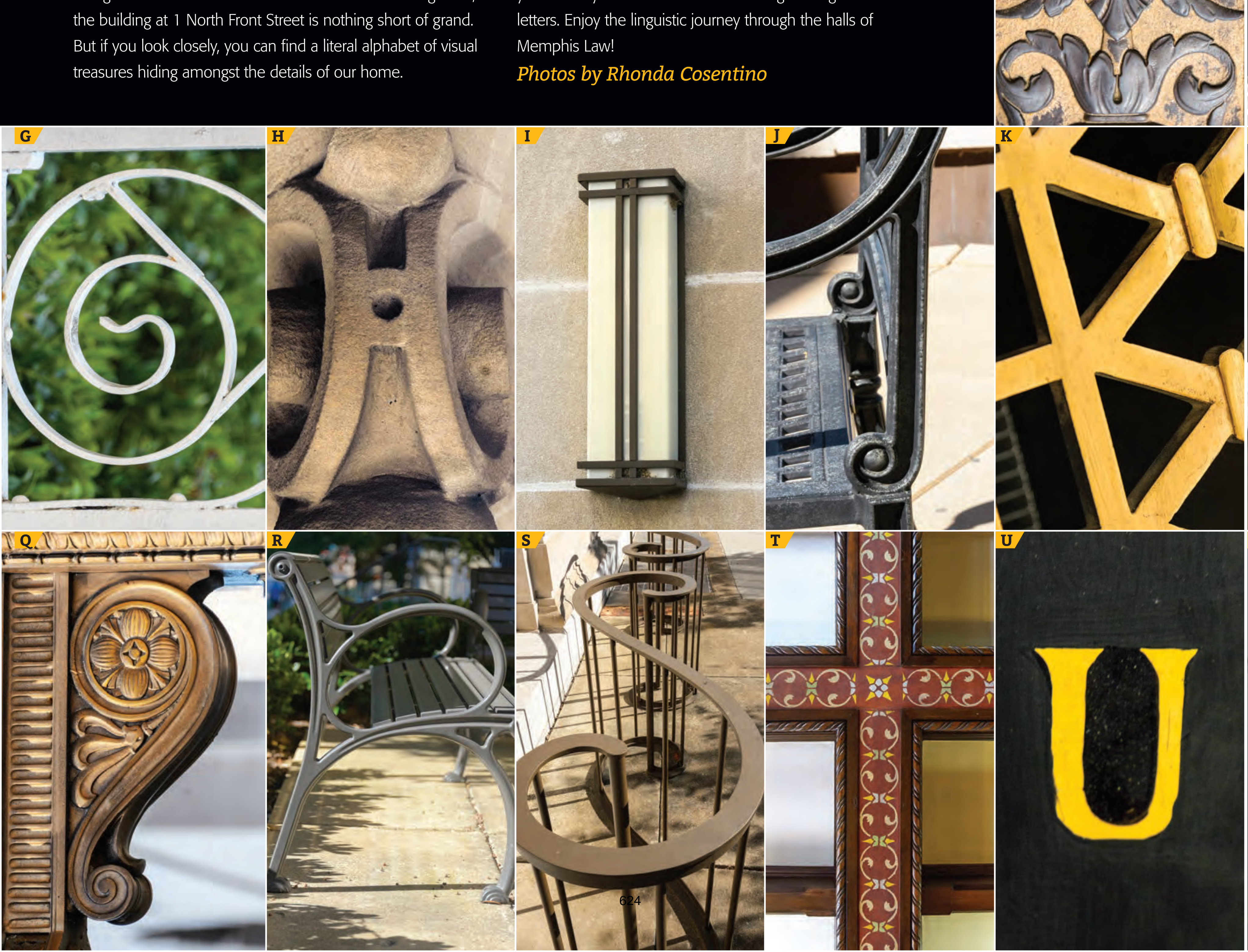
"Nothing has ever come remotely close to the true courtroom experience for me," Grimson says about his trial experience. "Absolutely nothing is that challenging or as big of a rush, certainly in terms of the intellectual experience, preparation and challenge."

The Letter(s) of the Law (School)

Our building is impressive, there's no way around that. With its soaring marble columns, original brass doors, elevators and window cages, hardwood paneling, intricate crown molding, beautiful woodworking with hand-painted stencil designs, and grand staircases made of Tennessee marble and granite, the building at 1 North Front Street is nothing short of grand. But if you look closely, you can find a literal alphabet of visual treasures hiding amongst the details of our home.

Most of us grew up with the alphabet decorating the classrooms of our youth. In this feature, we've brought some of that theme to law school, with a touch of class, architectural history and sophistication that you can see for yourself as you walk around our building looking for these letters. Enjoy the linguistic journey through the halls of Memphis Law!

Photos by Rhonda Cosentino



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ALUMNI: SETTING THE BAR

1970

John I. Houseal, Jr., of Glankler Brown, was recently elected to the board of directors of the Memphis Navy League. He was also asked by the University of Memphis School of Law to sit on the advisory board of a new law program focusing on health-care law.

1977

R. Hunter Humphreys, of Glankler Brown, has been invited to join the American College of Real Estate Lawyers. ACREL's distinguished, nationally-known lawyers have been elected to fellowship for their outstanding legal ability, experience and high standards of professional and ethical conduct in the practice of real estate law.

Lancelot L. Minor, III, a partner with the Memphis law firm of Bourland Heflin Alvarez Minor & Matthews, PLC, has been honored by being selected as a 2015 Mid-South Super Lawyer by Thomson Reuters, publishers of Mid-South Super Lawyers Magazine.

1980

W. Kerby Bowling was selected as a 2015 Power Player in Employment Law for Inside Memphis Business.

1981

Steve McCleskey, of Glankler Brown, has recently obtained his license to practice law in Mississippi.

1982

Judge William J. Borah finished his term as Chairman of the Illinois State Bar Association's Labor and Employment Law Section Council.

Bill Jakes was recently inducted into the American College of Trial Lawyers.

1992

Steve Maroney was reappointed in March 2015 as the Madison County Attorney, a position he has held since 2012.

1993

Caren Beth Nichol was recently appointed to the Beale Street Tourism Development Authority Board.

1995

Garland Erguden joined the Shelby County Juvenile Court as a magistrate and chief legal officer.

1996

Kevin Snider was recently reappointed to serve as the volunteer commander of the Fayette County Technical Rescue Team located in Rossville, Tennessee.

1998

Ronald T. Catelli became the President of the Monmouth County Bar Association in Monmouth, New Jersey.

Saffa Koja recently accepted a position at FTI Consulting as a business development director in New York City, New York.

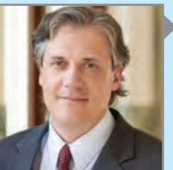
Emily Taube recently joined the Nashville office of Burr & Forman as a partner.

2000

Jason D. Salomon, an estate planning specialist with the Memphis law firm of Harkavy Shainberg Kaplan & Dunstan PLC, has been elected chairman of the Probate & Estate Planning Section of the Memphis Bar Association.

2001

Jacob Zweig, of Evans Petree PC, for the 2nd year in a row was named Bankruptcy Counsel of the Year by TD Auto Finance LLC as part of the firm's Creditor Rights/Insolvency Group. The award is given for superior overall performance and strategic bankruptcy litigation victories.



2002

John Packard Wade has joined McNabb, Bragorgos & Burgess, PLLC. Mr. Wade is admitted to practice law in all Tennessee courts and in the U.S. District Court for the Western District of Tennessee. He was named a "Rising Star" in the 2012 and 2013 editions of Super Lawyers.

Meredith L. Williams, chief knowledge management officer for Baker Donelson, has been elected to her third term on the board of directors of the International Legal Technology Association (ILTA) and will serve as its president. ILTA is governed by a seven-member board that is elected biennially.

2003

Kyle I. Cannon has achieved an AV-rating by Martindale-Hubbell. He also served as the co-chair of the Big Wig Ball 2015, the Le Bonheur Children's Hospital Associate Board's largest annual fundraiser. The event raised $60,000 for the hospital.

Jennifer Harrison joined the regional law firm of Hall Booth Smith as a partner and will lead the firm's newest office in Memphis, Tennessee. Jennifer focuses her practice on the defense of professional liability, medical malpractice and other healthcare related cases. She was selected as a Mid-South Super Lawyer in 2014 and is licensed in Tennessee, Arkansas and Mississippi.

Robert J. Fehse, of Evans Petree PC, for the 2nd year in a row, was named Bankruptcy Counsel of the Year by TD Auto Finance LLC as part of the firm's Creditor Rights/Insolvency Group. The award is given for superior overall performance and strategic bankruptcy litigation victories.

2004

Freeman Foster was recently appointed to serve as an Assistant City Attorney for the City of Memphis.

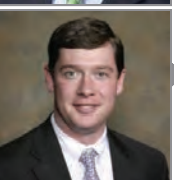
Kandace C. Stewart, of Evans Petree PC, for the 2nd year in a row was named Bankruptcy Counsel of the Year by TD Auto Finance LLC as part of the firm's Creditor Rights/Insolvency Group. The award is given for superior overall performance and strategic bankruptcy litigation victories.

Bert A. Echols, III, Evans Petree PC, for the 2nd year in a row was named Bankruptcy Counsel of the Year by TD Auto Finance LLC as part of the firm's Creditor Rights/Insolvency Group. The award is given for superior overall performance and strategic bankruptcy litigation victories.

2005

Thomas R. Greer was elected as president-elect of the Tennessee Association for Justice.

Aaron J. Nash, Evans Petree PC , for the 2nd year in a row was named Bankruptcy Counsel of the Year by TD Auto Finance LLC as part of the firm's Creditor Rights/Insolvency Group. The award is given for superior overall performance and strategic bankruptcy litigation victories.



Brian L. Yoakum, of Evans Petree PC, was recently elected as a barrister in the Leo Bearman, Sr. Chapter of the American Inn of Court.

2008

Nicole Bermel Dunlap has recently begun working for Ford & Harrison, LLP, one of the country's largest management-side labor and employment firms, in its Tampa, Florida office.

Russell A. Humphrey was elected president of the American Association of Legislative Clerks and Secretaries. Additionally, he was selected as a commissioner for the Mason's Manual Commission, which oversees the revisions of the parliamentary law treatise, Mason's Manual of Legislative Procedure.

Mary Lee was recently designated as a White House Foster Care Champion of Change. She and 12 other former foster youth were honored at a ceremony in Washington, D.C. at the White House, with remarks from U.S. Secretary of Education Arne Duncan and Deputy Assistant to the President for Urban Affairs, Justice and Opportunity Roy L. Austin, Jr.

2009

Richard "Trammel" Hoehn Jr. has joined the Nashville office of Butler Snow, and will work with the firm's government relations group.

Michael M. Lawless was elected chairman of the Young Lawyers Division of Eminent Domain Section of the North Carolina Advocates for Justice. The NCAJ is North Carolina's premier association of trial attorneys, and the Eminent Domain Section focuses on law, policy, and practice skills relevant to practitioners in that area.

Kacie Flinn McRee was honored as one of Knoxville's 40 Under 40 by the Knoxville News Sentinel.

Adam C. Ragan joined the law firm of McGuireWoods LLP as an attorney in its Financial Services Litigation Group.

2012

Lauren Dunavin Callins joined the law firm of Hall Booth Smith as an associate and assisted in opening the firm's eleventh regional office located in Memphis, Tennessee. Lauren focuses her practice on the defense of hospitals, physicians, and other healthcare providers in a variety of medical malpractice and professional liability claims.

Maggie Smith has joined the firm of Batson Nolan PLC.

2014

Megan E. Warden has joined Shea Moskovitz & McGhee as an associate.

2015

Martha Crowder has joined the firm of Apperson Crump PLC.

If you have an alumni news item or update that you would like to see featured in this section of ML, please send it to ML executive editor Ryan Jones at rjones1@memphis.edu, along with any corresponding headshots.

IN THESE HALLS: FACULTY ACCOMPLISHMENTS

Alena Allen

Professor Allen's most recent article, "Dense Women," will be published in the Ohio State Law Journal. She was also selected as a 2015 Maxine Smith Fellow by the Tennessee Board of Regents.

Lynda Wray Black

Professor Black was selected 2015 Professor of the Year by the Memphis Law Class of 2015. She was also named the 2015 Outstanding Alumna by the University of Memphis Alumni Association, Arts and Sciences Chapter.

Professor Black was also appointed to the Research Oversight Committee for the Biorepository and Integrative Genomics Initiative at Le Bonheur Children's Hospital.

Amy Campbell

Professor Campbell co-organized the Therapeutic Jurisprudence Track and was named to the International Scientific Committee of the 34th International Congress on Law and Mental Health held in Vienna, Austria, in July 2015. At this Congress, she also presented a work-in-progress, "Gun Control and Mental Health," as part of the Mental Health Exceptionalism Panel.

Professor Campbell was elected to the Nominating Committee of the American Society of Bioethics & Humanities in July 2015. She also was invited to join the newly formed Memphis My Brother's Keeper Policy Working Group (Mayor Wharton's Young Men of Color Initiative).

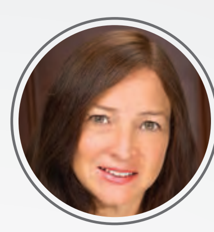
Donna Harkness

Professor Harkness's book chapter, "Bridging the Caregiving Gap - Does Technology Provide an Ethically and Legally Viable Answer? A U.S. Perspective," has been published in International and Comparative Law on the Rights of Older Persons.

Daniel Kiel

Professor Kiel received a fellowship from the Core Fulbright U.S. Scholar Program which will enable him spend the fall 2015 semester at the University of the Free State (UFS) in Bloemfontein, South Africa, working on his project, "Comparative Analysis of Educational Remedies in Destratifying Societies."

Professor Kiel also had a chapter published in the book, "Law and Education Inequality." The chapter is called "Equity Through Differentiation." He was also named chairman of the board of Just City, a new local nonprofit charged with minimizing the incidents and impact of contact with the criminal justice system in Memphis.



D.R. Jones

Professor D.R. Jones' article, "Law Firm Copying: An Examination of Different Purpose and Fair-Use Markets," is forthcoming in the South Texas Law Review. Professor Jones also has another article entitled "Commerciality and Fair Use" which is forthcoming in the Wake Forest Journal of Business and Intellectual Property Law.

Barbara Kritchevsky

Professor Kritchevsky's book chapter, "If There's a Right, is There a Remedy? The Federal Courts' Role in Remedying Constitutional Violations," will be published in Constitutionalism, Executive Power, and the Spirit of Moderation (State University of New York Press).

Boris Mamlyuk

Professor Mamlyuk's book chapter, "Early Soviet Property Law in Comparison with Western Legal Traditions," is forthcoming in Political Economy and Law: A Handbook of Contemporary Practice, Research and Theory.

Andrew McClurg

Professor McClurg's most recent article, "The Second Amendment Right to be Negligent," will be published in the Florida Law Review, and his article, "In Search of the Golden Mean in the Gun Debate," is forthcoming in the Howard Law Journal. Professor McClurg also was one of 10 authors (out of more than 1000) for West Academic Publishing invited to attend the Author Inside Look Conference in St. Paul, Minnesota. It was his second invitation in three years.

Steve Mulroy

Professor Mulroy's article, "Sunshine's Shadow: Overbroad Open Meetings Laws as Content-Based Speech Restrictions Distinct from Disclosure Requirements," was published in the Willamette Law Review. Professor Mulroy presented a paper in March at the Sorbonne in Paris, as part of the International Symposium on Freedom of Information & Governmental Transparency in the Open Government Era, University of Paris 1 Pantheon-Sorbonne. His paper, "Sunshine's Chill: Overbroad American Open Meetings Laws and the Limits of Disclosure," which takes a comparative approach, will be published in the book produced as part of the symposium. This past July, Professor Mulroy spoke at the Southeast Association Of Law Schools (SEALS) Conference in Boca Raton, Florida, on innovative methods for teaching Constitutional Law.

John Newman

John Newman's paper, "Antitrust in Zero-Price Markets: Foundations," has been accepted for publication in the University of Pennsylvania Law Review.

Danny Schaffzin

Professor Schaffzin's article, "So Why Not an Experiential Law School . . . Starting With Reflection in the First Year?," was published in the Elon Law Review. He also coauthored the Externships Chapter, titled "Delivering Effective Education in Externship Program" in the forthcoming Building on Best Practices book to be published by LexisNexis (summer/fall 2015).

Professor Schaffzin presented at the following events:

- Making Beautiful Music Together: Lawyers Team with Doctors in Medical-Legal Partnerships – panel presenter; Tennessee Bar Association Annual Convention, Memphis, Tennessee., June, 2015.

- Just What the Doctor Ordered: Multi-Disciplinary Clinics at the Forefront of Change – Co-presenter; AALS Conference on Clinical Education, Rancho Mirage, California., May, 2015.

- Advancing Population Health: An Overview of Law-School Based Medical-Legal Partnerships – poster presenter; National Medical-Legal Partnership Summit, McLean, Virginia, April, 2015.

Katherine T. Schaffzin

Professor Kate Schaffzin's article, "Learning Outcomes in a Flipped Classroom: A Comparison of Civil Procedure II Test Scores between Students in a Traditional Class and a Flipped Class," was accepted for publication in the University of Memphis Law Review.

Eugene Shapiro

Professor Shapiro's article, "Governmental Acquiescence in Private Party Searches: The State Action Inquiry and Lessons from the Federal Circuits," will be published in the Kentucky Law Journal.

Kevin Smith

Professor Smith's article, "Wax on/Wax off: Reflections on Learning to Think and Do as a Stone Carver (with Applications to Legal Education)," was published by the University of Memphis Law Review in the spring 2015 issue.

Jodi Wilson

In August 2015, Professor Wilson was an invited speaker at the 34th Annual Meeting of the Association of Reporters of Judicial Decisions. She spoke about assessing and citing nontraditional sources in opinions.

Christina Zawisza

Professor Zawisza was recently recognized by Florida's Children First, a statewide advocacy organization she helped to create, as Director Emeritus. Her article, "Teaching Cross-Cultural Competence to Law Students: Understanding the 'Self' as 'Other,'" will be published in the Florida Coastal Law Review. It will be published in the winter 2015 symposium edition developed in conjunction with the Florida Bar Public Interest Law Section.

Professor Zawisza also made a presentation on "Embracing Time and Place: Therapeutic Jurisprudence and the Civil Rights Movement in Memphis" at the 34th International Congress on Law and Mental Health at Sigmund Freud University in Vienna, Austria, in July 2015.

FACULTY PROMOTIONS

JODI WILSON

Jodi Wilson was promoted to Associate Professor of Law and awarded tenure in 2015.

KATHERINE T. SCHAFFZIN

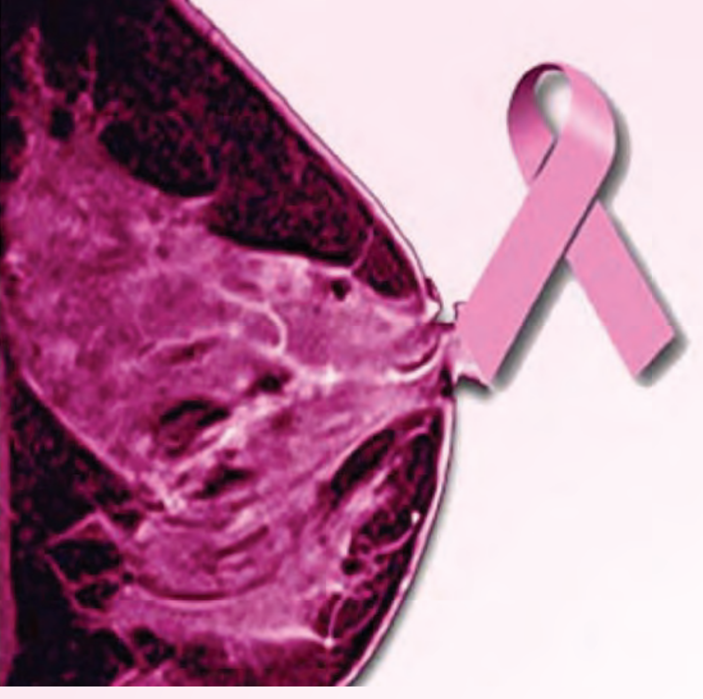
Katherine T. Schaffzin was promoted to Professor of Law in 2015.

D.R. JONES

D.R. Jones was promoted to Associate Professor of Law and awarded tenure in 2015.

JOHN NEWMAN

John Newman was hired on a full-time basis as an Assistant Professor of Law.



Do Dense Women Need Legislative Protection?

By Professor Alena Allen

Public support and awareness of breast cancer is unparalleled in Tennessee and throughout the nation. Pink ribbons, an international symbol of breast cancer, are now worn by both women and men throughout the year, and breast cancer charities have ramped up awareness by linking brands and products with pink ribbons. In fact, their strategy has been so successful in marketing that "pink" is now a verb.

As a result, almost every woman knows that early detection exponentially increases a woman's chance of survival and that having a yearly mammogram after 40 is the best way to ensure early detection.

But this familiar mantra at best offers incomplete information and at worst lulls women into a false sense of security. Although it is true that survival rates hover well over 98 percent if breast cancer is caught in the earliest stages, a yearly mammogram is not a panacea.

Mammographic technology has limits which until recently were not widely shared with women. In short, if a woman has dense breast tissue, then the fatty tissue in her breasts appears white on mammographic film. Because cancer also has a white appearance on mammographic film, cancer in women with dense breast tissue is much more likely to be missed.

Many women are dense. In fact, roughly 50 percent of women have clinically dense breasts. Moreover, breast density is not static but tends to decrease with age. Yet, few women are told anything about their breast density until they are, ultimately, diagnosed with advanced-stage breast cancer.

Density notification legislation seeks to change this and mandates that women be informed about their breast density. In 2009, Connecticut passed the first density notification law in the country. Currently, 24 states have enacted density legislation, including Tennessee.

Tennessee's statute became effective on January 1, 2014. The statute provides that the facility where the mammogram is performed must provide the following written notice to women with dense breasts:

Your mammogram shows that your breast tissue is dense. Dense breast tissue is common and not abnormal. However, dense breast tissue can make it harder to evaluate the results of your mammogram and may also be associated with an increased risk of breast cancer. This information about the results of your mammogram is given to you to raise your awareness and inform your conversations with your doctor. Together you can decide which screening options are right for you. A report of your results was sent to your physician.

While density notification legislation informs women, this solution has negative consequences as well.

First, women are informed of their density in writing. This means that a woman who has questions is not in an immediate position to have her questions answered by a physician. This situation can produce needless angst and anxiety while the woman is waiting to speak with her physician.

Second, the legislation usurps the power of physicians to decide what information should be shared and how.

The law has traditionally deferred to physicians allowing medical professionals to set the standard of care without having to worry about second-guessing by lay people. Density notification legislation interferes with the ability of physicians to exercise their professional judgment for the benefit of each individual patient.

This intrusion is particularly problematic because the legislature has mandated density notification without mandating that insurers pay for additional screenings. In practice, the law steers women to discuss breast density and its risks with their physicians without providing access to further assessment methodologies.

While supplemental screenings such as ultrasound and tomosynthesis are available, insurers are unlikely to cover the cost because such screenings are not cost effective. This puts women who are not affluent in the anxiety provoking position of spending limited resources on expensive supplemental screenings or going without the additional screening and hoping that cancer is not being masked by dense breast tissue.

Disclosure legislation is a hollow victory for breast cancer advocates. Dense women do not need boilerplate notices sent at the behest of the state legislature. Dense women need access to better individualized care and affordable access to screenings.

Cont'd from pg 14

The 60-day public comment period on the FAA's proposed drone rules ended in April with more than 4,500 comments and many expected a final rule would be delivered soon after. But given the amount of comments, the mandate from Congress to integrate drones into the American airspace, and orders from President Barack Obama to do it in a balanced way, the FAA (in the unsurprising move mentioned above) said it needed more time to issue a final rule and reached out to the private sector for help.

"Government has some of the best and brightest minds in aviation, but we can't operate in a vacuum," Transportation Secretary Foxx said in a statement. "This is a big job, and we'll get to our goal of safe, widespread (drone) integration more quickly by leveraging the resources and expertise of the industry."

The announcement came in May at the annual conference of the AUVSI, the drone trade group, in Atlanta. The FAA said then that it began working with three different companies on three different segments of drone regulation.

The agency is now working with cable news network CNN on operating drones in urban areas for gathering news in populated areas. It will work with drone manufacturer PrecisionHawk to explore drone use for monitoring crops in precision agriculture operations. Also, the FAA will work with BNSF railroad on using drones to inspect rail-system infrastructure.

Given all of the yet-answered questions and all of complexities within each question, the FAA said it wasn't comfortable even projecting a timeline for a final rule.

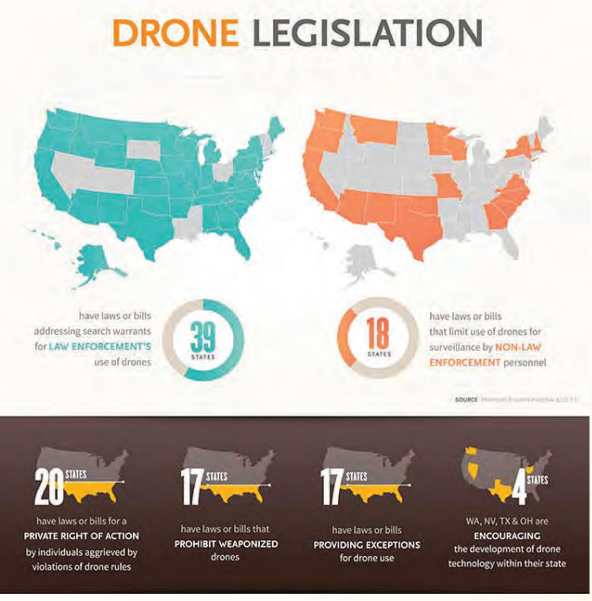
TENNESSEE FIREWORKS

Imagine flying through a huge fireworks show. Not high above it. Not below it looking up. But flying right through it.

Mortar shells explode a few feet in front of you and their concussive booms blow you back. All around you, the sky is painted with dazzling lights that burst and unfurl like the massive tendrils of electric, 50-story palm trees.

You can see this right now, thanks to YouTube and a drone.

Last year, a Nashville entrepreneur launched his $1,300 drone from a parking lot and flew it and a camera over the Cumberland River and directly into Music City's Fourth of July fireworks show, the second largest in the country. In the darkness, he lost sight of the drone but watched its course on a video screen with his friends.



On July 6, The Tennessean called the video "spectacular" and said that the drone pilot was on "firm legal footing for the activity." Two days later, the paper reported that the Federal Aviation Administration had opened an investigation into the fireworks flight. The agency received complaints about the risk the flight posed for possible injury and property damage on the ground after the video went viral.

For his part, the drone operator, Robert Hartline, was unconcerned, telling a Tennessean reporter that, "The technology is here, and it's going to take a while for the FAA to process how (drone use is) going to affect people."

Hartline was right, of course, at the time. But since the interview a year ago, his original drone video has been viewed more than 93,000 times and has been copied on tons of other YouTube channels. His story spread to online tech magazines, tech blogs, drone blogs, and also to a mainstream, national audience via USA Today and the Huffington Post. His story also spread to the Tennessee General Assembly.

In January, a bill was filed in the Tennessee House of Representatives that would ban drones to "intentionally capture an image over certain open-air events." The Tennessee State Fire Marshall's Office quickly requested an amendment to add firework displays. Hartline's fireworks flight was on its way to becoming a Class C misdemeanor.

The bill's Senate sponsor, Senator Jack Johnson (R-Franklin) said drone enthusiasts urged him to keep the new state rules loose. But he said companies and other government agencies found out about his drone bill and were eager to add their regulations. For example, the Tennessee Department of Corrections requested an amendment to ban drone flights over correctional facilities.

The Tennessee Titans requested an amendment to ban drone flights over ticketed, open-air events with more than 100 people. The team's lobbyist, Lana Johnston (J.D. '09), an associate and policy advisor with the law firm of Waller Lansden Dortch

“Before you can fly a drone over my stadium, please go get an actual license.”

and Davis, told a House committee that the amendment targeted drone hobbyists, who require neither training nor licensure.

“Before you can fly a drone over my stadium, please go get an actual license,” Johnston said. “Otherwise, I don’t want you flying over this public space for public safety and for copyright issues.”

But Senator Lee Harris (D-Memphis), a UofM law professor, asked the broadest, simplest and perhaps the most potent question about drones and public gatherings.

“If I’m having a backyard barbecue in Memphis and I invite 100 people over, shouldn’t I have an expectation of privacy?” Harris asked during a meeting of the Senate Judiciary Committee. “I was protected with the original bill but I’m not now (with the amended bill).”

Johnson, the bill’s sponsor, said he was trying to “thread the needle” on the drone issue, addressing copyright and safety concerns, and “not putting unreasonable restrictions on enthusiasts who like to fly these things in the park on Sunday afternoons.” But he said Harris was right on point.

“If you have a swimming pool in your backyard and you have a party and have some folks over, there’s nothing in the law prohibiting your neighbor from just flying his drone over and just filming what’s going on in your backyard,” Johnson said. “I don’t know how we rectify that.”

But Senator Mark Green (R-Clarskville) had a sound effect for a simple answer that had the hearing room in stitches. “Chick-chick,” he said, and the room erupted in laughter.

“Senator Green is over here cocking a shotgun,” laughed Johnson. “That would be one possibility.”

The bill became law in April and Hartline’s drone flight through the fireworks would now come with a fine of no more than $50 and no more than 30 days in jail. The same penalty comes for any drone user capturing images over a ticketed event of more than 100 people without the owner’s consent.

Tennessee state legislators asked for a drone task force to be assembled in 2013 to simply “study the use of drones for public and private purposes in this state.” Task force members would have been pulled from state offices representing everything from safety to economic development. The language of the law creating the task force noted (as did the Presidential memo on drones) that drones have great potential for commerce but pose unknown risks. However, the task force was never convened.

That same year, the legislature passed the Freedom from Unwarranted Surveillance Act, which banned law enforcement agencies from using drones to collect evidence or other information. That law was passed in response to the purchase of two drones by the Metro Nashville Police Department. In 2014, the legislature passed a bill that outlawed drone use to watch people “lawfully” hunting and fishing.

Before all of this, though, the legislature passed a blanket ban on drones, which made it a crime to

use drones for photography except in 18 different situations, including scholarly research, mapping purposes, part of the U.S. military, for maintaining utility easements, surveying the scene of a catastrophe, fire suppression, and more.

Right now 20 states have passed drone laws, according to McClurg, the UofM law professor and privacy expert, but he's not sure these laws are such a great idea.

"We should be careful in passing laws too quickly in such a rapidly changing area," McClurg said. "Ultimately, a uniform national approach would be preferable to a patchwork of conflicting state laws.

"Even in the absence of statutes or regulations, common law remedies for invasion of privacy and aerial trespass may be available to persons who are subjected to private drone misuse."

> ***"We should be careful in passing laws too quickly in such a rapidly changing area."***

THE HOBBYIST AND THE FUTURE

While big corporations push their drone research projects in super secrecy, drone hobbyists place their work loudly and proudly on the Internet for anyone who will click. And, to a large degree, hobbyists are on the front lines of the drone future. No matter what the FAA says.

Earlier this year the FAA issued an updated set of safety guidelines for drone hobbyists that it had used earlier for model aircraft. The guidelines say hobbyists should fly their drones below 400 feet, within their lines of sight, and away from manned aircraft, airports, people, and stadiums. The FAA also reminded hobbyists that they can be fined for endangering people or other aircraft. To push these rules, the FAA launched its "Know Before You Fly" campaign with a website, social media, and a mobile app.

It's not that drone hobbyists are scofflaws; they're more imbued with the current tech-punk sense of DIY power that places few limits on what can be done with an aircraft, a camera and a computer. And they'll put all of it—good or bad—on YouTube.

More than 1.8 million people have seen YouTube user Andy Stewart's video of a drone strapped with Roman candles. The fireworks are lit and the drone lifts off and shoots fire balls at two men who run away from it through the snow. Funny? Yes. Dangerous? A little. Did the cops show up? Probably not.

Now consider that more than 3.1 million have watched the 15-second, "Flying Gun" video from YouTube user "Hogwit." It shows show a drone strapped with semi-automatic hand gun. The 15-second video shows the gun hovering in the air while someone remotely pops off four rounds. Funny? No. Dangerous? Maybe. Did the cops show up? Yes. The stunt triggered an FAA investigation.

Hogwit went on to shoot a video at a Connecticut beach. A woman saw him doing it, confronted him, and shoved him to the ground. She was charged. He was not. It's the next step of normalizing drones into daily life. Remember Senator Green's suggestion of shooting an offending drone with a shotgun? Consider that when a Kentucky man did just that in July, he was charged with first degree criminal mischief and first degree wanton endangerment and spent the night in jail.

THE NEXT HUNDRED STEPS

As Van de Vuurst explained, old-school model airplane pilots policed themselves, stayed out of trouble, and were left largely alone by law enforcement or the FAA. But drones are easy to fly—with a joystick like in a video game ("and millennials were raised on video games") and they are easy to get.

He repeated the fact that drones are not going away and said the new FAA rules were a good first step.

"That is the first step in the next hundred that's going to have to be taken over the next several years to figure out how in the world we're going to integrate these things into everyone's lives and do it safely," Van de Vuurst said. "At the same time, we're going to have to figure out what to do with someone who puts a gun on one of them!"

Cont'd from pg 18

back they didn't change much (in the filing). They were still alleging the damage claim. Many observers of the case," Showalter Otts said, "were surprised the U.S. Supreme Court didn't dismiss the most recent complaint like the one before." Maybe it's to actually rule that groundwater should be treated in a similar way to surface water, thus putting it through a process that ends up with equitable apportionment. Of course, at least five of the justices might have felt there is merit to the case and are interested in hearing Mississippi's case.

"The Supreme Court granted Mississippi's most recent Petition for Leave to file an Original Action without explanation, so any attempt to explain what the Supreme Court considered or why the Court took this approach would be pure speculation," said David Bearman (J.D. '96) a shareholder at Baker, Donelson, Bearman, Caldwell & Berkowitz, PC and the co-lead attorney representing Memphis and MLGW in the case. Bearman points out that the City of Memphis and MLGW will respond to Mississippi's complaint and remain confident that they will ultimately prevail.

SURFACE WATER VS. GROUNDWATER

To understand the reasons, it might make sense to take a closer look at what is going on in Georgia.

The longstanding issue regarding Atlanta's use of water from Lake Lanier has moved back up to the Supreme Court because of shellfish issues in Alabama and Florida. The court has continued siding with Georgia.

It's important to note that when water is apportioned it doesn't have to be equal. "It's mostly based on need and different uses can be given greater priority," said Showalter Otts. "Out West, agriculture is given greater priority. In Atlanta, the public drinking water gets priority. The court has traditionally sided with Georgia because it has given this public use higher value than leaving water in streams. Alabama and Florida are arguing it should stay in streams for wildlife. That generally has been given lesser priority than public drinking water."

"With surface water, like with Georgia and Florida, the state would have to file for equitable apportion of the water. What Mississippi is doing is filing more of a tort action seeking monetary award."

Now, in 2015, it's the first summer with true drought that has led to a visible impact on the oyster industry in the Gulf of Mexico. "Finally," Showalter Otts said, "there is proof that a lack of freshwater is affecting the coastal economies."

The fight in Alabama, Florida and Georgia surrounds surface water. In Memphis, it's all about water that sits underground.

"Most of us thought this would be dismissed because one of the issues is, what is the right way to raise this?" Showalter Otts said. "With surface water, like with Georgia and Florida, the state would have to file for equitable apportion of the water. What Mississippi is doing is filing more of a tort action seeking a monetary award. I'm unsure (the Supreme Court) accepted it to go through the action to see if surface and ground waters are the same or to hear the argument Mississippi is making."

Some argue that Mississippi has relied on studies that are older, before the explosion in growth in Southaven. It could be argued that the growth in DeSoto County is in fact causing the water to draw back toward Mississippi.

The next step is the Supreme Court appoints a special master to investigate the case. That could take a few months, and it certainly would be surprising to expect a report from the special master for a year or so. As of the filing of this story, the time for the defendants to file an answer was extended to Sept. 14, 2015.

Speculating about what the U.S. Supreme Court might do can be a tricky proposition. So many unknowns surround Mississippi's case against Memphis and how the court might rule. But if or when it does one day rule in favor of Mississippi, some unknowns will face Memphis and Memphis Light, Gas and Water.

THE "WHAT IFS?"

"Requiring MLGW to draw water from the Mississippi River as an alternative or supplemental source of water is one of the remedies that the state of Mississippi is pursuing," Womack said. "One would assume that it would be necessary to construct a water treatment plant somewhere along or very close to the Mississippi River in order to utilize water from the Mississippi as a drinking water source. There would be challenges associated with the use of water from the Mississippi River that do not exist with the current use of groundwater."

It would cost a significant amount of money to pull water from the river, which

already has a reputation for being less than clean, so there would be additional water treatment costs that don't exist with the current groundwater situation.

"If the Supreme Court rules that conversion is a cognizable claim and if Mississippi were to prevail on a conversion claim, the impact on ground water users throughout West Tennessee would be severe," said Bearman. "A switch from ground water to river water would require construction of a new water collection facility, changes to the water distribution infrastructure, and development of much more intensive water treatment operations. The extremely high cost for these modifications would likely be reflected in higher water rates for our citizens."

Womack said the long-term issues surrounding a decision in favor of Mississippi will demonstrate the need for communities in the Mid-South to develop coordinated strategies for allocating, protecting and conserving water sources. "I believe that Memphis and every other community need to develop long-range plans to assure an adequate and safe water supply," he said. "Anyone reading about what is happening in such states as California and Texas would likely wonder whether their own communities could be impacted by water shortages and what can be done to avoid such problems."

"I find it highly unlikely under current law that the court could prevent Memphis from withdrawing anything," Showalter Otts said. "Even if they rule groundwater is different than surface water and it's the property of the state it underlies, Memphis would still have a right to withdraw water under its state. The question would be if Memphis would have to redo what it's withdrawing to take care of the alleged cone of depression."

"I find it highly unlikely under current law that the court could prevent Memphis from withdrawing anything."

And figuring out the amount of water being used isn't exactly impossible to know. Hydrologists can analyze what's going on in the aquifer. They know how much water is in there through seismic surveys. Showalter Otts said there is some indication that the cone of depression is not there anymore and has in fact changed direction because of development in Southaven, Mississippi.

BOTH SIDES OF THE ISSUE

Mississippi

The legal brief in the recent case states that "Mississippi cannot claim that Tennessee is taking Mississippi's water until the aquifer has been apportioned, and Mississippi expressly does not seek an equitable apportionment here. … Accordingly, the court should deny Mississippi leave to file its complaint without prejudice to refiling a properly framed complaint for an equitable apportionment of the aquifer premised on concrete allegations of real and substantial injury."

Jim Hood's response for Mississippi in late May this year said, "The Tennessee Parties could and should have located MLGW's massive well fields further from the Mississippi/Tennessee border, limiting withdrawal to the natural recharge in Tennessee, and supplementing their needs with the abundant water from the Mississippi River. Instead, it is undisputed that for purely economic reasons, they have consciously chosen to use modern pumping technology to reach into Mississippi, and forcibly take hundreds of millions of gallons of irreplaceable groundwater out of Mississippi's groundwater storage, drawing down water levels in wells throughout DeSoto County, Mississippi. This intentional, unauthorized taking of Mississippi's

RANDALL WOMACK

valuable natural resource, solely for the Tennessee Parties' economic advantage, is an actionable violation of Mississippi's sovereignty under the Court's decisions."

According to the state of Mississippi, "The natural hydrogeological characteristics of this Mississippi groundwater under natural conditions make it an intrastate, not interstate, natural resource. Under these conditions, it is trapped and resides in Mississippi, never naturally crossing into Tennessee."

Tennessee

Tennessee argues that Mississippi is relying on the same territorial property rights theory that the Supreme Court rejected when it denied Mississippi leave to file a bill of complaint in 2010. Tennessee further contends that Mississippi has no enforceable rights to water in the aquifer until that water has been apportioned and that the Supreme Court's doctrine of equitable apportionment applies to an action by one state that reaches into the territory of another state through the agency of natural law. Tennessee characterizes its commercial pumping operation, and the resulting drop in aquifer pressure, as an example of Tennessee reaching into Mississippi by the "agency of natural law."

Tennessee also argues that Mississippi's claims are barred by the doctrine of issue preclusion, which prevents a party from re-arguing an issue of fact that has already been determined by a previous court where no error was found. The district court and the Fifth Circuit both rejected Mississippi's territorial property-rights theory, and determined that the aquifer is a shared interstate waterway subject to equitable apportionment. Tennessee asserts that these findings are conclusive; therefore, Mississippi is precluded from raising these same issues before the Supreme Court.

"The water levels in the aquifer have materially dropped in areas on both sides of the Mississippi River largely due to irrigation practices initiated over the past 30 to 40 years."

WHERE DO WE GO FROM HERE?

There are other issues in the Mid-South where states and communities are focusing efforts on current and future water needs. Womack said a growing number of farmers and several communities in Arkansas, with the assistance and encouragement of the state and other agencies, have been working to reduce their dependence on the water taken from the Mississippi River Valley Alluvial Aquifer, a relatively shallow aquifer.

"The water levels in the aquifer have materially dropped in areas on both sides of the Mississippi River largely due to irrigation practices initiated over the past 30 to 40 years," Womack said. "A few years ago a task force was established in Mississippi to promote conservation measures, irrigation management practices and strategies and plans for sustainable water resources in the delta. Projects in both states are either under consideration or under construction to use surface water for irrigation and industrial uses."

Back in the West where the drought continues, it's hard to imagine the situation correcting overnight, especially with continued population explosions. "It's hard to stop a train like that," Showalter Otts said.

Closer to home, litigation over groundwater is at the forefront and Mississippi v. Tennessee could point the way towards new standards to resolve disputes over interstate groundwater resources.

"As a practicing trial lawyer and former city attorney, I know firsthand the importance of active learning experiences to help develop the skill set necessary to successfully litigate cases. Moot court provides those experiences for students. Through this fund, we hope to help grow the experiential learning team to ensure that any student with an interest in trial work can get practical experience."
Robert L.J. Spence (J.D. '86) and Dorchelle Spence (BA '94; BBA '12) recently committed $36,000 to the Robert L.J. Spence, Jr. Moot Court Award, which will be an endowed fund to support in-school trial competitions.
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MEMPHIS LAW MOURNS THE PASSING OF PROFESSOR EMERITUS JANET RICHARDS

"Professor Richards was respected by colleagues and beloved by students," said Peter V. Letsou, Dean of the University of Memphis Cecil C. Humphreys School of Law. "She left a lasting impression on this law school and her many students that have gone on to become successful attorneys will be her lasting legacy."

Professor Richards served as the Cecil C. Humphreys Professor of Law at Memphis Law, where she joined the faculty in 1978 and served for more than three decades. Professor Richards taught Family Law, Family Law Seminar, Juvenile Law and Sales. She obtained her B.S. and J.D. from the University of Memphis and her LL.M. from Yale. She was a member of the American Law Institute, past chair of the AALS Family and Juvenile Law Section, a master emeritus in the Leo Bearman Sr., Inn of Court and a member of the TBA Family Law Code Commission. She was also a past president of the Tennessee Supreme Court Historical Society, a Tennessee Bar Foundation Fellow, and a recipient of the Memphis Bar Association's prestigious Sam Myar Award.

"It is not hyperbole to say that Janet was a light within the law school, a wonderful mentor, an excellent teacher, a source of wise counsel, always institutionally minded, and of positive outlook and disposition," said professor Kevin Smith, former dean of the University of Memphis School of Law and friend and colleague of professor Richards."

There was nothing she would not do for the law school and for her fellow human beings," said professor William P. Kratzke, echoing the statements of all that knew and worked with her.

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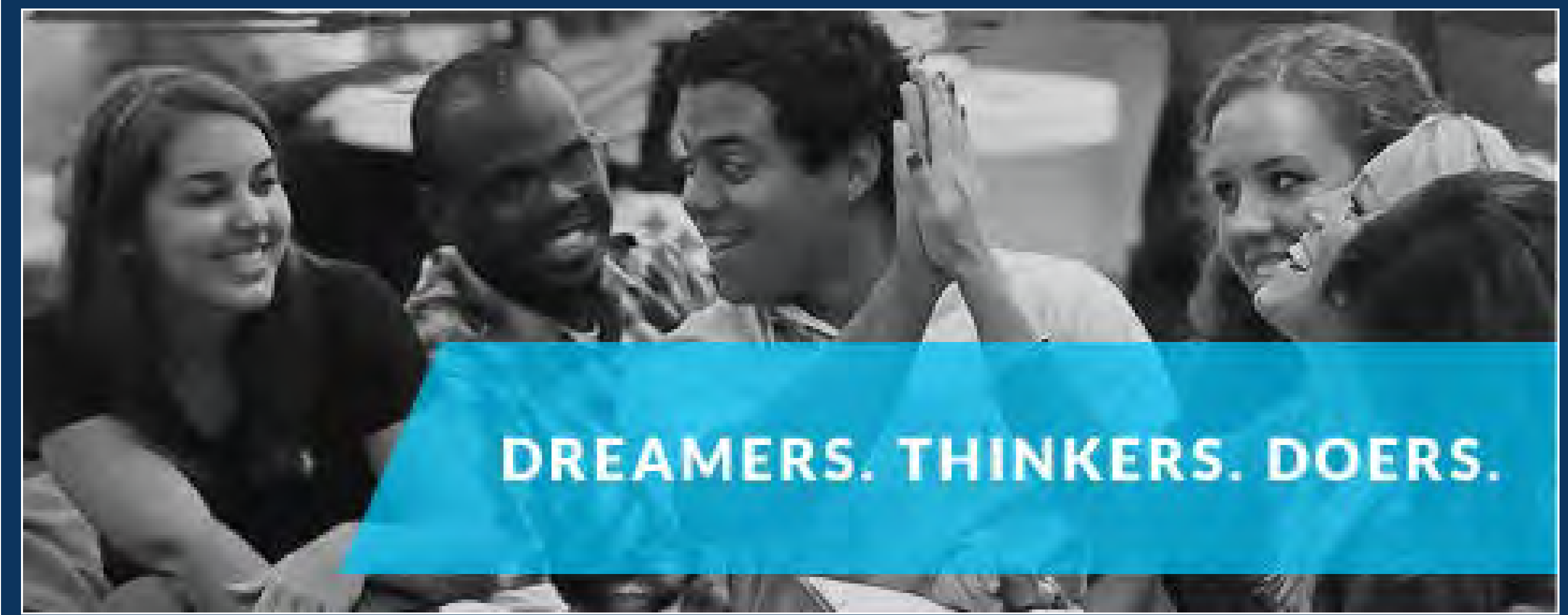

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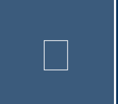
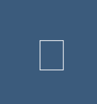
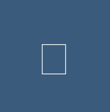
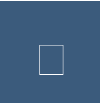
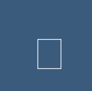
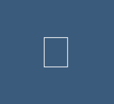

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PROF. MULROY SPEAKS ON VARIETY OF ISSUES

University of Memphis School of Law Professor and Associate Dean of Academic Affairs, Steve Mulroy spoke with several media outlets regarding a number of recent issues in the news, such as the recent Supreme Court of the United States decisions regarding the Affordable Healthcare Act, the Court's ruling on gay marriage equality, the removal of a Confederate statue from a local park and several issues surrounding the recent deaths of citizens in the Mid-South who were in police custody at the time of their passing.

Additionally, Professor Mulroy officiated the wedding of a local, same-sex couple at the the Memphis Gay and Lesbian Community Center on the same day that the SCOTUS ruling was announced.

SCOTUS Decision media coverage:

- **Memphis Flyer** - http://www.memphisflyer.com/MemphisGaydar/archives/2015/06/26/couples-tie-the-knot-at-tennessee-equality-project-marriage-celebration
- **Memphis Daily News** - http://www.memphisdailynews.com/news/2015/jun/27/gay-marriage-marks-first-day-in-memphis
- **Fox 13 Memphis** - http://www.myfoxmemphis.com/clip/11634049/law-professor-steve-mulroy-talks-about-supreme-court-ruling
- **Albany Times Union** - http://www.timesunion.com/news/article/Same-sex-couple-marries-in-Nashville-after-ban-6351935.php
- **ABC 24** - http://www.localmemphis.com/story/d/story/memphis-lgbt-community-celebrates-marriage-equalit/10678/XptwjdXzE0ORHUFECuWjxA
- **WREG Ch. 3** - http://wreg.com/2015/06/26/aca-ruling/

Passenger's rights coverage:

ABC 24 - http://www.localmemphis.com/news/local-news/knowing-the-law-when-being-pulled-over
- **Fox 13 Memphis** - http://www.myfoxmemphis.com/story/29609910/passengers-rights-when-a-car-is-pulled-over-by-police

Removal of Confederate statue coverage:

- **WMC TV 5 -** http://www.wmcactionnews5.com/story/29514094/citys-fight-to-remove-nathan-bedford-forrest-monument-grave-from-park-wont-be-easy

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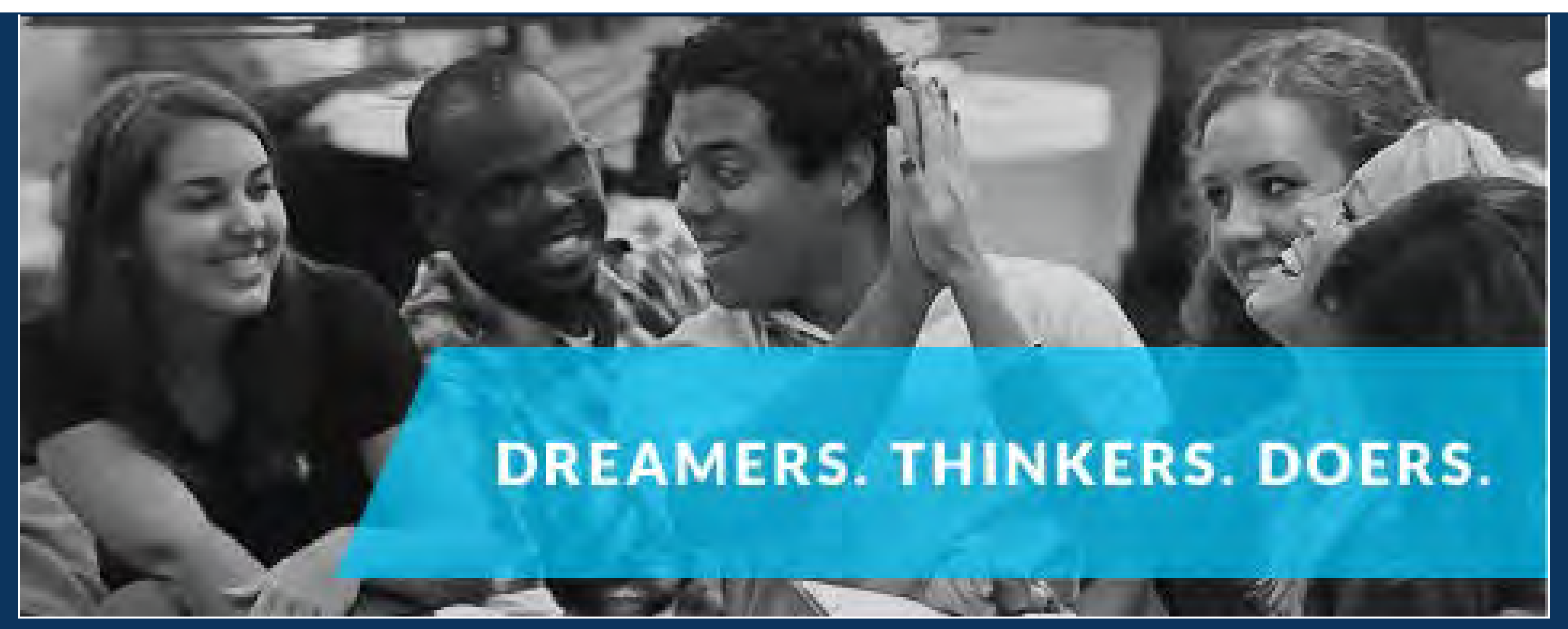

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Cecil C. Humphreys School of Law

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ML - Memphis Law Magazine

In this issue, we examine the current state of the bail bonding industry in America, with an interesting and in-depth feature from Lurene Kelley . From how this money-based bail system is being reformed and challenged across the country, to how it is being addressed here in Memphis and across Tennessee, this article examines the issue from all angles.

Our second feature story covers the daily fantasy sports betting industry that is being turned on it's head by new legislation, data leaks and promises of wealth. Toby Sells tells the full story of how the industry itself has been tackled for a major loss.

We also have some wonderful faculty contributions from Professors Demetria Frank and Daniel Kiel, with pieces focusing on Unconscious Bias and the Dual Roles of Public Education, respectively.

Make sure you take a look at the visually striking student profile in this issue too, as it focuses on law students that were student-athletes in their undergraduate careers.

And finally, our alumni spotlight in this issue highlights Marci Harris (JD '06) and her work in using communication, the legislature and a unique online platform called POPVOX to change the world!

Click HERE to read the full issue online.

Feel free to send us class notes and updates about your accomplishments. Please include your class year and a high-res head shot, if possible.

To request a hard copy, please email us and we will send you a copy as long as extras are available.

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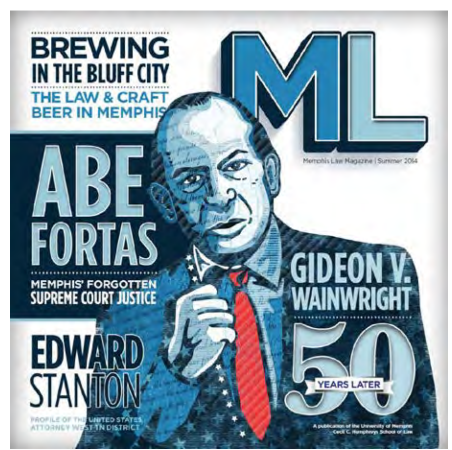

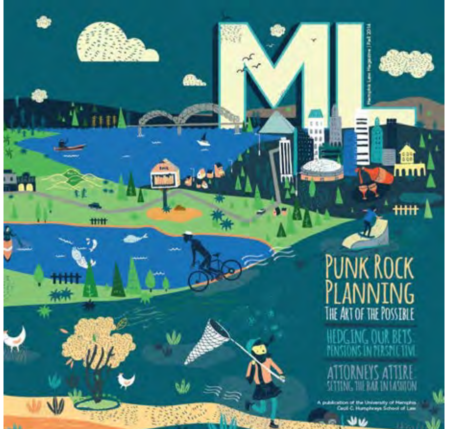

ML Issue #1, Spring 2014

ML Issue #2, Fall 2014

ML Issue #3, Spring 2015

ML Issue #4, Fall 2015 ML Issue #5, Spring 2016 ML Issue #6, Fall/Winter 2016

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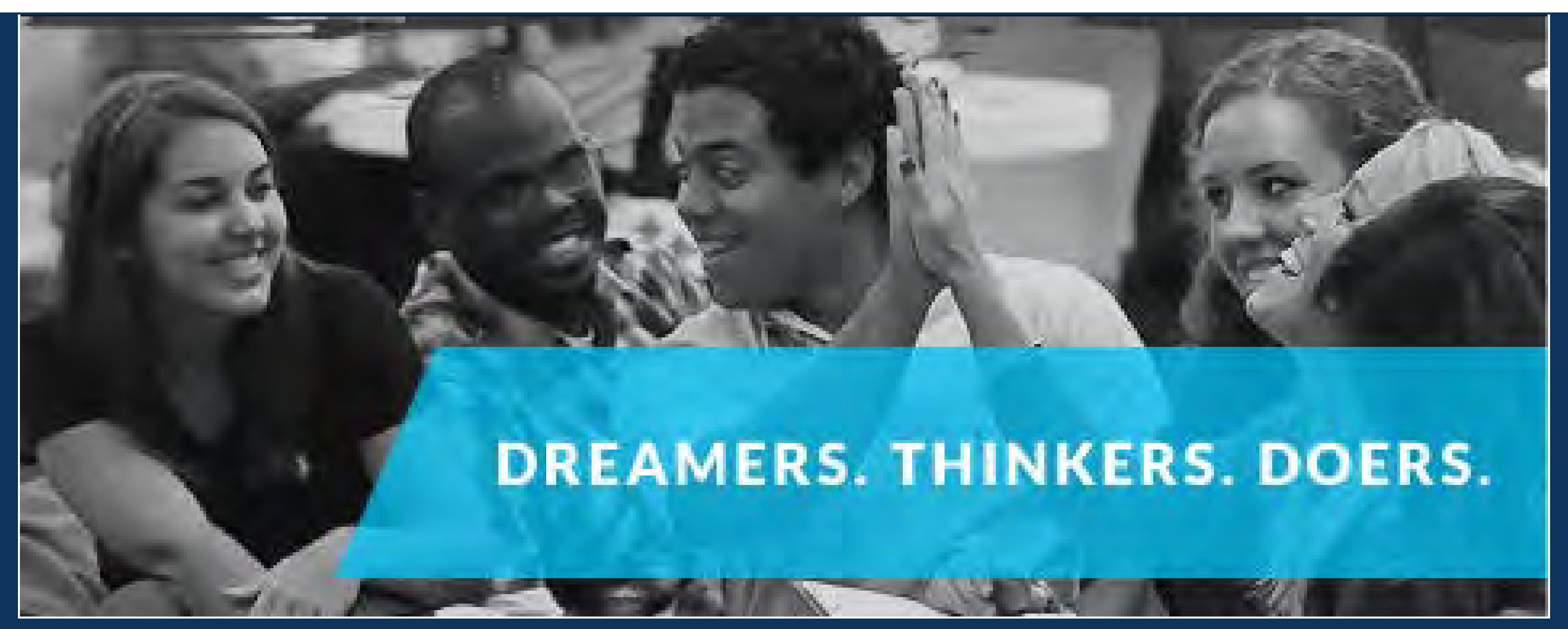

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2015 CLEA AWARD

University of Memphis Cecil C. Humphreys School of Law recent graduate Bill Hardegree (JD 14) was recently awarded the Clinical Legal Education Association (CLEA) Outstanding Student Award.

CLEA recognizes law students who have excelled in clinical fieldwork in law school by providing high quality representation to clients, and who have engaged in exceptionally thoughtful, self-reflective participation in an accompanying clinical seminar. The award is based on excellence in case work and the quality and extent of the student's contribution to the clinical community at his law school. Bill was lauded for, among other things, his ability to set the pace and the standard for his colleagues in his diligence, preparation, thoughtfulness, and motivation to be the best lawyer he can be.

In his mid-semester reflection, Bill Hardegree listed his tenets of life as "passion, diligence, and integrity. He said, "I am extremely passionate about my work. "...If I submit a trial brief with my signature, I will make sure that it is truthful, aesthetically appealing, and better than any sample brief. It may not be perfect, but my diligent pursuit of the best fueled by my passion will make it a contender for perfection."

In her nomination letter for Mr. Hardegree, Professor Donna Harkness notes several things about Bill that make him the ideal candidate for this award. She states that in his daily work, Bill lived up to his previously noted tenets, making every effort to take maximum benefit from the clinic and to hone his professionalism and litigation skills. He handled four cases in which he represented eight children. He deliberately chose his cases to give himself a wide range of experience: a highly contested, complex severe child abuse case involving four children ages seven to one; a guardianship for two Central American unaccompanied minors escaping from violence in their home country; a delinquency for a youth facing transfer to adult court, and foster care review for a dependent-delinquent youth in a residential treatment program. He accomplished representation with knowledge, persuasion, and reflection, routinely logging twenty to twenty-five hours per week. Bill not only plans ahead strategically, he seeks out feedback on how he can improve at every juncture.

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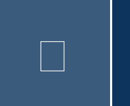
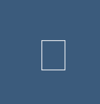
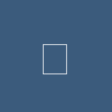
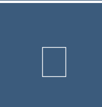
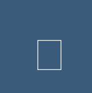
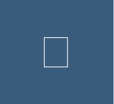

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Faculty & Staff

ARCHIVED FACULTY NEWS

2015

- Professor Christina Zawisza was recently recognized by Florida's Children First, a statewide advocacy organization that she helped to create, as Director Emeritus, with the following statement: "For realizing that Florida's children in care have similar systemic problems across the state, Having the foresight to bring together passionate child advocates to lay the groundwork in creating the leading nonprofit child advocacy organization in the state of Florida, And for tirelessly working to improve child-caring systems, serving for over a decade as a motivating force for all who follow."
- Professor Kate Schaffzin was elected as treasurer of the American Association of Law Schools (AALS) Section on Litigation.
- Professor Kate Schaffzin's article, entitled "Beyond Bobby Jo Clary: The Unavailability of Same-Sex Marital Privileges Infringes the Rights of So Many More than Criminal Defendants," was published in the University of Kansas Law Review.
- Professor Daniel Schaffzin's essay, "So Why Not An Experiential Law School ... Starting With Reflection In The First Year," was published in volume 7 of The Elon Law Review.
- Professor Schaffzin served on the Planning Committee for the Southern Clinical Conference at William & Mary Law School. At the conference he co-presented a concurrent session entitled "Is Subjective Assessment an Indispensable Cornerstone of Clinical Legal Education? Exploring the Role that Subjectivity Should Play in the Evaluation of Law Clinic Students."
- Professor Steve Mulroy was recently published in the Willamette Law Review, the article is entitled "Sunshine's Shadow: Overbroad Open Meetings Laws as Content-Based Speech Restrictions Distinct

From Disclosure Requirements."

- Professor Mulroy presented a paper in March at the Sorbonne in Paris, as part of the International Symposium on Freedom of Information & Governmental Transparency in the Open Government Era, University of Paris 1 Pantheon-Sorbonne. His paper, "Sunshine's Chill: Overbroad American Open Meetings Laws and the Limits of Disclosure," which takes a comparative approach, will be published in the book produced as part of the symposium.
- Professor Andrew McClurg's article, "In Search of the Golden Mean in the Gun Debate," will be published in volume 58 of the Howard Law Journal as part of a symposium, "Rights vs. Control: America's Perennial Debate on Guns."
- Professor Ernest Lidge's article, "The Necessity of Expanding Protection from Retaliation for Employees Who Complain about Hostile Environment Harassment," was published in the Louisville Law Review.
- Professor Lidge also served as a presenter on a panel at the ABA Practice and Procedure Under the National Labor Relations Act Committee Meeting, Region VIII. The panel topic was "NLRB Rulemaking: Proposed Amendments to Election Procedures."
- Professor Lidge was also a presenter at the Association of Administrative Law Judges Annual Conference, where he spoke on the topic, "Legal Ethics for Administrative Law Judges."
- Professor Christina Zawisza was a presenter at the Association of Administrative Law Judges Annual Conference, where she spoke the topic, "Children in the Courtroom."
- Professor Barbara Kritchevsky gave a presentation entitled "Moot Court Judging: The Good, the Bad, and the Ugly," at the Moot Court Conference held at Marquette Law School. She was also a panelist at the same Moot Court Conference, serving on a panel entitled "Teaching Brief-Writing: Some Successful Approaches."
- Professor Daniel Kiel recently had a chapter published in a book entitled "Law & Educational Inequality: Removing Barriers to Educational Opportunities." His chapter, "Equity Through Differentiation," examines the foundation and merits of the claim that equity can be achieved by providing more individualized educational opportunities by granting greater autonomy to individual school leaders.
- Professor D.R. Jones was invited to be a speaker on copyright law at the Wake Forest School of Law Intellectual Property in the Digital Age Symposium. The symposium was in February 2015. Professor Jones discussed fair use issues and issues concerning the resale of digital works.
- Professor Jones' article entitled "Law Firm Copying: An Examination of Different Purpose and Fair Use Markets" will be published in the winter issue of the South Texas Law Review.
- In February 2015, Professor Jones presented a paper topic, "Libraries, Contracts and Copyright" at the 2015 Works-in-Progress Intellectual Property Colloquium (WIPIP) held in Alexandria, Va., at the U.S. Patent and Trademark Office.
- Professor Donna Harkness's article, entitled "Bridging the Uncompensated Caregiver Gap: Does Technology Provide an Ethically and Legally Viable Answer," was published in the spring 2015 edition of The Elder Law Journal.
- Professor Amy Campbell published a chapter in the Handbook of Community Sentiment. Her chapter was entitled "Is There a Therapeutic Way to Balance Community Sentiment, Student Mental Health, and Student Safety to Address Campus-Related Violence?"
- Professor Campbell also made a presentation, entitled "Embedding a Longitudinal Experience in Public Health Law/Policy in the Academy & Community," at the APHA 2014 annual meeting in New

Orleans, Louisiana.

- Professor Ralph Brashier's article, "Conservatorships, Capacity, and Crystal Balls," was the lead article in the first issue of volume 87 of the Temple Law Review (fall 2014).
- The second edition of Professor Brashier's book, "Mastering Elder Law," was published by Carolina Academic Press in January 2015.
- In February 2015, Professor Brashier and Shelby County Probate Judge Kathleen Gomes headed a legal-musical presentation on elder financial abuse, entitled "Probate: How to Catch a Thief," before the Leo Bearman Sr. American Inns of Court.
- Professor Jeremy Bock attended the second annual Roundtable on Empirical Methods in Intellectual Property at IIT Chicago-Kent College of Law. He was also a panelist at the Leo Bearman Sr. American Inn of Court program, "A Case For and Against Patent Reform."
- Professor Jeremy Bock published an article in the University of Richmond Law Review, entitled "Does the Presumption of Validity Matter? An Experimental Assessment."
- Citing our own Professor Katherine Schaffzin prominently, the Supreme Court of New Jersey, in the case O'Boyle v. Borough of Longport, broadly adopted the common interest doctrine. Click here to read more about the case.

Summer/Fall 2014

- Professor Andrew McClurg's book, The "Companion Text to Law School: Understanding and Surviving Life with a Law Student has been named one of Amazon Editors' Favorite Books of the Year.
- Professor Steve Mulroy has been a recently featured speaker at a number of events in Fall 2014, such as:
  - A panel discussion on Tennessee Amendment 2 (judicial selection), Memphis Law SBA sponsored event—October 2014.
  - A presentation on his amicus curiae participation in Van Tran v. Colson (6th Cir. 2014) and his Vermont Law Review article on mental retardation and the death penalty—Sponsored by the Memphis Law Mental Health Law Society.
  - A debate against Prof. John Stinneford, Univ. Florida School of Law, on Eighth Amendment—sponsored by Federalist Society—November 2014.
  - A panel discussion on Amendment 1 (abortion), a Memphis Law SBA/ACS sponsored event—November 2014.
  - Moderated panel discussion between Prof. Michael Helfand of Pepperdine School of Law and Prof. Steven Green of Willamette School of Law re: the Hobby Lobby Supreme Court decision and religious freedom—sponsored by the law school—November 2014.
- Professor Lynda Black's article "The Birth of a Parent: Defining Parentage for Lenders of Genetic Material" was published in the Nebraska Law Review June 2014 edition. She also spoke at the Athens Institute for Education and Research (ATINER) Law Research Conference hosted in Athens, Greece, with a presentation on how the practices of assisted reproductive technology and surrogacy leave open many questions regarding legal parentage, particularly when couples engage in these practices abroad and then return to their home country with the child. Professor Black was also a workshop discussant at the 2014 Annual Conference of the Southeastern Association of Law Schools, where she spoke on the topic of "Innovations in Trusts and Estates."
- Professor Jeremy Bock's article "Restructuring the Federal Circuit" was published in the NYU Journal of Intellectual Property and Entertainment Law.

  - His article "Neutral Litigants in Patent Cases" was published in the North Carolina Journal of Law & Technology in 2014.
- Professor Donna Harkness participated in the 21st Belle R. & Joseph H. Braun Memorial Symposium/2014 International Elder Law and Policy Conference, jointly sponsored by John Marshall Law School, Roosevelt University and East China University of Political Science and Law, held in Chicago during July. Professor Harkness presented remarks as part of the Panel 2 discussion – "Health Care, Caregiving for Older Persons, and Legal Decision Making." Professor Harkness' recently published article "What Are Families For? Re-evaluating Return to Filial Responsibility Laws" was also featured in Professor Katherine Pearson's (Penn State Dickinson Law) March 18, 2014, post to the Elder Law Prof Blog.
- Professor Jones presented a paper on "Law Firm Copying and Fair Use" at the Works in Progress Intellectual Property (WIPIP) Colloquium held at Santa Clara University School of Law, Santa Clara, Calif., in February and at the 15th Annual Intellectual Property Scholars' Conference held at UC Berkeley, Berkeley, Calif., in August.
- Professor Jones was the moderator and a speaker for the program "Emerging Issues in Copyright: What You Need to Know" at the American Association of Law Libraries Annual Meeting in July 2014.
- Professor Daniel Kiel made two presentations at the Education & Civil Rights Conference at Penn State School of Law in June 2014. One paper offered the merger and demerger of school districts in Shelby County as a case study of contemporary educational reform, while the other made a broad structural critique of the American education system as one of inherent inequality.
- Professor Kiel also served on the scholar review committee for the renovations to the National Civil Rights Museum, which reopened in April. He consulted on the completely reconfigured exhibition on Brown v. Board of Education and contributed footage that is now featured in the museum.
- Professor Boris Mamlyuk published an article titled "Regionalizing Multilateralism: The Effect of Russia's Accession to the WTO on Existing Regional Integration Schemes in the Former Soviet Space" in the UCLA Journal of International Law & Foreign Affairs.
- Florida State University Law Review published Professor Mulroy's article "Raising The Floor Of Company Conduct: Deriving Public Policy From The Constitution In An Employment-At-Will Arena," co-authored by Elon University Professor (and former Memphis law professor) Amy Moorman in the fall of 2014. Professor Mulroy has authored another law review article "Sunshine's Shadow: Overbroad Open Meetings Acts As Content-Based And Distinct From Finance Disclosure" which has been accepted for publication in several law journals and is currently being evaluated by others. He made a presentation on this article at St. Mary's Law School in San Antonio, Texas in the fall of 2014.
- Visiting Assistant Professor John Newman's article "Cloud-Computing Contracts and Innovation Policy" was accepted for publication in the Handbook of Research on Digital Transformations for a forthcoming 2015 issue.
- Professor Daniel Schaffzin's latest article "Warning! Lawyer Advertising May Be Hazardous to Your Health: A Call to Limit Commercial Solicitation of Clients in Pharmaceutical Litigation" was published in the winter 2013-14 volume of the Charleston Law Review. The article has been reprinted in the latest Volume 63 of the Defense Law Journal.
- In April 2014, Professor Daniel Schaffzin co-presented a concurrent session entitled "Educating Money (and Other Motivators): Teaching Social Justice and Life Balance to Future For-Profit Attorneys" at the annual AALS Conference on Clinical Education in Chicago, Ill.
- Professor Katherine Schaffzin has been named as a Provost's Fellow by the University of Memphis

and will serve in this role in the Provost's office in spring 2015.

- Professor Katherine Schaffzin also had her article "Beyond Bobby Jo Clary: The Unavailability of Same-Sex Marital Privileges Infringes the Rights of So Many More than Criminal Defendants" in the October 2014 issue of the Kansas Law Review.
- Professor Kevin Smith published his article "25 années de problem-solving courts aux Etats-Unis" in the French publication Cahiers de la sécurité intérieure (Journal of Safety).
- Professor Smith also continues his service on the Tennessee Access to Justice Commission – Education Advisory Committee and the Tennessee Access to Justice Commission – Pro Bono Committee.
- During the Legal Writing Institute's 2014 Biennial Conference, Professor Jodi Wilson gave a poster presentation entitled "Wikipedia on the Rise: Teaching Legal Writers to Assess Non-Traditional Sources." In June 2014, Professor Wilson gave a joint presentation with Robert B. Vandiver, Jr., entitled "Joint Representation in Bankruptcy - Ethical Considerations" at the American Bankruptcy Institute's 2014 Memphis Consumer Bankruptcy Conference. Professor Wilson has been appointed to serve as the chair of the Listserv Committee of the Legal Writing Institute and the co-chair of the Survey Committee of the Association of Legal Writing Directors.
- In April 2014, Professor Chris Zawisza presented a seminar on "Hot Topics in Education Law" to over 100 student teachers in the University of Memphis Department of Education student teaching seminar. In June 2014, she presented a CLE on "Ethics and Professionalism: Integrity in the Courtroom" in Nashville on behalf of the Tennessee Administrative Office of the Courts Dependency Court Improvement Program (AOC). The session has been videotaped for viewing on the AOC website.

Spring 2014

- Professor Boris Mamlyuk's essay, Uniting for "Peace" in the Second Cold War: A Response to Larry Johnson, was recently published on the American Society for International Law website. To read the full essay, please click here.
- In an extremely unique result of legal scholarship, Prof. Andrew McClurg's presumption proposal in the recent Hasting Law Journal was enacted into law in Florida. The presumption statute pass unanimously through each legislative committee and also the Florida House and Senate. Florida Governor Rick Scott signed it into law on June 20, 2014 and it has an effective date of October 1, 2014. This is the ONLY statute of its type in the nation. To read a PDF version of the original article, click HERE. To see the final version of the Florida statute, please click HERE.
- Prof. Amy Campbell, director of the University of Memphis Health Law Institute, has been selected as one of 10 faculty fellows chosen to participate in the Future of Public Health Law Education: Faculty Fellowship Program. The program is funded by the Robert Wood Johnson Foundation to foster innovations and build a learning community among those who teach public health law at professional and graduate schools. For more information, visit law.gsu.edu/phlfellowship.
- Professor D.R. Jones is the recipient of the 2014 American Association of Law Libraries Law Library Journal Article of the Year Award. This national award, which is one of AALL's highest honors, is given for outstanding achievement in research and writing. The award is for Professor Jones' article entitled Locked Collections: Copyright and the Future of Research Support, 105 Law Library Journal 425 (2013) (available HERE). Professor Jones will receive the award at the AALL Annual Meeting in July 2014.

Spring 2013

- Prof. Boris Mamlyuk participated in an academic conference titled "Russia Between Asia and Europe" in Moscow and Perm, Russia from May 27 to June 2, 2013. The conference was organized by Rossotrudnichestvo, under the jurisdiction of the Russian Ministry of Foreign Affairs. Prof. Mamlyuk also participated in the Institute for Global Law and Policy Conference and Colloquium at Harvard Law School from June 2 to June 8, 2013. Prof. Mamlyuk presented remarks on a forthcoming article with Dr. Karolina Zurek, titled "Political Economy of a 21st Century Corporate Mass Merger: Walmart-Massmart and the Future of Global Governance."
- Prof. Andrew McClurg and portions of his book, The Companion Text to Law School: Understanding and Surving Life with a Law Student, were featured in an article from The National Jurist entitled "Can You Love While in Law School?" Click here for the full article.
- Prof. Christina Zawisza was reappointed by the Tennessee Supreme Court to the Court Improvement Program Work Group. The Supreme Court has asked the Work Group to review and revise the Tennessee Rules of Juvenile Procedure.
- Prof. Kate Schaffzin's article, The Great and Powerful Oz Revealed: The Ethics and Wisdom of the SCOTUS Leaks in National Federation of Independent Business v. Sebilius, 7 CHARLESTON L. REV. 317 (Winter 2012-13) (invited submission) will be published later this year in the Charleston Law Review.
- Prof. Jodi Wilson has several recent publications: How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act, 63 CASE W. RES. L. REV. 91 (2012) and Students Can't Avoid What They Can't See: Helping Students Recognize Ethical Pitfalls, THE SECOND DRAFT, Fall 2012, at 11. A forthcoming publication will be: Teaching by Engaging; Engaging by Gaming, The Learning Curve (forthcoming Winter 2013-2014).
- Associate Dean for Academic Affairs David Romantz was elected to the Executive Committee of the Association of American Law Schools (AALS) Section for Legislation & Law of Political Process.
- Prof. Kate Schaffzin presented at the Tennessee District Attorneys General Conference at the University of Memphis School of Law in early 2013. She presented a course on Prosecutorial Ethics in Closing Arguments.
- Whitney Curtis, Assistant Director for Public Services in the Memphis Law Library, recently published an article titled We Go Out Looking for Trouble: Taking Library Services to the Patrons' Point of Need in Perspectives: Teaching Legal Research and Writing.
- Assistant Professor Boris Mamlyuk presented a paper at the University of Maryland, in connection with the annual meeting of the Society of American Law Teachers. The presentation topic was "Logic and Pedagogy: Third World Perspectives & Public International Law." A link to the conference can be found here.
- Prof. Shapiro's article titled Examining an Underdeveloped Constitutional Standard: Trial in Absentia and the Relinquishment of a Criminal Defendant's Right to be Present will be published in the Winter, 2013 issue of the Marquette Law Review.
- Prof. Daniel Kiel was recently selected as one of the University of Memphis' 2013 Martin Luther King, Jr. Human Rights Award recipients.
- Prof. Alena Allen recently presented her paper, Direct to Consumer Advertising and Neo Classical Economics: A Dangerous Cocktail, at the St. Louis University and American Society of Law, Medicine, and Ethics health scholars workshop.

Prof. D.R. Jones was appointed to serve on the American Association of Law Libraries' Copyright Committee, a national committee that serves to represent, promote, and advocate AALL's interests regarding copyright and other intellectual property issues.

- Professor D.R. Jones' article, Protecting the Treasure: An Assessment of State Court Rules and Policies for Access to Online Civil Court Records, was accepted for publication in the Drake Law Review, volume 61, issue 2 (2013). The article has been distributed in the LSN Information Privacy Law eJournal (sponsored by the George Washington University Law School and the Berkeley Center for Law and Technology), the LSN Cyberspace Law eJournal and the LSN Information & Technology eJournal.

Fall 2012

- Assistant Dean for Career Services, Estelle Winsett, was recently named one of the 2013 Memphis Bar Association Fellows.
- Professor Lynda Black's review of Alan L. Feld's article, Who Are the Beneficiaries of Fisk University's Stieglitz Collection?, was recently published inTrusts & Estates JOTWELL publication. Please read her full review, The Failings of Donor Intent, by clicking here>>
- Herff Chair and Professor Andrew McClurg's article , Fight Club: Doctors vs. Lawyers, was recently published as the lead article in Chicago Medicine Magazine, the official publication of the Chicago Medical Society. The article is a revised, shortened version of an article McClurg originally published in the Temple Law Review. To read the article, please click here>>
- Herff Chair and Professor Andrew McClurg's book review of Philip Howard's Life Without Lawyers: Restoring Responsibility in America has been published in the American Journal of Legal History, vol. 52, p. 387.
- Professor Danny Schaffzin has been appointed by Memphis Mayor A.C. Wharton, Jr. to serve on the Memphis Civil Service Commission. The Civil Service Commission, comprised of seven members, conducts hearings to review disciplinary actions, including suspensions, dismissals, or demotions, of any city employees not exempted from the provisions of the City of Memphis Charter and Code. Members of the Commission are appointed by the Mayor, with the approval of a majority of the Memphis City Council. Professor Schaffzin will serve a three-year term as a commissioner.

Summer 2012

- The Community Alliance for the Homeless has recognized our very own Professor Steve Mulroy, also a Shelby County Commissioner, by awarding him the Homeless Public Champion Award for his recent advocacy for the homeless. Please click here to read more.
- Jamie B. Kidd has been named the assistant director for Law School Administration at the University of Memphis Cecil C. Humphreys School of Law. Her responsibilities will include matters concerning human resources, accreditation, budgeting, academic regulations, and other administration-related projects.
- Jacqueline O'Bryant is the new coordinator of diversity programs at the Cecil C. Humphreys School of Law at the University of Memphis. O'Bryant will oversee the Tennessee Institute for Prelaw, the state's only summer diversity access program for law school. She will also actively recruit and support diverse law students, while developing additional diversity outreach initiatives for the school.
- The Student Bar Association has named Assistant U.S. Attorney Steve Parker as the 2011-2012 Adjunct Professor of the Year and has posthumously named Professor Francis Gabor as the 2011-

2012 Professor of the Year.
- Professor Daniel Kiel received the Farris Bobango Scholarship Award for The Memphis 13, a documentary film. The film tells the stories of the 13 African-American individuals who broke the color line in the Memphis City Schools system.
- Herff Chair and Professor Andrew McClurg is one of 10 professors nationwide to be invited to this summer's West Author Inside Look conference, in which select West Academic Publishing authors are invited to the publisher's manufacturing headquarters in Minneapolis to meet with editors and staff to tour the facility and discuss current and future trends in legal publishing.

Spring 2012

- Professor Boris Mamlyuk will be participating in the third annual Institute of Global Law and Policy workshop at Harvard Law School from May 29 to June 9, 2012. Click here to view a video of Professor Mamlyuk's from last year's Workshop.
- Whitney A. Curtis, Assistant Director, Public Services at the Law Library, was a presenter at the 2012 Southeastern American Association of Law Libraries Conference. The Conference is entitled In Step with the Future, and is in Clearwater Beach, Florida on March 22-24, 2012. Ms. Curtis will present a session entitled We Go Out Looking for Trouble: Taking Library Services to Patrons' Point of Need. This presentation is part of the SEAALL Insitutute, Going Mobile in a Mobile World.
- Professor Christina Zawisza has been reappointed by Tennessee Supreme Court Justice Sharon Lee for an additional year on the Court Improvement Program Workgroup. The workgroup is charged with identifying and addressing barriers for safety, permanency, and child and family well-being at the state and local levels.
- At the invitation of the Governor's Counsel, Professor Eugene Shapiro recently submitted his views concerning the constitutional issues involved with the state regulation of a public forum.
- Two law professors, Chris Zawisza and Angela Laughlin Brown, are working with law students to assist the Shelby County Juvenile Court in operating its Youth Court program. Youth Court is an effort to divert juvenile first time offenders from adjudication as delinquents. Professor Zawisza recently presided over one Youth Court trial, while a Student Attorney in the Child and Family Litigation Clinic, Jennifer Sutch, mentored a young prosecutor. Professor Laughlin-Brown also recently mentored a high school student and also introduced her Evidence students to the Youth Court process.
- Professor Daniel Schaffzin was a presenter at the Externships 6 Conference, Preparing Lawyers: The Role of Field Placement, co-hosted by Harvard Law School and Northeastern University School of Law on March 1-4, 2012. Professor Schaffzin presented as part of a session entitled "Necessary Control or Control Freak? For and Against Faculty Selection of For-Credit Field Placements for Externship Students."
- Professor Alena Allen recently published an article in the BRIGHAM YOUNG UNIVERSITY LAW REVIEW entitled State-Mandated Disability Insurance as Salve to the Consumer Bankruptcy Imbroglio.
- Professor Barbara Kritchevsky, whose article, Judging: The Missing Piece of the Moot Court Puzzle, served as inspiration for the Legal Writing Institute's model guidelines for oral argument judges. The guidelines will be used by coordinators of intramural and national moot court competitions to educate their oral argument judges. The article originally appeared in 37 U. Mem. L. Rev. 45 (2006).
- Professor and Herff Chair Andrew McClurg was interviewed on West Academic Publishing's Insider Blog about his new book, The "Companion Text" to Law School: Understanding and Surviving Life with

a Law Student.

- Callie Caldwell (JD 10) has been named the first public interest counselor in the Office of Career Services. Read more here>>
- Estelle Winsett, Assistant Dean for Career Services, was recently named a West TN Delegate for the TBA General, Solo and Small Firm Practitioner's Section Executive Council.
- Professor Katharine Traylor Schaffzin contributed to the winter edition of the AALS Evidence Section Newsletter.
- Professor Daniel Schaffzin will be a presenter at the Externships 6 Conference in March. Professor Schaffzin's session abstract is "Necessary Control or Control Freak? For and Against Faculty Selection of For-Credit Field Placements for Externship Students." The session will be held at Harvard Law School.
- Professor Boris Mamlyuk recently published an article in the WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW entitled Russia and Legal Harmonization: an Historical Inquiry into IP Reform as Global Convergence and Resistance.
- Professor Lee Harris recently gave a talk to Duquense Law School faculty in Pittsburgh, regarding executive compensation and reform.
- Professor and Herff Chair Andrew McClurg recently published a book entitled, The "Companion" Text to Law School: Understanding and Surviving Life with a Law Student (West 2012). Read more about the book here.
- Fall 2011
- Professor Donna Harkness published an article in the December 2011 edition of the TENNESSEE BAR JOURNAL, Now That We've Got It, What Does It Do For Us? The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act! The article is the feature story in the publication.
- Professor Katharine Traylor Schaffzin contributed to the winter edition of the AALS Evidence Section Newsletter.
- Professor Katarine Traylor Schaffzin authored three guest posts on EvidenceProf Blog regarding the newly revised Federal Rules of Evidence that became effective on December 1, 2011. Click on the following links for the posts: Take 1, Take 2 and Take 3.
- Professor Lee Harris recently authored a guest column for the Commercial Appeal.
- Professor and Herff Chair Andrew McClurg was recently featured in an entertaining article in the Commercial Appeal.
- Associate Dean David Romantz spoke to the Memphis Daily News about the law school's new curriculum, effective for the incoming class of 2012.
- Professor and Herff Chair Andrew McClurg's article, Fixing the Broken Windows of Online Privacy Through Private Ordering: A Facebook Application, has been published as the feature article by the Wake Forest Law Review Online.
- Professor Boris Mamlyuk attended a conference on Third World Approaches to International Law (TWAIL) hosted by the University of Oregon, School of Law from October 20-22, 2011. His presentation discussed whether TWAIL frameworks offer any guidance to understanding international law developments in the Post-Soviet space. Additionally, Professor Mamlyuk moderated a panel titled "Situating TWAIL within Political Struggles and Ideational Contestations." The conference brought more than 50 international law scholars from more than ten countries.
- Professor Ernest Lidge was a panel speaker at the ABA/NLRA Practice and Procedure Region meeting on Friday, Sept. 10 on the topic of "NLRB Rule Making: Proposed Amendments to Election

Procedures." He will also speak at the upcoming Federal Bar Association Annual Seminar on Wednesday, Oct. 26 on the topic of "Ethics of Contacting the Opposing Party's Current and Former Employees."

- The Memphis 13, a documentary directed and produced by Professor Daniel Kiel, premiered to the public on Tuesday, October 4, 2011. Click here for the full release.
- Professor Steven Mulroy spoke on Separation of Church and State: DeSoto County Issues on Sept. 15, at the Cordova Library. The event was sponsored by the Memphis Freethought Alliance. The talk dealt with the constitutional issues raised by the recent controversies in DeSoto County regarding the broadcast of prayers at public high school football games, and the distribution of Bibles by private groups on public school campuses during school hours.
- The Law Teacher will publish an essay written by David S. Romantz, Associate Dean for Academic Affairs, in its spring 2012 edition. Professor Lee Harris was recently included in Memphis-based Grace Magazine's "Top Forty Under Forty" list.
- Read the September issue of the National Jurist for insights from Professor Andrew McClurg about the first year of law school. The Law Teacher is published twice a year by the Institute for Law Teaching and Learning (previously the Institute for Law School Teaching). It provides a forum for ideas for improving teaching and learning in law schools and informs law teachers of the activities of the Institute.
- Jamie Kidd (JD 10) joined the law school in August as Acting Assistant Dean for Administration.
- Memphis Law named five new faculty in the fall of 2011.
- Professor Barbara Kritchevsky chatted with the Daily News in August about her years of involvement with Memphis Law's advocacy program.
- Professor Daniel Kiel was featured in August on CSPAN discussing the history of Memphis school desegregation.
- This summer, Professor Lee Harris published his second book, Corporations and Other Business Entities: A Practical Approach.
- Janette Smith, law school receptionist, received a Bachelor of Professional Studies with a concentration in Organizational Leadership from the University of Memphis.
- Professor and Herff Chair Andrew J. McClurg's book, 1L of a Ride: A Well-Traveled Professor's Roadmap to Success in the First Year of Law School, was recently touted in an article about the summer before law school that appears in both the National Jurist's Prelaw and Concurring Opinions, a well-respected legal blog.

Click here to browse the archived faculty and staff news.

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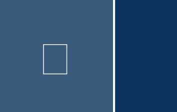
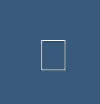
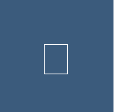
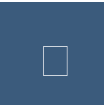
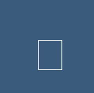
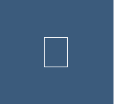

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Memphis, TN 38148-0001

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Department 238
P.O. Box 1000

Memphis, TN 38148-0001

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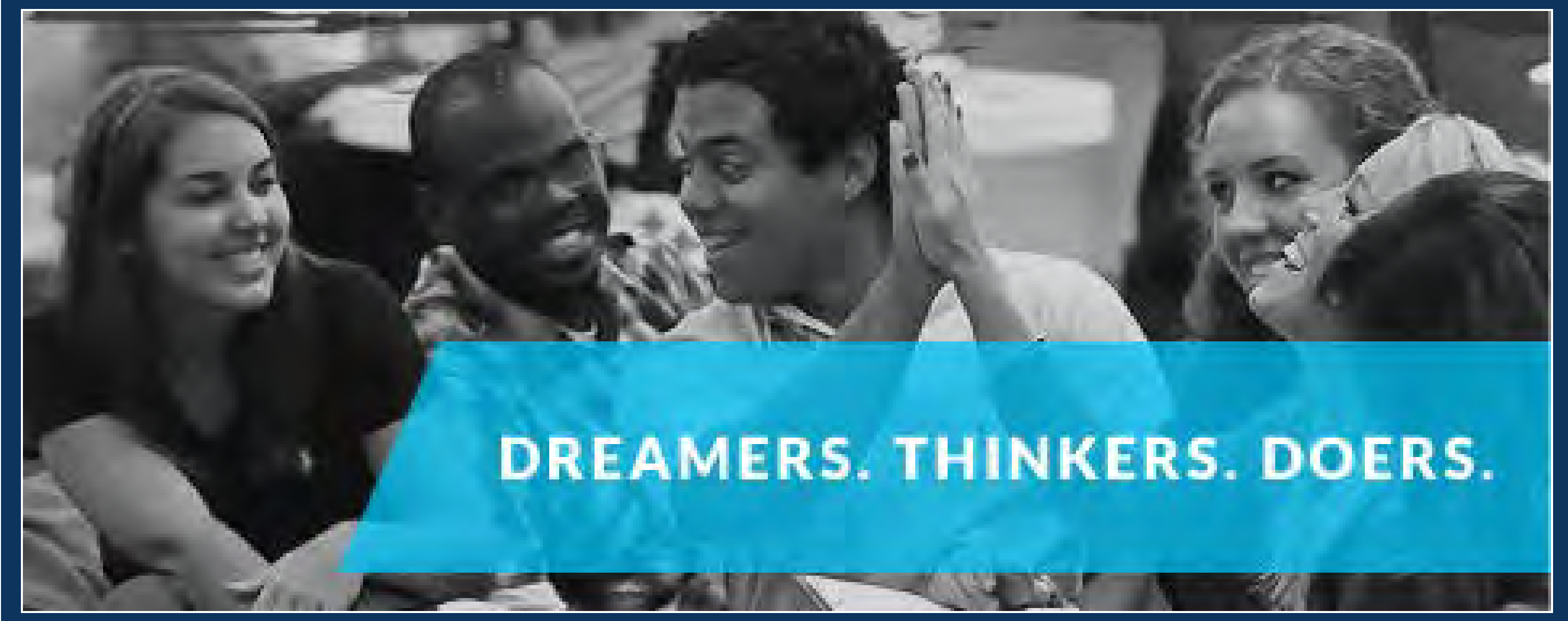
Your gift of securities can be transferred to the law school through either Morgan Stanley, Merrill Lynch or Raymond James.

Before making the transfer, please call us at (901) 678-4726 with the name and number of the stock you intend to transfer or the approximate value of your gift, as well as your broker's name and phone number. The value of your stock gift is based on the average of the high and low price of the stock on the day it was transferred.

Planned giving

There are numerous opportunities for planned gifts including property, estate, and gifts through wills. For more information on these and other planned giving opportunities for the law school, please contact Holly Hazlett, Sr. Director of Development, at (901) 678-4726.



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Cecil C. Humphreys School of Law - 2016 Standard 509 Information Report

1 N. Front Street
Memphis, TN 38103
Phone: 901-678-2421
Website: http://www.memphis.edu/law/

Last Site Visit: 2015-2016
Next Site Visit: 2022-2023

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The Basics

Type of school	PUBLIC
Term	Semester
Application deadline	3/5/2018
Application fee	$ 0
Financial aid deadline	4/1/2018
Can first year start other than fall?	No

Tuition and Fees (academic year*)

	Resident	Non-Resident
Full-Time	$ 18,763	$ 25,968
Part-Time	$ 16,789	$ 23,012
Tuition Guarantee Program		No

Living Expenses (academic year*)

Estimated Living Expenses for singles

Living on Campus	$ 17,576
Living Off Campus	$ 17,576
Living at Home	$ 11,410

Conditional Scholarships

Students Matriculating in	# Entering with	# Reduced or Eliminated
2015-2016 Academic Year	19	7
2014-2015 Academic Year	29	13
2013-2014 Academic Year	22	12

GPA and LSAT Scores (calendar year**)

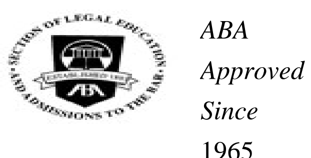
	Total	Full-Time	Part-Time
# of apps	587	587	0
# of offers	324	324	0
# of matriculants	110	106	4
75th Percentile GPA	3.54	3.54	0.00
50th Percentile GPA	3.24	3.24	0.00
25th Percentile GPA	3.01	3.01	0.00
# not incl. in GPA percentile calc.	-4.00	-4.00	0.00
75th Percentile LSAT	154	154	0
50th Percentile LSAT	151	151	0
25 Percentile LSAT	149	149	0
# not incl. in LSAT percentile calc.	-4	-4	0

Grants and Scholarships (prior academic year*)

	Total		Full-Time		Part-Time	
	#	%	#	%	#	%
Total # of students	330	100	307	93	23	7
Total # receiving grants	141	42.7	138	45	3	13
Less than 1/2 tuition	98	29.7	95	30.9	3	13
Half to full tuition	33	10	33	10.7	0	0
Full tuition	8	2.4	8	2.6	0	0
More than full tuition	2	0.6	2	0.7	0	0
75th Percentile grant amount			$ 9,194		$ 7,000	
50th Percentile grant amount			$ 7,860		$ 7,000	
25th Percentile grant amount			$ 4,000		$ 6,611	

J.D. Enrollment and Ethnicity (academic year*)

	Men		Women		Other		Full-Time		Part-Time		First - Year		Total		J.D. Deg Awd
	#	%	#	%	#	%	#	%	#	%	#	%	#	%	
Hispanics of any race	7	3.9	9	6.1	0	0	16	5.2	0	0	5	4.5	16	4.9	2
American Indian or Alaska Native	2	1.1	2	1.4	0	0	4	1.3	0	0	2	1.8	4	1.2	3
Asian	2	1.1	6	4.1	0	0	8	2.6	0	0	1	0.9	8	2.5	1
Black or African American	16	9	36	24.5	0	0	41	13.3	11	64.7	13	11.8	52	16	17
Native Hawaiian or Other Pacific Islander	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Two or more races	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Total Minority	27	15.2	53	36.1	0	0	69	22.4	11	64.7	21	19.1	80	24.6	23
White	150	84.3	93	63.3	0	0	238	77.3	5	29.4	89	80.9	243	74.8	76
Nonresident Alien	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Race and Ethnicity Unknown	1	0.6	1	0.7	0	0	1	0.3	1	5.9	0	0	2	0.6	1
Total	178	54.8	147	45.2	0	0	308	94.8	17	5.2	110	33.8	325	100	100



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Curriculum (prior academic year*)

Typical first-year section size	60
# of classroom course titles beyond first-year curriculum	89
# of upper division classroom course sections	
Under 25	80
25 - 49	12
50 - 74	4
75 - 99	8
100+	0
# of positions available in simulation courses	291
# of simulation positions filled	228
# of seminar positions filled	89
# of law clinics	12
# of seats available in the law clinics identified in sub-part (i) above	73
# of seats filled in the law clinics identified in sub-part (i) above	61
# of field placement positions filled	101
# of students who enrolled in independent study	0
# of students who participated in law journals	72
# of students who participated in interschool skills competitions	59

Faculty and Administrators (calendar year**)

	Total		Men		Women		Other		Minorities	
	Spr	Fall	Spr	Fall	Spr	Fall	Spr	Fall	Spr	Fall
Full-Time	22	22	12	12	10	10	0	0	3	3
Deans, librarians & others who teach	3	3	2	2	1	1	0	0	0	0
Part-Time	38	23	28	16	10	7	0	0	6	4
	63	**48**	**42**	**30**	**21**	**18**			**9**	**7**

J.D. Attrition (prior academic year*)

	Academic	Transfer	Other	Total	
	#	#	#	#	%
1st year	5	3	6	14	12
2nd year	2	0	0	2	1.8
3rd year	0	0	0	0	0
4th year	0	0	0	0	0

Transfers (prior academic year*)

Transfers In

#	
See Appendix for list of schools from which students transferred	
Transfers Out	3

Bar Passage Rates (February and July 2015)

First Time Takers: 102

Jurisdiction	Takers	Passers	Pass %	State %	Diff. %
Tennessee	95	71	74.74	78.04	-3.30

Reporting %	Avg. School Pass %	Avg. State Pass %	Avg. Pass Diff. %
93.14	74.74	78.04	-3.30

Bar Passage Rates (February and July 2014)

First Time Takers: 123

Jurisdiction	Takers	Passers	Pass %	State %	Diff. %
Tennessee	114	82	71.93	74.52	-2.59

Reporting %	Avg. School Pass %	Avg. State Pass %	Avg. Pass Diff. %
92.68	71.93	74.52	-2.59

Bar Passage Rates (February and July 2013)

First Time Takers: 122

Jurisdiction	Takers	Passers	Pass %	State %	Diff. %
Tennessee	117	103	88.03	85.49	2.54

Reporting %	Avg. School Pass %	Avg. State Pass %	Avg. Pass Diff. %
95.90	88.03	85.49	2.54

* "Academic year" refers to the 2016 - 2017 academic year. ** "Calendar year" refers to the 2016 calendar year.

TRANSFER OF CREDIT POLICY

Credit for law school work competed at law schools other than at The University of Memphis Cecil C. Humphreys School of Law will be credited toward fulfilling graduation requirements only after individual consideration by the Dean. No credit, however, will be given for work completed in a United States Law School which is not ABA approved. Advanced standing will be granted only for work done after the student has completed a Baccalaureate degree.

To be eligible for transfer, credit earned in each course considered for transfer credit must be at least equal to the overall grade point average required for graduation at the University of Memphis, Cecil C. Humphreys School of Law.

In conformity with the Association of American Law Schools (AALS), the University of Memphis School of Law may grant a transfer student academic credit up to the equivalent of three semesters for full-time students or up to the equivalent of four semesters for part-time students for work successfully completed at another AALS-accredited law school, and two semesters for full-time students or 2.6 semesters for part-time students for work successfully completed at a non-AALS school.

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JD/MBA PROGRAM

The School of Law and the College of Business and Economics offer a coordinated degree program leading to the conferral of the JD and MBA. The purpose of this joint degree program is to allow the student to study the intricacies of modern law and management as a coordinated educational effort. Students who are contemplating a career as a lawyer specializing in business issues and want to acquire the skills and perspective of the business manager will find the JD/MBA especially helpful. An additional benefit of the joint program is that it offers the student the ability to complete both the JD and MBA in considerably less time than required to complete each degree separately.

Admission

An applicant must submit separate applications and be independently accepted to both the JD and MBA programs. A student is encouraged to apply to both programs at the same time. A law student must begin the MBA program before beginning the third year of law school course work. An MBA student must begin law school before completing one half of the course work in the MBA program. This program is designed for students who wish to complete both degrees simultaneously.

Curriculum

Students are expected to work toward both degrees concurrently. As part of the cooperative nature of the JD/MBA program, the College of Business and Economics and the School of Law have agreed to accept course work from each college toward their specific degrees.

Benefits

The School of Law will award credit toward the JD degree for nine hours of approved Core Curriculum course work with a grade of B or better from the MBA program. Grades in these MBA courses transfer to the School of Law on a Pass/No Grade basis. Grades in MBA courses are not used to determine academic standing or class rank in the School of Law. These nine credit hours count for a portion of the thirty-five JD elective hours.

The College of Business and Economics will award credit toward the MBA degree for nine credit hours from approved courses offered by the School of Law. The student must earn a C+ or better on the law classes used for the MBA. The law classes will not be used towards computing the MBA grade point average; however, no more than two C's may count towards the MBA portion of the joint degree program. These nine credit hours count for the three elective hours and six required hours of the MBA degree. The decision on which six required hours are substituted is at the discretion of the director of the MBA program.

MBA Classes Substituted for JD Classes

For JD/MBA students, the law school will accept up to 9 credits from the following list of courses offered by the MBA program:

- ACCT 7080: Financial and Managerial Accounting for Managers. (3)
- ECON 7100: Economics for the Global Executive. (3)
- MIS 7650: Information Systems in the Global Enterprise. (3)

- FIR 7155: Global Financial Management. (3)
- SCMS 7313: Global Operations Management. (3)
- SCMS 7110: Quantitative Tools for Managers. (3)
- MKTG 7140: Global Strategic Marketing. (3)
- MGMT 7160: Global Strategic Management. (3)

These courses will replace electives hours otherwise required in the Law School curriculum. Only classes taken live (i.e. not online) will be awarded transfer credit.

JD Classes Substituted for MBA Classes

For JD/MBA students, the director of the MBA program will have the discretion to approve course substitutions of up to 9 credits from the following list of courses offered by the law school:

- Administrative Law (311)
- Antitrust (318)
- Arbitration/Labor (315)
- Banking Law (385)
- Bankruptcy Reorganization Seminar (442)
- Business Organizations I (211)
- Business Organizations II (319)
- Commercial Law (700)
- Commercial Paper (323)
- Comparative Law Seminar (441)
- Corporate Finance (384)
- Corporate Tax (334)
- Debtor-Creditor Relations (327)
- Employment & Labor Law Seminar (443)
- Environmental Law (328)
- Environmental Law Seminar (438)
- Health Care Insurance & Regulation Seminar (434)
- Health Law (336)
- Health Law Organization, Regulation, and Finance (302)
- Immigration Law (337)
- Insurance Law (339)
- International Business Transactions (399)
- International Economic Law (397)
- International Finance (338)
- International Law (340)
- Labor Law (343)
- Labor Relations (343)
- Land Use Planning (344)
- Mergers & Acquisitions (301)
- Non-Profit Organizations (370)

- Partnership Tax (352)
- Problems in Bankruptcy (354)
- Realty Transactions (358)
- Sales (359)
- Securities Regulations (361)
- Sports Law (372)
- Transnational Legal Problems (365)
- Unfair Trade Practices (366)

To facilitate customization, students are encouraged to consult with the director of the MBA program to add to this list in order to complement their desired course plan.

Program Sequence

Students in the coordinated JD/MBA program may schedule their course work in the joint program to suit their educational objectives, subject to the restrictions listed below:

- A student may take only law courses while completing the first year law curriculum.
- A law student must begin the MBA program before beginning the third year of law school course work.
- An MBA student must begin law school before completing one half of the course work in the MBA program.

Important note about cost

The Tennessee Board of Regents charges a student in a joint degree program the higher tuition for all credits earned in either degree. Since law school tuition is higher than graduate business school tuition, students in the joint degree are charged law school tuition rates for course credit in both law school and business school even when a student only takes business school courses in a semester.

Contact Information

Before Entrance to JD:

Sue Ann McClellan, Ed.D.
Assistant Dean for Law Admissions, Recruiting and Scholarships
University of Memphis, Cecil C. Humphreys School of Law
Phone: (901) 678-5403
smcclell@memphis.edu

Meredith Aden, J.D., LL.M.
Assistant Dean for Law Student Affairs
University of Memphis, Cecil C. Humphreys School of Law
Phone: (901) 678-3441
maden@memphis.edu

Before Entrance to MBA:

Ms. Marja Martin
MBA Academic Advisor
University of Memphis Fogelman College of Business and Economics
Phone: (901) 678-3656
mnmartin@memphis.edu

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JD/MA IN POLITICAL SCIENCE

Program Admission

Admission to the dual program will require separate admission to both the Cecil C. Humphreys School of Law and the University of Memphis Department of Political Science. However, for applicants to the joint program, the Political Science Department will accept LSAT scores in lieu of the GRE. Students are admitted into each program separately; completion of one degree is not contingent upon completion of both.

Program Requirements

The MA degree program will accept up to 16 hours for courses taken at the law school. The remaining hours toward the MA in Political Science must be taken in Political Science. Students may take only law courses while completing the first year law curriculum. The following courses will qualify for credit in the MA in Political Science:

Law Courses required at Law School

- Constitutional Law (4 hours)
- Criminal Law (3 hours)
- Criminal Procedure I (3 hours)

Law School Electives

- Administrative Law (3 hours)
- Criminal Procedure II (2 hours)
- Federal Courts A (2 hours)
- Federal Courts B (2 hours)
- Civil Rights (3 hours)
- Constitutional Law Seminar (2 hours)
- Tennessee Con Law (2 hours)
- Jurisprudence (2 hours)
- International Law (3 hours)
- Comparative Law (3 hours)
- Immigration Law (3 hours)
- Environmental Law (3 hours)

With the above exceptions, all the requirements for admission and graduation for the JD degree and the MA in Political Science degree apply.

This is a unique and wonderful opportunity for students. If you have any questions about this program, please contact Dr. Michael Sances, Assistant Professor, 901.678.2395. For questions about law school admissions, please contact Meredith Aden, J.D., LL.M., Assistant Dean for Law Student Affairs at (901) 678-3441 or maden@memphis.edu.

To view a comprehensive brochure about the program, please click the image below.

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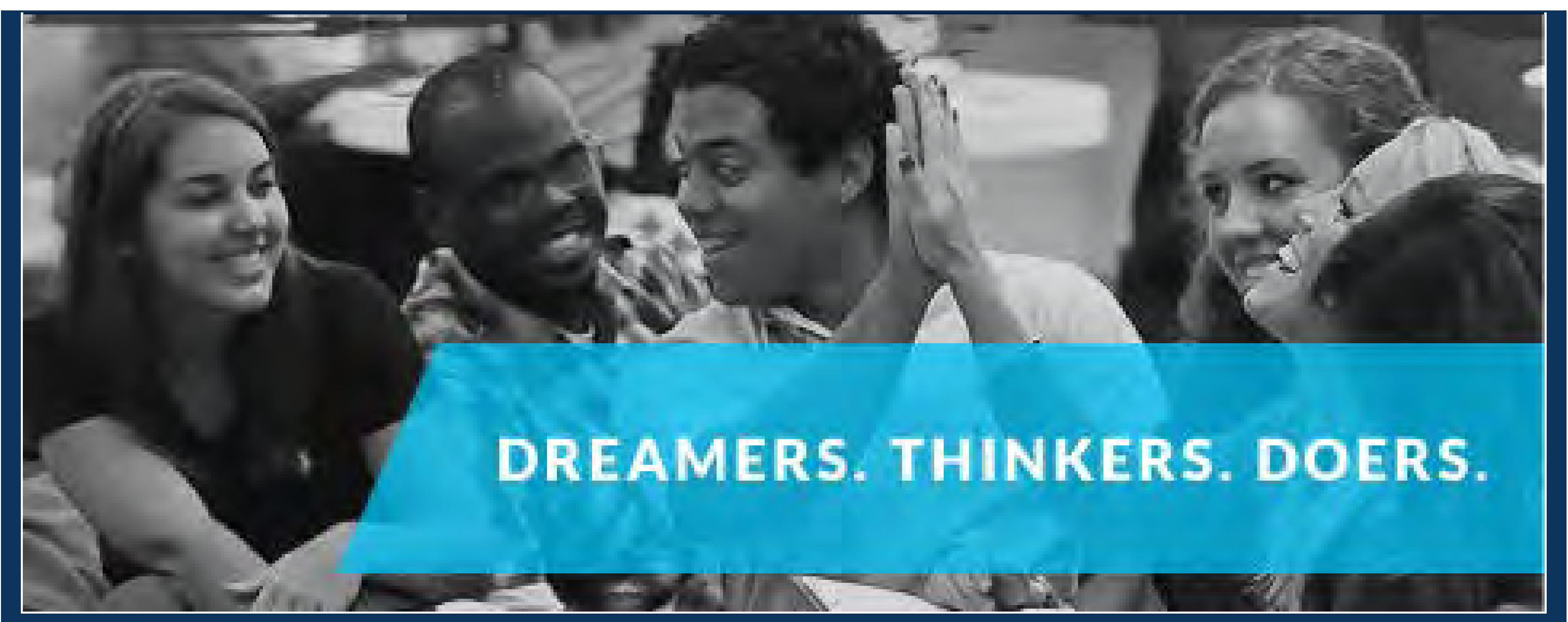

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JD/MPH PROGRAM

Public health, public policy and issues of health disparities are at the forefront of many of America's unresolved social problems. Rising health care costs pose a growing threat to the economy, while for some access to even the most basic health care is tenous. Lawyers play a central role in society's approach to these public health issues. However, their effectiveness is frequently limited by an inadequate knowledge of public health matters. To close this educational gap, the University of Memphis has created the JD/MPH dual degree program. The program offers students the opportunity to pursue the JD (juris doctor) and MPH (master of public health) degrees simultaneously. Students will have the ability to complete both degrees in four years of full-time study, a year less than it would take to complete each degree separately.

The goal of the JD/MPH program is to prepare and train students to apply law and policy to benefit public health. The dual degree allows law students to combine in-depth advocacy and policy skills learned in the UofM's JD program with the population health perspective gained in the MPH program to address policy and advocacy needs at the community level.

JD/MPH ADMISSIONS AND PROGRAM REQUIREMENTS

Candidates must meet the entrance requirements for both the Juris Doctor and Master of Public Health degree programs, and must notify both programs at the time of application that s/he intends to pursue the dual JD/MPH degree. Students will be admitted into each program separately, and completion of one degree is not contingent upon completion of both.

The MPH is a 42-credit hour degree program, and the JD/MPH program will allow up to nine (9) credit hours of law courses for shared credit. Students must have a grade of C or higher for the law school courses that are to be credited toward the MPH degree; grades for the shared courses will not be counted in the GPA for the MPH degree. For a complete listing of law courses offered with shared credit, please click here.

JD/MPH APPLICATION

Applicants to the JD/MPH Program must be admitted to the Cecil C. Humphreys School of Law, the University of Memphis Graduate School, and the MPH Program. Please click here for the application form for the JD/MPH dual degree program.

Questions about the JD/MPH Program?

Marian Levy, DrPH, RD, FAND
Assistant Dean of Students and Public Health Practice
901.678.4514
mlevy@memphis.edu

Questions about the JD/MPH application process?

Shirl Sharpe, MS, Academic Services Coordinator II

114 Robison Hall
901.678.1710
Shirl Sharpe

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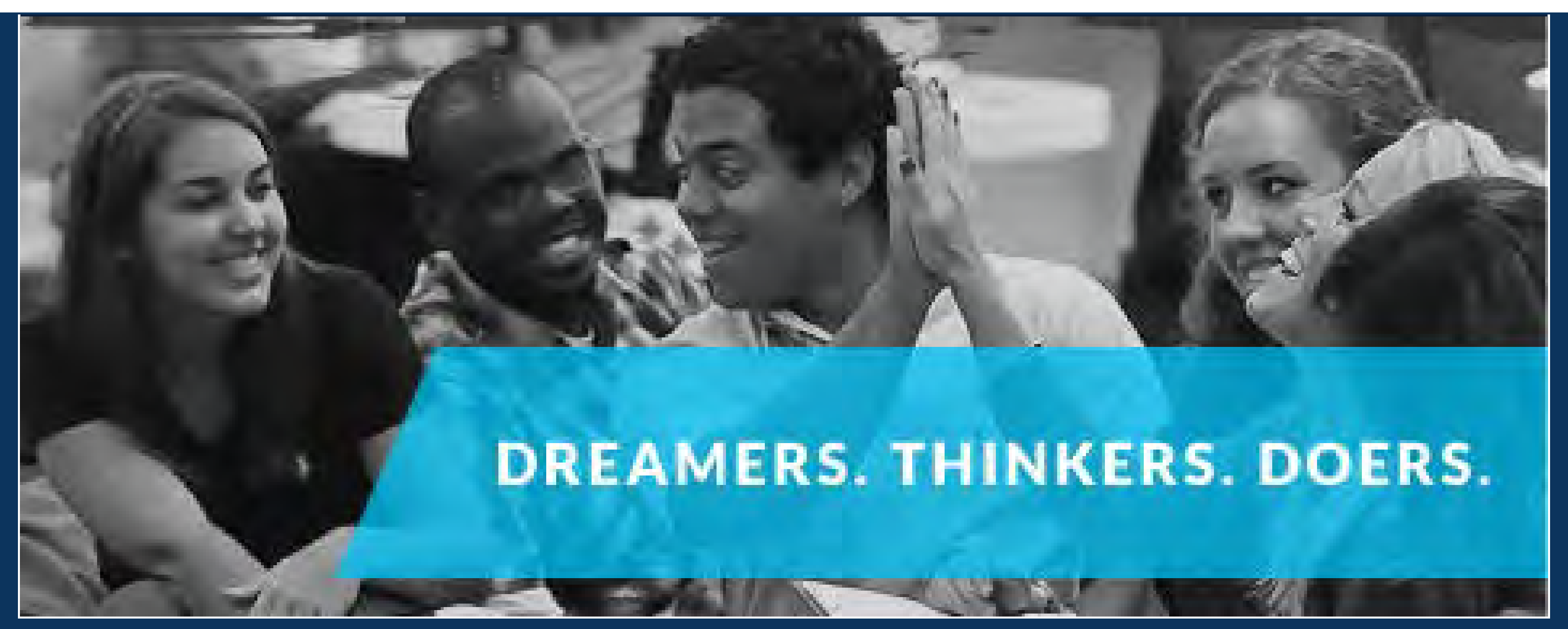

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MPH FAST TRACK

The School of Public Health at the University of Memphis offers a unique opportunity for attorneys to obtain a Master of Public Health degree in 12-months. Termed the "Fast Track MPH," the MPH is earned in an intensive full-time format in which attorneys attend classes during the evening and online for 3 consecutive semesters (fall, spring, summer). As part of their coursework, students also complete a 240-hour community-based practicum.

The 42-credit program is designed to allow attorneys to extend their advocacy skills to a population health perspective and gain substantive knowledge in applying law and policy to public health problems. Special expertise will be gained in urban public health issues, health systems, public health policy, and environmental health advocacy. The program prepares attorneys for leadership in addressing public health policy issues related to access to healthcare, health reform, environmental justice, and social concerns that affect health equity.

Eligible candidates must be graduates of the Cecil C. Humphreys School of Law at the University of Memphis or another American Bar Association-accredited U.S. law school.

For further information on the program, contact:

- Dr. Marian Levy, MPH Director in the School of Public Health - mlevy@memphis.edu or (901) 678-4514
- Dr. Sue Ann McClellan, Dean of Law Admissions, Recruiting, & Scholarships - smcclell@memphis.edu or (901) 678-5403
- Meredith Aden, J.D., LL.M. - Assistant Dean for Law Student Affairs, University of Memphis, Cecil C. Humphreys School of Law at (901) 678-3441 or maden@memphis.edu

Admissions Procedure

Individuals applying to the MPH Program should complete and submit the application by April 1 (for Fall) and November 1 (for Spring). MPH application materials can be found online by CLICKING HERE. The MPH admission requirement of GRE scores is waived in lieu of the LSAT.

This training represents an unparalleled opportunity for attorneys to gain insight in applying legal policy to public health problems.

Suggested Course Sequence
"FAST TRACK" for Lawyers
12-month format

Fall (5 courses)	**Spring (5 courses)**
• PUBH 7150 Biostatistical Methods 1 • PUBH 7180 Foundations of Public Health • PUBH 7170 Epidemiology in Public	• PUBH 7120 Environmental Health • PUBH 7160 Social and Behavioral Sciences Principles • HADM 7105 Health Policy

Health • PUBH 7985 Practicum in Public Health • Guided Elective *	• PUBH 7992 Master's Project Seminar • Guided Elective *
Summer (4 online courses)	
• Pre-Summer intersession course (HPRO Health Promotion) • Guided Elective (First Summer Term) • Guided Elective (Second Summer Term) • Guided Elective (Entire Summer Term)	

Each course is worth 3 credits hours.14 courses X 3 = 42 hrs.

* Consider shared credit for 6 hrs in Law School; will reduce by two electives. E.G., Administrative Law; Civil Rights; Disability Law and Practice; Education/Civil Rights; Elder Law; Environmental Law; Family Law; Gun Control/ Gun Rights Seminar; Health Law; Immigration Law; Labor Relations; Mental Health Law; or National Security Law.

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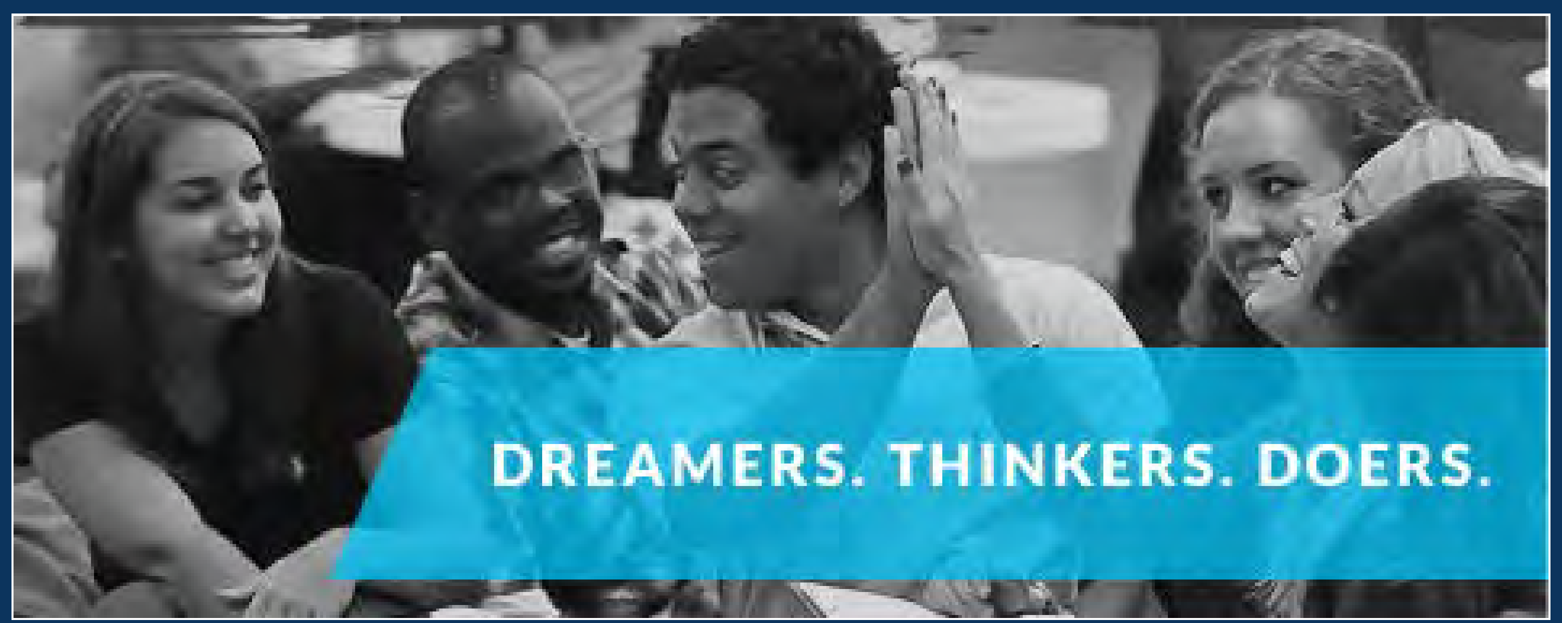

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PART-TIME PROGRAM

The University of Memphis Cecil C. Humphreys School of Law offers a part-time program which enables students to enroll in fewer hours than full-time students. This is not an evening program - part-time students attend classes during the day with full-time students. Students are not able to choose the day and time of courses.

By attending classes during the fall, spring, and summer semesters, part-time students will normally graduate in four and one-half years. Graduation requirements in the part-time program are the same as the full-time program. A part-time student is required to enroll in 8 to 11 hours each semester, for a total of 90 law hours. Part-time students may not request a transfer to the full-time program until they have completed the first-year curriculum.

The applicant may check the "part-time" box on the application or, after an offer of admission is received, the applicant can submit (by mail or e-mail) a written request to attend part-time. Only 10% of the entering class of 150 may enroll part-time. All applicants interested in attending part-time should submit an additional statement discussing why they are unable to enroll full-time. Decisions on part-time admission typically are finalized in mid-July.

As an example of class scheduling for part-time students, below are the fall 2015 classes for first-, second- and third-year part-time students:

First-Year Classes

Fall

- Civil Procedure I (3)
- Legal Methods I (3)
- Torts I (3)

Spring

- Civil Procedure II (2)
- Legal Methods II (2)
- Torts II (2)
- Criminal Law (3)

Second-Year Classes

Fall

- Constitutional Law (4)
- Contracts Law I (4)
- Property I (3)

Spring

- Criminal Procedure (3)
- Contracts II (2)
- Property II (3)

Third-Year Classes

Fall

- Business Organizations (3)
- Decedent's Estates (3)
- Income Tax (4)

Spring

- Secured Transactions (3)
- Evidence (4)

An eight-week summer session is offered each year for students who have completed one year of study. Two required courses are usually offered together with electives. Students may enroll for no more than nine hours in a summer session.

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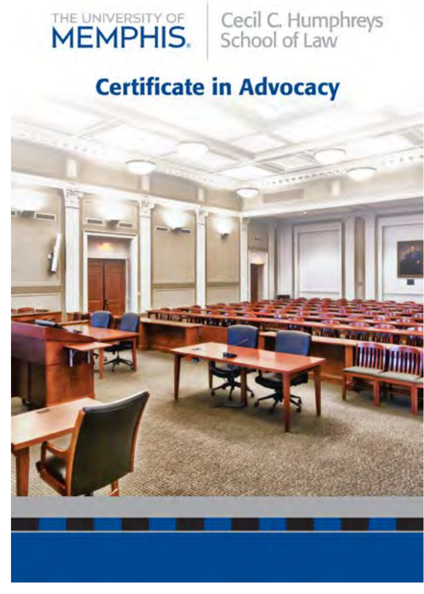
CERTIFICATE IN ADVOCACY



The goal of the Certificate in Advocacy program is to enable students who are interested in a career in litigation or the study of advocacy to follow a specialized course of study, to work closely with other students interested in the area and to receive guidance from faculty members with an interest and expertise in the area.

This program will enable you to work alongside other students and professors to prepare you for a career in litigation. A student who receives the Certificate in Advocacy demonstrates knowledge of fundamental principles of trial and appellate advocacy, as well as competence in the skills essential to a career in litigation. In turn, Certificate in Advocacy graduates are attractive to law firms seeking to hire litigation attorneys who enter the practice of law with practical training.

For more information about the Certificate in Advocacy program, please contact Prof. Barbara Kritchevsky at bkrtchvs@memphis.edu or (901) 678-3239.

Curriculum

Students in the Certificate in Advocacy Program not only take courses that teach legal rules and principles in a traditional classroom setting but also put those ideas into practice through client representation, skills courses and participation in Moot Court, Mock Trial and Alternative Dispute Resolution (ADR) travel teams. The out of class component enables students to work with practicing attorneys and make contacts in the legal community.

Course Requirements

A student must successfully complete at least 15 hours of advocacy courses. At least 2 hours of study must be in trial advocacy courses and 2 hours must be in appellate advocacy courses

Non-class Requirements

Students seeking the certificate must also complete work outside the classroom, allowing them to gain invaluable

experience and see advocacy in action. A student must complete 25 hours of non class work in the advocacy field. The student must complete at least 5 hours each semester. Students in the program must keep a log of their activities in accordance with the Director of Advocacy's guidelines and must attend one meeting each semester with other students enrolled in the Certificate of Advocacy program.

Grade Point Requirement

To satisfy the requirements of the Certificate in Advocacy, each student must demonstrate a successful understanding of the fundamentals of advocacy by receiving a grade of at least a C and obtaining an overall GPA of at least 2.5 in the building-block courses of Legal Methods I and II, Civil Procedure I and II, Evidence and Professional Responsibility. Students must receive at least a 3.0 GPA in all courses taken to satisfy the certificate.

To receive the certificate with honors, a student must complete the graded courses to satisfy the certificate with a GPA of 3.5 or higher and receive a grade of Excellent in at least two-thirds of the non-graded coursework taken to satisfy the certificate requirements.

How to Enroll

Students in good academic standing may enroll in the Certificate for Advocacy program after completing one year of full-time law study (or 30 hours for part-time students). A student may not enroll after the add deadline in the student's fourth semester of full-time study (or the semester after a part-time student has completed 45 hours of study).

A student enrolls by submitting a completed enrollment form to the Director of Advocacy. In completing the form, the student must certify that he/she can satisfy the requirements of the certificate program and is committed to fulfilling its requirements. A student will be dropped from the program if he/she fails to meet the requirements.

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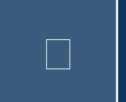
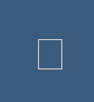
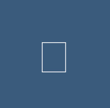
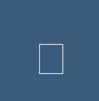
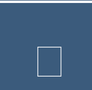
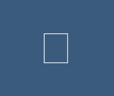

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Cecil C. Humphreys School of Law

BUSINESS LAW CERTIFICATE

The goal of the Certificate in Business Law is to enable students who are interested in a career involving business-related practice areas to follow a specialized course of study, to work closely with other students interested in the area, and to receive guidance from faculty members with an interest and expertise in business law. A student who receives the Certificate in Business Law demonstrates knowledge of fundamental principles of business-related legal issues and competence in the skills essential to a business-related practice.

For more information about the Certificate in Business Law, please contact Prof. Kevin Smith at ksmith@memphis.edu.

COURSE REQUIREMENTS

A student must successfully complete business-related study by taking courses from the lists below.

Required Courses: All the following courses.

- Business Organizations I (3 hours)
- Corporate Tax (3 hours)*
- Commercial Law Survey (4 hours) or both Secured Transactions (3) and Sales(3)

Core Electives: At least two (2) of the following courses.

- Administrative Law (3)
- Debtor-Creditor or Problems in Bankruptcy (3)
- Mergers & Acquisitions (3)
- Non-profit Organizations (3)
- Partnership Tax (3)*
- Securities Regulations (3)

Skills Component: At least one of the following courses.

- ADR-Arbitration (2-hour skills course)
- ADR-Labor (2-hour skills course)
- ADR-Mediation (2-hour skills course)
- Business-related Externship (2-, 3-, or 4-hour skills course)
- Contract Drafting (2-hour skills course)
- Mediation Clinic (4-hour skills course)

The Director of the Business Law Program may add courses to these lists to reflect new curricular offerings and may approve substitutions in compelling circumstances.

NON-COURSE REQUIREMENTS

Student must complete at least twenty-five hours of non-course work related to business law while enrolled in the Certificate program. The student must complete at least five hours of work each semester. Permissible activities

include participating in the VITA program and performing pro bono work that involves Memphis Area Legal Services Consumer or Tax units and others in consultation with the Pro Bono Coordinator and the Director of the Business Law Certificate Program.

Student must also attend one meeting of students who are enrolled in the Certificate program each semester.

GRADE POINT REQUIREMENTS

A student must demonstrate successful understanding of the fundamentals of business-related law by receiving grades of at least C, and achieving an overall GPA of at least 2.5 in the building block courses of Legal Methods I and II, Contracts, and Professional Responsibility. Students must receive a GPA of at least 3.0 in courses taken to satisfy the Certificate in Business Law.

A student will receive the Certificate in Business Law with Honors by completing the graded courses taken to satisfy the Certificate with a GPA of 3.5 or higher and receiving a grade of Excellent in at least two-thirds of the non-graded courses taken to satisfy the Certificate requirements.

ENROLLMENT

Students in good academic standing may enroll in the Certificate in Business Law program after completing one year of full-time law study (or thirty hours as a part-time student). A student may not enroll after the add deadline in the student's fourth semester of full-time study (or of the semester after a part-time student has completed forty-five hours of study). A student enrolls by completing an enrollment form and submitting it to the Director of the Business Law program. In completing the form, the student certifies that he or she can satisfy the grade requirements for the Certificate program and is committed to completing all of the Program's requirements. A student will be dropped from the Program if he or she fails to meet the requirements.

*Both Corporate Tax and Partnership Tax require Income Tax

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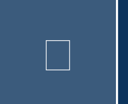
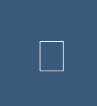
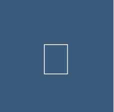
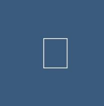
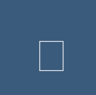
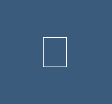

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Cecil C. Humphreys School of Law

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HEALTH LAW CERTIFICATE

For more information about the Health Law Certificate, please contact Professor Amy Campbell.

Course Requirements

15 Total Credits: (Doctrinal, Experiential Learning, and Writing Requirements) =

6 Core Credits (Doctrinal credits) +

9 Elective Credits (Includes but is not limited to Experiential & Writing credits)

Core Credits (6):

- Health Law Survey (3)
- Administrative Law (3)

Note: It is recommended that students complete these three core course requirements in the 2L year because they set a critical foundation on which to build enhanced learning and understanding of general or specific, focus areas of health law.

Elective Credits (At Least 9):

- Health Law Writing Requirement (2-3)

Note: Students can fulfill this requirement through completion of a law review note (upon approval of faculty mentor and Institute Director), OR, through Health Law Seminar, Mental Health Law Seminar, or other Seminar with health law-related paper (upon approval of seminar faculty and Institute Director). (This may also meet the Law School's writing requirement.)

- Experiential Learning (2-4)

Note: Students can fulfill this requirement by taking a health law-related clinic or practicum, doing a health law-related externship, or taking another health law-related skills course, upon approval of the Institute Director. (This may also meet the Law School's skills requirement.)

- Other Electives:*

Health-Specific:

Note: Not all of these courses are offered each year. Additionally, other courses may also be considered on a case-by-case basis in consultation with the Institute Director.

F Bioethics & the Law (2)
TBD Elder Law Health Clinic (4)

F/S Externship, Health Law Placement (2-4)
TBD Food and Drug Law (2 or 3)
TBD Health Care Insurance & Regulation Seminar (2)
F/S Health Law Seminar (2 or 3)
TBD Health Policy Practicum (2)
TBD Mental Health Law (3)
F Mental Health Law Seminar (2 or 3)
S Public Health Law (3)

Health-Related:

F Elder Law (3)
TBD Employee Benefits (2)
TBD Environmental Law (3)
TBD Intellectual Property Survey (3)
TBD Nonprofit Organization Tax (3)
TBD Patent Law (3)
TBD Products Liability (2)
S White Collar Crime (2)

* F = offered in the Fall term
S = offered in the Spring term

Summary:

Fall:
Health Law (2L, preferred)
Administrative Law (2L, preferred)
Law Seminar (3L)

Spring:
Health Law Seminar or other Seminar (3L)
Or Note (2L)

Non-Course Requirements

Students must complete at least twenty-five hours of non-course work related to health law while enrolled in the Certificate program. Permissible activities include doing pro bono work with the Health Law Section of the MBA, assisting MALS with health law fairs, providing pro bono legal services or law related education for health organizations, and other activities in consultation with the Pro Bono Coordinator and the Institute Director. Students should arrange a meeting with the Pro Bono Coordinator to discuss options as soon as enrolling in the Certificate program.

Students must also attend an annual meeting held for all students enrolled in the Certificate of Health Law program.

Grade Point Requirement

To satisfy the requirements of the Certificate in Health Law, each student must demonstrate a successful understanding of the fundamentals of health law by holding a minimum 2.5 overall GPA and obtaining at least a C in each course and a minimum 2.5 overall GPA in the building-block courses of Torts I and Torts II, and Constitutional Law. Students must receive at least a 3.0 GPA in all courses taken to satisfy the certificate.

To receive the certificate with honors, a student must complete the graded courses to satisfy the certificate with a GPA of 3.5 or higher and receive a grade of Excellent in at least two-thirds of the non-graded coursework taken to satisfy the certificate requirements.

When to Enroll

Students in good academic standing may enroll after completing one year of full-time law study (or thirty hours as a part-time student). It is highly recommended that a student enroll by the add deadline of his/her third semester. (There is no penalty to later decide to drop from the program.) Students cannot enroll after the add deadline in the student's fourth semester (or, if part-time, of the semester after completion of forty-five hours of study).

How to Enroll

.A student enrolls by submitting a completed enrollment form (available on TWEN) to the Institute Director. In completing the form, the student must certify that he/she can satisfy the requirements of the certificate program and is committed to fulfilling its requirements. A student will be dropped from the program if he/she fails to meet the requirements.

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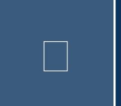
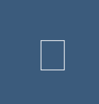
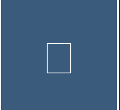
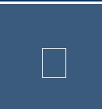
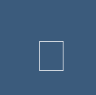
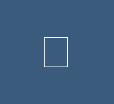

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TAX LAW CERTIFICATE

Memphis Law is proud to offer a Certificate in Tax for our students. Tax law affects and influences nearly every aspect of our lives, from sales tax, income tax, property tax, charitable deductions, tax credits and inheritance tax just to name a few areas. Students studying tax law will be able to apply their knowledge not only to their work but also to their daily decisions.

In studying the Internal Revenue Service Code, students in the Certificate in Tax program develop and strengthen their critical thinking skills. Knowledge of the code is essential not only for tax practitioners, but also for attorneys practicing in various fields such as labor and employment, family law, insurance, social security, workers compensation, and corporate litigation.

For more information about the Certificate in Tax program, please contact Prof. William P. Kratzke at wkratzke@memphis.edu or (901) 678-3221.

Course Requirements

Basic Income Tax (3)
Corporate Tax (3)
Partnership Tax (3)

Minimum 6 hours from the following list:

Estate & Gift Tax (2)
Nonprofit Organizations (3)
International Taxation (3)
Tax Seminar (2)
Estate Planning (2)
Mergers & Acquisitions (2)

Non-class requirements

Students seeking the Certificate in Tax must also complete 25 hours of VITA (Volunteer Income Tax Assistance) clinic work. These 25 hours can be counted toward the pro bono hours that the law school requires for graduation.

Grade point requirement

To satisfy the requirements of the Certificate in Tax, students must demonstrate a successful understanding of the fundamentals of taxation by obtaining an overall GPA of at least 3.0 for Certificate classes and a minimum Overall GPA of 2.5.

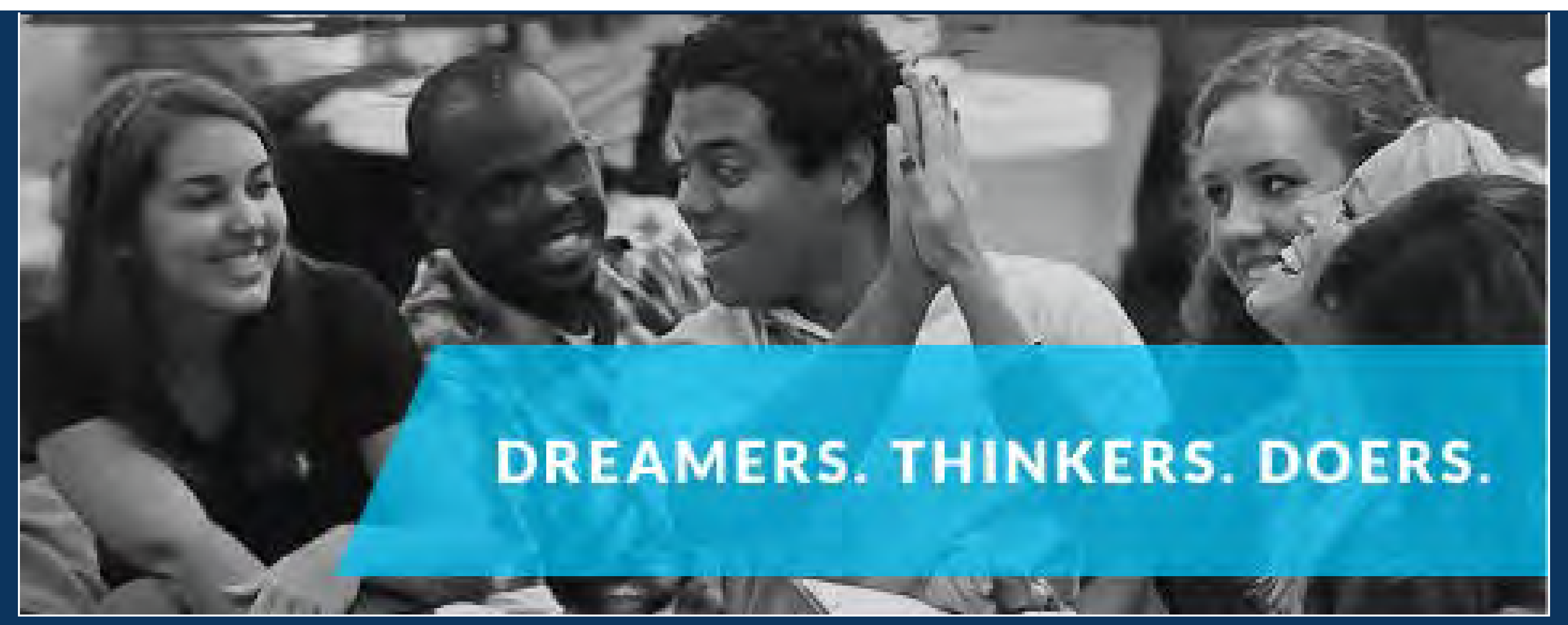
Competition

Students seeking a Certificate in Tax are strongly encouraged to participate in the Law Student Tax Challenge, sponsored by the American Bar Association Section of Taxation.

How to Enroll

Students in good academic standing may enroll in the Certificate for Tax program after completing one year of full-time law study (or 30 hours for part-time students).

A student enrolls by submitting a completed enrollment form to the Tax Certificate Director. In completing the form, the student must certify that he/she can satisfy the requirements of the certificate program and is committed to fulfilling its requirements. A student will be dropped from the program if he/she fails to meet the requirements.



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Cecil C. Humphreys School of Law

Programs

UNIVERSITY OF MEMPHIS LEGAL CLINIC

For more than 20 years, the University of Memphis Legal Clinic has enabled student attorneys to make the connection between legal theory and legal practice by offering them the opportunity to represent actual clients under close clinical faculty supervision. Student attorneys are specially licensed by the Tennessee Supreme Court. The Legal Clinic is located on the lower level of the law school building, with a separate exterior entrance plaza for clients. Legal Clinic facilities include a research library, interview rooms, conference rooms, and offices equipped with state-of-the-art technology.

Download the Spring 2017 Legal Clinic Course Application HERE.

The following subject-specific Clinics operate as part of the University of Memphis Legal Clinic:

- Child and Family Litigation Clinic
- Children's Defense Clinic
- Civil Litigation Clinic
- Elder Law Clinic
- Elder Health Law Advocacy Clinic
- Housing Adjudication Clinic
- Mediation Clinic
- Medical-Legal Partnership Clinic
- Neighborhood Preservation Clinic

During a three-week orientation period, supervising faculty introduce student attorney to skills, and ethics in the subject area of the designated Clinic. All clinics help student attorneys develop core legal skills, regardless of subject area, making the clinical experience transferable to any area of practice.

Specific emphasis is placed on:

- Client interviewing and counseling
- Fact and witness investigation
- Formal and informal pretrial discovery
- Communication with opposing counsel, court staff, and other key personnel
- Negotiation and settlement
- Drafting of letters, motions, pleadings, briefs, advanced directives, and/or other legal documents
- Motions practice and court filing
- Statutory interpretation
- Use of experts
- Mediation preparation
- Trial preparation and trial advocacy

The clinical program adheres to a client-centered approach, requiring the student attorney to visualize her/himself in the client's circumstances. This approach allows students an opportunity to explore the various roles attorneys assume in society, including trial attorney, transactions attorney, interviewer, negotiator, counselor, mediator, facilitator, community builder, legislative advocate, and officer of the court. Student attorneys also are introduced to holistic legal practice, focusing on representation in all forums in which the client may have a legal problem or need a legal solution.

The University of Memphis Legal Clinic emphasizes the promotion of the highest values of the legal profession as a complement to classroom instruction:

- Personal integrity
- Ethics and professionalism
- Holistic and collaborative approaches to problem solving
- Vigorous client and community service
- Social justice obligations

The University of Memphis Legal Clinic fulfills a critical community service by providing free legal services to under-represented clients – including children, the elderly, and victims of consumer fraud – thus developing first-hand knowledge of ways attorneys can promote social justice and use their law degrees in service to society.

See also:

- Student Testimonials

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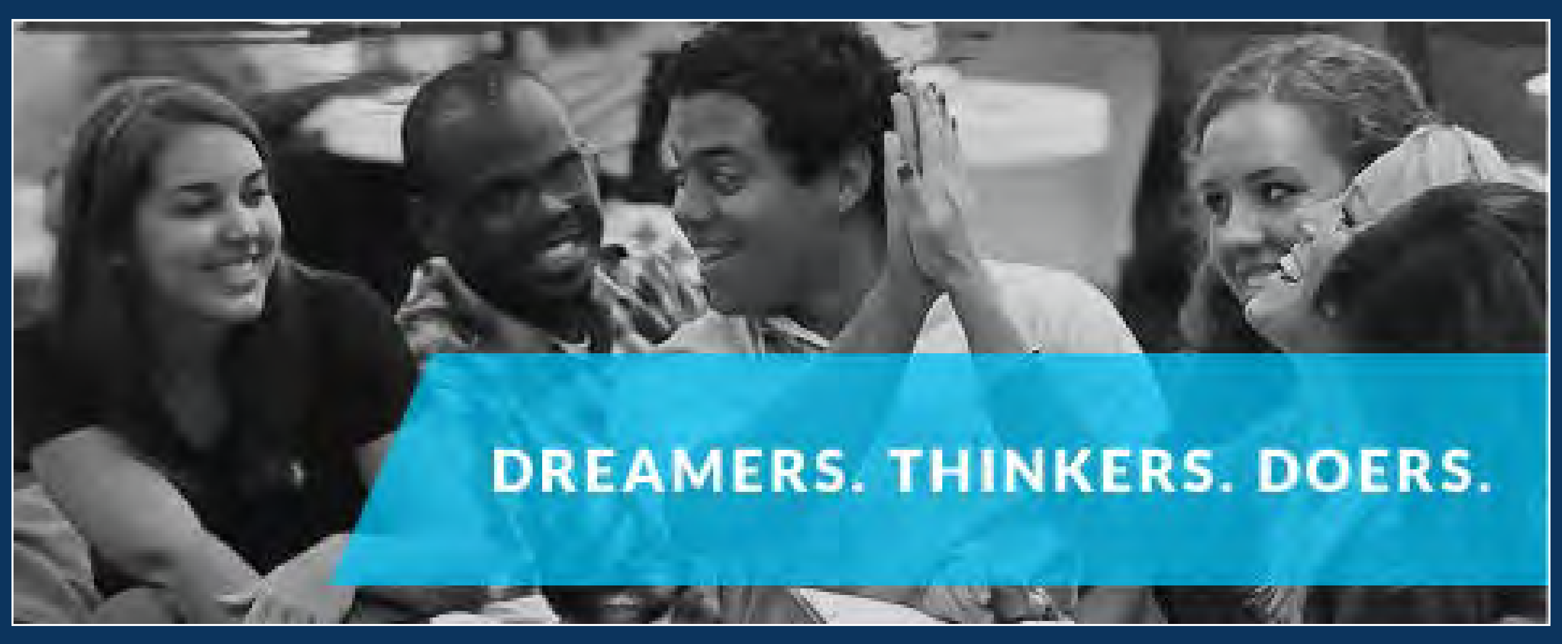

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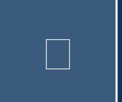
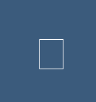
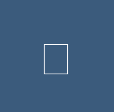
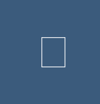
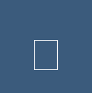
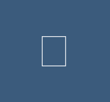

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EXTERNSHIP PROGRAM

The University of Memphis Externship Program offers upper-level law students the opportunity to earn academic credit for carefully supervised legal work they perform in a variety of practice settings throughout the Memphis area. Stepping outside the traditional classroom, externship students learn by doing and observing, further developing essential research and writing skills, communication abilities, and problem-solving techniques under the direction of local judges and attorneys. To maximize this experiential learning opportunity, externship students simultaneously participate in a faculty-led seminar designed to introduce the essential habits of the reflective practitioner and assessment of the skills, relationships, issues, and mindsets that prevail in the practice setting.

Download the Spring 2017 Externship Course Application HERE.

Spring 2017 Externship Course Description of Anticipated Field Placements

Exposed to lawyering at both practical and theoretical levels, University of Memphis externs should:

- Strive toward practice readiness through continued development of legal skills, including research and writing
- Better understand the day-to-day work of a lawyer
- Apply classroom learning to the world of legal practice
- Develop the habits of a reflective practitioner

- Identify, explore and address issues of professional ethics and responsibility
- Evaluate and utilize various means and approaches to problem solving
- Improve upon essential communication and relationship-building skills
- Explore career interests
- Build professional and personal networks

The law school's move to its downtown location has allowed a greater number of law students to take part in previously-established externships with the U.S. District Court, the U.S. Bankruptcy Court, the Tennessee Court of Appeals, the Shelby County Circuit Court, the U.S. Attorney's Office, the Federal Public Defender's Office, the Shelby County District Attorney General's Office, the Shelby County Public Defender's Office, the National Labor Relations Board, and the Memphis Area Legal Services. Improved accessibility is also allowing for the establishment of new externship opportunities, including recently initiated placements with the U.S. Court of Appeals for the Sixth Circuit, Tennessee Supreme Court, Equal Employment Opportunity Commission (Hearings and Legal Divisions), Memphis City Attorney's Office, the Memphis-Shelby County Airport Authority, and the Community Legal Center.

More information about the for-credit field placements offered through The University of Memphis Externship Course can be found HERE.

See also:

- Externship Course Learning Objectives, Policies and Guidelines
- Spring 2017 Externship Course Description of Anticipated Field Placements
- Application Information
- Student Testimonials

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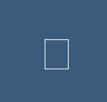
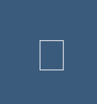
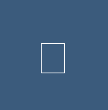
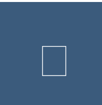
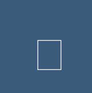
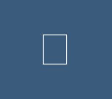

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CHILD & FAMILY LITIGATION CLINIC

The Child and Family Litigation Clinic develops core legal skills through representing the child in context.

Broadly grouped as "child advocacy," clinic cases offer practice in "holistic" child representation, including:

- Child abuse and neglect
- Foster care
- Delinquency
- Child custody, paternity, and adoption
- Education or mental health
- Public benefits, such as TennCare
- Any legal forum necessary to meet each child's needs

Student attorneys also experience the variety of roles and responsibilities required: in one case representing a child's best interests; in another representing a child's legal interests or expressed wishes; or in another scenario, representing the child's parent to promote the child's welfare. In addition to developing core legal skills, student attorneys participate in problem-solving, co-counseling, collaboration, meeting facilitation, and multidisciplinary consultation and practice essential in today's global society.

Through giving a vulnerable population a "voice" in the legal system, the Child and Family Litigation Clinic

awakens within students who will be tomorrow's litigators, advocates, lawmakers, and judges a spirit of compassion, sense of fairness, and understanding of equal justice.

Faculty: Christina A. Zawisza, Professor of Clinical Law and Director, Child and Family Litigation Clinic

To view a detailed brochure regarding Collateral Consequences of being a Juvenile Delinquent in Tennessee, please click here for a student-made brochure.

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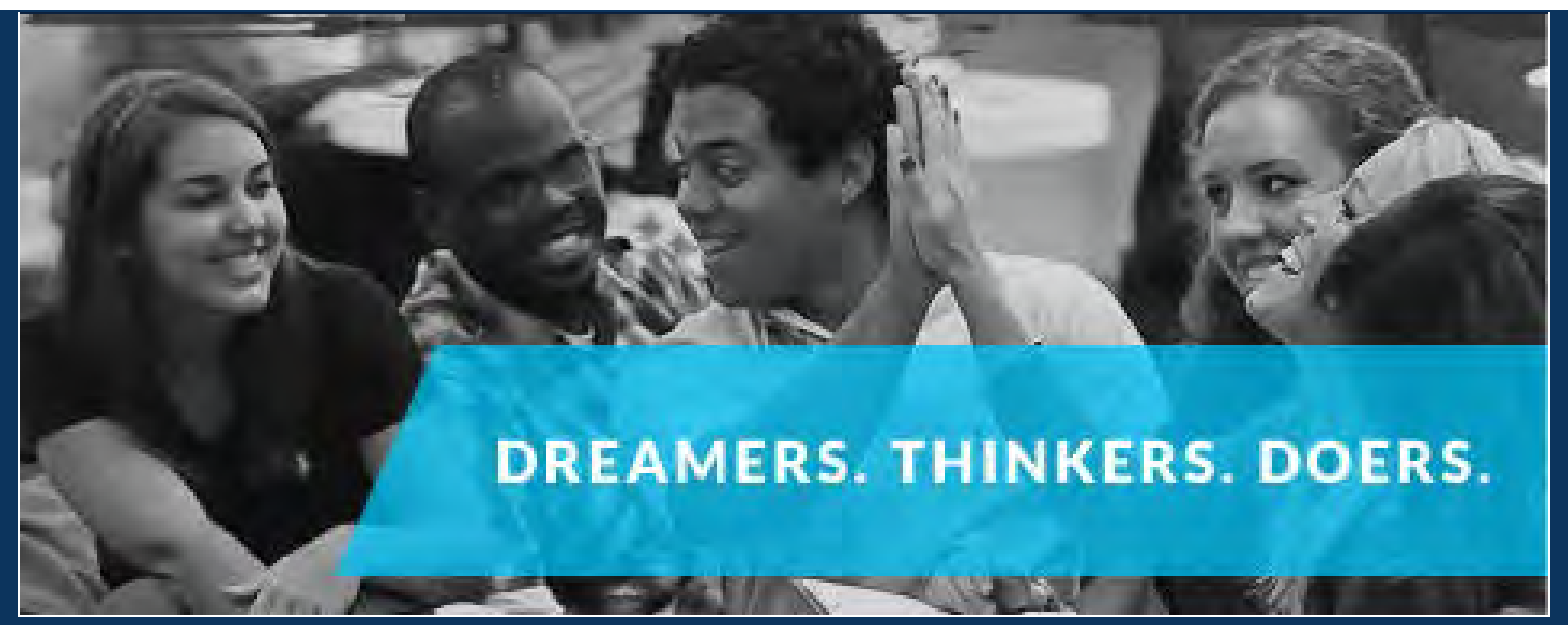

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ELDER LAW CLINIC

The Elder Law Clinic offers student attorneys the opportunity to represent senior citizens, who are one of the fastest growing demographic groups in the United States. Student practice will be governed by the tenets of elder law practice developed by the National Elder Law Foundation and refined by the National Academy of Elder Law Attorneys. Student attorneys will further develop core legal skills through representation of elderly clients across a broad range of substantive areas, including

- Consumer Protection
- Financial Exploitation
- Conservatorship
- Real property issues
- Grandparent adoption
- Health care
- Social Security
- Wills and advanced directives

Student attorneys also gain practical experience in problem solving, case analysis, transactional practice, administrative advocacy, and litigation in Shelby County General Sessions, Circuit, Chancery, and Probate Courts.

Faculty: Donna S. Harkness, CELA, Professor of Clinical Law and Director, Elder Law Clinic

NEWS

ELDER LAW CLINIC HIGHLIGHTED IN PERSPECTIVE MAGAZINE

The University of Memphis Cecil C. Humphreys School of Law Elder Law Clinic, led by Professor Donna Harkness, is highlighted in the new issue of Perspective magazine, a publication of the Young Lawyers Section of the NY State Bar Association. Memphis Law and Elder Law Clinic alum Adam Cooper co-authored the article, which details his experience in the Memphis Law Elder Law Clinic, alongside the experiences of other law students from various other law schools. To read the complete article, please click here.

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HOUSING ADJUDICATION CLINIC

Students enrolled in the University of Memphis Housing Adjudication Clinic are presented with the unique opportunity to study law and lawyering from the standpoint of the administrative law judge rather than that of direct client representative. During the course of this intensive, one-semester clinical program, students will participate in a twice-weekly seminar designed to survey federal fair housing law, provide valuable exposure to administrative law and procedure, and hone essential legal skills. The seminar portion of the course will complement the clinical segment, in which students will be assigned to investigate, research, hear, adjudicate, and issue written opinions ruling on administrative appeals involving participants in the Memphis Housing Authority's Housing Choice Voucher Program who have challenged adverse decisions affecting their eligibility for or amounts of public housing assistance they are receiving.

As they study the substantive and administrative aspects of housing law, Housing Adjudication Clinic students will continue to enhance the critical skills in research and writing, communication, problem-solving, strategy, and persuasion that prepare them to address the multidimensional needs of clients and serve the legal community in other capacities. Important values informing these skills will be fostered through a continuous critique of the justice system and an ongoing dialogue about the ethical and professional responsibilities of judges and lawyers.

Faculty: Daniel M. Schaffzin, Assistant Professor of Law and Director of Clinical Programs and Externships

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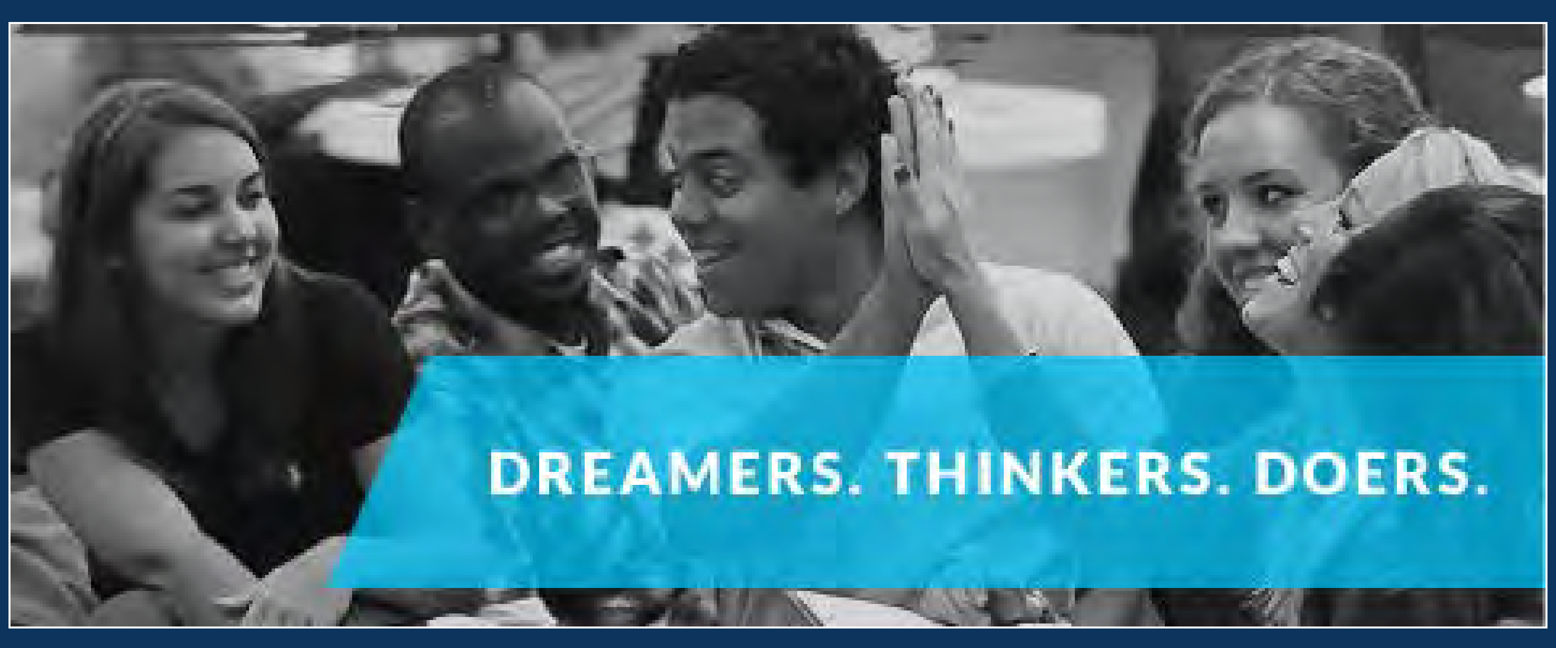

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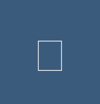
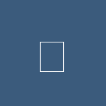
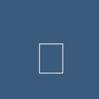
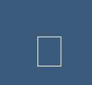
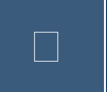

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MEDICAL-LEGAL PARTNERSHIP CLINIC

The Medical-Legal Partnership (MLP) Clinic is an interdisciplinary course in which Memphis Law students represent low-income pediatric patients at Le Bonheur Children's Hospital and their families. The MLP Clinic is part of the Memphis Children's Health Law Directive (Memphis CHiLD), a collaborative effort among the School of Law, Memphis Area Legal Services (MALS) and Le Bonheur to address the legal and social issues that impact child and family health though direct legal services, education and systemic advocacy. Memphis CHiLD is the first medical-legal partnership of its kind in the region.

Under the supervision of Professor Janet Goode, MLP Clinic students may handle cases involving one or more of the following I-HELP areas: Income and insurance (including public benefits and public and private health insurance), Housing (including landlord-tenant matters and utilities), Employment and education (including unemployment and IEP's), Legal education and counsel (providing education and training to health care professionals and the community), and Personal and family safety (domestic violence and other family law matters).

To complement their casework, students participate in weekly classroom sessions designed to explore the legal services they are providing, the legal, policy and ethical issues that affect patients' health, and the ways that health outcomes and health care access for low-income children can be enhanced by bringing together health and legal professionals. In both the case and classroom components of the Clinic, students engage in a series of ongoing interactions with the attorney and social work team that MALS has devoted to the Memphis CHiLD, as well as

doctors, residents, medical school students, social workers, and other Le Bonheur faculty and staff.

Faculty: Janet H. Goode, Visiting Assistant Professor of Law and Director of the Medical-Legal Partnership Clinic

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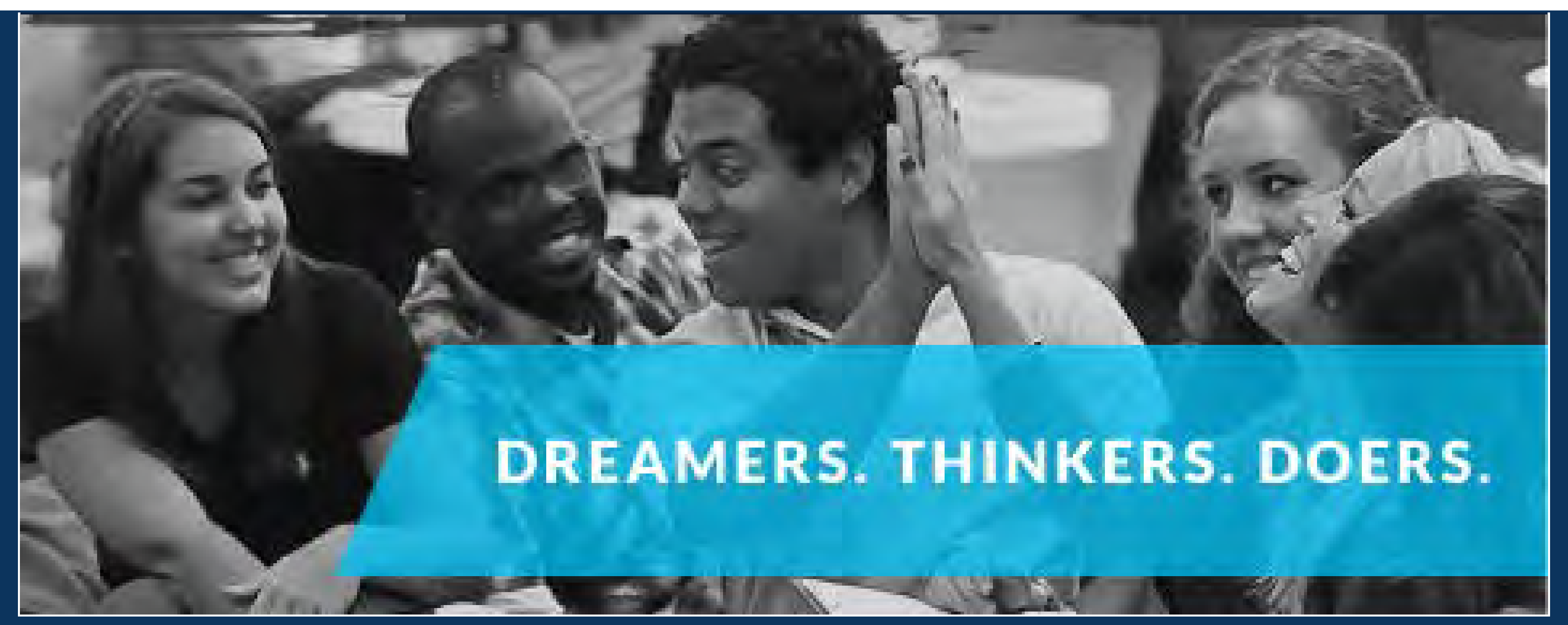

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MEDIATION CLINIC

Guided by Professor Steve Shields, a Rule 31 Listed Mediator and Tennessee Supreme Court Approved Rule 31 Trainer, students in the Mediation Clinic will study mediation from the inside-out, analyzing in detail the communicative, strategic, and ethical dimensions of specific interventions that mediators make in the context of particular cases. \

The Clinic will primarily focus on the students as the mediators, but the students will also be asked to consider the issues from other points of view: as the disputant, as an attorney representing a client in mediation, and in the capacity of advising an organizational client about dispute resolution options. The Clinic will have four primary components: (1) the training that is required by Tennessee Supreme Court Rule 31 before one may become listed as a Rule 31 Mediator; (2) ongoing student observation of mediations conducted by Rule 31 Mediators in General Sessions Court cases, Federal Court cases, and EEOC administrative proceedings; (3) student participation as co-mediator with Rule 31 Mediators in Shelby County General Sessions Court cases; and (4) weekly classroom seminar and case rounds designed to give students further training and feedback throughout the course of the semester.

Faculty: Stephen Shields, Adjunct Professor of Law

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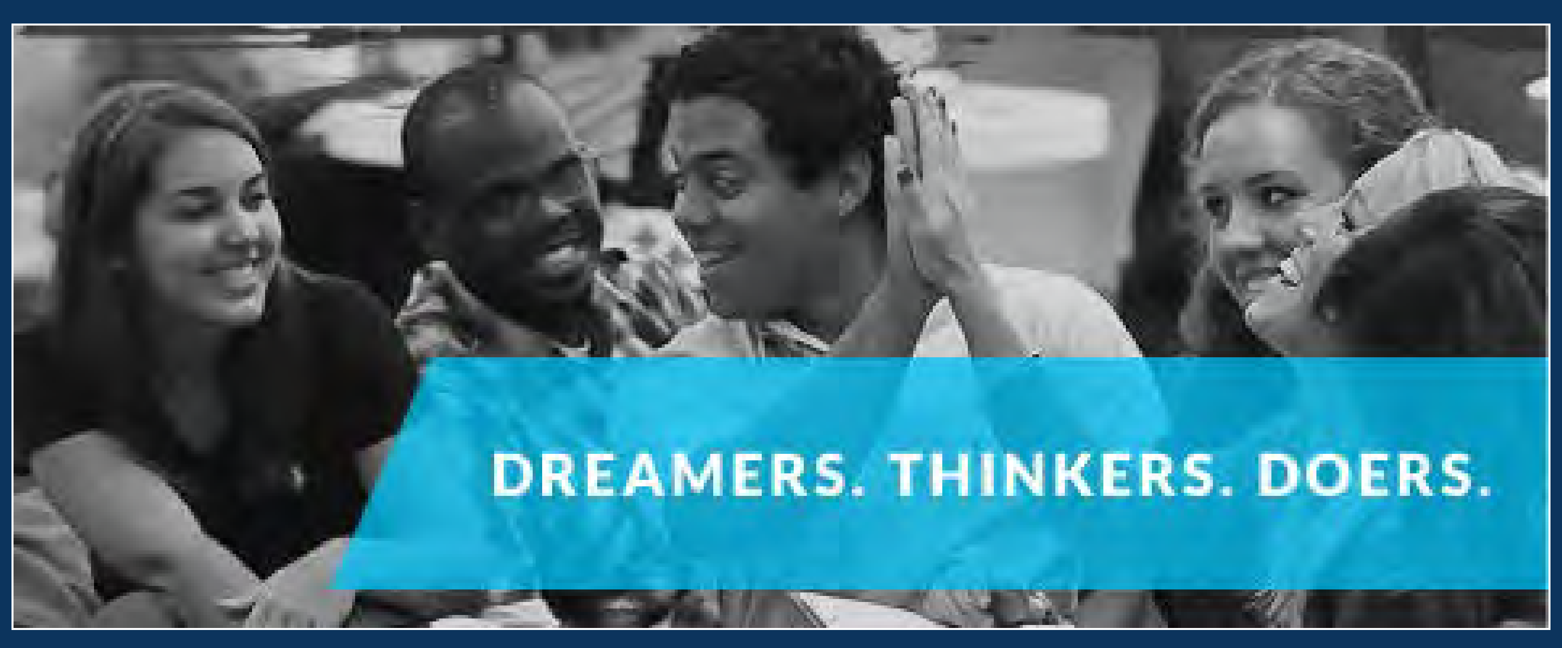

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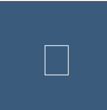
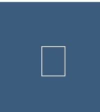
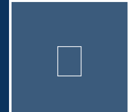
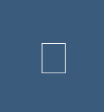
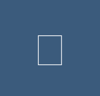
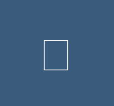

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NEIGHBORHOOD PRESERVATION CLINIC

Students enrolled in the University of Memphis Neighborhood Preservation Clinic have the opportunity to experience lawyering from the standpoint of the municipal lawyer and municipal administration addressing the complex legal, economic and social issues surrounding real property abandonment and neglect in Memphis.

Working under faculty supervision, students will be assigned to investigate property ownership and conditions, communicate with field code enforcement professionals, prepare civil lawsuits, and prosecute neglectful owners seeking an enforceable order of compliance with property maintenance and other local housing and building code standards. Cases will be brought in the Shelby County Environmental Court, a unique court of special jurisdiction concurrent with the Tennessee Circuit and Chancery Courts for certain purposes, including the prosecution of cases alleging the existence of a public nuisance (as defined in Tennessee Code Annotated §13-6-102 (8)), and requesting either an order of compliance or the appointment of a receiver to abate such public nuisance.

To complement their work as anti-blight litigators, Clinic students will participate in a weekly classroom session focused on the pervasive challenge of blight and abandonment in Memphis. The seminar segment of the weekly class will be designed to survey substantive code enforcement and housing law, explore national models of legal strategies to address blight and abandonment, outline practice and procedure in the Shelby County Environmental Court, provide skills training, and consider issues of ethics and professionalism that arise in the context of their cases. The seminar component of the weekly class will complement the case rounds component, during which

students will engage in an ongoing discussion of the myriad issues and challenges they are experiencing in the cases they are handling.

Neighborhood Preservation Clinic in the news:

- WREG News Ch. 3 - http://wreg.com/2016/12/14/anti-blight-partnership-to-clean-up-memphis/
- WREG News Ch. 3 - http://wreg.com/2015/01/12/homeowners-hopeful-law-students-can-help-with-blight-issues/
- Memphis Flyer - http://www.memphisflyer.com/NewsBlog/archives/2015/01/09/new-anti-blight-clinic-launched-at-u-of-m-law-school
- Commercial Appeal - http://www.commercialappeal.com/news/local-news/city-hall/demolition-of-executive-inn-kicks-off-antiblight-law-clinic_08563128
- "City files 1,000th suit against owners of blighted properties," Commercial Appeal, August 27, 2015
- "Problem Properties: Neighborhood Preservation working to remedy blight in Memphis," Memphis Daily News, August 17, 2015
- "In the universe of Memphis blight fighting, all roads lead to Steve Barlow," Commercial Appeal, August 7, 2015
- "Blight Fight: Teams surveying Downtown properties in search of neglect," Memphis Daily News, June 15, 2015
- "City Launches Effort to Condemn Apartment Buildings," Commercial Appeal, April 21, 2015
- "Ministries founder apologizes for apartment conditions, promises immediate repairs," Commercial Appeal, April 24, 2015
- "City afraid blighted downtown property is on the brink of collapse," WREG-TV, April 2, 2015

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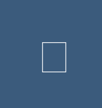
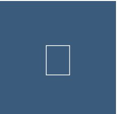
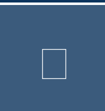
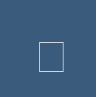
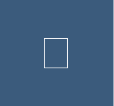

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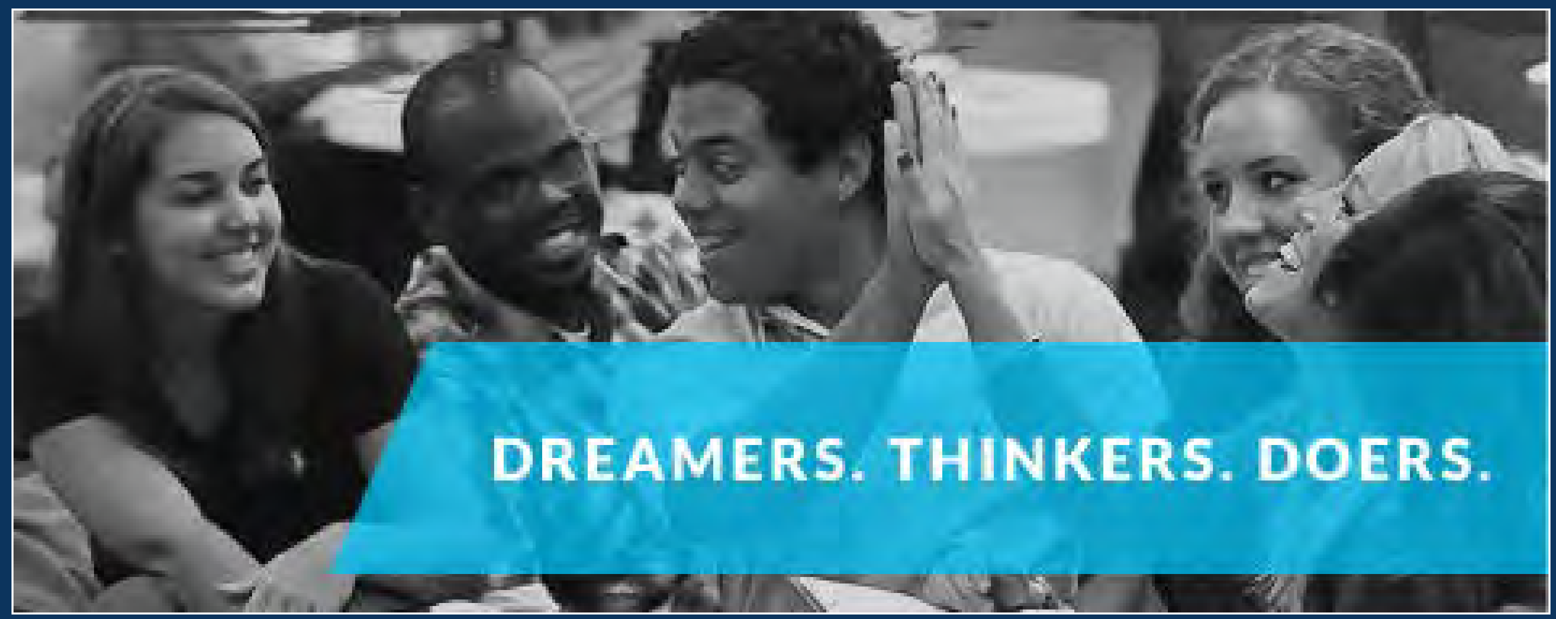

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Lyle Gruby, Editor-in-Chief

THE UNIVERSITY OF MEMPHIS
LAW REVIEW

VOLUME 47 | 2016–2017 | BOOKS 1–4

Authors and Readers,

Thank you for visiting the University of Memphis Law Review website. We strive to publish volumes of the highest quality. Our goal is to provide authors with a professional editing process and readers with useful and insightful legal scholarship. We see our role as integrally tied to the Law School's reputation. Memphis is an excellent law school, and we are proud to call it our own. Because of that, we want every author and reader to see the individualized commitment that we bring to the editing process.

Our published authors include professors, judges, and attorneys from throughout the country who write on a variety of novel legal topics. We do not limit publication to specific jurisdictions but rather seek to publish the best articles. We value articles that are clear, concise, and well-structured: these are the articles that further legal debate and are useful to the legal community.

Volume 47's Editorial Board hopes to build upon the Law Review's reputation for developing great relationships with their authors and producing excellent Volumes. From the moment an author accepts an offer for publication, the Law Review staff seeks to communicate effectively. Throughout the editing process, our Bluebooking staff will find and correct citations, allowing our Articles Editors to focus on a single article as a whole. In this way, the author receives integrated and effective feedback—rather than sporadic communication—from a member of the staff who knows the structure, theme, and thesis of the article by heart.

We are always open to direct submission of articles. If you would like to submit an article for publication, please email your résumé, cover letter, and article to our Articles Editor, Jordan Emily, at jmemily@memphis.edu. If you have questions about subscribing to the University of Memphis Law Review, please contact our Business Editor, Will Podesta, at wcpdesta@memphis.edu. Please also feel free to contact me at lwgruby@memphis.edu with any questions.

Respectfully,

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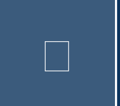
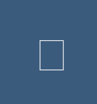
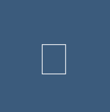
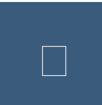
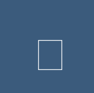
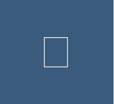

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Membership on the University of Memphis Law Review is limited to second- and third-year law students who are selected based on their performance in a competition held during the summer of their 1L year.

After successfully completing the required courses of a full-time first year law student, and achieving a GPA of 2.50 or higher, the law student is eligible to participate in the summer competition. Part-time law students and transfer students are also eligible to participate once they have completed the required courses of a full-time first year law student and have met the GPA requirements. Second-year transfers are eligible to compete once they complete the second year coursework and have met the GPA requirements.

Selection

Up to thirty rising 2Ls will be chosen as staff members of the Law Review.

The three highest-ranked students in each section of the first-year class at the end of the first year will receive automatic invitations to be Law Review staff members pending a good faith completion of the summer competition.

Selection of the other staff members is based on the results of the summer competition, which is designed to demonstrate the students' aptitude for legal scholarly writing, researching, and cite checking.

The competitors are required to write a Case Comment on a recent state or federal case, as well as complete a citation and editing exam for a piece of unpublished work. The anonymous competition is scored by the Editorial Board and the top scoring 2Ls are then selected as Staff Members.

Membership

If selected for membership on the Law Review, the duties for 2Ls and 3Ls include line editing and cite checking the articles chosen for publication. Additionally, 2L members must write their own work of legal scholarship, the student Note. The Note is roughly thirty to fifty pages in length, and explores a specific issue within an area of law.

Rising 3L members may apply for positions on the Law Review Editorial Board. The Editorial Board is responsible for day-to-day operations of each facet of the journal: article selection and editing, cite checking supervision and reconciliation, and student Note consultation.

Student Publications

Each year, the Law Review selects a number of student works to publish. Selected student Notes and the winning Case Comment from the summer competition are published throughout the year. In conjunction with the faculty, the Editor-in-Chief and the Senior Notes Editor select the best students Notes of those published. The top three ranking Notes receive a cash award and plaque for their achievement.

Credit

Upon successful completion of their Note and other assignments, 2L Staff Members will receive two credits in the spring semester of their 2L year, as well as satisfaction of the legal writing requirement. Senior Staff Members will receive an additional credit hour during the spring of their 3L year. Editorial Board members receive two additional credit hours during the spring of their 3L year, for a total of four credits for fulfilling all of their Law Review responsibilities.

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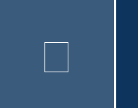
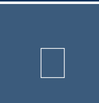
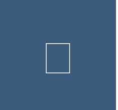
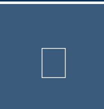
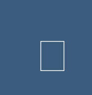
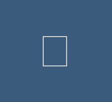

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LAW REVIEW ANNUAL SYMPOSIUM

The 2017 University of Memphis Law Review Symposium, **The Fragile Fortress: Judicial Independence in the 21st Century**, will assemble a remarkable group of jurists and scholars to examine one of the great issues of the day. It will be held on Friday, April 7, 2017 at the University of Memphis School of Law. **Register now!** (Registration and CLE information provided below; all attendees are asked to register, but the event is free to those not seeking CLE hours.)

The ideal of judicial independence — of fair and impartial tribunals standing guard against abuses of power by the other branches of government, protecting civil liberties and serving as the "bulwark of the Constitution"— has never been easy to attain. But it could be that this ideal has been undergoing particularly stern tests in our time.

This year's symposium will bring together voices, insight, experience, and ideas from the bench, academy, and bar in a dialogue meant to bring renewed attention and innovative thinking to this vital issue. We invite attorneys, judges, students, and all members of the public who care about the well-being of our constitutional republic to join us for this crucial dialogue.

We are delighted to recognize the generosity of the Federal Bar Association's Memphis/Mid-South Chapter, and of Lewis, Thomason, King, Krieg & Waldrop, P.C. as event sponsors; it is our pleasure to share the distinguished roster of jurists and scholars who will explore judicial independence from a wide diversity of viewpoints:

- **Judge Bernice B. Donald** (United States Court of Appeals for the Sixth Circuit) — The intrajudicial context of judicial independence
- **Judge Timothy J. Corrigan** (United States District Court for the Middle District of Florida) — Impact

of threats of violence on judges' independence
- **Senior Judge Sterling Johnson, Jr.** (United States District Court for the Eastern District of New York) — Congress and judicial sentencing discretion: Feeney Amendment revisited
- **The Honorable Michael B. Mukasey**, Former Chief Judge (United States District Court for the Southern District of New York) and former United States Attorney General — Political criticism of judges: real threat to judicial independence?
- **Judge R. David Proctor** (United States District Court for the Northern District of Alabama) — Judicial independence: an overview, from impeachment to court-packing
- **Chief Justice Zarela Villanueva** (Supreme Court of Costa Rica) — Judicial Independence and the rule of law: a hemispheric perspective
- **Professor and Dean Emeritus John DiPippa** (UALR William H. Bowen School of Law) — Can a legislative committee subpoena a sitting judge?
- **Professor Eric Kasper** (University of Wisconsin - Eau Claire) — When judges campaign: free speech and restrictions on fundraising
- **Professor Justin Walker** (University of Louisville Brandeis School of Law) — Should judges be forced to disclose their papers upon retirement?
- **Professor Patrick Walsh** (Federal Law Enforcement Training Center) — Use of secretly-acquired intelligence evidence in federal criminal proceedings

Registration/CLE: To register, please **click here**. Please note: **The Fragile Fortress** has been approved for 6.58 hours CLE Credit (including 1.0 hour Dual Credit) in Tennessee; Arkansas and Mississippi have already confirmed they will recognize the credits. Requests pending with selected other states; if you are seeking CLE Credit from another state, please contact us.

Agenda: Check-in/breakfast 8 a.m.; program 9 a.m. to 5 p.m. (lunch 11:55 a.m. to 12:45 p.m.). For a detailed agenda, please click here.

Location: The Law School is located at 1 N. Front Street in downtown Memphis, overlooking the Mississippi River in the historic former U.S. Courthouse, Customs House, and Post Office at 1 North Front Street, Memphis, Tennessee 38103. There are three parking garages within 1 block of the Law School, and some half-dozen within 3-4 blocks.

Questions about the Symposium may be directed to Pablo J. Davis, Symposium Editor, at pablo.j.davis@memphis.edu or 901-288-3018.

We look forward to seeing you!

The University of Memphis Law Review hosts its annual symposium every spring at the Law School. For more information about the most recent past topics and speakers, please visit the links below.

2016 - Urban Revitalization: The Legal Implications of Remaking a City

2015 - In re Valor: Policy and Action in Veterans Legal Aid

2014 - Juvenile Courts in Transition

2013 - Breaking the Silence: Legal Voices in the Fight Against Human Trafficking

2012 - Cultural Competency and the Death Penalty

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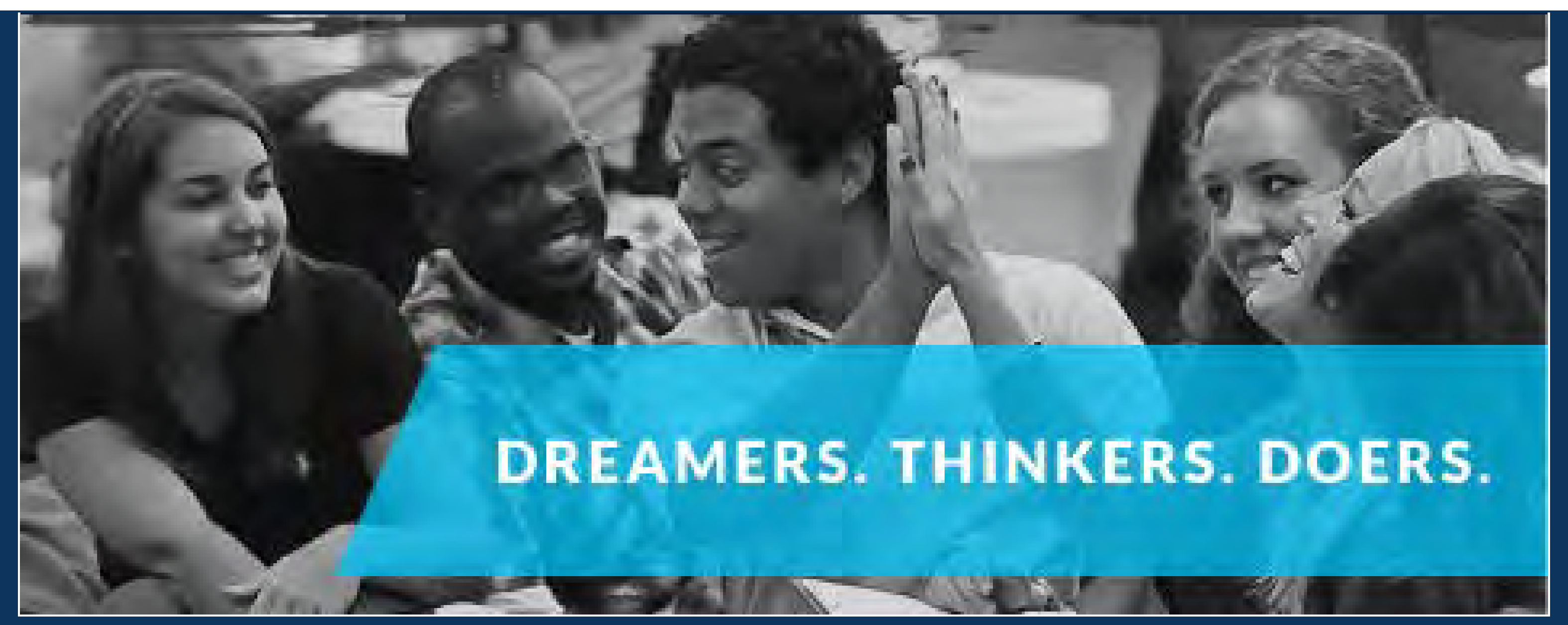

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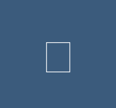
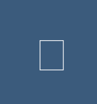
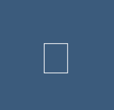
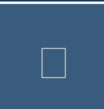
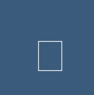
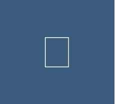

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Alternatively, for hard copy submission, please address all manuscripts to:
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Please adhere to the specifications regarding article format:

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- Font: Times New Roman; 12 pt. (including footnotes)
- Headings: Use traditional outline headings; I,A,1,(a),(1).

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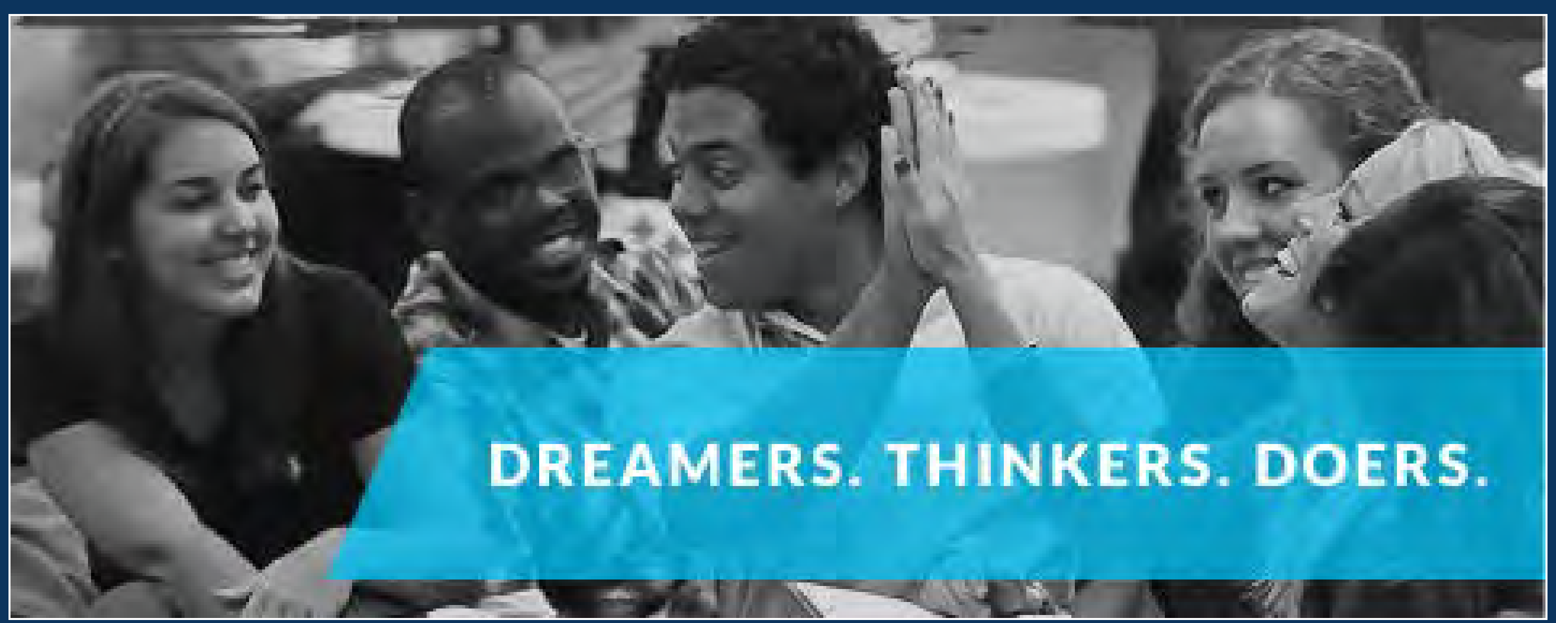

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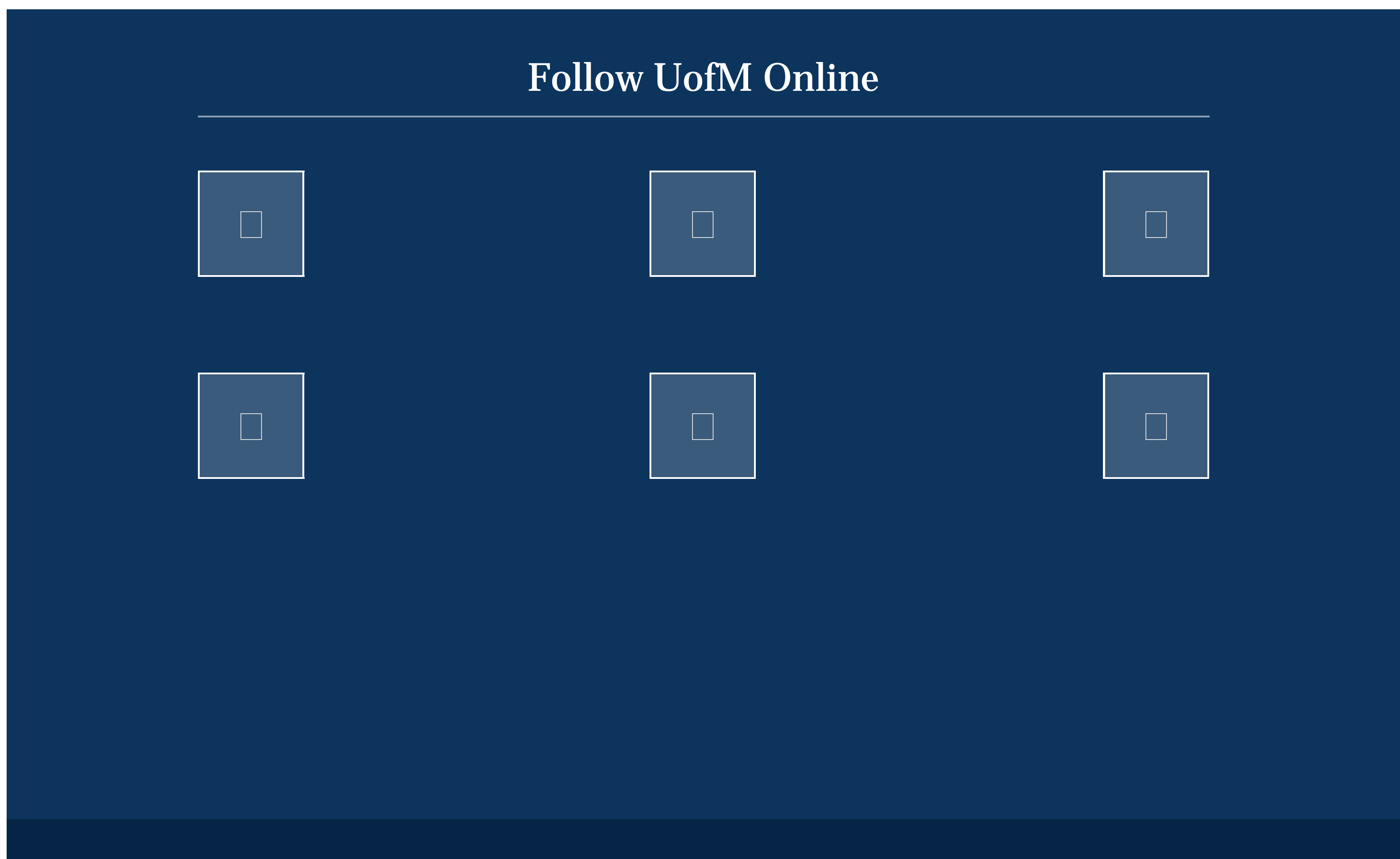

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Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities which receive Federal financial assistance. Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance..." 20 U.S.C. § 1681 - To Learn More, visit Title IX and Sexual Misconduct.

Cecil C. Humphreys School of Law

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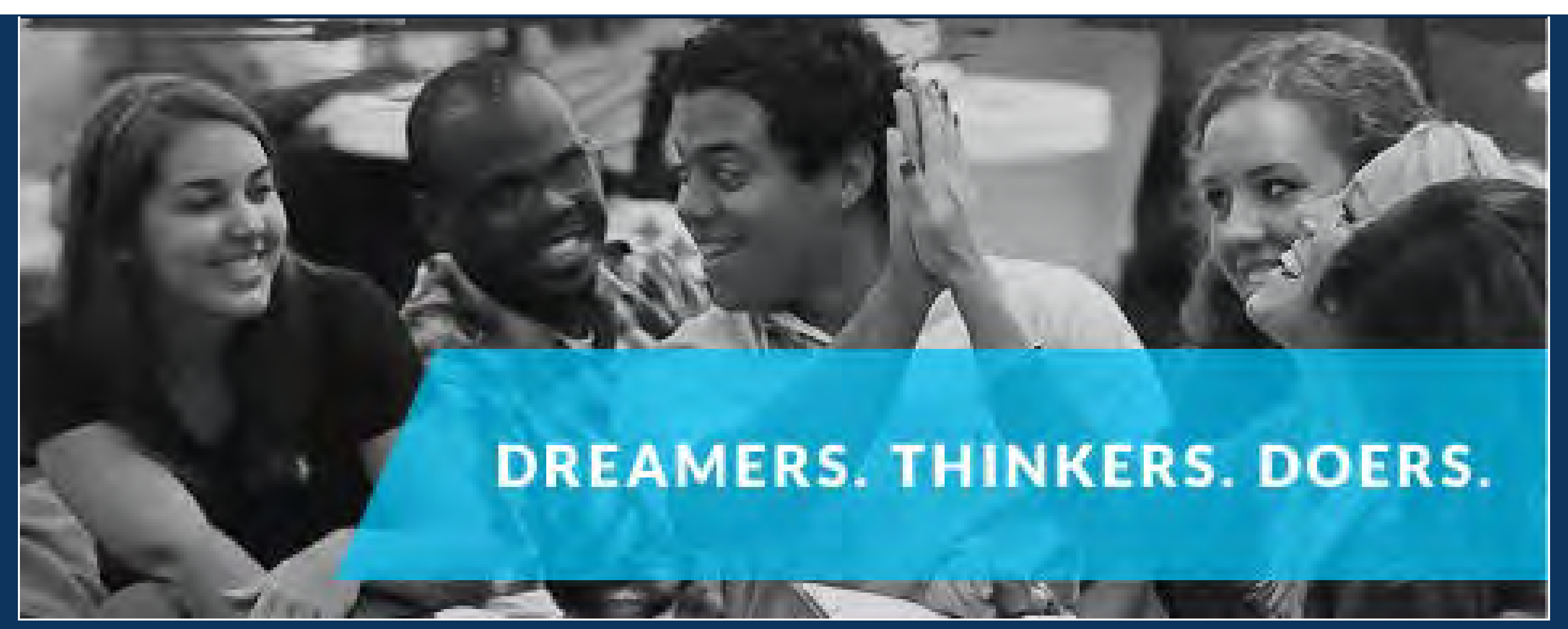

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THE UNIVERSITY OF
MEMPHIS
Institute for Health Law & Policy
INSTITUTE FOR HEALTH LAW & POLICY
at the University of Memphis Cecil C. Humphreys School of Law

INSTITUTE FOR
HEALTH LAW
& POLICY

THE MISSION of the Institute for Health Law & Policy (iHeLP) covers three prongs: Education, Scholarship and Service. Each area is grounded by an overarching mission to use law and policy to advance health.

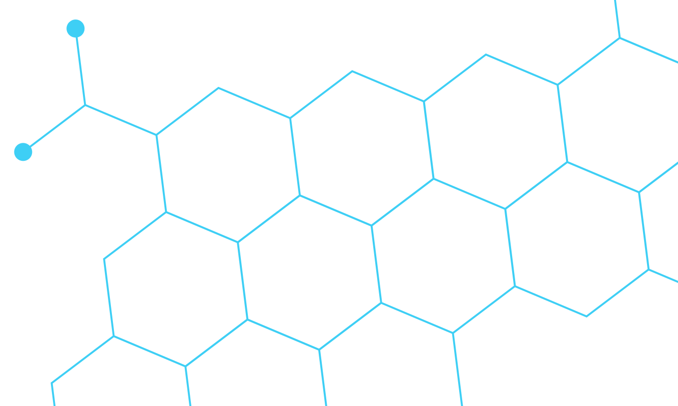
MEMPHIS AS A HUB FOR HEALTHCARE

Healthcare is one of Memphis' most prominent and important industries, with the Greater Memphis area emerging as a leading medical and bioscience center. Shelby County is home to over 16 different hospitals, including internationally-renowned St. Jude Children's Research Hospital and hospitals within two major health systems – Methodist Le Bonheur Healthcare and Baptist Memorial Health Care. It's also home to divisional or corporate headquarters to orthopedic and medical device leaders Medtronic, MicroPort Orthopedics, Smith & Nephew and Wright Medical.

EDUCATIONAL goals focus on developing competencies and skills in law students for interdisciplinary, client- and mission-driven practice via traditional coursework, externships and other skills-based opportunities, and scholarship. Focus areas cover traditional health law practice, as well as public health and health system policy and science/biotechnology. Faculty have expertise in a diverse array of health law fields and are also drawn from the surrounding community – who bring a critical practice-based orientation to education.

SCHOLARSHIP opportunities open up for students the possibility for self-directed and faculty-sponsored research, both within and transcending the law school's boundaries, to include, for example, collaboration with affiliated faculty with the School of Public Health and the Loewenberg College of Nursing at the University of Memphis, as well as the University of Tennessee Health Science Center.

SERVICE extends iHeLP's reach into the community where the Institute endeavors to: address unmet health law issues of local organizations and communities, host community forums on health law and policy issues, and work with community leaders to proactively address health policy needs.



Amy Campbell
Director & Associate Professor of Law

We learn by doing; we truly "achieve" our mission only by helping to address, in partnership with others, policy obstacles or gaps that impede the health of the Memphis community. Our mission requires a commitment to civic engagement and collaboration, the very commitments and skills that are necessary ingredients for a successful health law career.

Health-Specific

Bioethics & the Law
Food & Drug Law
Health Law Seminar
Mental Health Law Seminar
Public Health Law

Health-Related

Elder Law
Employee Benefits
Environmental Law
Intellectual Property Survey
Legislation
Patent Law
Products Liability
White Collar Crime

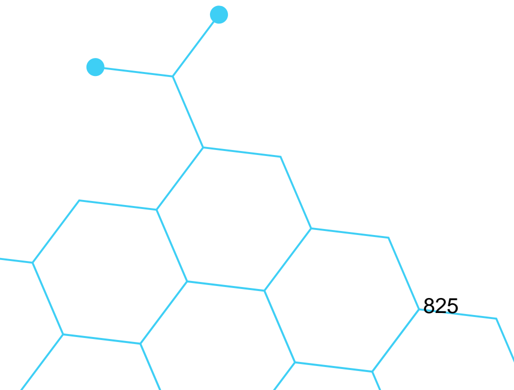
EDUCATION

HEALTH LAW CERTIFICATE

Memphis Law students can take advantage of the robust healthcare industry in the Mid-South through the School of Law's Health Law certificate program. This certificate program offers a wide selection of courses intended to give students specialized knowledge of the healthcare field, as well as the complex policy areas surrounding the industry.

Certificate Requirements

- 15 Credits, covering the Core Curriculum (Health Law and Administrative Law) and 9 Elective Credits, which must include writing and skills credits
- 25 hours of non-course work in health law
- GPA requirements: 3.0 Minimum for Certificate Classes; 2.0 Minimum Overall Classes; 2.5 Overall in Foundational Courses (Torts I and II, and Constitutional Law)



FAST TRACK MPH

Memphis Law has partnered with the School of Public Health at the University of Memphis to offer a unique opportunity for attorneys to obtain a Master of Public Health degree in 12-months. Termed the "Fast Track MPH," the MPH is earned in an intensive full-time format in which attorneys attend classes during the evening and online for three consecutive semesters (fall, spring, summer). As part of their coursework, students also complete a 240-hour community-based practicum.

The 42-credit program is designed to allow attorneys to extend their advocacy skills to a population health perspective and gain substantive knowledge in applying law and policy to public health problems. Special expertise will be gained in urban public health issues, health systems, public health policy and environmental health advocacy. The program prepares attorneys for leadership in addressing public health policy issues related to access to healthcare, health reform, environmental justice and social concerns that affect health equity.

FACULTY

Amy Campbell

Director, Institute of Health Law & Policy; Associate Professor of Law

Professor Campbell leads the Institute. She was formerly Associate Professor of Bioethics and Humanities at SUNY Upstate Medical University, with a background in teaching health law and ethics to medical, nursing and graduate basic science students, and health policy to an interdisciplinary mix of professional students. In 2014, she was selected as one of ten inaugural "Future of Public Health Law Education" Faculty Fellows by a Robert Wood Johnson Foundation-funded program. She received her JD from Yale Law School, her Masters in Bioethics from the University of Pennsylvania and her BA from the University of Notre Dame.

Alena M. Allen

Associate Professor of Law

Professor Allen joined the School of Law faculty in August 2010. Prior to joining the Memphis Law faculty, Professor Allen worked as an associate in the food and drug group at Arnold & Porter. Additionally, she has served on the selection committee for the Food and Drug Law Institute's Thomas Austern Memorial Writing Competition. Professor Allen received her juris doctorate degree from Yale Law School and her Bachelor of Arts degree in Psychology from Loyola University New Orleans.

Janet Goode

Visiting Assistant Professor of Law; Director, Memphis CHiLD Medical Legal Partnership

Before joining Memphis Law, Professor Goode served as the first Executive Director of Christian Legal Aid of Pittsburgh (CLA), a large pro bono community clinic, where she significantly shaped CLA's direction and clinic structure, represented clients, and managed a network of volunteer attorneys and law students. She was the recipient of the 2013 Lorraine M. Bittner Public Interest Attorney Award and the 2014 Pennsylvania Bar Association Civil Legal Aid Attorney Award for her work with CLA.

ADJUNCT FACULTY

Tony Alexander, JD – Of Counsel, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC (teaches Food & Drug Law)

John D. Fabian, JD – Asst. U.S. Attorney (teaches White Collar Crime with health focus)

McGehee Marsh, JD – Senior Counsel, St. Jude Children's Research Hospital (health-focused Externship Seminar)

E. Haavi Morreim, JD, PhD – Professor, Univ. of Tennessee Health Science Center (teaches Bioethics & the Law)

EXTERNSHIP SUPERVISORS

Steve Barlow – Memphis City Attorney's Office

Martha Birkhead – Regional One Health

Laurie Christensen – Baptist Memorial Health Care Corporation

McGehee Marsh – St. Jude Children's Research Hospital

Waid Ray – Baptist Memorial Health Care Corporation

Carla Robbins – Methodist Le Bonheur Healthcare

Janet Shipman – Shelby County Health Department

Laura Sy – Methodist Le Bonheur Healthcare

Monica Wharton – Regional One Health

INSTITUTE FOR HEALTH LAW & POLICY

SERVICE

COMMUNITY

We are striving to make a meaningful difference in the Memphis community for generations to come. Policy and legislative changes in healthcare can help change the way not simply Memphians live, but also how Memphis as a community fosters and protects the health of its members and neighborhoods. The Institute strives to address unmet health law issues of local organizations and communities, host community forums on health law and policy issues, and work with community leaders to proactively address health policy needs.

HEALTHY HOMES PARTNERSHIP

The Healthy Homes Partnership was established through the leadership of the Institute of Health Law & Policy and Le Bonheur Children's Hospital, and now includes City, County, health system, business, law and community development leaders. It was formed to find comprehensive solutions to eliminate environmental and safety hazards in housing, to promote collaboration between housing and legal services agencies and healthcare providers, and to advance best practices and strategies, including policy and regulatory changes to increase the availability of and access to healthy housing for all Memphis-area residents. Its mission is to ensure "every child in Memphis grows up in a healthy home."

EXPERIENTIAL LEARNING OPPORTUNITIES

Through the strong relationships the Institute has made in the Memphis healthcare community, a number of experiential learning opportunities are available to students.

Externships

Baptist Memorial Health Care Corporation
Methodist Le Bonheur Healthcare
Regional One Health
St. Jude Children's Research Hospital
Shelby County Health Department
Memphis City Attorney's Office - Anti-Blight Division

Legal Clinic

Elder Law Health Clinic, Memphis CHiLD (a Medical-Legal Partnership with Methodist Le Bonheur Healthcare and Memphis Area Legal Services)

MEMPHIS CHILD

Memphis Law, Memphis Area Legal Services (MALS) and Le Bonheur Children's Hospital have collaborated to create the Memphis CHiLD (Children's Health Law Directive) Medical-Legal Partnership, the first medical-legal partnership of its kind in the region. In addition to a variety of training programs and education, bi-directional partnerships, Memphis CHiLD also consists of an on-site legal clinic located at Le Bonheur Children's Hospital.

IHELP POLICY LAB: ACE INITIATIVE

To manifest the iHelp mission and link our service and educational goals with unique possibilities for scholarship, the School of Law has established a policy lab within the Institute for Health Law & Policy. The policy lab's work will build on local and statewide momentum around addressing adversity in the early childhood years and building family support, and will partner in efforts to drive system-level health policy change in the Mid-South community and across Tennessee for the specific purpose of ACE (Adverse Childhood Experiences), mitigation and recovery. The iHelp Policy Lab: ACE Initiative, with generous support of the ACE Awareness Foundation, will be a resource for policy research, policy advising and drafting of new policies to create a nationally-regarded trauma-informed system, building on the foundation's goals to inform the community about the role of emotional trauma in mental, physical and behavioral health, and implement models that provide preventable and sustainable solutions to reducing toxic stress in family systems.

The policy lab will work on items which include, for example, substantial research into insurance reimbursement policies to help craft "bundled" payment models that incorporate within prevention and wellness services promising culturally-sensitive family and parental-support practices and programs. It will also serve as policy advisor and support to the Building Strong Brains: Tennessee ACEs Initiative.

Through the policy lab, the Institute for Health Law & Policy hopes to advance the law school's role in the community and the growing influence of public/private initiatives to create an academic/public/private approach to benefit our community's health.

The University of Memphis, a Tennessee Board of Regents institution, is an Equal Opportunity/Affirmative Action University. It is committed to education of a non-racially identifiable student body. UOM051-FY1617/5C Mercury Printing

Workshop on Private International Law in Context: Russian-American Bilateral Trade and Cultural Exchange: Prospects and Challenges

Organizers:
Dr. Beck Niyazov, Russian Cultural Center, Memphis
Dr. Boris N. Mamlyuk, University of Memphis, Cecil C. Humphreys School of Law

January 13, 2013

Location: Russian Cultural Center, Memphis
509 S. Main St., next door to Bluff City Coffee Shop
Memphis, TN 38103

January 14, 2013

Location: University of Memphis, Cecil C. Humphreys School of Law
1 N. Front Street
Memphis, TN 38103

All participants must sign in with any government issued form of ID at the front security desk.

9:30 – 11:00 Roundtable 1 (Scenic Reading Room, 4th Floor):

American-Russian Business, Cultural and Educational Exchange: Current Challenges for Cooperation

Case Studies

Importance of Institutional Linkages

11:00 – 11:30 Group Photo (In front of Law School)

Meet in Main Floor Vestibule by the Security Desk

11:30 – 12:30 Buffet Lunch (Scenic Reading Room, 4th Floor) and Music Performance

12:30 – 13:00 Break

13:00 – 14:30 Roundtable 2 (Scenic Reading Room, 4th Floor):

Legal Barriers to Further Economic Cooperation Following Russia's Accession to the WTO

- Effect of Russia's WTO Accession for American Firms
- Repeal of Jackson-Vanick
- U.S. Magnitsky Act

14:30 – 15:30 Tour of Law School and Greater Memphis Chamber

17:30 – 19:00 Dinner (Rendezvous BBQ)

CECIL C. HUMPHREYS SCHOOL OF LAW
2016-2017 ACADEMIC CALENDAR

FALL 2016

First-Year Orientation	Sunday-Friday, August 7-12
Classes Start	Monday, August 15
Labor Day Holiday	Monday, September 5
Classes End	Monday, November 21
Reading Days	Tuesday & Wednesday, November 22-23
Thanksgiving Holiday	Thursday & Friday, November 24-25
Exams Begin	Monday, November 28
Exams End	Friday, December 9
Graduation	Sunday, December 11

SPRING 2017

Classes Start	Wednesday, January 11
MLK Holiday	Monday, January 16
Spring Break	March 6-10
Monday class schedule/Classes End	Wednesday, April 26
Reading Days	Thursday & Friday, April 27-28
Exams Begin	Monday, May 1
Exams End	Friday, May 12
Graduation	Saturday, May 13

SUMMER 2017

Classes Start	Monday, May 22
Memorial Day	Monday, May 29
July 4 Holiday	Monday & Tuesday, July 3-4
Monday class schedule/Classes End	Wednesday, July 12
Reading Day	Thursday, July 13
Exams Begin	Friday, July 14
Exams End	Tuesday, July 18
Graduation	Saturday, August 6

Cecil C. Humphreys School of Law
2017-2018 Academic Calendar

Fall 2017

First-Year Orientation	Monday-Friday, August 7-11
Classes Start	Monday, August 14
Labor Day Holiday	Monday, September 4
Classes End	Monday, November 20
Reading Days	Tuesday & Wednesday, November 21-22
Thanksgiving Holiday	Thursday & Friday, November 23-24
Exams Begin	Monday, November 27
Exams End	Friday, December 8
Graduation	Sunday, December 17

Spring 2018

Classes Start	Wednesday, January 10
MLK Holiday	Monday, January 15
Spring Break	Monday-Friday, March 5-9
Monday class schedule/Classes End	Wednesday, April 25
Reading Days	Thursday & Friday, April 26-27
Exams Begin	Monday, April 30
Exams End	Friday, May 11
Graduation	Saturday, May 12

Summer 2018

Classes Start	Monday, May 21
Memorial Day	Monday, May 28
July 4 Holiday	Wednesday, July 4
Wednesday class schedule/Classes End	Tuesday, July 10
Reading Day	Wednesday, July 11
Exams Begin	Thursday, July 12
Exams End	Monday, July 16

FIRST ASSIGNMENTS – SPRING 2017

Note: This list is arranged alphabetically by course name. The list may be updated before the first day of classes. If so, a notation of "UPDATED" along with the date will be made next to the link. If your course is not listed, this does not necessarily mean you do not have an assignment. Please check your *memphis.edu* email account, as professors may email you directly or via their assist.

ADMIRALTY LAW
Professor Mulrooney

- Read pp. 1-4, 31-60
- Print and read Lozman v. City of Riviera Beach, Florida, 133 S. Ct. 735 (2013).

ADVANCED BRIEF-WRITING SEMINAR
Professor Kritchevsky

- Sign up for the course on TWEN. Read the tentative class policies. A syllabus will be posted before the first class.
- The assignment for the first class is to watch Bryan Garner's interview with at least one Supreme Court Justice. (Go to www.lawprose.org, go to the tab Bryan Garner and follow the link to Interviews and then to Supreme Court Interviews).

ANTITRUST
Professor Newman
Read the first numbered assignment in the "Reading Assignments" list posted to the course TWEN site.

Updated BAR EXAM PREPARATION COURSE
Professor Kritchevsky
Sign up for the course on TWEN (course will be up January 2).

- You should have received information from Barbri about signing onto the Matrix course platform. (You may have been enrolled twice; what's key is that you can access it now). Check your spam and clutter folders if you haven't received log on information. If you still don't have it, contact Barbri at IPLearningTeam@barbri.com.
- Complete the Pre Test on Matrix before the first class. The Pre Test is a 100 question simulated Multistate Bar Exam. You are not expected to study before taking it. The point is to give you some sense of what the bar exam will require and give you a benchmark before you begin preparation.
- Course materials will be distributed after the first class.
- I will post a Syllabus and Updated Class Policies on TWEN before the first class.

CIVIL PROCEDURE II (11)
Professor Bock
Please check TWEN for the syllabus and the first week's assignment, which will be posted by 12 noon on Friday, January 6.

CIVIL PROCEDURE II (12)
Professor K. Schaffzin
Register for Prof. Schaffzin's Lexis Webcourse to read the syllabus and reading assignments

FIRST ASSIGNMENTS – SPRING 2017

COMMERCIAL LAW

Professor Smith

After January 1, 2017, please register for the course on TWEN. Please print and read (1) Syllabus (in "Syllabus"), (2) Learning Objectives (in "Syllabus"), and (3) Assignments (in "Syllabus"). I look forward to meeting with you.

CONSTITUTIONAL LAW

Professor Kiel

Assignments will be posted on the course TWEN page.

CONTRACTS II

Professor Newman

Read the first numbered assignment in the "Reading Assignments" list posted to the course TWEN site.

COPYRIGHT

Professor Jones

Please register for the course site on TWEN. Course information and a syllabus are available on the site. The syllabus contains the assignment for Thursday, January 12th as well as the first day of class.

For the first class on Wednesday, January 11th: In the casebook (Julie E. Cohen, et al., *Copyright in a Global Information Economy* (4th ed. 2015)) read Chapter 1, pp. 3 through 20 (top); 23-34 (top); skim pp. 35 through 40 (top). Please see the Course Information on TWEN for information about the Casebook and Supplement.

CORPORATE GOVERNANCE AND COMPLIANCE

Professor Goldsmith

Read pp. page 1-26, The Role of Shareholders in text *Law of Governance, Risk Management & Compliance*

CRIMINAL LAW (11)

Professor Mulroy

- Register on TWEN. Download and review the Syllabus/Course Ground Rules, and the Sample Case Brief. Sign up for TopHat. (You will soon be receiving an email from the TopHat company with instructions on how to sign up.)
- Prepare the following assignment (Introduction from the Syllabus): Casebook pages 4-6, notes 3 through 7; page 96 n.4; TCA Section 39-11-101 and Section 39-11-102. (The TCA Handout is under Course Materials on TWEN).

CRIMINAL LAW (12)

Dean Romantz

Please read Dressler (7th ed.) pp. 1 – 14; and pp. 93 - 96.

FIRST ASSIGNMENTS – SPRING 2017

CRIMINAL PROCEDURE II

Judge Ward

Register on TWEN. Download and review Syllabus.

DIVORCE LAW PRACTICUM

Professor Pounders

For the first class:

- Read and brief, in preparation for their first class with Professor Pounders, the following Supreme Court case: Elonis v. United States 135 S. Ct. 2001(2015)

ELDER LAW CLINIC

Professor Harkness

Elder Law Clinic – First Orientation Class – Thursday, Jan. 12th, 3:00-4:20 p.m. Clinic Conference Room

- Read Chaps. 1 & 2 , Rosenblatt, WORKING WITH AGING CLIENTS

Resources for discussion:

- NELF Rules & Regulations for Certification of Elder Law Attorneys (access under Supplemental Materials on TWEN)
- Elder Law Clinic Manual (access under Course materials on TWEN – hard copy will be provided to you at first class meeting)

EMPLOYEE BENEFITS LAW

Professor Kiesewetter

In textbook, *Pension and Employee Benefit Law* (6th edition) – Part 1, Chapter 1, pages 1-30

EVIDENCE

Professor K. Schaffzin

Register for Prof. Schaffzin's Lexis Webcourse to read the syllabus and reading assignments

FAIR EMPLOYMENT PRACTICE

Professor Lidge

The attendance policy will be in effect the first day of class. We will have a makeup class at noon on Thursday, January 19. Attendance will be taken during make-up classes.

Assignment for Wednesday, January 11:

- Read edited version of Brockmeyer, 335 N.W. 2d 834 (Wis. 1983) (in photocopied supplement); Title VII, §§ 701, 702, 703(e)(j), 704 in CB Appendix.

Assignment for Thursday, January 12:

- Read CB 17-25, 31-44.

FIRST ASSIGNMENTS – SPRING 2017

FEDERAL COURTS
Professor Frank
Reading: Fink Text Chapter 1
Assignment: Assignment 1 Problems (available on TWEN on or before 1/2/17)

IMMIGRATION LAW
Judge Pazar
Overview of Immigration Law; Immigration and the Constitution; Sources of the Federal immigration Power; Limits to the Federal Immigration Power; Foundational Cases.
Read: Overview, 1-12; Chapter 2, 97-118 (middle). Emphasis: *Chinese Exclusion Case; Ehiu.*

LEGAL DRAFTING: CONTRACTS
Professor B. Smith
No assignment.

LEGAL ETHICS SEMINAR
Professor Lidge
Attendance is mandatory for all classes. Please let Professor Lidge know ahead of time if illness or other serious reasons prevent you from attending a class. Laptops are banned in the seminar.
Assignment for Wednesday, January 11

- Read Preamble to ABA Model Rules §§ 1-9 and Model Rule 2.1.
- Read the following three readings. They are available from Linda Hayes, Room 347.
    - Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 Cath. U.L. Rev. 319 (1987) – WESTLAW CITE 36 CATHULREV 319.
    - Monroe H. Freedman, *Legal Ethics and the Suffering Client*, 36 Cath. U.L. Rev. 331 (1987) – WESTLAW CITE 36 CATHULREV 331.
    - The Parable of the Sadhu
    - Have thought about some possible ideas for seminar paper topics

LEGAL METHODS II (Both sections)
Professor Wilson
The Syllabus will be posted on the main Legal Methods TWEN course. Please review the Syllabus for the first assignment. The Syllabus also contains details on the schedule of lecture and section meetings for the spring semester. Please be especially attentive to the schedule for the first two weeks of class. Finally, please review the Section Schedule, also posted on TWEN, for details on when and where your section meetings will take place.

NEGOTIATION AND MEDIATION
Professors Wade (11) and Schwarz (12)
Students in both sections of the class are assigned to read the small, easy to read, but very important book “Getting to Yes” in advance of the first class on January 25, 2016.

First Assignments – Spring 2017

PATENT LAW
Professor Bock
Please register for the Patent Law TWEN site. The syllabus and first assignment will be posted by 12 noon on Friday, January 6.

PRODUCT LIABILITY LAW
Professor Bearman
In the text, read Pp. 15-23.

PROFESSIONAL RESPONSIBILITY
Professor Wilson
The Syllabus will be posted on the "Professional Responsibility – Wilson" TWEN course. Please read the Syllabus and complete the first assignment in the Schedule of Assignments included with the Syllabus.

PROPERTY II (12)
Professor Kiel
Assignments will be posted on the course TWEN page.

REALTY TRANSACTIONS
Professor Humphreys
The first assignment is contained in an email from Ms. Cheryl Edwards. If you registered late for the course, contact Ms. Edwards for the information.

REMEDIES
Professor Smith
After January 1, 2017, please register for the course on TWEN. Please print and read (1) Syllabus (in "Syllabus"), (2) Assignments (in "Syllabus"), and (3) any problems or readings to which the assignments refer (in "Course Materials"). I look forward to meeting with you.

TORTS II (11 & 12)
Professor McClurg

- Friday, Jan. 13: Casebook 359-66; Supp. Mat. p. 1-2.
- Pick up the Supplemental Materials for Torts II from Ms. Hayes' work station.
- Note that both sections will meet together this semester at the same time in Wade Auditorium.

TRADEMARKS LAW
Professor Alexander
For the 1st day of class, read chapter 1 (pages 1-49) of the textbook, with emphasis on the following cases: ***International News Service*** v. ***The Associated Press*** (pages 1-13), ***Dastar Corp. v. Twentieth Century Fox Film Corp.*** (pages 18-26) and ***The Trademark Cases*** (pages 35-41).

TRIAL ADVOCACY (11)

Professor Frank

Reading: Mauet, Ch. 1; Ch. 5 §§ 5.1 through 5.8, 5.16 and 5.17

Assignment: Imagine that you have been "accused" of enrolling in trial advocacy to sabotage a fellow student. Give a brief opening statement that explains the TRUE reasons for your enrollment in this course (3 minutes max). Include in your opening a brief synopsis of witnesses that will testify on your behalf, and what they will likely say and any other evidence that will be presented on our behalf [for now, don't worry about proper form/contents of opening statements, we will address this later in the course]. Also, please enroll in our TWEN course.

TRIAL ADVOACY (13)

Judge Craft

You will need to have read Chapter One of *Modern Trial Advocacy* (Lubet) for the first class, "Trial Basics." We will discuss material in that chapter, the reason for certain trial techniques, and demonstrate how to move around the courtroom and use it to your advantage as a battle arena.

TRUST LAW

Professor McDaniel

Bogert text - Chapters 1 & 2. Uniform trust code TCA 35-15-401 thru 408 & 601.

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ANY - ANY
PRINT ISBN: YES PRINT NOTES: YES

INCLUDE ONLY NON-RETURNABLE TITLES: NO
12-13-2016 12:00PM PAGE 1

COURSE		INSTRUCTOR	SECTION NOTE			CLASS START DATE			
AUTHOR	TITLE	EDITION NOTE	ED	CY	ISBN	PUB	USE	CTN PER	NON-RTN
LAW 0121 011		**NEWMAN**				01-11-2017			
FARNSWORTH	CONTRACTS (CASEBOOK)		8TH	2013	9781609300975	FOUND	REQ		NO
LAW 0121 012		**MAMLYUK**				01-11-2017			
KNAPP	PROBLEMS IN CONTRACT LAW (CASEBOOK)		7TH	2012	9780735598225	ASPEN	REQ		NO
KNAPP	RULES OF CONTRACT LAW 2015-2016 STATUTORY SUPPLEMENT			2015	9781454840596	ASPEN	REC		NO
LAW 0122 011		**MCCLURG**				01-11-2017			
GLANNON	LAW OF TORTS: EXAMPLES & EXPLANATIONS		5TH	2015	9781454850113	ASPEN	REC		NO
MCCLURG	1L OF A RIDE: WELL-TRAVELED PROF ROADMAP TO SUCCESS ETC		2ND	2013	9780314283054	WESTG	REC		NO
SCHWARTZ	TORTS, CASES & MATERIALS		13TH	2015	9781609304072	WESTG	REQ		NO

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LAW 0122 012		**MCCLURG**				01-11-2017			
GLANNON	LAW OF TORTS: EXAMPLES & EXPLANATIONS		5TH	2015	9781454850113	ASPEN	REC		NO
MCCLURG	1L OF A RIDE: WELL-TRAVELED PROF ROADMAP TO SUCCESS ETC		2ND	2013	9780314283054	WESTG	REC		NO
SCHWARTZ	TORTS, CASES & MATERIALS		13TH	2015	9781609304072	WESTG	REQ		NO
LAW 0123 011		**WILSON**				01-11-2017			
GARNER	REDBOOK: MANUAL ON LEGAL STYLE		3RD	2013	9780314289018	WEST	REC		NO
HARVARD LAW REVIEW	BLUEBOOK: UNIFORM SYSTEM OF CITATION		20TH	2015	9780692400197	HARLW	REQ		NO
NEUMANN	LEGAL REASONING & LEGAL WRITING		7TH	2013	9781454826972	ASPEN	REQ		NO
ROMANTZ	LEGAL ANALYSIS		2ND	2009	9781594602795	CACAD	REQ		NO
SLOAN	BASIC LEGAL RESEARCH		6TH	2016	9781454850403	ASPEN	REQ		NO

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LAW 0123 012	**WILSON**					01-11-2017			
GARNER	REDBOOK: MANUAL ON LEGAL STYLE		3RD	2013	9780314289018	WEST	REC		NO
HARVARD LAW REVIEW	BLUEBOOK: UNIFORM SYSTEM OF CITATION		20TH	2015	9780692400197	HARL W	REQ		NO
JR.	LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE		7TH		9781454836001	ASLA W	REQ		NO
NEUMANN	LEGAL REASONING & LEGAL WRITING		7TH	2013	9781454826972	ASPEN	REQ		NO
ROMANTZ	LEGAL ANALYSIS		2ND	2009	9781594602795	CACA D	REQ		NO
SLOAN	BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES		6TH		9781454860907	ASLA W	REQ		NO
SLOAN	BASIC LEGAL RESEARCH		6TH	2016	9781454850403	ASPEN	REQ		NO
LAW 0124 011	**BOCK**					01-11-2017			
FRIEDENTHAL	CIVIL PROCEDURE ('16-'17) SUPPLEMENT			2016	9781634607582	WEST G	REQ		NO
FRIEDENTHAL	CIVIL PROCEDURE (CASEBOOK)		11TH	2013	9780314280169	WEST	REQ		NO

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LAW 0124 012		**SCHAFFZIN**				01-11-2017			
GLANNON	CIVIL PROCEDUR: COURSEBOOK (W/BIND-IN ACCESS CODE)		2ND	2014	9781454851332	ASPEN	REQ		NO
GLANNON	CIVIL PROCEDURE: RULES, STATUTES & OTHER MATERIALS			2016	9781454875338	ASPEN	REQ		NO
LAW 0125 011		**BRASHIER**				01-11-2017			
DUKEMINIER	PROPERTY (CASEBOOK) (W/ACCESS CODE)		8TH	2014	9781454851363	ASPEN	REQ		NO
LAW 0125 012		**KIEL**				01-11-2017			
DUKEMINIER	PROPERTY (CASEBOOK) (W/ACCESS CODE)		8TH	2014	9781454851363	ASPEN	REQ		NO
SPRANKLING	UNDERSTANDING PROPERTY LAW		3RD	2012	9781422498736	CACAD	REC		NO
LAW 0126 011		**MULROY**				01-11-2017			
DRESSLER	CRIMINAL LAW (CASES & MATERIALS)		7TH	2016	9781628102055	WESTG	REQ		NO

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LAW 0126 012		**ROMANTZ**				01-11-2017			
DRESSLER	CRIMINAL LAW (CASES & MATERIALS)		7TH	2016	9781628102055	WEST G	REQ		NO
LAW 0212 011		**KIEL**				01-11-2017			
WEAVER	CONSTITUTIO NAL LAW (CASEBOOK)		3RD	2013	9781454830535	ASPEN	REQ		NO
LAW 0221 011		**SCHAFFZIN**				01-11-2017			
GOODE	COURTROOM EVIDENCE HANDBOOK 2015-2016			2015	9781634593557	WEST G	REC		NO
MERRITT	LEARNING EVIDENCE (CASEBOOK)		3RD	2015	9781628101003	WEST G	REQ		NO
LAW 0222 011		**BLACK**				01-11-2017			
BROOK	PROBLEMS & CASES ON SECURED TRANSACTION S		3RD	2016	9781454870609	WKLB	REQ		NO
MANN	COMPREHENSI VE COMMERCIAL LAW: 2016 STAT SUPPL			2016	9781454875383	ASPEN	REQ		NO

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LAW 0224 011		**WILSON**					01-11-2017			
LERMANSCHRAGGUPTA	BUNDLE: ETHICAL PROBLEMS IN THE PRACTICE OF LAW: CONCISE, 3E FOR TWO-CREDIT COURSE + ETHICAL PROBLEMS IN THE PRACTICE OF LAW: STATUTES, STANDARDS, & QUESTIONS STATUTORY SUPPLEMENT 2017-2018		3RD	2017	9781454886426		ASPEN	REQ		NO
LAW 0305 011		**POUNDERS**	STUDENTS ARE REQUIRED TO HAVE A COPY OF THE TN RULES OF CIVIL PROCEDURE.				01-11-2017			
RICHARDS	RICHARDS ON TENNESSEE FAMILY LAW		3RD		9781422428696		LEXIS	REQ		NO
LAW 0308 011		**HARVEY**					01-11-2017			
DYCUS	NATIONAL SECURITY LAW		6TH	2016	9781454868323		ASPEA	REQ		NO
LAW 0312 011		**MULROONEY**					01-11-2017			
MARAIST	CASES & MATERIALS ON MARITIME LAW (CASEBOOK)		2ND	2009	9780314199621		WEST	REQ		NO

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LAW 0317 011		**WADE**				01-11-2017			
FISHER	GETTING TO YES		3RD	2011	9780143118756	VP	REQ		NO
LAW 0317 012		**SCHWARZ**				01-11-2017			
FISHER	GETTING TO YES		3RD	2011	9780143118756	VP	REQ		NO
LAW 0318 011		**NEWMAN**				01-11-2017			
SULLIVAN	ANTITRUST LAW ETC (CASEBOOK)		6TH	2009	9781422472156	LEXIS	REQ		NO
LAW 0325 011		**JONES**				01-11-2017			
COHEN LOREN OKEDIJI O'ROURKE	COPYRIGHT IN GLOBAL INFORMATION ECONOMY BUNDLE		4TH	2015	9781454877073	ASPEN	REQ		NO
LAW 0326 011		**WARD**				01-11-2017			
MARK WARD	TENNESSEE CRIMINAL TRIAL PRACTICE			2017	9780314843098	WEST	REQ		NO
LAW 0329 011		**BLACK**				01-11-2017			
CCH	FEDERAL ESTATE & GIFT TAXES			2015	9780808038269	CCH	REQ		NO

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LAW 0330 011		**LIDGE**	SEE INSTRUCTOR FOR COURSE PACKET			01-11-2017				
FRIEDMAN	LAW OF EMPLOYMENT DISCRIMINATION (CASEBOOK)		10TH	2015	9781628101850		FOUND	REQ		NO
LIDGE	FEP COURSE PACKET			2017			UMCPY	REQ		NO
LAW 0333 011		**FRANK**				01-11-2017				
FINK	FEDERAL COURTS IN 21ST CENTURY: CASES & MATERIALS		4TH	2013	9780769865089		CACAD	REQ		NO
LAW 0334 011		**KRATZKE**	SEE INSTRUCTOR			01-11-2017				
***	No Store Supplied Material									NO
LAW 0337 011		**PAZAR**				01-11-2017				
LEGOMSKY	IMMIGRATION & REFUGEE LAW & POLICY (CASEBOOK)		6TH	2015	9781609304249		FOUND	REQ		NO
LAW 0357 011		**BEARMAN**				01-11-2017				
FISCHER	PRODUCTS LIABILITY (CASEBOOK)	(OE-11/13)	4TH	2006	9780314161239		WEST	REQ		NO

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AUTHOR	TITLE	EDITION NOTE	ED	CY	ISBN		PUB	USE	CTN PER	NON-RTN
LAW 0358 011		**HUMPHREYS**				01-11-2017				
NELSON	LAND TRANSACTION S & FINANCE	(OE-01/16)	4TH	2004	9780314150431		WEST	REQ		NO
LAW 0366 011		**ALEXANDER**				01-11-2017				
LUNNEY	CASES & MATERIALS ON TRADEMARK LAW		2ND	2016	9780314290007		WEST G	REQ		NO
LAW 0368 011		**SMITH**				01-11-2017				
SHOBEN	REMEDIES (CASEBOOK)		6TH	2016	9781634602631		FOUN D	REQ		NO
LAW 0371 011		**KIESEWETTER**				01-11-2017				
LANGBEIN	PENSION & EMPLOYEE BENEFIT LAW		6TH	2015	9781628100211		FOUN D	REQ		NO
LAW 0374 011		**BRASHIER**				01-11-2017				
KOHN	ELDER LAW: PRACTICE, POLICY, AND PROBLEMS				9781454843214		ASLA W	REQ		NO
KOHN	ELDER LAW			2014	9781454837817		ASPEN	REQ		NO

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AUTHOR	TITLE	EDITION NOTE	ED	CY	ISBN	PUB	USE	CTN PER	NON-RTN
LAW 0377 011		**MCGOWN**				01-11-2017			
NITA	FEDERAL RULES OF CIVIL PROCEDURE			2016	9781601564894	LEXIS	REQ		NO
THOMSON	SKILLS & VALUES: DISCOVERY PRACTICE	(OE-04/13)		2010	9781422429846	MATTH	REQ		NO
LAW 0385 011		**KRATZKE**				01-11-2017			
PERONI	INTERNATIONA L INCOME TAXATION (2016-2017)				9780808044185	CCH	REQ		NO
SCHADEWALD	PRACTICAL GUIDE TO U. S. TAXATION OF INTERNATIONA L TRANSACTION S (10TH EDITION)		10TH	2015	9780808040842	CCH	REQ		NO
LAW 0390 011		**BOCK**	"GET THE SIXTH (6TH) EDITION (PREVIOUSLY PUBLISHED BY LEXISNEXIS). DO NOT GET THE 7TH EDITION."			01-11-2017			
MERGES	PATENT LAW & POLICY: CASES & MATERIALS		6TH	2013	9780769857688	CACA D	REQ		NO
LAW 0392 011		**MCDANIEL**				01-11-2017			
BOGERT	LAW OF TRUSTS (CASES & TEXT)		9TH	2012	9781609300982	FOUN D	REQ		NO

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AUTHOR	**TITLE**	**EDITION NOTE**	**ED**	**CY**	**ISBN**	**PUB**	**USE**	**CTN PER**	**NON-RTN**
LAW 0400 011		**ALLEN**				01-11-2017			
***	No text required								NO
LAW 0404 011		**MAMLYUK**				01-11-2017			
DAMROSCH	INTERNATIONAL LAW (BASIC DOC SUPPL)	(OE-05/14)	5TH	2009	9780314191298	WEST	REQ		NO
DAMROSCH	INTERNATIONAL LAW (CASEBOOK)		6TH	2014	9780314286437	WEST G	REQ		NO
LAW 0447 011		**LIDGE**	STUDENTS ARE REQUIRED TO HAVE ANY PR RULES BOOK. THEY SHOULD HAVE FROM ANOTHER COURSE.			01-11-2017			
***	No Store Supplied Material								NO
LAW 0453 011		**KRITCHEVSKY**				01-11-2017			
GUBERMAN	POINT MADE		2ND	2014	9780199943852	OUP	REQ		NO
SCALIA	MAKING YOUR CASE			2008	9780314184719	WEST	REQ		NO
LAW 0501 011		**ROMANTZ**				01-11-2017			
***	No text required								NO
LAW 0502 011		**SHIELDS**				01-11-2017			
KOVACH	MEDIATION		3RD	2004	9780314150226	WEST	REQ		NO

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LAW 0504 011		**ZAWISZA**	SAME BOOKS USED IN COURSE 0509			01-11-2017			
***	No text required								NO
LAW 0505 011		**HARKNESS**	SAME BOOKS USED IN COURSE 0510			01-11-2017			
***	No text required								NO
LAW 0509 011		**ZAWISZA**				01-11-2017			
MICHE	TENNESSEE COMPILATION OF SELECTED LAWS ON CHILDREN, YOUTH & FAMILIES			2016	9781522118237	LEXIS	REQ		NO
VENTRELL	TRIAL ADVOCACY FOR THE CHILD WELFARE LAWYER			2011	9781601561497	NIFTA	REQ		NO
LAW 0510 011		**HARKNESS**				01-11-2017			
MOYE	ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY			2005	9781590314975	AMER B	REQ		NO
ROSENBLATT	WORKING WITH AGING CLIENTS			2015	9781634251617	AMER B	REQ		NO

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LAW 0513 011		**LAKEY**				01-11-2017			
BRIDGES	WRITING FOR LITIGATION			2011	9781454802730	ASPEN	REQ		NO
GARNER	LEGAL WRITING IN PLAIN ENGLISH		2ND	2013	9780226283937	UCHIC	REQ		NO
LAW 0516 011		**FRANK**				01-11-2017			
MAUET	MATERIALS IN TRIAL ADVOCACY (W/CD)		7TH	2011	9780735510449	ASPEN	REQ		NO
MAUET	TRIAL TECHNIQUES & TRIALS (W/WEB 12MTH ACCESS PASS CRD)		9TH	2013	9781454822332	ASPEN	REQ		NO
MAUET	TRIAL TECHNIQUES AND TRIALS		9TH		9781454838609	ASLAW	REQ		NO
LAW 0516 012		**LAURENZI**				01-11-2017			
LUBET	MODERN TRIAL ADVOCACY: LAW SCHOOL ED		3RD	2013	9781601563323	NIFTA	REQ		NO
MAUET	MATERIALS IN TRIAL ADVOCACY (W/CD)		7TH	2011	9780735510449	ASPEN	REQ		NO

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LAW 0516 013		**CRAFT**	STUDENTS ARE REQUIRED TO BRING THE FEDERAL RULES OF EVIDENCE TO CLASS			01-11-2017			
LUBET	MODERN TRIAL ADVOCACY: ANALYSIS & PRACTICE (LAW SCHOOL ED)		4TH		9781601565730	NIFTA	REQ		NO
MAUET	MATERIALS IN TRIAL ADVOCACY (W/CD)		7TH	2011	9780735510449	ASPEN	REQ		NO
LAW 0516 014		**NICHOLS**	STUDENTS ARE REQUIRED TO BRING A COPY OF THE FEDERAL RULES OF EVIDENCE TO CLASS			01-11-2017			
LUBET	MODERN TRIAL ADVOCACY: LAW SCHOOL ED		3RD	2013	9781601563323	NIFTA	REQ		NO
MAUET	MATERIALS IN TRIAL ADVOCACY (W/CD)		7TH	2011	9780735510449	ASPEN	REQ		NO
LAW 0523 011		**KRITCHEVSKY**				01-11-2017			
***	No text required								NO
LAW 0523 012		**KRITCHEVSKY**				01-11-2017			
***	No text required								NO

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LAW 0524 011		**KRITCHEVSKY**				01-11-2017			
***	No text required								NO
LAW 0539 011		**SCHAFFZIN**				01-11-2017			
***	No text required								NO
LAW 0545 011		**SCHAFFZIN**				01-11-2017			
***	No text required								NO
LAW 0557 011		**GEIS**				01-11-2017			
***	No text required								NO
LAW 0569 011		**GEIS**				01-11-2017			
AMSTERDAM	TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE DELINQUENCY CASES			2014	9781627226608	ABA	REQ		NO
SIMKINS	WHEN KIDS GET ARRESTED			2009	9780813546391	RUTGR	REQ		NO
LAW 0595 011		**GOODE**				01-11-2017			
TYLER	POVERTY, HEALTH & LAW: READINGS & CASES FOR MEDICAL-LEGAL PARTNERSHIP				9781594607790	CACAD	REQ		NO

PRICES SUBJECT TO CHANGE WITHOUT NOTICE

CONFIDENTIAL INFORMATION OF FOLLETT HIGHER EDUCATION GROUP

BOOK LIST - COURSE ORDER

STORE 1228: UNIVERSITY OF MEMPHIS LAW SCHOOL

TERM: SPRING 2017

COURSE	INSTRUCTOR	SECTION NOTE				CLASS START DATE			
AUTHOR	TITLE	EDITION NOTE	ED	CY	ISBN	PUB	USE	CTN PER	NON-RTN
LAW 0597 011	**SMITH**					01-11-2017			
STARK	DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO		2ND		9781454829058	ASLAW	REQ		NO
STARK	DRAFTING CONTRACTS		2ND	2012	9780735594777	ASPEN	REQ		NO
LAW 0598 011	**GOODE**					01-11-2017			
***	No text required								NO
LAW 0599 011	**SCHAFFZIN**					01-11-2017			
***	No text required								NO
LAW 0600 011	**SCHAFFZIN**					01-11-2017			
***	No text required								NO
LAW 0600 012	**SCHAFFZIN**					01-11-2017			
***	No text required								NO
LAW 0600 013	**SCHAFFZIN**					01-11-2017			
***	No text required								NO

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CONFIDENTIAL INFORMATION OF FOLLETT HIGHER EDUCATION GROUP

BOOK LIST - COURSE ORDER

STORE 1228: UNIVERSITY OF MEMPHIS LAW SCHOOL

TERM: SPRING 2017

COURSE		INSTRUCTOR	SECTION NOTE			CLASS START DATE			
AUTHOR	TITLE	EDITION NOTE	ED	CY	ISBN	PUB	USE	CTN PER	NON-RTN
LAW 0700 011		**SMITH**				01-11-2017			
MANN	COMPREHENSIVE COMMERCIAL LAW: 2016 STAT SUPPL			2016	9781454875383	ASPEN	REQ		NO
WHALEY	PROBLEMS & MATERIALS ON COMMERCIAL LAW		11TH	2016	9781454863342	ASPEN	REQ		NO
LAW 0705 011		**CAMPBELL**				01-11-2017			
***	No text required								NO
LAW 0710 011		**SPENCE**				01-11-2017			
REBECCA H. GORDON & THOMAS M. SUSMAN	LOBBYING MANUAL COMPLETE GDE TO FEDERAL LOBBYING LAW & PRACTICE		5TH	2016	9781634254540	ABA	REQ		NO
LAW 0711 011		**MULROY**				01-11-2017			
***	No text required								NO
LAW 0720 011		**GOLDSMITH**				01-11-2017			
MILLER	LAW OF GOVERNANCE, RISK MANAGEMENT & COMPLIANCE			2014	9781454845447	ASPEN	REQ		NO

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CONFIDENTIAL INFORMATION OF FOLLETT HIGHER EDUCATION GROUP

BOOK LIST - COURSE ORDER

STORE 1228: UNIVERSITY OF MEMPHIS LAW SCHOOL

TERM: SPRING 2017

COURSE		INSTRUCTOR	SECTION NOTE				CLASS START DATE			
AUTHOR	TITLE	EDITION NOTE	ED	CY	ISBN		PUB	USE	CTN PER	NON-RTN
LAW 0721 011		KRITCHEVSKY	SEE INSTRUCTOR				01-11-2017			
***	No Store Supplied Material									NO
LAW 0722 011		ALLEN					01-11-2017			
***	No text required									NO
LAW 0811 011		KRITCHEVSKY					01-11-2017			
***	No text required									NO
LAW 0811 012		KRITCHEVSKY					01-11-2017			
***	No text required									NO
LAW 0812 011		KRITCHEVSKY					01-11-2017			
***	No text required									NO
LAW 0813 011		KRITCHEVSKY					01-11-2017			
***	No text required									NO
LAW 0913 011		MCCLURG					01-11-2017			
***	No text required									NO
LAW 0914 011		MCCLURG					01-11-2017			
***	No text required									NO

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CONFIDENTIAL INFORMATION OF FOLLETT HIGHER EDUCATION GROUP

BOOK LIST - COURSE ORDER

STORE 1228: UNIVERSITY OF MEMPHIS LAW SCHOOL

TERM: SPRING 2017

COURSE		INSTRUCTOR	SECTION NOTE				CLASS START DATE			
AUTHOR	TITLE		EDITION NOTE	ED	CY	ISBN	PUB	USE	CTN PER	NON-RTN
LAW 0915 011		**MCCLURG**					01-11-2017			
***	No text required									NO

PRICES SUBJECT TO CHANGE WITHOUT NOTICE

CONFIDENTIAL INFORMATION OF FOLLETT HIGHER EDUCATION GROUP

Spring 2017 Course Schedule
University of Memphis School of Law

#	Name	Section	Hours	Professor	Days	Time	Room	CRN
	1L Required Courses							
121	Contracts II	011	2	Newman	MW	11:00-11:50	244	14220
	Contracts II	012	2	Mamlyuk	MTh	3:00-3:50	226	14221
122	Torts II	011	3	McClurg	T	2:30-3:45	244	14222
					F	1:00-2:15		
	Torts II	012	3	McClurg	T	2:30-3:45	244	14223
					F	1:00-2:15		
123	Legal Methods II	011	2	Wilson	M	1:00-1:50	325	14224
	LM small section	011		Adjunct	TBA	TBA	TBA	
	Legal Methods II	012	2	Wilson	M	10:00-10:50	325	14225
	LM small section	012		Adjunct	TBA	TBA	TBA	
124	Civil Procedure II	011	2	Bock	WF	10:00-10:50	325	14226
	Civil Procedure II	012	2	Schaffzin	MW	1:00-1:50	226	14227
125	Property II	011	3	Brashier	TTh	10:35-11:50	244	14228
	Property II	012	3	Kiel	TF	9:00-10:15	226	14229
126	Criminal Law	011	3	Mulroy	TThF	9:00-9:50	244	14230
	Criminal Law	012	3	Romantz	TTh	1:00-2:15	226	14232
	2L or 3L Required Course							
212	Constitutional Law	011	4	Kiel	TWF	1:00-2:10	325	22359
221	Evidence	011	4	Schaffzin, K.	MW	9:00-10:50	326	14233
224	Professional Responsibility	011	2	Wilson	T	10:00-11:50	325	14243
	Statutory Course Menu							
222	Secured Transactions	011	3	Black	MW	8:00-8:50	325	14237
					Th	8:30-9:20		
330	Fair Employment Practice	011	3	Lidge	MWTh	11:00-11:50	326	14256
334	Taxation of Corps. & Shareholders	011	3	Kratzke	MWTh	11:00-11:50	233	14260
	Practice Foundation Course Menu							
368	Remedies	011	3	Smith, K.	TF	8:00-9:15	325	14278

Spring 2017 Course Schedule
University of Memphis School of Law

Electives

308	National Security Law	011	2	Harvey	MW	5:00-5:50	230	19587
312	Admiralty Law	011	2	Mulrooney	W	6:00-7:50	230	20674
318	Antitrust	011	3	Newman	TTh	2:25-3:40	326	23689
325	Copyright	011	3	Jones	MWTh	11:00-11:50	127	20671
326	Criminal Procedure II	011	2	Ward	M	6:00-7:50	325	25122
329	Estate Planning	011	3	Black	MTh	9:30-10:45	127	14254
333	Federal Courts	011	3	Frank	MTh	9:30-10:45	226	23690
337	Immigration Law	011	3	Pazar	TTh	6:00-7:15	230	14262
357	Products Liability	011	2	Bearman	TTh	5:15-6:05	226	14274
358	Realty Transactions	011	2	Humphreys	F	8:30-10:20	233	14275
366	Trademarks	011	3	Alexander	MW	2:30-3:45	127	20670
371	Employee Benefits	011	3	Kiesewetter	MW	4:30-5:45	233	20675
374	Elder Law	011	3	Brashier	MTh	1:00-2:15	326	14280
385	U.S. Taxation of International Income	011	3	Kratzke	TTh	3:50-5:05	233	20676
390	Patent Law	011	3	Bock	TTh	2:25-3:40	127	22362
392	Trust Law	011	2	McDaniel	Th	4:00-5:50	230	16977
700	Commercial Law	011	4	Smith	TThF	1:00-2:10	127	22875
720	Corporate Governance and Compliance	011	2	Goldsmith, Harry	T	5:15-7:05	127	24524
721	Bar Exam Preparation Course	011	2	Kritchevsky	W	9:00-10:50	226	24548
722	Health Law Survey	011	3	Allen	TF	8:30-9:45	230	24786

Spring 2017 Course Schedule
University of Memphis School of Law

	Course	Section	Credits	Instructor	Days	Time	Room	CRN
	Seminars/Adv. Research&Writing *Permit Required*							
400	Health Law Seminar	011	2	Allen	W	1:00-2:50	206	22364
404	Public International Law Seminar	011	2	Mamlyuk	W	2:30-4:20	233	24525
447	Legal Ethics Seminar	011	2	Lidge	W	2:30-4:20	338	18531
453	Advanced Brief Writing Seminar	011	2	Kritchevsky	W	2:30-4:20	104	19593
	Skills Courses *Permit Required*							
305	Divorce Law Practicum	011	3	Pounders	TW	5:15-6:30	206	22596
317	Negotiation and Mediation	011	2	Wade	M	6:00-7:50	230	18528
		012	2	Schwarz	M	6:00-7:50	230	24513
377	Discovery	011	2	McGown, Gigi	M	6:00-7:50	206	20669
513	Legal Drafting: Litigation	011	2	Lakey	Th	8:00-9:50	233	19592
516	Trial Advocacy[1]							
	Trial Advocacy: Criminal & Civil	011	3	Frank	T	3:50-4:40	230	14289
				Frank	Th	3:50-5:20	310 (SMC)	
	Trial Advocacy: Criminal & Civil	012	3	Laurenzi	Th	5:30 - 8:20	Fed Bldg	14290
	Trial Advocacy: Criminal & Civil	013	3	Craft	Th	5:30 - 8:20	201 Poplar	14291
	Trial Advocacy: Criminal	014	3	Nichols	W	5:30 - 8:20	201 Poplar	22366
597	Legal Drafting: Contracts	011	2	Smith, Bryan	T	8:00-9:50	233	20936
705	Health Policy Practicum	011	3	Campbell	T	1:00-2:50	230	24514
	Clinics[3]							
501	Clinic: Housing Adjudication	011	4	Romantz	T	3:00-4:40	231	22878
502	Clinic: Mediation	011	4	Shields	W	6:00-7:50	231	22367
504	Advanced Clinic: Child/Family	011	2	Zawisza	F	10:30-12:20	Clinic	22630
505	Advanced Clinic: Elder Law	011	2	Harkness	TBA	TBA	Clinic	22631
509	Civil Litigation Clinic: Children & Families	011	4	Zawisza	F	10:30-12:20	Clinic	14287
510	Elder Law Clinic	011	4	Harkness	F	10:30-12:20	Clinic	14288
539	Clinic: Neighborhood Preservation	011	4	Schaffzin, D	F	10:30-12:20	Clinic	23769

Spring 2017 Course Schedule
University of Memphis School of Law

	Clinics Continued							
545	Advanced Criminal Prosecution intersession[2]	011	1	Schaffzin, D	TBA	TBA	Clinic	23940
569	Clinic: Children's Defense	011	4	Gies, L	T	3:50-5:40	Clinic	24779
595	Clinic: Medical-Legal Partnership Clinic	011	4	Goode, J	F	10:30-12:20	Clinic	24594
598	Adv. Clinic: Medical-Legal Partnership Clinic	011	2	Goode, J	TBA	TBA	Clinic	24609
599	Adv. Clinic: Neighborhood Preservation	011	2	Schaffzin, D	TBA	TBA	Clinic	24610
557	Adv. Clinic: Children's Defense Clinic	011	2	Geis, L	TBA	TBA	Clinic	25151
	Externships							
600	Externships *(lecture)*							
	Externships	all		Schaffzin, D	M	4:30-5:50	244	
				McCarver	M	4:30-5:50	226	
	Externships	011	2	Schaffzin, D			clinic	21690
	Externships	012	3	Schaffzin, D			clinic	21691
	Research/Moot Court/Law Review							
711	Research I	011	1	Mulroy				14299
523	Moot Court Travel Team	011	1	Kritchevsky				19757
	Moot Court Travel Team	012	2	Kritchevsky				19758
524	Trial /ADR Travel Team	011	1	Kritchevsky				20677
811	Moot Court - 2 Competitions	011	1	Kritchevsky				14300
	Moot Court - 4 Competitions	012	2	Kritchevsky				20667
812	Moot Court Board	011	1	Kritchevsky				20678
813	Moot Court Executive Board	011	2	Kritchevsky				20679
913	Law Review Note	011	2	McClurg				14303
914	Law Review Staff	011	1	McClurg				14304
915	Law Review Editorial Board	011	2	McClurg				24219

[1]Trial Advocacy will meet all three class hours in separate adjunct-professor sections; Trial Ad will not meet in big lecture. In the spring, we are trying something new, practice-specific Trial Ad sections. Section 011 (Frank) will teach Trial Ad using civil cases; Section 014 (Nichols) will teach Trial Ad using criminal cases; Section 012 (Laurenzi) and section 013 (Craft) will teach using both civil and criminal cases.

[2]Permit required. Advanced Criminal Prosecution is a 1-credit intersession course offered during the Law School's 2017 Spring Break. The Course will meet each day from Monday, March 6 to Friday, March 10, 2017 and will be filled via application. Please contact Professor D. Schaffzin with any questions.

[3]Students who have previously taken one of the five fall/spring Clinics are eligible to enroll as an Advanced Clinic student in that same clinic. If you have questions,please see the Professor who directs and teaches the base Clinic course.

Monday - SPRING 2017

	104 (10-12)	127 (48)	136(259)Aud	206 (12)	226 (110)	244 (110)	230 (36)	233 (18)	325 (92)	326 (92)	338 (10)	310(44)SMC	335(98)HMC	CLINIC/Other
8:00									Sec. Trans. (Black) 8:00-8:50 MW 8:30-9:20 Th					
9:00		Estate Planning Black MTh 9:30-10:45			Federal Courts Frank MTh 9:30-10:45					Evidence Schaffzin, K. MW 9:00-10:50				
10:00									Legal Methods Wilson §12 M					
11:00		Copyright Jones MWTh				Contracts II Newman §11 MW		Corporate Tax Kratzke MWTh		Fair Employment Practice MWTh Lidge				
12:00	NOON HOUR - NO CLASSES													
1:00					Civil Procedure Schaffzin, K. §12 MW				Legal Methods Wilson §11 M	Elder Law Brashier MTh 1:00-2:15				
2:00		Trademarks Alexander MW 2:30-3:45												
3:00					Contracts II Mamlyuk §12 MTh									
4:00					Externship McCarver M 4:30-5:50	Externship Schaffzin, D. M 4:30-5:50		Employee Benefits Kiesewetter MW 4:30-5:45						
5:00							National Security Harvey MW							
6:00				Discovery McGown M 6:00-7:50			Negotiation & Mediation Wade & Schwarz M 6:00-7:50		Criminal Procedure II M 6:00-7:50					
7:00														

1L Required	2L Required	2L/3L Required	Statutory menu	Practice menu	Skills Course	Research/Writing	Elective	LM Section

Updated on 1/10/2017

Tuesday - SPRING 2017

	006 (10-12)	104 (10-12)	127 (48)	136(259)Aud	206 (12)	226 (110)	244 (110)	230 (36)	233 (18)	325 (92)	326 (92)	338 (10)	335(98)HMC	CLINIC/Other
8:00					Legal Methods small section TTh Alden			Health Law Survey Allen TF 8:30-9:45	Legal Drafting: Contracts Smith, B. T 8:00-9:50	Remedies Smith, K. TF 8:00-9:15				
9:00						Property II Kiel §12 TF 9:00-10:15	Criminal Law Mulroy §11 TThF							
10:00							Property II Brashier §11 TTh 10:35-11:50			Professional Responsibility Wilson T 10:00-11:50				
11:00														
12:00	NOON HOUR - NO CLASSES													
1:00			Commercial Law Smith, K. TThF 1:00-2:10			Criminal Law Romantz §12 TTh 1:00-2:15		Health Policy Practicum Campbell T 1:00-2:50		Constitutional Law Kiel TWF 1:00-2:10				
2:00			Patent Law Bock TTh 2:25-3:40				Torts II - §11 & §12 McClurg T 2:30-3:45 F 1:00-2:15				Antitrust Newman TTh 2:25-3:40			
3:00								Trial Advocacy Frank §11 T 3:50-4:40/ Th	US Taxation of Int'l. Income Kratzke TTh 3:50-5:05					Children's Defense Clinic Geis T 3:50-5:40
4:00	Legal Methods small section Wilson T 4:00-5:50													
5:00		Legal Methods small section Bell T 5:30-7:20	Corporate Governance & Compliance Goldsmith T 5:15-7:05		Divorce Law Practicum Pounders TW 5:15-6:30	Products Liability Bearman TTh 5:15-6:05				Legal Methods small section Low T 5:00-6:50		Legal Methods small section Singh T 5:00-6:50		
6:00	Legal Methods small section Enekwa T 6:00-7:50						Legal Methods small section Wright T 6:10-8:00	Immigration Law Pazar TTh 6:00-7:15	Legal Methods small section Perry T 6:00-7:50					
7:00														

1L Required	2L Required	2L/3L Required	Statutory menu	Practice menu	Skills Course	Research/Writing	Elective	LM Section

Updated on 1/10/2017

Wednesday - SPRING 2017

	006 (10-12)	104 (10-12)	127 (48)	136(259)Aud	206 (12)	226 (110)	244 (110)	230 (36)	233 (18)	325 (92)	326 (92)	338 (10)	335(98)HMC	CLINIC/Other
8:00										Sec. Trans. (Black) 8:00-8:50 MW 8:30-9:20 Th				
9:00						Bar Exam Prep Course Kritchevsky W 9:00-10:50					Evidence Schaffzin, K. MW 9:00-10:50			
10:00										Civil Procedure II Bock §11 WF				
11:00			Copyright Jones MWTh				Contracts II Newman §11 MW		Corporate Tax Kratzke MWTh		Fair Employment Practice MWTh Lidge			
12:00	**NOON HOUR - NO CLASSES**													
1:00					Health Law Seminar Allen W 1:00-2:50	Civil Procedure Schaffzin, K. §12 MW				Constitutional Law Kiel TWF 1:00-2:10				
2:00		Advanced Brief Writing Seminar Kritchevsky W 2:30-4:20	Trademarks Alexander MW 2:30-3:45				Legal Analysis Aden/Gill W 2:00-3:15		Public Int'l. Law Seminar Mamlyuk W 2:30-4:20			Legal Ethics Seminar Lidge W 2:30-4:20		
3:00														
4:00		Legal Methods small section Vescovo W 4:30-6:20							Employee Benefits Kiesewetter MW 4:30-5:45					
5:00			Legal Methods small section Oliphant W 5:30-7:20		Divorce Law Practicum Pounders TW 5:15-6:30			National Security Harvey MW						**Trial Ad: Nichols § 14** *Criminal* 201 Poplar Ave. W 5:30-8:20
6:00								Admiralty Law Mulrooney W 6:00-7:50	Mediation Clinic Shields W 6:00-7:50 Room 231					
7:00														

1L Required	2L Required	2L/3L Required	Statutory menu	Practice menu	Skills Course	Research/Writing	Elective	LM Section

Updated on 1/10/2017

Thursday - SPRING 2017

	104 (10-12)	127 (48)	136(259)Aud	206 (12)	226 (110)	244 (110)	230 (36)	233 (18)	325 (92)	326 (92)	338 (10)	310(44)SMC	Other	
8:00				Legal Methods small section TTh Alden				Legal Drafting: Litigation Lakey Th 8:00-9:50	Sec. Trans. (Black) 8:00-8:50 MW 8:30-9:20 Th					
9:00		Estate Planning Black MTh 9:30-10:45			Federal Courts Frank MTh 9:30-10:45	Criminal Law Mulroy §11 TThF								
10:00						Property II Brashier §11 TTh 10:35-11:50								
11:00		Copyright Jones MWTh						Corporate Tax Kratzke MWTh		Fair Employment Practice MWTh Lidge				
12:00	NOON HOUR - NO CLASSES													
1:00		Commercial Law Smith, K. TThF 1:00-2:10			Criminal Law Romantz §12 TTh 1:00-2:15					Elder Law Brashier MTh 1:00-2:15				
2:00		Patent Law Bock TTh 2:25-3:40								Antitrust Newman TTh 2:25-3:40				
3:00					Contracts II Mamlyuk §12 MTh			US Taxation of Int'l. Income Kratzke TTh 3:50-5:05				Trial Advocacy Frank § 11 T 3:50-4:40 Th 3:50-5:20		
4:00				Legal Methods small section Sink Th 4:00-5:50			Trust Law McDaniel Th 4:00-5:50							
5:00					Products Liability Bearman TTh 5:15-6:05								**Trial Ad: Laurenzi § 12** *Civil & Criminal* Federal Bldg. Ct. Rm. 1 11th floor Th 5:30-8:20	**Trial Ad: Craft § 13** *Civil & Criminal* 201 Poplar Ave. Th 5:30-8:20
6:00							Immigration Law Pazar TTh 6:00-7:15							
7:00														

1L Required	2L Required	2L/3L Required	Statutory menu	Practice menu	Skills Course	Research/Writing	Elective	LM Section

Updated on 1/10/2017

Friday - SPRING 2017

	104 (10-12)	127 (48)	136(259)Aud	206 (12)	226 (110)	244 (110)	230 (36)	233 (18)	325 (92)	326 (92)	338 (10)	310(44)SMC	335(98)HMC	CLINIC/Other
8:00							Health Law Survey Allen TF 8:30-9:45	Realty Transactions Humphreys F 8:30-10:20	Remedies Smith, K. TF 8:00-9:15					
9:00					Property II Kiel §12 TF 9:00-10:15	Criminal Law Mulroy §11 TThF								
10:00									Civil Procedure II Bock §11 WF					CLINIC Child & Family MLP Elder Nghbrhood Pres. F 10:30-12:20
11:00														
12:00	NOON HOUR													
1:00		Commercial Law Smith, K. TThF 1:00-2:10				Torts II - §11 & §12 McClurg T 2:30-3:45 F 1:00-2:15			Constitutional Law Kiel TWF 1:00-2:10					
2:00														
3:00														
4:00														
5:00														
6:00														
7:00														

1L Required	2L Required	2L/3L Required	Statutory menu	Practice menu	Skills Course	Research/Writing	Elective	LM Section

Updated on 1/10/2017

Cecil C. Humphreys School of Law
SPRING 2017 EXAM SCHEDULE

******NOTE: Students may not enroll in courses with conflicting exams unless written approval is obtained from the Associate Dean prior to enrolling. All requests for approval of enrollment in courses with conflicting exams must be submitted in the form of a written memo.***

DATE	TIME	SECTION	COURSE	PROFESSOR	ROOM
Monday, May 1					
	9:00 am	011	Health Law Survey	Allen	230
		011	Realty Transactions	Humphreys	233
		011	Remedies	Smith, K.	325
	2:00 pm	011	Civil Procedure II	Bock	136
		012	Civil Procedure II	Schaffzin, K.	226, 244
Tuesday, May 2					
	9:00 am	011	Copyright	Jones	325
		011	Corporate Tax	Kratzke	233
		011	Fair Employment Practices	Lidge	326
Wednesday, May 3					
	9:00 am	011	Admiralty Law	Mulrooney	230
		011	Professional Responsibility	Wilson	325
	2:00 pm	011	Property II	Brashier	226, 244
		012	Property II	Kiel	325,326
Thursday, May 4					
	9:00 am	011	Antitrust	Newman	127
		011	Patent Law	Bock	326
Friday, May 5					
	9:00 am	011	Estate Planning	Black	127
		011	Evidence	Schaffzin	326
		011	Federal Courts	Frank	325
	2:00 pm	011	Torts II	McClurg	136
		012	Torts II	McClurg	136

Cecil C. Humphreys School of Law
SPRING 2017 EXAM SCHEDULE

DATE	TIME	SECTION	COURSE	PROFESSOR	ROOM
Monday, May 8					
	9:00 am	011	Commercial Law	Smith, K.	127
		011	Constitutional Law	Kiel	325
		011	Secured Transactions	Black	326
	2:00 pm	011	Contracts	Newman	325,326
		012	Contracts	Mamlyuk	226, 244
Tuesday, May 9					
	9:00 am	011	Criminal Procedure II	Ward	325
		011	Elder Law	Brashier	230
		011	U.S. Taxation of Int'l Income	Kratzke	233
Wednesday, May 10					
	9:00 am	011	Corporative Governance & Compliance	Goldsmith	338
		011	Immigration Law	Pazar	244
		011	Products Liability	Bearman	226
Thursday, May 11					
	9:00 am	011	Bar Exam Preparation Course	Kritchevsky	226
		011	Trademark Law	Alexander	127
		011	Trust Law	McDaniel	244
	2:00 pm	011	Criminal Law	Mulroy	325,326
		012	Criminal Law	Romantz	226, 244
Friday, May 12					
	9:00 am	011	Employee Benefits	Kiesewetter	233
		011	National Security	Harvey	230

The University of Memphis
Cecil C. Humphreys School of Law

YOU ARE RESPONSIBLE FOR READING THIS MEMO PRIOR TO REGISTRATION

SPRING 2017 LAW SCHOOL REGISTRATION

VETERANS – MONDAY, NOVEMBER 14 AT 8:00 A.M.
43+ HOURS –TUESDAY, NOVEMBER 15 AT 9:00 A.M.
15-42 HOURS – THURSDAY, NOVEMBER 17 AT 9:00 A.M.
0-14 HOURS – FRIDAY, NOVEMBER 18 AT 9:00 A.M.

You will register on your *myMemphis* Student Self Service account for the 2017 spring semester. Please read the following instructions and pay close attention to the Law School Calendar as some of our dates and deadlines differ from the rest of the University. The registration materials posted on the Law School website and the bulletin board in Room 262 are the only official Law School registration materials. You are responsible for following the Law School's instructions.

PRIORITY ENROLLMENT:
There is a priority procedure in place for registration. Questions about your priority status should be directed to the Law School's Registrar Office.

(1) Veterans or Active Duty Military
State law authorizes priority registration for Veterans. Veterans may register beginning Monday, November 14, at 8:00 a.m.

(a) **Veterans**: If you are a Veteran but are not claiming VA Educational Benefits, and are not registered with the Veterans Educational Benefits & Certification Office on campus, you will need to provide them with a copy of your DD-214 so your account can be coded for early registration.

(b) **National Guard**: Provide the Veterans Educational Benefits & Certification Office with a copy of your DD-214 and Notice of Basic Eligibility (NOBE).

(c) **Reserves**: Provide the Veterans Educational Benefits & Certification Office with a copy of your DD-214 that indicates you have completed initial active duty for training.

Veterans Education Benefits & Certification Office of the Registrar
003 Wilder Tower
Phone: 901-678-2996
Fax: 901-678-1425
vetedbenefits@memphis.edu

(1) Students who have attempted 43 or more credit hours at the time of registration will be allowed to register on Tuesday, November 15, at 9:00 a.m.*

(2) Students who have attempted 15-42 credit hours at the time of registration will be allowed to register on Thursday, November 17, at 9:00 a.m.*

(3) Students who have attempted 0-15 or more credit hours at the time of registration will be allowed to register on Friday, November 18, at 9:00 a.m.*

"Attempted" hours do not include the hours which are currently in-progress, i.e. the hours in which you are enrolled at the time of registration. To find your official number of attempted hours, look at your Academic Transcript in Banner, at the column entitled "Attempt Hours," under your most recently completed academic term.

REGISTRATION INFORMATION:
Login to the *myMemphis* Portal at with your University ID and password, select the Student tab, go to Registration Tools and follow the directions. Course Registration Numbers (CRNs) are listed on the Law School Course Schedule online. If you need assistance accessing your *myMemphis* account, contact 901-678-8888.

(1) You may register and pay fees until 4:30 p.m. on Tuesday, January 10, 2017, without incurring late fees. Seating capacity is limited in some classrooms; it is to your advantage to register early. Your courses will be cancelled for non-payment at 4:31 p.m. on Tuesday, January 10, 2017.

(2) Course Load (Academic Regulation 5):

(a) Full-time students must enroll in a minimum of 12 hours and not more than 18 semester hours. For students with a GPA below 2.50, the maximum course load is 16 hours unless prior approval is obtained from the Associate Dean for Academic Affairs. Students wishing to switch to part-time **must submit a written request** to the Associate Dean for Academic Affairs for approval prior to enrolling.

(b) Part-time students must enroll in at least 8 and not more than 11 credit hours. Students wishing to switch to full-time **must submit a written request** to the Associate Dean for Academic Affairs for approval prior to enrolling. Taking less than 12 credit hours may affect the amount of your financial aid. Contact DebraAnn Brown with financial aid questions.

(3) Course Sequencing and Requirements (Academic Regulation 16):

(a) **Second-Year Full-Time Students:** Second-year students are required to take Evidence and Constitutional Law in the fall or spring semester. Second-year students should, but are not required to, enroll in Professional Responsibility and take two courses from both the Statutory Course Menu and the Practice Foundation Menu. Two courses in each menu must be completed prior to graduation. The following Menu courses are offered in the spring 2017 semester:

Statutory Menu Courses	**Practice Foundation Menu Courses**
Secured Transactions	Remedies
Taxation of Corps. & Shareholders	

(b) **Second-Year Part-Time Students:***
Constitutional Law
Contracts II
Criminal Law
Property II
Evidence

**Curricular requirements vary according to start-date. Check Rule 16 of the Academic Regulations to determine which curricular requirements apply to you.*

(c) **Third-Year and Fourth-Year Part-Time Students:**
Complete any required courses as needed under the curriculum in place when you entered law school.

(d) **Part-Time Students:**
You must enroll in required courses in sequence. If you fail to register for a required course in sequence, you are deemed enrolled and will receive a failing grade in the class for failure to attend. You must remain in the same section in which you start for the entire full-time 1L curriculum.

LIMITED COURSES:

Skills and Advanced Research: The sign-up procedure will open on Wednesday, October 26 at noon and will close on Monday, October 31 at noon. Those selected for a seat will be notified by email by Monday, November 7. The Registrar's Office will enroll you during the week of registration. If you decide not to take the limited course, **you must drop the course and notify the Law School Registrar's Office immediately**.

Externships: Professor Danny Schaffzin, Director of the Externship Program, will notify students who were selected; these students will be enrolled by the Registrar's Office. A student who decides to drop the Externship Course must obtain the permission of Professor Danny Schaffzin before doing so.

Legal Clinics: The clinic faculty member has notified students selected for Legal Clinics; these students will be enrolled by the Registrar's Office. If you decide to drop the clinic, you are required to notify the faculty member and the Law School Registrar's Office immediately.

HOLDS:

If you have any HOLDS on your account, you will not be able to register until you clear the HOLDS through the Bursar's Office. Check your account now and clear any HOLDS, so you are able to register. I do not have access to the HOLD information and cannot help you clear it.

ALTERNATE PIN:

Students who:

(1) have needed an "alternate pin" to enroll in prior semesters,
(2) are registered with Disability Resources Services,
(3) are pursuing a JD/MBA or JD/MA degree, or
(4) are registered with Veteran Services,

should email the Law School Registrar's Office **PRIOR** to registration.

FEES: Refer to the Bursar's website.

DEADLINES: Refer to the Deadline Calendar.

Drops/Adds: (Refer to Academic Regulations)

Add courses via your account through Tuesday, January 10, 2017 at 4:30 p.m.

Drop courses via your account through Friday, March 3. Drops after this date must be done through the Law Registrar office, with permission from the Associate Dean for Academic Affairs.

(a) The deadline for 100% refund for dropped courses is Tuesday, January 10, 2017.
(b) Courses dropped after Monday, January 30, 2017 will show as a "W" on your transcript.

Late Registration: From Wednesday, January 11 through Thursday, January 19, 2017 at 5:30 p.m., students may register online. The fee payment deadline for Late Registration is Thursday, January 19, at 5:30 p.m. A late registration fee will be assessed to students who register during this period. Any classes missed due to late registration count as absences.

Courses Canceled for Non-Payment: For regular registration, all courses will be canceled for non-payment after 4:30 p.m. on Tuesday, January 10, 2017. For late registration, all courses will be canceled for non-payment after 4:30 p.m. on Friday, January 20, 2016.

PREREQUISITES:

Students are responsible for compliance with course prerequisites and other course restrictions as stated in the Academic Regulations and in the Course Catalog. A student may be dropped from a course if the student does not have the required prerequisites.

EXPERIENTIAL LEARNING:

1. Clinic and Externship course information is available online. In addition to the Academic Regulations, please review the Policies and Procedures of the Externship Program.

2. Students may only receive credit toward graduation for three Externships, or two Clinics, or a combination of two Externships and one Clinic.

3. Absent permission from the Associate Dean of Academic Affairs, a student may not repeat a clinic or externship, may not enroll in both a clinic and externship in the same term, and may not enroll in more than one clinic or more than one externship in any term. A student enrolled in an externship may not be enrolled in more than 16 hours without permission. Students must have completed 28 hours before enrolling in an Externship. For enrollment purposes in these limited enrollment courses, a student who has taken one clinic will not receive priority for a second clinic, and a student who has taken one externship will not receive priority for a second externship.

INDEPENDENT RESEARCH:
Students interested in enrolling in Independent Research must obtain the permission of the Associate Dean of Academic Affairs and turn in a completed Research Paper Form to the Associate Dean of Academic Affairs. Forms may be picked up from the Law School Registrar. If you are interested, you should speak with the Associate Dean prior to registration.

EXAM SCHEDULE:
Students may not enroll in courses with conflicting exams unless written approval is obtained from the Associate Dean prior to enrolling. All requests for approval of enrollment in courses with conflicting exams must be submitted in the form of a written memo.

LIMITATION ON COURSES GRADED E, S, U ("E,S,U COURSES"):
A student may not utilize more than twelve (12) credit hours toward graduation requirements from any combination of the following courses: Externship, Law Review or Law Review Board, Moot Court (including Moot Court Board, Moot Court Executive Board, and inter-school or intra-school competition credit), Independent Research, and Advanced Clinic.

LOCKERS: Payment should be made online. Once you have paid the locker fee online, see Brigitte Boyd in Room 260 for assignment of a locker and combination.

COURSE CANCELLATION: The Law School Administration reserves the right to cancel a course that fails to get sufficient enrollment.

********See important financial information on the next page.********

Spring 2016 Law
FINANCIAL INFORMATION

YOU are responsible for complying with the policies and fee information on the Bursar's website. Please read before registering. Dates for registration and fee payment are available online. See also the Law Deadlines Calendar.

Registration Cancellation Policy
NO PAYMENT = NO CLASSES!

If your financial aid (grants and student loans), scholarship, and/or third party assistance does not cover 100% of your fees, you must pay the remaining balance by the appropriate fee payment deadline. You will be notified via your University email account when your electronic invoice is available online. You remain responsible for completing the fee payment process by the fee payment deadline, even if you do not receive or open your fee invoice, which will be available on your Banner Student Self Service account.

Tuition and fees are available online.

Payments mailed to the Bursar's Office must be **received** in their office by the appropriate fee payment deadline, **regardless of the postmark date on the envelope**. **Please allow five to seven days for processing.**

The University of Memphis
Cecil C. Humphreys School of Law

2017 Spring Law Registrar Deadline Calendar

Wednesday, October 26 – Monday, October 31	Limited Enrollment Registration
Monday, November 14 – Friday, November 18	Registration

Monday, November 14: **Veteran registration** *(8am)*
Tuesday, November 15: **43+ Attempted Hrs.*** *(9am)*
Thursday, November 17: **15-42 Attempted Hrs.*** *(9am)*
Friday, November 18: **0-14 Attempted Hrs.*** *(9am)*

**To find your official number of attempted hours, look at your Academic Transcript in Banner, at the column entitled "Attempt Hours," under your most recently completed academic term.*

Tuesday, January 10	Law School Tuition & Fees Payment Deadline ***(Courses Deleted for Non-Payment after 5:30pm)***
Tuesday, January 10	Last Day for 100% Refund on Drops and/or Withdrawals
Wednesday, January 11	First Day of Classes
Wednesday, January 11 — Thursday, January 19	Late Registration and Late Add period ***($100 Late Registration Fee assessed during Late Registration.)***
Monday, January 16	Holiday: MLK Birthday
Thursday, January 19	Late Payment Fee Assessed after 5:30pm
Friday, January 20	Courses deleted for Non-Payment after 4:30pm
Tuesday, January 24	Last Day for 75% Refund, Drops/Withdrawals
Friday, January 27	Last Day to Apply for May 2017 Graduation
Monday, January 30	Last Day to Drop Course or Withdraw Without Showing "W" on Transcript
Friday, February 10	Last Day for 25% Refund, Drops/Withdrawals
Friday, March 3	Last Day to Drop Courses or Withdraw Without Permission
Monday, March 6 – Friday, March 10	Spring Break
Wednesday, April 26	Last Day of Classes (Monday Class Schedule)
Thursday & Friday, April 27 & 28	Reading Days
Monday, May 1	Exams Begin
Friday, May 12	Exams End
Saturday, May 13	Commencement

Summer 2017 Course Schedule
University of Memphis School of Law

#	Name	Section	Hours	Professor	Days	Time	Room	CRN	Exam
331	Family Law	011	3	Black	MTWR	8:00 am - 9:15 am	244	56234	**July 18, 9:00 am**
359	Sales	011	3	Mamlyuk	MTWR	5:00 pm - 6:15 pm	244	55771	**July 14, 9:00 am**
397	International Economic Law*	011	3	Kratzke	MTWR	9:30 am-10:45 am	230	53247	**July 17, 9:00 am**
600	Externships	011	2	Schaffzin, D.	T	3:00 pm-4:50 pm	244	55619	
		012	3	Schaffzin, D.	T	3:00 pm-4:50 pm	244	55620	
		013	4	Schaffzin, D.	T	3:00 pm-4:50 pm	244	55621	

NOTES:

1. If you are unable to sit for the scheduled final exam, you may not enroll in the course.

2. A student enrolled in 6 or more credit hours may work no more than 20 hours outside the law school.

3. To be eligible for financial aid, law students must be enrolled in at least 3 credit hours during the summer semester.

4. A student may not be enrolled in more than 9 credit hours during the summer semester.

5. **Externships:** Students must have successfully completed 45 credit hours to be eligible to enroll. Students will apply for and be accepted into an Externship for 2 credits (16 hours weekly), 3 credits (24 hours weekly), or 4 credits (32 hours weekly - see #6 note below), in addition to participating in a once-weekly seminar that will meet on Tuesday from 3:00 p.m. to 4:50 p.m. The number of credit hours assigned to each Externship field placement is predetermined. Credit is awarded for successful completion of both the field placement and the Externship Course seminar. An Externship may satisfy the Skills Requirement.

6. During the Summer Session, students enrolled in a 4-credit (32 weekly hours externship may not concurrently enroll in any additional summer courses offered during the day (1:00-5:00 pm)).

**** Students in this course must be available for several possible make-up sessions on Friday mornings, to be scheduled with advanced notice.***

The University of Memphis
Cecil C. Humphreys School of Law

YOU ARE RESPONSIBLE FOR READING THIS MEMO PRIOR TO REGISTRATION

SUMMER 2017 LAW SCHOOL REGISTRATION

VETERANS – MONDAY, APRIL 3 AT 8:00 A.M.
43+ HOURS –TUESDAY, APRIL 4 AT 9:00 A.M.
15-42 HOURS – THURSDAY, APRIL 6 AT 9:00 A.M.
0-14 HOURS – FRIDAY, APRIL 7 AT 9:00 A.M.

You will register on your *myMemphis* Student Self Service account for the 2017 Summer term. Please read the following instructions and pay close attention to the Law School Calendar as some of our dates and deadlines differ from the rest of the University. The registration materials posted on the Law School website and the bulletin board in Room 262 are the only official Law School registration materials. You are responsible for following the Law School's instructions.

PRIORITY ENROLLMENT:
There is a priority procedure in place for registration that is based on attempted hours. Questions about your priority status should be directed to the Law School's Registrar Office.

(1) Veterans or Active Duty Military
State law authorizes priority registration for Veterans. Veterans may register beginning Monday, April 4, at 8:00 a.m.

(a) **Veterans**: If you are a Veteran but are not claiming VA Educational Benefits, and are not registered with the Veterans Educational Benefits & Certification Office on campus, you will need to provide them with a copy of your DD-214 so your account can be coded for early registration.

(b) **National Guard**: Provide the Veterans Educational Benefits & Certification Office with a copy of your DD-214 and Notice of Basic Eligibility (NOBE).

(c) **Reserves**: Provide the Veterans Educational Benefits & Certification Office with a copy of your DD-214 that indicates you have completed initial active duty for training.

Veterans Education Benefits & Certification Office of the Registrar
003 Wilder Tower
Phone: 901-678-2996
Fax: 901-678-1425
vetedbenefits@memphis.edu

(1) Students who have attempted 43 or more credit hours at the time of registration will be allowed to register on Tuesday, April 4, at 9:00 a.m.*

(2) Students who have attempted 15-42 credit hours at the time of registration will be allowed to register on Thursday, April 6, at 9:00 a.m.*

(3) Students who have attempted 0-14 credit hours at the time of registration will be allowed to register on Friday, April 7 at 9:00 a.m.*

"Attempted" hours do not include the hours which are currently in-progress, i.e. the hours in which you are enrolled at the time of registration. To find your official number of attempted hours, look at your Academic Transcript in Banner, at the column entitled "Attempt Hours," under your most recently completed academic term.

REGISTRATION INFORMATION:
Login to the *myMemphis* Portal at https://sso.memphis.edu with your University ID and password, select the Student tab, go to Registration Tools and follow the directions. Course Registration Numbers (CRNs) are listed on the Law School Course Schedule online. If you need assistance accessing your *myMemphis* account, contact 901.678.8888.

(1) You may register and pay fees until 4:30 p.m. on Friday, May 19, 2017, without incurring late fees. Seating capacity is limited in some classrooms; it is to your advantage to register early. Your courses will be cancelled for non-payment at 4:31 p.m. on Friday, May 19, 2017.

(2) Course Load (Academic Regulation 5):

(a) Full-time student course load is 6 hours during the summer term. Students enrolled in 6 or more hours may not work more than 20 hours per week.
(b) Part-time students may not enroll in more than 5 hours.
(c) A student may not enroll in more than 9 hours during the summer semester.

FINANCIAL AID: For the Summer term only, the minimum enrollment requirement for federal student loans is 3 LAW credit hours. If you did not borrow the maximum amount of your unsubsidized loan between Fall 2016 and Spring 2017, please complete the **Summer Request Form** available now on the Financial Aid Office's forms page. (Check your myMemphis account for the amount you borrowed.) You can scan the completed form then send as an e-mail attachment directly to dbrown@memphis.edu or you can fax to (901) 678-3590.

If you've exhausted your maximum unsubsidized loan eligibility and/or you need to supplement it, you can apply for the Graduate PLUS online at www.studentloans.gov. Select the **2016-2017 Award/Aid Year**, with a loan period of **May 2017 through August 2017**.

If you have any questions, please contact DebraAnn Brown at dbrown@memphis.edu. Your correspondence should include your name and U-ID# in the Subject Line of your e-mail.

HOLDS: If you have any HOLDS on your account, you will not be able to register until you clear the HOLDS through the Bursar's Office. Check your account now and clear any HOLDS, so you are able to register. I do not have access to the HOLD information and cannot help you clear it.

ALTERNATE PIN:

Students who:

1. have needed an "alternate pin" to enroll in prior semesters,
2. are registered with Disability Resources Services,
3. are pursuing a JD/MBA or JD/MA degree, or
4. are registered with Veteran Services,

should email the Law School Registrar's Office **PRIOR** to registration.

FEES: Refer to the Bursar's website.

DEADLINES: Refer to the Deadline Calendar.

Drops/Adds: (Refer to Academic Regulations)

Add courses via your account through Thursday, May 25, 2017.

Drop courses via your account through Wednesday, June 14. Drops after this date must be done through the Law Registrar office, with permission from the Associate Dean for Academic Affairs.

(a) The last day for 100% refund for dropped courses is Sunday, May 21, 2017.

(b) Courses dropped after Monday, June 5, 2017 will show as a "W" on your transcript.

Late Registration: From Saturday, May 20 through Thursday, May 25, 2017 at 4:30 p.m., students may register online. The fee payment deadline for Late Registration is Thursday, May 25, 2017 at 4:30 p.m. A late registration fee will be assessed to students who register during this period. Any classes missed due to late registration count as absences.

Courses Canceled for Non-Payment: For regular registration, all courses will be canceled for non-payment after 4:30 p.m. on Friday, May 19, 2017. For late registration, all courses will be canceled for non-payment after 4:30 p.m. on Friday, May 26, 2017.

PREREQUISITES:

Students are responsible for compliance with course prerequisites and other course restrictions as stated in the Academic Regulations and in the Course Catalog. A student may be dropped from a course if the student does not have the required prerequisites.

<u>LOCKERS</u>: Payment should be made <u>online</u>. Once you have paid the locker fee online, see Brigitte Boyd in Room 260 for assignment of a locker and combination.

<u>COURSE CANCELLATION</u>: The Law School Administration reserves the right to cancel a course that fails to get sufficient enrollment.

*******See important financial information on the next page.*******

Summer 2017 Law

FINANCIAL INFORMATION

YOU are responsible for complying with the policies and fee information on the Bursar's website. Please read before registering. Dates for registration and fee payment are available online. See also the Law Deadlines Calendar.

Registration Cancellation Policy
NO PAYMENT = NO CLASSES!

If your financial aid (grants and student loans), scholarship, and/or third party assistance does not cover 100% of your fees, you must pay the remaining balance by the appropriate fee payment deadline. You will be notified via your University email account when your electronic invoice is available online. You remain responsible for completing the fee payment process by the fee payment deadline, even if you do not receive or open your fee invoice, which will be available on your Banner Student Self Service account.

Tuition and fees information is available online.

Payments mailed to the Bursar's Office must be **received** in their office by the appropriate fee payment deadline, **regardless of the postmark date on the envelope**. **Please allow five to seven days for processing.**

The University of Memphis Cecil C. Humphreys School of Law

2017 Summer Law Registrar Deadline Calendar

Friday, March 17 – Tuesday, March 21	Limited Enrollment Registration
Monday, April 3 – Friday, April 7	Registration

Monday, April 3: **Veteran registration** *(8am)*
Tuesday, April 4: **43+ Attempted Hrs.*** *(9am)*
Thursday, April 6: **15-42 Attempted Hrs.***(9am)*
Friday, April 7: **0-14 Attempted Hrs.*** *(9am)*

**To find your official number of attempted hours, look at your Academic Transcript in Banner, in the column entitled "Attempt Hours," under your most recently completed academic term.*

Friday, May 19	Law School Tuition & Fee Payment Deadline ***(Courses Deleted for Non-Payment after 4:30pm)***
Saturday, May 20 — Thursday, May 25	Late Registration and Late Add period ***($100 Late Registration Fee assessed during Late Registration.)***
Sunday, May 21	Last Day for 100% Refund on Drops
Monday, May 22	First Day of Classes
Thursday, May 25	Late Payment Fee Assessed after 4:30pm
Friday, May 26	Courses deleted for Non-Payment after 4:30pm
Monday, May 29	Holiday – Memorial Day Last Day for 75% Refund on Drops
Monday, June 5	Last Day for 25% Refund on Drops Last Day to Drop Without Showing "W" on transcript
Thursday, June 1	Last Day to Apply for August 2016 Graduation
Wednesday, June 14	Last Day to Withdraw Without Permission
Monday & Tuesday, July 3- 4	Holiday — Independence Day Holiday Observed
Wednesday, July 12	Last Day of Classes (Monday Class Schedule)
Thursday, July 13	Reading Day
Friday, July 14	Exams Begin
Tuesday, July 18	Exams End
Saturday, August 6	Commencement (10 am)

Fall 2017 Course Schedule
University of Memphis School of Law

#	Name	Section	Hours	Professor	Days	Time	Room	CRN
	1L Required Courses							
111	Contracts	011	3	Newman	TTh	3:15-4:30	244	83428
	Contracts	012	3	Mamlyuk	TTh	2:30-3:45	326	83429
112	Torts I	011	3	McClurg	TF	1:00-2:15	244	83443
	Torts I	012	3	Allen	TTh	1:00-2:15	226	83444
113	Legal Methods I	011	3	Wilson	MTh	10:30-11:45	230	83446
		011A		Delta 11D1	MTh	9:00-10:15	127	95977
		011B		Gamma 11G1	MW	9:00-10:15	230	95978
		011C		Gamma 11G2	MW	2:30-3:45	127	95979
	Legal Methods I	012	3	Wilson	MTh	10:30-11:45	230	83447
		012A		Delta 12D2	MTh	10:30-11:45	233	95980
		012B		Beta 12B1	MW	2:30-3:45	233	95981
		012C		Beta 12B2	MW	1:00-2:15	233	95982
114	Civil Procedure I	011	3	Bock	WF	10:30-11:45	325	83449
	Civil Procedure I	012	3	Schaffzin, K.	MWTh	9:00-9:50	226	83450
115	Property I	011	3	Brashier	MTh	1:00-2:15	326	83451
	Property I	012	3	Kiel	TWF	10:00-10:50	226	83453
553	Academic Success Class	011	0	Aden				95777
	Academic Success Class	012	0	Aden				95778
	2L Required Course							
221	Evidence	011	4	Frank	TWF	1:00-2:10	325	93684
212	Constitutional Law	011	4	Mulroy	MTTh	9:00-10:10	Wade Aud.	83561
	2L or 3L Required Course							
224	Professional Responsibility *(offered Fall and Spring)*	011	2	Lidge	MTh	1:00-1:50	244	83580
	Statutory Courses Menu							
214	Income Tax	011	3	Kratzke	MWF	11:00-11:50	326	83577
359	Sales	011	3	Smith, K.	MWTh	8:00-8:50	226	87307
348	Legislation	011	3	Romantz	MTh	10:30-11:45	244	90186

Fall 2017 Course Schedule
University of Memphis School of Law

#	Name	Section	Hours	Professor	Days	Time	Room	CRN
	Practice Foundation Course Menu							
211	Business Organizations	011	3	Harris	MTh	3:50-5:05	325	83548
311	Administrative Law	011	3	Romantz	TTh	2:20-3:35	226	93686
331	Family Law	011	3	Black	MW	2:25-3:40	325	88949
213	Decedents' Estates	011	3	Brashier	TTh	10:30-11:45	326	83575
	Electives							
301	Mergers & Acquisitions	011	2	Harris	W	1:00-2:50	226	92960
310	Education & Civil Rights	011	3	Kiel	WF	1:00-2:15	230	95448
318	Antitrust	011	3	Newman	TF	10:30-11:45	244	94422
322	Civil Rights	011	3	Kritchevsky	MTh	1:00-2:15	127	83585
326	Criminal Procedure II	011	2	Ward	M	6:00-7:50	325	83588
327	Debtor-Creditor	011	3	Latta	MW	4:00-5:15	230	87305
343	Labor Law	011	3	Lidge	MWTh	11:00-11:50	127	83602
344	Land Use Law	011	2	Whitehead	W	6:00-7:50	127	90175
352	Partnership Tax	011	3	Kratzke	MTTh	1:00-1:50	104	90177
388	Food and Drug Law	011	3	Alexander	TTh	2:30-3:45	230	94299
394	Mental Health Law	011	3	Campbell	TTh	9:00-10:15	233	93683
395	Intellectual Property Survey	011	3	Bock	TTh	2:25-3:40	127	90180
399	International Business Transactions	011	3	Mamlyuk	TTh	4:15-5:30	127	94495
722	Health Law Survey	011	3	Allen	TF	10:30-11:45	127	95983
723	Tax Lawyering	011	2	Kratzke	MTh	5:10-6:00	104	95988
	Seminars/Adv. Research&Writing *Permit Required*							
421	Reproductive Rights/Family Law Seminar	011	2	Black	W	9:00-10:50	206	94991
444	Federal Discrimination Seminar	011	2	Mulroy	W	9:00-10:50	338	83623
445	TN Constitutional Law Seminar	011	2	Smith, K.	W	9:00-10:50	233	83625
492	Mass Incarceration Seminar	011	2	Frank	W	9:00-10:50	104	95987

Course	Title	Section	Credits	Instructor	Day	Time	Room	CRN
	Skills Courses *Permit may be required*							
309	Appellate Advocacy	011	3					
	large section - all students			Kritchevsky	W	3:50-5:05	244	90187
	App. Advocacy small section			Kritchevsky	M	9:00-10:15	206	
	App. Advocacy small section			Rogers	M	6:00-7:15	206	
	App. Advocacy small section			Perkins	T	5:30-6:45	206	
	App. Advocacy small section			Whitwell	T	6:00-7:15	230	
316	ADR/Mediation	011	2	Lait	M	6:00-7:50	230	83582
	ADR/Mediation	012	2	Cantrell	M	6:00-7:50	230	83583
513	Legal Drafting: Litigation	011	2	Chambliss	W	6:00-7:50	206	91069
516	Trial Advocacy: Civil & Criminal	012	3	Laurenzi	Th	5:30-8:20	Fed. Bldg.	83640
	Trial Advocacy: Civil & Criminal	013	3	Craft	Th	5:30-8:20	201 Poplar	83642
	Trial Advocacy: Criminal	014	3	Nichols	W	5:30-8:20	201 Poplar	90174
705	Health Policy Practicum	011	3	Campbell	T	4:00-5:50	230	94142
	Clinic and Externships *Permit required*							
501	Clinic: Neighborhood Preservation	011	4	Schaffzin, D	F	9:00-10:50	Clinic	92964
502	Clinic: Mediation	011	4	Shields	T	5:00-6:50	231	96174
504	Advanced Clinic: Child/Family	011	2	Zawisza	TBA	TBA	Clinic	94486
505	Advanced Clinic: Elder Law	011	2	Harkness	TBA	TBA	Clinic	95660
509	Clinic: Child & Family Litigation	011	4	Zawisza	F	9:00-10:50	Clinic	83630
510	Clinic: Elder Law	011	4	Harkness	F	9:00-10:50	Clinic	83632
569	Clinic: Children's Defense	011	4	Geis	W	3:45-5:35	Clinic	95613
595	Clinic: Medical-Legal Partnership	011	4	Goode	F	9:00-10:50	Clinic	95242
598	Advanced Clinic: Medical-Legal Partnership	011	2	Goode	TBA	TBA	Clinic	95760
600	Externships	all		Schaffzin, D	W	4:00-5:20	127	
	Externships	011	2	Schaffzin, D				93768
	Externships	012	3	Schaffzin, D				93769
	Externships	013	4	Schaffzin, D				93770

Moot Court/Law Review/Research

Course	Title	Section	Credits	Instructor	CRN
523	Moot Court Travel Team	011	1	Kritchevsky	90536
	Moot Court Travel Team	012	2	Kritchevsky	90537
524	Trial / ADR Travel Team	011	1	Kritchevsky	91453
811	Moot Court - 2 Competitions	011	1	Kritchevsky	83660
	Moot Court - 4 Competitions	012	2	Kritchevsky	91398
812	Moot Court Board	011	1	Kritchevsky	91408
813	Moot Court Executive Board	011	2	Kritchevsky	91409
913	Law Review Note	011	2	McClurg	83667
914	Law Review Staff	011	1	McClurg	95484
915	Law Review Editorial Board	011	2	McClurg	95485
711	Research I	011	1	Mulroy	83658

IMPORTANT INFORMATION

* Students are responsible for compliance with the Academic Regulations and with course prerequisites and other course restrictions as stated in the:

(1) Academic Regulations
(2) Course Catalog
(3) Registration Memorandum

* Students should not enroll in courses with conflicting exams unless prior approval is granted by Dean Mulroy.

FOOTNOTES

[1]Course 309 - Appellate Advocacy will satisfy the Skills graduation requirement, but will not be limited enrollment nor will a permit be required. Students will meet twice weekly; once as one large group and once divided into small groups.

[2]In addition to the two hours of classroom time listed on the schedule, Health Policy Practicum will have also have one hour worth of class credit each week that is earned through meetings in the community, with varying locations and times, which will be determined by Professor Campbell.

Monday - FALL 2017

	104 (10-12)	127 (48)	136(259)Aud	206 (12)	226 (110)	244 (110)	230 (36)	233 (18)	325 (92)	326 (92)	338 (10)	310(44)SMC	335(98)HMC	CLINIC/Other
8:00					Sales Smith MWTh 8:00-8:50									
9:00		Legal Methods §11D1- DELTA MTh 9:00-10:15	Con Law Mulroy MTTh 9:00-10:10	Appellate Ad small § Kritchevsky M 9:00-10:15	Civ Pro § 12 Schaffzin, K. MWTh		Legal Methods §11G1 - GAMMA MW 9:00-10:15							
10:00						Legislation Romantz MTh 10:30-11:45	Legal Methods §11 & §12 - Wilson MTh 10:30-11:45	Legal Methods §12D2- DELTA MTh 10:30-11:45						
11:00		Labor Law Lidge MWTh								Income Tax Kratzke MWF				
12:00	NOON HOUR - NO CLASSES													
1:00	Partnership Tax Kratzke MTTh	Civil Rights Kritchevsky MTh 1:00-2:15				Prof. Responsibility Lidge MTh		Legal Methods §12B2 - BETA MW 1:00-2:15		Property I § 11 Brashier MTh 1:00-2:15				
2:00		Legal Methods §11G2 - GAMMA MW 2:30-3:45						Legal Methods §12B1 - BETA MW 2:30-3:45	Family Law Black MW 2:25-3:40					
3:00									Business Org. Harris MTh 3:50-5:05					
4:00							Debtor-Creditor Latta MW 4:00-5:15							
5:00	Tax Lawyering Kratzke MTh 5:10-6:00													
6:00				Appellate Ad small § Rogers M 6:00-7:15			ADR:Mediation Lait §11 Cantrell §12 M 6:00-7:50		Criminal Procedure II Ward M 6:00-7:50					
7:00														

1L Required	2L Required	2L/3L Required	Statutory menu	Practice menu	Skills Course	Research/Writing	Elective	LM Section

Update: 3/3/2017 at 10:20 AM

Tuesday - FALL 2017

	104 (10-12)	127 (48)	136(259)Aud	206 (12)	226 (110)	244 (110)	230 (36)	233 (18)	325 (92)	326 (92)	338 (10)	310(44)SMC	335(98)HMC	231 (10)
8:00														
9:00			Con Law Mulroy MTTh 9:00-10:10					Mental Health Law Campbell TTh 9:00-10:15						
10:00		Health Law Survey Allen TF 10:30-11:45			Property I §12 Kiel TWF	Antitrust Newman TF 10:30-11:45				Dec. Estates Brashier TTh 10:30-11:45				
11:00														
12:00	NOON HOUR - NO CLASSES													
1:00	Partnership Tax Kratzke MTTh				Torts I §12 Allen TTh 1:00-2:15	Torts I §11 McClurg TF 1:00-2:15			Evidence Frank TWF 1:00-2:10					
2:00		IP Survey Bock TTh 2:25-3:40			Administrative Law Romantz TTh 2:20-3:35		Food & Drug Law Alexander TTh 2:30-3:45			Contracts §12 Mamlyuk TTh 2:30-3:45				
3:00						Contracts §11 Newman TTh 3:15-4:30								
4:00		Int'l. Business Transactions Mamlyuk TTh 4:15-5:30					Health Policy Practicum Campbell T 4:00-5:50							
5:00				Appellate Ad small § Perkins T 5:30-6:45										Mediation Clinic Shields T 5:00-6:50
6:00							Appellate Ad small § Whitwell T 6:00-7:15							
7:00														

1L Required	2L Required	2L/3L Required	Statutory menu	Practice menu	Skills Course	Research/Writing	Elective	LM Section

Update: 3/3/2017 at 10:20 AM

Wednesday - FALL 2017

	104 (10-12)	127 (48)	136(259)Aud	206 (12)	226 (110)	244 (110)	230 (36)	233 (18)	325 (92)	326 (92)	338 (10)	310(44)SMC	335(98)HMC	CLINIC/Other
8:00					Sales Smith MWTh 8:00-8:50									
9:00	Mass Incarceration Seminar Frank W 9:00-10:50			Reproductive Rtgs. / Family Law Seminar Black W 9:00-10:50	Civ Pro §12 Schaffzin, K. MWTh		Legal Methods §11G1 - GAMMA MW 9:00-10:15	TN Con Law Seminar Smith W 9:00-10:50			Fed Discrimination Seminar Mulroy W 9:00-10:50			
10:00					Property I §12 Kiel TWF				Civ Pro §11 Bock WF 10:30-11:45					
11:00		Labor Law Lidge MWTh								Income Tax Kratzke MWF				
12:00	NOON HOUR - NO CLASSES													
1:00					Mergers & Acquisitions Harris W 1:00-2:50		Education & Civil Rights Kiel WF 1:00-2:15	Legal Methods §12B2 - BETA MW 1:00-2:15	Evidence Frank TWF 1:00-2:10					
2:00		Legal Methods §11G2 - GAMMA MW 2:30-3:45						Legal Methods §12B1 - BETA MW 2:30-3:45	Family Law Black MW 2:25-3:40					
3:00						Appellate Ad Kritchevsky all §§ 3:50-5:05								Children's Defense Clinic Geis 3:45-5:35
4:00		Externship Schaffzin, D. W 4:00-5:20					Debtor-Creditor Latta MW 4:00-5:15							
5:00														Trial Ad W 5:30-8:20 Criminal §14 - Nichols 201 Poplar
6:00		Land Use Law Whitehead W 6:00-7:50		Legal Drafting: Litigation Chambliss W 6:00-7:50										
7:00														

1L Required	2L Required	2L/3L Required	Statutory menu	Practice menu	Skills Course	Research/Writing	Elective	LM Section

Update: 3/3/2017 at 10:20 AM

Thursday - FALL 2017

	104 (10-12)	127 (48)	136(259)Aud	206 (12)	226 (110)	244 (110)	230 (36)	233 (18)	325 (92)	326 (92)	338 (10)	310(44)SMC	335(98)HMC	CLINIC/Other
8:00					Sales Smith MWTh 8:00-8:50									
9:00		Legal Methods §11D1 - DELTA MTh 9:00-10:15	Con Law Mulroy MTTh 9:00-10:10		Civ Pro §12 Schaffzin, K. MWTh			Mental Health Law Campbell TTh 9:00-10:15						
10:00						Legislation Romantz MTh 10:30-11:45	Legal Methods §11 & §12 - Wilson MTh 10:30-11:45	Legal Methods §12D2- DELTA MTh 10:30-11:45		Dec. Estates Brashier TTh 10:30-11:45				
11:00		Labor Law Lidge MWTh												
12:00	NOON HOUR - NO CLASSES													
1:00	Partnership Tax Kratzke MTTh	Civil Rights Kritchevsky MTh 1:00-2:15			Torts I §12 Allen TTh 1:00-2:15	Prof. Responsibility Lidge MTh				Property I §11 Brashier MTh 1:00-2:15				
2:00		IP Survey Bock TTh 2:25-3:40			Administrative Law Romantz TTh 2:20-3:35		Food & Drug Law Alexander TTh 2:30-3:45			Contracts §12 Mamlyuk TTh 2:30-3:45				
3:00						Contracts §11 Newman TTh 3:15-4:30			Business Org. Harris MTh 3:50-5:05					
4:00		Int'l. Business Transactions Mamlyuk TTh 4:15-5:30												
5:00	Tax Lawyering Kratzke MTh 5:10-6:00													Trial Ad Th 5:30-8:20 Civil & Criminal §13 - Craft 201 Poplar § 12 - Laurenzi Federal Bldg.
6:00														
7:00														

1L Required	2L Required	2L/3L Required	Statutory menu	Practice menu	Skills Course	Research/Writing	Elective	LM Section

Update: 3/3/2017 at 10:20 AM

Friday - FALL 2017

	104 (10-12)	127 (48)	136(259)Aud	206 (12)	226 (110)	244 (110)	230 (36)	233 (18)	325 (92)	326 (92)	338 (10)	310(44)SMC	335(98)HMC	CLINIC/Other
8:00														
9:00														CLINIC MLP/Elder/ NPC/HAC F 9:00-10:50
10:00		Health Law Survey Allen TF 10:30-11:45			Property I §12 Kiel TWF	Antitrust Newman TF 10:30-11:45			Civ Pro §11 Bock WF 10:30-11:45					
11:00										Income Tax Kratzke MWF				
12:00	NOON HOUR - NO CLASSES													
1:00						Torts I §11 McClurg TF 1:00-2:15	Education & Civil Rights Kiel WF 1:00-2:15		Evidence Frank TWF 1:00-2:10					
2:00														
3:00														
4:00														
5:00														
6:00														
7:00														

1L Required	2L Required	2L/3L Required	Statutory menu	Practice menu	Skills Course	Research/Writing	Elective	LM Section

Update: 3/3/2017 at 10:20 AM

Cecil C. Humphreys School of Law
FALL 2017 EXAM SCHEDULE

NOTE: It is preferable that students not enroll in courses that have conflicting exams. If a student must enroll in courses with conflicting exams, the student should obtain written approval to do so from the Associate Dean prior to enrolling. All requests for approval of conflicting exams must be submitted in writing to the Associate Dean.

DATE	TIME	SECTION	COURSE	PROFESSOR	ROOM
Monday, November 27					
	9:00 am	011	Partnership Tax	Kratzke	233
		011	Professional Responsibility	Lidge	226, 244
Tuesday, November 28					
	9:00 am	011	Administrative Law	Romantz	226, 244
		011	Food and Drug Law	Alexander	230
		011	IP Survey	Bock	233
	2:00 pm	011	Property I	Brashier	325, 326
		012	Property I	Kiel	226, 244
Wednesday, November 29					
	9:00 am	011	Antitrust	Newman	244
		011	Income Tax	Kratzke	326
Thursday, November 30					
	9:00 am	011	Criminal Procedure II	Ward	325
		011	Evidence	Frank	226
	2:00 pm	011	Torts I	McClurg	226, 244
		012	Torts I	Allen	325, 326
Friday, December 1					
	9:00 am	011	Land Use Law	Whitehead	127
		011	Sales	Smith, K.	226

Cecil C. Humphreys School of Law
FALL 2017 EXAM SCHEDULE

DATE	TIME	SECTION	COURSE	PROFESSOR	ROOM
Monday, December 4					
	9:00 am	011	Constitutional Law	Mulroy	136
		011	Mental Health Law	Campbell	233
Tuesday, December 5					
	9:00 am	011	Family Law	Black	325
		011	Mergers & Acquisitions	Harris	244
	2:00 pm	011	Contracts I	Newman	226, 244
		012	Contracts I	Mamlyuk	325, 326
Wednesday, December 6					
	9:00 am	011	Decedents' Estates	Brashier	325, 326
		011	Labor Law	Lidge	226
		011	Legislation	Romantz	244
Thursday, December 7					
	9:00 am	011	Business Organizations	Harris	325, 326
		011	Debtor-Creditor Law	Latta	230
		011	Tax Lawyering	Kratzke	233
	2:00 pm	011	Civil Procedure I	Bock	136
		012	Civil Procedure I	Schaffzin, K.	226, 244
Friday, December 8					

	Course	Professor	Room
Self-Scheduled Exams*	Civil Rights	Kritchevsky	104*
	Education & Civil Rts. Law	Kiel	104*
	Health Law Survey	Allen	104*
	Int'l Business Transactions	Mamlyuk	104*

**** Please check with your professor for instructions on your exam. Room 104 will be reserved for Self-Scheduled exams during the examination period.***

The University of Memphis

Cecil C. Humphreys School of Law

YOU ARE RESPONSIBLE FOR READING THIS MEMO PRIOR TO REGISTRATION

FALL 2017 LAW SCHOOL REGISTRATION

VETERANS – MONDAY, APRIL 3 AT 8:00 A.M.
43+ HOURS –TUESDAY, APRIL 4 AT 9:00 A.M.
15-42 HOURS – THURSDAY, APRIL 6 AT 9:00 A.M.
0-14 HOURS – FRIDAY, APRIL 7 AT 9:00 A.M.

You will register on your *myMemphis* Student Self Service account for the 2017 Fall semester. Please read the following instructions and pay close attention to the Law School Calendar as some of our dates and deadlines differ from the rest of the University. The registration materials posted on the Law School website and the bulletin board in Room 262 are the only official Law School registration materials. You are responsible for following the Law School's instructions.

PRIORITY ENROLLMENT:

There is a priority procedure in place for registration. Questions about your priority status should be directed to the Law School's Registrar Office.

(1) Veterans or Active Duty Military
State law authorizes priority registration for Veterans. Veterans may register beginning Monday, April 3, at 8:00 a.m.

(a) **Veterans**: If you are a Veteran but are not claiming VA Educational Benefits, and are not registered with the Veterans Educational Benefits & Certification Office on campus, you will need to provide them with a copy of your DD-214 so your account can be coded for early registration.

(b) **National Guard**: Provide the Veterans Educational Benefits & Certification Office with a copy of your DD-214 and Notice of Basic Eligibility (NOBE).

(c) **Reserves**: Provide the Veterans Educational Benefits & Certification Office with a copy of your DD-214 that indicates you have completed initial active duty for training.

Veterans Education Benefits & Certification Office of the Registrar
003 Wilder Tower
Phone: 901-678-2996
Fax: 901-678-1425
vetedbenefits@memphis.edu

(1) Students who have attempted 43 or more credit hours at the time of registration will be allowed to register on Tuesday, April 4, at 9:00 a.m.*

(2) Students who have attempted 15-42 credit hours at the time of registration will be allowed to register on Thursday, April 6, at 9:00 a.m.*

(3) Students who have attempted 0-15 or more credit hours at the time of registration will be allowed to register on Friday, April 7, at 9:00 a.m.*

"Attempted" hours do not include the hours which are currently in-progress, i.e. the hours in which you are enrolled at the time of registration. To find your official number of attempted hours, look at your Academic Transcript in Banner, at the column entitled "Attempt Hours," under your most recently completed academic term.

REGISTRATION INFORMATION:
Login to the *myMemphis* Portal at http://myMemphis.memphis.edu with your University ID and password, select the Student tab, go to Registration Tools and follow the directions. Course Registration Numbers (CRNs) are listed on the Law School Course Schedule online. If you need assistance accessing your *myMemphis* account, contact 901-678-8888.

(1) You may register and pay fees until 4:30 p.m. on Friday, August 11, 2017 without incurring late fees. Seating capacity is limited in some classrooms; it is to your advantage to register early. Your courses will be cancelled for non-payment at 4:31 p.m. on Friday, August 11, 2017.

(2) Course Load (Academic Regulation 5):

(a) Full-time students must enroll in a minimum of 12 hours and not more than 18 semester hours. For students with a GPA below 2.50, the maximum course load is 16 hours unless prior approval is obtained from the Associate Dean for Academic Affairs. Students wishing to switch to part-time **must submit a written request** to the Associate Dean for Academic Affairs for approval prior to enrolling.

(b) Part-time students must enroll in at least 8 and not more than 11 credit hours. Students wishing to switch to full-time **must submit a written request** to the Associate Dean for Academic Affairs for approval prior to enrolling. Taking less than 12 credit hours may affect the amount of your financial aid. Contact DebraAnn Brown with financial aid questions.

(3) Course Sequencing and Requirements (Academic Regulation 16):

(a) **Second-Year Full-Time Students:** Second-year students are required to take Evidence and Constitutional Law in the fall or spring semester. Second-year students should, but are not required to, enroll in Professional Responsibility and take courses from the Statutory Course Menu and the Practice Foundation Menu. Two of the five courses in each menu must be completed prior to graduation. The following Menu courses are offered in the spring 2016 semester:

Statutory Menu Courses	Practice Foundation Menu Courses
Legislation	Administrative Law
Income Tax	Business Organizations
Sales	Decedents' Estates
	Family Law

(b) **Second-Year Part-Time Students:** ***Second—year part-time students must take the following courses in their second year: ****
Contracts I (Fall) & Contracts II (Spring)
Property I (Fall) & Property II (Spring)
Constitutional Law (Fall or Spring)
Evidence (Fall or Spring)

(c) **Third-Year and Fourth-Year Part-Time Students:**
Complete any required courses as needed under the curriculum in place when you entered law school.

(d) **Part-Time Students:**
You must enroll in required courses in sequence. ***If you fail to register for a required course in sequence, you are deemed enrolled and will receive a failing grade in the class for failure to attend.*** You must remain in the same section in which you start for the entire full-time 1L curriculum unless you obtain permission to switch sections from the Associate Dean of Academic Affairs.

LIMITED COURSES:

Skills and Advanced Research: The sign-up procedure will open on Friday, March 17 at 8am and will close on Tuesday, March 21 at noon. Those selected for a seat will be notified by email at least one week before (regular) Registration begins. The Registrar's Office will enroll you in your courses. If you decide not to take the limited course, **you must drop the course and notify the Law School Registrar's Office immediately**.

Externships: Professor Danny Schaffzin, Director of the Externship Program, will notify students who were selected; these students will be enrolled by the Registrar's Office. A student who decides to drop the Externship Course must obtain the permission of Professor Danny Schaffzin before doing so.

Legal Clinics: The clinic faculty member has notified students selected for Legal Clinics; these students will be enrolled by the Registrar's Office. If you decide to drop the clinic, you are required to notify the faculty member and the Law School Registrar's Office immediately.

HOLDS:

If you have any HOLDS on your account, you will not be able to register until you clear the HOLDS through the Bursar's Office. Check your account now and clear any HOLDS, so you are able to register. I do not have access to the HOLD information and cannot help you clear it.

ALTERNATE PIN:

Students who:

(1) have needed an "alternate pin" to enroll in prior semesters,
(2) are registered with Disability Resources Services,
(3) are pursuing a JD/MBA or JD/MA degree, or
(4) are registered with Veteran Services,

should email the Law School Registrar's Office **PRIOR** to registration.

FEES: Refer to the Bursar's website.

DEADLINES: Refer to the Deadline Calendar.

Drops/Adds: (Refer to Academic Regulations)

Add courses via your account through Friday, August 11, 2017 at 4:30 p.m.
Drop courses via your account through Friday, September 30. Drops after this date must be done through the Law Registrar office, with permission from the Associate Dean for Academic Affairs.

(a) The deadline for 100% refund for dropped courses is Sunday, August 13, 2017.
(b) Courses dropped after Sunday, September 10, 2017 will show as a "W" on your transcript.

Late Registration: From Monday, August 14 through Wednesday, August 23, 2017, students may register online. The fee payment deadline for Late Registration is Friday, August 25, at 4:30 p.m. A late registration fee will be assessed to students who register during this period. Any classes missed due to late registration count as absences.

Courses Canceled for Non-Payment: For regular registration, all courses will be canceled for non-payment after 4:30 p.m. on Friday, August 11, 2017. For late registration, all courses will be canceled for non-payment after 4:30 p.m. on Friday, August 25, 2017.

PREREQUISITES:

Students are responsible for compliance with course prerequisites and other course restrictions as stated in the Academic Regulations and in the Course Catalog. A student may be dropped from a course if the student does not have the required prerequisites.

EXPERIENTIAL LEARNING:

1. Clinic and Externship course information is available online. In addition to the Academic Regulations, please review the Policies and Procedures of the Externship Program.

2. Students may only receive credit toward graduation for three Externships, or two Clinics, or a combination of two Externships and one Clinic.

3. To satisfy graduation requirements, a student is permitted a total of three (3) externships, two (2) clinic courses, or a combination of (1) clinic and (2) two externship courses. Absent permission from the Associate Dean of Academic Affairs, a student may not repeat a clinic or externship, may not enroll in both a clinic and externship in the same semester or summer session, and may not enroll in more than one clinic or more than one externship in any semester or summer session. For enrollment purposes in these limited enrollment courses, a student who has taken one clinic will not receive priority for a second clinic, and a student who has taken one externship will not receive priority for a second externship.

INDEPENDENT RESEARCH:
Students interested in enrolling in Independent Research must obtain the permission of the Associate Dean of Academic Affairs and turn in a completed Research Paper Form to the Associate Dean of Academic Affairs. Forms may be picked up from the Law School Registrar. If you are interested, you should speak with the Associate Dean prior to registration.

EXAM SCHEDULE:
Please refer to the Exam Schedule when making course selections. A student may not enroll in courses that have conflicting examination schedules. No exceptions in the Exam Schedule will be made unless written approval is obtained from the Associate Dean of Academic Affairs prior to enrolling. **Requests must be submitted in writing.**

LIMITATION ON COURSES GRADED E, S, U ("E,S,U COURSES"):
A student may not utilize more than twelve (12) credit hours toward graduation requirements from any combination of the following courses: Externship, Law Review or Law Review Board, Moot Court (including Moot Court Board, Moot Court Executive Board, and inter-school or intra-school competition credit), Independent Research, and Advanced Clinic.

LOCKERS: Payment should be made online. Once you have paid the locker fee online, see Brigitte Boyd in Room 260 for assignment of a locker and combination.

COURSE CANCELLATION: The Law School Administration reserves the right to cancel a course that fails to get sufficient enrollment.

*******See important financial information on the next page.*******

FINANCIAL INFORMATION

YOU are responsible for complying with the policies and fee information on the Bursar's website. Please read before registering. Dates for registration and fee payment are available online. See also the Law Deadlines Calendar.

Registration Cancellation Policy
NO PAYMENT = NO CLASSES!

If your financial aid (grants and student loans), scholarship, and/or third party assistance does not cover 100% of your fees, you must pay the remaining balance by the appropriate fee payment deadline. You will be notified via your University email account when your electronic invoice is available online. You remain responsible for completing the fee payment process by the fee payment deadline, even if you do not receive or open your fee invoice, which will be available on your Banner Student Self Service account.

Tuition and fees are available online.

Payments mailed to the Bursar's Office must be **received** in their office by the appropriate fee payment deadline, **regardless of the postmark date on the envelope**. **Please allow five to seven days for processing.**

The University of Memphis Cecil C. Humphreys School of Law

2017 Fall Law Registrar Deadline Calendar

Friday, March 17 – Tuesday, March 21	Limited Enrollment Registration
Monday, April 3 – Friday, April 7	Registration

Monday, April 3: **Veteran registration** *(8am)*
Tuesday, April 4: **43+ Attempted Hrs.*** *(9am)*
Thursday, April 6: **15-42 Attempted Hrs.*** *(9am)*
Friday, April 7: **0-14 Attempted Hrs.*** *(9am)*

Monday, August 7 – Friday, August 11	First-Year Orientation
Friday, August 11	Law School Tuition & Fees Payment Deadline ***(Courses Deleted for Non-Payment after 4:30pm)***
Sunday, August 13	Last Day for 100% Refund on Drops and Withdrawals
Monday, August 14	First Day of Classes
Monday, August 14—Wednesday, August 23	Late Registration and Late Add period ***($100 Late Registration Fee assessed during Late Registration.)***
Thursday, August 24	Late Payment Fee Assessed after 5:30pm
Friday, August 25	Late Registration Tuition and Fee Payment Deadline ***(Courses Deleted for Non-Payment after 4:30pm)***
Sunday, August 27	Last Day for 75% Refund, Drops
Monday, September 4	Labor Day Holiday
Sunday, September 10	Last Day to Drop Without Showing "W" on Transcript
Monday, September 12	Last Day for 25% Refund, Drops/Withdrawals
Friday, September 15	Last Day to Apply for December Graduation 2017
Friday, September 30	Last Day to Withdraw Without Permission
Monday, November 20	Last Day of Classes
Tuesday & Wednesday, November 21 - 22	Reading Days
Thursday & Friday, November 23-24	Thanksgiving Holiday
Monday, November 27	Exams Begin
Friday, December 8	Exams End
Sunday, December 17	Commencement (at 10:00am)

DRAFT Spring 2018 - Monday

	104 (10-12)	127 (48)	136(259)Aud	206 (12)	226 (110)	244 (110)	230 (36)	233 (18)	325 (92)	326 (92)	338 (10)	310(44)SMC	335(98)HMC	CLINIC/Other
8:00									Remedies Smith MTh 8:00-9:15					
9:00		LM § 11B1 BETA MW 9:00-10:15								Civil Procedure II §12 - Schaffzin MW				
10:00														
11:00					Copyright Jones MWTh		Corporate Tax Kratzke MThF							
12:00	NOON HOUR - NO CLASSES													
1:00		FEP Lidge MWTh		Commercial Law Smith MWTh 1:00-2:10		Contracts II §11 - Newman MW 1:00-2:15	NonProfits Kratzke MWF		Contracts II §12 - Mamlyuk MTh 1:00-2:15	Elder Law Brashier MW 1:00-2:15				
2:00		LM § 12G2 GAMMA MW 2:30-3:45						LM § 11B2 BETA MW 2:30-3:45	LM § 11D1 DELTA MW 2:30-3:45					
3:00							Professional Reponsibility Wilson M 3:35-5:25							
4:00		Employee Benefits Kiesewetter MW 4:30-5:45			Entertainment Law Alexander MW 4:30-5:45	Externship Schaffzin M 4:30-5:50					International Tax Kratzke MW 4:30-5:45			
5:00								National Security Harvey MW						
6:00				Discovery McGown M 6:00-7:50		Negotiation & Mediation both sections Wade Schwarz M 6:00-7:50								
7:00														

1L Required	2L Required	2L/3L Required	Statutory menu	Practice menu	Skills Course	Research/Writing	Elective	LM Section

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DRAFT Spring 2018 -Tuesday

	104 (10-12)	127 (48)	136(259)Aud	206 (12)	226 (110)	244 (110)	230 (36)	233 (18)	325 (92)	326 (92)	338 (10)	310(44)SMC	335(98)HMC	CLINIC/Other
8:00							Legal Drafting: Contracts Smith, Bryan T 8:00-9:50							
9:00					Property II §12 - Kiel TF 9:00-10:15	Secured Trans. Black TThF				Criminal Law §11 Mulroy TThF				
10:00		Patent Law Bock TTh 10:35-11:50			Torts II §12 - Allen TF 10:35-11:50	Estate Planning Black TTh 10:35-11:50			Federal Courts Frank TF 10:35-11:50	Property II §11 - Brashier TTh 10:35-11:50				
11:00														
12:00	NOON HOUR - NO CLASSES													
1:00					Criminal Procedure I Romantz TTh 1:00-2:15	Torts II §11 - McClurg TF 1:00-2:15			Constitutional Law Kiel TWF 1:00-2:10					
2:00					Conflicts Newman TTh 2:30-3:45	LM § 12G1 GAMMA TTh 2:30-3:45	Trial Ad -Frank- §11 T 2:30-3:20 Th 2:30-4:30	LM § 11 & 12 Wilson T 2:30-4:20	LM § 12D2 DELTA TTh 2:30-3:45					
3:00														
4:00											Regulatory Compliance Campbell T 4:00-5:50			Children's Defense Clinic Geis T 4:00-5:50
5:00				Divorce Law Practicum Pounders TW 5:15-6:30	Products Liability Bearman TTh									
6:00							Immigration Law Pazar TTh 6:00-7:15							
7:00														

1L Required	2L Required	2L/3L Required	Statutory menu	Practice menu	Skills Course	Research/Writing	Elective	LM Section

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DRAFT Spring 2018 -Wednesday

	104 (10-12)	127 (48)	136(259)Aud	206 (12)	226 (110)	244 (110)	230 (36)	233 (18)	325 (92)	326 (92)	338 (10)	310(44)SMC	231	CLINIC/Other
8:00														
9:00	Corporate Law Seminar Letsou W 9:00-10:50	LM § 11B1 BETA MW 9:00-10:15		Legal Ethics Seminar Lidge W 9:00-10:50						Civil Procedure II §12 - Schaffzin MW	Health Law Seminar Allen W 9:00-10:50		Public Int'l. Law Seminar Mamlyuk W 9:00-10:50	
10:00														
11:00					Copyright Jones MWTh					Civil Procedure II §11 - Bock WF				
12:00	**NOON HOUR - NO CLASSES**													
1:00		FEP Lidge MWTh		Commercial Law Smith MWTh 1:00-2:10	Criminal Law §12 - Romantz WF 1:00-2:15	Contracts II §11 - Newman MW 1:00-2:15	NonProfits Kratzke MWF		Constitutional Law Kiel TWF 1:00-2:10	Elder Law Brashier MW 1:00-2:15				
2:00		LM § 12G2 GAMMA MW 2:30-3:45			Bar Prep Kritchevsky W 2:30-4:20			LM § 11B2 BETA MW 2:30-3:45	LM § 11D1 DELTA MW 2:30-3:45					
3:00														
4:00		Employee Benefits Kiesewetter MW 4:30-5:45			Entertainment Law Alexander MW 4:30-5:45	Legal Analysis TBA W 4:00-5:15					International Tax Kratzke MW 4:30-5:45			
5:00				Divorce Law Practicum Pounders TW 5:15-6:30				National Security Harvey MW						**Trial Ad: Nichols § 14** Criminal W 5:30-8:20 ***201 Poplar Ave.***
6:00							Admiralty Law Mulrooney Coombs W 6:00-7:50						Mediation Clinic Shields W 6:00-7:50 ***Room 231***	
7:00														

1L Required	**2L Required**	**2L/3L Required**	**Statutory menu**	**Practice menu**	**Skills Course**	**Research/Writing**	**Elective**	**LM Section**

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DRAFT Spring 2018 - Thursday

	104 (10-12)	127 (48)	136(259)Aud	206 (12)	226 (110)	244 (110)	230 (36)	233 (18)	325 (92)	326 (92)	338 (10)	310(44)SMC	Other	CLINIC/Other
8:00								Legal Drafting: Litigation Lakey Th 8:00-9:50	Remedies Smith MTh 8:00-9:15					
9:00						Secured Trans. Black TThF				Criminal Law §11 Mulroy TThF				
10:00		Patent Law Bock TTh 10:35-11:50				Estate Planning Black TTh 10:35-11:50				Property II §11 - Brashier TTh 10:35-11:50				
11:00					Copyright Jones MWTh		Corporate Tax Kratzke MThF							
12:00	**NOON HOUR - NO CLASSES**													
1:00		FEP Lidge MWTh		Commercial Law Smith MWTh 1:00-2:10	Criminal Procedure I Romantz TTh 1:00-2:15				Contracts II §12 - Mamlyuk MTh 1:00-2:15					
2:00					Conflicts Newman TTh 2:30-3:45	LM § 12G1 GAMMA TTh 2:30-3:45		Guns & the Law McClurg Th 2:30-4:20	LM § 12D2 DELTA TTh 2:30-3:45			Trial Ad Frank § 11 T 2:30-3:20 Th 2:30-4:00		
3:00														
4:00							Trust Law McDaniel Th 4:00-5:50							
5:00					Products Liability Bearman TTh			Corporate Governance & Compliance Goldsmith Th 5:15-7:05					**Trial Ad: Laurenzi § 12** Civil & Criminal Th 5:30-8:20 ***Federal Bldg. Ct. Rm. 1 11th floor***	**Trial Ad: Craft § 13** Civil & Criminal Th 5:30-8:20 ***201 Poplar Ave.***
6:00							Immigration Law Pazar TTh 6:00-7:15							
7:00														

1L Required	2L Required	2L/3L Required	Statutory menu	Practice menu	Skills Course	Research/Writing	Elective	LM Section

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DRAFT Spring 2018 -Friday

	104 (10-12)	127 (48)	136(259)Aud	206 (12)	226 (110)	244 (110)	230 (36)	233 (18)	325 (92)	326 (92)	338 (10)	310(44)SMC	335(98)HMC	CLINIC/Other
8:00								Realty Transactions Humphreys F 8:10-10:00						
9:00					Property II §12 - Kiel TF 9:00-10:15	Secured Trans. Black TThF				Criminal Law §11 Mulroy TThF				
10:00					Torts II §12 - Allen TF 10:35-11:50				Federal Courts Frank TF 10:35-11:50					Clinic MLP / Elder/ Neighborhood Pres. Housing Adj. F 10:00-11:50
11:00							Corporate Tax Kratzke MThF			Civil Procedure II §11 - Bock WF				
12:00	NOON HOUR - NO CLASSES													
1:00					Criminal Law §12 - Romantz WF 1:00-2:15	Torts II §11 - McClurg TF 1:00-2:15	NonProfits Kratzke MWF		Constitutional Law Kiel TWF 1:00-2:10					
2:00														
3:00														
4:00														
5:00														
6:00														
7:00														

1L Required	2L Required	2L/3L Required	Statutory menu	Practice menu	Skills Course	Research/Writing	Elective	LM Section

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Spring 2017 Midterm

Notice: If you are using a newer MacBook Pro model equipped with Apple's Touch Bar feature, you MUST disable the Touch Bar before beginning your exam. Instructions for doing so can be viewed here: Instructions for disabling the MacBook Pro Touch Bar

***Failure to do this is an Honor Code violation.**

If you have any technical questions about this, please ask a member of the IT staff prior to beginning your exam.

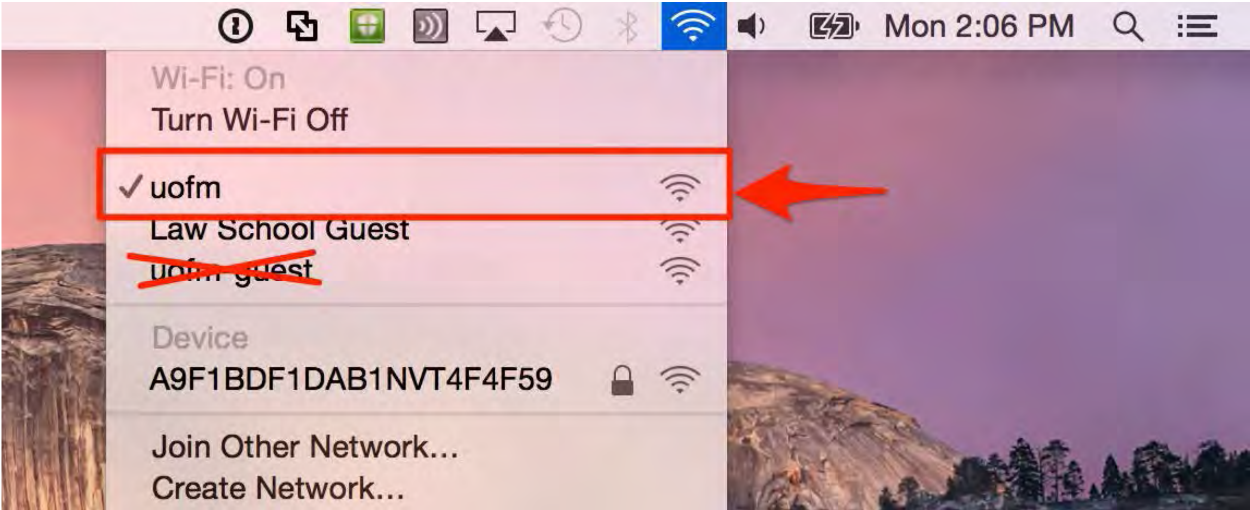
Cecil C. Humphreys School of Law

1 N. Front Street
Memphis, TN 38103-2189
Office: 901.678.3245
Fax: 901.678.3245
http://www.memphis.edu/law

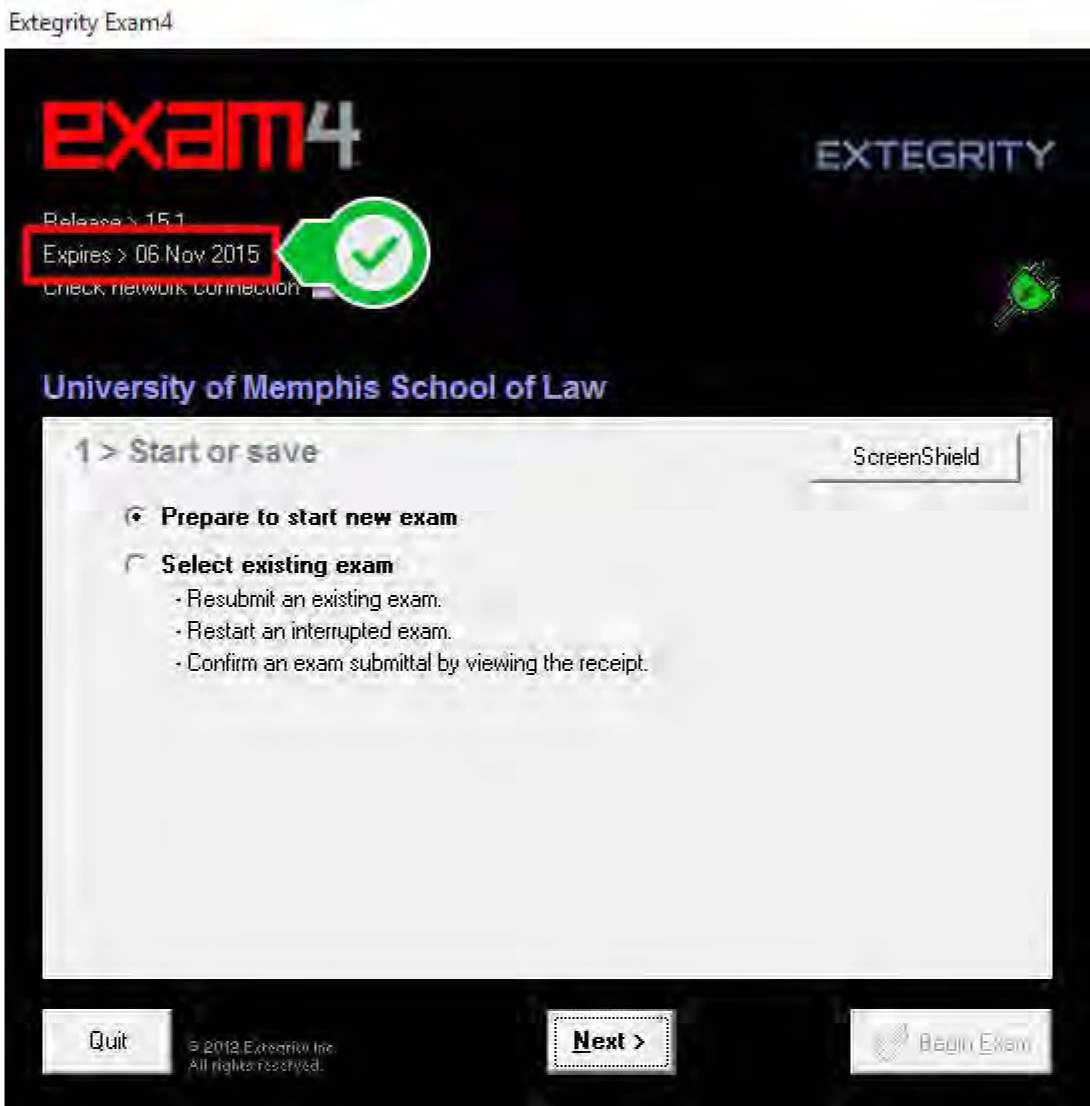
Exam4 Instructions

Pre-requisites

- You must have a working laptop
  - Supported operating systems can be found at the following link, and include:
    - Windows 10
    - Windows 8 (and 8.1)
    - Windows 7
    - Apple OS X 10.11 “El Capitan”
    - Apple OS X 10.10 “Yosemite”
    - Apple OS X 10.9 "Mavericks"
  - Make sure that your system is fully up-to-date with relevant security patches before the exam. Users who do not perform routine system updates before the exam sometimes experience unexpected reboots when the system attempts to update during the exam.
  - Perform a antivirus scan on your system prior to your exam
- You must be connected to the University of Memphis wireless network (not the “Guest” network). Once you’ve connected to the “uofm” wireless network, open a browser and verify that you can browse the internet without receiving an error message. You may need to install the SafeConnect Client Policy Key to use the “uofm” wifi. If so, install it, and then test your internet after the installation completes.



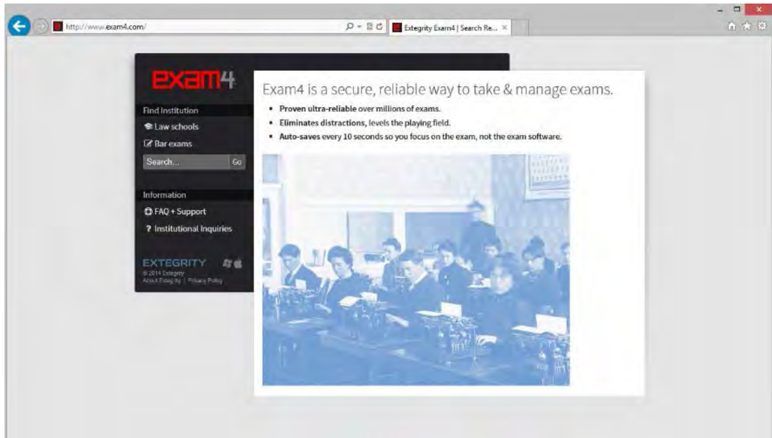
- If you have a previously installed version of Exam4, you MUST UPDATE to the latest version before taking your exams. You can check this by launching the software, and looking at the date next to the “Expires” field. If the expiration date has already passed on the software, then you will NOT be able to use it take your exams. You must download the latest copy of the software using the instructions in the next section of this document.



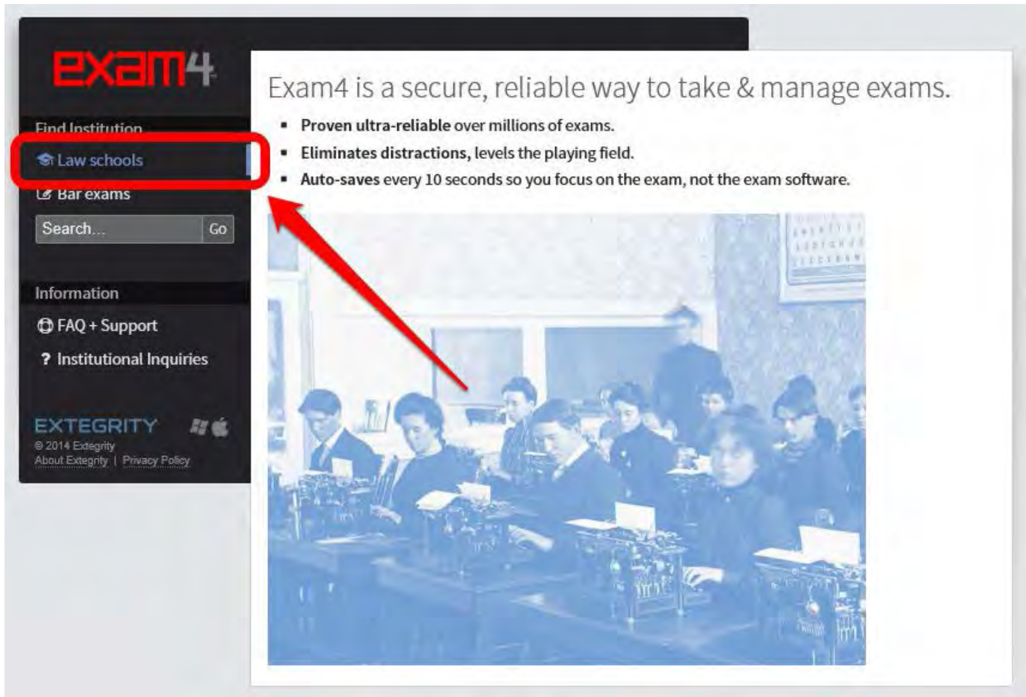
- If you are having trouble with your system prior to exams, please come see IT in Room 209 or email lawit@memphis.edu AS SOON AS POSSIBLE **BEFORE** YOUR EXAM DATE.

Installing the Exam4 software

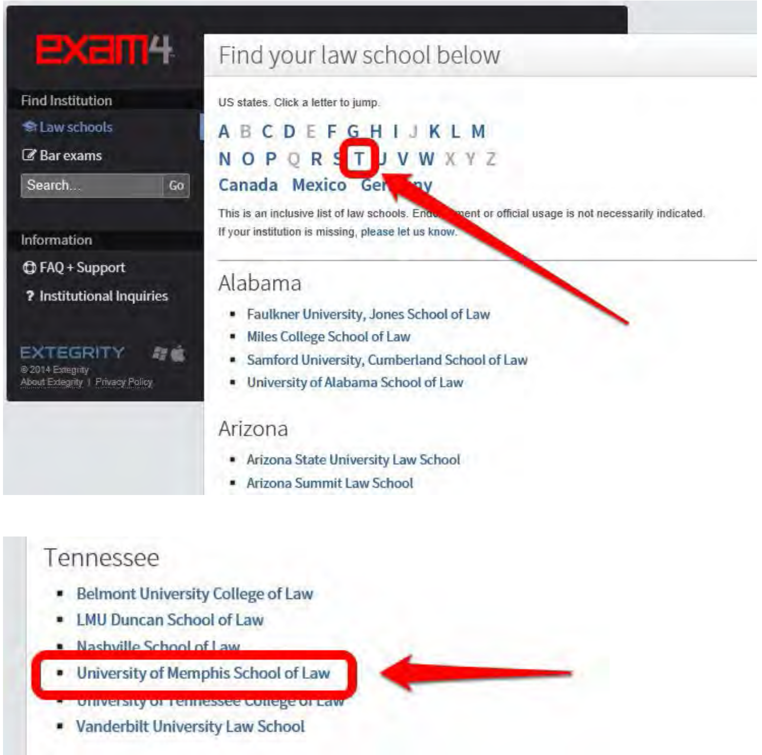
1. Navigate to the Exam4 website: http://exam4.com/



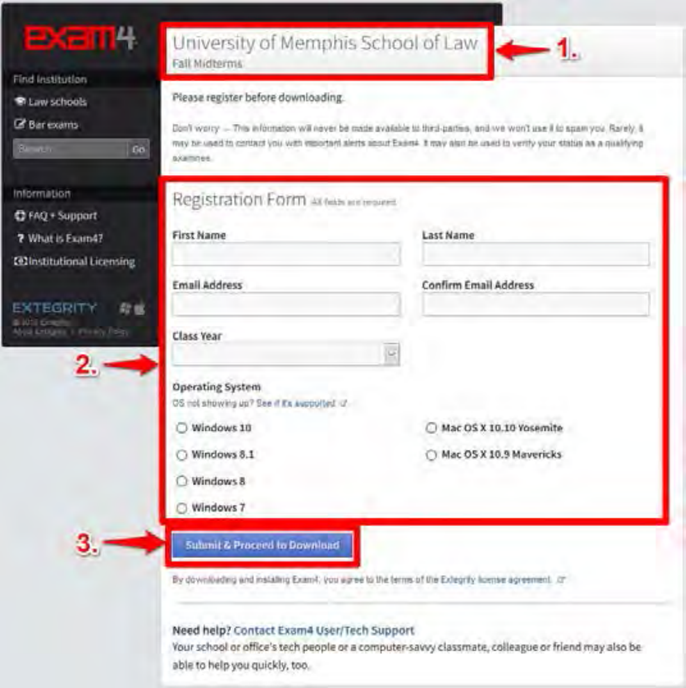
2. From there, on the menu to the left side of the screen, select for Law Schools.



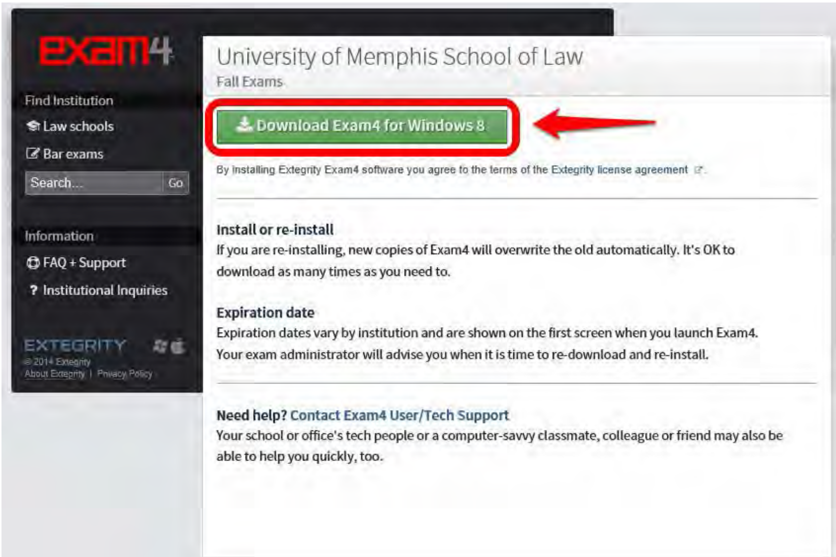
3. Next, click T or scroll down to Tennessee to find the link to our law school, **University of Memphis School of Law**, which you should select.



4. Next complete the registration form, selecting the Operating System which you will use for the exam.

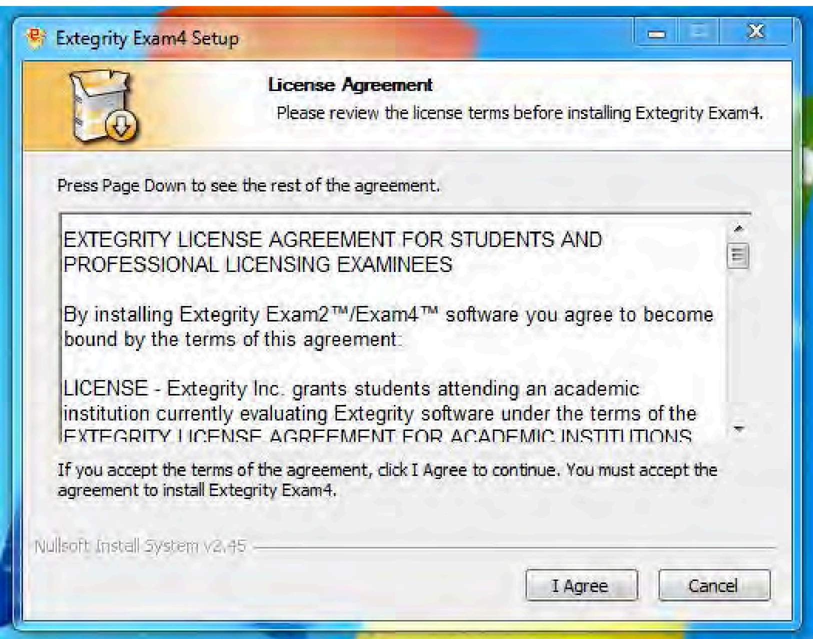


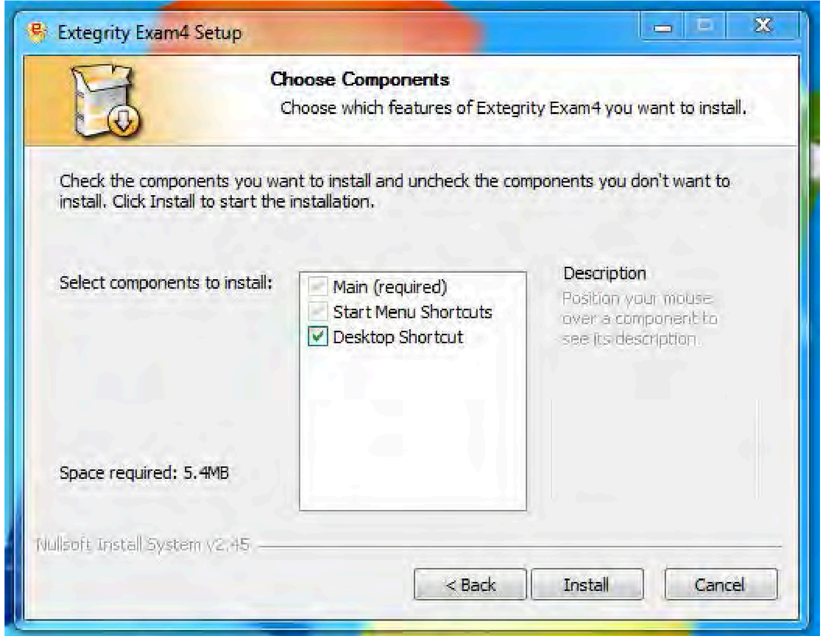
5. After registration, you will see a screen providing instructions for downloading the software.



6. After downloading, you will need to install the software and take a practice exam to confirm that it is working.

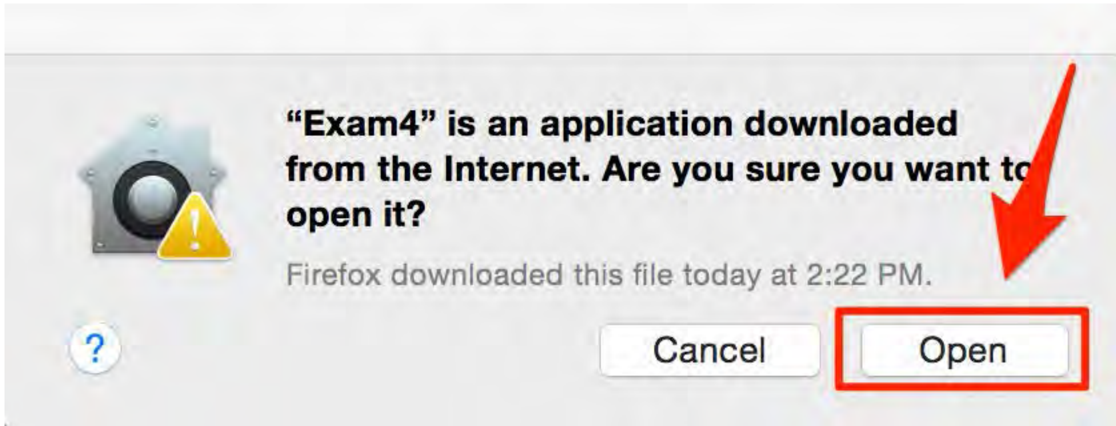
PC Installation




Extegrity Exam4 Setup
Choose Components
Choose which features of Extegrity Exam4 you want to install.
Check the components you want to install and uncheck the components you don't want to install. Click Install to start the installation.
Select components to install:
Main (required)
Start Menu Shortcuts
Desktop Shortcut
Description
Position your mouse over a component to see its description.
Space required: 5.4MB
Nullsoft Install System v2.45
< Back
Install
Cancel

Extegrity Exam4 Setup
Completing the Extegrity Exam4 Setup Wizard
Extegrity Exam4 has been installed on your computer.
Click Finish to close this wizard.
Run Extegrity Exam4
< Back
Finish
Cancel

Mac Installation

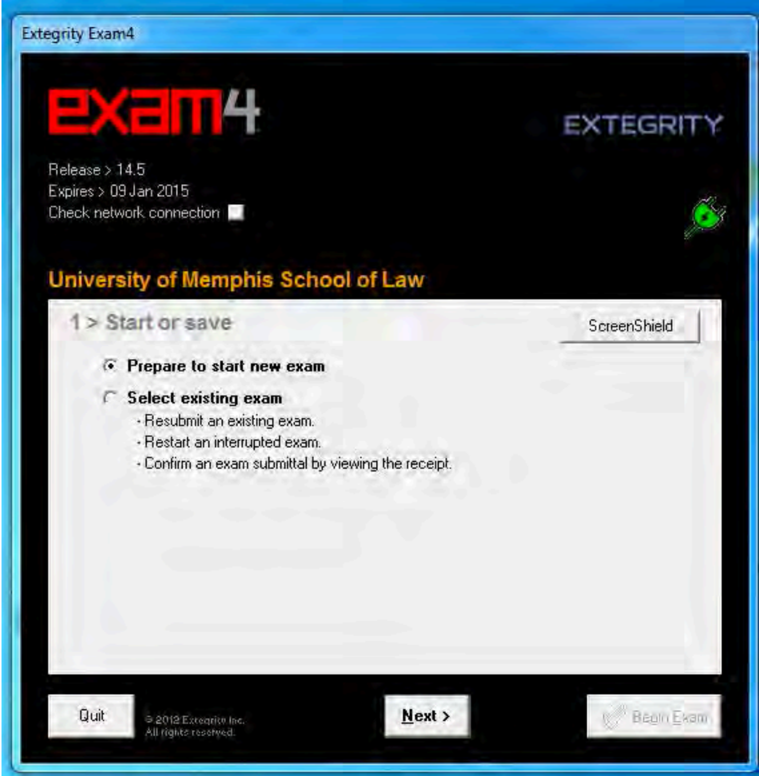


Taking a Practice Exam

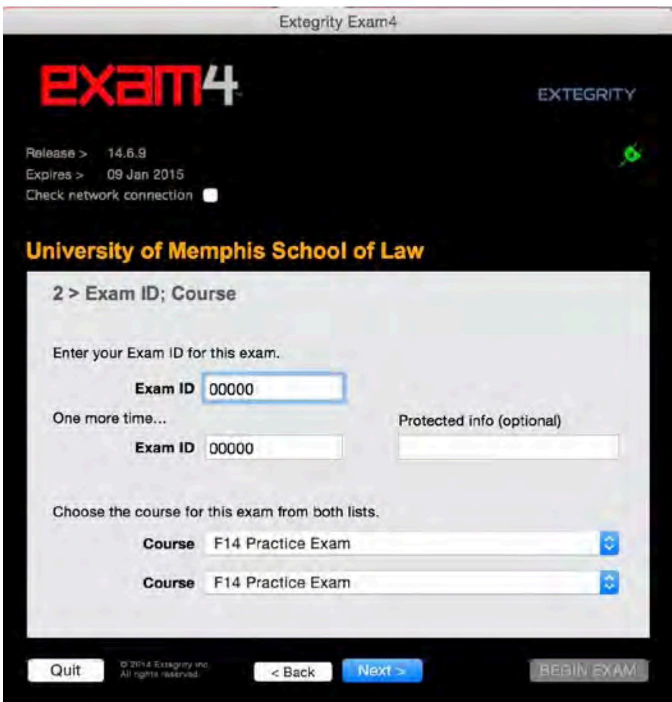
1. Launch the Exam4 software.

2. Click on “OK”

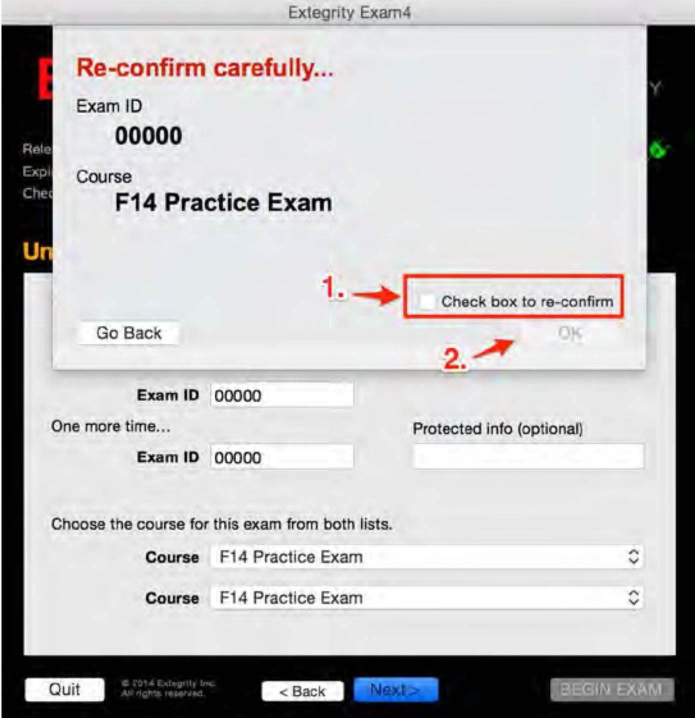
3. Select "Prepare to start new exam" and click Next.



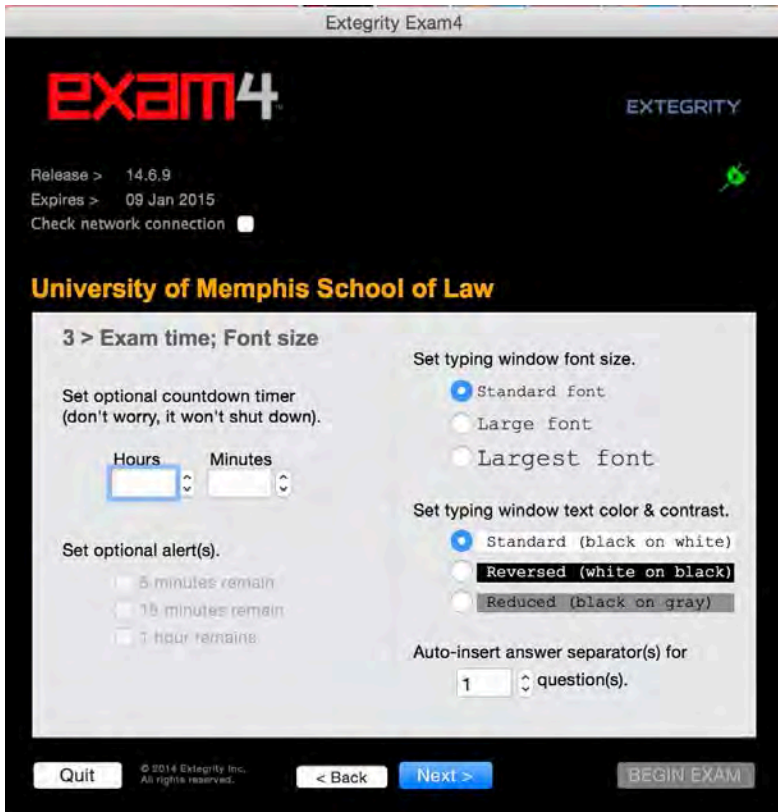
4. Enter your Exam ID, then select “Practice Exam” as the Course, finally click “Next”. On the day of your exams, you will select the Course that has the course name, section number, and professor name corresponding to the exam you are taking.



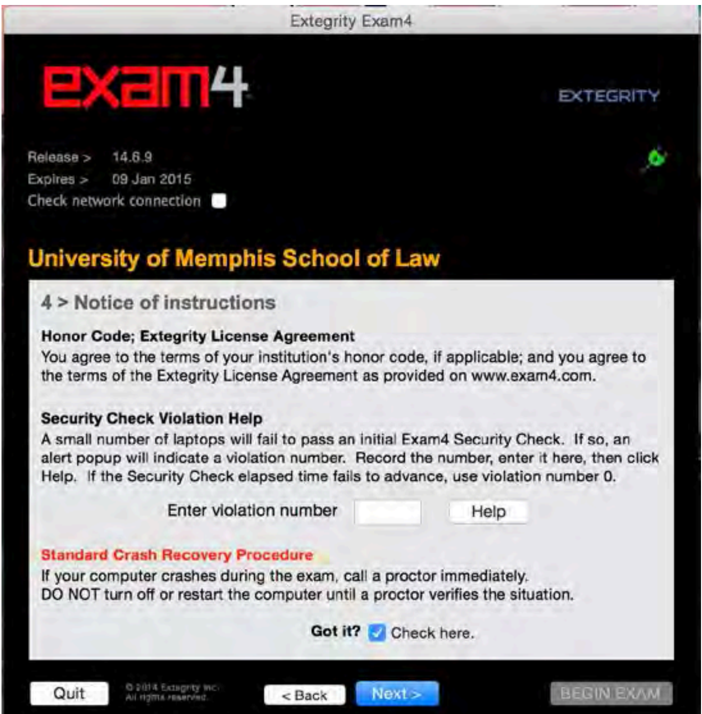
5. When the “Re-confirm carefully…” box appears, click “Check box to re-confirm” then click on “OK” to move forward.



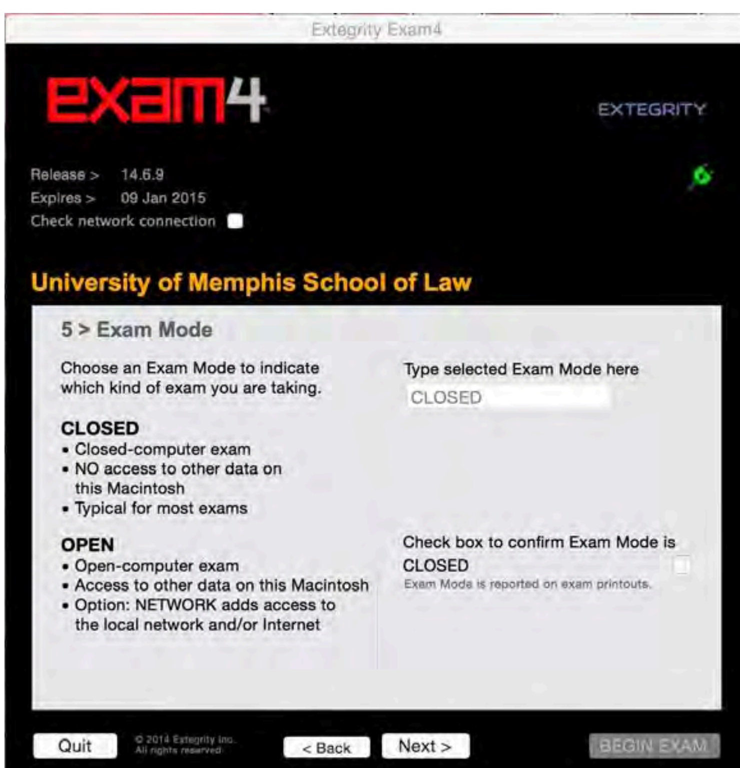
6. On this screen you can set some preferences (font size, alerts, etc). We highly recommend you use the default settings. Click “Next” to move forward.



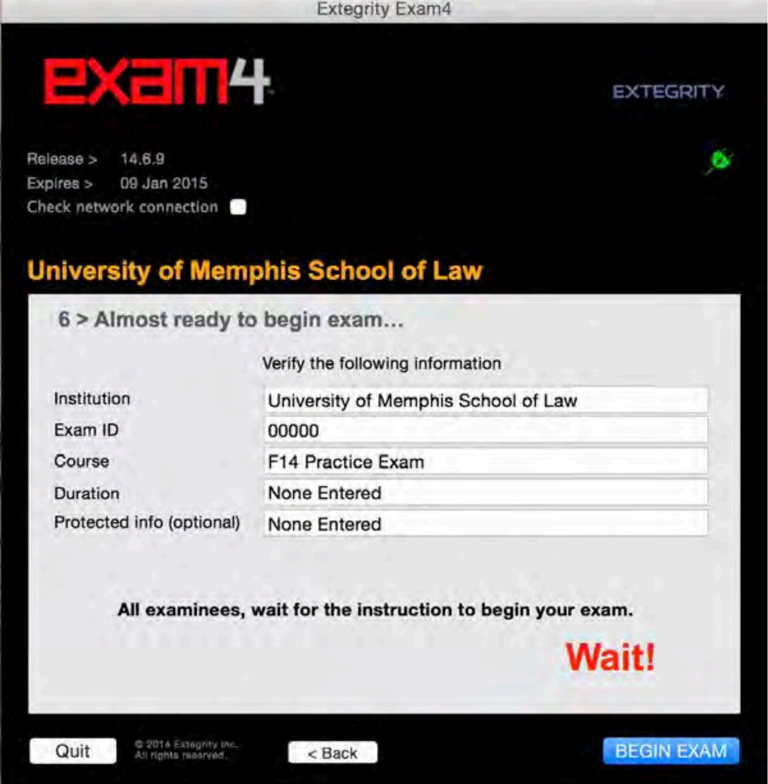
7. After reading the instructions below, put a check on "Got it? Check here" and click Next.



8. Type CLOSED for exam mode, put a check on "Confirm the exam mode" and click Next.



9. Confirm that all the information is correct and click on "Begin Exam".



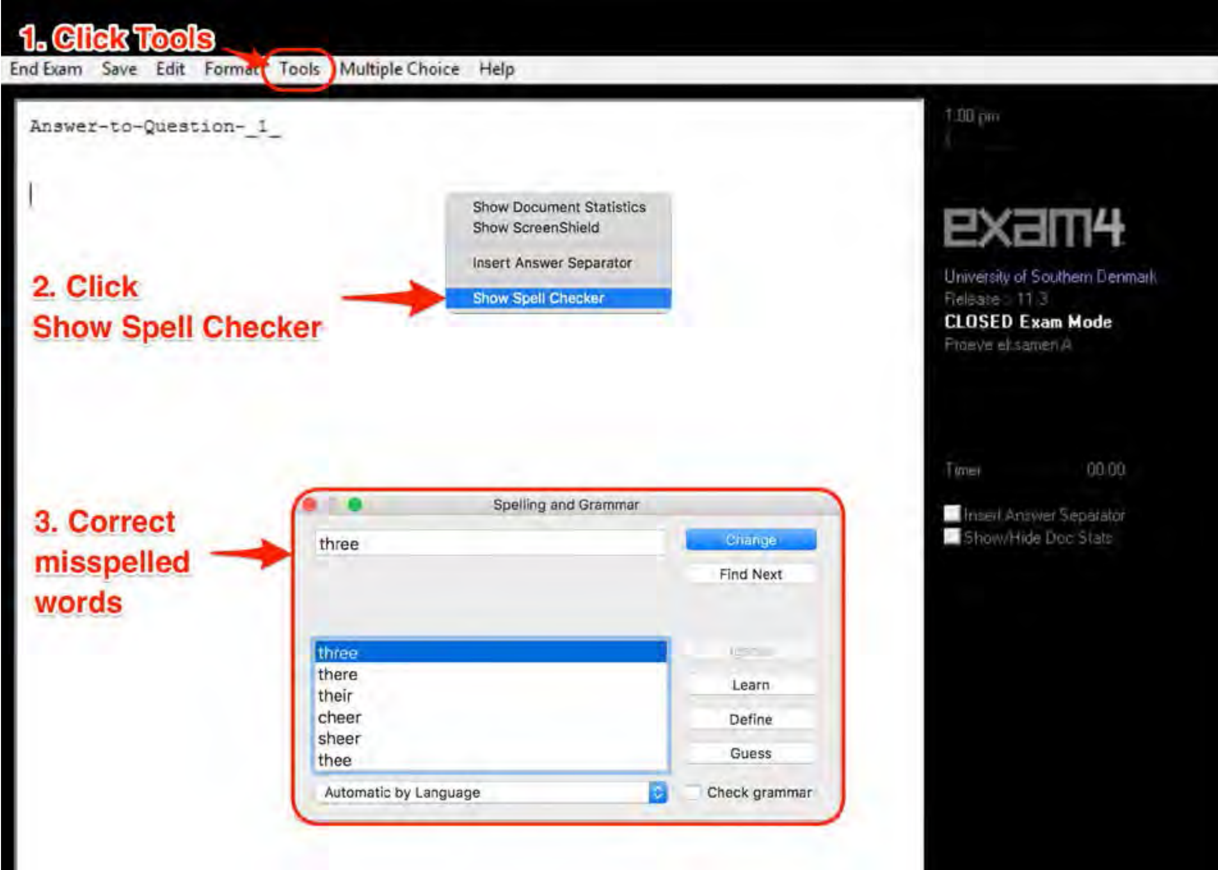
The first time that you run Exam4, it will perform a Security Check. Your screen may go blank for a few seconds. At the end of the check, you will see the exam window.

You may type anything you want into the Practice Exam. There are no questions to answer in the Practice Exam. Your work will be saved automatically every 4 seconds. You may also use the "Save" option on the toolbar.

When you have finished using the Practice Exam, you may exit by clicking on the "End Exam" option. In the End Exam window, put a check in "Confirm" and click on the "OK, end exam" button.

Spell Check

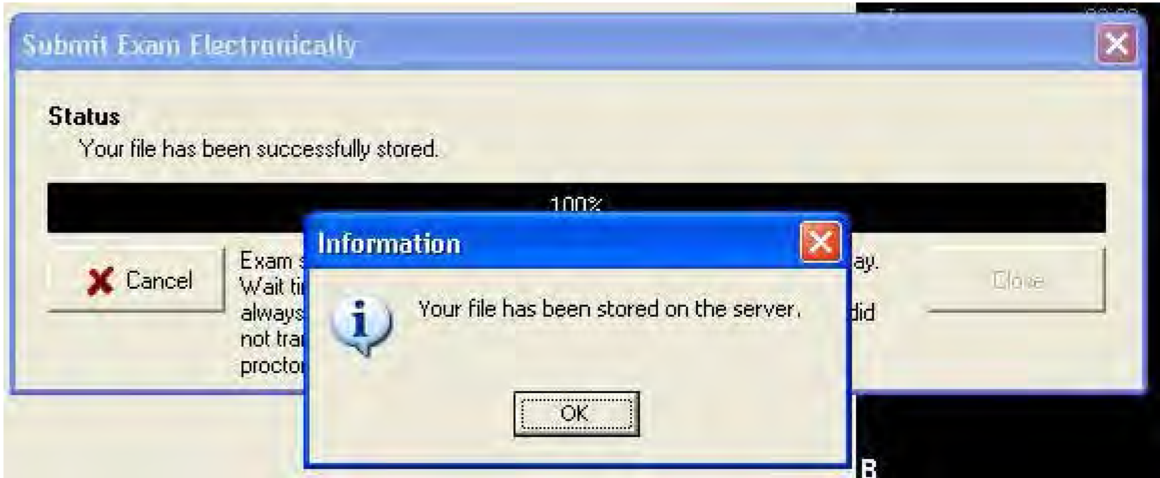
Exam has a built-in spell check feature that is currently enabled; however, it is not an "auto-correct" – it will not correct words as you type them, it will only perform a spell check when you go into the "Tools" menu and start the spell check tool, as in the image below:

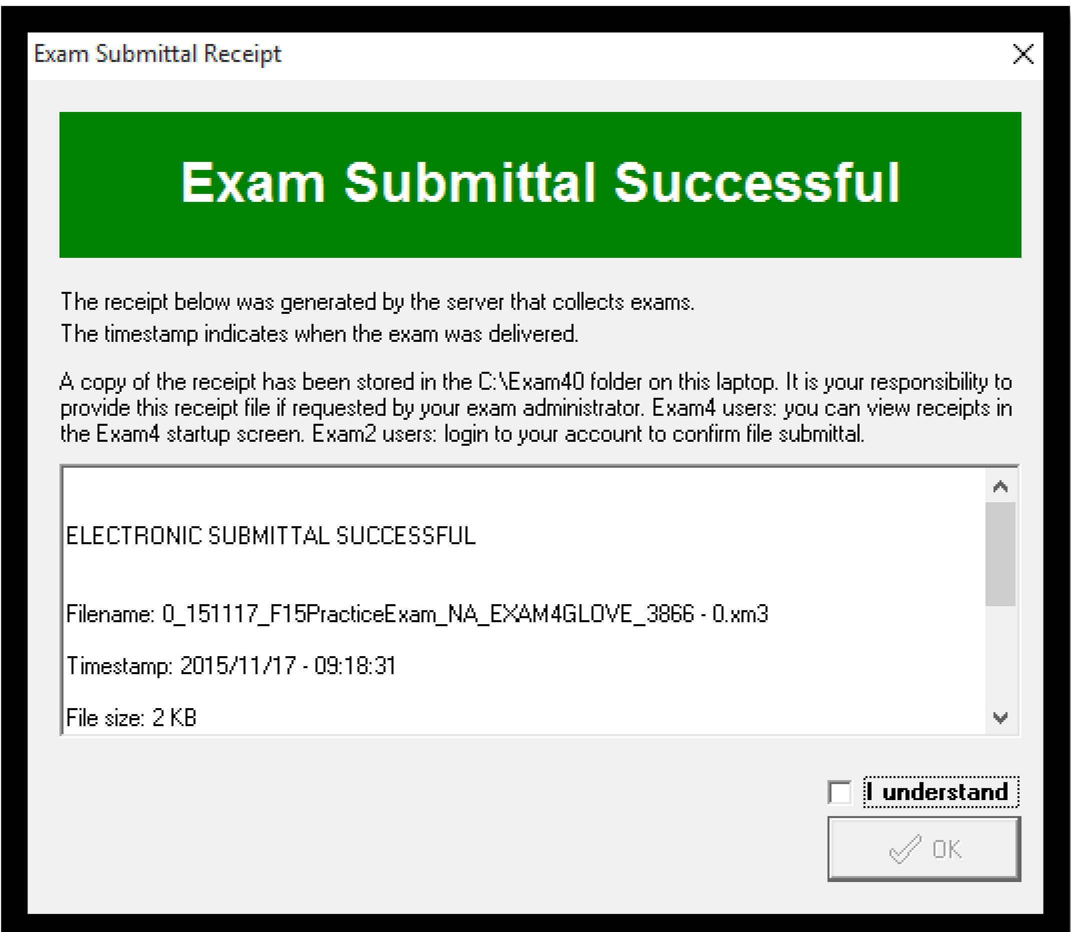


Submitting a Practice Exam

In the "Save Options" window, click on "Submit Electronically".

Your system will then attempt to submit your completed exam to the server. If the process is successful, you will see a message stating that your exam has been stored on the server, followed by a green box.





IF YOU DO NOT RECEIVE THE GREEN BOX ABOVE, THEN YOUR EXAM HAS NOT BEEN SUBMITTED, AND YOU MAY NOT RECEIVE CREDIT. FOLLOW THE STEPS BELOW TO GUARANTEE YOUR EXAM IS SUBMITTED BEFORE YOU LEAVE!!!

If the exam submission process fails, then your exam has been completed, but not turned in. It is possible that your system is not connected to the school network. Please refer to the steps at the being of this guide to check your check your network connection, then try to submit your exam again.

If that does not resolve the issue, then contact IT immediately. Do not leave campus until your completed exam has been successfully submitted, or you may not receive credit for your exam.

If you have any problems, please contact IT by coming to Room 209 or via email at lawit@memphis.edu

Once your exam has been successfully submitted, you can close Exam4 by going to "File and Save Options", selecting "Exit" and then confirming that you wish to close the program.

Cecil C. Humphreys School of Law

Current Students

NUMERICAL COURSE LIST

111 Contracts I

112 Torts I
113 Legal Methods I
114 Civil Procedure I
115 Property I
121 Contracts II
122 Torts II
123 Legal Methods II
124 Civil Procedure II
125 Property II
126 Criminal Law

211 Business Organizations I

212 Constitutional Law
213 Decedent's Estates
214 Income Tax

221 Evidence

222 Secured Transactions

223 Criminal Procedure I

224 Professional Responsibility

301 Mergers & Acquisitions

302 Health Law Organization, Regulation, and Finance

308 National Security Law

309 Appellate Advocacy

310 Education/Civil Rights

311 Administrative Law

312 Admiralty and Maritime Law

313 ADR-Arbitration

315 ADR-Labor

316 ADR-Mediation

318 Antitrust

319 Business Organizations II

320 Business Planning

321 Civil Procedure III

322 Civil Rights

323 Commercial Paper

324 Conflicts

325 Copyright

326 Criminal Procedure II

327 Debtor-Creditor

328 Environmental Law

329 Estate Planning

330 Fair Employment Practices

331 Family Law

333 Federal Courts A

334 Federal Taxation of Business Enterprises

335 Estate and Gift Tax

336 Health Law

337 Immigration Law

339 Insurance

340 International Law

342 Jurisprudence

343 Labor Relations

344 Land Use Planning

346 Law and Economics

347 Legal Argument and Appellate Practice

348 Legislation

352 Partnership Tax

353 Pre-Trial Litigation

354 Problems in Bankruptcy

357 Products Liability

358 Realty Transactions

359 Sales

361 Securities Regulation

366 Unfair Trade Practices

367 Worker's Compensation

368 Remedies

370 Non-Profit Organization Tax

371 Employee Benefits

372 Sports Law

374 Elder Law

375 Juvenile Law

377 Discovery

378 Legal History

379 Federal Courts B

385 Banking Law

386 Cyberlaw

390 Patent Law

392 Trust Law

394 Mental Health Law

395 Intellectual Property Survey

397 International Economic Law

399 International Business Transactions

419 Elder Law Seminar

420 Evidence Seminar

421 Family Law Seminar

426 Law and Medicine Seminar

429 Tennessee Civil Procedure Seminar

431 Tax Seminar

438 Environmental Law Seminar

440 Corporate Law Seminar (Corporate Finance)

441 Comparative Law Seminar

444 Federal Discrimination Seminar

445 Tennessee Constitutional Law Seminar
447 Legal Ethics Seminar
452 Scholarly Writing for Law Students Seminar
453 Advanced Brief-Writing Seminar
489 Social Welfare/Poverty Law Seminar
494 Gun Control/Gun Rights Seminar

500 Immigration Law Clinic
501 Housing Adjudication Clinic
509 Child and Family Litigation Clinic
510 Elder Law Clinic
511 General Session Civil Litigation Clinic
513 Legal Drafting: 011-Litigation and 012-Contract
515 Small Business Clinic
516 Trial Advocacy
521 Disability Law and Practice
523 Advanced Appellate Advocacy
524 Advanced Trial Advocacy

611 Bankruptcy Externship
613 National Labor Relations Board (NLRB) Externship
614 U.S. Attorney Externship
616 Criminal Justice Externship
617 Judicial Externship
618 Memphis Area Legal Services Externship

711 Research I

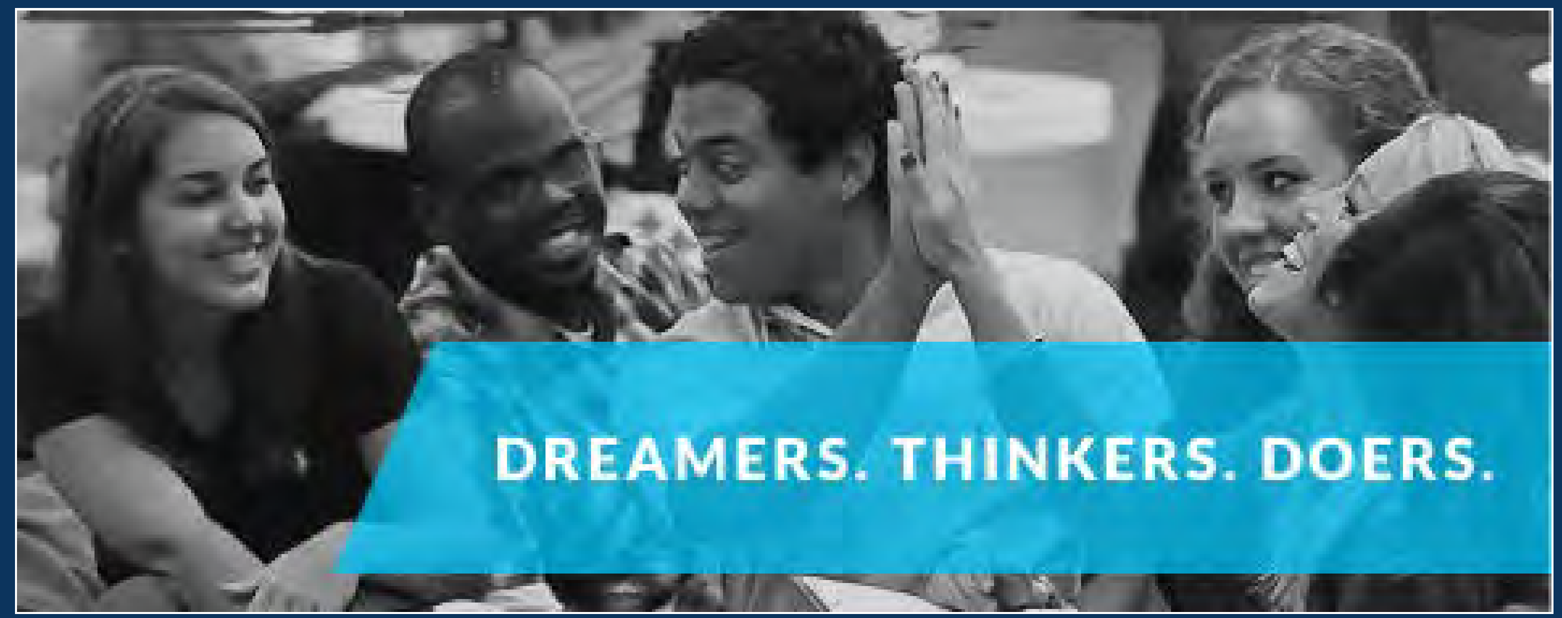
811 Moot Court

912 Law Review
913 Law Review
914 Law Review

Alumni & Support

ABA Required Disclosures

Full sitemap



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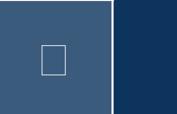
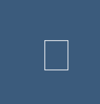
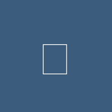
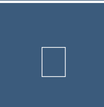
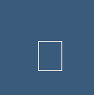
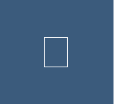

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Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities which receive Federal financial assistance. Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance..." 20 U.S.C. § 1681 - To Learn More, visit Title IX and Sexual Misconduct.

UNIVERSITY OF MEMPHIS SCHOOL OF LAW EXTERNSHIP PROGRAM
ANTICIPATED SPRING 2017 EXTERNSHIP FIELD PLACEMENTS

JUDICIAL EXTERNSHIPS – U.S. COURTS
___ U.S. Court of Appeals for the Sixth Circuit (3 Credits/12 hours per week)
___ U.S. District Court for the Western District of TN (2 Credits/8 hours per week)
___ U.S. Bankruptcy Court for the Western District of TN (2 Credits/8 hours per week)
___ U.S. Immigration Court (Memphis) (3 Credits/12 hours per week)
** Application for U.S. Immigration Court Due By Wednesday, October 19, 2016

JUDICIAL EXTERNSHIPS – TENNESSEE STATE COURTS (2 Credits/8 hours per week)
___ Tennessee Supreme Court
___ Tennessee Court of Criminal Appeals
___ Shelby County Circuit Court

CRIMINAL JUSTICE EXTERNSHIPS (2 Credits/8 hrs per week, except U.S. Atty's Office)
___ U.S. Attorney's Office (3 Credits/12 hours per week) (Must be 3L Student)
___ Federal Public Defender's Office
___ Shelby County District Attorney General's Office (Must have 45 credits to apply)
___ Shelby County Public Defender's Office

MUNICIPAL GOVERNMENT EXTERNSHIPS (2 Credits/8 hours per week)
___ Memphis City Attorney's Office (Litigation Unit)
___ Memphis City Attorney's Office (Transactional Unit)
___ Memphis-Shelby County Airport Authority – Office of General Counsel

ADMINISTRATIVE AGENCY EXTERNSHIPS
___ U.S. Dept. of Homeland Security, Immigration and Customs Enforcement, Office of Chief Counsel (3 Credits/12 hrs per week)
___ Equal Employment Opp'y Commission–Hearings Unit (3 Credits/12 hrs per week)
___ National Labor Relations Board (2 Credits/8 hours per week)

HEALTHCARE PRACTICE EXTERNSHIPS
___ St. Jude Children's Research Hospital (4 Credits/16 hours per week)
___ Baptist Memorial Healthcare Corporation (3 Credits/12 hours per week)
___ Methodist Le Bonheur Healthcare (3 Credits/12 hours per week)
___ Regional One Health (The Med) (3 Credits/12 hours per week)
___ Shelby County Public Health Department (2 Credits/8 hours per week)

COMMUNITY LEGAL OFFICE EXTERNSHIPS (2 Credits/8 hours per week)
___ Community Legal Center – Immigrant Justice Program
___ Latino Memphis – *Derechos* Immigration Program
___ Legal Aid of Arkansas – West Memphis Office
___ Memphis Area Legal Services (MALS)
    ___ Education Law/Partnership for Educational Advocacy and Parity
    ___ Family Law Unit
    ___ Low Income Taxpayer Unit
___ Mid-South Immigration Advocates

IN-HOUSE EXTERNSHIPS
___ Ducks Unlimited (3 Credits/12 hours per week)
___ Orion Federal Credit Union – Office of General Counsel (2 Credits/8 hours per week)
___ University of Memphis Office of Athletic Compliance (2 Credits/8 hours per week)
___ University of Memphis Office of University Counsel (2 Credits/8 hours per week)

SPRING 2017 EXTERNSHIP PROGRAM – FIELD PLACEMENT DESCRIPTIONS

JUDICIAL EXTERNSHIPS – U.S. COURTS

United States Court Appeals for the Sixth Circuit – The Honorable Bernice B. Donald

Students are placed as externs in the chambers of U.S. Circuit Judge Bernice Donald on the United States Court of Appeals for the Sixth Circuit. Judicial externs have a unique opportunity to learn about the process of judicial decision-making while working with the Judge, the Judge's law clerk(s), and court staff, and through observation in the courtroom. Responsibilities will include assisting law clerks in drafting Rule 34 and en banc recommendations. Externs gain broad exposure to essential appellate advocacy skills as well as appellate court practice and procedure.

General Eligibility Preference: GPA > 3.0; Staff membership on The University of Memphis Law Review

U.S. District Court for the Western District of Tennessee
U.S. Bankruptcy Court for the Western District of Tennessee

Students are placed as externs in the United States Courts for the Western District of Tennessee. Each student is assigned to the chambers of a U.S. District Court Judge, a U.S. Magistrate Judge, or a U.S. Bankruptcy Court Judge. Judicial externs have a unique opportunity to learn about the process of judicial decision-making while working with Court staff and observing in the courtroom. Responsibilities vary from chambers to chambers, but have in common an emphasis on legal research and writing, including the preparation of bench memoranda, and assistance with pretrial, trial and post-trial motions and judicial opinions. Externs gain broad exposure to litigation strategies and advocacy skills, as well as trial court practice and procedure.

Preferred Course(s) (satisfied by prior or concurrent enrollment):
For Bankruptcy Court Judges –Debtor-Creditor and/or Problems in Bankruptcy
For U.S. Magistrate Diane Vescovo– Civil Rights or Federal Courts

Executive Office of Immigration Review/U.S. Immigration Court (Memphis)

This externship is with the United States Department of Justice, Executive Office for Immigration Review at the Memphis Immigration Court in downtown Memphis. The jurisdiction of the United States Immigration Courts includes all matters brought before the Court by the Department of Homeland Security. The immigration judges at the Memphis Immigration Court preside over formal immigration hearings to determine whether aliens are deportable, excludable, inadmissible or removable from the United States. In addition, the judges have jurisdiction to consider applications for various forms of discretionary and mandatory relief, including various waivers, adjustment of status, cancellation of removal, asylum, withholding of removal, and protection under the U.N. Convention Against Torture.

The position will entail in-depth research and analysis of legal issues, as well as preparation of legal memoranda for the immigration judges. Externs will have opportunities to draft decisions that will be taken under advisement by the immigration judges and that may later

be used as writing samples. Externs can expect to develop research and writing skills as well as an understanding of immigration law and procedure as it relates to removal and deportation issues. In addition, they will be able to observe a variety of matters brought before the Court. Externs will work under the supervision of the Court's Judicial Law Clerks but will have substantial interaction with the Immigration Judges.

The position requires that applicants be United States citizens. Immigration experience is preferred but not required. Selected candidates must pass a background security check conducted by the Department of Justice.

Through Professor Schaffzin, and **BY WEDNESDAY, OCTOBER 19TH**, interested students should submit (preferably in pdf form) **a cover letter, resume, transcript, and writing sample** (unedited by others to the extent possible) addressed to:

Kaylee Klixbull and Kaitlin McKenzie
Judicial Law Clerks
Memphis Immigration Court
80 Monroe Ave., Suite 501
Memphis, TN 38103
901-528-5883
memphisintern@usdoj.gov

Preferred Courses: Professional Responsibility, Evidence, Immigration Law

JUDICIAL EXTERNSHIPS – TENNESSEE STATE COURTS

Tennessee Appellate Courts

Students are placed as externs in a Tennessee Appellate Court. Each student is assigned to the chambers of a Tennessee Supreme Court Justice, a Tennessee Court of Appeals judge, or a Tennessee Court of Criminal Appeals Judge. Judicial externs have a unique opportunity to learn about the process of judicial decision-making while working with the Judge and court staff and through observation in the courtroom. Responsibilities vary from chambers to chambers, but have in common an emphasis on legal research and writing, including the preparation of bench memoranda and judicial opinions. Externs gain broad exposure to various appellate advocacy skills as well as appellate court practice and procedure.

Anticipated Spring 2017 Placements:

Tennessee Supreme Court (Justice Holly Kirby)
Tennessee Court of Criminal Appeals (Judge Camille McMullen)

Preferred Courses: Evidence, Criminal Procedure

Tennessee Trial Courts

Students are placed as externs in a trial-level court in Shelby County. Each student is assigned to the chambers of a Shelby County Circuit Court Judge or a Shelby County Chancery Court Chancellor. Judicial externs have a unique opportunity to learn about the process of judicial decision-making while working with the Judge and court staff and through observation in the courtroom. Responsibilities vary from chambers to chambers, but have in common an emphasis on legal research and writing, including the preparation

of bench memoranda, and assistance with pretrial, trial and post-trial motions and judicial opinions. Externs gain broad exposure to a various litigation strategies and advocacy skills, as well as trial court practice and procedure.

Preferred Courses: Evidence.

IMPORTANT: Externs must be available on Friday mornings for Circuit Court Motions Dockets.

<u>CRIMINAL JUSTICE EXTERNSHIPS</u>

United States Attorney's Office

In this externship, students are placed in the United States Attorney's Office for the Western District of Tennessee. The United States Attorney's Office serves as the principal litigator for its judicial district and is responsible for coordinating multiple agency investigations within the district. The United States Attorney's Office prosecutes violations of federal criminal statutes, defends the government in civil actions, seeks enforcement of a variety of civil enforcement statutes, and institutes proceedings for the collection of fines and penalties. Typical assignments for externs will involve assisting with all aspects of case preparation, including researching legal issues, drafting/writing motions, briefs, responses and various pleadings, providing trial support to Assistant U.S. Attorneys, and assembling exhibits for trial. Students also observe trials in the District Court and appellate arguments at the United States Court of Appeals for the Sixth Circuit.

Preferred Courses: Evidence, Professional Responsibility, Criminal Procedure.

General Prerequisite: Applicants must have completed their second year of law school (i.e., must be 3L students) by the start of the externship.

Background Check: Students must be able to pass a <u>rigorous</u> background check that will grant them a security clearance to work in this office. The background check will require that students answer questions under oath regarding any illegal drug use (past or present), alcohol abuse, criminal history (including DUI, assault, etc.), credit history, past employment history and mental health.

Federal Public Defender's Office

In this externship, students are placed in the Office of the Federal Public Defender for the Western District of Tennessee. The Federal Public Defender's Office represents indigent clients against convictions at trial, or where appropriate, by bargaining for plea agreements, and if a client is convicted, by obtaining a just and fair sentence. Student externs may have the opportunity to perform legal research, write memoranda, motions, and briefs, and to participate in client interviews and preparation for court appearances. They may also work one-on-one with attorneys and investigators and gain exposure to all stages of criminal cases including initial appearances, plea negotiations with the U.S. Attorneys Office, trials and appellate work.

Preferred Courses: Evidence, Professional Responsibility, Criminal Procedure.

Shelby County District Attorney General's Office

In this externship, students are placed in the Office of the Shelby County District Attorney General. Each extern is assigned to one of the many specialized units of the DA's Office and works under the supervision of a prosecutor within the assigned unit. Responsibilities assigned to externs may include such tasks as researching and preparing pre-trial memoranda, responding to criminal defense motions, and contacting victims and witnesses regarding interviews, trial dates and various other matters. Externs may also prepare trial exhibits and observe felony jury trials. In most instances, externs handle limited court matters (e.g., preliminary hearings) under the supervision of a supervising prosecutor, provided the extern is certified under Tennessee Supreme Court Rule 7, Section 10.03 (the Tennessee Law Student Practice Rule).

Credits Offered: 2 Credits (8 hours per week)

Course Prerequisites/Co-Requisites: Professional Responsibility, Evidence; Criminal Procedure.

Preferred Course(s) (satisfied by prior or concurrent enrollment): Trial Advocacy

Background Check: Students must be able to pass a rigorous background check that will grant them a security clearance to work in this office

IMPORTANT: Externs placed with the Shelby County DA's Office MAY NOT engage in concurrent legal employment or volunteer legal work during the field placements semester.

Shelby County Public Defender's Office

In this externship, students are placed in the Office of the Shelby County Public Defender. Each extern is assigned to one of the many specialized units of the Public Defender's Office and works under the supervision of an assistant public defender within the assigned unit. Responsibilities assigned to externs include such tasks as researching and preparing pre-trial memoranda, responding to prosecution motions, and contacting witnesses regarding interviews, trial dates and various other matters. Externs will also observe and participate in court matters under supervision.

Preferred Courses: Professional Responsibility, Evidence; Criminal Procedure.

MUNICIPAL GOVERNMENT EXTERNSHIPS

Memphis City Attorney's Office

The Memphis City Attorney's Office externship course will introduce students to the legal issues facing attorneys who represent the City of Memphis in civil litigation, transactional, and policy-related matters, and the role of lawyers in municipal government generally. It will also expose students to the intricacies of the City Attorney's role as counselor and advocate for Memphis, its governmental offices, and its employees. Students selected for this placement will be assigned to either the litigation unit or a transaction unit within the City Attorney's Office.

Depending on the division within the City Attorney's Office to which they are assigned, externs may be asked to prepare internal legal memoranda (for example, analyzing legal issues or policy implications for the City Attorney or client agency officials); draft motion papers; assist with discovery; review proposed rules or legislation; or review drafts of transactional agreements. Externs may also have the opportunity to attend and participate in meetings with government officials, client or witness interviews, legislative hearings, depositions, court appearances, negotiation sessions, or other events relating to their work under the supervision of a licensed attorney. If eligible, externs may seek student practice permission pursuant to Tennessee Supreme Court Rule 7, Section 10.03 (the Tennessee Law Student Practice Rule).

Anticipated Spring 2017 Placements:

General Litigation Unit
Transactional Unit

Preferred Courses: Professional Responsibility, Evidence

Memphis-Shelby County Airport Authority – Office of General Counsel

This Externship course will offer students the opportunity to earn academic credit for legal work performed under the immediate and ongoing supervision of the General Counsel to the Memphis-Shelby County Airport Authority. Students enrolled in this externship will be exposed to the wide variety of legal matters handled by the Airport Authority's General Counsel, examples of which include matters involving business contracting (including contract drafting, negotiation, and interpretation); administrative and regulatory law (e.g., aviation law); risk management (e.g., premises liability issues); labor and employment law (e.g., worker's compensation issues); formulation and implementation of rules and policies (e.g., adoption of a local preference rule for purchasing); and preventative/prophylactic training, advice, and counseling.

Among other assignments, it is anticipated that the extern will perform legal research; draft, review, and opine on contractual agreements; and draft memoranda, letters, and other documents. Externs will also learn through observation of and participation in day-to-day practice activities, including legal proceedings, negotiations, meetings, trainings, and counseling sessions. When possible, externs will work with client departments and departmental staff to gather information and to gain insight into and understanding of the Airport Authority's operations and structure.

Preferred Courses: Evidence, Professional Responsibility.

ADMINISTRATIVE AGENCY EXTERNSHIPS

U.S. Department of Homeland Security, Immigration and Customs Enforcement, Office of the Chief Counsel (Memphis OCC Litigation Unit)

The U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE), Office of the Chief Counsel in Memphis, Tennessee (Memphis OCC Litigation Unit) handles all litigation for ICE involving administrative removal/deportation, asylum and Torture

Convention claims from many different countries throughout the world, and other relief from removal. The Office of Chief Counsel also provides legal advice to operational components of the Department of Homeland Security, and to the U.S. Attorney's Office throughout its area of responsibility. Memphis OCC Assistant Chief Counsels are in court an average of four to five days per week, covering a docket in excess of 6,000 administrative cases each year.

Externs placed with the Memphis OCC Litigation Unit will gain insight into immigration law from the perspective of the federal government. Assigned externs will also observe the manner in which immigration law touches on many different legal areas. Among other opportunities, externs will perform legal research and writing; work on and assist in the preparation of court filings, and assist in the preparation for and attend immigration hearings. Externs may also be given the opportunity to litigate hearings under the supervision of an Assistant Chief Counsel.

Credits Offered: 3 Credits (12 hours per week)

Course Prerequisites/Co-Requisites: Professional Responsibility, Evidence; Criminal Procedure.

General Prerequisite: Candidates must rank in the top 50% of their respective class.

Background Check: Students must be able to pass a rigorous background check that will grant them a security clearance to work in this office.

Equal Employment Opportunity Commission – Hearings Unit or Legal Unit

Students in this placement will serve as externs in the Memphis Field Office of the Equal Employment Opportunity Commission (EEOC). Students will be assigned to either the Hearings Unit or the Legal Unit of the EEOC Office. The Hearings Units employs three administrative judges who conduct hearings and render decisions with respect to EEO complaints that are brought by Federal workers. The role of the extern in the Hearings Unit will be similar to that of a judicial law clerk. The extern will conduct legal research on specific topics at the direction of the administrative judge, write decisions in conjunction with the administrative, and prepare for and attend hearings, settlement conferences, and other case-related events. Externs in the Legal Unit will work under the supervision of trial attorneys engaged in litigation against employers for violations of Title VII, the ADEA and the ADA. Externs will perform legal research and writing, assist in interviewing claimants or witnesses, help prepare discovery responses based on those interviews, and help prepare claimants or witnesses for deposition. In addition to the legal assignments, externs will be given the opportunity to observe different aspects of agency functions, including intake interviews, depositions, mediation sessions, administrative hearings, court hearings, and trials.

Preferred Courses: Evidence, Fair Employment Practice or Federal Courts.

Preference: Student(s) should have a sincere interest in employment law or litigation.

National Labor Relations Board Externship

Students in this placement will serve as externs in the Regional Office of the National Labor Relations Board (NLRB) in Memphis. Assigned externs will work on unfair labor practice cases and may assist on matters relating to challenges and objections in representation elections. It is anticipated that externs will perform research of labor law issues, conduct factual investigations, draft relevant documents, and assist in the preparation and handling of hearings and elections.

Credits Offered: 2 Credits (8 hours per week)

Preferences: Professional Responsibility; Labor Law. Student should have a sincere interest in labor law.

HEALTHCARE PRACTICE EXTERNSHIPS

The Health Law Externships will offer students interested in health law and in-house legal practice the opportunity to earn academic credit for legal work performed under the immediate and ongoing supervision of attorneys in the legal departments of local healthcare organizations. Students enrolled in this externship will be exposed to the wide variety of legal matters handled by these offices, examples of which include matters involving administrative and regulatory law, hospital risk management, clinical research compliance, labor and employment law; business contracting; formulation and implementation of hospital and corporate policy; healthcare legislation, policy, and reform; and preventative/prophylactic training and counseling.

Among other assignments, it is anticipated that externs will perform legal research; draft memoranda, letters, and other documents; draft and review contractual agreements; and prepare presentations to hospital personnel. Externs will also learn through observation of and participation in day-to-day practice activities, including legal proceedings, negotiations, meetings, trainings, and counseling sessions. When possible, externs will work with client departments and departmental staff to gather information and to gain insight into and understanding of clinical, business, and health care operations.

Anticipated Spring 2017 Placements:

St. Jude Children's Research Hospital
Baptist Memorial Healthcare
Regional Medical Center at Memphis
Shelby County Health Department

Preferred Courses: Professional Responsibility, Evidence.

NOTE: RISING 3L STUDENTS (OTHERS NOT ELIGIBLE) WHO WISH TO APPLY FOR THE EXTERNSHIP WITH ST. JUDE CHILDREN'S RESEARCH HOSPITAL MUST REVIEW A SEPARATE HANDOUT DESCRIPTION OF THE ST. JUDE OFFICE OF LEGAL SERVICES INTERNSHIP. PLEASE CONTACT PROFESSOR SCHAFFZIN IMMEDIATELY IF YOU PLAN TO APPLY FOR PLACEMENT WITH ST. JUDE.

COMMUNITY LAW OFFICE EXTERNSHIPS

Community Legal Center – Immigrant Justice Program

The Community Legal Center's Immigrant Justice Program offers a variety of legal services to low-income immigrants living within the jurisdiction of the Memphis Immigration Court (Tennessee, Arkansas, northern Mississippi, and western Kentucky). Externs placed with the IJP will assist staff attorneys on a variety of family and humanitarian-based immigration cases, including applications for adjustment of status, asylum, U nonimmigrant visas for victims of certain crimes, and Special Immigrant Juvenile status. Responsibilities will include conducting and participating in client interviews, legal research and writing, preparation of pleadings and applications for immigration relief, assistance with and attendance of hearings before the Memphis Immigration Court and interviews with U.S. Citizenship and Immigration Services ("USCIS"). Externs will also have the opportunity to represent clients in guardianship proceedings before the Shelby County Probate Court, an initial step in the process of applying for Special Immigrant Juvenile status.

Preferred Courses: Professional Responsibility; Evidence.

Memphis Area Legal Services

The Memphis Area Legal Services Externship allows students to receive academic credit for one semester of work at Memphis Area Legal Services (MALS), a nonprofit law firm that provides free civil legal assistance to eligible elderly and low-income people in Western Tennessee. MALS helps clients who are faced with legal problems that harm their ability to have such basics as food, shelter, income, medical care, and personal safety. The externship course is available to second- or third-year students. Students work under the close supervision of MALS staff attorneys to perform client interviews, undertake factual and legal research; collect and review records; develop witness testimony and evidence; draft pleadings and other written submissions; and participate in the representation of clients at hearings and other court proceedings.

Anticipated Spring 2017 Placements:
Education Law/PEAP
Family Law
Low Income Taxpayer Unit

Preferred Courses: Professional Responsibility; Evidence.

Latino Memphis – *Derechos* Immigration Program

Latino Memphis is a nonprofit 501(c)(3) organization that has served Latino clients throughout the Mid-South for the past 20 years. Its mission is to assist Latinos in this region by connecting, collaborating and advocating for health, education and justice. Latino Memphis addresses the needs of the Latino community by offering three core programs that range from direct client services and immigration assistance to collecting household items for flood victims. As one of the only agencies in the region dedicated specifically to serving Latinos, Latino Memphis has become a resource for individuals struggling to navigate life in the U.S. and to understand their place in the legal system.

Derechos Immigration Program, Latino Memphis' in-house immigration legal practice,

provides accessible legal representation to low-income people within the jurisdiction of the Memphis Immigration Court. In addition to direct representation, Derechos also engages in outreach and community programs to disseminate information and build relationships and coalitions throughout the region.

The students enrolled in this field placement will work in devoted space at the office of Latino Memphis. Latino Memphis attorneys Casey Bryant and Stacie Hunhoff will be the primary field supervisors for this externship. Under ongoing supervision, externs will assist in representing clients in immigration matters, defensively in Immigration Court and affirmatively with petitions to the U.S. Citizenship and Immigration Services. Externs will have the opportunity for hands on experience interviewing clients, compiling client information, drafting correspondence, preparing applications, performing legal research, and attending Immigration Court. Additionally, externs will be assigned a project to be completed over the course of their term.

Preferred Courses: Professional Responsibility; Evidence, Immigration Law

Legal Aid of Arkansas – West Memphis Office

Legal Aid of Arkansas (LAA) is a public interest, not-for-profit law firm dedicated to providing equal access to justice in civil matters for low-income Arkansans through legal representation, advocacy, community partnerships, education, and outreach. Substantive practice areas include consumer law, family law, housing, public benefits, expungement, wills, and other related poverty-law issues.

Student externs placed with Legal Aid of Arkansas's West Memphis Office will be presented with opportunities to hone legal writing and researching skills and gain first-hand experience with clients in areas such as client intake, investigation, representation, community education, and outreach. Students who have completed their 2L year (60 credits) may be able to gain in-court experience by obtaining a limited practice license under Arkansas Rule Governing Bar Admission15 (Student Practice).

Preferred Courses: Professional Responsibility; Evidence

Mid-South Immigration Associates

MIA is a non-profit public interest law office whose primary mission is the provision of affordable immigration services to economically disadvantaged non-citizens within the geographic jurisdiction of the Memphis Immigration Court. Within the Memphis metro region, MIA also seeks to facilitate the administration of justice and to increase public awareness on issues related to US immigration and naturalization law.

In particular, MIA assists individuals to obtain immigration status based upon family relationships, domestic violence and persecution, and other non-employment based avenues available in US immigration law. MIA conducts case appeals as resources allow, but does not at this time engage in impact or class-action litigation. MIA also provides community legal rights presentations and consultations 'clinics' in the Memphis area.

Finally, MIA engages in administrative advocacy in the Memphis area, organizing and attending meetings with USCIS, ICE, EOIR, local police, local immigrants' rights

organizations and attorney stakeholders. Currently our administrative advocacy is focused around the 'U Visa' issue.

Under the supervision of MIA staff attorneys, assigned externs will conduct casework in a select number of cases, of the type listed above. Externs will also assist with client intake interviews, have the opportunity to work directly with clients, assist with immigration applications and filings, and potentially represent clients at immigration court hearings.

Preferred Courses: Professional Responsibility, Evidence, Immigration Law

IN-HOUSE EXTERNSHIPS

Ducks Unlimited -- Office of Land Protection

Ducks Unlimited, the world's largest nonprofit, waterfowl and wetlands conservation organization, has an opportunity for placement of a legal extern in its National Headquarters in Memphis, Tennessee. DU is an accredited land trust with a portfolio of nearly 500 conservation easements and a fee-title portfolio of 23,000 acres. DU's land protection efforts conserve habitat across a diverse array of landscapes, from native prairie ecosystems in the Dakotas to bottomland hardwood forests in the Mississippi Delta to wetland systems along the coasts.

The assigned legal extern will work closely with the Director of Land Protection, whose primary responsibility is to guide, draft, and negotiate easement and fee-title transactions for the organization's nationwide land protection efforts.

Specifically, the extern will assist with the following:

- Draft, review, and perform due diligence for conservation easement and fee-title transactions.
- Ensure DU's land protection efforts comply with federal and state statutes and regulations. Because most conservation easements are either fully or partially donated, it is particularly concerned with IRC § 170 and the associated regulations on Qualified Conservation Contributions, 26 CFR § 1.170A-14.
- Ensure compliance with all internal guidelines and policies, as well as the Land Trust Alliance accreditation standards.
- Interpret Conservation Easement Deed language to determine if a landowner's request to exercise a reserved right is permissible under the terms of the easement.
- Interpret Conservation Easement Deed language when potential violations arise and determine the organization's response to easement violations.
- Work with General Counsel's office to implement easement defense strategies.

The extern may also have the opportunity to work with the General Counsel's office on matters related to nonprofit fundraising, charitable regulations and governance, and trademarks.

Preferred Courses: Professional Responsibility

Orion Federal Credit Union ------ Office of Legal Counsel and Compliance

Founded in 1957 as Memphis Area Teachers' Credit Union, Orion Federal Credit Union has grown to become the largest credit union in Western Tennessee. Orion FCU is a not-for-profit financial cooperative owned Orion offers a full spectrum of banking options ranging from savings and checking accounts to auto, mortgage and personal loans to almost everyone who lives or works in the greater Memphis area.

Student externs placed with Orion FCU's Office of Legal Counsel and Compliance will support the Office's work in the area of banking law. Among other charges, the Office works to ensure compliance with all applicable banking statutes and regulations from the Federal Reserve, NCUA, HUD, and the Consumer Financial Protection Bureau; review of loan documents and modification for specific loan promotions; draft modification and forbearance agreements for commercial loans; file claims against estates and review other probate matters; and create procedures for state law matters related to decedents' accounts, safe deposit boxes, etc.

Beyond exposure to the Office of Legal Counsel and Compliance's banking law practice, student externs will assist in the Office's general practice, which includes contract drafting, review, and modification; review of possible EEOC-law violations; management of litigation referred to outside counsel and handling of smaller litigation matters; and provision of legal opinions on general business matters.

Credits Offered: 2 Credits (8 hours/week)

Preferred Courses: Professional Responsibility

Teach for America – Office of Legal Affairs

Teach For America (TFA) is a not-for-profit national corps of college graduates, graduate students, and professionals who commit two years to teach in low-income urban and rural public schools and become leaders in expanding educational opportunity. TFA's mission is to build the movement to eliminate educational inequity by enlisting America's most promising future leaders in the effort.

TFA's Legal Affairs Team provides legal and strategic advice to over fifty Teach For America regions nationwide and the central functional teams – Program, Regional Operations, Finance, Marketing and Communications, Growth Strategy and Development and Human Assets. Our team of attorneys consists of lawyers that practice in a wide range of substantive areas including employment law, administrative law, nonprofit law, trademark and copyright protection, general compliance, and education laws. The day-to-day work often includes, partnering closely with staff members to manage questions of law and policy; creating training materials for organizational compliance such as copyright and lobbying trainings; and drafting and negotiating contracts with other partner entities and vendors.

The Legal Affairs externship provides a platform for law students committed to working in a mission-driven organization to develop legal skills and acumen while partnering directly with TFA attorneys to work on various legal projects throughout the summer. The extern will get exposure to a wide range of matters from lobbying compliance to developing organization-wide policies to real estate matters. Through the experience, the extern will

have the chance to observe the strategy development of a national non-profit.

Responsibilities may include, but are not limited to:

- Conducting legal research across a wide variety of substantive areas with a particular focus on employment and benefits law, state lobbying compliance requirements, contracts, and non-profit corporation and tax law with an opportunity to create a writing sample.
- Producing high-quality written communication for different constituencies within the organization, including training materials and presentations related to various areas of legal compliance.

Credits Offered: 3 Credits (12 hours/week)

Candidate Requirements: At least 2 years of law school required; 3.2 GPA required

Candidate Materials: (1) resume, (2) cover letter, (3) copy of your law school transcript, (4) a minimum of 5 pages writing sample, and (5) a letter of recommendation.

Preferred Courses: Professional Responsibility

University of Memphis Office of Athletic Compliance

The University Athletics Compliance Externship will offer students interested in higher education law and athletics compliance the opportunity to earn academic credit for work performed under the ongoing supervision of compliance personnel in The University of Memphis Office of Legal Counsel and members of the University of Memphis Athletics Compliance Staff. The selected extern(s) will immerse themselves within the day-to-day operations of a compliance office operating under both NCAA and SEC regulations, and will gain experience relevant to NCAA bylaws concerning eligibility, recruiting, financial aid, personnel, awards, and other areas as assigned.

Students enrolled in this externship will perform a wide variety of legal and compliance-focused assignments on behalf of the University client, examples of which may include various rules interpretations, research, and filing of waivers. In addition, students will aid the compliance staff with initial eligibility, continuing eligibility, recruiting database oversight, National Letter of Intent processing, review of pre- and post-official visit paperwork, research and creation of rules education, maintenance of various compliance forms, and other duties as assigned.

Preferred Courses: Professional Responsibility.

University of Memphis – Office of University Counsel

The University Counsel Externship course will offer students interested in higher education law and in-house legal practice the opportunity to earn academic credit for work performed under the immediate and ongoing supervision of attorneys in The University of Memphis Office of Legal Counsel. Students enrolled in this externship will be exposed to the wide variety of legal matters handled by the Office of Legal Counsel on behalf of its University client, examples of which include matters involving labor and employment disputes;

academic and student issues; athletic and research compliance; business and real estate transactions; contract drafting and review; formulation and implementation of University policies; and intellectual property. Externs will actively engage in legal research and writing while learning through observation of and participation in hearings, negotiations, client meetings, and other practice events.

Preferred Courses: Professional Responsibility, Evidence

FULL-TIME STUDENTS**

16.1.a.i. A FULL-TIME student who matriculates **before** January 1, 2015

First Year

Fall Term
- 112 Torts I
- 113 Legal Methods I
- 114 Civil Procedure I
- 115 Property I
- 126 Criminal Law

Spring Term
- 122 Torts II
- 123 Legal Methods II
- 124 Civil Procedure II
- 125 Property II
- 121 Contracts
- 212 Constitutional Law

Second Year

221 Evidence

**A student is required to complete Evidence by the end of spring of his/her second year. If a student takes Evidence in the summer term between the first and second year, this requirement will be satisfied.*

Second or Third Year

A. 224 Professional Responsibility

\+

B. Two Courses in both the Statutory Menu and Practice Foundation Menu:

Statutory Menu	Practice Foundation Menu
323 Commercial Paper	311 Administrative Law
334 Corporate Tax	211 Business Organizations
214 Income Taxation	223 Criminal Procedure
359 Sales	213 Decedents' Estates
222 Secured Transactions	331 Family Law

Note: Any student may opt in to the course menu requirements effective after August 1, 2016 or August 1, 2017.

16.1.a.ii A FULL-TIME student who matriculates **after** January 1, 2015 but **before** August 1, 2016

First Year

Fall Term
- 111 Contracts I
- 112 Torts I
- 113 Legal Methods I
- 114 Civil Procedure I
- 115 Property I

Spring Term
- 121 Contracts II
- 122 Torts II
- 123 Legal Methods II
- 124 Civil Procedure II
- 125 Property II
- 126 Criminal Law

Second Year

212 Constitutional Law
221 Evidence

**A student is required to complete Evidence & Constitutional Law by the end of spring of his/her second year. If a student takes either or both courses in the summer term between the first and second year, this requirement will be satisfied.*

Second or Third Year

A. 224 Professional Responsibility

\+

B. Two Courses in both the Statutory Menu and Practice Foundation Menu:

Statutory Menu	Practice Foundation Menu
323 Commercial Paper	311 Administrative Law
334 Corporate Tax	211 Business Organizations
214 Income Taxation	223 Criminal Procedure
359 Sales	213 Decedents' Estates
222 Secured Transactions	331 Family Law

Note: Any student may opt in to the course menu requirements effective after August 1, 2016 or August 1, 2017.

16.1.a.iii. A FULL-TIME student who matriculates **after** August 1, 2016

First Year

Fall Term
- 111 Contracts I
- 112 Torts I
- 113 Legal Methods I
- 114 Civil Procedure I
- 115 Property I

Spring Term
- 121 Contracts II
- 122 Torts II
- 123 Legal Methods II
- 124 Civil Procedure II
- 125 Property II
- 126 Criminal Law

Second Year

212 Constitutional Law
221 Evidence

**A student is required to complete Evidence & Constitutional Law by the end of spring of his/her second year. If a student takes either or both courses in the summer term between the first and second year, this requirement will be satisfied.*

Second or Third Year

A. 224 Professional Responsibility

\+

B. Two Courses in both the Statutory Menu and Practice Foundation Menu:

Statutory Menu	Practice Foundation Menu
334 Corporate Tax	311 Administrative Law
214 Income Taxation	211 Business Organizations
359 Sales	223 Criminal Procedure
222 Secured Transactions	213 Decedents' Estates
	331 Family Law
	324 Conflict of Laws
	368 Remedies

Note: Any student may opt in to the course menu requirements effective after August 1, 2016 or August 1, 2017.

16.1.a.iii. A FULL-TIME student who matriculates **after** August 1, 2017

First Year

Fall Term
111 Contracts I
112 Torts I
113 Legal Methods I
114 Civil Procedure I
115 Property I

Spring Term
121 Contracts II
122 Torts II
123 Legal Methods II
124 Civil Procedure II
125 Property II
126 Criminal Law

Second Year

212 Constitutional Law
221 Evidence

**A student is required to complete Evidence & Constitutional Law by the end of spring of his/her second year. If a student takes either or both courses in the summer term between the first and second year, this requirement will be satisfied.*

Second or Third Year

A. 224 Professional Responsibility

B. Two Courses in both the Statutory Menu and Practice Foundation Menu:

Statutory Menu	Practice Foundation Menu
334 Corporate Tax	311 Administrative Law
330 Fair Employment Practice	211 Business Organizations
214 Income Taxation	213 Decedents' Estates
348 Legislation	331 Family Law
359 Sales	324 Conflict of Laws
222 Secured Transactions	368 Remedies

C. 223 Criminal Procedure I

D. 721 Bar Exam Preparation Course

***** In addition to the above specified courses, and also within the ninety (90) credit hours required for graduation, a student is required to satisfy both the advanced writing and the experiential requirements. Outside of the ninety (90) credit hours required for graduation, students are also required to complete forty (40) pro bono hours.***

PART-TIME STUDENTS**

16.1.b.i. A PART-TIME student who matriculates **before** January 1, 2015

First Year

Fall Term
112 Torts I
113 Legal Methods I
114 Civil Procedure I

Spring Term
122 Torts II
123 Legal Methods II
124 Civil Procedure II
121 Contracts

Second Year

Fall Term
115 Property I
126 Criminal Law
221 Evidence/ Elective

Spring Term
125 Property II
212 Constitutional Law
221 Evidence/ Elective

**A student is required to complete the above courses by the end of spring of his/her second year. If a student takes one of these courses in the summer term between the first and second year, this requirement will be satisfied, and an Elective may be taken in its place.*

Third and Fourth Year

A.224 Professional Responsibility
+
B. Two Courses in both the Statutory Menu and Practice Foundation Menu:

Statutory Menu	Practice Foundation Menu
323 Commercial Paper	311 Administrative Law
334 Corporate Tax	211 Business Organizations
214 Income Taxation	223 Criminal Procedure
359 Sales	213 Decedents' Estates
222 Secured Transactions	331 Family Law

Note: Any student may opt in to the course menu requirements effective after August 1, 2016 or August 1, 2017.

16.1.b.ii. A PART-TIME student who matriculates **after** January 1, 2015 but **before** August 1, 2016

First Year

Fall Term
112 Torts I
113 Legal Methods I
114 Civil Procedure I

Spring Term
122 Torts II
123 Legal Methods II
124 Civil Procedure II
126 Criminal Law

Second Year

Fall Term
111 Contracts I
115 Property I
212 Constitutional Law/ 221 Evidence

Spring Term
121 Contracts II
125 Property II
212 Constitutional Law/ 221 Evidence

**A student is required to complete the above courses by the end of spring of his/her second year. If a student takes one of these courses in the summer term between the first and second year, this requirement will be satisfied, and an Elective may be taken in its place.*

Third and Fourth Year

A. 224 Professional Responsibility
+
B. Two Courses in both the Statutory Menu and Practice Foundation Menu:

Statutory Menu	Practice Foundation Menu
323 Commercial Paper	311 Administrative Law
334 Corporate Tax	211 Business Organizations
214 Income Taxation	223 Criminal Procedure
359 Sales	213 Decedents' Estates
222 Secured Transactions	331 Family Law

Note: Any student may opt in to the course menu requirements effective after August 1, 2016 or August 1, 2017.

16.1.b.iii. A PART-TIME student who matriculates **after** August 1, 2016

First Year

Fall Term
112 Torts I
113 Legal Methods I
114 Civil Procedure I

Spring Term
122 Torts II
123 Legal Methods II
124 Civil Procedure II
126 Criminal Law

Second Year

Fall Term
115 Property I
111 Contracts I
212 Constitutional Law/221 Evidence

Spring Term
121 Contracts II
125 Property II
212 Constitutional Law/221 Evidence

**A student is required to complete the above courses by the end of spring of his/her second year. If a student takes one of these courses in the summer term between the first and second year, this requirement will be satisfied, and an*

Third and Fourth Year

A. 224 Professional Responsibility
+
B. Two Courses in both the Statutory Menu and Practice Foundation Menu:

Statutory Menu	Practice Foundation Menu
334 Corporate Tax	311 Administrative Law
214 Income Taxation	211 Business Organizations
359 Sales	213 Decedents' Estates
222 Secured Transactions	331 Family Law
	324 Conflict of Laws

Elective may be taken in its place.

368 Remedies

Note: Any student may opt in to the course menu requirements effective after August 1, 2017.

16.1.b.iii. A PART-TIME student who matriculates **after** August 1, 2017

First Year		**Second Year**	
Fall Term	Spring Term	Fall Term	Spring Term
112 Torts I	122 Torts II	115 Property I	121 Contracts II
113 Legal Methods I	123 Legal Methods II	111 Contracts I	125 Property II
114 Civil Procedure I	124 Civil Procedure II	212 Constitutional Law/221 Evidence	212 Constitutional Law/221 Evidence
	126 Criminal Law		

**A student is required to complete the above courses by the end of spring of his/her second year. If a student takes one of these courses in the summer term between the first and second year, this requirement will be satisfied, and an Elective may be taken in its place.*

Third and Fourth Year

A. 224 Professional Responsibility

+

B. Two Courses in both the Statutory Menu and Practice Foundation Menu:

Statutory Menu	Practice Foundation Menu
334 Corporate Tax	311 Administrative Law
330 Fair Employment Practice	211 Business Organizations
214 Income Taxation	213 Decedents' Estates
348 Legislation	331 Family Law
359 Sales	324 Conflict of Laws
222 Secured Transactions	368 Remedies

C. 223 Criminal Procedure I

D. 721 Bar Preparation Course

***** In addition to the above specified courses, and also within the ninety (90) credit hours required for graduation, a student is required to satisfy both the advanced writing and the experiential requirements. Outside of the ninety (90) credit hours required for graduation, students are also required to complete forty (40) pro bono hours.***

University of Memphis Cecil C. Humphreys School of Law

Credit Hour Policy

1. Definitions

   a. The Law School adheres to Federal law and ABA definitions of a credit hour. ABA Standard 310(b) provides a "credit hour" is an amount of work that reasonably approximates:

      i. Not less than one hour of classroom or direct faculty instruction and two hours of out-of-class student work per week for fifteen weeks, or the equivalent amount of work over a different amount of time; or

      ii. At least an equivalent amount of work as required in subparagraph (1) of this definition for other academic activities as established by the institution, including simulation, field placement, clinical, co-curricular, independent research, and other academic work leading to the award of credit hours.

   b. The Law School currently operates on 15 week class cycles (14 weeks for regularly-scheduled class sessions and 1 week for the course examination). For Law School purposes, in-class time (including for examinations) is calculated in 50 minute "hours" per credit over 15 weeks, or other equivalent for more-condensed courses, including summer courses. Any direct faculty instruction time is calculated at this rate. All other academic time is calculated in 60-minute hours. This means that at least 42.5 total hours, accumulated through some combination of in-class and out-of-class time, are required for a credit hour.

2. Work Required

   a. Professors are responsible for designing courses that reflect at least 42.5 total hours[1] of work per credit hour, attained through any of the following, alone or in combination:

      i. Direct faculty instruction in class, mandatory office hours, exercises, practices, rehearsals, or supervision of field placement or clinic work;

      ii. Reading;

      iii. Preparing and revising notes, class outlines, and related materials;

      iv. Observing taped materials, podcasts, or live events;

      v. Preparing for, performing, and reviewing exercises, simulations, competitions, field placement and clinic work, and other assignments;

      vi. Researching, drafting, and editing writings;

      vii. Reviewing others' work (as allowed by class policies);

[1] Two credit courses will have 85 total hours of work; three credit courses will have 127.5 hours; and four credit courses will have 170 total hours.

viii. Contributing to discussions both orally and in writing;

ix. Preparing for, taking, and reviewing performances on quizzes, midterms, exams, and other assessments; and

x. All other academic activity.

b. Professors are responsible for ensuring that simulation, field placement, clinical, co-curricular, independent research, and all other academic work leading to the award of credit hours, reflect at least 42.5 total hours of work per credit hour.

3. Policy and Procedures for Assuring the Law School Adheres to and Enforces the Credit Hour Policy

a. Responsibility for Assuring Adherence to Standard 310 and the Credit Hour Policy.

i. The Associate Dean for Academic Affairs is charged with assuring that the Law School adheres to ABA Standard 310 and this Credit Hour Policy. This includes assuring that the methods and processes used to determine and assign credits lead to reliable, accurate results, and conform to commonly accepted practice in higher education. It also includes assuring that the methods and processes followed in determining and assigning academic credit are documented, and that all requisite records are kept.

b. Determination of Credit Hours for New Courses:

i. At the time of approving a new course, the Curriculum Committee shall determine and assign the number of credits to be awarded for that course. In doing so, the Curriculum Committee shall adhere to Standard 310 and this Credit Hour Policy.

ii. A new course proposal submitted to the Curriculum Committee shall include a proposed syllabus and set forth a statement from the faculty member proposing the new course that provides a justification for the number of credits to be awarded that takes into account classroom or direct faculty instruction, as well as the time to be spent on course-related out-of-class work.

iii. In determining and assigning the number of credits, the Curriculum Committee shall take into account:

1. The type of course (e.g., first year doctrinal course, upper level common law course, upper level code course, seminar, simulation course, clinical course, and field placement);

2. The amount and difficulty of the assigned readings;

3. The number and types of assignments students must complete during the semester (e.g., papers and simulation exercises);

4. The number and types of assessments (e.g., final examination, midterm exam, research paper, quizzes, and short papers);

5. Other types of academically-related work (e.g*.,* in the case of law journals, the amount of time spent on the completion of a note or comment, reading and evaluating journal submissions, and editing and cite checking articles; and in the case of mock trial and moot court, the amount of time spent practicing, judging practice rounds, doing research, and writing briefs, and the time spent in actual competition);

6. Any feedback from the Associate Dean for Academic Affairs, the Law School Registrar, and experienced faculty members;

7. Commonly accepted practice in higher education; and

8. Any other factors that the Curriculum Committee determines are relevant for determining accuracy and reliability of the credits being awarded.

iv. The Curriculum Committee shall submit a statement to the Associate Dean for Academic Affairs that provides a justification for the number of credits to be awarded that takes into account classroom or direct faculty instruction, as well as the time to be spent on course-related out-of-class work.

v. The Associate Dean for Academic Affairs shall review the statement provided by the Curriculum Committee and make a determination whether or not the number of credits that the Curriculum Committee assigned to the new course complies with Standard 310 and the Credit Hour Policy. If the Associate Dean for Academic Affairs determines that the number of credits assigned is not in compliance, the Associate Dean shall describe the problems identified and send the new course proposal back to the Curriculum Committee for further consideration.

c. Ongoing Review to Assure Adherence to Standard 310 and the Credit Hour Policy

i. Each semester, professors must submit course syllabi to the Associate Dean for Academic Affairs that demonstrate compliance with this Credit Hour Policy. If the syllabus has not undergone a significant change, the professor may instead so indicate to the Associate Dean.

ii. The Associate Dean for Academic Affairs will review the documentation to determine whether the professor has complied with this Credit Hour policy. If there is a question concerning compliance with this policy, the professor will be given an opportunity to provide additional information to the Associate Dean for Academic Affairs to demonstrate compliance.

Adopted by the faculty on February 10, 2017.

CECIL C. HUMPHREYS SCHOOL OF LAW
2015-2016 ACADEMIC CALENDAR

Fall 2015

First-year Orientation	Wednesday, Thursday, Friday, August 12-14
Classes Start	Monday, August 17
Labor Day Holiday	Monday, September 7
Classes End	Monday, November 23
Reading Days	Tuesday & Wednesday, November 24-25
Thanksgiving Holiday	Thursday & Friday, November 26-27
Exams Start	Monday, November 30
Exams End	Friday, December 11
Commencement	Sunday, December 13

Spring 2016

Classes Start	Wednesday, January 13
MLK Holiday	Monday, January 18
Spring Break	March 7-11
Monday Class Schedule/Classes End	Wednesday, April 27
Reading Days	Thursday & Friday, April 28-29
Exams Begin	Monday, May 2
Exams End	Friday, May 13
Commencement	Saturday, May 14

Summer 2016

Classes Start	Monday, May 23
Memorial Day Holiday	Monday, May 30
July 4th Holiday	Monday, July 4
Monday Class Schedule/Classes End	Tuesday, July 12
Reading Day	Wednesday, July 13
Exams Begin	Thursday, July 14
Exams End	Monday, July 18
Commencement	TBA

CECIL C. HUMPHREYS SCHOOL OF LAW
2014-2015 ACADEMIC CALENDAR

Fall 2014

First-year Orientation	Wednesday, Thursday, Friday, August 13-15
Classes Start	Monday, August 18
Labor Day Holiday	Monday, September 1
Classes End	Monday, November 24
Reading Days	Tuesday & Wednesday, November 25-26
Thanksgiving Holiday	Thursday & Friday, November 27-28
Exams Start	Monday, December 1
Exams End	Friday, December 12
Commencement	Sunday, December 14

Spring 2015

Classes Start	Wednesday, January 7
MLK Holiday	Monday, January 19
Spring Break	March 9-15
Monday Class Schedule/Classes End	Wednesday, April 22
Reading Days	Thursday & Friday, April 23-24
Exams Begin	Monday, April 27
Exams End	Friday, May 8
Commencement	Saturday, May 9

Summer 2015

Classes Start	Monday, May 18
Memorial Day Holiday	Monday, May 25
July 4th Holiday	Friday, July 3
Friday Class Schedule/ Classes End	Monday, July 6
Reading Day	Tuesday, July 7
Exams Begin	Wednesday, July 8
Exams End	Friday, July 10
Commencement	Sunday, August 9

University of Memphis School of Law
2015 Spring Law Registrar Deadline Calendar

Date	Event
Monday, November 10 – Friday, November 14 *Monday, Nov. 10*: **Veteran registration** *Wednesday, Nov. 12*: **3L registration** *Thursday, Nov. 13*: **2L registration** *Friday, Nov. 14*: **1L registration**	Registration (***Registration begins at 8am for Veterans and 9am for everyone else.)***
Tuesday, January 6	Law School Tuition & Fees Payment Deadline ***(Courses Deleted for Non-Payment after 4:30pm)***
Tuesday, January 6	Last Day for 100% Refund on Drops and/or Withdrawals
Wednesday, January 7	First Day of Classes
Wednesday, January 7— Thursday, January 15	Late Registration and Late Add period ***($100 Late Registration Fee assessed during Late Registration.)***
Thursday, January 15	Late Payment Fee Assessed after 5:30pm
Friday, January 16	Courses deleted for Non-Payment after 4:30pm
Monday, January 19	Holiday: MLK Birthday
Tuesday, January 20	Last Day for 75% Refund, Drops/Withdrawals
Friday, January 23	Last Day to Apply for May Graduation 2015
Monday, February 2	Last Day to Drop Course or Withdraw Without Showing "W" on Transcript
Friday, February 6	Last Day for 25% Refund, Drops/Withdrawals
Monday, March 9 – Sunday, March 15	Spring Break
Friday, March 13	Last Day to Drop Courses or Withdraw Without Showing "F" on Transcript
Wednesday, April 22	Last Day of Classes (Monday Class Schedule)
Thursday & Friday, April 23 & 24	Reading Days
Monday, April 27	Exams Begin
Friday, May 8	Exams End
Saturday, May 9	Commencement (at 5 pm)

The University of Memphis Cecil C. Humphreys School of Law

2015 Summer Law Registrar Deadline Calendar

Monday, April 6 – Friday, April 10	Registration

Monday, April 6: **Veteran registration** *(8am)*
Tuesday, April 7: **43+ Attempted Hrs.*** *(9am)*
Thursday, April 9: **15-42 Attempted Hrs.*** *(8am)*
Friday, April 10: **0-14 Attempted Hrs.*** *(9am)*

**"Attempted" hours do not include the hours which are currently in-progress, i.e. the hours in which you are enrolled at the time of registration. To find your official number of attempted hours, look at your Academic Transcript in Banner, at the column entitled "Attempt Hours," under your most recently completed academic term.*

Friday, May 15	Law School Tuition & Fee Payment Deadline ***(Courses Deleted for Non-Payment after 4:30pm)***
Sunday, May 17	Last Day for 100% Refund on Drops
Monday, May 18	First Day of Classes
Saturday, May 16 — Thursday, May 21	Late Registration and Late Add period ***($100 Late Registration Fee assessed during Late Registration.)***
Thursday, May 21	Late Payment Fee Assessed after 4:30pm
Friday, May 22	Courses deleted for Non-Payment after 4:30pm
Sunday, May 24	Last Day for 75% Refund on Drops
Monday, May 25	Holiday – Memorial Day
Sunday, May 31	Last Day for 25% Refund on Drops Last Day to Drop/Withdraw Without Showing "W" on Transcript
Friday, June 5	Last Day to Apply for August 2015 Graduation
Monday, June 29	Last Day to Withdraw Without Permission
Friday, July 3	Observance of Independence Day Holiday
Monday, July 6	Last Day of Classes
Tuesday, July 7	Reading Days
Wednesday, July 8	Exams Begin
Friday, July 10	Exams End
Saturday, August 8	Commencement (at 10 am)

2016 Spring Law Registrar Deadline Calendar

Monday, November 9 – Friday, November 13	Registration

Monday, November 9: **Veteran registration** *(8am)*
Tuesday, November 10: **43+ Attempted Hrs.*** *(9am)*
Thursday, November 12: **15-42 Attempted Hrs.*** *(9am)*
Friday, November 13: **0-14 Attempted Hrs.*** *(9am)*

**"Attempted" hours do not include the hours which are currently in-progress, i.e. the hours in which you are enrolled at the time of registration. To find your official number of attempted hours, look at your Academic Transcript in Banner, at the column entitled "Attempt Hours," under your most recently completed academic term.*

Tuesday, January 12	Law School Tuition & Fees Payment Deadline ***(Courses Deleted for Non-Payment after 4:30pm)***
Tuesday, January 12	Last Day for 100% Refund on Drops and/or Withdrawals
Wednesday, January 13	First Day of Classes
Wednesday, January 13—Thursday, January 21	Late Registration and Late Add period ***($100 Late Registration Fee assessed during Late Registration.)***
Monday, January 18	Holiday: MLK Birthday
Thursday, January 21	Late Payment Fee Assessed after 5:30pm
Friday, January 22	Courses deleted for Non-Payment after 4:30pm
Friday, January 22	Last Day to Apply for May 2016 Graduation
Tuesday, January 26	Last Day for 75% Refund, Drops/Withdrawals
Monday, February 1	Last Day to Drop Course or Withdraw Without Showing "W" on Transcript
Friday, February 11	Last Day for 25% Refund, Drops/Withdrawals
Friday, March 4	Last Day to Drop Courses or Withdraw Without Permission
Monday, March 7 –Friday, March 11	Spring Break
Wednesday, April 27	Last Day of Classes (Monday Class Schedule)
Thursday & Friday, April 28 & 29	Reading Days
Monday, May 2	Exams Begin
Friday, May 13	Exams End
Saturday, May 14	Commencement

The University of Memphis Cecil C. Humphreys School of Law

2016 Summer Law Registrar Deadline Calendar

Monday, April 4 – Friday, April 8	Registration

Monday, April 4: **Veteran registration** *(8am)*
Tuesday, April 5: **43+ Attempted Hrs.*** *(9am)*
Thursday, April 7: **15-42 Attempted Hrs.****(9am)*
Friday, April 8: **0-14 Attempted Hrs.*** *(9am)*

**To find your official number of attempted hours, look at your Academic Transcript in Banner, in the column entitled "Attempt Hours," under your most recently completed academic term.*

Friday, May 20	Law School Tuition & Fee Payment Deadline ***(Courses Deleted for Non-Payment after 4:30pm)***
Saturday, May 21 — Thursday, May 26	Late Registration and Late Add period ***($100 Late Registration Fee assessed during Late Registration.)***
Sunday, May 22	Last Day for 100% Refund on Drops
Monday, May 23	First Day of Classes
Thursday, May 26	Late Payment Fee Assessed after 4:30pm
Friday, May 27	Courses deleted for Non-Payment after 4:30pm
Sunday, May 29	Last Day for 75% Refund on Drops
Monday, May 30	Holiday – Memorial Day
Sunday, June 5	Last Day for 25% Refund on Drops Last Day to Drop Without Showing "W" on transcript
Friday, June 3	Last Day to Apply for August 2016 Graduation
Wednesday, June 15	Last Day to Withdraw Without Permission
Monday, July 4	Holiday — Independence Day Holiday
Tuesday, July 12	Last Day of Classes (Monday Class Schedule)
Wednesday, July 13	Reading Day
Thursday, July 14	Exams Begin
Monday, July 18	Exams End
Saturday, August 6	Commencement (10 am)

The University of Memphis Cecil C. Humphreys School of Law

2016 Fall Law Registrar Deadline Calendar

Monday, April 4 – Friday, April 8	Registration

Monday, April 4: **Veteran registration** *(8am)*
Tuesday, April 5: **43+ Attempted Hrs.*** *(9am)*
Thursday, April 7: **15-42 Attempted Hrs.****(9am)*
Friday, April 8: **0-14 Attempted Hrs.*** *(9am)*

**To find your official number of attempted hours, look at your Academic Transcript in Banner, in the column entitled "Attempt Hours," under your most recently completed academic term.*

Sunday, August 7 – Friday, August 12	First-Year Orientation
Friday, August 12	Law School Tuition & Fees Payment Deadline ***(Courses Deleted for Non-Payment after 4:30pm)***
Sunday, August 14	Last Day for 100% Refund on Drops and Withdrawals
Monday, August 15	First Day of Classes
Monday, August 15— Thursday, August 25	Late Registration and Late Add period ***($100 Late Registration Fee assessed during Late Registration.)***
Thursday, August 25	Late Payment Fee Assessed after 5:30pm
Friday, August 26	Late Registration Tuition and Fee Payment Deadline ***(Courses Deleted for Non-Payment after 4:30pm)***
Sunday, August 28	Last Day for 75% Refund, Drops
Sunday, September 4	Last Day to Drop Without Showing "W" on Transcript
Monday, September 5	Labor Day Holiday
Monday, September 12	Last Day for 25% Refund, Drops/Withdrawals
Friday, September 16	Last Day to Apply for December Graduation 2016
Friday, September 30	Last Day to Withdraw Without Permission
Monday, November 21	Last Day of Classes
Tuesday & Wednesday, November 22 - 23	Reading Days
Thursday & Friday, November 24-25	Thanksgiving Holiday
Monday, November 28	Exams Begin
Friday, December 9	Exams End
Sunday, December 11	Commencement (at 10:00am)

Off-Campus Request for Official Transcript

Office of the Registrar - Transcripts, 003 Wilder Tower, University of Memphis, TN 38152-3520 Fax: (901) 678-3249

*** Allow up to 5 business days for processing any transcript request. ***

Use this form only when FAXing or mailing your transcript request. If you intend to submit your request in person at the Registrar's Office, complete the form that is available there.

Name: Last:______________________ First:______________________ Middle:____________

Contact Info: Street Address: ____

City: ____________________ State: ____________________ Zip: ____________

E-mail: ____ Ph: (___) _____-________

U-Number: _________________________ OR **Last 4 Digits of SSN:** ______________

Birth Date: MM:____DD:____YY:____

Former Names: ____

Years Attended University of Memphis (UM): First Yr:________ Last Yr:________

Check if Appropriate:

Mail transcript now.

I will pick up at your office.

Hold transcript for the current term's grades. (Info format, ex: Full/Spring/20YY.)

Part of Term: ______________ / **Term:** ______________ / **Year:**______________

Hold transcript for degree. (Info format, ex: BA/Spring/20YY.)

Degree: ______________ / **Term:** ______________ / **Year:**______________

Hold transcript for pending grade change. (Info format, ex: ENGL4501/Spring/20YY.)

CourseID: ______________ / **Term:** ______________ / **Year:**______________

I attended Law School at UM.

I have taken Continuing Education (CEU) courses and want them included.

I have attached Enclosures that should accompany the transcript.

Release Academic Record & Other Pertinent Information to (Name/Address):	[#Copies]:
______________________________ ______________________________ ______________________________ ______________________________	[____]
______________________________ ______________________________ ______________________________ ______________________________ (Attach additional addresses if necessary.)	[____]

Signature:____ **Date:** ______________

A Tennessee Board of Regents Institution
An Equal Opportunity/Affirmative Action University

THE UNIVERSITY OF MEMPHIS
CECIL C. HUMPHREYS
SCHOOL OF LAW

ACADEMIC REGULATIONS

(Updated through December 14, 2016)

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(As Updated on December 14, 2016)

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STANDARDS FOR ATTAINMENT OF THE J.D. DEGREE ... 41

ACADEMIC REGULATIONS

The provisions set forth herein and in the Standards for Attainment of the J.D. Degree attached hereto as Appendix I govern the Academic Affairs of all students enrolled at the School of Law. All references to these Academic Regulations shall be deemed to include Appendix I. It is the responsibility of each student to be familiar with the terms contained herein and each student shall be deemed to be so. For the purposes of these Academic Regulations, any place where approval of the Dean is required, it shall be taken to mean the Dean or the Dean's designate such as the Associate Dean or an Assistant Dean.

1. DEGREES CONFERRED AND PROGRAMS OF STUDY

1.1 J.D. Degree

Graduates of The University of Memphis Cecil C. Humphreys School of Law receive the Juris Doctor Degree.

1.2 J.D./M.B.A. Degree Program

A J.D./M.B.A. Degree Program is available in cooperation with the School of Business. Further information is available in the office of the Dean.

1.3 Programs

The law school offers a full-time day program and a part-time day program on the semester system. Students in the full-time program normally graduate in three years (six semesters). Summer classes and intersession classes may be available and some students may graduate after five semesters and two summer sessions (equivalent to six semesters) as full-time students. Intersession classes may be offered between regularly scheduled classes (i.e., Winter intersession), or during regularly scheduled academic breaks in semesters (i.e., Spring intersession). Students in the part-time program normally graduate in nine semesters or in eight semesters and two summer sessions (equivalent to nine semesters). (See Section 5 for course maximums and minimums during each semester.)

2. REGISTRATION WITH BAR

Some states require that, for a candidate to take the bar examination in that state, the candidate shall have registered with a supervisory authority upon or shortly after enrolling in law school. Each student should ascertain the rules of the state in which he/she expects to take the bar examination in this respect. Tennessee does not have this requirement.

3. ENROLLMENT

Enrollment is subject to the general rules of the University pertaining to registration and is possible only during the scheduled registration periods of the university and School of Law as shown on the Law School and university calendars.

Newly admitted students and startovers may only enter in the fall term. Upper division law students, transfer students, and transient students may enter in any term and should preregister each semester for the succeeding term. Specific instructions on preregistering and course schedules are ordinarily provided at least one month before the preceding examination period.

The enrollment procedure begins in the administration offices of the School of Law. Enrollment in any course or section must be approved by the Dean or the Law School Registrar. Every enrollment after the first is conditional upon the student's being eligible to re-enroll under the Academic Eligibility Requirements. (See Section 14.) Students on probation from the previous semester and those who have been on probation will be conditionally enrolled until such time as all grades are received from the previous semester. If computation of a student's grades results in the student being academically excluded, the student will receive a refund of fees. (See Section 4.1.)

4. WITHDRAWALS AND RE-ENROLLMENT

4.1 Withdrawals and Refunds of Fees

A student may withdraw from the Law School by notifying the office of the Dean in writing, provided, however, that withdrawal is not permitted within one week of the beginning of the final examination period of a semester, summer, or intersession without permission of the Dean.

Withdrawals are recorded on the student's record at any time after a student has registered and paid fees.

The following refund percentages of enrollment fees (Maintenance, Out-Of-State Tuition and Student Activity Fees) apply to students who withdraw from the law school or who drop to an hourly load below full time:

A **full (100%) refund** of fees will be made only under the following conditions:

a. Cancellation of a class by the University.

b. Drop or withdrawal prior to official registration. (Example: Pre-registration of a first year student.)

c. Death of a student certified by the Vice President for Student Educational Services or designated university official.

d. Withdrawal of the student by the Dean's Office for reason of academic exclusion after the student has registered and paid fees.

A **75% refund** will be provided during the first day of classes and extending for a period of time noted in the term calendar of the Law School Schedule of Classes. A 90% refund of the Student Activity Fee will be provided during this period.

A **25% refund** will be provided beginning at the expiration of the 75% refund period and extending for a period of time noted in the term calendar of the Law School Schedule of Classes. A 75% refund of the Student Activity Fee will be provided during this period.

At the conclusion of the 25% refund period, there will be no refund of these fees.

4.2 Re-Enrollment after Withdrawal

a. Eligibility

To be eligible to re-enroll as a matter of right after withdrawal, the student who has withdrawn must have completed one academic year, have met the retention standards (See Sec. 14.1.b.), and be able to comply with the six year requirement. (See Section 16.4.) Students who cannot re-enroll as a matter of right must secure permission from the Dean. Denial of permission to re-enroll shall not prevent a student from competing for a position in the first year class. Re-enrollment procedures require filing a readmission application.

b. Graduation Requirements Upon Re-Enrollment

Students re-enrolling after withdrawing in good standing must comply with graduation requirements of the class with whom they are scheduled to graduate. These graduation requirements may differ from those in effect at the time of the student's original enrollment.

5. COURSE MINIMUMS AND MAXIMUMS: FULL-TIME AND PART-TIME STUDENTS

5.1 Full-Time Students

Full-time students must enroll in at least 12 credit hours toward the J.D. or J.D./M.B.A. degree in each semester. No student may be enrolled at any time in coursework that, if successfully completed, would exceed 18 credit hours. Unless permission of the Dean is obtained, no student with less than a 2.5 cumulative grade point average may enroll in more than 16 credit hours in a semester. Unless permission of the Dean is obtained, no student enrolled in an extern program may be enrolled in more than 16 credit hours, including the externship.

5.2 Part-Time Students

Unless permission of the Dean is obtained, part-time students must enroll in at least 8 credit hours, but not more than 11 credit hours, in each semester.

5.3 Summer Session Enrollment: Classification of Full-Time and Part-Time Students

Without regard to whether students are classified as full-time or part-time during the regular academic year, such students may enroll in summer session in any number of credit hours not exceeding nine (9). Students enrolling in six (6) or more credit hours will be classified as full-time students for the summer session and will be subject to all academic regulations applying to full-time students, including outside work limitations. Students enrolling in five (5) or fewer credit

hours will be classified as part-time students for the summer session. Students enrolling in intersession classes will be subject to all academic regulations applying to full-time students, including outside work limitations. Enrollment in summer session will not affect the full-time or part-time status of a student. (See Sections 8, 9, and 16.3 for related matters).

5.4 Enrollment

At the time of initial enrollment, students must enroll either as full-time or part-time students. From that time on, they will be governed by regulations applying to their initial enrollment classification unless they change status as provided in these regulations. (See Section 8.)

6. DROP/ADD COURSES

6.1 Adding Courses

With the exception of Trial Advocacy, Clinic, and Intersession classes, courses may be added to a student's schedule during the first ten (10) calendar days beginning with the first day of classes for regular semesters and during the first four (4) calendar days beginning with the first day of classes for summer sessions. Trial Advocacy, Clinic, and Intersession classes may be added to a student's schedule during the first five (5) calendar days beginning with the first day of classes for regular semesters and during the first two (2) calendar days beginning with the first day of classes for summer session. Classes missed before being added will be counted as absences for the attendance policy of the faculty teaching the course.

6.2 Dropping Courses

Elective courses may be dropped on or before the "drop date" listed in the calendar for each semester without permission of the Dean. Elective courses may be dropped after the drop date only with permission of the Dean. A full-time student may not drop below twelve (12) hours, and a part-time student (in the extended program) may not drop below eight (8) hours, without permission of the Dean. Drops occurring after the "Add Period" are recorded as "withdrawals". Required courses may not be dropped without permission of the Dean. (See Sections 5.1, 5.2 and 16.)

7. REPEATING COURSES; PASSING REQUIRED COURSES

A course may not be repeated unless it is failed -- i.e., no credit earned. Required courses must be completed and passed to meet graduation requirements. Required courses that are failed must be retaken in the next regular semester in which the course is offered unless taken in summer session prior to such next regular semester. When a course is repeated after having previously been failed, the grade for the course is averaged in the normal manner including the previous failure -- i.e., the previous grade stands and both grades become a part of the student's grade record and for computation of the student's grade point average. No grade is removed. (See Section 12.)

Any student who receives a D in a required first-year course the first time he or she takes the course must retake that course prior to graduation. Credit for that course will count towards the 90 credit-hour graduation requirement only the first time, but both grades received will become part of the student's grade record and count for computation of the student's grade point average.

8. CHANGE OF PROGRAM

8.1 Part-Time to Full-Time Program

Part-time students must secure permission from the Dean to transfer to the full-time program.

8.2 Full-Time to Part-Time Program

Full-time students in good standing must secure permission from the Dean to transfer to the part-time program.

8.3 Students Not in Good Standing

Students not in good standing will not be permitted to change programs except for good cause as determined by the Dean. (See Sec. 14.)

9. CLASS ATTENDANCE AND OUTSIDE WORK LIMITATIONS

9.1 Class Attendance

Students are expected to give their scholastic obligation first priority. Prompt and regular class attendance is considered necessary for satisfactory work. It is expected that a student will regard an engagement to attend classes as he/she would any other engagement or conference with his/her instructor. The necessity of absences does not in any sense relieve the student from responsibility for the work of his/her course during his/her absence. The instructor in charge of a course determines in all instances the extent to which absences and tardiness affect the student's grade and credit. The attendance policy of the instructor shall be announced to the class and distributed to the class in writing at the time of its implementation. Generally, attendance policies will be announced at the first class meeting of the semester. A student may receive a failing grade for excessive absences and may be dropped from the course with a failing grade if excessive absences occur. Each student shall be responsible for keeping records of his/her attendance.

9.2 Outside Work Limitation for Full-Time Students

The full-time program of the School of Law is intended to promote full-time study of law. Full-time students may not engage in employment in excess of twenty (20) hours per week. (See Section 5.3.) It is the policy of the School of Law to discourage any employment of first-year full-time students.

10. EXAMINATION POLICIES AND PROCEDURES INCLUDING DEFERRALS OR DELAYS IN COMPLETING EXAMINATIONS OR RESEARCH PAPERS

10.1 Schedule of Examinations

a. The schedule for examinations is made part of the registration materials. The schedule of examinations may be amended during a regular semester, summer session or intersession. Such amended schedules will be posted, and all students prior to the examination period are responsible for checking the Law School Bulletin Board for an amended schedule.

b. Unless students obtain the written permission of the Dean at the time of registration, students may not register in courses which have conflicting examination schedules -- i.e. where examinations are scheduled to be administered at the same time or on the same day. If permission is granted, one of the conflicting examinations will be scheduled on the next day in the examination period on which the student does not have an examination.

c. Students are required to take examinations at the scheduled times. Faculty members are not authorized to grant exceptions, but the Dean may grant exceptions as set forth in Sections 10.2 and 10.3.

10.2 Scheduled Examination Conflicting with Observance of a Religious Holiday

If a scheduled examination conflicts with the observance of a religious holiday or a day on which the student may not be present because of religious practices, the student will be entitled to a deferral of the examination until the earliest time at which the student may take the examination and proctoring can be arranged. The student should notify the Dean's office of the conflict and make arrangements for the deferral no later than two weeks prior to the start of the examination period.

10.3 Examinations under Special Circumstances

Students with disabilities may be granted permission to take examinations under special circumstance. Such students must be registered with the University Office of Student Disabilities. The special circumstances (conditions) will be established on an individual basis by the Dean considering the recommendations of the University Office of Student Disabilities.

10.4 Using Computers and Typewriters

Unless a student has an accommodation from Student Disability Services or demonstrates a case of severe hardship, a student is required to use a laptop or similar device and the approved exam-writing software to write essay or short-answer examinations.

10.5 Anonymous Grading System and Examination Numbers

All examinations are to be graded in a manner so as to protect the anonymity of students taking the examinations. To facilitate the anonymous grading system, all students are required to secure from the Law School Registrar an examination number for each semester, summer session and intersession. A student who does not use the assigned examination number will not have a grade reported to the student or to the University until such number is secured.

10.6 Deferrals or Delays in Taking Scheduled Examinations; Unreasonable Hardship

Deferral of, or a delay in taking, an examination may be permitted only by the Dean and then only when it would result, or would have resulted, in an unreasonable hardship on the student to attend the examination. Application for delay must be made to the Dean prior to the examination, if feasible. If a delay is permitted, the student shall take the examination at such time as the instructor in conjunction with Dean's office shall require. Unreasonable hardship includes illness and other matters beyond the control of the student. If for reasons beyond the student's control, deferral or delay cannot be requested in advance of the scheduled examination, such request must be made as soon as possible after the examination. (WARNING: Failure to take a scheduled examination results in a grade F or U unless the Dean permits the student to withdraw from the course.)

10.7 Late Arrivals for Examinations

A student who arrives at an examination after the examination has started but before it is completed may sit for the examination. The Dean, in consultation with the faculty member, if available, may permit a student whose late arrival is attributable to factors that are beyond the student's reasonable control to take the entire scheduled time for the examination, either beginning immediately or as rescheduled by the Dean. Otherwise, a student shall be permitted to take the examination, but in the Professor's discretion, may be required to complete the examination at the regularly scheduled time.

10.8 Conclusiveness of Taking an Examination

A student, by taking an examination, is conclusively deemed to represent that no unreasonable hardship existed and the student was able to take the examination. The grade earned will be recorded and will not be expunged for any reason. A student may not withdraw from a course after taking the examination.

10.9 Illnesses or Emergencies Arising During an Examination

If during an examination, an illness or emergency arises which would result in an unreasonable hardship on such student or the student being unable to complete the examination, the student, if capable of so doing, must notify the faculty member or person proctoring the examination immediately upon such occurrence. After such notification and/or occurrence, the Dean's office shall be notified, and, thereafter, the Dean's office will, in conjunction with the faculty member involved, schedule the examination as circumstances permit.

10.10 Research Papers and Work Other Than Examinations; Due Dates and Extensions

The research paper in final form, whether written in connection with a seminar or as independent research, must be submitted to the faculty research advisor no later than the last day of the examination period of the semester or summer session in which the student is registered for the seminar or independent research, and may be required earlier by the faculty research advisor. A schedule for the submission of outlines, drafts, lists, and paper will be prepared in writing by the faculty research advisor and given to the student. Failure to comply with the schedule may result in failure in the course for which the paper is required to be written. The faculty research advisor may permit additional time, in which case the conditions and limitations of any such extension must be met; provided, however, no extension of time shall be beyond the last day of the examination period in which the student is registered unless requested in writing and approved by the faculty research advisor and by the Dean and filed with the Law School Registrar prior to the last day of the examination period. The Law School Registrar will provide a form by which this may be done. It is the responsibility of the student to procure the execution of the form by the faculty research advisor and by the Dean and to file it with the Law School Registrar.

10.11 Incompletes and Effect on Grades

If a deferral or delay of the due date on an examination or research paper extends beyond the end of the semester, a grade of Incomplete will be given in the course or seminar, and a notation will be made in the student's records of the time and method by which completion is required. Any grade of Incomplete not removed in accordance with the requirements of a permitted deferral or delay will result in a grade of F or U in the course. (See Sections 10.3 & 11.)

10.12 Computation of Grades

For all purposes for which grade point averages are computed (i.e. - standing, retention, rank, etc.), an Incomplete will not be counted in the semester in which it is received. When the grade is reported, it will be included for computation of grade point average at the end of the semester in which it is reported. (See Section 12.3.)

10.13 Enrollment when Deferrals or Delays in Taking Scheduled Examinations Are Pending

The permission of the Dean is required to permit a student to enroll in a semester, summer session, or intersession when scheduled examinations for any prior semester, summer session, or intersession have not been completed including deferred or delayed examinations. A student seeking to enroll under such circumstances must submit a written request to the Dean.

11. INCOMPLETES AND GRADE CHANGES

11.1 Incompletes

An Incomplete may be recorded by faculty members when there is a legitimate reason for a student not completing course work during the regular period (i.e., a semester or summer

session). Any grade of Incomplete not removed in accordance with the requirements of the Instructor or approval by the Dean shall result in a grade of F in the course.

11.2 Grade Changes

Upon reporting grades to the Law School Registrar, a professor is required to sign the grade sheet as certification that the grades are correct. After submission of grades to the Law School Registrar, grades may be changed by a professor only for computational or objective errors of the professor. Grade changes for any other reason may be made only with approval of the Academic Affairs Committee. Any such grade change must be made by the end of the semester, excluding summer session, or intersession, after the semester in which the grade was received.

12. GRADING SYSTEM

12.1 Grades

a. Grades are represented by the following letter grades: A+, A, A-, B+, B, B-, C+, C, C-, D+, D, and F, and in certain courses the letters E Excellent), S (Satisfactory), and U (Unsatisfactory) (See Section l2.2) A grade of D or better is passing, and less than a D is failing. While a grade of D, D+ or C- is passing and credit is earned, such grade indicates less than satisfactory performance. (See Section 12.5 for grading factors in seminar courses.)

For purposes of determining grade point averages, letter grades have the following number equivalents:

A+	4.0	C+	2.33
A	4.0	C	2.0
A-	3.67	C-	1.67
B+	3.33	D+	1.33
B	3.0	D	1.0
B-	2.67	F	0

Grades of E, S, and U will not be assigned number equivalents and will not be used in determining grade point averages.

b. For first-year courses, the mean cumulative grade point average for each section shall fall on or between 2.70 – 2.80. In extraordinary circumstances, the Associate Dean for Academic Affairs may approve an exception to this rule.

12.2 Grading Systems and Factors to be Considered

a. Subject to exceptions set forth in the following subsections, all courses will be graded on a letter grade basis as set forth in Subsection 12.1 supra. (See Subsection 12.5. regarding factors to be considered.)

b. Courses identified as simulation courses shall be graded on a letter grade basis.

c. All courses identified as clinic courses will be graded on a letter basis and will not include as a component the grade on a final examination.

d. Externships, Law Review and Moot Court shall be graded according to standards of Excellent (E), Satisfactory (S) and Unsatisfactory (U). Excellent shall represent achievement substantially above the minimum requirement for a grade of Satisfactory.

e. The use of E, S, and U may be appropriate for courses in which, as taught and tested, the achievement of students cannot be closely compared. The use of these grades shall only be by faculty approval following an initial study and recommendation by the Curriculum Committee. Such grading policy will be noted on the course schedule for each semester, summer session, or intersession to which it applies.

12.3 Cumulative Grade Point Average

A student's cumulative grade point average is computed by first converting letter grades to number equivalents pursuant to Section 12.l. The number equivalents are then multiplied by the number of hours of credit assigned to each course. The products are added, and the sum divided by the total number of hours of courses whose products are included in the sum. Courses graded E, S and U are excluded from the grade point computation.

12.4 Rounding

Averages are computed and recorded to two decimal places, e.g., 2.65, with no rounding.

12.5 Grading Factors

a. A written examination is usually given at the end of each course, and the grade for the course will be the grade made on the examination. An instructor, at his/her discretion and to the extent he/she desires, may, however, consider class attendance, participation in classroom instruction, other examinations and the performance of required work in determining the grade. These additional factors will be announced at the beginning of the course, or at such time as to provide adequate notice to the students.

b. In a seminar course that fulfills the Law School’s writing requirement, between 65% and 80% of the grade must be based on the research paper. The balance of the course grade must be based on participation that demonstrates the students’ knowledge, comprehension, and analysis of assigned readings or research. A student may not satisfy the research requirement unless a grade of C or better is received, both in the seminar and on the research paper. A student may receive a grade of C or better in a seminar by receiving points

based on additional grading factors, even though the research paper is not satisfactory to satisfy the Law School's research requirement for graduation. (See Section 16.1c.)

13. CLASS RANKING

13.1 Full-Time Students

Full-time students will be ranked at the following intervals:

1st year: fall and spring semesters

2nd year: fall and spring semesters

3rd year: fall and spring semesters

Final: as a group, following summer session

13.2 Part-Time Students

Part-time students will be ranked at the following intervals with the designated class:

1st year fall and spring semester with admission class

2nd year spring semester with admission class

3rd year fall and spring semester with the second year full-time students after the fall and spring of their third year

4th year fall semester and spring semester with the third year full-time students

5th year (if applicable) fall semester and spring semester with third year full-time students

Final: as a group, following summer session

13.3 Work Considered for Ranking

Only the work completed at the University of Memphis will be considered in computing class rank. (See Section 16.)

13.4 Honors

Students with high cumulative grade point averages are awarded the J.D. degree with honors. The categories are:

Summa Cum Laude – Top 1% of the graduating class

Magna Cum Laude – Top 10% of the graduating class

Cum Laude – Top 25% of the graduating class

Diplomas awarded to such students will reflect the distinction.

14. ACADEMIC ELIGIBILITY REQUIREMENTS

14.1 Good Standing. Retention and Academic Exclusion for Non-Transfer Students

a. Good Standing

A student is in good standing only if the student's cumulative grade point average, as computed pursuant to Section 12, is 2.00 or better.

b. Retention and Academic Exclusion

A student not in good standing will be academically excluded unless one of the following exceptions applies:

1. The student has received grades in fewer than 15 credit hours.

2. The student has received grades in 15 to 23 credit hours and has a cumulative grade point average of 1.5 or better.

3. The student has received grades in 24 to 38 credit hours and either has a cumulative grade point average of 1.80 or has earned a semester grade point average of 2.10 in the most recent semester.

4. The student has received grades in 39 to 53 credit hours and either has a cumulative grade point average of 1.90 or has earned a semester grade point average of 2.10 in the most recent semester.

5. The student has had a cumulative grade point average of 2.00 at the end of every previous semester. Such a student will receive one semester of probation. Following the semester of probation, the student will be subject to the requirements of Section 14.1.

A student who is not in good standing but entitled to retention under provisions 1-5 above must complete the student's next semester after no more than two semesters of non-enrollment. Non-enrollment includes withdrawal during a semester. (See Sec. 4.2.a.)

c. Exclusion After First Semester

In addition to the provisions of Rule 14.1a and Rule 14.1b, the Law School will exclude any first year full-time student whose cumulative GPA after one semester is below 1.5 without the benefit of rounding.

d. Computation of Grade Point Average

For the purposes of determining good standing or retention status, the student's grade point average will be determined at the end of each fall semester and at the end of each spring semester. Summer term grades will be computed as if taken during the fall semester. Intersession grades will be computed as if taken during the subsequent full semester. Enrollment in a succeeding academic term prior to computation of the student's grade point average will be at the student's risk. (See Section 3).

14.2 Good Standing, Retention, and Academic Exclusion for Transfer Students

a. Good Standing

Any transfer student whose cumulative grade point average for work taken at The University of Memphis, as computed pursuant to Section 12, is 2.00 or better is in good standing.

b. Retention and Academic Exclusion

A transfer student not in good standing will be academically excluded unless one of the following exceptions applies:

1. The student has received grades in fewer than 17 credit hours at this law school.

2. The student transferred to this law school with fewer than 17 transfer credits, has received grades in 17 to 32 credit hours at this law school and has a cumulative grade point average of 1.9 for work at this law school, or has earned a semester grade point average of 2.3 in the most recent semester.

3. The student transferred to this law school with 17 or more transfer credits, has received grades in 17 to 32 credit hours at this law school and has earned a semester grade point average of 2.5 in the most recent semester.

14.3 Significance of Academic Exclusion

A student who is academically excluded may:

a. Challenge a grade pursuant to the Grade Appeals procedures outlined in Section 22. In the event that the appeal results in a grade change that raises the student's grade point average over the threshold for exclusion, the student will be readmitted.

b. File a petition with the Academic Affairs Committee seeking a change in the Academic Regulations. If the Committee recommends, and the faculty approves, a change in the Regulations that would result in the student being able to remain in school, the student will be readmitted. There is no appeal from the decision of the Academic Affairs Committee or the faculty.

Subject to the above, academic exclusion is final and there is no appeal. A student who is academically excluded may seek startover admission pursuant to the provisions of Section 15.

15. STARTOVER

a. An applicant for admission to the first year entering class who was academically excluded from any law school may be admitted to the class for which he or she has applied, provided:

1. The applicant was academically excluded from this law school or is a Tennessee resident for fee and tuition purposes at the time of application, residency determination, and enrollment.

2. The applicant has been out of law school for a period of at least two (2) regular academic semesters (excluding the Summer Session) on the date of enrollment; or, if the applicant has completed three (3) semesters of law school, he or she is required to have been out of law school for only one regular academic semester (excluding the Summer session) on the date of enrollment.

3. The applicant has satisfied, on the dates of admission and enrollment, all absolute admission requirements applicable to all other applicants who are admitted and enrolled in the entering class for which application is made, except that the LSAT exam must have been taken within five years prior to the date of admission unless waived by the Admissions Committee;

4. The applicant, before admission, has been approved for admission by a majority of this law school's Admission Committee and the Dean after consideration of the applicant's situation in light of ABA Standard 505;

5. The applicant has not enrolled as a startover admit at any law school after previously being previously being academically excluded from any law school; and

6. The startover application is complete by April 1st.

b. Each applicant described above, who has been admitted and enrolled will not be counted in the total number of enrollments needed to fill the first year entering class. In no event will more than five (5) such applicants be admitted and enrolled in any one entering class. In the event that more than five (5) such applicants are approved as eligible for admission, the Admissions Committee together with the Dean will select the five (5) to be admitted. Selections will be based upon the applicant's admission index and other factors reflecting the likelihood for success at this law school.

16. REQUIREMENTS FOR GRADUATION

16.1 Course Requirements

A student is required to complete course work for a total of at least 90 credit hours for all courses.

a. Required Courses and Course Sequencing for Full-Time Students

A student enrolled in the full-time program is required to complete the following courses in the sequence indicated, unless an exception is granted by the Dean or the Dean's designee.

16.1.a.i. A FULL-TIME student who matriculates **before** January 1, 2015

First Year		Second Year	Second or Third Year	
Fall Term	Spring Term	221 Evidence	A. 224 Professional Responsibility + B. Two Courses in both the Statutory Menu and Practice Foundation Menu:	
112 Torts I	122 Torts II	**A student is required to complete Evidence by the end of spring of his/her second year. If a student takes Evidence in the summer term between the first and second year, this requirement will be satisfied.*	Statutory Menu	Practice Foundation Menu
113 Legal Methods I	123 Legal Methods II		323 Commercial Paper	311 Administrative Law
114 Civil Procedure I	124 Civil Procedure II		334 Corporate Tax	211 Business Organizations
115 Property I	125 Property II		214 Income Taxation	223 Criminal Procedure
126 Criminal Law	121 Contracts		359 Sales	213 Decedents' Estates
	212 Constitutional Law		222 Secured Transactions	331 Family Law
			Note: Any student may opt in to the course menu requirements effective after August 1, 2016 or August 1, 2017.	

16.1.a.ii A FULL-TIME student who matriculates **after** January 1, 2015 but **before** August 1, 2016

First Year		Second Year	Second or Third Year
Fall Term	Spring Term	212 Constitutional Law	A. 224 Professional Responsibility
111 Contracts I	121 Contracts II	221 Evidence	+
112 Torts I	122 Torts II		B. Two Courses in both the Statutory Menu and

113 Legal Methods I
114 Civil Procedure I
115 Property I

123 Legal Methods II
124 Civil Procedure II
125 Property II
126 Criminal Law

**A student is required to complete Evidence & Constitutional Law by the end of spring of his/her second year. If a student takes either or both courses in the summer term between the first and second year, this requirement will be satisfied.*

Practice Foundation Menu:

Statutory Menu	Practice Foundation Menu
323 Commercial Paper	311 Administrative Law
334 Corporate Tax	211 Business Organizations
214 Income Taxation	223 Criminal Procedure
359 Sales	213 Decedents' Estates
222 Secured Transactions	331 Family Law

Note: Any student may opt in to the course menu requirements effective after August 1, 2016 or August 1, 2017.

16.1.a.iii. A FULL-TIME student who matriculates **after** August 1, 2016

First Year

Fall Term
111 Contracts I
112 Torts I
113 Legal Methods I
114 Civil Procedure I
115 Property I

Spring Term
121 Contracts II
122 Torts II
123 Legal Methods II
124 Civil Procedure II
125 Property II
126 Criminal Law

Second Year

212 Constitutional Law
221 Evidence

**A student is required to complete Evidence & Constitutional Law by the end of spring of his/her second year. If a student takes either or both courses in the summer term between the first and second year, this requirement will be satisfied.*

Second or Third Year

A. 224 Professional Responsibility
+
B. Two Courses in both the Statutory Menu and Practice Foundation Menu:

Statutory Menu	Practice Foundation Menu
334 Corporate Tax	311 Administrative Law
214 Income Taxation	211 Business Organizations
359 Sales	223 Criminal Procedure
222 Secured Transactions	213 Decedents' Estates
	331 Family Law
	324 Conflict of Laws
	368 Remedies

Note: Any student may opt in to the course menu requirements effective after August 1, 2017.

16.1.a.iii. A FULL-TIME student who matriculates **after** August 1, 2017

First Year

Fall Term
111 Contracts I
112 Torts I
113 Legal Methods I
114 Civil Procedure I
115 Property I

Spring Term
121 Contracts II
122 Torts II
123 Legal Methods II
124 Civil Procedure II
125 Property II
126 Criminal Law

Second Year

212 Constitutional Law
221 Evidence

**A student is required to complete Evidence & Constitutional Law by the end of spring of his/her second year. If a student takes either or both courses in the summer term between the first and second year, this requirement will be satisfied.*

Second or Third Year

A. 224 Professional Responsibility

B. Two Courses in both the Statutory Menu and Practice Foundation Menu:

Statutory Menu	Practice Foundation Menu
334 Corporate Tax	311 Administrative Law
330 Fair Employment Practice	211 Business Organizations
214 Income Taxation	213 Decedents' Estates
348 Legislation	331 Family Law
359 Sales	324 Conflict of Laws
222 Secured Transactions	368 Remedies

C. 223 Criminal Procedure I

D. 721 Bar Exam Preparation Course

b. Required Courses and Course Sequencing for Part-Time Students

A student enrolled in the part-time program is required to complete the following courses in the indicated sequence unless an exception is granted by the Dean of the Dean's designee.

16.1.b.i. A PART-TIME student who matriculates **before** January 1, 2015

First Year		Second Year		Third and Fourth Year
Fall Term	Spring Term	Fall Term	Spring Term	
112 Torts I	122 Torts II	115 Property I	125 Property II	A.224 Professional Responsibility +
113 Legal Methods I	123 Legal Methods II	126 Criminal Law	212 Constitutional Law	B. Two Courses in both the Statutory Menu and Practice Foundation Menu:
114 Civil Procedure I	124 Civil Procedure II	221 Evidence/ Elective	221 Evidence/ Elective	
	121 Contracts			

**A student is required to complete the above courses by the end of spring of his/her second year. If a student takes one of these courses in the summer term between the first and second year, this requirement will be satisfied, and an Elective may be taken in its place.*

Statutory Menu	Practice Foundation Menu
323 Commercial Paper	311 Administrative Law
334 Corporate Tax	211 Business Organizations
214 Income Taxation	223 Criminal Procedure
359 Sales	213 Decedents' Estates
222 Secured Transactions	331 Family Law

Note: Any student may opt in to the course menu requirements effective after August 1, 2016 or August 1, 2017.

16.1.b.ii. A PART-TIME student who matriculates **after** January 1, 2015 but **before** August 1, 2016

First Year		Second Year		Third and Fourth Year
Fall Term	Spring Term	Fall Term	Spring Term	
112 Torts I	122 Torts II	111 Contracts I	121 Contracts II	A. 224 Professional Responsibility +
113 Legal Methods I	123 Legal Methods II	115 Property I	125 Property II	B. Two Courses in both the Statutory Menu and Practice Foundation Menu:
114 Civil Procedure I	124 Civil Procedure II	212 Constitutional Law/ 221 Evidence	212 Constitutional Law/ 221 Evidence	
	126 Criminal Law			

**A student is required to complete the above courses by the end of spring of his/her second year. If a student takes one of these courses in the summer term between the first and second year, this*

Statutory Menu	Practice Foundation Menu
323 Commercial Paper	311 Administrative Law
334 Corporate Tax	211 Business Organizations
214 Income Taxation	223 Criminal Procedure
359 Sales	213 Decedents' Estates

	requirement will be satisfied, and an Elective may be taken in its place.	222 Secured Transactions 331 Family Law ***Note: Any student may opt in to the course menu requirements effective after August 1, 2016 or August 1, 2017.***

16.1.b.iii. A PART-TIME student who matriculates **after** August 1, 2016

First Year		Second Year		Third and Fourth Year	
Fall Term	Spring Term	Fall Term	Spring Term	A. 224 Professional Responsibility + B. Two Courses in both the Statutory Menu and Practice Foundation Menu:	
112 Torts I	122 Torts II	115 Property I	121 Contracts II		
113 Legal Methods I	123 Legal Methods II	111 Contracts I	125 Property II		
114 Civil Procedure I	124 Civil Procedure II	212 Constitutional Law/221 Evidence	212 Constitutional Law/221 Evidence		
	126 Criminal Law				
		**A student is required to complete the above courses by the end of spring of his/her second year. If a student takes one of these courses in the summer term between the first and second year, this requirement will be satisfied, and an Elective may be taken in its place.*		Statutory Menu	Practice Foundation Menu
				334 Corporate Tax	311 Administrative Law
				214 Income Taxation	211 Business Organizations
				359 Sales	213 Decedents' Estates
				222 Secured Transactions	331 Family Law
					324 Conflict of Laws
					368 Remedies

Note: Any student may opt in to the course menu requirements effective after August 1, 2017.

16.1.b.iii. A PART-TIME student who matriculates **after** August 1, 2017

First Year		Second Year		Third and Fourth Year
Fall Term	Spring Term	Fall Term	Spring Term	A. 224 Professional Responsibility + B. Two Courses in both the Statutory Menu and Practice Foundation Menu:
112 Torts I 113 Legal Methods I 114 Civil Procedure I	122 Torts II 123 Legal Methods II 124 Civil Procedure II 126 Criminal Law	115 Property I 111 Contracts I 212 Constitutional Law/221 Evidence	121 Contracts II 125 Property II 212 Constitutional Law/221 Evidence	

**A student is required to complete the above courses by the end of spring of his/her second year. If a student takes one of these courses in the summer term between the first and second year, this requirement will be satisfied, and an Elective may be taken in its place.*

Statutory Menu	Practice Foundation Menu
334 Corporate Tax	311 Administrative Law
330 Fair Employment Practice	211 Business Organizations
214 Income Taxation	213 Decedents' Estates
348 Legislation	331 Family Law
359 Sales	324 Conflict of Laws
222 Secured Transactions	368 Remedies

C. 223 Criminal Procedure I

D. 721 Bar Preparation Course

c. Other Required Courses for Full-Time and Part-Time Students

In addition to the above listed courses, a student is required to satisfy both the advanced writing and the experiential requirements.

1. Advanced Writing
A student is required successfully to complete a two or three hour advanced writing course. The advanced writing requirement is met by earning a C or better in an advanced writing course. (See Section 12.5.) See the Course Catalog for a list of courses that satisfy the advanced writing requirement. (See Section 12.5.) A student is required to complete the first-year full-time curriculum prior to satisfying the advanced writing requirement by enrollment in an advanced writing course, unless a waiver is granted by the Academic Affairs Committee. An advanced writing course satisfying the advanced writing requirement must be taught by a full-time Law School faculty member. Each such course is offered as a rigorous writing experience under faculty supervision and shall include a substantial research paper, appellate brief, Law Review Note, or other writing of similar length and complexity, individualized assessment by the faculty member of the student's written product, and a faculty member's review and edit of one or more drafts of the student's work.

2. Experiential Learning
A student is required to satisfactorily complete one or more experiential course(s) totaling at least six (6) credit hours, including a minimum of one clinic course or

externship. The courses that qualify as experiential courses are designated in the online Course Catalog. For purposes of the Experiential Learning Requirement, satisfactory completion means earning a grade of C or better in the course for courses graded on a letter grade basis, and earning a grade of Satisfactory or better in the course for courses graded on an Excellent/Satisfactory/Unsatisfactory basis. A student is required to complete 28 credit hours before taking an externship, which is one type of course that qualifies as an experiential course for the Experiential Learning Requirement. See the Course Catalog for a list of courses that satisfy the experiential requirement.

d. Limitations on Courses for Credit toward Graduation

1. Not more than a total of twelve (12) credit hours may be utilized toward satisfying graduation requirements by satisfactorily completing the following courses:

(a) Any externship,
(b) Law Review and Law Review Board,
(c) Moot Court (including Moot Court Board, Moot Court Executive Board, and inter-school or intra-school competition credit),
(d) Independent Research, and
(e) Advanced Clinic.

2. To satisfy graduation requirements, a student is permitted a total of three (3) externships, two (2) clinic courses, or a combination of (1) clinic and (2) two externship courses. Absent permission from the Associate Dean of Academic Affairs, a student may not repeat a clinic or externship, may not enroll in both a clinic and externship in the same semester or summer session, and may not enroll in more than one clinic or more than one externship in any semester or summer session. For enrollment purposes in these limited enrollment courses, a student who has taken one clinic will not receive priority for a second clinic, and a student who has taken one externship will not receive priority for a second externship.

16.2 Waiver of Course Requirement

For good cause shown and to avoid hardship, waiver of completion of any required course may be permitted only with the approval of the Academic Affairs Committee and on conditions set by the Committee.

16.3 Twenty-four Month Requirement

A student may complete the law school's degree requirements no earlier than 24 months after a student has commenced law study at the law school or a law school from which the school has accepted transfer credit.

16.4 Six-Year Requirement

A student must complete all of such student's graduation requirements within six (6) calendar years from the date of the student's initial enrollment in law school or forfeit all hours earned during this period. The student will, however, be allowed to reapply for admission as an entering student and compete with other applicants for a position in the entering class, with no credit allowed for prior work. The Academic Affairs Committee may make an exception to the foregoing rule if the student submits a proposed course of study for approval, but in no event may a student extend study so that the J.D. degree is not completed within 84 months of the time the student commenced law study.

16.5 Work at Other Schools

Any work to be taken at another law school on a transient basis must be approved by the Dean prior to the student's attendance at such other law school. Once approved, a student may not utilize more than 30 semester hours toward the student's degree at this law school, unless an exception is granted by the Academic Affairs Committee.

16.6 Grade Requirement

A student must have a grade point average of 2.00 or better in all work undertaken at the University of Memphis to graduate.

16.7 Completion of Work

All required courses must be completed. Completion of a course consists of sufficient attendance in class, performance of all required work, the taking of all examinations, making a passing grade (D or above or, in the case of non-graded course, a grade of E or S), with the exception of the research requirement which requires a grade of C or above. (See Section 12.5.) Failure to complete work in any course as it is required, or to take an examination when required, will result in a grade of F in the course. Delay in completing the work in a course may be permitted, as outlined under Delay in Completing Required Work. (See Section 10.)

16.8 Pro Bono Requirement

A student must complete forty hours of pro bono service to graduate. Please see the Pro Bono Program Handbook for more information.

17. TRANSFERRED CREDIT

Credit for law school work competed at law schools other than at The University of Memphis Cecil C. Humphreys School of Law will be credited toward fulfilling graduation requirements only after individual consideration by the Dean. No credit, however, will be given for work completed in a United States Law School which is not ABA approved. Advanced standing will be granted only for work done after the student has completed a Baccalaureate degree.

To be eligible for transfer, credit earned in each course considered for transfer credit must be at least equal to the overall grade point average required for graduation at the University of Memphis, Cecil C. Humphreys School of Law.

18. AUDITING (NON-LAW STUDENTS); TRANSIENT STUDENTS

18.1 Auditing Courses

Subject to limited exceptions, all students enrolled in any course must be a J.D. degree candidate at this law school or have been admitted to the School of Law as a transient student. Exceptions are made for practicing attorneys, members of the faculty of the University, graduates of the University, students pursuing a graduate degree program of the University, and students pursuing graduate degree programs at other accredited universities or colleges. These individuals should contact the office of the Dean for additional information.

18.2 Transient Students

A transient student is a student currently in good standing at another ABA accredited law school and enrolled in this law school for the purpose of transferring the credits earned to the law school in which the student is enrolled as a degree candidate.

18.3 Foreign Lawyers

At the discretion of the Dean or the Dean's designee, a person who has graduated from a foreign law school (or equivalent institution) and has demonstrated proficiency in the English language, which may include objective assessment through a standardized test, may enroll in up to twenty-four(24) credits in courses offered in the first year of law school.

19. REQUIREMENTS FOR STUDENT RESEARCH PAPERS OTHER THAN THOSE REQUIRED IN SEMINARS

Requirements for student research papers other than those required in seminars are available from the Law School Registrar. Students must secure permission from the supervising faculty member prior to enrolling in Research I. No more than one hour credit may be obtained in this way. (See Section 16.I.d.)

20. STUDENT RECORDS AND FILES: GRADE INFORMATION

20.1 Confidentiality of Student Records

In compliance with provisions of the "Family Educational Rights and Privacy Act of 1974," the School of Law abides by the rules and regulations of the University pertaining to the confidentiality of student records, the release of that information, and the rights of students and others to have access to such records as set forth in the University Student Handbook, University

Bulletins and Schedules of Classes. Copies of these publications are available at the office of the Dean.

20.2 Grade Information

Individual grades will not be divulged over the telephone. Grades for seminar papers are accepted and may be furnished to students individually by the faculty member or the office of the Dean. All grades will be posted by the office of the Dean when received by that office from the instructor, but no earlier than three (3) weeks after the end of the examination period. Thereafter, grades will be posted as received. (See 20.3 for students' rights to not to have their grades posted.) Except for circumstances beyond the control of a faculty member, all grades should be reported by the faculty within three (3) weeks of the end of any examination period. Individual grade reports will be mailed by the University Registrar to each student.

20.3 Non-Posting of Grades Upon Request

Pursuant to the Family Educational Rights and Privacy Act of 1974, students may request that their grades not be posted in any manner. Students so requesting will receive their grades individually from the office of the Dean.

21. HONOR CODE

21.1 Definitions

a. "Accused" refers to a student accused of a violation of the Honor Code.

b. "Appellate Board" refers to the three-person appellate board consisting of the Dean, the Associate Dean for Academic Affairs, and one member of the full-time faculty. The Dean shall select the faculty member on the Appellate Board.

c. "Associate Chief Justice" refers to the Student Justice who shall act as the Chief Justice if the Chief Justice is unable to preside over any meeting, hearing, or function involving the Honor Council.

d. "Chief Justice" refers to the Student Justice who shall act as the head and the voice of the Honor Council and is vested with the authority to run the Council and hearing processes.

e. "Class" and "Course" refer to any academic enterprise that awards credit toward a degree or any law school-sanctioned, co-curricular activity including but not limited to Moot Court and Law Review.

f. For the purpose of determining deadlines, "day" means any regular business day of the School of Law, and does not include weekends, holidays observed by the School of Law, or any day on which the School of Law is not open to conduct regular business.

g. “Dean” refers to the Dean of the Cecil C. Humphreys School of Law at the University of Memphis, or that person’s designee.

h. “Elections” are the mechanism by which the student body will elect student justices.

i. “Honor Council” refers to the group of Student Justices that has plenary authority to review alleged violations under the Honor Code and to impose those sanctions it deems appropriate. The Honor Council consists of eleven members: five from the 2L class, and six from the 3L class.

j. “Investigators” refer to the two Honor Council members, appointed by the Chief Justice on a case-by-case basis, who will serve as fact gatherers for the preliminary hearings, and who will also serve as presenters of information in all preliminary and main hearings. The Investigators will not have a vote on matters to which they are appointed.

k. “Notice” means written notice and includes e-mail messages.

l. “Secretary” refers to the Student Justice who is responsible for keeping an adequate record of proceedings, as set forth herein.

m. “Student Counsel” refers to a current member of the student body requested by the Accused to be his or her counsel. The Student Counsel may act on behalf of the Accused in an Honor Council hearing. The Student Counsel shall keep confidential any information learned in the course of his or her representation. Current Honor Council members may not serve as Student Counsel.

n. “Student Justice” refers to an individual member of the Honor Council. Any student who has been convicted of a violation of the Honor Code may not serve as a Student Justice.

o. “Writing” includes a letter, memorandum, or e-mail message sent to a student’s School of Law e-mail account.

21.2 Scope

a. This Code applies to all students admitted to the School of Law. The Code covers conduct that occurs from the time a law student applies for admission through graduation and that occurs:

1. at the University of Memphis Cecil C. Humphreys School of Law;

2. at an off-site event sponsored by the University of Memphis Cecil C. Humphreys School of Law; or

3. in connection with a Course.

b. The Code also applies to students enrolled in courses or programs sponsored or co-

sponsored by the School of Law. The Code covers conduct that occurs from the time the student is admitted to the course or program and that occurs under the scope of (b)(1)(A-C) of this Code.

c. Investigations may be initiated or continued after a student has graduated, but no later than the time that student is admitted to a state bar. If an Honor Code matter is pending when a student is scheduled to graduate, the student's degree may be withheld at least until the matter is resolved, or for 90 days, whichever is less.

21.3 Oath

A degree-seeking student who registers at the School of Law will take the following oath before beginning classes:

"I [state name], as a student at The Cecil C. Humphreys School of Law at The University of Memphis, understand that I am joining an academic community and am embarking on a professional career. The law school community and the legal profession share important values that are reflected in the Cecil C. Humphreys School of Law Academic Honor Code and in its Code of Conduct. I have read this Code, and will conduct my academic, professional, and personal life to honor the values reflected therein."

Each student shall sign a statement attesting that the student has read and understands the provisions of the Honor Code.

21.4 Types of Dishonesty and Misconduct

An act of dishonesty is a wrongful or improper act that questions a student's academic honesty or integrity; an act of misconduct is a wrongful, improper or prohibited act. The Honor Council has the authority to investigate either an act of dishonesty or an act of misconduct. Acts of dishonesty and misconduct include but are not limited to the following:

a. Cheating. Using or attempting to use unauthorized materials or sources in connection with any assignment, examination, or other academic exercise, or having someone else do work for the student when forbidden by the professor.

b. Unauthorized assistance or collaboration. Giving or receiving aid on an assignment, examination, or other academic exercise when not permitted by the professor.

c. Plagiarism and inappropriate use of others' work. Using the words, thoughts, or ideas of another without attribution so that they seem as if they are the student's own.

   1. Plagiarism includes, but is not limited to, copying another's work word-for-word, turning in a paper written by another, rewriting another's work with only minor changes, and summarizing another's work or taking another person's ideas without acknowledging the source through proper attribution and citation.

2. An accidental omission of a citation(s) will not be considered an act of academic misconduct, unless other facts determine otherwise.

3. The faculty member responsible for grading the academic work in question has plenary authority either to make a referral of plagiarism to the Honor Council, if that faculty member is unclear if there is a violation, or to reduce the student's grade based on the academic merits of the academic work. The faculty member may not make a determination of a violation, because that is within the sole authority of the Honor Council.

d. Misappropriation of and damage to academic and personal materials. Damaging, misappropriating, or disabling academic resources so that others cannot use them is considered misconduct. This includes but is not limited to removing pages from books, stealing books or articles, hiding or misplacing books or articles intentionally, deleting or damaging computer files intended for others' use, or the taking of any personal property on school grounds.

e. Compromising examination security. Invading the security maintained for preparing or storing examinations, tampering with exam-making or exam-taking software, or discussing any part of a test or examination with a student who has not yet taken that examination but is scheduled to do so.

f. Deception and misrepresentation. Lying about or misrepresenting a student's own work, academic records, credentials, or other academic matters or information. Examples of deception and misrepresentation include but are not limited to: forging signatures, signing another student's name or initials on a roll sheet, forging letters of recommendation, falsifying internship, externship, or clinic documentation, falsifying pro bono records, or falsifying information in an application or on a résumé.

g. Electronic dishonesty. Using network or computer access in a way that inappropriately affects a class or other students' academic work. Non-exhaustive examples of electronic dishonesty include tampering with another student's account so that the student cannot complete or submit an assignment, stealing a student's work through electronic means, or knowingly spreading a computer virus.

h. Facilitating academic dishonesty. Aiding someone else to commit an act of academic dishonesty. This includes but is not limited to giving someone work product to copy or allowing someone to cheat from a student's own examination or assignment.

i. Writing past the end of an examination. Continuing to respond to a test or examination question when the time allotted has elapsed.

j. Failing to disclose admonitory incidents. A matriculated student, a student who is accepted to law school but has not yet enrolled, and a student enrolled in law school must report all admonitory incidents as described in the student's law school application

to the Associate Dean for Academic Affairs. The student must provide all corroborating documentation. For criminal incidents, the student must provide all corroborating documentation, including but not limited to, the criminal charge, an arrest record, and the final disposition record. A student who fails to disclose an admonitory action as described in the law school application is in violation of this Code.

k. Failing to amend admissions application. A student has a continuing responsibility to ensure the completeness and correctness of his or her admissions application to the School of Law by disclosing to the Associate Dean for Academic Affairs any factual irregularities or discrepancies in the application.

A student or graduate violates this Code when he or she supplies false information on the Admissions Application or the LSAT application, or submits forged or altered documents in aid of admission, or submits as his/her LSAT score the score of another person.

A student who fails to disclose an admonitory action as described in the law school application or who provides false or misleading information on the law school application is in violation of this Code. The disclosure must include a statement of the reasons for failing to report the information or for providing misleading information on the application. The student must provide all corroborating documentation. For criminal incidents, corroborating documentation includes, but is not limited to, the criminal charge, an arrest record, and the final disposition record.

l. Knowingly referring false allegation(s). It is a violation of this Code to knowingly make a false allegation or referral pursuant to this Code or to assist another in doing so.

m. Duty to Report. A student shall report any act or conduct raising a reasonable belief that a violation of the honor code has occurred. A student who fails to meet the duty to report is in violation of the honor code except that a student does not abridge the duty to report when, based upon a good faith belief that a violation has been reported or that the conduct in question is not a violation of the honor code, he or she fails to report a violation of the honor code.

For the purposes of this provision, actual knowledge of a violation is not required to form a reasonable belief that a violation has occurred. A reasonable belief exists when there is a reasonable basis for the belief, based upon personal observation or the report of others that a violation of the honor code has occurred.

n. Illegal activity on school grounds or at school-sponsored events. A student who is accused of, charged with, or arrested while on School of Law grounds or at a School of Law sponsored event will be investigated by the Honor Council and subject to sanctions under this Code.

21.5 Sanctions

a. Types of sanctions: This Code does not require any particular sanction or range of sanctions. The appropriate sanction(s) in a particular case will depend on the circumstances as determined by the Honor Council. Multiple sanctions may be imposed in connection with any violation. Below is a non-exhaustive list of sanctions that may be imposed under this Code, upon recommendation of the Honor Council with approval by the Dean.

1. Written warning;

2. Community or law school service;

3. Counseling or referral to a student support service;

4. Letter of apology or explanation of conduct;

5. Academic penalty, such as a research paper, a lower or failing grade, or no credit for an assignment or course; this penalty may be imposed only by the Honor Council after the Chief Justice consults with and receives the recommendation of the course professor;

6. Exclusion or suspension from one or more activities, events, functions, benefits, or privileges of the School of Law;

7. Disciplinary probation for a set period of time, determined by the Honor Council, during which the student must fulfill any requirements imposed by the Honor Council due to a violation; if the student fails to fulfill the conditions during the disciplinary probation period, the Honor Council may determine that the student has violated the probation and may impose new or additional sanctions; the Honor Council must give the student notice and a reasonable opportunity to respond before making such a determination;

8. Suspension from the School of Law;

9. Expulsion from the School of Law;

10. Revocation of admission from the School of Law;

11. Denial of a dean’s certificate (diploma);

12. Suspension or revocation of a degree, certification, or other award conferred by the School of Law; or

13. Any combination thereof.

b. Effective date of sanctions: All sanctions are effective immediately, unless stayed by the Chief Justice or Dean. The Accused may request that the Chief Justice stay the sanction

during the review process.

1. The Chief Justice will stay the sanction at the request of the Accused if the matter has been appealed by the Accused or accepted for review by the Appellate Board.

2. The sanction will take immediate effect once the Appellate Board denies the appeal or otherwise renders a final judgment upon review.

c. Mitigating and aggravating factors: In determining the sanction, the Honor Council may consider mitigating and aggravating factors. A non-exhaustive list of factors that may be considered include the following:

1. Pre-referral admission,
2. Other admissions,
3. Cooperation,
4. Intent,
5. Degree of harm or seriousness of offense,
6. Prior violations,
7. Nexus to professional standards,
8. Willingness to make restitution.

d. Authority of faculty: This Code does not diminish or modify a faculty member's authority to assess students or to formulate grades in the normal course of teaching for academic reasons unrelated to an Honor Code violation. If a faculty member wishes to reduce or modify a grade as a penalty for an instance of dishonesty such as those covered by section (d) of this Code, the faculty member may do so by referring the matter to the Honor Council. If a faculty member chooses to refer a student to the Honor Council, the faculty member may not impose a grade penalty for an alleged Honor Code violation if the Honor Council finds the student not guilty of the relevant dishonesty. If the Honor Council finds that the student is guilty, the Honor Council shall consult with the faculty member regarding the nature of the grade penalty. Faculty members are encouraged to publish their policy on the Honor Code in the court syllabus.

21.6 <u>Procedures</u>

a. Referrals

1. Method of Referral: A student shall refer a violation of this Code to any student

member of the Honor Council, to the Associate Dean for Academic Affairs, or to a faculty member. Referrals may be made in person or through any method approved by the Honor Council, but are not required to be in writing. Referrals may not be made anonymously. However, the identity of a referring student will remain confidential unless the referring student waives his or her right to confidentiality. Further, a student referring a matter may be required to repeat information he or she provides to other Honor Council members or at a hearing.

2. Sua Sponte Referrals: If the Honor Council becomes aware of information that suggests that a student subject to this Code may have violated a provision of the Code, the Honor Council may treat this information as a referral for purposes of this Code.

b. Investigation and decision

1. After receiving a referral, the Chief Justice will appoint Investigators and instruct the Investigators to gather the relevant facts.

2. The Investigators:

i. shall determine whether the referral primarily reflects academic or nonacademic misconduct;

ii. shall make a preliminary determination as to whether the referral reflects conduct that falls within the scope of this Honor Code by an individual subject to this Honor Code;

iii. may interview the person making the referral and other persons with information, and may seek additional information regarding the referral and shall instruct all interviewees of the confidential nature of the investigation;

iv. shall meet with the Accused;

v. may consider any probative information, including hearsay and other evidence not normally allowed in an Article III setting, taking into consideration the credibility of such information when reaching a decision;

vi. shall present to the Chief Justice, Associate Chief Justice, and the Secretary all findings so that the three have sufficient information upon which to determine that a sufficient basis exists to believe that the Honor Code has been violated;

3. At the meeting with the Investigator, the Accused will be provided with:

i. an explanation of any Honor Code section at issue and the nature of the conduct that is the basis for invoking that Code section(s);

ii. all information gathered during the investigation;

iii. a reasonable opportunity to respond; and

iv. an explanation of the applicable disciplinary procedures.

4. The referral will be considered an allegation under this Code only after the Chief Justice, Associate Chief Justice, and the Secretary determine, by a majority vote, that a sufficient basis exists to believe that the Accused violated the Honor Code. A sufficient basis will exist if the referral relates to an allegation of fact, which, if true, would constitute a violation of the Honor Code. The Chief Justice, Associate Chief Justice, and the Secretary may consider any probative information, including hearsay and other evidence not normally allowed in an Article III setting, taking into consideration the credibility of such information when reaching a decision. If no substantive basis exists, the referral will be dismissed.

5. If the Chief Justice, Associate Chief Justice, and the Secretary decide that there is sufficient basis upon which to proceed with an allegation, the Chief Justice will have the Investigators present their findings to three non-officers of the Honor Council. These non-officers will make a probable cause determination, and will decide, by a majority vote, whether to dismiss the claim(s) or proceed to a hearing.

6. A student who fails to attend a scheduled meeting with the Investigator or Honor Council risks a decision being rendered in absentia, for a negative inference will be drawn, unless excused by the Investigator(s) or Chief Justice.

c. Hearing Process

1. Upon determination that a hearing is necessary, the Accused will be notified in writing and in person by the Chief Justice that a referral to the Honor Council has been deemed sufficient, based on probable cause, to warrant a hearing, and the Accused will be informed of the dates and procedures for such a hearing. The hearing will take place within a reasonable amount of time from the time of notification.

2. After carefully considering the information gathered, the Investigators will present their findings to the Honor Council.

3. The names of any witnesses expected to appear at the hearing, as well as any relevant facts, will be provided to the accused at a reasonable time before the hearing so that the accused may present a comprehensive defense to the allegations.

4. In addition to the Honor Council, the following individuals shall be present at the hearing:

    i. The Investigators,

    ii. The Accused and his or her Student Counsel.

5. Witnesses will be permitted at the hearing to give testimony at the request of either the Investigator(s) or the Accused, and the Chief Justice may allow said witnesses to remain at the hearing upon his or her discretion.

6. The Honor Council shall conduct the hearing in the following manner:

    i. The process must include, but is not limited to, examination of the Accused, if the Accused chooses to testify, and any other substantiating witness(es);

    ii. A substantiating witness does not necessarily have to be the initial referring student;

    iii. The Accused or his or her Student Counsel will have the right to cross-examine any witness(es) during a hearing after the Investigator's direct examination. The Investigators will also have the right to cross-examine any witness(es) the Accused or Student Counsel puts forth. The Investigators and Accused or Student Counsel will have the opportunity to redirect a witness upon request which may be granted by the Chief Justice;

    iv. All questioning, cross-examination, and redirection will be strictly limited to the scope of the hearing regarding an Honor Code violation. The Chief Justice will have the plenary discretion to determine if a question is within the scope of the hearing.

    v. The Investigators and the Accused may put forth any probative information, including hearsay and other evidence not normally allowed in an Article III setting, but the Honor Council may take into consideration the credibility of such information when reaching a decision.

7. After all the facts have been considered and the Accused has been given a sufficient opportunity to respond, the Honor Council shall decide, by a majority vote of those present and voting, whether a violation of the Honor Code has been established by clear and convincing evidence. If a Student Justice is unable to vote impartially based on any bias at any point before, during, or after the hearing has commenced, he or she may be excused from the hearing, which

includes relinquishment of voting responsibilities. In the event of an even number of justices at the end of a hearing, the Chief Justice will not cast a vote. If the Honor Council decides that a violation of the Honor Code has been established by clear and convincing evidence, the Honor Council must determine the appropriate sanction by a majority vote. At all times, the sanction(s) imposed by the Honor Council shall be reasonably warranted by the facts and subject to approval by the Dean.

8. The Decision of the Honor Council is final, pending approval by the Dean, and pending a request for review by the Accused.

9. The Chief Justice will notify the Dean of the Honor Council's decision at the conclusion of the hearing so that the Dean may approve or reject the Honor Council's decision.

10. Within five days of receiving approval from the Dean, the Honor Council will provide the Accused with written notice of its decision. Such notice must describe the alleged violation, the determination of the Honor Council regarding whether a violation occurred, and, if so, the sanction(s) imposed.

d. Review

1. An Accused who has been sanctioned for a violation of the Honor Code by the Honor Council may petition for review by the Appellate Board.

2. The request for review must be in writing and must be delivered to the Chief Justice within five days of the Honor Council issuing its decision. The Chief justice must deliver the request for review to the Appellate Board, and the Chief Justice, in his or her discretion, may grant an extension of time to the Accused for the filing of request for review.

3. After receiving the request for review, the Honor Council will compile the referring document, if any, any written response from the Accused, all relevant materials submitted to the Honor Council, and the Honor Council's decision. The request for review and accompanying documents shall be submitted to the Appellate Board in a timely manner.

4. The Appellate Board shall review any and all information submitted by the Honor Council. The Appellate Board will review the record de novo and may review determinations of fact made by the Honor Council, but that review is limited to the record. The Appellate Board may affirm, modify, remand, or overturn the decision of the Honor Council, but the Appellate Board cannot overturn an acquittal.

21.7 Elections

a. The ballot for elections to the Honor Council will be determined by anonymous nominations from the student body, submitted to the Dean or assignee.

   1. Once the nomination process is complete, the Dean shall email each nominee and explain that he will apply the standard in part (a)(2) and allow the nominee to withdraw, submit a brief statement in support of his or her nomination, or do nothing.

   2. The Dean shall review the nomination list and may remove nominees from the list if the Dean or designee determines that a nominee is ineligible based on past admonitions in the student's admissions record pertaining to illegal or unethical conduct, a precarious academic status, or other competent information.

   3. After nominees have been notified and accepted their nominations, a final list of nominees will be put on a ballot. Elections will be held at the end of the semester, coinciding with SBA elections.

b. Each student casting a vote for his or her respective class will indicate, on the ballot, which nominees he or she selects based on the number of available positions for that class.

c. If, at any time, a Student Justice is unable to be a member of the Honor Council due to death, transfer, Honor Code violation, or the like, the position will be vacant until the next election, except under exceptional circumstances as determined by the Chief Justice.

d. The SBA will be responsible for administering the election and will have authority to promulgate reasonable rules governing it.

   1. A student in the 2L class will cast five votes, and a student in the 3L class will cast three votes.

   2. The five nominees from the 2L class who receive the most votes will be seated.

      i. The three nominees from the 2L class who receive the most votes will be seated for a two-year term on the Honor Council.

      ii. The remaining two nominees will serve a one-year term on the Honor Council.

      iii. The nominee who receives the most votes from the 2L class will serve as Secretary in his or her first year and Chief Justice in his or her second year on the Honor Council.

iv. The nominee who receives the second most votes will serve as Associate Chief Justice in his or her second year on the Honor Council.

v. The nominee who receives the third most votes will serve Student Justice in his or her third year on the Honor Council.

3. The three nominees from the 3L class who receive the most votes will be seated.

4. A student is only permitted to vote for nominees in his or her class.

21.8 Reporting and Record-keeping

a. The Honor Council's written decision and all other documentation will be placed in the student's file in the Registrar's Office.

b. A finding that the Accused has violated the Honor Code will be reported by the Dean to any board of bar examiners or similar organization for any bar to which the Accused applies. Students should be aware that most bar applications will require the student to report any sanctions imposed on the student by an educational institution, regardless of whether the sanctions were for conduct suggesting unfitness for the practice of law. Students also should be aware that the School of Law routinely responds to inquiries regarding student character and fitness from boards of bar examiners and similar organizations.

c. Approximately two weeks before the last day of classes, the Honor Council must provide a report to the faculty and the SBA providing the following information:

1. For referrals, the number of referrals considered by the Honor Council's Investigators, the Honor Code provisions implicated by the referrals, and the number of referrals dismissed without further proceedings;

2. For allegations submitted to probable cause hearings, the number of allegations submitted to probable cause hearings, the Honor Code provisions implicated by those allegations, and the number of allegations dismissed without further proceedings;

3. For each allegation submitted to a final hearing, state the Honor Code provisions implicated by the allegation, the determination regarding whether a violation occurred as to each implicated Honor Code provision, and the sanction(s) imposed, if any. Additionally, for each allegation submitted to a final hearing, the report shall indicate the status of the decision in terms of review by the Appellate Board (e.g., "The time for review has expired without a request for review."). If a decision was reviewed by the Appellate Board, the report should state the outcome of the review or indicate that the review is pending.

21.9 Confidentiality

a. The School of Law considers referrals and hearings under the Honor Code to be confidential. All participants should respect the confidentiality of this information and disclose it only to those who have authority to know.

b. A violation of the confidentiality of any proceeding, other than by the Accused or with the express consent of the Accused, will be considered an Honor Code violation.

21.10 Honor Code Advisory Committee

a. The Dean, on a periodic basis, may appoint a committee to review all decisions rendered for the purposes of amending these procedures under the Honor Code since the last review.

b. The committee will be determined by appointment by the Dean from the full-time faculty members, but also may include students, staff, alumni, attorneys, national experts, and others the Dean considers appropriate.

c. Information provided to the committee should not contain names of any persons involved with the matter.

d. The committee should prepare a written report that privately advises the Dean about whether, overall, the sanctions issued under the Code were appropriate. No individual result can be changed as a result of this review and report.

e. The committee also may make recommendations to the Dean about possible amendments to the Honor Code. These recommendations will be published to the faculty and the Honor Council.

21.11 Amendments

Amendments to the Honor Code may be proposed by any member of the faculty, by the Honor Council through a majority vote, or member of the student body accompanied by a written petition with twenty-five signatures supporting the amendment, and the amendment must be approved by a majority of the full-time voting faculty, only after consulting with the Honor Council.

a. Any amendment must be published on the announcement bulletin board and emailed to every member of the law school.

b. Any amendments to the Honor Code are not effective until the next full academic semester following the vote to amend the Code.

22. STUDENT GRADE APPEAL PROCEDURE

22.1 Grades

a. It will be the obligation of the student to arrange a conference with the faculty member involved in sufficient time to meet the time limit set out in 22.1c, below.

b. It will be the obligation of the faculty member to meet with the student to discuss the complaint and try in good faith to reconcile the differences.

c. If the faculty member and the student are unable to resolve the complaint, the student may file a written complaint in duplicate with the Dean of the Law School not more than sixty (60) days after the last examination was given in the term in which the complaint relates, or fifteen (15) days after the grade is posted, whichever is later. The complaint will specifically allege the grounds on which the complaint is based and the cause for action by the committee. The grounds will be supported by a narrative statement of fact.

d. If the faculty member is not available for conference with the student, after the student has made a good faith effort to initiate such conference, the student may omit the procedure in 22.1c. However, in no event will this paragraph become operative until fifty-five (55) days have elapsed since the last examination was given in the term to which the complaint relates.

e. Upon receipt of the WRITTEN COMPLAINT (in compliance with the provisions of paragraph 22.1c) the Dean will attempt to resolve the complaint by consultations with the student and the faculty member. If the complaint is not resolved within fifteen (15) days after the written complaint is filed or if the complaint is resolved adversely to the student, the student may appeal to the Academic Affairs Committee, sitting as the Grade Appeals Committee by requesting that the Dean forward the complaint together with all documents considered in any prior proceedings. Provided, however, that all appeals must be made no later than twenty (20) days after the written complaint is filed with the Dean of the Law School, or five (5) days after the conference with the Dean, whichever is later. The Committee upon receipt of the complaint from the Dean will determine whether or not a prima facie case has been alleged and whether the matter should be heard. Failure to allege a cause of action will result in a dismissal of the petition forthwith.

f. It shall be the obligation of the student to present evidence and a prima facie case as set out below.

g. The Committee shall hear such evidence as is relevant that the faculty member used factors extraneous to academic performance to determine, at least in part, the student's grade. The grading factors listed in 12.5 shall not be deemed to be factors extraneous to academic performance on the grounds that adequate notice of the instructor's use of such factors was not given.

h. The faculty member at whom the appeal is directed may be present if the complaint specifically alleges prejudice, bias or discrimination because of race, color, religion, national origin, age, handicap or disability, sexual orientation or gender. The faculty member will not have the right to attend other hearings in which the student presents his/her evidence set out in 22.1g above, although the Committee in its discretion may request or allow him/her to attend. In the event that the faculty member is permitted to attend under any circumstances he/she may do so without comment or examination of any parties to the hearing. The faculty member may not under any circumstances participate or sit in on any deliberation or voting. The Committee upon request will provide the faculty member with a copy of all written statements or documents utilized by the student in making his/her prima facie case. Neither the faculty member nor the student may be represented by counsel or next friend.

i. After the presentment of the student's evidence the Committee will determine whether the student has presented a prima facie case.

j. If the Committee determines that a prima facie case has not been made, the appeal will be dismissed by the Committee. The Committee will notify the Dean of the Committee's decision and the Dean will then notify the student.

k. If the Committee determines that a prima facie case has been made, it will then determine whether bias, prejudice or other factors extraneous to academic performance did in fact adversely affect the student's grade.

l. In making the determination in 22.1k, above, the Committee shall with the faculty member present, if he/she desires to be, review the written work submitted by the student in the course and review the method by which the final grade was determined.

m. In connection with the review in 22.1, above, the Committee may request a written statement from the faculty member containing any outline of his/her answers to any examination questions and a statement of how the grade was determined.

n. In connection with the review in 22.1, above, the Committee may, in its discretion, request written work turned in by other students to be used for comparison purposes. The material and information requested in 22.1, m. and n above will be used only to determine whether factors extraneous to academic performance were used in determining the grade. No evaluation for rank, policy, or substantive determinations will be considered.

o. Should any member of the Committee (a) be unavailable, or (b) excuse himself/herself because of a conflict of interest, the Dean will appoint a substitute member to serve on the Committee for all matters involving the case in question.

p. Any determinations by the Committee as to the grade of the appealing student shall be final within the School of Law. The Dean, faculty member and student will be given notification of the decision of the Committee.

q. The Committee may request the assistance of other members of the law faculty in reviewing the written work submitted by the student and written work of other students used for comparison purposes. The request of assistance of other members of the law faculty will be for the purpose of determination of the use of factors extraneous to the course work in determining the student's grade.

23. STUDENT COMPLAINT PROCEDURE

The Cecil C. Humphreys School of Law at the University of Memphis is subject to the ABA Standards for Approval of Law schools. The Standards may be found at http://www.americanbar.org/groups/legal_education/resources/standards.html. Under ABA Standard 512(a), a law school "shall establish, publish, and comply with policies with respect to addressing student complaints." Under ABA standard 512(c), a "complaint" is a communication in writing that seeks to bring to the attention of the law school a significant problem that directly implicates the school's program of legal education and its compliance with the Standards."

23.1 Procedures for Submitting a Complaint

To bring a complaint, a student at the Law School must take the following steps:

a. A student must hand deliver the complaint in writing to a member of the Student Complaint Review Committee ("Review Committee"). The Review Committee is composed of the Associate Dean for Academic Affairs, the Assistant Dean for Administration, and the Assistant Dean for Student Affairs.

b. The complaint must describe in detail the behavior, program, or process complained of, and demonstrate how it implicates the Law School's program of legal education and the school's compliance with a particular ABA Standard.

c. The complaint must provide the name of the student submitting the complaint, the student's University of Memphis email address, an address where the student receives U.S. mail, and a phone number where the student can be reached.

23.2 Procedures for Addressing a Complaint

a. Once a complaint is delivered, a member of the Review Committee will acknowledge the receipt of the complaint in writing to the mailing address provided in the complaint within seven business days.

b. A member of the Review Committee must either meet with the student to discuss the resolution of the complaint or mail a written response to the substance of the complaint to the mailing address provided in the complaint within thirty business days.

c. The written response must either state a decision regarding the substance of the complaint with an explanation for that decision, or explain steps that the Law School will take to resolve or further investigate the complaint.

d. Absent exceptional circumstances, the Review Committee shall endeavor to fully investigate and resolve all complaints within ninety business days from the date of the complaint.

23.3 Procedures for Appealing a Resolution

a. A student may appeal the Review Committee's resolution to the Dean.

b. The student must hand deliver the appeal to the Dean or Dean's designee in writing within seven business days of the date of resolution.

c. The appeal must describe in detail the grounds for appeal. The appeal may not include complaints not covered in the original complaint.

d. The Dean shall endeavor to respond to the appeal in writing to the mailing address provided in the complaint within thirty business days from the date the appeal was submitted.

e. The Dean's decision is final.

23.4 Maintenance of Records of Student Complaints

The Assistant Dean for Administration shall maintain a record of the student complaints, resolutions, and appeals for a period of eight years.

24. NOTIFICATIONS

Notifications to students concerning class assignments, attendance, and all other matters pertaining to the Law School and its activities may be given by faculty or the Law School administration as follows:

a. by posting in the mails for delivery by regular mail to the address of a student set forth in the records maintained by the Law School's Registrar; or

b. by posting on the bulletin boards on the second floor of the Law School; or

c. by delivery to a student=s mail folder at the Law School.

Any notification so given shall be deemed received by the student.

25. UNIVERSITY POLICIES & PROCEDURES AFFECTING STUDENTS

In addition to the Academic Regulations as set forth herein governing the rights and responsibilities of law students, the policies and procedures of the university as set forth in the most recent edition of the Student Handbook of The University of Memphis apply to law students. Such policies and procedures include, but are not limited to:

I. Privacy Rights of Parents & Students -- Notice to Students

II. Harassment Policy

III. Student Appeal Procedure for Discrimination

IV. Withdrawal or Temporary Suspension due to Severe Psychological Disturbance

V. Students with Disabilities

26. CONFORMITY WITH RULES AND REGULATIONS OF THE UNIVERSITY AND OTHER ENTITIES

These academic regulations shall be interpreted and construed in such a way as to be consistent with the rules and regulations of The University of Memphis, the Tennessee Board of Regents, the Supreme Court of Tennessee, the American Bar Association or other accrediting entity, and the laws of the State of Tennessee and of the United States.

27. SEVERABILITY OF PROVISIONS

If any provision in these Academic Regulations shall be held invalid or in contravention of the rules and regulations of the University, or of the laws of the State of Tennessee or the United States, then the remainder of these Academic Regulations shall not be affected thereby.

APPENDIX I

Standards for Attainment of the J.D. Degree

Attainment of the J.D. degree awarded by the Cecil C. Humphreys School of Law at the University of Memphis means that the student has, in the judgment of the faculty, acquired an acceptable level of mastery of essential skills that the faculty has determined to be prerequisite to entering the practice of law. The purpose of the curriculum of the School of Law is to enable students to acquire these skills. All candidates for the J.D. degree must be capable of acquiring, and ultimately demonstrating, mastery of these skills. The requisite level of mastery includes the ability to perform these skills under circumstances, including time constraints and other performance requirements that reflect the realities of the practice of law.

In acquiring these skills, it is essential that the candidate behave honestly, responsibly, fairly and professionally. It is also essential that the candidate regularly and punctually be prepared for and attend scheduled obligations and that the candidate meet deadlines.

To the extent that resources permit, the Law School curriculum is intended to enable students to acquire skills other than those essential skills listed below, but the curriculum, taken as a whole, is intended to insure that students master these essential skills:

1. Intellectual Skills:

    1. Knowledge. Ability to identify, define and describe a core body of American legal terminology and classifications, literature (i.e. sources of law), principles and concepts, and judicial and administrative systems.

    2. Comprehension. Ability to paraphrase, explain, compare, organize, and interpret legal knowledge.

    3. Application. Ability to apply legal knowledge in performing legal research and in **identifying legal issues in factual situations that differ from those in which the knowledge was first encountered.**

    4. Analysis. Ability to formulate legitimate arguments and responses for resolution of legal issues in new factual situations, and to support those arguments and responses, both directly and by analogy, with sources of law.

    5. Evaluation. Ability to evaluate and criticize the quality of legal analysis in terms of both reasoning and support in sources of law.

    6. Synthesis. Ability to apply skills of analysis and evaluation to a complex body of legal knowledge to create an organized and original intellectual product.

2. Communication Skills:

    1. Ability to acquire and preserve information from both oral and written sources.

    2. Ability to communicate effectively the candidate's knowledge, comprehension, application, analysis, evaluation, and synthesis skills.

    3. Ability to communicate effectively and responsively in a public forum.

THE UNIVERSITY OF MEMPHIS
CECIL C. HUMPHREYS
SCHOOL OF LAW

ACADEMIC REGULATIONS

(Updated through April 27, 2015)

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(As Updated on April 27, 2015)

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STANDARDS FOR ATTAINMENT OF THE J.D. DEGREE.. 40

ACADEMIC REGULATIONS

The provisions set forth herein and in the Standards for Attainment of the J.D. Degree attached hereto as Appendix I govern the Academic Affairs of all students enrolled at the School of Law. All references to these Academic Regulations shall be deemed to include Appendix I. It is the responsibility of each student to be familiar with the terms contained herein and each student shall be deemed to be so. For the purposes of these Academic Regulations, any place where approval of the Dean is required, it shall be taken to mean the Dean or the Dean's designate such as the Associate Dean or an Assistant Dean.

1. DEGREES CONFERRED AND PROGRAMS OF STUDY

1.1 J.D. Degree

Graduates of The University of Memphis Cecil C. Humphreys School of Law receive the Juris Doctor Degree.

1.2 J.D./M.B.A. Degree Program

A J.D./M.B.A. Degree Program is available in cooperation with the School of Business. Further information is available in the office of the Dean.

1.3 Programs

The law school offers a full-time day program and a part-time day program on the semester system. Students in the full-time program normally graduate in three years (six semesters). Summer classes and intersession classes may be available and some students may graduate after five semesters and two summer sessions (equivalent to six semesters) as full-time students. Intersession classes may be offered between regularly scheduled classes (i.e., Winter intersession), or during regularly scheduled academic breaks in semesters (i.e., Spring intersession). Students in the part-time program normally graduate in nine semesters or in eight semesters and two summer sessions (equivalent to nine semesters). (See Section 5 for course maximums and minimums during each semester.)

2. REGISTRATION WITH BAR

Some states require that, for a candidate to take the bar examination in that state, the candidate shall have registered with a supervisory authority upon or shortly after enrolling in law school. Each student should ascertain the rules of the state in which he/she expects to take the bar examination in this respect. Tennessee does not have this requirement.

3. ENROLLMENT

Enrollment is subject to the general rules of the University pertaining to registration and is possible only during the scheduled registration periods of the university and School of Law as shown on the Law School and university calendars.

Newly admitted students and startovers may only enter in the fall term. Upper division law students, transfer students, and transient students may enter in any term and should preregister each semester for the succeeding term. Specific instructions on preregistering and course schedules are ordinarily provided at least one month before the preceding examination period.

The enrollment procedure begins in the administration offices of the School of Law. Enrollment in any course or section must be approved by the Dean or the Law School Registrar. Every enrollment after the first is conditional upon the student's being eligible to re-enroll under the Academic Eligibility Requirements. (See Section 14.) Students on probation from the previous semester and those who have been on probation will be conditionally enrolled until such time as all grades are received from the previous semester. If computation of a student's grades results in the student being academically excluded, the student will receive a refund of fees. (See Section 4.1.)

4. WITHDRAWALS AND RE-ENROLLMENT

4.1 Withdrawals and Refunds of Fees

A student may withdraw from the Law School by notifying the office of the Dean in writing, provided, however, that withdrawal is not permitted within one week of the beginning of the final examination period of a semester, summer, or intersession without permission of the Dean.

Withdrawals are recorded on the student's record at any time after a student has registered and paid fees.

The following refund percentages of enrollment fees (Maintenance, Out-Of-State Tuition and Student Activity Fees) apply to students who withdraw from the law school or who drop to an hourly load below full time:

A **full (100%) refund** of fees will be made only under the following conditions:

a. Cancellation of a class by the University.

b. Drop or withdrawal prior to official registration. (Example: Pre-registration of a first year student.)

c. Death of a student certified by the Vice President for Student Educational Services or designated university official.

d. Withdrawal of the student by the Dean's Office for reason of academic exclusion after the student has registered and paid fees.

A **75% refund** will be provided during the first day of classes and extending for a period of time noted in the term calendar of the Law School Schedule of Classes. A 90% refund of the Student Activity Fee will be provided during this period.

A **25% refund** will be provided beginning at the expiration of the 75% refund period and extending for a period of time noted in the term calendar of the Law School Schedule of Classes. A 75% refund of the Student Activity Fee will be provided during this period.

At the conclusion of the 25% refund period, there will be no refund of these fees.

4.2 Re-Enrollment after Withdrawal

a. Eligibility

To be eligible to re-enroll as a matter of right after withdrawal, the student who has withdrawn must have completed one academic year, have met the retention standards (See Sec. 14.1.b.), and be able to comply with the six year requirement. (See Section 16.4.) Students who cannot re-enroll as a matter of right must secure permission from the Dean. Denial of permission to re-enroll shall not prevent a student from competing for a position in the first year class. Re-enrollment procedures require filing a readmission application.

b. Graduation Requirements Upon Re-Enrollment

Students re-enrolling after withdrawing in good standing must comply with graduation requirements of the class with whom they are scheduled to graduate. These graduation requirements may differ from those in effect at the time of the student's original enrollment.

5. COURSE MINIMUMS AND MAXIMUMS: FULL-TIME AND PART-TIME STUDENTS

5.1 Full-Time Students

Full-time students must enroll in at least 12 credit hours toward the J.D. or J.D./M.B.A. degree in each semester. No student may be enrolled at any time in coursework that, if successfully completed, would exceed 18 credit hours. Unless permission of the Dean is obtained, no student with less than a 2.5 cumulative grade point average may enroll in more than 16 credit hours in a semester. Unless permission of the Dean is obtained, no student enrolled in an extern program may be enrolled in more than 16 credit hours, including the externship.

5.2 Part-Time Students

Unless permission of the Dean is obtained, part-time students must enroll in at least 8 credit hours, but not more than 11 credit hours, in each semester.

5.3 Summer Session Enrollment: Classification of Full-Time and Part-Time Students

Without regard to whether students are classified as full-time or part-time during the regular academic year, such students may enroll in summer session in any number of credit hours not exceeding nine (9). Students enrolling in six (6) or more credit hours will be classified as full-time students for the summer session and will be subject to all academic regulations applying to full-time students, including outside work limitations. Students enrolling in five (5) or fewer credit

hours will be classified as part-time students for the summer session. Students enrolling in intersession classes will be subject to all academic regulations applying to full-time students, including outside work limitations. Enrollment in summer session will not affect the full-time or part-time status of a student. (See Sections 8, 9, and 16.3 for related matters).

5.4 Enrollment

At the time of initial enrollment, students must enroll either as full-time or part-time students. From that time on, they will be governed by regulations applying to their initial enrollment classification unless they change status as provided in these regulations. (See Section 8.)

6. DROP/ADD COURSES

6.1 Adding Courses

With the exception of Trial Advocacy, Clinic, and Intersession classes, courses may be added to a student's schedule during the first ten (10) calendar days beginning with the first day of classes for regular semesters and during the first four (4) calendar days beginning with the first day of classes for summer sessions. Trial Advocacy, Clinic, and Intersession classes may be added to a student's schedule during the first five (5) calendar days beginning with the first day of classes for regular semesters and during the first two (2) calendar days beginning with the first day of classes for summer session. Classes missed before being added will be counted as absences for the attendance policy of the faculty teaching the course.

6.2 Dropping Courses

Elective courses may be dropped on or before the "drop date" listed in the calendar for each semester without permission of the Dean. Elective courses may be dropped after the drop date only with permission of the Dean. A full-time student may not drop below twelve (12) hours, and a part-time student (in the extended program) may not drop below eight (8) hours, without permission of the Dean. Drops occurring after the "Add Period" are recorded as "withdrawals". Required courses may not be dropped without permission of the Dean. (See Sections 5.1, 5.2 and 16.)

7. REPEATING COURSES; PASSING REQUIRED COURSES

A course may not be repeated unless it is failed -- i.e., no credit earned. Required courses must be completed and passed to meet graduation requirements. Required courses that are failed must be retaken in the next regular semester in which the course is offered unless taken in summer session prior to such next regular semester. When a course is repeated after having previously been failed, the grade for the course is averaged in the normal manner including the previous failure -- i.e., the previous grade stands and both grades become a part of the student's grade record and for computation of the student's grade point average. No grade is removed. (See Section 12.)

8. CHANGE OF PROGRAM

8.1 Part-Time to Full-Time Program

Part-time students must secure permission from the Dean to transfer to the full-time program.

8.2 Full-Time to Part-Time Program

Full-time students in good standing must secure permission from the Dean to transfer to the part-time program.

8.3 Students Not in Good Standing

Students not in good standing will not be permitted to change programs except for good cause as determined by the Dean. (See Sec. 14.)

9. CLASS ATTENDANCE AND OUTSIDE WORK LIMITATIONS

9.1 Class Attendance

Students are expected to give their scholastic obligation first priority. Prompt and regular class attendance is considered necessary for satisfactory work. It is expected that a student will regard an engagement to attend classes as he/she would any other engagement or conference with his/her instructor. The necessity of absences does not in any sense relieve the student from responsibility for the work of his/her course during his/her absence. The instructor in charge of a course determines in all instances the extent to which absences and tardiness affect the student's grade and credit. The attendance policy of the instructor shall be announced to the class and distributed to the class in writing at the time of its implementation. Generally, attendance policies will be announced at the first class meeting of the semester. A student may receive a failing grade for excessive absences and may be dropped from the course with a failing grade if excessive absences occur. Each student shall be responsible for keeping records of his/her attendance.

9.2 Outside Work Limitation for Full-Time Students

The full-time program of the School of Law is intended to promote full-time study of law. Full-time students may not engage in employment in excess of twenty (20) hours per week. (See Section 5.3.) It is the policy of the School of Law to discourage any employment of first-year full-time students.

10. EXAMINATION POLICIES AND PROCEDURES INCLUDING DEFERRALS OR DELAYS IN COMPLETING EXAMINATIONS OR RESEARCH PAPERS

10.1 Schedule of Examinations

a. The schedule for examinations is made part of the registration materials. The schedule of examinations may be amended during a regular semester, summer session or intersession. Such amended schedules will be posted, and all students prior to the examination period are responsible for checking the Law School Bulletin Board for an amended schedule.

b. Unless students obtain the written permission of the Dean at the time of registration, students may not register in courses which have conflicting examination schedules -- i.e. where examinations are scheduled to be administered at the same time or on the same day. If permission is granted, one of the conflicting examinations will be scheduled on the next day in the examination period on which the student does not have an examination.

c. Students are required to take examinations at the scheduled times. Faculty members are not authorized to grant exceptions, but the Dean may grant exceptions as set forth in Sections 10.2 and 10.3.

10.2 Scheduled Examination Conflicting with Observance of a Religious Holiday

If a scheduled examination conflicts with the observance of a religious holiday or a day on which the student may not be present because of religious practices, the student will be entitled to a deferral of the examination until the earliest time at which the student may take the examination and proctoring can be arranged. The student should notify the Dean's office of the conflict and make arrangements for the deferral no later than two weeks prior to the start of the examination period.

10.3 Examinations under Special Circumstances

Students with disabilities may be granted permission to take examinations under special circumstance. Such students must be registered with the University Office of Student Disabilities. The special circumstances (conditions) will be established on an individual basis by the Dean considering the recommendations of the University Office of Student Disabilities.

10.4 Using Computers and Typewriters

Unless a student has an accommodation from Student Disability Services or demonstrates a case of severe hardship, a student is required to use a laptop or similar device and the approved exam-writing software to write essay or short-answer examinations.

10.5 Anonymous Grading System and Examination Numbers

All examinations are to be graded in a manner so as to protect the anonymity of students taking the examinations. To facilitate the anonymous grading system, all students are required to secure from the Law School Registrar an examination number for each semester, summer session and intersession. A student who does not use the assigned examination number will not have a grade reported to the student or to the University until such number is secured.

10.6 Deferrals or Delays in Taking Scheduled Examinations; Unreasonable Hardship

Deferral of, or a delay in taking, an examination may be permitted only by the Dean and then only when it would result, or would have resulted, in an unreasonable hardship on the student to attend the examination. Application for delay must be made to the Dean prior to the examination, if feasible. If a delay is permitted, the student shall take the examination at such time as the instructor in conjunction with Dean's office shall require. Unreasonable hardship includes illness and other matters beyond the control of the student. If for reasons beyond the student's control, deferral or delay cannot be requested in advance of the scheduled examination, such request must be made as soon as possible after the examination. (WARNING: Failure to take a scheduled examination results in a grade F or U unless the Dean permits the student to withdraw from the course.)

10.7 Late Arrivals for Examinations

A student who arrives at an examination after the examination has started but before it is completed may sit for the examination. The Dean, in consultation with the faculty member, if available, may permit a student whose late arrival is attributable to factors that are beyond the student's reasonable control to take the entire scheduled time for the examination, either beginning immediately or as rescheduled by the Dean. Otherwise, a student shall be permitted to take the examination, but in the Professor's discretion, may be required to complete the examination at the regularly scheduled time.

10.8 Conclusiveness of Taking an Examination

A student, by taking an examination, is conclusively deemed to represent that no unreasonable hardship existed and the student was able to take the examination. The grade earned will be recorded and will not be expunged for any reason. A student may not withdraw from a course after taking the examination.

10.9 Illnesses or Emergencies Arising During an Examination

If during an examination, an illness or emergency arises which would result in an unreasonable hardship on such student or the student being unable to complete the examination, the student, if capable of so doing, must notify the faculty member or person proctoring the examination immediately upon such occurrence. After such notification and/or occurrence, the Dean's office shall be notified, and, thereafter, the Dean's office will, in conjunction with the faculty member involved, schedule the examination as circumstances permit.

10.10 Research Papers and Work Other Than Examinations; Due Dates and Extensions
The research paper in final form, whether written in connection with a seminar or as independent research, must be submitted to the faculty research advisor no later than the last day of the examination period of the semester or summer session in which the student is

registered for the seminar or independent research, and may be required earlier by the faculty research advisor. A schedule for the submission of outlines, drafts, lists, and paper will be prepared in writing by the faculty research advisor and given to the student. Failure to comply with the schedule may result in failure in the course for which the paper is required to be written. The faculty research advisor may permit additional time, in which case the conditions and limitations of any such extension must be met; provided, however, no extension of time shall be beyond the last day of the examination period in which the student is registered unless requested in writing and approved by the faculty research advisor and by the Dean and filed with the Law School Registrar prior to the last day of the examination period. The Law School Registrar will provide a form by which this may be done. It is the responsibility of the student to procure the execution of the form by the faculty research advisor and by the Dean and to file it with the Law School Registrar.

10.11 Incompletes and Effect on Grades

If a deferral or delay of the due date on an examination or research paper extends beyond the end of the semester, a grade of Incomplete will be given in the course or seminar, and a notation will be made in the student's records of the time and method by which completion is required. Any grade of Incomplete not removed in accordance with the requirements of a permitted deferral or delay will result in a grade of F or U in the course. (See Sections 10.3 & 11.)

10.12 Computation of Grades

For all purposes for which grade point averages are computed (i.e. - standing, retention, rank, etc.), an Incomplete will not be counted in the semester in which it is received. When the grade is reported, it will be included for computation of grade point average at the end of the semester in which it is reported. (See Section 12.3.)

10.13 Enrollment when Deferrals or Delays in Taking Scheduled Examinations Are Pending

The permission of the Dean is required to permit a student to enroll in a semester, summer session, or intersession when scheduled examinations for any prior semester, summer session, or intersession have not been completed including deferred or delayed examinations. A student seeking to enroll under such circumstances must submit a written request to the Dean.

11. INCOMPLETES AND GRADE CHANGES

11.1 Incompletes

An Incomplete may be recorded by faculty members when there is a legitimate reason for a student not completing course work during the regular period (i.e., a semester or summer session). Any grade of Incomplete not removed in accordance with the requirements of the Instructor or approval by the Dean shall result in a grade of F in the course.

11.2 Grade Changes

Upon reporting grades to the Law School Registrar, a professor is required to sign the grade sheet as certification that the grades are correct. After submission of grades to the Law School Registrar, grades may be changed by a professor only for computational or objective errors of the professor. Grade changes for any other reason may be made only with approval of the Academic Affairs Committee. Any such grade change must be made by the end of the semester, excluding summer session, or intersession, after the semester in which the grade was received.

12. GRADING SYSTEM

12.1 Grades

a. Grades are represented by the following letter grades: A+, A, A-, B+, B, B-, C+, C, C-, D+, D, and F, and in certain courses the letters E Excellent), S (Satisfactory), and U (Unsatisfactory) (See Section l2.2) A grade of D or better is passing, and less than a D is failing. While a grade of D, D+ or C- is passing and credit is earned, such grade indicates less than satisfactory performance. (See Section 12.5 for grading factors in seminar courses.)

For purposes of determining grade point averages, letter grades have the following number equivalents:

A+	4.0	C+	2.33
A	4.0	C	2.0
A-	3.67	C-	1.67
B+	3.33	D+	1.33
B	3.0	D	1.0
B-	2.67	F	0

Grades of E, S, and U will not be assigned number equivalents and will not be used in determining grade point averages.

b. For first-year courses, the mean cumulative grade point average for each section shall fall on or between 2.70 – 2.80. In extraordinary circumstances, the Associate Dean for Academic Affairs may approve an exception to this rule.

12.2 Grading Systems and Factors to be Considered

a. Subject to exceptions set forth in the following subsections, all courses will be graded on a letter grade basis as set forth in Subsection 12.1 supra. (See Subsection 12.5. regarding factors to be considered.)

b. Courses identified as simulation courses shall be graded on a letter grade basis.

c. All courses identified as clinic courses will be graded on a letter basis and will not include as a component the grade on a final examination.

d. Externships, Law Review and Moot Court shall be graded according to standards of Excellent (E), Satisfactory (S) and Unsatisfactory (U). Excellent shall represent achievement substantially above the minimum requirement for a grade of Satisfactory.

e. The use of E, S, and U may be appropriate for courses in which, as taught and tested, the achievement of students cannot be closely compared. The use of these grades shall only be by faculty approval following an initial study and recommendation by the Curriculum Committee. Such grading policy will be noted on the course schedule for each semester, summer session, or intersession to which it applies.

12.3 Cumulative Grade Point Average

A student's cumulative grade point average is computed by first converting letter grades to number equivalents pursuant to Section 12.l. The number equivalents are then multiplied by the number of hours of credit assigned to each course. The products are added, and the sum divided by the total number of hours of courses whose products are included in the sum. Courses graded E, S and U are excluded from the grade point computation.

12.4 Rounding

Averages are computed and recorded to two decimal places, e.g., 2.65, with no rounding.

12.5 Grading Factors

a. A written examination is usually given at the end of each course, and the grade for the course will be the grade made on the examination. An instructor, at his/her discretion and to the extent he/she desires, may, however, consider class attendance, participation in classroom instruction, other examinations and the performance of required work in determining the grade. These additional factors will be announced at the beginning of the course, or at such time as to provide adequate notice to the students.

b. In a seminar course that fulfills the Law School’s writing requirement, between 65% and 80% of the grade must be based on the research paper. The balance of the course grade must be based on participation that demonstrates the students’ knowledge, comprehension, and analysis of assigned readings or research. A student may not satisfy the research requirement unless a grade of C or better is received, both in the seminar and on the research paper. A student may receive a grade of C or better in a seminar by receiving points based on additional grading factors, even though the research paper is not satisfactory to satisfy the Law School’s research requirement for graduation. (See Section 16.1c.)

13. CLASS RANKING

13.1 Full-Time Students

Full-time students will be ranked at the following intervals:

1st year: fall and spring semesters

2nd year: fall and spring semesters

3rd year: fall and spring semesters

Final: as a group, following summer session

13.2 Part-Time Students

Part-time students will be ranked at the following intervals with the designated class:

1st year fall and spring semester with admission class

2nd year spring semester with admission class

3rd year fall and spring semester with the second year full-time students after the fall and spring of their third year

4th year fall semester and spring semester with the third year full-time students

5th year (if applicable) fall semester and spring semester with third year full-time students

Final: as a group, following summer session

13.3 Work Considered for Ranking

Only the work completed at the University of Memphis will be considered in computing class rank. (See Section 16.)

13.4 Honors

Students with high cumulative grade point averages are awarded the J.D. degree with honors. The categories are:

Summa Cum Laude – Top 1% of the graduating class

Magna Cum Laude – Top 10% of the graduating class

Cum Laude – Top 25% of the graduating class

Diplomas awarded to such students will reflect the distinction.

14. ACADEMIC ELIGIBILITY REQUIREMENTS

14.1 Good Standing. Retention and Academic Exclusion for Non-Transfer Students

a. Good Standing

A student is in good standing only if the student's cumulative grade point average, as computed pursuant to Section 12, is 2.00 or better.

b. Retention and Academic Exclusion

A student not in good standing will be academically excluded unless one of the following exceptions applies:

1. The student has received grades in fewer than 24 credit hours.

2. The student has received grades in 24 to 38 credit hours and either has a cumulative grade point average of 1.80 or has earned a semester grade point average of 2.10 in the most recent semester.

3. The student has received grades in 39 to 53 credit hours and either has a cumulative grade point average of 1.90 or has earned a semester grade point average of 2.10 in the most recent semester.

4. The student has had a cumulative grade point average of 2.00 at the end of every previous semester. Such a student will receive one semester of probation. Following the semester of probation, the student will be subject to the requirements of Section 14.1.

A student who is not in good standing but entitled to retention under provisions 1-4 above must complete the student's next semester after no more than two semesters of non-enrollment. Non-enrollment includes withdrawal during a semester. (See Sec. 4.2.a.)

c. Computation of Grade Point Average

For the purposes of determining good standing or retention status, the student's grade point average will be determined at the end of each fall semester and at the end of each spring semester. Summer term grades will be computed as if taken during the fall semester. Intersession grades will be computed as if taken during the subsequent full semester. Enrollment in a succeeding academic term prior to computation of the student's grade point average will be at the student's risk. (See Section 3).

14.2 Good Standing, Retention, and Academic Exclusion for Transfer Students

a. Good Standing

Any transfer student whose cumulative grade point average for work taken at The University of Memphis, as computed pursuant to Section 12, is 2.00 or better is in good standing.

b. Retention and Academic Exclusion

A transfer student not in good standing will be academically excluded unless one of the following exceptions applies:

1. The student has received grades in fewer than 17 credit hours at this law school.

2. The student transferred to this law school with fewer than 17 transfer credits, has received grades in 17 to 32 credit hours at this law school and has a cumulative grade point average of 1.9 for work at this law school, or has earned a semester grade point average of 2.3 in the most recent semester.

3. The student transferred to this law school with 17 or more transfer credits, has received grades in 17 to 32 credit hours at this law school and has earned a semester grade point average of 2.5 in the most recent semester.

14.3 Significance of Academic Exclusion

A student who is academically excluded may:

a. Challenge a grade pursuant to the Grade Appeals procedures outlined in Section 22. In the event that the appeal results in a grade change that raises the student's grade point average over the threshold for exclusion, the student will be readmitted.

b. File a petition with the Academic Affairs Committee seeking a change in the Academic Regulations. If the Committee recommends, and the faculty approves, a change in the Regulations that would result in the student being able to remain in school, the student will be readmitted. There is no appeal from the decision of the Academic Affairs Committee or the faculty.

Subject to the above, academic exclusion is final and there is no appeal. A student who is academically excluded may seek startover admission pursuant to the provisions of Section 15.

15. STARTOVER

a. An applicant for admission to the first year entering class who was academically excluded from any law school may be admitted to the class for which he or she has applied, provided:

1. The applicant was academically excluded from this law school or is a Tennessee resident for fee and tuition purposes at the time of application, residency determination, and enrollment.

2. The applicant has been out of law school for a period of at least two (2) regular academic semesters (excluding the Summer Session) on the date of enrollment; or, if the applicant has completed three (3) semesters of law school, he or she is required to have been out of law school for only one regular academic semester (excluding the Summer session) on the date of enrollment.

3. The applicant has satisfied, on the dates of admission and enrollment, all absolute admission requirements applicable to all other applicants who are admitted and enrolled in the entering class for which application is made, except that the LSAT exam must have been taken within five years prior to the date of admission unless waived by the Admissions Committee;

4. The applicant, before admission, has been approved for admission by a majority of this law school's Admission Committee and the Dean after consideration of the applicant's situation in light of ABA Standard 505;

5. The applicant has not enrolled as a startover admit at any law school after previously being previously being academically excluded from any law school; and

6. The startover application is complete by April 1st.

b. Each applicant described above, who has been admitted and enrolled will not be counted in the total number of enrollments needed to fill the first year entering class. In no event will more than five (5) such applicants be admitted and enrolled in any one entering class. In the event that more than five (5) such applicants are approved as eligible for admission, the Admissions Committee together with the Dean will select the five (5) to be admitted. Selections will be based upon the applicant's admission index and other factors reflecting the likelihood for success at this law school.

16. REQUIREMENTS FOR GRADUATION

16.1 Course Requirements

A student is required to complete course work for a total of at least 90 credit hours for all courses.

a. Required Courses and Course Sequencing for Full-Time Students

A student enrolled in the full-time program is required to complete the following courses in the sequence indicated, unless an exception is granted by the Dean or the Dean's designee.

16.1.a.i. A student who matriculates **before** January 1, 2015

First Year

Fall Semester	Spring Semester
112 Torts I	122 Torts II
115 Property I	125 Property II
114 Civil Procedure I	124 Civil Procedure II
113 Legal Methods I	123 Legal Methods II
126 Criminal Law	121 Contracts
	212 Constitutional Law

Second Year

Fall Semester	Spring Semester
221 Evidence*	221 Evidence*

*A student is required to enroll in Evidence in *either* the fall or spring semester of their second year.

Second or Third Year

A. 224 Professional Responsibility

B. Two Courses in both the Statutory Courses Menu and Practice Foundation Courses Menu:

Statutory Courses	Practice Foundation Courses
323 Commercial Paper	311 Administrative Law
224 Corporate Tax	211 Business Organizations
214 Income Taxation	223 Criminal Procedure
359 Sales	213 Decedents' Estates
222 Secured Transactions	331 Family Law

16.1.a.ii. A student who matriculates **after** January 1, 2015

First Year

Fall Semester	Spring Semester
112 Torts I	122 Torts II
115 Property I	125 Property II
114 Civil Procedure I	124 Civil Procedure II
113 Legal Methods I	123 Legal Methods II
111 Contracts I	121 Contracts II
	126 Criminal Law

Second Year

Fall Semester	Spring Semester
212 Constitutional Law	221 Evidence*
221 Evidence*	

*A student is required to enroll in Evidence in *either* the fall or spring semester of their second year.

Second or Third Year

A. 224 Professional Responsibility

B. Two Courses in both the Statutory Courses Menu and Practice Foundation Courses Menu:

Statutory Courses	Practice Foundation Courses
323 Commercial Paper	311 Administrative Law
224 Corporate Tax	211 Business Organizations
214 Income Taxation	223 Criminal Procedure
359 Sales	213 Decedents' Estates
222 Secured Transactions	331 Family Law

b. Required Courses and Course Sequencing for Part-Time Students

A student enrolled in the part-time program is required to complete the following courses in the indicated sequence unless an exception is granted by the Dean of the Dean's designee.

16.1.b.i. A student who matriculates **before** January 1, 2015

First Year

Fall Semester	Spring Semester
112 Torts I	122 Torts II
114 Civil Procedure I	124 Civil Procedure II
113 Legal Methods I	123 Legal Methods II
	121 Contracts

Second Year

Fall Semester	Spring Semester
126 Criminal Law	212 Constitutional Law
115 Property I	125 Property II
221 Evidence/Elective*	221 Evidence/Elective*

*A student must take Evidence in the fall or spring of the second year.

Third and Fourth Year

A. 224 Professional Responsibility

B. Two Courses in both the Statutory Courses Menu and Practice Foundation Courses Menu:

Statutory Courses	Practice Foundation Courses
323 Commercial Paper	311 Administrative Law
224 Corporate Tax	211 Business Organizations
214 Income Taxation	223 Criminal Procedure
359 Sales	213 Decedents' Estates
222 Secured Transactions	331 Family Law

16.1.b.ii. A student who matriculates **after** January 1, 2015

First Year

Fall Semester	Spring Semester
112 Torts I	122 Torts II
114 Civil Procedure I	124 Civil Procedure II
113 Legal Methods I	123 Legal Methods II
	121 Criminal Law

Second Year

Fall Semester	Spring Semester
111 Contracts I	121 Contracts II
115 Property I	125 Property II
212 Constitutional Law	221 Evidence

Third and Fourth Year

A. 224 Professional Responsibility

B. Two Courses in both the Statutory Courses Menu and Practice Foundation Courses Menu:

Statutory Courses	Practice Foundation Courses
323 Commercial Paper	311 Administrative Law
224 Corporate Tax	211 Business Organizations
214 Income Taxation	223 Criminal Procedure
359 Sales	213 Decedents' Estates
222 Secured Transactions	331 Family Law

c. Other Required Courses for Full-Time and Part-Time Students

In addition to the above listed courses, a student is required to satisfy both the advanced writing and the skills requirements.

1. Advanced Writing
   A student is required to enroll in a two (2) or three (3) hour advanced writing course. The advanced writing requirement is be met by earning a C or better in an advanced writing course. (See Section 12.5.) See the Course Catalog for a list of courses that satisfy the advanced writing requirement. (See Section 12.5.) A student is required to complete the first-year full-time curriculum prior to enrollment in an advanced writing course, unless a waiver is granted by the Academic Affairs Committee.

2. Skills
   A student is required to have at least **two credit-hours of skills courses** to satisfy the skills requirement. (See Section 12.2.) See the Course Catalog for a list of courses that satisfy the skills requirement.

d. Limitations on Courses for Credit toward Graduation

1. Not more than a total of twelve (12) credit hours may be utilized toward satisfying graduation requirements by satisfactorily completing the following courses:

   (a) Any externship,
   (b) Law Review and Law Review Board,
   (c) Moot Court (including Moot Court Board, Moot Court Executive Board, and inter-school or intra-school competition credit),
   (d) Independent Research, and
   (e) Advanced Clinic.

2. To satisfy graduation requirements, a student is permitted a total of three (3) externships, two (2) clinic courses, or a combination of (1) clinic and (2) two externship courses. Absent permission from the Associate Dean of Academic Affairs, a student may not repeat a clinic or externship, may not enroll in both a clinic and externship in the same semester or summer session, and may not enroll in more than one clinic or more than one externship in any semester or summer session. For enrollment purposes in these limited enrollment courses, a student who has taken one clinic will not receive priority for a second clinic, and a student who has taken one externship will not receive priority for a second externship.

16.2 Waiver of Course Requirement

For good cause shown and to avoid hardship, waiver of completion of any required course may be permitted only with the approval of the Academic Affairs Committee and on conditions set by the Committee.

16.3 Twenty-four Month Requirement

A student may complete the law school's degree requirements no earlier than 24 months after a student has commenced law study at the law school or a law school from which the school has accepted transfer credit.

16.4 Six-Year Requirement

A student must complete all of such student's graduation requirements within six (6) calendar years from the date of the student's initial enrollment in law school or forfeit all hours earned during this period. The student will, however, be allowed to reapply for admission as an entering student and compete with other applicants for a position in the entering class, with no credit allowed for prior work. The Academic Affairs Committee may make an exception to the foregoing rule if the student submits a proposed course of study for approval, but in no event may a student extend study so that the J.D. degree is not completed within 84 months of the time the student commenced law study.

16.5 Work at Other Schools

Any work to be taken at another law school on a transient basis must be approved by the Dean prior to the student's attendance at such other law school. Once approved, a student may not utilize more than 30 semester hours toward the student's degree at this law school, unless an exception is granted by the Academic Affairs Committee.

16.6 Grade Requirement

A student must have a grade point average of 2.00 or better in all work undertaken at the University of Memphis to graduate.

16.7 Completion of Work

All required courses must be completed. Completion of a course consists of sufficient attendance in class, performance of all required work, the taking of all examinations, making a passing grade (D or above or, in the case of non-graded course, a grade of E or S), with the exception of the research requirement which requires a grade of C or above. (See Section 12.5.) Failure to complete work in any course as it is required, or to take an examination when required, will result in a grade of F in the course. Delay in completing the work in a course may be permitted, as outlined under Delay in Completing Required Work. (See Section 10.)

16.8 Pro Bono Requirement

A student must complete forty hours of pro bono service to graduate. Please see the Pro Bono Program Handbook for more information.

17. TRANSFERRED CREDIT

Credit for law school work competed at law schools other than at The University of Memphis Cecil C. Humphreys School of Law will be credited toward fulfilling graduation requirements only after individual consideration by the Dean. No credit, however, will be given for work completed in a United States Law School which is not ABA approved. Advanced standing will be granted only for work done after the student has completed a Baccalaureate degree.

To be eligible for transfer, credit earned in each course considered for transfer credit must be at least equal to the overall grade point average required for graduation at the University of Memphis, Cecil C. Humphreys School of Law.

18. AUDITING (NON-LAW STUDENTS); TRANSIENT STUDENTS

18.1 Auditing Courses

Subject to limited exceptions, all students enrolled in any course must be a J.D. degree candidate at this law school or have been admitted to the School of Law as a transient student. Exceptions are made for practicing attorneys, members of the faculty of the University, graduates of the University, students pursuing a graduate degree program of the University, and students pursuing graduate degree programs at other accredited universities or colleges. These individuals should contact the office of the Dean for additional information.

18.2 Transient Students

A transient student is a student currently in good standing at another ABA accredited law school and enrolled in this law school for the purpose of transferring the credits earned to the law school in which the student is enrolled as a degree candidate.

18.3 Foreign Lawyers

At the discretion of the Dean or the Dean’s designee, a person who has graduated from a foreign law school (or equivalent institution) and has demonstrated proficiency in the English language, which may include objective assessment through a standardized test, may enroll in up to twenty-four(24) credits in courses offered in the first year of law school.

19. REQUIREMENTS FOR STUDENT RESEARCH PAPERS OTHER THAN THOSE REQUIRED IN SEMINARS

Requirements for student research papers other than those required in seminars are available from the Law School Registrar. Students must secure permission from the supervising faculty member prior to enrolling in Research I. No more than one hour credit may be obtained in this way. (See Section 16.I.d.)

20. STUDENT RECORDS AND FILES: GRADE INFORMATION

20.1 Confidentiality of Student Records

In compliance with provisions of the "Family Educational Rights and Privacy Act of 1974," the School of Law abides by the rules and regulations of the University pertaining to the confidentiality of student records, the release of that information, and the rights of students and others to have access to such records as set forth in the University Student Handbook, University Bulletins and Schedules of Classes. Copies of these publications are available at the office of the Dean.

20.2 Grade Information

Individual grades will not be divulged over the telephone. Grades for seminar papers are accepted and may be furnished to students individually by the faculty member or the office of the Dean. All grades will be posted by the office of the Dean when received by that office from the instructor, but no earlier than three (3) weeks after the end of the examination period. Thereafter, grades will be posted as received. (See 20.3 for students' rights to not to have their grades posted.) Except for circumstances beyond the control of a faculty member, all grades should be reported by the faculty within three (3) weeks of the end of any examination period. Individual grade reports will be mailed by the University Registrar to each student.

20.3 Non-Posting of Grades Upon Request

Pursuant to the Family Educational Rights and Privacy Act of 1974, students may request that their grades not be posted in any manner. Students so requesting will receive their grades individually from the office of the Dean.

21. HONOR CODE

21.1 Definitions

a. "Accused" refers to a student accused of a violation of the Honor Code.

b. "Appellate Board" refers to the three-person appellate board consisting of the Dean, the Associate Dean for Academic Affairs, and one member of the full-time faculty. The Dean shall select the faculty member on the Appellate Board.

c. "Associate Chief Justice" refers to the Student Justice who shall act as the Chief Justice if the Chief Justice is unable to preside over any meeting, hearing, or function involving the Honor Council.

d. "Chief Justice" refers to the Student Justice who shall act as the head and the voice of the Honor Council and is vested with the authority to run the Council and hearing processes.

e. “Class” and “Course” refer to any academic enterprise that awards credit toward a degree or any law school-sanctioned, co-curricular activity including but not limited to Moot Court and Law Review.

f. For the purpose of determining deadlines, “day” means any regular business day of the School of Law, and does not include weekends, holidays observed by the School of Law, or any day on which the School of Law is not open to conduct regular business.

g. “Dean” refers to the Dean of the Cecil C. Humphreys School of Law at the University of Memphis, or that person’s designee.

h. “Elections” are the mechanism by which the student body will elect student justices.

i. “Honor Council” refers to the group of Student Justices that has plenary authority to review alleged violations under the Honor Code and to impose those sanctions it deems appropriate. The Honor Council consists of eleven members: five from the 2L class, and six from the 3L class.

j. “Investigators” refer to the two Honor Council members, appointed by the Chief Justice on a case-by-case basis, who will serve as fact gatherers for the preliminary hearings, and who will also serve as presenters of information in all preliminary and main hearings. The Investigators will not have a vote on matters to which they are appointed.

k. “Notice” means written notice and includes e-mail messages.

l. “Secretary” refers to the Student Justice who is responsible for keeping an adequate record of proceedings, as set forth herein.

m. “Student Counsel” refers to a current member of the student body requested by the Accused to be his or her counsel. The Student Counsel may act on behalf of the Accused in an Honor Council hearing. The Student Counsel shall keep confidential any information learned in the course of his or her representation. Current Honor Council members may not serve as Student Counsel.

n. “Student Justice” refers to an individual member of the Honor Council. Any student who has been convicted of a violation of the Honor Code may not serve as a Student Justice.

o. “Writing” includes a letter, memorandum, or e-mail message sent to a student’s School of Law e-mail account.

21.2 <u>Scope</u>

a. This Code applies to all students admitted to the School of Law. The Code covers conduct that occurs from the time a law student applies for admission through graduation and that occurs:

1. at the University of Memphis Cecil C. Humphreys School of Law;

2. at an off-site event sponsored by the University of Memphis Cecil C. Humphreys School of Law; or

3. in connection with a Course.

b. The Code also applies to students enrolled in courses or programs sponsored or co-sponsored by the School of Law. The Code covers conduct that occurs from the time the student is admitted to the course or program and that occurs under the scope of (b)(1)(A-C) of this Code.

c. Investigations may be initiated or continued after a student has graduated, but no later than the time that student is admitted to a state bar. If an Honor Code matter is pending when a student is scheduled to graduate, the student's degree may be withheld at least until the matter is resolved, or for 90 days, whichever is less.

21.3 Oath

A degree-seeking student who registers at the School of Law will take the following oath before beginning classes:

"I [state name], as a student at The Cecil C. Humphreys School of Law at The University of Memphis, understand that I am joining an academic community and am embarking on a professional career. The law school community and the legal profession share important values that are reflected in the Cecil C. Humphreys School of Law Academic Honor Code and in its Code of Conduct. I have read this Code, and will conduct my academic, professional, and personal life to honor the values reflected therein."

Each student shall sign a statement attesting that the student has read and understands the provisions of the Honor Code.

21.4 Types of Dishonesty and Misconduct

An act of dishonesty is a wrongful or improper act that questions a student's academic honesty or integrity; an act of misconduct is a wrongful, improper or prohibited act. The Honor Council has the authority to investigate either an act of dishonesty or an act of misconduct. Acts of dishonesty and misconduct include but are not limited to the following:

a. Cheating. Using or attempting to use unauthorized materials or sources in connection with any assignment, examination, or other academic exercise, or having someone else do work for the student when forbidden by the professor.

b. Unauthorized assistance or collaboration. Giving or receiving aid on an assignment, examination, or other academic exercise when not permitted by the professor.

c. Plagiarism and inappropriate use of others' work. Using the words, thoughts, or ideas of another without attribution so that they seem as if they are the student's own.

1. Plagiarism includes, but is not limited to, copying another's work word-for-word, turning in a paper written by another, rewriting another's work with only minor changes, and summarizing another's work or taking another person's ideas without acknowledging the source through proper attribution and citation.

2. An accidental omission of a citation(s) will not be considered an act of academic misconduct, unless other facts determine otherwise.

3. The faculty member responsible for grading the academic work in question has plenary authority either to make a referral of plagiarism to the Honor Council, if that faculty member is unclear if there is a violation, or to reduce the student's grade based on the academic merits of the academic work. The faculty member may not make a determination of a violation, because that is within the sole authority of the Honor Council.

d. Misappropriation of and damage to academic and personal materials. Damaging, misappropriating, or disabling academic resources so that others cannot use them is considered misconduct. This includes but is not limited to removing pages from books, stealing books or articles, hiding or misplacing books or articles intentionally, deleting or damaging computer files intended for others' use, or the taking of any personal property on school grounds.

e. Compromising examination security. Invading the security maintained for preparing or storing examinations, tampering with exam-making or exam-taking software, or discussing any part of a test or examination with a student who has not yet taken that examination but is scheduled to do so.

f. Deception and misrepresentation. Lying about or misrepresenting a student's own work, academic records, credentials, or other academic matters or information. Examples of deception and misrepresentation include but are not limited to: forging signatures, signing another student's name or initials on a roll sheet, forging letters of recommendation, falsifying internship, externship, or clinic documentation, falsifying pro bono records, or falsifying information in an application or on a résumé.

g. Electronic dishonesty. Using network or computer access in a way that inappropriately affects a class or other students' academic work. Non-exhaustive examples of electronic dishonesty include tampering with another student's account so that the student cannot complete or submit an assignment, stealing a student's work through electronic means, or knowingly spreading a computer virus.

h. Facilitating academic dishonesty. Aiding someone else to commit an act of academic dishonesty. This includes but is not limited to giving someone work product to copy or

allowing someone to cheat from a student's own examination or assignment.

i. Writing past the end of an examination. Continuing to respond to a test or examination question when the time allotted has elapsed.

j. Failing to disclose admonitory incidents. A matriculated student, a student who is accepted to law school but has not yet enrolled, and a student enrolled in law school must report all admonitory incidents as described in the student's law school application to the Associate Dean for Academic Affairs. The student must provide all corroborating documentation. For criminal incidents, the student must provide all corroborating documentation, including but not limited to, the criminal charge, an arrest record, and the final disposition record. A student who fails to disclose an admonitory action as described in the law school application is in violation of this Code.

k. Failing to amend admissions application. A student has a continuing responsibility to ensure the completeness and correctness of his or her admissions application to the School of Law by disclosing to the Associate Dean for Academic Affairs any factual irregularities or discrepancies in the application.

A student or graduate violates this Code when he or she supplies false information on the Admissions Application or the LSAT application, or submits forged or altered documents in aid of admission, or submits as his/her LSAT score the score of another person.

A student who fails to disclose an admonitory action as described in the law school application or who provides false or misleading information on the law school application is in violation of this Code. The disclosure must include a statement of the reasons for failing to report the information or for providing misleading information on the application. The student must provide all corroborating documentation. For criminal incidents, corroborating documentation includes, but is not limited to, the criminal charge, an arrest record, and the final disposition record.

l. Knowingly referring false allegation(s). It is a violation of this Code to knowingly make a false allegation or referral pursuant to this Code or to assist another in doing so.

m. Duty to Report. A student shall report any act or conduct raising a reasonable belief that a violation of the honor code has occurred. A student who fails to meet the duty to report is in violation of the honor code except that a student does not abridge the duty to report when, based upon a good faith belief that a violation has been reported or that the conduct in question is not a violation of the honor code, he or she fails to report a violation of the honor code.

For the purposes of this provision, actual knowledge of a violation is not required to form a reasonable belief that a violation has occurred. A reasonable belief exists when there is a reasonable basis for the belief, based upon personal observation or the report of others that a violation of the honor code has occurred.

n. Illegal activity on school grounds or at school-sponsored events. A student who is accused of, charged with, or arrested while on School of Law grounds or at a School of Law sponsored event will be investigated by the Honor Council and subject to sanctions under this Code.

21.5 Sanctions

a. Types of sanctions: This Code does not require any particular sanction or range of sanctions. The appropriate sanction(s) in a particular case will depend on the circumstances as determined by the Honor Council. Multiple sanctions may be imposed in connection with any violation. Below is a non-exhaustive list of sanctions that may be imposed under this Code, upon recommendation of the Honor Council with approval by the Dean.

1. Written warning;

2. Community or law school service;

3. Counseling or referral to a student support service;

4. Letter of apology or explanation of conduct;

5. Academic penalty, such as a research paper, a lower or failing grade, or no credit for an assignment or course; this penalty may be imposed only by the Honor Council after the Chief Justice consults with and receives the recommendation of the course professor;

6. Exclusion or suspension from one or more activities, events, functions, benefits, or privileges of the School of Law;

7. Disciplinary probation for a set period of time, determined by the Honor Council, during which the student must fulfill any requirements imposed by the Honor Council due to a violation; if the student fails to fulfill the conditions during the disciplinary probation period, the Honor Council may determine that the student has violated the probation and may impose new or additional sanctions; the Honor Council must give the student notice and a reasonable opportunity to respond before making such a determination;

8. Suspension from the School of Law;

9. Expulsion from the School of Law;

10. Revocation of admission from the School of Law;

11. Denial of a dean’s certificate (diploma);

12. Suspension or revocation of a degree, certification, or other award conferred by the School of Law; or

13. Any combination thereof.

b. Effective date of sanctions: All sanctions are effective immediately, unless stayed by the Chief Justice or Dean. The Accused may request that the Chief Justice stay the sanction during the review process.

1. The Chief Justice will stay the sanction at the request of the Accused if the matter has been appealed by the Accused or accepted for review by the Appellate Board.

2. The sanction will take immediate effect once the Appellate Board denies the appeal or otherwise renders a final judgment upon review.

c. Mitigating and aggravating factors: In determining the sanction, the Honor Council may consider mitigating and aggravating factors. A non-exhaustive list of factors that may be considered include the following:

1. Pre-referral admission,

2. Other admissions,

3. Cooperation,

4. Intent,

5. Degree of harm or seriousness of offense,

6. Prior violations,

7. Nexus to professional standards,

8. Willingness to make restitution.

d. Authority of faculty: This Code does not diminish or modify a faculty member's authority to assess students or to formulate grades in the normal course of teaching for academic reasons unrelated to an Honor Code violation. If a faculty member wishes to reduce or modify a grade as a penalty for an instance of dishonesty such as those covered by section (d) of this Code, the faculty member may do so by referring the matter to the Honor Council. If a faculty member chooses to refer a student to the Honor Council, the faculty member may not impose a grade penalty for an alleged Honor Code violation if the Honor Council finds the student not guilty of the relevant dishonesty. If the Honor

Council finds that the student is guilty, the Honor Council shall consult with the faculty member regarding the nature of the grade penalty. Faculty members are encouraged to publish their policy on the Honor Code in the court syllabus.

21.6 Procedures

a. Referrals

1. Method of Referral: A student shall refer a violation of this Code to any student member of the Honor Council, to the Associate Dean for Academic Affairs, or to a faculty member. Referrals may be made in person or through any method approved by the Honor Council, but are not required to be in writing. Referrals may not be made anonymously. However, the identity of a referring student will remain confidential unless the referring student waives his or her right to confidentiality. Further, a student referring a matter may be required to repeat information he or she provides to other Honor Council members or at a hearing.

2. Sua Sponte Referrals: If the Honor Council becomes aware of information that suggests that a student subject to this Code may have violated a provision of the Code, the Honor Council may treat this information as a referral for purposes of this Code.

b. Investigation and decision

1. After receiving a referral, the Chief Justice will appoint Investigators and instruct the Investigators to gather the relevant facts.

2. The Investigators:

i. shall determine whether the referral primarily reflects academic or nonacademic misconduct;

ii. shall make a preliminary determination as to whether the referral reflects conduct that falls within the scope of this Honor Code by an individual subject to this Honor Code;

iii. may interview the person making the referral and other persons with information, and may seek additional information regarding the referral and shall instruct all interviewees of the confidential nature of the investigation;

iv. shall meet with the Accused;

v. may consider any probative information, including hearsay and other evidence not normally allowed in an Article III setting, taking into consideration the credibility of such information when reaching a

decision;

vi. shall present to the Chief Justice, Associate Chief Justice, and the Secretary all findings so that the three have sufficient information upon which to determine that a sufficient basis exists to believe that the Honor Code has been violated;

3. At the meeting with the Investigator, the Accused will be provided with:

   i. an explanation of any Honor Code section at issue and the nature of the conduct that is the basis for invoking that Code section(s);

   ii. all information gathered during the investigation;

   iii. a reasonable opportunity to respond; and

   iv. an explanation of the applicable disciplinary procedures.

4. The referral will be considered an allegation under this Code only after the Chief Justice, Associate Chief Justice, and the Secretary determine, by a majority vote, that a sufficient basis exists to believe that the Accused violated the Honor Code. A sufficient basis will exist if the referral relates to an allegation of fact, which, if true, would constitute a violation of the Honor Code. The Chief Justice, Associate Chief Justice, and the Secretary may consider any probative information, including hearsay and other evidence not normally allowed in an Article III setting, taking into consideration the credibility of such information when reaching a decision. If no substantive basis exists, the referral will be dismissed.

5. If the Chief Justice, Associate Chief Justice, and the Secretary decide that there is sufficient basis upon which to proceed with an allegation, the Chief Justice will have the Investigators present their findings to three non-officers of the Honor Council. These non-officers will make a probable cause determination, and will decide, by a majority vote, whether to dismiss the claim(s) or proceed to a hearing.

6. A student who fails to attend a scheduled meeting with the Investigator or Honor Council risks a decision being rendered in absentia, for a negative inference will be drawn, unless excused by the Investigator(s) or Chief Justice.

c. Hearing Process

1. Upon determination that a hearing is necessary, the Accused will be notified in writing and in person by the Chief Justice that a referral to the Honor Council has been deemed sufficient, based on probable cause, to warrant a hearing, and the Accused will be informed of the dates and procedures for such a hearing.

The hearing will take place within a reasonable amount of time from the time of notification.

2. After carefully considering the information gathered, the Investigators will present their findings to the Honor Council.

3. The names of any witnesses expected to appear at the hearing, as well as any relevant facts, will be provided to the accused at a reasonable time before the hearing so that the accused may present a comprehensive defense to the allegations.

4. In addition to the Honor Council, the following individuals shall be present at the hearing:

   i. The Investigators,

   ii. The Accused and his or her Student Counsel.

5. Witnesses will be permitted at the hearing to give testimony at the request of either the Investigator(s) or the Accused, and the Chief Justice may allow said witnesses to remain at the hearing upon his or her discretion.

6. The Honor Council shall conduct the hearing in the following manner:

   i. The process must include, but is not limited to, examination of the Accused, if the Accused chooses to testify, and any other substantiating witness(es);

   ii. A substantiating witness does not necessarily have to be the initial referring student;

   iii. The Accused or his or her Student Counsel will have the right to cross-examine any witness(es) during a hearing after the Investigator's direct examination. The Investigators will also have the right to cross-examine any witness(es) the Accused or Student Counsel puts forth. The Investigators and Accused or Student Counsel will have the opportunity to redirect a witness upon request which may be granted by the Chief Justice;

   iv. All questioning, cross-examination, and redirection will be strictly limited to the scope of the hearing regarding an Honor Code violation. The Chief Justice will have the plenary discretion to determine if a question is within the scope of the hearing.

   v. The Investigators and the Accused may put forth any probative information, including hearsay and other evidence not normally allowed

in an Article III setting, but the Honor Council may take into consideration the credibility of such information when reaching a decision.

7. After all the facts have been considered and the Accused has been given a sufficient opportunity to respond, the Honor Council shall decide, by a majority vote of those present and voting, whether a violation of the Honor Code has been established by clear and convincing evidence. If a Student Justice is unable to vote impartially based on any bias at any point before, during, or after the hearing has commenced, he or she may be excused from the hearing, which includes relinquishment of voting responsibilities. In the event of an even number of justices at the end of a hearing, the Chief Justice will not cast a vote. If the Honor Council decides that a violation of the Honor Code has been established by clear and convincing evidence, the Honor Council must determine the appropriate sanction by a majority vote. At all times, the sanction(s) imposed by the Honor Council shall be reasonably warranted by the facts and subject to approval by the Dean.

8. The Decision of the Honor Council is final, pending approval by the Dean, and pending a request for review by the Accused.

9. The Chief Justice will notify the Dean of the Honor Council's decision at the conclusion of the hearing so that the Dean may approve or reject the Honor Council's decision.

10. Within five days of receiving approval from the Dean, the Honor Council will provide the Accused with written notice of its decision. Such notice must describe the alleged violation, the determination of the Honor Council regarding whether a violation occurred, and, if so, the sanction(s) imposed.

d. Review

1. An Accused who has been sanctioned for a violation of the Honor Code by the Honor Council may petition for review by the Appellate Board.

2. The request for review must be in writing and must be delivered to the Chief Justice within five days of the Honor Council issuing its decision. The Chief justice must deliver the request for review to the Appellate Board, and the Chief Justice, in his or her discretion, may grant an extension of time to the Accused for the filing of request for review.

3. After receiving the request for review, the Honor Council will compile the referring document, if any, any written response from the Accused, all relevant materials submitted to the Honor Council, and the Honor Council's decision. The request for review and accompanying documents shall be submitted to the Appellate Board in a timely manner.

4. The Appellate Board shall review any and all information submitted by the Honor Council. The Appellate Board will review the record de novo and may review determinations of fact made by the Honor Council, but that review is limited to the record. The Appellate Board may affirm, modify, remand, or overturn the decision of the Honor Council, but the Appellate Board cannot overturn an acquittal.

21.7 Elections

a. The ballot for elections to the Honor Council will be determined by anonymous nominations from the student body, submitted to the Dean or assignee.

   1. Once the nomination process is complete, the Dean shall email each nominee and explain that he will apply the standard in part (a)(2) and allow the nominee to withdraw, submit a brief statement in support of his or her nomination, or do nothing.

   2. The Dean shall review the nomination list and may remove nominees from the list if the Dean or designee determines that a nominee is ineligible based on past admonitions in the student's admissions record pertaining to illegal or unethical conduct, a precarious academic status, or other competent information.

   3. After nominees have been notified and accepted their nominations, a final list of nominees will be put on a ballot. Elections will be held at the end of the semester, coinciding with SBA elections.

b. Each student casting a vote for his or her respective class will indicate, on the ballot, which nominees he or she selects based on the number of available positions for that class.

c. If, at any time, a Student Justice is unable to be a member of the Honor Council due to death, transfer, Honor Code violation, or the like, the position will be vacant until the next election, except under exceptional circumstances as determined by the Chief Justice.

d. The SBA will be responsible for administering the election and will have authority to promulgate reasonable rules governing it.

   1. A student in the 2L class will cast five votes, and a student in the 3L class will cast three votes.

   2. The five nominees from the 2L class who receive the most votes will be seated.

i. The three nominees from the 2L class who receive the most votes will be seated for a two-year term on the Honor Council.

ii. The remaining two nominees will serve a one-year term on the Honor Council.

iii. The nominee who receives the most votes from the 2L class will serve as Secretary in his or her first year and Chief Justice in his or her second year on the Honor Council.

iv. The nominee who receives the second most votes will serve as Associate Chief Justice in his or her second year on the Honor Council.

v. The nominee who receives the third most votes will serve Student Justice in his or her third year on the Honor Council.

3. The three nominees from the 3L class who receive the most votes will be seated.

4. A student is only permitted to vote for nominees in his or her class.

21.8 Reporting and Record-keeping

a. The Honor Council's written decision and all other documentation will be placed in the student's file in the Registrar's Office.

b. A finding that the Accused has violated the Honor Code will be reported by the Dean to any board of bar examiners or similar organization for any bar to which the Accused applies. Students should be aware that most bar applications will require the student to report any sanctions imposed on the student by an educational institution, regardless of whether the sanctions were for conduct suggesting unfitness for the practice of law. Students also should be aware that the School of Law routinely responds to inquiries regarding student character and fitness from boards of bar examiners and similar organizations.

c. Approximately two weeks before the last day of classes, the Honor Council must provide a report to the faculty and the SBA providing the following information:

1. For referrals, the number of referrals considered by the Honor Council's Investigators, the Honor Code provisions implicated by the referrals, and the number of referrals dismissed without further proceedings;

2. For allegations submitted to probable cause hearings, the number of allegations submitted to probable cause hearings, the Honor Code provisions implicated by

those allegations, and the number of allegations dismissed without further proceedings;

3. For each allegation submitted to a final hearing, state the Honor Code provisions implicated by the allegation, the determination regarding whether a violation occurred as to each implicated Honor Code provision, and the sanction(s) imposed, if any. Additionally, for each allegation submitted to a final hearing, the report shall indicate the status of the decision in terms of review by the Appellate Board (e.g., "The time for review has expired without a request for review."). If a decision was reviewed by the Appellate Board, the report should state the outcome of the review or indicate that the review is pending.

21.9 Confidentiality

a. The School of Law considers referrals and hearings under the Honor Code to be confidential. All participants should respect the confidentiality of this information and disclose it only to those who have authority to know.

b. A violation of the confidentiality of any proceeding, other than by the Accused or with the express consent of the Accused, will be considered an Honor Code violation.

21.10 Honor Code Advisory Committee

a. The Dean, on a periodic basis, may appoint a committee to review all decisions rendered for the purposes of amending these procedures under the Honor Code since the last review.

b. The committee will be determined by appointment by the Dean from the full-time faculty members, but also may include students, staff, alumni, attorneys, national experts, and others the Dean considers appropriate.

c. Information provided to the committee should not contain names of any persons involved with the matter.

d. The committee should prepare a written report that privately advises the Dean about whether, overall, the sanctions issued under the Code were appropriate. No individual result can be changed as a result of this review and report.

e. The committee also may make recommendations to the Dean about possible amendments to the Honor Code. These recommendations will be published to the faculty and the Honor Council.

21.11 Amendments

Amendments to the Honor Code may be proposed by any member of the faculty, by the Honor Council through a majority vote, or member of the student body accompanied by a written

petition with twenty-five signatures supporting the amendment, and the amendment must be approved by a majority of the full-time voting faculty, only after consulting with the Honor Council.

a. Any amendment must be published on the announcement bulletin board and emailed to every member of the law school.

b. Any amendments to the Honor Code are not effective until the next full academic semester following the vote to amend the Code.

22. STUDENT GRADE APPEAL PROCEDURE

22.1 Grades

a. It will be the obligation of the student to arrange a conference with the faculty member involved in sufficient time to meet the time limit set out in 22.1c, below.

b. It will be the obligation of the faculty member to meet with the student to discuss the complaint and try in good faith to reconcile the differences.

c. If the faculty member and the student are unable to resolve the complaint, the student may file a written complaint in duplicate with the Dean of the Law School not more than sixty (60) days after the last examination was given in the term in which the complaint relates, or fifteen (15) days after the grade is posted, whichever is later. The complaint will specifically allege the grounds on which the complaint is based and the cause for action by the committee. The grounds will be supported by a narrative statement of fact.

d. If the faculty member is not available for conference with the student, after the student has made a good faith effort to initiate such conference, the student may omit the procedure in 22.1c. However, in no event will this paragraph become operative until fifty-five (55) days have elapsed since the last examination was given in the term to which the complaint relates.

e. Upon receipt of the WRITTEN COMPLAINT (in compliance with the provisions of paragraph 22.1c) the Dean will attempt to resolve the complaint by consultations with the student and the faculty member. If the complaint is not resolved within fifteen (15) days after the written complaint is filed or if the complaint is resolved adversely to the student, the student may appeal to the Academic Affairs Committee, sitting as the Grade Appeals Committee by requesting that the Dean forward the complaint together with all documents considered in any prior proceedings. Provided, however, that all appeals must be made no later than twenty (20) days after the written complaint is filed with the Dean of the Law School, or five (5) days after the conference with the Dean, whichever is later. The Committee upon receipt of the complaint from the Dean will determine whether or not a prima facie case has been alleged and whether the matter should be

heard. Failure to allege a cause of action will result in a dismissal of the petition forthwith.

f. It shall be the obligation of the student to present evidence and a prima facie case as set out below.

g. The Committee shall hear such evidence as is relevant that the faculty member used factors extraneous to academic performance to determine, at least in part, the student's grade. The grading factors listed in 12.5 shall not be deemed to be factors extraneous to academic performance on the grounds that adequate notice of the instructor's use of such factors was not given.

h. The faculty member at whom the appeal is directed may be present if the complaint specifically alleges prejudice, bias or discrimination because of race, color, religion, national origin, age, handicap or disability, sexual orientation or gender. The faculty member will not have the right to attend other hearings in which the student presents his/her evidence set out in 22.1g above, although the Committee in its discretion may request or allow him/her to attend. In the event that the faculty member is permitted to attend under any circumstances he/she may do so without comment or examination of any parties to the hearing. The faculty member may not under any circumstances participate or sit in on any deliberation or voting. The Committee upon request will provide the faculty member with a copy of all written statements or documents utilized by the student in making his/her prima facie case. Neither the faculty member nor the student may be represented by counsel or next friend.

i. After the presentment of the student's evidence the Committee will determine whether the student has presented a prima facie case.

j. If the Committee determines that a prima facie case has not been made, the appeal will be dismissed by the Committee. The Committee will notify the Dean of the Committee's decision and the Dean will then notify the student.

k. If the Committee determines that a prima facie case has been made, it will then determine whether bias, prejudice or other factors extraneous to academic performance did in fact adversely affect the student's grade.

l. In making the determination in 22.1k, above, the Committee shall with the faculty member present, if he/she desires to be, review the written work submitted by the student in the course and review the method by which the final grade was determined.

m. In connection with the review in 22.1, above, the Committee may request a written statement from the faculty member containing any outline of his/her answers to any examination questions and a statement of how the grade was determined.

n. In connection with the review in 22.1, above, the Committee may, in its discretion, request written work turned in by other students to be used for comparison purposes.

The material and information requested in 22.1, m. and n above will be used only to determine whether factors extraneous to academic performance were used in determining the grade. No evaluation for rank, policy, or substantive determinations will be considered.

o. Should any member of the Committee (a) be unavailable, or (b) excuse himself/herself because of a conflict of interest, the Dean will appoint a substitute member to serve on the Committee for all matters involving the case in question.

p. Any determinations by the Committee as to the grade of the appealing student shall be final within the School of Law. The Dean, faculty member and student will be given notification of the decision of the Committee.

q. The Committee may request the assistance of other members of the law faculty in reviewing the written work submitted by the student and written work of other students used for comparison purposes. The request of assistance of other members of the law faculty will be for the purpose of determination of the use of factors extraneous to the course work in determining the student's grade.

23. STUDENT COMPLAINT PROCEDURE

The Cecil C. Humphreys School of Law at the University of Memphis is subject to the ABA Standards for Approval of Law schools. The Standards may be found at http://www.americanbar.org/groups/legal_education/resources/standards.html. Under ABA Standard 512(a), a law school "shall establish, publish, and comply with policies with respect to addressing student complaints." Under ABA standard 512(c), a "complaint" is a communication in writing that seeks to bring to the attention of the law school a significant problem that directly implicates the school's program of legal education and its compliance with the Standards."

23.1 Procedures for Submitting a Complaint

To bring a complaint, a student at the Law School must take the following steps:

a. A student must hand deliver the complaint in writing to a member of the Student Complaint Review Committee ("Review Committee"). The Review Committee is composed of the Associate Dean for Academic Affairs, the Assistant Dean for Administration, and the Assistant Dean for Student Affairs.

b. The complaint must describe in detail the behavior, program, or process complained of, and demonstrate how it implicates the Law School's program of legal education and the school's compliance with a particular ABA Standard.

c. The complaint must provide the name of the student submitting the complaint, the student's University of Memphis email address, an address where the student receives U.S. mail, and a phone number where the student can be reached.

23.2 Procedures for Addressing a Complaint

a. Once a complaint is delivered, a member of the Review Committee will acknowledge the receipt of the complaint in writing to the mailing address provided in the complaint within seven business days.

b. A member of the Review Committee must either meet with the student to discuss the resolution of the complaint or mail a written response to the substance of the complaint to the mailing address provided in the complaint within thirty business days.

c. The written response must either state a decision regarding the substance of the complaint with an explanation for that decision, or explain steps that the Law School will take to resolve or further investigate the complaint.

d. Absent exceptional circumstances, the Review Committee shall endeavor to fully investigate and resolve all complaints within ninety business days from the date of the complaint.

23.3 Procedures for Appealing a Resolution

a. A student may appeal the Review Committee's resolution to the Dean.

b. The student must hand deliver the appeal to the Dean or Dean's designee in writing within seven business days of the date of resolution.

c. The appeal must describe in detail the grounds for appeal. The appeal may not include complaints not covered in the original complaint.

d. The Dean shall endeavor to respond to the appeal in writing to the mailing address provided in the complaint within thirty business days from the date the appeal was submitted.

e. The Dean's decision is final.

23.4 Maintenance of Records of Student Complaints

The Assistant Dean for Administration shall maintain a record of the student complaints, resolutions, and appeals for a period of eight years.

24. NOTIFICATIONS

Notifications to students concerning class assignments, attendance, and all other matters pertaining to the Law School and its activities may be given by faculty or the Law School administration as follows:

a. by posting in the mails for delivery by regular mail to the address of a student set forth in the records maintained by the Law School's Registrar; or

b. by posting on the bulletin boards on the second floor of the Law School; or

c. by delivery to a student=s mail folder at the Law School.

Any notification so given shall be deemed received by the student.

25. UNIVERSITY POLICIES & PROCEDURES AFFECTING STUDENTS

In addition to the Academic Regulations as set forth herein governing the rights and responsibilities of law students, the policies and procedures of the university as set forth in the most recent edition of the Student Handbook of The University of Memphis apply to law students. Such policies and procedures include, but are not limited to:

I. Privacy Rights of Parents & Students -- Notice to Students

II. Harassment Policy

III. Student Appeal Procedure for Discrimination

IV. Withdrawal or Temporary Suspension due to Severe Psychological Disturbance

V. Students with Disabilities

26. CONFORMITY WITH RULES AND REGULATIONS OF THE UNIVERSITY AND OTHER ENTITIES

These academic regulations shall be interpreted and construed in such a way as to be consistent with the rules and regulations of The University of Memphis, the Tennessee Board of Regents, the Supreme Court of Tennessee, the American Bar Association or other accrediting entity, and the laws of the State of Tennessee and of the United States.

27. SEVERABILITY OF PROVISIONS

If any provision in these Academic Regulations shall be held invalid or in contravention of the rules and regulations of the University, or of the laws of the State of Tennessee or the United States, then the remainder of these Academic Regulations shall not be affected thereby.

APPENDIX I

Standards for Attainment of the J.D. Degree

Attainment of the J.D. degree awarded by the Cecil C. Humphreys School of Law at the University of Memphis means that the student has, in the judgment of the faculty, acquired an acceptable level of mastery of essential skills that the faculty has determined to be prerequisite to entering the practice of law. The purpose of the curriculum of the School of Law is to enable students to acquire these skills. All candidates for the J.D. degree must be capable of acquiring, and ultimately demonstrating, mastery of these skills. The requisite level of mastery includes the ability to perform these skills under circumstances, including time constraints and other performance requirements, that reflect the realities of the practice of law.

In acquiring these skills, it is essential that the candidate behave honestly, responsibly, fairly and professionally. It is also essential that the candidate regularly and punctually be prepared for and attend scheduled obligations and that the candidate meet deadlines.

To the extent that resources permit, the Law School curriculum is intended to enable students to acquire skills other than those essential skills listed below, but the curriculum, taken as a whole, is intended to insure that students master these essential skills:

1. Intellectual Skills:

    1. Knowledge. Ability to identify, define and describe a core body of American legal terminology and classifications, literature (i.e. sources of law), principles and concepts, and judicial and administrative systems.

    2. Comprehension. Ability to paraphrase, explain, compare, organize, and interpret legal knowledge.

    3. Application. Ability to apply legal knowledge in performing legal research and in **identifying legal issues in factual situations that differ from those in which the knowledge was first encountered.**

    4. Analysis. Ability to formulate legitimate arguments and responses for resolution of legal issues in new factual situations, and to support those arguments and responses, both directly and by analogy, with sources of law.

    5. Evaluation. Ability to evaluate and criticize the quality of legal analysis in terms of both reasoning and support in sources of law.

    6. Synthesis. Ability to apply skills of analysis and evaluation to a complex body of legal knowledge to create an organized and original intellectual product.

2. Communication Skills:

    1. Ability to acquire and preserve information from both oral and written sources.

    2. Ability to communicate effectively the candidate's knowledge, comprehension, application, analysis, evaluation, and synthesis skills.

    3. Ability to communicate effectively and responsively in a public forum.

Law School Academic Regulations FAQs

Q—What are the Academic Regulations?

A—The Regulations are the rules of your life as a student in this law school. They reflect our insistence that students behave professionally, and they state our standards for academic excellence. At orientation, you signed a statement acknowledging that you read and understand the regulations and agree to abide by them. You are bound by each such rule. If you have a question about the regulations or a question on an interpretation of the regulations, please see the Associate Dean of Academic Affairs.

Q—Suppose a full-time law student enrolls in six hours in the fall semester. The Associate Dean for Academic Affairs tells him he is in violation of Rule 5.1 of the Academic Regulations. The student says, "But I didn't read that regulation, so you can't hold me to it."

A—See above.

Q—What is Appendix I all about?

A—The appendix entitled **Standards for the Attainment of the J.D. Degree** is the backdrop to the Regulations. The Standards do two things. They explain the essential analytical and communication skills that we believe every student must master in law school; and they set out some essential student obligations. For example, each student must "behave honestly, responsibly, fairly, and professionally." Additionally, each student must "regularly and punctually be prepared for and attend scheduled obligations" and must "meet deadlines."

Q—Why is Academic Regulation 21 so important?

A—Academic Regulation 21 is the law school's Honor Code. The Rule describes the Honor Council and sets a standard for student academic and professional conduct—The Honor Code. Rule 21 also explains the process for reporting, investigating, and prosecuting alleged offenders. Be sure you clearly understand Rule 21.

Q—Am I allowed to withdraw from law school? If so, how do I re-enroll?

A—Rule 4 deals with withdrawals and re-enrollment. While you may withdraw from law school and—in some circumstances—may re-enroll, you must be able to complete the degree requirements within six years from the date of enrollment.

Q—What is the maximum number of credit hours I can take in a semester?

A—Rule 5 discusses course minimums and maximums for part-time and full-time students. A full-time student must take at least 12 credit hours and may not enroll in more than 18 hours. If a student has less than a 2.5 GPA, a student may not enroll in more than 16 hours without the Associate Dean's permission. A part-time student must enroll in at least 8 hours and not more than 11 hours in each semester.

Q—How do I drop or add a course?

A—Rule 6 discusses dropping and adding courses. Generally, a student has up to 10 days after the start of classes in the fall or spring semesters to drop or add a course. Please note a student who enrolls in a course after the start of classes may be counted absent for the missed classes. Before dropping a course you should consider the impact on grades, refunds, and financial aid.

Q—What happens if I fail a required course?

A—Rule 7 requires students to pass each required course. If a student fails a required course, he or she must retake the course at the next regular semester in which the course is offered. If a course is repeated after a failing grade, the original failing grade remains on the student's transcript, and counts toward the cumulative GPA.

Q—Am I allowed to switch to part-time if I start law school as a full-time student?

A—Rule 8 explains how a part-time student can convert to full-time status and vice versa. Please note, once a student changes his or her status, the student cannot revert back to the original status.

Q—Will my professors take attendance in class?

A—Yes. Rule 9.1 discusses class attendance. The ABA, our accrediting agency, requires class attendance. Both the ABA and the law school agree that class attendance is critical to achieving the essential level of mastery of essential legal skills legal skills. For these reasons, class attendance is required. Each professor has his or her own attendance policy, and it is your responsibility to find out that policy and adhere to it. A student who exceeds the allowable number of absences may be penalized and could fail the course. The Associate Dean will not grant exemptions from class attendance policies.

Q—Can I work while a law student?

A—Yes but with limits. Rule 9.2 explains the limitation on working outside the law school. Per our accrediting agency, the American Bar Association, a full-time student may NOT work more than 20 hours per week. 1Ls are discouraged strongly from working at all.

Q—Where can I get information about examination policies?

A—Rule 10 discusses exams and exam procedures. Please note students may not register for courses with conflicting exams without the Associate Dean's permission. Prior to the close of registration, a student must submit a written request to the Associate Dean asking to register for classes with conflicting exams.

Rule 10.5: Exam grading is anonymous. Each student will receive an examination ID number from the Registrar's office before the start of exams.

Rule 10.8: Taking an exam is conclusive. A student cannot sit for an exam and then decide after the fact that he or she was too sick to take it.

Rule 10.9: If there's an illness or similar emergency, students must notify the Associate Dean or the Registrar before the exam if at all possible or as soon as the student is able. Please do not contact the professor in order to maintain anonymity.

Q—If I'm not happy with a final grade, will my professor ever consider a grade change?

A—Probably not. Rule 11 explains grade changes. A professor may change a student's grade only for computational or objective errors. All other grade changes must be approved by the Academic Affairs Committee.

Q—Does the law school use letter grades or numeric grades?

A—Rule 12 discusses our grading system. You will receive a letter grade for each graded course. The grade is converted to a numeric grade in order to determine your GPA. Your GPA is truncated to two decimal places with no rounding. So, a GPA of 2.769 is recorded as a 2.76. In most classes, your grade is based exclusively on a final examination. But professors may take other factors into account, such as a mid-term, attendance or class participation.

Q—Other than my class grades, how else can I tell how well I'm performing in law school?

A—Rule 13 discusses class rank. Each student is ranked with her or his classmates at the end of the fall and spring semesters. There is no rank after the summer semester; summer grades are calculated with the fall grades.

Q—Do students fail out of law school?

A—Unfortunately, yes. Rule 14 explains the law school's academic eligibility requirements. A student must be in good academic standing to remain in law school. Good academic standing is a cumulative GPA of 2.0 or better. A student whose cumulative GPA falls below a 2.0 may be eligible for an exception to Rule 14. Additionally, a student whose GPA falls below 1.5 at the end of his or her first semester will be academically excluded. Please carefully review Academic Regulation 14.1. Please be aware that there are no appeals from academic exclusion.

Q—What courses do I need to take to graduate?

A--Rule 16 explains the requirement for graduation.. Please review carefully Rule 16 and see the registrar for more information.

Q—Can I take a semester abroad or at another law school?

A—Yes. Rule 17 explains the rules for transferring credit from another law school. The law school must be ABA-approved. Students must earn a C or better, and the transferred grade will show on the transcript, but is not calculated into the cumulative GPA.

Q—Why does the law school require students to disclose all past admonitory actions (arrests, terminations, suspensions, etc.)?

A—The law school admits some students who have had legal or other admonitory problems in the past. We are required to report these incidents to the Board of Bar Examiners when students make application for admission to state bars. Even though we admit students with one or more admonitory incidents, we make no guarantee that any state's Board of Bar Examiners will find the student admissible. If you have any questions, you should contact the Bar Examiners in the state where you intend to practice.

A more serious problem is when a student fails to report an admonitory incident to the law school that the student was required to report in the law school application. If a student did not report an incident that he or she should have reported, the student must report it to the Associate Dean immediately. Failure to do so can result in a referral to the Honor Council.

Q—What happens if I get arrested or face other legal problems while in law school?

A—You must report the incident to the Associate Dean. Bar examiners are more tolerant of legal problems prior to law school than they are with legal problems occurring during law school. Law students are rightly held to a higher standard of conduct and breaches of law are taken seriously. You are under a continuing duty to update your record. See Rule 21.4.k.

Q—If I have a physical or learning disability what should I do?

A—A student with a disability should contact the Assistant Dean of Student Affairs. Individual faculty members cannot award an accommodation to a student for a disability. The University of Memphis' office of Disability Resources for Students (DRS) determines whether a student has a disability. When the office enrolls eligible students in the disability program, it contacts the law school regarding suggested accommodations. Students with disabilities may be eligible for class and examination accommodations.

Q—What should I do if I can't figure out what the rules (or a particular rule) means?

A—Please see the Associate Dean.

TENNESSEE BOARD OF LAW EXAMINERS
401 CHURCH STREET, SUITE 2200
NASHVILLE, TN 37219
WWW.TNBLE.ORG
BLE.ADMINISTRATOR@TNCOURTS.GOV

LAW DEGREE VERIFICATION AND DEAN CERTIFICATION FORMS AND INSTRUCTIONS

Beginning with applications for the July 2016 Tennessee Bar Examination, new forms are required to be completed by the law schools for any first time applicant to the Bar of Tennessee. Each First-Time Applicant by Examination to the Tennessee Bar must cause to be provided verification of the law degree and certifications of character and fitness from every law school the applicant attended. Included in this document are the following forms:

I. Applicant's Authorization and Release (Page 1)

INSTRUCTIONS: Complete the Authorization and Release Form (page 1) and sign under oath and in the presence of a notary. Forward the Authorization and Release with the appropriate related forms (from the list below) to the Dean of your law school or other appropriate official for completion. Complete the information in the box at the top of each form and forward to your law school(s) with the Authorization and Release form. The completed forms must be forwarded directly by your law school to the office of the Tennessee Board of Law Examiners at the above address.

II. Law Degree Verification Form and Certificate of Dean of Law School (Pages 2 and 3)

INSTRUCTIONS FOR LAW SCHOOLS: Once complete, this two page form should be forwarded directly to the office of the Tennessee Board of Law Examiners at the address above (**note the new zip code)** and not sent to the student. This form must be received by the final deadline for filing applications, **Dec. 20** for the February exam and **May 20** for the July exam. If grades and graduation information is not available, the school can submit the form with the anticipated date and submit the Late Degree Confirmation Form (Item III) to verify completion of all requirements for graduation. This form is also used if the Applicant attended but did not graduate from a law school.

III. Late Confirmation of Degree Form (Page 4)

This form is retained by the school and used to verify completion of all requirements for graduation if Applicant had not completed requirements for graduation when the Law Degree Verification form was submitted. The form must be received by the Board of Law Examiners on or before the Friday immediately preceding the exam or the Applicant will not be eligible to sit for the examination.

IV. Non-ABA Accredited Law School Disclosure (Page 5)

INSTRUCTIONS: Applicants seeking admission by examination who attended a law school approved by the state in which it is located but not ABA accredited, pursuant to Tenn. Sup. Ct. Rule 7, Section 2.02(c), must provide certain additional law school disclosures. Please complete this form and return on or before the deadline (Dec 20 for February exam; May 20 for July exam). NOTE: This information is not required from ABA accredited law schools and law schools located in Tennessee approved pursuant to Tenn. Sup. Ct. R. 7.

NOTE: Applicants to the Bar of Tennessee are responsible for ensuring that all documents are submitted to the Board of Law Examiners in a timely manner. As such, the Applicant must submit the Law Degree Verification to the law school with sufficient time for it to be processed prior to the deadline for applications. For the **February** exam, forms must be received on or before **December 20;** for the **July** exam, forms must be received by **May 20.** ***The Board of Law Examiners will not consider forms received after the deadline and the Applicant will not be eligible to sit for the examination.***

AUTHORIZATION AND RELEASE OF APPLICANT

TENNESSEE BOARD OF LAW EXAMINERS
401 CHURCH ST., SUITE 2200
NASHVILLE, TENNESSEE 37219
(*Please note new zip code)*

TO BE COMPLETED BY APPLICANT:
I,____, authorize and request every person, firm, company, corporation, governmental agency, court, association or institution having control of any documents, records, and other information pertaining to me to furnish to the Tennessee Board of Law Examiners any such information, including documents, records, or any other pertinent data, and to permit the Tennessee Board of Law Examiners or any of their agents or representatives to inspect and make copies of such documents, records and other information. I hereby release, discharge and exonerate the Tennessee Board of Law Examiners, its agents and representatives, and any persons so furnishing information from any and all liability of every kind and nature arising out to the furnishing or inspection of such documents, records, and other information or the investigation made by the Tennessee Board of Law Examiners or its investigating agencies.

____
Signature of Applicant

State of ______________________)
County of _____________________)

Subscribed and sworn to before me this (Notary seal)

_______ day of ____________ , _____ .

____
Notary Public
My Commission Expires: __________.

To be completed by the Applicant:

____ __________________________
Name of Applicant SS#

LAW DEGREE VERIFICATION FORM

Tennessee Board of Law Examiners | 401 Church St., Suite 2200 | Nashville, Tennessee 37219

I, ____, hereby certify that I am the __________________ of
(name of law school official) (title)

____; that ______________________________ entered the law school of said college
(law school) (name of applicant)

on _________________________; and that Applicant
(date)

☐ has completed all requirements for graduation. The date of the graduation is/was: ____________________ (date).

☐ is on course to complete all requirements for graduation and will have the number of credit hours required for graduation prior to the date of the bar examination. **If this box is selected, the school must submit the Late Degree Confirmation Form** (See Page 4) **as soon as possible upon completion of the coursework, certifying that the Applicant successfully completed the requirements for graduation and the date the degree was or will be conferred. The form must be submitted on or before the Friday immediately preceding the exam.**

☐ will not complete all requirements for graduation or have the number of credit hours required for graduation prior to the date of the bar examination.

☐ withdrew or otherwise left this law school prior to graduation (please explain): ____.

Said Law School is: (check one)
__________(a) Accredited by the American Bar Association (ABA).
__________(b) Approved by the Tennessee Board of Law Examiners although not accredited by the ABA.
__________(c) Approved/Accredited by the state in which the school is located although not accredited by the ABA (See page 5.)

I further certify that there [ ] **are** [ ] **are not** matters known to me or contained in the graduate's record which may deprecate the graduate's good moral character. If there are matters known or contained in the file, I have appended documents fully explanatory of those matters, and have marked the appropriate items below.

Do the records in your office reflect that the applicant has ever been:	**YES**	**NO**
1. arrested?	☐	☐
2. accused of a violation of trust?	☐	☐
3. dropped from any educational institution?	☐	☐
4. suspended from any educational institution?	☐	☐
5. expelled from any educational institution?	☐	☐
6. asked to resign from any educational institution?	☐	☐
7. otherwise disciplined by any educational institution?	☐	☐
8. a party to legal proceedings?	☐	☐
9. a party to proceedings before an administrative agency?	☐	☐
10. addicted to the use of narcotics?	☐	☐
11. addicted to the use of intoxicating liquors?	☐	☐
12. afflicted with or received treatment for emotional disturbance?	☐	☐
13. afflicted with or received treatment for mental disorder?	☐	☐
14. afflicted with or received treatment for nervous disorder?	☐	☐
15. denied admission to the Bar of any other state?	☐	☐
16. delinquent in any financial obligations?	☐	☐

The information furnished above is given with the understanding that it will be revealed to no one not interested in the applicant's admission to the Tennessee bar, and it is true and correct to the best of my knowledge and belief.

________________________ ____
(Date) (Signature of law school official)

(School Seal)

To be completed by the Applicant:

____ ______________________________
Name of Applicant SS#

DEAN CERTIFICATION OF CHARACTER AND FITNESS

To the Law School Dean or Designated Official:

Please provide the following information to assist us in evaluating the applicant's character and fitness for admission to the Tennessee bar. Your answers should be based on the school's records, as well as the personal knowledge of the applicant.

	YES	NO
1. Did your law school ever determine, within its discipline system that there was "probable cause" to believe that the applicant had violated the policies or honor code of the law school or the campus code of conduct? If so, please attach a description of the matter and its disposition (including sanctions, if any).	□	□
2. Did the applicant fail to disclose or provide late disclosures of any arrest, discipline, or other infraction that was required to be disclosed on the law school application or disclosed at the time of such event? If so, please attach such disclosures, law school application and any response from the school regarding the disclosures.	□	□
3. While engaging in law school activities including, without limitation, clinical courses and student bar association activities, did the applicant breach any professional or fiduciary obligation or violate any law or ordinance?	□	□
4. Has your law school determined that the applicant filed false charges against fellow students, professors, or other members of the law school community?	□	□
5. Is the applicant in default on any financial obligations to the law school or on student loan?	□	□
6. Has the administration of the law school received any complaints–regardless of disposition–alleging dishonesty or breach of an obligation or duty on the part of the applicant? If so, please attach a description of these complaints and their disposition.	□	□
7. Has the applicant exhibited conduct that suggests the applicant lacks the mental and/or emotional stability necessary to practice law, or that the applicant abuses or is addicted to alcohol or drugs?	□	□
8. Is there any additional information that you wish to provide or do you wish to give the names and addresses of others with pertinent information?	□	□

If you answered "Yes" to any question above, please attach to this form an explanation of your answer.

Based on the above, do you recommend the applicant's admission to the practice of law? □ Yes □ No

I certify that a review of the applicant's file maintained by this law school has been conducted and that the information provided above is true and correct.

____ ___________________________
Signature Date

____ (School Seal required)
Title

To be completed by the Applicant:

______________________________ ______________________________
Name of Applicant SS#

LAW DEGREE VERIFICATION
LATE CONFIRMATION OF DEGREE FORM

Tennessee Board of Law Examiners | 401 Church St., Suite 2200 | Nashville, Tennessee 37219

I, ______________________________ (name of law school official), hereby certify that I am the ______________________________ (title) of ______________________________ (name of law school); that ______________________________ (name of applicant) entered the law school of said college on ______________________ (date); and that Applicant completed all requirements for graduation on ______________________ (completion date). The date of the graduation is/was: ______________________ (Graduation date).

____
(Date)

(School Seal)

____
(Signature of law school official)

____
(Typed Name of School Official)

Return this completed form directly to the TN Board of Law Examiners on or before the Friday immediately preceding the bar exam for which Applicant has applied. Failure to provide this information will result in denial of eligibility to sit for the examination.

To be completed by the Applicant:

______________________________ ______________________________
Name of Applicant SS#

NON-ABA ACCREDITED LAW SCHOOL DISCLOSURES

Tennessee Board of Law Examiners | 401 Church St., Suite 2200 | Nashville, Tennessee 37219

I, ____, hereby certify that I am the ________________ of
(name of law school official) (title)

____; and that said Law School (check all that apply):
(name of law school)

__________(a) Is accredited by the State Licensing Board in which the law school is located and its graduated are permitted to take the bar examination in the state in which the school is located.

__________(b) Requires the equivalent of a three-year course of study that is the substantial equivalent of the legal education required of ABA or TN-approved law schools.

__________(c) Issues a Juris Doctorate (J.D.) degree.

__________(d) Does not issue the J.D. degree based in whole or in part on study by correspondence or other than in-person attendance.

The information furnished above is given with the understanding that it will be revealed to no one not interested in the applicant's admission to the Tennessee bar, and it is true and correct to the best of my knowledge and belief.

______________________ ______________________________________
(Date) (Signature of law school official)

(School Seal)

____
(Typed Name of School Official)

Cecil C. Humphreys School of Law

Current Students

APPOINTMENT INFORMATION

To make an appointment with Dean Aden, please send her a calendar invitation. If she is available during the time you propose, she will accept the invitation, and the appointment will appear on your calendar. If she is unavailable during your proposed time, she will decline your invitation, but please request a new time. If you are unsure how to send a calendar invite, please see the instructions below. Dean Aden prefers for you to use Outlook calendar invites, but if you need to use Google Calendar, that is fine.

- Outlook Online Calendar Invite Instructions
- Outlook 2013 Calendar Invite Instructions
- Google Calendar

Sometimes, your calendar may be set to the wrong time zone, which can create problems with calendar invitations. Instructions on how to set your calendar to the correct time zone area available below.

- How to correct the time zone on your outlook calendar.

If you need assistance, please contact Brigitte Boyd.

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ABA Required Disclosures

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The University of Memphis does not discriminate against students, employees, or applicants for admission or employment on the basis of race, color, religion, creed, national origin, sex, sexual orientation, gender identity/expression, disability, age, status as a protected veteran, genetic information, or any other legally protected class with respect to all employment, programs and activities sponsored by the University of Memphis. The following person has been designated to handle inquiries regarding non-discrimination policies: Michael Washington, Director for Institutional Equity. For more information see University of Memphis Equal Opportunity and Affirmative Action.

Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities which receive Federal financial assistance. Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance..." 20 U.S.C. § 1681 - To Learn More, visit Title IX and Sexual Misconduct.

THE UNIVERSITY OF MEMPHIS | Cecil C. Humphreys School of Law

1L Orientation Schedule
Sunday, August 7, 2016

5:00 - 7:00 p.m.	**Welcome Reception** *Sponsored by Mr. & Mrs. Jack Belz, the Cecil C. Humphreys School of Law Alumni Chapter & the law firm of Glassman, Wyatt, Tuttle & Cox P.C.*	**Belz Museum of Asian & Judaic Art**

THE UNIVERSITY OF MEMPHIS | Cecil C. Humphreys School of Law

1L Orientation Schedule
Monday, August 8, 2016

Time	Event	Location
8:15 – 9:00 a.m.	**Breakfast & Registration** *Breakfast sponsored by the University Bookstore*	Historic Lobby
9:00 – 9:15 a.m.	**Introduction & Welcome** *Peter Letsou, Dean,* *The University of Memphis, Cecil C. Humphreys School of Law*	Wade Auditorium
9:15 – 9:35 a.m.	**Class Introduction** *Dr. Sue Ann McClellan, Assistant Dean for Law Admissions, Recruiting & Scholarships*	Wade Auditorium
9:35 – 10:20 a.m.	**Remarks & Swearing-In** *The Honorable Deborah M. Henderson & Honor Council*	Wade Auditorium
10:20 – 10:35 a.m.	**Break**	
10:35 – 11:15 a.m.	**Welcome to Memphis Panel** *Jen Andrews, Executive Director, Shelby Farms Park Conservancy* *John Carroll, Executive Director, City Leadership* *Kandace Stewart, Business Operations Coordinator, Memphis Grizzlies*	Wade Auditorium
11:15 a.m.– 12:00 p.m.	**Writing Professional Email** *Dr. Marilyn Dunham Smith, Writing Center Director* **Maintaining a Professional Digital Presence** *Kara Phillips, Assistant Director for Law Admissions*	Wade Auditorium
12:00 – 1:15 p.m.	**Lunch & Tour with Legal Methods Small Sections** *Sponsored by BARBRI*	See List of Assignments
1:15 – 2:15 p.m.	**Introduction to Legal Methods** *Section 11* *Jodi Wilson, Associate Professor & Director of Legal Methods*	Room 325
	Introduction to the Writing Center *Section 12* *Dr. Marilyn Dunham Smith, Writing Center Director*	Room 326
2:20 – 3:20 p.m.	**Introduction to the Writing Center** *Section 11* *Dr. Marilyn Dunham Smith, Writing Center Director*	Room 325
	Introduction to Legal Methods *Section 12* *Jodi Wilson, Associate Professor & Director of Legal Methods*	Room 326
3:30 – 4:00 p.m.	**Navigating the First Year of Law School** *Steve Mulroy, Associate Dean for Academic Affairs* *Meredith Aden, Assistant Dean for Student Affairs*	Wade Auditorium

THE UNIVERSITY OF MEMPHIS | Cecil C. Humphreys School of Law

1L Orientation Schedule
Tuesday, August 9, 2016

Time	Event	Location
8:30 – 9:00 a.m.	**Breakfast** *Sponsored by Kaplan & Lexis-Nexis*	Historic Lobby
9:00 – 10:15 a.m.	**Legal Methods Class** *Jodi Wilson, Associate Professor & Director of Legal Methods*	Wade Auditorium
10:15 – 10:30 a.m.	**Break**	
10:30 a.m. – 12:00 p.m.	**Diversity & Inclusion at Memphis Law** *Jacqueline O'Bryant, Diversity Coordinator* *Christina Zawisza, Professor of Clinical Law & Director of Child & Family Litigation Clinic*	Wade Auditorium
12:00 – 1:15 p.m.	**Welcome to Downtown Lunch**	Student Lounge
	Campus IDs We will make student ID cards for students who did not have an ID made prior to orientation ***from 12:00 – 1:15 today only.***	Room 244
1:15 – 2:15 p.m.	**Using Formal Language Effectively for Legal Methods** *Dr. Marilyn Dunham Smith, Writing Center Director*	Wade Auditorium
2:15 – 2:30 p.m.	**Break** *Sponsored by Wolters Kluwer*	
2:30 – 3:15 p.m.	**Faculty Panel** *Jeremy Bock, Assistant Professor* *Daniel Kiel, Associate Professor* *John Newman, Assistant Professor*	Wade Auditorium
3:15 – 4:00 p.m.	**Student Life Panel** *Dawn Campbell* *Maggie McGowan* *Gale Robinson* *Callie Tran* *Sydney Trujillo*	Wade Auditorium

THE UNIVERSITY OF MEMPHIS | Cecil C. Humphreys School of Law

1L Orientation Schedule
Wednesday, August 10, 2016

9:00 – 10:15 a.m.	**Introduction to Legal Analysis**	
	Section 11	Room 325
	Section 12	Room 326
10:15 – 10:30 a.m.	**Break**	
10:30 – 11:20 a.m.	**Intentional Torts I & Demystification of the Socratic Method I**	
	Section 11	Room 325
	Section 12	Room 326
11:20 a.m. – 12:00 p.m.	**Intentional Torts II & Demystification of the Socratic Method II**	
	Section 11	Room 325
	Section 12	Room 326
12:00 – 1:30 p.m.	**Lunch & Student Organization Fair**	Student Lounge
1:30 – 2:45 p.m.	**Intentional Torts III**	
	Section 11	Room 325
	Section 12	Room 326
2:45 – 4:00 p.m.	**Introduction to Case Reading & Case Briefing**	
	Section 11	Room 325
	Section 12	Room 326

THE UNIVERSITY OF MEMPHIS | Cecil C. Humphreys School of Law

1L Orientation Schedule
Thursday, August 11, 2016

9:00 – 10:15 a.m.	**Battery I & Advanced Demystification of the Socratic Method I**	
	Section 11	Room 325
	Section 12	Room 326
10:15 – 10:30 a.m.	**Break**	
10:30 – 11:20 a.m.	**Battery II**	
	Section 11	Room 325
	Section 12	Room 326
11:20 a.m. – 12:00 p.m.	**Assault I**	
	Section 11	Room 325
	Section 12	Room 326
12:00 – 1:30 p.m.	**Lunch on Your Own**	
1:30 – 2:45 p.m.	**Introduction to Outlining**	
	Section 11	Room 325
	Section 12	Room 326
2:45 – 4:00 p.m.	**Introduction to Essay Writing**	
	Section 11	Room 325
	Section 12	Room 326

THE UNIVERSITY OF MEMPHIS | Cecil C. Humphreys School of Law

1L Orientation Schedule
Friday, August 12, 2016

9:00 – 10:00 a.m.	**Brief Discussion of Intentional Infliction of Emotional Distress & Consent**	
	Section 11	Room 325
	Section 12	Room 326
10:00 – 10:15 a.m.	**Break**	
10:15 – 11:20 a.m.	**Skills Review & Real Life Exercise I**	
	Section 11	Room 325
	Section 12	Room 326
11:20 a.m. – 12:00 p.m.	**Real Life Exercise II**	
	Section 11	Room 325
	Section 12	Room 326
12:00 – 1:30 p.m.	**Lunch on Your Own**	
1:30 – 4:00 p.m.	**Final Exam & Conclusion**	
	Section 11	Room 325
	Section 12	Room 326
5:00 – 7:00 p.m.	**SBA 1L Welcome Party**	Promenade

Pre-Orientation Checklist for the Class of 2019

	TO DO	DETAILS	DUE DATE	QUESTIONS?
☐	**Complete the Law School Orientation Survey**	Please complete the survey here to select your T-shirt size.	By Thursday, July 28, 2016	Ryan Jones
☐	**RSVP to Welcome Reception**	Please RSVP here to the Welcome Reception at the Belz Museum of Asian & Judaic Art.	By Thursday, July 28, 2016	Ida Bounds
☐	**Complete the Student Publicity Release Form**	Complete the Student Publicity Release Form here.	By Thursday, August 4, 2016	Ryan Jones
☐	**Purchase Your Books**	Purchase your books from the Law School bookstore. The book list will be available by Wednesday, July 27, 2016, and you can buy books after that. Check the Orientation website for the 1L book list. The bookstore is open from 8:00 a.m. – 4:00 p.m. The University of Memphis offers a program for those students who want to use their financial aid (loan) excess money to buy books before federal aid is officially released. The program is called **BAPP** (Bookstore Advance Payment Plan). Note you have to complete a Title IV authorization form to be approved for BAPP. **Note: Since most 1L books are used both semesters, you save no money by renting books; you should buy them.**	By Thursday, August 4, 2016	Cheryl Edwards
☐	**Look for your first *On Legal Grounds* postings**	***On Legal Grounds*** is the law school's blog for all announcements and official law school business. We will subscribe your Memphis email address to receive automatic daily email summaries from On Legal Grounds. You can also access On Legal Grounds via the link on the law school home page or here.	By Thursday, August 4, 2016	Brigitte Boyd

	TO DO	DETAILS	DUE DATE	QUESTIONS?
☐	**Register for Westlaw/TWEN & Lexis-Nexis/Blackboard**	**Westlaw/TWEN** • Westlaw is an online legal research platform you will use throughout your time in law school. • TWEN is an online course platform used in some first-year classes. TWEN is owned by Westlaw, so you will use the same login information for TWEN and Westlaw. • You **must** register for Westlaw/TWEN. **Lexis-Nexis/Blackboard** • Lexis-Nexis is another online research platform you will use throughout your time in law school. • Blackboard is an online course platform used in some first-year classes. Blackboard is owned by Lexis-Nexis, so you will use the same login information for Blackboard and Lexis-Nexis. **Registration Instructions** • After July 27, 2016, please e-mail Linda Hayes to request the University of Memphis activation codes for Westlaw/TWEN and for Lexis-Nexis/Blackboard. • Instructions for registering for Westlaw/TWEN are here. • Instructions for registering for Lexis-Nexis/Blackboard are available here.	By Thursday, August 4, 2016	Linda Hayes
☐	**Register for the Legal Methods TWEN Course 2016 – 2017**	After you register for TWEN, you **must** register for the following TWEN course: LEGAL METHODS – Wilson (Full Year 2016-2017). Instructions for registering for this course are included in the Westlaw/TWEN registration instructions available here. Please note that Legal Methods has both a Lecture component and a Small Section component. Lecture meetings are scheduled for Mondays. Small Section meetings are scheduled later in the week. Although the Small Section schedule is not yet available, please note that most Small Sections meet once a week in the evening for two consecutive hours. Each student will be assigned to a specific Small Section. The Small Section assignments and the Small Section schedule will be posted on the Legal Methods TWEN Course no later than Thursday, August 4. Students are assigned to specific sections in an effort to create Small Sections that are representative of the entire class across several factors. Accordingly, as a matter of course policy, students may not choose their preferred Small Section assignment.	By Thursday, August 4, 2016	Jodi Wilson

	TO DO	DETAILS	DUE DATE	QUESTIONS?
☐	**Prepare Required Homework for your First Legal Methods Classes**	Your first Legal Methods classes are Monday, August 8, and Tuesday, August 9. You must complete your Legal Methods assignments before class. The Legal Methods syllabus and other materials needed for the first assignments are available via the Legal Methods TWEN Course.	Before class on Monday, August 8, 2016	Jodi Wilson
☐	**Read the Academic Regulations**	You must thoroughly read the Academic Regulations before Monday, August 8, 2016. You will be asked to sign a document on August 8, 2016 stating that you have read and understand the Academic Regulations. Pay particular attention to the Honor Code (Rule 21). Please note that **the Academic Regulations are currently being updated for the upcoming academic year (2016 – 2017)**. They will be available here after August 2, 2016. Please be sure to read the **2016 – 2017** regulations.	Before Orientation on Monday, August 8, 2016	Steve Mulroy
☐	**Complete Project Implicit Assessment**	Please visit **Project Implicit** and complete at least **one** assessment. Project Implicit is a non-profit organization and international collaboration between researchers interested in implicit social cognition – feelings or thoughts outside of conscious awareness and control. You will have the opportunity to assess your conscious and unconscious preferences as it relates to various populations. Each assessment takes 10 -15 minutes to complete. Results from your participation are anonymous and are not provided to the law school. Please complete your assessment prior to Orientation. **Steps:** **1.** Visit Project Implicit **2.** Select an IAT You may choose to take any one or more of the following tests: • Asian IAT • Disability IAT • Race IAT • Age IAT • Gender-Career IAT • Weapons IAT • Skin Tone IAT • Sexuality IAT • Arab-Muslim IAT • Religion IAT • Native IAT	Before Orientation on Monday, August 8, 2016	Jacqueline O'Bryant

	TO DO	DETAILS	DUE DATE	QUESTIONS?
☐	**Sign & Return the University's Financial Responsibility Statement**	Please print and bring a completed and signed copy of the University of Memphis's Financial Responsibility Statement to the "Navigating the First Year of Law School" Orientation on Monday, August 8, 2016. The form is mandatory. If we do not receive your form, you will be dropped from your classes, and you will not be permitted to start school.	Before Orientation on Monday, August 8, 2016	Jamie Johnson
☐	**Register for the Academic Success Class on TWEN**	After you register for TWEN, please register for the TWEN Academic Success Class for 2016-2017. Follow the same process to register that you followed for the Legal Methods TWEN Course.	Before Orientation on Monday, August 8, 2016	Brigitte Boyd
☐	**Get your Parking Permit**	The Law School does not provide any on-campus parking for law students. Students may not park in the University-designated faculty/staff parking areas on Court Avenue or next to the Law School building or behind the building. Student parking for the Law School is available at all downtown parking garages and public parking venues. The University has negotiated reduced parking rates for law students at nearby garages listed here. Of course, you may choose to seek other options for parking. A good place to start is www.downtownmemphis.com. Click on the parking map link.	Before Orientation on Monday, August 8, 2016	Contact individual garages for any questions.
☐	**RSVP to SBA Social Event**	RSVP here to the SBA Social Event on Friday, August 12, 2016.	By Monday, August 8, 2016	Sydney Trujillo
☐	**Get your University ID**	During lunch on Tuesday, August 9, 2016, we will issue University IDs to all students. You will need a government-issued ID, such as a driver's license or passport. Students are encouraged to get IDs made on the main University of Memphis Campus before Orientation. **Friday, August 5, the Friday before Orientation would be an excellent day to do this to avoid long lines!** To have your ID made, go the Campus Card Office (now part of the Bursar's office) in 115 Wilder Tower on the main campus. The office is open from 8:00 a.m. - 4:30 p.m., Monday through Friday. Students must be registered for class and have a form of photo ID to have IDs made early.	Before Orientation or during lunch on August 9, 2016	Brigitte Boyd

	TO DO	DETAILS	DUE DATE	QUESTIONS?
☐	**Review Lawyering Fundamentals Welcome Letter & Syllabus**	Review the Lawyering Fundamentals Website, Syllabus, and Welcome Letter and complete all included assignments. Assignments will take approximately five hours to complete. You should start working on these assignments prior to Orientation. Note that we anticipate that the Welcome Letter, Syllabus, and other course materials will be available to review by August 1, 2016.	Before first class on Wednesday, August 10, 2016	Meredith Aden
☐	**Bring Your Laptop**	You will need to use your laptop in the workshops on Friday, August 12, 2016, so please bring them to school.	By Friday, August 12, 2016	Brigitte Boyd
☐	**Consider Getting a Locker**	Lockers are optional, and the cost is $10/year. Instructions are here. Lockers will be available for rental beginning on Wednesday, August 10, 2016.	Optional, Beginning Wednesday, August 10, 2016	Brigitte Boyd
☐	**Sign up For ERefunds**	Students who choose to receive excess loan money (i.e., money left after tuition and fees) by direct deposit will receive their funds before students who choose to receive their excess loan money by hard copy check. If you want to receive your excess loan money by direct deposit, you need to sign up for E-Refunds. To sign up • Log into your My Memphis account. • Click the Account tab. • In the “Bursar - Fees, Payments, Disbursements & Refunds” box, click on “Sign up for E-Refunds (Direct Deposit).” You will be redirected to TigerXpress (U of M's online billing site). • Click the E-Refunds tab at the top. • Enter your bank account information. (You’ll need a check with the routing number and account number for the account you want to use).	Optional	Brigitte Boyd

Welcome RECEPTION

HONORING

THE CLASS OF 2019

SUNDAY, AUGUST 7
5:00-7:00 P.M.
Belz Museum of Asian
& Judaic Art
Pembroke Square Bldg.
119 South Main, Concourse Level

PLEASE JOIN US

Enjoy hors d' oeuvres & cocktails while welcoming the incoming law class of 2019. Join fellow distinguished guests, including members of the judiciary, alumni, faculty & staff.

This event is made possible through the genorosity of Mr. & Mrs. Jack Belz, Belz Enterprises, the Cecil C. Humphreys School of Law Alumni Chapter & the law firm of Glassman, Wyatt, Tuttle & Cox P.C.

Parking tickets for the Peabody Place Tower Garage (110 Peabody Place) will be partially validated at the check-in table.

DRESS: Cocktail Attire

Please RSVP by Thursday, July 28

CLICK HERE TO RSVP

CLASS OF 2019 Orientation Social Events

Class of 2019 Welcome Reception
Sunday, August 7
5:00 - 7:00 p.m.
Belz Museum of Asian & Judaic Art
Pembroke Square Bldg.
119 South Main, Concourse Level

RSVP by Thurs., July 28
CLICK HERE TO RSVP

Swearing-In Ceremony
Monday, August 8
9:35 - 10:20 a.m.
Wade Auditorium
University of Memphis Law School
1 North Front St.
Immediate family is welcome to attend.

SBA 1L Welcome Party on the Promenade
Hosted by the Student Bar Assoc.
Friday, August 12
5:00 - 7:00 p.m.

This party & cookout will be held on the Promenade behind the law school and is FREE to all students. Immediate family/significant others are welcome to attend.

CLICK HERE TO RSVP

WWW.MEMPHIS.EDU/LAW/CURRENT-STUDENTS/ORIENTATION.PHP

FINANCIAL RESPONSIBILITY STATEMENT

Name:_________________________________ **U#** __________________
(Print)

PAYMENT OF FEES/PROMISE TO PAY

I understand and agree that when I register for any class at the **University of Memphis**, (hereinafter referred to as the "Institution",) or receive any service from the Institution, I am accepting full responsibility to pay all tuition, fees and other associated charges assessed as a result of my registration, and/or receipt of services. I understand and agree that if I drop or withdraw from some or all of the classes for which I register, I will be responsible for paying all or a portion of tuition and fees in accordance with the published tuition refund schedule at **http://www.memphis.edu/bursar/calendars.php**. I have read the terms and conditions of the published tuition refund schedule and understand those terms are incorporated herein by reference. I further understand that my failure to attend class or receive a bill does not absolve me of my financial responsibility as described above. **If I expect financial aid to pay all or part of my financial obligations to the Institution, I understand and agree that it is my responsibility to meet all requirements for disbursement to my student account. I authorize the Institution to use the financial aid to pay for all education costs charged to my student account for my current term of enrollment or attendance at the Institution. I understand that it is my responsibility to ensure that all requirements of grantors, lenders, employers, and other third party payers are met on a timely basis. I understand that despite my expectations for payment from financial aid or other sources, I am ultimately responsible for all charges incurred. I understand that my financial aid may be adjusted due to eligibility. I agree to pay back to the Institution any amounts for which I am not eligible under applicable financial aid guidelines.** I understand and agree that it is my responsibility to review my Institution e-mail account and my account history via **TigerXpress** for notifications regarding balances due and payment deadlines each semester. I understand and agree that if I enter into an installment payment plan, the due dates and terms of the installment payment plan become part of this agreement and are incorporated herein by reference.

DELINQUENT ACCOUNT/COLLECTION

I understand and agree I will be in default if: I break any promise made to the Institution or fail to perform promptly at the time and in the

manner provided in my housing plan, meal plan, or tuition plan agreement with the Institution or if I fail to pay other charges, including but not limited to, parking fees or fines, or financial aid adjustments that post to my student account by the date due or at the point at which I am no longer enrolled. If there is an event of default, the Institution may exercise any remedy allowed by law, including one or more of the following, without notice or demand (except as required by law): (1) The Institution may declare the principal balance plus any late fees, fines or penalties immediately due and payable in full. or (2) The Institution may hire or pay a third-party to collect the debt including, without limitation, the pursuit of litigation. Financial Hold: I understand and agree that if I fail to pay my financial obligation to the Institution, the Institution, in accordance with the provisions of T.C.A. § 49-9-108, will place a financial hold on my student account, preventing me from registering for future classes, receiving grades or transcripts, or receiving my diploma. Late Payment Charge: I understand and agree that if I fail to pay my financial obligation to the Institution by the scheduled due date, the Institution may assess a late payment fee as approved by the Tennessee Board of Regents. Collection Agency Fees: I understand and accept that if I fail to pay my financial obligation to the Institution or fail to make acceptable payment arrangements to bring my account current, the Institution may refer my delinquent account to a collection agency. I further understand that I may be responsible for paying the collection agency fee, which may be based on a percentage at a maximum of 33-1/3 percent of my delinquent account, together with all fees and expenses, including reasonable attorney's fees, necessary for the collection of my delinquent account. Finally, I understand that my delinquent account may be reported to one or more of the national credit bureaus. **Bankruptcy: I understand and agree Tuition and other related fees or charges may not be dischargeable in bankruptcy and may survive after the bankruptcy has closed and that I may still owe the debt to the Institution after the bankruptcy.**

COMMUNICATION

Method of Communication: I understand and agree that the Institution uses e-mail addresses assigned by the Institution as an official method of communication with me, and that, therefore, I am responsible for reading the e-mails I receive from the Institution on a timely basis. Contact: **I authorize the Institution and its agents and contractors to contact me at my current and any future cellular phone number(s), email address(es) or wireless device(s) regarding my delinquent student account(s)/loan(s), any other debt I owe to the Institution, or to receive general information from the Institution. I authorize the Institution and its agents and contractors to use automated telephone dialing equipment, artificial or pre-recorded voice or text**

messages, and personal calls and emails, in their efforts to contact me. Furthermore, I understand that I may withdraw my consent to call my cellular phone by submitting my request in writing to the Institution Bursar's Office or in writing to the applicable contractor or agent contacting me on behalf of the Institution. Updating Contact Information: I understand and agree that I am responsible for keeping the Institution's records up to date with my current physical addresses, email addresses, and phone numbers. Upon leaving the Institution for any reason, it is my responsibility to provide the Institution with updated contact information for purposes of continued communication regarding any amounts that remain due to the Institution.

BILLING ERRORS

I understand that administrative, clerical or technical billing errors do not absolve me of my financial responsibility to pay the correct amount of tuition, fees, and other associated financial obligations assessed as a result of my registration and attendance at the Institution.

RETURNED PAYMENTS/FAILED PAYMENT AGREEMENTS

If a payment made to my student account is returned by the bank for any reason, I agree to repay the original amount of the payment plus a returned payment fee of $30.00 and any applicable late fees. I understand that returned payments for tuition or multiple returned payments for non-tuition items may result in a permanent cash only payment status at the Institution. If any initial term payments for tuition are returned, the Institution reserves the right to delete my class schedule if not settled by the notification deadline.

FINANCIAL AID

I understand that aid described as "memo", "estimated", or "authorized" on my Financial Aid Award does not represent actual or guaranteed payment, but is an estimate of the aid I may receive if I meet all requirements stipulated by that aid program. I understand that my Financial Aid Award is contingent upon my continued enrollment and attendance in each class upon which my financial aid eligibility was calculated. If I fail to attend, drop any class, or stop attending before completion, I understand that my financial aid eligibility may decrease and some or all of the financial aid awarded to me may be revoked or adjusted. If some or all of my financial aid is revoked or adjusted because I dropped, failed to attend, or stopped attending class, I agree to repay all revoked or adjusted aid that was disbursed to my account.

IRS FORM 1098-T

I agree to provide my correct Social Security number (SSN) or taxpayer identification number (TIN) to the Institution upon request as required by Internal Revenue Service (IRS) regulations for Form 1098-T reporting purposes. If I fail to provide my correct SSN or TIN to the Institution, I may be responsible for paying any and all IRS fines assessed as a result of my missing SSN/TIN.

ENTIRE AGREEMENT

This agreement, which is governed by Tennessee law, supersedes all prior understandings, representations, negotiations and correspondence between the student and the Institution, constitutes the entire agreement between the parties with respect to the matters described, and shall not be modified or affected by any course of dealing or course of performance. This agreement may be modified by the Institution if the modification is signed by me. Any modification is specifically limited to those policies and/or terms addressed in the modification.

Name: ________________________________ **U#:** __________________
(Signature)

Date: ________________________

Cecil C. Humphreys School of Law

LAWYERING FUNDAMENTALS

Lawyering Fundamentals (LF) is a 3-day course you will take during Orientation on August 10 - 12, 2016. The LF course simulates the first semester of law school. It includes daily classes in which you will be questioned on the assigned reading, answer law school exam-style questions, and receive helpful law school success strategies. You will also sit for a final exam at the end of LF. It will not be counted in your GPA, but it will help you assess your progress. However, most importantly, the course will help demystify some of the law school teaching methods in order to help you acclimate and succeed faster. Therefore, consider LF the first step of your legal training.

By August 1, 2016, we will post the materials you will need to review for Lawyering Fundamentals. Please note that you will have assignments and readings due on Wednesday, August 10. You should complete these assignments prior to the beginning of Orientation. We anticipate that you will need about 5 hours to complete the required assignments for the first day of the Lawyering Fundamentals course. You will have additional assignments to complete on Wednesday evening before Thursday's classes and on Thursday evening before Friday's classes and exam.

In order to complete your assignments, you will need to use the BarBri Matrix website. We anticipate that you will receive login information at your University of Memphis email address by August 1, 2016. You will not be able to log in until you receive the login instructions. If you have not received login instructions by August 1, 2016, please check your junk mail folder. If you have other technical questions or difficulty logging in, please contact BarBri at IPLearningTeam@barbri.com.

Syllabus
Welcome Letter
Welcome Materials
Torts Case Materials
BarBri Matrix Website
Matrix Student Instructions

On August 31, 2016, we will have a mandatory exam review for the Lawyering Fundamentals exam. The review session will take place from 11:30 - 12:50 in Wade Auditorium.

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News & Events

Alumni & Support

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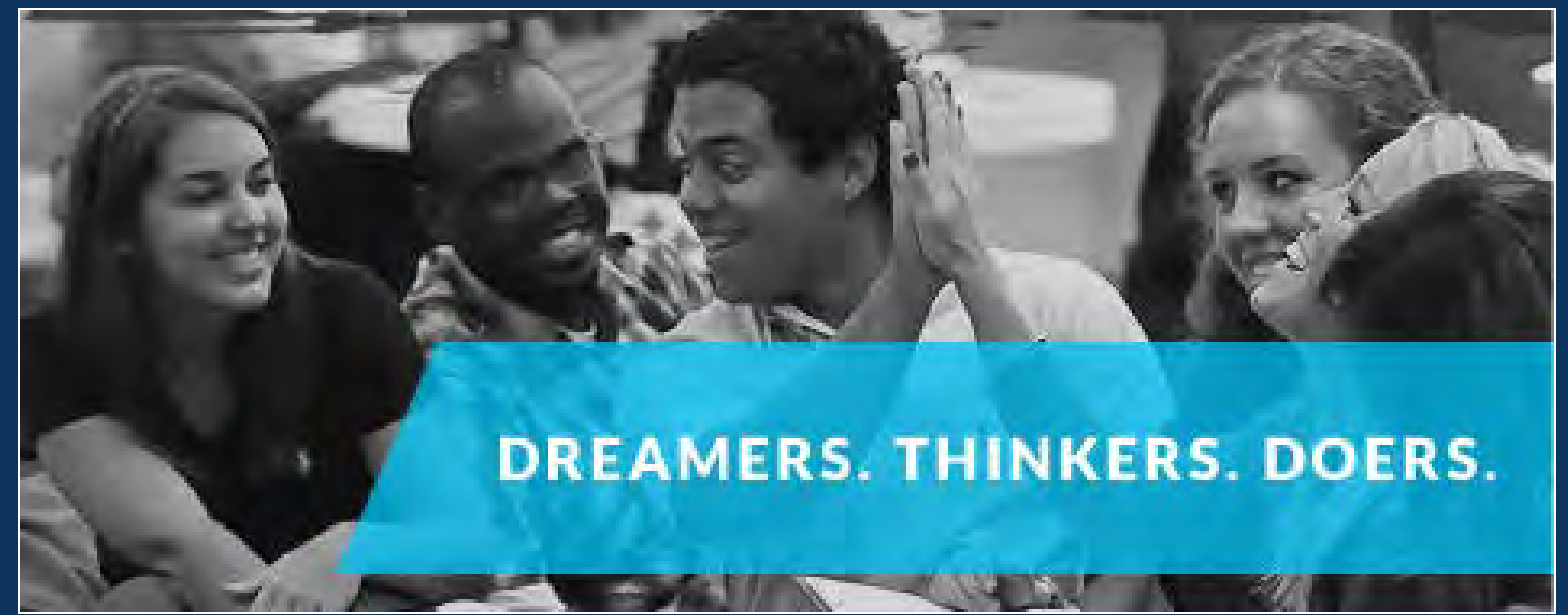

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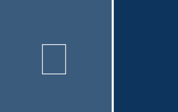
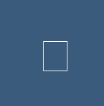
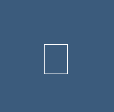
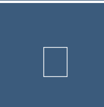
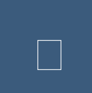
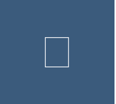

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THE UNIVERSITY OF MEMPHIS
CECIL C. HUMPHREYS
SCHOOL OF LAW

ACADEMIC REGULATIONS

(Updated through August 1, 2016)

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ACADEMIC REGULATIONS

The provisions set forth herein and in the Standards for Attainment of the J.D. Degree attached hereto as Appendix I govern the Academic Affairs of all students enrolled at the School of Law. All references to these Academic Regulations shall be deemed to include Appendix I. It is the responsibility of each student to be familiar with the terms contained herein and each student shall be deemed to be so. For the purposes of these Academic Regulations, any place where approval of the Dean is required, it shall be taken to mean the Dean or the Dean's designate such as the Associate Dean or an Assistant Dean.

1. DEGREES CONFERRED AND PROGRAMS OF STUDY

1.1 J.D. Degree

Graduates of The University of Memphis Cecil C. Humphreys School of Law receive the Juris Doctor Degree.

1.2 J.D./M.B.A. Degree Program

A J.D./M.B.A. Degree Program is available in cooperation with the School of Business. Further information is available in the office of the Dean.

1.3 Programs

The law school offers a full-time day program and a part-time day program on the semester system. Students in the full-time program normally graduate in three years (six semesters). Summer classes and intersession classes may be available and some students may graduate after five semesters and two summer sessions (equivalent to six semesters) as full-time students. Intersession classes may be offered between regularly scheduled classes (i.e., Winter intersession), or during regularly scheduled academic breaks in semesters (i.e., Spring intersession). Students in the part-time program normally graduate in nine semesters or in eight semesters and two summer sessions (equivalent to nine semesters). (See Section 5 for course maximums and minimums during each semester.)

2. REGISTRATION WITH BAR

Some states require that, for a candidate to take the bar examination in that state, the candidate shall have registered with a supervisory authority upon or shortly after enrolling in law school. Each student should ascertain the rules of the state in which he/she expects to take the bar examination in this respect. Tennessee does not have this requirement.

3. ENROLLMENT

Enrollment is subject to the general rules of the University pertaining to registration and is possible only during the scheduled registration periods of the university and School of Law as shown on the Law School and university calendars.

Newly admitted students and startovers may only enter in the fall term. Upper division law students, transfer students, and transient students may enter in any term and should preregister each semester for the succeeding term. Specific instructions on preregistering and course schedules are ordinarily provided at least one month before the preceding examination period.

The enrollment procedure begins in the administration offices of the School of Law. Enrollment in any course or section must be approved by the Dean or the Law School Registrar. Every enrollment after the first is conditional upon the student's being eligible to re-enroll under the Academic Eligibility Requirements. (See Section 14.) Students on probation from the previous semester and those who have been on probation will be conditionally enrolled until such time as all grades are received from the previous semester. If computation of a student's grades results in the student being academically excluded, the student will receive a refund of fees. (See Section 4.1.)

4. WITHDRAWALS AND RE-ENROLLMENT

4.1 Withdrawals and Refunds of Fees

A student may withdraw from the Law School by notifying the office of the Dean in writing, provided, however, that withdrawal is not permitted within one week of the beginning of the final examination period of a semester, summer, or intersession without permission of the Dean.

Withdrawals are recorded on the student's record at any time after a student has registered and paid fees.

The following refund percentages of enrollment fees (Maintenance, Out-Of-State Tuition and Student Activity Fees) apply to students who withdraw from the law school or who drop to an hourly load below full time:

A **full (100%) refund** of fees will be made only under the following conditions:

a. Cancellation of a class by the University.

b. Drop or withdrawal prior to official registration. (Example: Pre-registration of a first year student.)

c. Death of a student certified by the Vice President for Student Educational Services or designated university official.

d. Withdrawal of the student by the Dean's Office for reason of academic exclusion after the student has registered and paid fees.

A **75% refund** will be provided during the first day of classes and extending for a period of time noted in the term calendar of the Law School Schedule of Classes. A 90% refund of the Student Activity Fee will be provided during this period.

A **25% refund** will be provided beginning at the expiration of the 75% refund period and extending for a period of time noted in the term calendar of the Law School Schedule of Classes. A 75% refund of the Student Activity Fee will be provided during this period.

At the conclusion of the 25% refund period, there will be no refund of these fees.

4.2 Re-Enrollment after Withdrawal

a. Eligibility

To be eligible to re-enroll as a matter of right after withdrawal, the student who has withdrawn must have completed one academic year, have met the retention standards (See Sec. 14.1.b.), and be able to comply with the six year requirement. (See Section 16.4.) Students who cannot re-enroll as a matter of right must secure permission from the Dean. Denial of permission to re-enroll shall not prevent a student from competing for a position in the first year class. Re-enrollment procedures require filing a readmission application.

b. Graduation Requirements Upon Re-Enrollment

Students re-enrolling after withdrawing in good standing must comply with graduation requirements of the class with whom they are scheduled to graduate. These graduation requirements may differ from those in effect at the time of the student's original enrollment.

5. COURSE MINIMUMS AND MAXIMUMS: FULL-TIME AND PART-TIME STUDENTS

5.1 Full-Time Students

Full-time students must enroll in at least 12 credit hours toward the J.D. or J.D./M.B.A. degree in each semester. No student may be enrolled at any time in coursework that, if successfully completed, would exceed 18 credit hours. Unless permission of the Dean is obtained, no student with less than a 2.5 cumulative grade point average may enroll in more than 16 credit hours in a semester. Unless permission of the Dean is obtained, no student enrolled in an extern program may be enrolled in more than 16 credit hours, including the externship.

5.2 Part-Time Students

Unless permission of the Dean is obtained, part-time students must enroll in at least 8 credit hours, but not more than 11 credit hours, in each semester.

5.3 Summer Session Enrollment: Classification of Full-Time and Part-Time Students

Without regard to whether students are classified as full-time or part-time during the regular academic year, such students may enroll in summer session in any number of credit hours not exceeding nine (9). Students enrolling in six (6) or more credit hours will be classified as full-time students for the summer session and will be subject to all academic regulations applying to full-time students, including outside work limitations. Students enrolling in five (5) or fewer credit

hours will be classified as part-time students for the summer session. Students enrolling in intersession classes will be subject to all academic regulations applying to full-time students, including outside work limitations. Enrollment in summer session will not affect the full-time or part-time status of a student. (See Sections 8, 9, and 16.3 for related matters).

5.4 Enrollment

At the time of initial enrollment, students must enroll either as full-time or part-time students. From that time on, they will be governed by regulations applying to their initial enrollment classification unless they change status as provided in these regulations. (See Section 8.)

6. DROP/ADD COURSES

6.1 Adding Courses

With the exception of Trial Advocacy, Clinic, and Intersession classes, courses may be added to a student's schedule during the first ten (10) calendar days beginning with the first day of classes for regular semesters and during the first four (4) calendar days beginning with the first day of classes for summer sessions. Trial Advocacy, Clinic, and Intersession classes may be added to a student's schedule during the first five (5) calendar days beginning with the first day of classes for regular semesters and during the first two (2) calendar days beginning with the first day of classes for summer session. Classes missed before being added will be counted as absences for the attendance policy of the faculty teaching the course.

6.2 Dropping Courses

Elective courses may be dropped on or before the "drop date" listed in the calendar for each semester without permission of the Dean. Elective courses may be dropped after the drop date only with permission of the Dean. A full-time student may not drop below twelve (12) hours, and a part-time student (in the extended program) may not drop below eight (8) hours, without permission of the Dean. Drops occurring after the "Add Period" are recorded as "withdrawals". Required courses may not be dropped without permission of the Dean. (See Sections 5.1, 5.2 and 16.)

7. REPEATING COURSES; PASSING REQUIRED COURSES

A course may not be repeated unless it is failed -- i.e., no credit earned. Required courses must be completed and passed to meet graduation requirements. Required courses that are failed must be retaken in the next regular semester in which the course is offered unless taken in summer session prior to such next regular semester. When a course is repeated after having previously been failed, the grade for the course is averaged in the normal manner including the previous failure -- i.e., the previous grade stands and both grades become a part of the student's grade record and for computation of the student's grade point average. No grade is removed. (See Section 12.)

8. CHANGE OF PROGRAM

8.1 Part-Time to Full-Time Program

Part-time students must secure permission from the Dean to transfer to the full-time program.

8.2 Full-Time to Part-Time Program

Full-time students in good standing must secure permission from the Dean to transfer to the part-time program.

8.3 Students Not in Good Standing

Students not in good standing will not be permitted to change programs except for good cause as determined by the Dean. (See Sec. 14.)

9. CLASS ATTENDANCE AND OUTSIDE WORK LIMITATIONS

9.1 Class Attendance

Students are expected to give their scholastic obligation first priority. Prompt and regular class attendance is considered necessary for satisfactory work. It is expected that a student will regard an engagement to attend classes as he/she would any other engagement or conference with his/her instructor. The necessity of absences does not in any sense relieve the student from responsibility for the work of his/her course during his/her absence. The instructor in charge of a course determines in all instances the extent to which absences and tardiness affect the student's grade and credit. The attendance policy of the instructor shall be announced to the class and distributed to the class in writing at the time of its implementation. Generally, attendance policies will be announced at the first class meeting of the semester. A student may receive a failing grade for excessive absences and may be dropped from the course with a failing grade if excessive absences occur. Each student shall be responsible for keeping records of his/her attendance.

9.2 Outside Work Limitation for Full-Time Students

The full-time program of the School of Law is intended to promote full-time study of law. Full-time students may not engage in employment in excess of twenty (20) hours per week. (See Section 5.3.) It is the policy of the School of Law to discourage any employment of first-year full-time students.

10. EXAMINATION POLICIES AND PROCEDURES INCLUDING DEFERRALS OR DELAYS IN COMPLETING EXAMINATIONS OR RESEARCH PAPERS

10.1 Schedule of Examinations

a. The schedule for examinations is made part of the registration materials. The schedule of examinations may be amended during a regular semester, summer session or intersession. Such amended schedules will be posted, and all students prior to the examination period are responsible for checking the Law School Bulletin Board for an amended schedule.

b. Unless students obtain the written permission of the Dean at the time of registration, students may not register in courses which have conflicting examination schedules -- i.e. where examinations are scheduled to be administered at the same time or on the same day. If permission is granted, one of the conflicting examinations will be scheduled on the next day in the examination period on which the student does not have an examination.

c. Students are required to take examinations at the scheduled times. Faculty members are not authorized to grant exceptions, but the Dean may grant exceptions as set forth in Sections 10.2 and 10.3.

10.2 Scheduled Examination Conflicting with Observance of a Religious Holiday

If a scheduled examination conflicts with the observance of a religious holiday or a day on which the student may not be present because of religious practices, the student will be entitled to a deferral of the examination until the earliest time at which the student may take the examination and proctoring can be arranged. The student should notify the Dean's office of the conflict and make arrangements for the deferral no later than two weeks prior to the start of the examination period.

10.3 Examinations under Special Circumstances

Students with disabilities may be granted permission to take examinations under special circumstance. Such students must be registered with the University Office of Student Disabilities. The special circumstances (conditions) will be established on an individual basis by the Dean considering the recommendations of the University Office of Student Disabilities.

10.4 Using Computers and Typewriters

Unless a student has an accommodation from Student Disability Services or demonstrates a case of severe hardship, a student is required to use a laptop or similar device and the approved exam-writing software to write essay or short-answer examinations.

10.5 Anonymous Grading System and Examination Numbers

All examinations are to be graded in a manner so as to protect the anonymity of students taking the examinations. To facilitate the anonymous grading system, all students are required to secure from the Law School Registrar an examination number for each semester, summer session and intersession. A student who does not use the assigned examination number will not have a grade reported to the student or to the University until such number is secured.

10.6 Deferrals or Delays in Taking Scheduled Examinations;
Unreasonable Hardship

Deferral of, or a delay in taking, an examination may be permitted only by the Dean and then only when it would result, or would have resulted, in an unreasonable hardship on the student to attend the examination. Application for delay must be made to the Dean prior to the examination, if feasible. If a delay is permitted, the student shall take the examination at such time as the instructor in conjunction with Dean's office shall require. Unreasonable hardship includes illness and other matters beyond the control of the student. If for reasons beyond the student's control, deferral or delay cannot be requested in advance of the scheduled examination, such request must be made as soon as possible after the examination. (WARNING: Failure to take a scheduled examination results in a grade F or U unless the Dean permits the student to withdraw from the course.)

10.7 Late Arrivals for Examinations

A student who arrives at an examination after the examination has started but before it is completed may sit for the examination. The Dean, in consultation with the faculty member, if available, may permit a student whose late arrival is attributable to factors that are beyond the student's reasonable control to take the entire scheduled time for the examination, either beginning immediately or as rescheduled by the Dean. Otherwise, a student shall be permitted to take the examination, but in the Professor's discretion, may be required to complete the examination at the regularly scheduled time.

10.8 Conclusiveness of Taking an Examination

A student, by taking an examination, is conclusively deemed to represent that no unreasonable hardship existed and the student was able to take the examination. The grade earned will be recorded and will not be expunged for any reason. A student may not withdraw from a course after taking the examination.

10.9 Illnesses or Emergencies Arising During an Examination

If during an examination, an illness or emergency arises which would result in an unreasonable hardship on such student or the student being unable to complete the examination, the student, if capable of so doing, must notify the faculty member or person proctoring the examination immediately upon such occurrence. After such notification and/or occurrence, the Dean's office shall be notified, and, thereafter, the Dean's office will, in conjunction with the faculty member involved, schedule the examination as circumstances permit.

10.10 Research Papers and Work Other Than Examinations; Due Dates and Extensions
The research paper in final form, whether written in connection with a seminar or as independent research, must be submitted to the faculty research advisor no later than the last day of the examination period of the semester or summer session in which the student is registered for the seminar or independent research, and may be required earlier by the faculty research advisor. A schedule for the submission of outlines, drafts, lists, and paper will be

prepared in writing by the faculty research advisor and given to the student. Failure to comply with the schedule may result in failure in the course for which the paper is required to be written. The faculty research advisor may permit additional time, in which case the conditions and limitations of any such extension must be met; provided, however, no extension of time shall be beyond the last day of the examination period in which the student is registered unless requested in writing and approved by the faculty research advisor and by the Dean and filed with the Law School Registrar prior to the last day of the examination period. The Law School Registrar will provide a form by which this may be done. It is the responsibility of the student to procure the execution of the form by the faculty research advisor and by the Dean and to file it with the Law School Registrar.

10.11 Incompletes and Effect on Grades

If a deferral or delay of the due date on an examination or research paper extends beyond the end of the semester, a grade of Incomplete will be given in the course or seminar, and a notation will be made in the student's records of the time and method by which completion is required. Any grade of Incomplete not removed in accordance with the requirements of a permitted deferral or delay will result in a grade of F or U in the course. (See Sections 10.3 & 11.)

10.12 Computation of Grades

For all purposes for which grade point averages are computed (i.e. - standing, retention, rank, etc.), an Incomplete will not be counted in the semester in which it is received. When the grade is reported, it will be included for computation of grade point average at the end of the semester in which it is reported. (See Section 12.3.)

10.13 Enrollment when Deferrals or Delays in Taking Scheduled Examinations Are Pending

The permission of the Dean is required to permit a student to enroll in a semester, summer session, or intersession when scheduled examinations for any prior semester, summer session, or intersession have not been completed including deferred or delayed examinations. A student seeking to enroll under such circumstances must submit a written request to the Dean.

11. INCOMPLETES AND GRADE CHANGES

11.1 Incompletes

An Incomplete may be recorded by faculty members when there is a legitimate reason for a student not completing course work during the regular period (i.e., a semester or summer session). Any grade of Incomplete not removed in accordance with the requirements of the Instructor or approval by the Dean shall result in a grade of F in the course.

11.2 Grade Changes

Upon reporting grades to the Law School Registrar, a professor is required to sign the grade sheet as certification that the grades are correct. After submission of grades to the Law School

Registrar, grades may be changed by a professor only for computational or objective errors of the professor. Grade changes for any other reason may be made only with approval of the Academic Affairs Committee. Any such grade change must be made by the end of the semester, excluding summer session, or intersession, after the semester in which the grade was received.

12. GRADING SYSTEM

12.1 Grades

a. Grades are represented by the following letter grades: A+, A, A-, B+, B, B-, C+, C, C-, D+, D, and F, and in certain courses the letters E Excellent), S (Satisfactory), and U (Unsatisfactory) (See Section l2.2) A grade of D or better is passing, and less than a D is failing. While a grade of D, D+ or C- is passing and credit is earned, such grade indicates less than satisfactory performance. (See Section 12.5 for grading factors in seminar courses.)

For purposes of determining grade point averages, letter grades have the following number equivalents:

A+	4.0	C+	2.33
A	4.0	C	2.0
A-	3.67	C-	1.67
B+	3.33	D+	1.33
B	3.0	D	1.0
B-	2.67	F	0

Grades of E, S, and U will not be assigned number equivalents and will not be used in determining grade point averages.

b. For first-year courses, the mean cumulative grade point average for each section shall fall on or between 2.70 – 2.80. In extraordinary circumstances, the Associate Dean for Academic Affairs may approve an exception to this rule.

12.2 Grading Systems and Factors to be Considered

a. Subject to exceptions set forth in the following subsections, all courses will be graded on a letter grade basis as set forth in Subsection 12.1 supra. (See Subsection 12.5. regarding factors to be considered.)

b. Courses identified as simulation courses shall be graded on a letter grade basis.

c. All courses identified as clinic courses will be graded on a letter basis and will not include as a component the grade on a final examination.

d. Externships, Law Review and Moot Court shall be graded according to standards of Excellent (E), Satisfactory (S) and Unsatisfactory (U). Excellent shall represent

achievement substantially above the minimum requirement for a grade of Satisfactory.

e. The use of E, S, and U may be appropriate for courses in which, as taught and tested, the achievement of students cannot be closely compared. The use of these grades shall only be by faculty approval following an initial study and recommendation by the Curriculum Committee. Such grading policy will be noted on the course schedule for each semester, summer session, or intersession to which it applies.

12.3 Cumulative Grade Point Average

A student's cumulative grade point average is computed by first converting letter grades to number equivalents pursuant to Section 12.l. The number equivalents are then multiplied by the number of hours of credit assigned to each course. The products are added, and the sum divided by the total number of hours of courses whose products are included in the sum. Courses graded E, S and U are excluded from the grade point computation.

12.4 Rounding

Averages are computed and recorded to two decimal places, e.g., 2.65, with no rounding.

12.5 Grading Factors

a. A written examination is usually given at the end of each course, and the grade for the course will be the grade made on the examination. An instructor, at his/her discretion and to the extent he/she desires, may, however, consider class attendance, participation in classroom instruction, other examinations and the performance of required work in determining the grade. These additional factors will be announced at the beginning of the course, or at such time as to provide adequate notice to the students.

b. In a seminar course that fulfills the Law School’s writing requirement, between 65% and 80% of the grade must be based on the research paper. The balance of the course grade must be based on participation that demonstrates the students’ knowledge, comprehension, and analysis of assigned readings or research. A student may not satisfy the research requirement unless a grade of C or better is received, both in the seminar and on the research paper. A student may receive a grade of C or better in a seminar by receiving points based on additional grading factors, even though the research paper is not satisfactory to satisfy the Law School’s research requirement for graduation. (See Section 16.1c.)

13. CLASS RANKING

13.1 Full-Time Students

Full-time students will be ranked at the following intervals:

1st year: fall and spring semesters

2nd year: fall and spring semesters

3rd year: fall and spring semesters

Final: as a group, following summer session

13.2 Part-Time Students

Part-time students will be ranked at the following intervals with the designated class:

1st year fall and spring semester with admission class

2nd year spring semester with admission class

3rd year fall and spring semester with the second year full-time students after the fall and spring of their third year

4th year fall semester and spring semester with the third year full-time students

5th year (if applicable) fall semester and spring semester with third year full-time students

Final: as a group, following summer session

13.3 Work Considered for Ranking

Only the work completed at the University of Memphis will be considered in computing class rank. (See Section 16.)

13.4 Honors

Students with high cumulative grade point averages are awarded the J.D. degree with honors. The categories are:

Summa Cum Laude – Top 1% of the graduating class

Magna Cum Laude – Top 10% of the graduating class

Cum Laude – Top 25% of the graduating class

Diplomas awarded to such students will reflect the distinction.

14. ACADEMIC ELIGIBILITY REQUIREMENTS

14.1 Good Standing. Retention and Academic Exclusion for Non-Transfer Students

a. Good Standing

A student is in good standing only if the student's cumulative grade point average, as computed pursuant to Section 12, is 2.00 or better.

b. Retention and Academic Exclusion

A student not in good standing will be academically excluded unless one of the following exceptions applies:

1. The student has received grades in fewer than 24 credit hours, and is not excluded under Rule 14.1c.

2. The student has received grades in 24 to 38 credit hours and either has a cumulative grade point average of 1.80 or has earned a semester grade point average of 2.10 in the most recent semester.

3. The student has received grades in 39 to 53 credit hours and either has a cumulative grade point average of 1.90 or has earned a semester grade point average of 2.10 in the most recent semester.

4. The student has had a cumulative grade point average of 2.00 at the end of every previous semester. Such a student will receive one semester of probation. Following the semester of probation, the student will be subject to the requirements of Section 14.1.

A student who is not in good standing but entitled to retention under provisions 1-4 above must complete the student's next semester after no more than two semesters of non-enrollment. Non-enrollment includes withdrawal during a semester. (See Sec. 4.2.a.)

c. Exclusion After First Semester

In addition to the provisions of Rule 14.1a and Rule 14.1b, the Law School will exclude any first year student whose cumulative GPA after one semester is below 1.5 without the benefit of rounding.

d. Computation of Grade Point Average

For the purposes of determining good standing or retention status, the student's grade point average will be determined at the end of each fall semester and at the end of each spring semester. Summer term grades will be computed as if taken during the fall

semester. Intersession grades will be computed as if taken during the subsequent full semester. Enrollment in a succeeding academic term prior to computation of the student's grade point average will be at the student's risk. (See Section 3).

14.2 Good Standing, Retention, and Academic Exclusion for Transfer Students

a. Good Standing

Any transfer student whose cumulative grade point average for work taken at The University of Memphis, as computed pursuant to Section 12, is 2.00 or better is in good standing.

b. Retention and Academic Exclusion

A transfer student not in good standing will be academically excluded unless one of the following exceptions applies:

1. The student has received grades in fewer than 17 credit hours at this law school.

2. The student transferred to this law school with fewer than 17 transfer credits, has received grades in 17 to 32 credit hours at this law school and has a cumulative grade point average of 1.9 for work at this law school, or has earned a semester grade point average of 2.3 in the most recent semester.

3. The student transferred to this law school with 17 or more transfer credits, has received grades in 17 to 32 credit hours at this law school and has earned a semester grade point average of 2.5 in the most recent semester.

14.3 Significance of Academic Exclusion

A student who is academically excluded may:

a. Challenge a grade pursuant to the Grade Appeals procedures outlined in Section 22. In the event that the appeal results in a grade change that raises the student's grade point average over the threshold for exclusion, the student will be readmitted.

b. File a petition with the Academic Affairs Committee seeking a change in the Academic Regulations. If the Committee recommends, and the faculty approves, a change in the Regulations that would result in the student being able to remain in school, the student will be readmitted. There is no appeal from the decision of the Academic Affairs Committee or the faculty.

Subject to the above, academic exclusion is final and there is no appeal. A student who is academically excluded may seek startover admission pursuant to the provisions of Section 15.

15. STARTOVER

a. An applicant for admission to the first year entering class who was academically excluded from any law school may be admitted to the class for which he or she has applied, provided:

1. The applicant was academically excluded from this law school or is a Tennessee resident for fee and tuition purposes at the time of application, residency determination, and enrollment.

2. The applicant has been out of law school for a period of at least two (2) regular academic semesters (excluding the Summer Session) on the date of enrollment; or, if the applicant has completed three (3) semesters of law school, he or she is required to have been out of law school for only one regular academic semester (excluding the Summer session) on the date of enrollment.

3. The applicant has satisfied, on the dates of admission and enrollment, all absolute admission requirements applicable to all other applicants who are admitted and enrolled in the entering class for which application is made, except that the LSAT exam must have been taken within five years prior to the date of admission unless waived by the Admissions Committee;

4. The applicant, before admission, has been approved for admission by a majority of this law school's Admission Committee and the Dean after consideration of the applicant's situation in light of ABA Standard 505;

5. The applicant has not enrolled as a startover admit at any law school after previously being previously being academically excluded from any law school; and

6. The startover application is complete by April 1st.

b. Each applicant described above, who has been admitted and enrolled will not be counted in the total number of enrollments needed to fill the first year entering class. In no event will more than five (5) such applicants be admitted and enrolled in any one entering class. In the event that more than five (5) such applicants are approved as eligible for admission, the Admissions Committee together with the Dean will select the five (5) to be admitted. Selections will be based upon the applicant's admission index and other factors reflecting the likelihood for success at this law school.

16. <u>REQUIREMENTS FOR GRADUATION</u>

16.1 <u>Course Requirements</u>

A student is required to complete course work for a total of at least 90 credit hours for all courses.

a. Required Courses and Course Sequencing for Full-Time Students

A student enrolled in the full-time program is required to complete the following courses in the sequence indicated, unless an exception is granted by the Dean or the Dean's designee.

16.1.a.i. A FULL-TIME student who matriculates **before** January 1, 2015

First Year – Fall Term	First Year – Spring Term	Second Year	Second or Third Year
112 Torts I	122 Torts II	221 Evidence	A. 224 Professional Responsibility + B. Two Courses in both the Statutory Menu and Practice Foundation Menu:
113 Legal Methods I	123 Legal Methods II		
114 Civil Procedure I	124 Civil Procedure II		
115 Property I	125 Property II		
126 Criminal Law	121 Contracts		
	212 Constitutional Law		

**A student is required to complete Evidence by the end of spring of his/her second year. If a student takes Evidence in the summer term between the first and second year, this requirement will be satisfied.*

Statutory Menu	Practice Foundation Menu
323 Commercial Paper	311 Administrative Law
334 Corporate Tax	211 Business Organizations
214 Income Taxation	223 Criminal Procedure
359 Sales	213 Decedents' Estates
222 Secured Transactions	331 Family Law

Note: Any student may opt in to the course menu requirements effective August 1, 2016.

16.1.a.ii A FULL-TIME student who matriculates **after** January 1, 2015 but **before** August 1, 2016

First Year – Fall Term	First Year – Spring Term	Second Year	Second or Third Year
111 Contracts I	121 Contracts II	212 Constitutional Law	A. 224 Professional Responsibility + B. Two Courses in both the Statutory Menu and Practice Foundation Menu:
112 Torts I	122 Torts II	221 Evidence	
113 Legal Methods I	123 Legal Methods II		
114 Civil Procedure I	124 Civil Procedure II		
115 Property I	125 Property II		
	126 Criminal Law		

**A student is required to complete Evidence & Constitutional Law by the end of spring of his/her second year. If a student takes either or both courses in the summer term between the first and second year, this requirement will be satisfied.*

Statutory Menu	Practice Foundation Menu
323 Commercial Paper	311 Administrative Law
334 Corporate Tax	211 Business Organizations
214 Income Taxation	223 Criminal Procedure
359 Sales	213 Decedents' Estates
222 Secured Transactions	331 Family Law

Note: Any student may opt in to the course menu requirements effective August 1, 2016.

16.1.a.iii. A FULL-TIME student who matriculates **after** August 1, 2016

First Year		Second Year	Second or Third Year	
Fall Term	Spring Term	212 Constitutional Law	A. 224 Professional Responsibility	
111 Contracts I	121 Contracts II	221 Evidence	+	
112 Torts I	122 Torts II		B. Two Courses in both the Statutory Menu and Practice Foundation Menu:	
113 Legal Methods I	123 Legal Methods II	**A student is required to complete Evidence & Constitutional Law by the end of spring of his/her second year. If a student takes either or both courses in the summer term between the first and second year, this requirement will be satisfied.*	Statutory Menu	Practice Foundation Menu
114 Civil Procedure I	124 Civil Procedure II		334 Corporate Tax	311 Administrative Law
115 Property I	125 Property II		214 Income Taxation	211 Business Organizations
	126 Criminal Law		359 Sales	223 Criminal Procedure
			222 Secured Transactions	213 Decedents' Estates
				331 Family Law
				324 Conflict of Laws
				368 Remedies

b. Required Courses and Course Sequencing for Part-Time Students

A student enrolled in the part-time program is required to complete the following courses in the indicated sequence unless an exception is granted by the Dean of the Dean's designee.

16.1.b.i. A PART-TIME student who matriculates **before** January 1, 2015

First Year		Second Year		Third and Fourth Year	
Fall Term	Spring Term	Fall Term	Spring Term	A.224 Professional Responsibility	
112 Torts I	122 Torts II	115 Property I	125 Property II	+	
113 Legal Methods I	123 Legal Methods II	126 Criminal Law	212 Constitutional Law	B. Two Courses in both the Statutory Menu and Practice Foundation Menu:	
114 Civil Procedure I	124 Civil Procedure II	221 Evidence/ Elective	221 Evidence/ Elective		
	121 Contracts			Statutory Menu	Practice Foundation Menu
		**A student is required to complete the above courses by the end of spring of his/her second year. If a student takes one of these courses in the summer term between the first and second year, this requirement will be satisfied, and an Elective may be taken in its place.*		323 Commercial Paper	311 Administrative Law
				334 Corporate Tax	211 Business Organizations
				214 Income Taxation	223 Criminal Procedure
				359 Sales	213 Decedents' Estates
				222 Secured Transactions	331 Family Law
				Note: Any student may opt in to the course menu requirements effective August 1, 2016.	

16.1.b.ii. A PART-TIME student who matriculates **after** January 1, 2015 but **before** August 1, 2016

First Year		**Second Year**		**Third and Fourth Year**
Fall Term	Spring Term	Fall Term	Spring Term	A. 224 Professional Responsibility + B. Two Courses in both the Statutory Menu and Practice Foundation Menu:
112 Torts I	122 Torts II	111 Contracts I	121 Contracts II	
113 Legal Methods I	123 Legal Methods II	115 Property I	125 Property II	
114 Civil Procedure I	124 Civil Procedure II	212 Constitutional Law/ 221 Evidence	212 Constitutional Law/ 221 Evidence	
	126 Criminal Law			

**A student is required to complete the above courses by the end of spring of his/her second year. If a student takes one of these courses in the summer term between the first and second year, this requirement will be satisfied, and an Elective may be taken in its place.*

Statutory Menu	Practice Foundation Menu
323 Commercial Paper	311 Administrative Law
334 Corporate Tax	211 Business Organizations
214 Income Taxation	223 Criminal Procedure
359 Sales	213 Decedents' Estates
222 Secured Transactions	331 Family Law

Note: Any student may opt in to the course menu requirements effective August 1, 2016.

16.1.b.iii. A PART-TIME student who matriculates **after** August 1, 2016

First Year		**Second Year**		**Third and Fourth Year**
Fall Term	Spring Term	Fall Term	Spring Term	A. 224 Professional Responsibility
112 Torts I	122 Torts II	115 Property I	121 Contracts II	+
113 Legal Methods I	123 Legal Methods II	111 Contracts I	125 Property II	B. Two Courses in both the Statutory Menu and Practice Foundation Menu:
114 Civil Procedure I	124 Civil Procedure II	212 Constitutional Law/221 Evidence	212 Constitutional Law/221 Evidence	
	126 Criminal Law			

**A student is required to complete the above courses by the end of spring of his/her second year. If a student takes one of these courses in the summer term between the first and second year, this requirement will be satisfied, and an Elective may be taken in its place.*

Statutory Menu	Practice Foundation Menu
334 Corporate Tax	311 Administrative Law
214 Income Taxation	211 Business Organizations
359 Sales	223 Criminal Procedure
222 Secured Transactions	213 Decedents' Estates
	331 Family Law
	324 Conflict of Laws
	368 Remedies

c. Other Required Courses for Full-Time and Part-Time Students

In addition to the above listed courses, a student is required to satisfy both the advanced writing and the skills requirements.

1. Advanced Writing
A student is required to enroll in a two (2) or three (3) hour advanced writing course. The advanced writing requirement is be met by earning a C or better in an advanced writing course. (See Section 12.5.) See the Course Catalog for a list of courses that satisfy the advanced writing requirement. (See Section 12.5.) A student is required to complete the first-year full-time curriculum prior to enrollment in an advanced writing course, unless a waiver is granted by the Academic Affairs Committee.

2. Experiential Learning
A student is required to satisfactorily complete one or more experiential course(s) totaling at least six (6) credit hours, including a minimum of one clinic course or externship. The courses that qualify as experiential courses are designated in the online Course Catalog. For purposes of the Experiential Learning Requirement, satisfactory completion means earning a grade of C or better in the course for courses graded on a letter grade basis, and earning a grade of Satisfactory or better in the course for courses graded on an Excellent/Satisfactory/Unsatisfactory basis. A student is required to complete 28 credit hours before taking an externship, which is one type of course that qualifies as an experiential course for the Experiential Learning Requirement. See the Course Catalog for a list of courses that satisfy the experiential requirement.

d. Limitations on Courses for Credit toward Graduation

1. Not more than a total of twelve (12) credit hours may be utilized toward satisfying graduation requirements by satisfactorily completing the following courses:

   (a) Any externship,
   (b) Law Review and Law Review Board,
   (c) Moot Court (including Moot Court Board, Moot Court Executive Board, and inter-school or intra-school competition credit),
   (d) Independent Research, and
   (e) Advanced Clinic.

2. To satisfy graduation requirements, a student is permitted a total of three (3) externships, two (2) clinic courses, or a combination of (1) clinic and (2) two externship courses. Absent permission from the Associate Dean of Academic Affairs, a student may not repeat a clinic or externship, may not enroll in both a clinic and externship in the same semester or summer session, and may not enroll in more than one clinic or more than one externship in any semester or summer session. For enrollment purposes in these limited enrollment courses, a student who has taken one clinic will not receive priority for a second clinic, and a student who has taken one externship will not receive priority for a second externship.

16.2 Waiver of Course Requirement

For good cause shown and to avoid hardship, waiver of completion of any required course may be permitted only with the approval of the Academic Affairs Committee and on conditions set by the Committee.

16.3 Twenty-four Month Requirement

A student may complete the law school's degree requirements no earlier than 24 months after a student has commenced law study at the law school or a law school from which the school has accepted transfer credit.

16.4 Six-Year Requirement

A student must complete all of such student's graduation requirements within six (6) calendar years from the date of the student's initial enrollment in law school or forfeit all hours earned during this period. The student will, however, be allowed to reapply for admission as an entering student and compete with other applicants for a position in the entering class, with no credit allowed for prior work. The Academic Affairs Committee may make an exception to the foregoing rule if the student submits a proposed course of study for approval, but in no event may a student extend study so that the J.D. degree is not completed within 84 months of the time the student commenced law study.

16.5 Work at Other Schools

Any work to be taken at another law school on a transient basis must be approved by the Dean prior to the student's attendance at such other law school. Once approved, a student may not utilize more than 30 semester hours toward the student's degree at this law school, unless an exception is granted by the Academic Affairs Committee.

16.6 Grade Requirement

A student must have a grade point average of 2.00 or better in all work undertaken at the University of Memphis to graduate.

16.7 Completion of Work

All required courses must be completed. Completion of a course consists of sufficient attendance in class, performance of all required work, the taking of all examinations, making a passing grade (D or above or, in the case of non-graded course, a grade of E or S), with the exception of the research requirement which requires a grade of C or above. (See Section 12.5.) Failure to complete work in any course as it is required, or to take an examination when required, will result in a grade of F in the course. Delay in completing the work in a course may be permitted, as outlined under Delay in Completing Required Work. (See Section 10.)

16.8 Pro Bono Requirement

A student must complete forty hours of pro bono service to graduate. Please see the Pro Bono Program Handbook for more information.

17. TRANSFERRED CREDIT

Credit for law school work competed at law schools other than at The University of Memphis Cecil C. Humphreys School of Law will be credited toward fulfilling graduation requirements only after individual consideration by the Dean. No credit, however, will be given for work completed in a United States Law School which is not ABA approved. Advanced standing will be granted only for work done after the student has completed a Baccalaureate degree.

To be eligible for transfer, credit earned in each course considered for transfer credit must be at least equal to the overall grade point average required for graduation at the University of Memphis, Cecil C. Humphreys School of Law.

18. AUDITING (NON-LAW STUDENTS); TRANSIENT STUDENTS

18.1 Auditing Courses

Subject to limited exceptions, all students enrolled in any course must be a J.D. degree candidate at this law school or have been admitted to the School of Law as a transient student. Exceptions

are made for practicing attorneys, members of the faculty of the University, graduates of the University, students pursuing a graduate degree program of the University, and students pursuing graduate degree programs at other accredited universities or colleges. These individuals should contact the office of the Dean for additional information.

18.2 Transient Students

A transient student is a student currently in good standing at another ABA accredited law school and enrolled in this law school for the purpose of transferring the credits earned to the law school in which the student is enrolled as a degree candidate.

18.3 Foreign Lawyers

At the discretion of the Dean or the Dean's designee, a person who has graduated from a foreign law school (or equivalent institution) and has demonstrated proficiency in the English language, which may include objective assessment through a standardized test, may enroll in up to twenty-four(24) credits in courses offered in the first year of law school.

19. REQUIREMENTS FOR STUDENT RESEARCH PAPERS OTHER THAN THOSE REQUIRED IN SEMINARS

Requirements for student research papers other than those required in seminars are available from the Law School Registrar. Students must secure permission from the supervising faculty member prior to enrolling in Research I. No more than one hour credit may be obtained in this way. (See Section 16.I.d.)

20. STUDENT RECORDS AND FILES: GRADE INFORMATION

20.1 Confidentiality of Student Records

In compliance with provisions of the "Family Educational Rights and Privacy Act of 1974," the School of Law abides by the rules and regulations of the University pertaining to the confidentiality of student records, the release of that information, and the rights of students and others to have access to such records as set forth in the University Student Handbook, University Bulletins and Schedules of Classes. Copies of these publications are available at the office of the Dean.

20.2 Grade Information

Individual grades will not be divulged over the telephone. Grades for seminar papers are accepted and may be furnished to students individually by the faculty member or the office of the Dean. All grades will be posted by the office of the Dean when received by that office from the instructor, but no earlier than three (3) weeks after the end of the examination period. Thereafter, grades will be posted as received. (See 20.3 for students' rights to not to have their grades posted.) Except for circumstances beyond the control of a faculty member, all grades should be reported by the faculty within three (3) weeks of the end of any examination period. Individual grade reports will be mailed by the University Registrar to each student.

20.3 Non-Posting of Grades Upon Request

Pursuant to the Family Educational Rights and Privacy Act of 1974, students may request that their grades not be posted in any manner. Students so requesting will receive their grades individually from the office of the Dean.

21. HONOR CODE

21.1 Definitions

a. "Accused" refers to a student accused of a violation of the Honor Code.

b. "Appellate Board" refers to the three-person appellate board consisting of the Dean, the Associate Dean for Academic Affairs, and one member of the full-time faculty. The Dean shall select the faculty member on the Appellate Board.

c. "Associate Chief Justice" refers to the Student Justice who shall act as the Chief Justice if the Chief Justice is unable to preside over any meeting, hearing, or function involving the Honor Council.

d. "Chief Justice" refers to the Student Justice who shall act as the head and the voice of the Honor Council and is vested with the authority to run the Council and hearing processes.

e. "Class" and "Course" refer to any academic enterprise that awards credit toward a degree or any law school-sanctioned, co-curricular activity including but not limited to Moot Court and Law Review.

f. For the purpose of determining deadlines, "day" means any regular business day of the School of Law, and does not include weekends, holidays observed by the School of Law, or any day on which the School of Law is not open to conduct regular business.

g. "Dean" refers to the Dean of the Cecil C. Humphreys School of Law at the University of Memphis, or that person's designee.

h. "Elections" are the mechanism by which the student body will elect student justices.

i. "Honor Council" refers to the group of Student Justices that has plenary authority to review alleged violations under the Honor Code and to impose those sanctions it deems appropriate. The Honor Council consists of eleven members: five from the 2L class, and six from the 3L class.

j. "Investigators" refer to the two Honor Council members, appointed by the Chief Justice on a case-by-case basis, who will serve as fact gatherers for the preliminary hearings, and who will also serve as presenters of information in all preliminary and main hearings. The Investigators will not have a vote on matters to which they are appointed.

k. “Notice” means written notice and includes e-mail messages.

l. “Secretary” refers to the Student Justice who is responsible for keeping an adequate record of proceedings, as set forth herein.

m. “Student Counsel” refers to a current member of the student body requested by the Accused to be his or her counsel. The Student Counsel may act on behalf of the Accused in an Honor Council hearing. The Student Counsel shall keep confidential any information learned in the course of his or her representation. Current Honor Council members may not serve as Student Counsel.

n. “Student Justice” refers to an individual member of the Honor Council. Any student who has been convicted of a violation of the Honor Code may not serve as a Student Justice.

o. “Writing” includes a letter, memorandum, or e-mail message sent to a student’s School of Law e-mail account.

21.2 Scope

a. This Code applies to all students admitted to the School of Law. The Code covers conduct that occurs from the time a law student applies for admission through graduation and that occurs:

1. at the University of Memphis Cecil C. Humphreys School of Law;

2. at an off-site event sponsored by the University of Memphis Cecil C. Humphreys School of Law; or

3. in connection with a Course.

b. The Code also applies to students enrolled in courses or programs sponsored or co-sponsored by the School of Law. The Code covers conduct that occurs from the time the student is admitted to the course or program and that occurs under the scope of (b)(1)(A-C) of this Code.

c. Investigations may be initiated or continued after a student has graduated, but no later than the time that student is admitted to a state bar. If an Honor Code matter is pending when a student is scheduled to graduate, the student’s degree may be withheld at least until the matter is resolved, or for 90 days, whichever is less.

21.3 Oath

A degree-seeking student who registers at the School of Law will take the following oath before beginning classes:

"I [state name], as a student at The Cecil C. Humphreys School of Law at The University of Memphis, understand that I am joining an academic community and am embarking on a professional career. The law school community and the legal profession share important values that are reflected in the Cecil C. Humphreys School of Law Academic Honor Code and in its Code of Conduct. I have read this Code, and will conduct my academic, professional, and personal life to honor the values reflected therein."

Each student shall sign a statement attesting that the student has read and understands the provisions of the Honor Code.

21.4 Types of Dishonesty and Misconduct

An act of dishonesty is a wrongful or improper act that questions a student's academic honesty or integrity; an act of misconduct is a wrongful, improper or prohibited act. The Honor Council has the authority to investigate either an act of dishonesty or an act of misconduct. Acts of dishonesty and misconduct include but are not limited to the following:

a. Cheating. Using or attempting to use unauthorized materials or sources in connection with any assignment, examination, or other academic exercise, or having someone else do work for the student when forbidden by the professor.

b. Unauthorized assistance or collaboration. Giving or receiving aid on an assignment, examination, or other academic exercise when not permitted by the professor.

c. Plagiarism and inappropriate use of others' work. Using the words, thoughts, or ideas of another without attribution so that they seem as if they are the student's own.

1. Plagiarism includes, but is not limited to, copying another's work word-for-word, turning in a paper written by another, rewriting another's work with only minor changes, and summarizing another's work or taking another person's ideas without acknowledging the source through proper attribution and citation.

2. An accidental omission of a citation(s) will not be considered an act of academic misconduct, unless other facts determine otherwise.

3. The faculty member responsible for grading the academic work in question has plenary authority either to make a referral of plagiarism to the Honor Council, if that faculty member is unclear if there is a violation, or to reduce the student's grade based on the academic merits of the academic work. The faculty member may not make a determination of a violation, because that is within the sole authority of the Honor Council.

d. Misappropriation of and damage to academic and personal materials. Damaging, misappropriating, or disabling academic resources so that others cannot use them is considered misconduct. This includes but is not limited to removing pages from books,

stealing books or articles, hiding or misplacing books or articles intentionally, deleting or damaging computer files intended for others' use, or the taking of any personal property on school grounds.

e. Compromising examination security. Invading the security maintained for preparing or storing examinations, tampering with exam-making or exam-taking software, or discussing any part of a test or examination with a student who has not yet taken that examination but is scheduled to do so.

f. Deception and misrepresentation. Lying about or misrepresenting a student's own work, academic records, credentials, or other academic matters or information. Examples of deception and misrepresentation include but are not limited to: forging signatures, signing another student's name or initials on a roll sheet, forging letters of recommendation, falsifying internship, externship, or clinic documentation, falsifying pro bono records, or falsifying information in an application or on a résumé.

g. Electronic dishonesty. Using network or computer access in a way that inappropriately affects a class or other students' academic work. Non-exhaustive examples of electronic dishonesty include tampering with another student's account so that the student cannot complete or submit an assignment, stealing a student's work through electronic means, or knowingly spreading a computer virus.

h. Facilitating academic dishonesty. Aiding someone else to commit an act of academic dishonesty. This includes but is not limited to giving someone work product to copy or allowing someone to cheat from a student's own examination or assignment.

i. Writing past the end of an examination. Continuing to respond to a test or examination question when the time allotted has elapsed.

j. Failing to disclose admonitory incidents. A matriculated student, a student who is accepted to law school but has not yet enrolled, and a student enrolled in law school must report all admonitory incidents as described in the student's law school application to the Associate Dean for Academic Affairs. The student must provide all corroborating documentation. For criminal incidents, the student must provide all corroborating documentation, including but not limited to, the criminal charge, an arrest record, and the final disposition record. A student who fails to disclose an admonitory action as described in the law school application is in violation of this Code.

k. Failing to amend admissions application. A student has a continuing responsibility to ensure the completeness and correctness of his or her admissions application to the School of Law by disclosing to the Associate Dean for Academic Affairs any factual irregularities or discrepancies in the application.

A student or graduate violates this Code when he or she supplies false information on the Admissions Application or the LSAT application, or submits forged or altered documents in aid of admission, or submits as his/her LSAT score the score of another

person.

A student who fails to disclose an admonitory action as described in the law school application or who provides false or misleading information on the law school application is in violation of this Code. The disclosure must include a statement of the reasons for failing to report the information or for providing misleading information on the application. The student must provide all corroborating documentation. For criminal incidents, corroborating documentation includes, but is not limited to, the criminal charge, an arrest record, and the final disposition record.

l. Knowingly referring false allegation(s). It is a violation of this Code to knowingly make a false allegation or referral pursuant to this Code or to assist another in doing so.

m. Duty to Report. A student shall report any act or conduct raising a reasonable belief that a violation of the honor code has occurred. A student who fails to meet the duty to report is in violation of the honor code except that a student does not abridge the duty to report when, based upon a good faith belief that a violation has been reported or that the conduct in question is not a violation of the honor code, he or she fails to report a violation of the honor code.

For the purposes of this provision, actual knowledge of a violation is not required to form a reasonable belief that a violation has occurred. A reasonable belief exists when there is a reasonable basis for the belief, based upon personal observation or the report of others that a violation of the honor code has occurred.

n. Illegal activity on school grounds or at school-sponsored events. A student who is accused of, charged with, or arrested while on School of Law grounds or at a School of Law sponsored event will be investigated by the Honor Council and subject to sanctions under this Code.

21.5 Sanctions

a. Types of sanctions: This Code does not require any particular sanction or range of sanctions. The appropriate sanction(s) in a particular case will depend on the circumstances as determined by the Honor Council. Multiple sanctions may be imposed in connection with any violation. Below is a non-exhaustive list of sanctions that may be imposed under this Code, upon recommendation of the Honor Council with approval by the Dean.

1. Written warning;
2. Community or law school service;
3. Counseling or referral to a student support service;
4. Letter of apology or explanation of conduct;

5. Academic penalty, such as a research paper, a lower or failing grade, or no credit for an assignment or course; this penalty may be imposed only by the Honor Council after the Chief Justice consults with and receives the recommendation of the course professor;

6. Exclusion or suspension from one or more activities, events, functions, benefits, or privileges of the School of Law;

7. Disciplinary probation for a set period of time, determined by the Honor Council, during which the student must fulfill any requirements imposed by the Honor Council due to a violation; if the student fails to fulfill the conditions during the disciplinary probation period, the Honor Council may determine that the student has violated the probation and may impose new or additional sanctions; the Honor Council must give the student notice and a reasonable opportunity to respond before making such a determination;

8. Suspension from the School of Law;

9. Expulsion from the School of Law;

10. Revocation of admission from the School of Law;

11. Denial of a dean’s certificate (diploma);

12. Suspension or revocation of a degree, certification, or other award conferred by the School of Law; or

13. Any combination thereof.

b. Effective date of sanctions: All sanctions are effective immediately, unless stayed by the Chief Justice or Dean. The Accused may request that the Chief Justice stay the sanction during the review process.

1. The Chief Justice will stay the sanction at the request of the Accused if the matter has been appealed by the Accused or accepted for review by the Appellate Board.

2. The sanction will take immediate effect once the Appellate Board denies the appeal or otherwise renders a final judgment upon review.

c. Mitigating and aggravating factors: In determining the sanction, the Honor Council may consider mitigating and aggravating factors. A non-exhaustive list of factors that may be considered include the following:

1. Pre-referral admission,

2. Other admissions,

3. Cooperation,

4. Intent,

5. Degree of harm or seriousness of offense,

6. Prior violations,

7. Nexus to professional standards,

8. Willingness to make restitution.

d. Authority of faculty: This Code does not diminish or modify a faculty member's authority to assess students or to formulate grades in the normal course of teaching for academic reasons unrelated to an Honor Code violation. If a faculty member wishes to reduce or modify a grade as a penalty for an instance of dishonesty such as those covered by section (d) of this Code, the faculty member may do so by referring the matter to the Honor Council. If a faculty member chooses to refer a student to the Honor Council, the faculty member may not impose a grade penalty for an alleged Honor Code violation if the Honor Council finds the student not guilty of the relevant dishonesty. If the Honor Council finds that the student is guilty, the Honor Council shall consult with the faculty member regarding the nature of the grade penalty. Faculty members are encouraged to publish their policy on the Honor Code in the court syllabus.

21.6 <u>Procedures</u>

a. Referrals

1. Method of Referral: A student shall refer a violation of this Code to any student member of the Honor Council, to the Associate Dean for Academic Affairs, or to a faculty member. Referrals may be made in person or through any method approved by the Honor Council, but are not required to be in writing. Referrals may not be made anonymously. However, the identity of a referring student will remain confidential unless the referring student waives his or her right to confidentiality. Further, a student referring a matter may be required to repeat information he or she provides to other Honor Council members or at a hearing.

2. Sua Sponte Referrals: If the Honor Council becomes aware of information that suggests that a student subject to this Code may have violated a provision of the Code, the Honor Council may treat this information as a referral for purposes of this Code.

b. Investigation and decision

1. After receiving a referral, the Chief Justice will appoint Investigators and instruct the Investigators to gather the relevant facts.

2. The Investigators:

   i. shall determine whether the referral primarily reflects academic or nonacademic misconduct;

   ii. shall make a preliminary determination as to whether the referral reflects conduct that falls within the scope of this Honor Code by an individual subject to this Honor Code;

   iii. may interview the person making the referral and other persons with information, and may seek additional information regarding the referral and shall instruct all interviewees of the confidential nature of the investigation;

   iv. shall meet with the Accused;

   v. may consider any probative information, including hearsay and other evidence not normally allowed in an Article III setting, taking into consideration the credibility of such information when reaching a decision;

   vi. shall present to the Chief Justice, Associate Chief Justice, and the Secretary all findings so that the three have sufficient information upon which to determine that a sufficient basis exists to believe that the Honor Code has been violated;

3. At the meeting with the Investigator, the Accused will be provided with:

   i. an explanation of any Honor Code section at issue and the nature of the conduct that is the basis for invoking that Code section(s);

   ii. all information gathered during the investigation;

   iii. a reasonable opportunity to respond; and

   iv. an explanation of the applicable disciplinary procedures.

4. The referral will be considered an allegation under this Code only after the Chief Justice, Associate Chief Justice, and the Secretary determine, by a majority vote, that a sufficient basis exists to believe that the Accused violated the Honor Code. A sufficient basis will exist if the referral relates to an allegation of fact, which, if

true, would constitute a violation of the Honor Code. The Chief Justice, Associate Chief Justice, and the Secretary may consider any probative information, including hearsay and other evidence not normally allowed in an Article III setting, taking into consideration the credibility of such information when reaching a decision. If no substantive basis exists, the referral will be dismissed.

5. If the Chief Justice, Associate Chief Justice, and the Secretary decide that there is sufficient basis upon which to proceed with an allegation, the Chief Justice will have the Investigators present their findings to three non-officers of the Honor Council. These non-officers will make a probable cause determination, and will decide, by a majority vote, whether to dismiss the claim(s) or proceed to a hearing.

6. A student who fails to attend a scheduled meeting with the Investigator or Honor Council risks a decision being rendered in absentia, for a negative inference will be drawn, unless excused by the Investigator(s) or Chief Justice.

c. Hearing Process

1. Upon determination that a hearing is necessary, the Accused will be notified in writing and in person by the Chief Justice that a referral to the Honor Council has been deemed sufficient, based on probable cause, to warrant a hearing, and the Accused will be informed of the dates and procedures for such a hearing. The hearing will take place within a reasonable amount of time from the time of notification.

2. After carefully considering the information gathered, the Investigators will present their findings to the Honor Council.

3. The names of any witnesses expected to appear at the hearing, as well as any relevant facts, will be provided to the accused at a reasonable time before the hearing so that the accused may present a comprehensive defense to the allegations.

4. In addition to the Honor Council, the following individuals shall be present at the hearing:

    i. The Investigators,

    ii. The Accused and his or her Student Counsel.

5. Witnesses will be permitted at the hearing to give testimony at the request of either the Investigator(s) or the Accused, and the Chief Justice may allow said witnesses to remain at the hearing upon his or her discretion.

6. The Honor Council shall conduct the hearing in the following manner:

i. The process must include, but is not limited to, examination of the Accused, if the Accused chooses to testify, and any other substantiating witness(es);

ii. A substantiating witness does not necessarily have to be the initial referring student;

iii. The Accused or his or her Student Counsel will have the right to cross-examine any witness(es) during a hearing after the Investigator's direct examination. The Investigators will also have the right to cross-examine any witness(es) the Accused or Student Counsel puts forth. The Investigators and Accused or Student Counsel will have the opportunity to redirect a witness upon request which may be granted by the Chief Justice;

iv. All questioning, cross-examination, and redirection will be strictly limited to the scope of the hearing regarding an Honor Code violation. The Chief Justice will have the plenary discretion to determine if a question is within the scope of the hearing.

v. The Investigators and the Accused may put forth any probative information, including hearsay and other evidence not normally allowed in an Article III setting, but the Honor Council may take into consideration the credibility of such information when reaching a decision.

7. After all the facts have been considered and the Accused has been given a sufficient opportunity to respond, the Honor Council shall decide, by a majority vote of those present and voting, whether a violation of the Honor Code has been established by clear and convincing evidence. If a Student Justice is unable to vote impartially based on any bias at any point before, during, or after the hearing has commenced, he or she may be excused from the hearing, which includes relinquishment of voting responsibilities. In the event of an even number of justices at the end of a hearing, the Chief Justice will not cast a vote. If the Honor Council decides that a violation of the Honor Code has been established by clear and convincing evidence, the Honor Council must determine the appropriate sanction by a majority vote. At all times, the sanction(s) imposed by the Honor Council shall be reasonably warranted by the facts and subject to approval by the Dean.

8. The Decision of the Honor Council is final, pending approval by the Dean, and pending a request for review by the Accused.

9. The Chief Justice will notify the Dean of the Honor Council's decision at the conclusion of the hearing so that the Dean may approve or reject the Honor

Council's decision.

10. Within five days of receiving approval from the Dean, the Honor Council will provide the Accused with written notice of its decision. Such notice must describe the alleged violation, the determination of the Honor Council regarding whether a violation occurred, and, if so, the sanction(s) imposed.

d. Review

1. An Accused who has been sanctioned for a violation of the Honor Code by the Honor Council may petition for review by the Appellate Board.

2. The request for review must be in writing and must be delivered to the Chief Justice within five days of the Honor Council issuing its decision. The Chief justice must deliver the request for review to the Appellate Board, and the Chief Justice, in his or her discretion, may grant an extension of time to the Accused for the filing of request for review.

3. After receiving the request for review, the Honor Council will compile the referring document, if any, any written response from the Accused, all relevant materials submitted to the Honor Council, and the Honor Council's decision. The request for review and accompanying documents shall be submitted to the Appellate Board in a timely manner.

4. The Appellate Board shall review any and all information submitted by the Honor Council. The Appellate Board will review the record de novo and may review determinations of fact made by the Honor Council, but that review is limited to the record. The Appellate Board may affirm, modify, remand, or overturn the decision of the Honor Council, but the Appellate Board cannot overturn an acquittal.

21.7 <u>Elections</u>

a. The ballot for elections to the Honor Council will be determined by anonymous nominations from the student body, submitted to the Dean or assignee.

   1. Once the nomination process is complete, the Dean shall email each nominee and explain that he will apply the standard in part (a)(2) and allow the nominee to withdraw, submit a brief statement in support of his or her nomination, or do nothing.

   2. The Dean shall review the nomination list and may remove nominees from the list if the Dean or designee determines that a nominee is ineligible based on past admonitions in the student's admissions record pertaining to illegal or unethical conduct, a precarious academic status, or other competent information.

3. After nominees have been notified and accepted their nominations, a final list of nominees will be put on a ballot. Elections will be held at the end of the semester, coinciding with SBA elections.

b. Each student casting a vote for his or her respective class will indicate, on the ballot, which nominees he or she selects based on the number of available positions for that class.

c. If, at any time, a Student Justice is unable to be a member of the Honor Council due to death, transfer, Honor Code violation, or the like, the position will be vacant until the next election, except under exceptional circumstances as determined by the Chief Justice.

d. The SBA will be responsible for administering the election and will have authority to promulgate reasonable rules governing it.

1. A student in the 2L class will cast five votes, and a student in the 3L class will cast three votes.

2. The five nominees from the 2L class who receive the most votes will be seated.

i. The three nominees from the 2L class who receive the most votes will be seated for a two-year term on the Honor Council.

ii. The remaining two nominees will serve a one-year term on the Honor Council.

iii. The nominee who receives the most votes from the 2L class will serve as Secretary in his or her first year and Chief Justice in his or her second year on the Honor Council.

iv. The nominee who receives the second most votes will serve as Associate Chief Justice in his or her second year on the Honor Council.

v. The nominee who receives the third most votes will serve Student Justice in his or her third year on the Honor Council.

3. The three nominees from the 3L class who receive the most votes will be seated.

4. A student is only permitted to vote for nominees in his or her class.

21.8 <u>Reporting and Record-keeping</u>

a. The Honor Council's written decision and all other documentation will be placed in the student's file in the Registrar's Office.

b. A finding that the Accused has violated the Honor Code will be reported by the Dean to any board of bar examiners or similar organization for any bar to which the Accused applies. Students should be aware that most bar applications will require the student to report any sanctions imposed on the student by an educational institution, regardless of whether the sanctions were for conduct suggesting unfitness for the practice of law. Students also should be aware that the School of Law routinely responds to inquiries regarding student character and fitness from boards of bar examiners and similar organizations.

c. Approximately two weeks before the last day of classes, the Honor Council must provide a report to the faculty and the SBA providing the following information:

   1. For referrals, the number of referrals considered by the Honor Council's Investigators, the Honor Code provisions implicated by the referrals, and the number of referrals dismissed without further proceedings;

   2. For allegations submitted to probable cause hearings, the number of allegations submitted to probable cause hearings, the Honor Code provisions implicated by those allegations, and the number of allegations dismissed without further proceedings;

   3. For each allegation submitted to a final hearing, state the Honor Code provisions implicated by the allegation, the determination regarding whether a violation occurred as to each implicated Honor Code provision, and the sanction(s) imposed, if any. Additionally, for each allegation submitted to a final hearing, the report shall indicate the status of the decision in terms of review by the Appellate Board (e.g., "The time for review has expired without a request for review."). If a decision was reviewed by the Appellate Board, the report should state the outcome of the review or indicate that the review is pending.

21.9 <u>Confidentiality</u>

a. The School of Law considers referrals and hearings under the Honor Code to be confidential. All participants should respect the confidentiality of this information and disclose it only to those who have authority to know.

b. A violation of the confidentiality of any proceeding, other than by the Accused or with the express consent of the Accused, will be considered an Honor Code violation.

21.10 <u>Honor Code Advisory Committee</u>

a. The Dean, on a periodic basis, may appoint a committee to review all decisions rendered

for the purposes of amending these procedures under the Honor Code since the last review.

b. The committee will be determined by appointment by the Dean from the full-time faculty members, but also may include students, staff, alumni, attorneys, national experts, and others the Dean considers appropriate.

c. Information provided to the committee should not contain names of any persons involved with the matter.

d. The committee should prepare a written report that privately advises the Dean about whether, overall, the sanctions issued under the Code were appropriate. No individual result can be changed as a result of this review and report.

e. The committee also may make recommendations to the Dean about possible amendments to the Honor Code. These recommendations will be published to the faculty and the Honor Council.

21.11 Amendments

Amendments to the Honor Code may be proposed by any member of the faculty, by the Honor Council through a majority vote, or member of the student body accompanied by a written petition with twenty-five signatures supporting the amendment, and the amendment must be approved by a majority of the full-time voting faculty, only after consulting with the Honor Council.

a. Any amendment must be published on the announcement bulletin board and emailed to every member of the law school.

b. Any amendments to the Honor Code are not effective until the next full academic semester following the vote to amend the Code.

22. STUDENT GRADE APPEAL PROCEDURE

22.1 Grades

a. It will be the obligation of the student to arrange a conference with the faculty member involved in sufficient time to meet the time limit set out in 22.1c, below.

b. It will be the obligation of the faculty member to meet with the student to discuss the complaint and try in good faith to reconcile the differences.

c. If the faculty member and the student are unable to resolve the complaint, the student may file a written complaint in duplicate with the Dean of the Law School not more than sixty (60) days after the last examination was given in the term in which the complaint relates, or fifteen (15) days after the grade is posted, whichever is later. The complaint

will specifically allege the grounds on which the complaint is based and the cause for action by the committee. The grounds will be supported by a narrative statement of fact.

d. If the faculty member is not available for conference with the student, after the student has made a good faith effort to initiate such conference, the student may omit the procedure in 22.1c. However, in no event will this paragraph become operative until fifty-five (55) days have elapsed since the last examination was given in the term to which the complaint relates.

e. Upon receipt of the WRITTEN COMPLAINT (in compliance with the provisions of paragraph 22.1c) the Dean will attempt to resolve the complaint by consultations with the student and the faculty member. If the complaint is not resolved within fifteen (15) days after the written complaint is filed or if the complaint is resolved adversely to the student, the student may appeal to the Academic Affairs Committee, sitting as the Grade Appeals Committee by requesting that the Dean forward the complaint together with all documents considered in any prior proceedings. Provided, however, that all appeals must be made no later than twenty (20) days after the written complaint is filed with the Dean of the Law School, or five (5) days after the conference with the Dean, whichever is later. The Committee upon receipt of the complaint from the Dean will determine whether or not a prima facie case has been alleged and whether the matter should be heard. Failure to allege a cause of action will result in a dismissal of the petition forthwith.

f. It shall be the obligation of the student to present evidence and a prima facie case as set out below.

g. The Committee shall hear such evidence as is relevant that the faculty member used factors extraneous to academic performance to determine, at least in part, the student's grade. The grading factors listed in 12.5 shall not be deemed to be factors extraneous to academic performance on the grounds that adequate notice of the instructor's use of such factors was not given.

h. The faculty member at whom the appeal is directed may be present if the complaint specifically alleges prejudice, bias or discrimination because of race, color, religion, national origin, age, handicap or disability, sexual orientation or gender. The faculty member will not have the right to attend other hearings in which the student presents his/her evidence set out in 22.1g above, although the Committee in its discretion may request or allow him/her to attend. In the event that the faculty member is permitted to attend under any circumstances he/she may do so without comment or examination of any parties to the hearing. The faculty member may not under any circumstances participate or sit in on any deliberation or voting. The Committee upon request will provide the faculty member with a copy of all written statements or documents utilized by the student in making his/her prima facie case. Neither the faculty member nor the student may be represented by counsel or next friend.

i. After the presentment of the student's evidence the Committee will determine whether the student has presented a prima facie case.

j. If the Committee determines that a prima facie case has not been made, the appeal will be dismissed by the Committee. The Committee will notify the Dean of the Committee's decision and the Dean will then notify the student.

k. If the Committee determines that a prima facie case has been made, it will then determine whether bias, prejudice or other factors extraneous to academic performance did in fact adversely affect the student's grade.

l. In making the determination in 22.1k, above, the Committee shall with the faculty member present, if he/she desires to be, review the written work submitted by the student in the course and review the method by which the final grade was determined.

m. In connection with the review in 22.1, above, the Committee may request a written statement from the faculty member containing any outline of his/her answers to any examination questions and a statement of how the grade was determined.

n. In connection with the review in 22.1, above, the Committee may, in its discretion, request written work turned in by other students to be used for comparison purposes. The material and information requested in 22.1, m. and n above will be used only to determine whether factors extraneous to academic performance were used in determining the grade. No evaluation for rank, policy, or substantive determinations will be considered.

o. Should any member of the Committee (a) be unavailable, or (b) excuse himself/herself because of a conflict of interest, the Dean will appoint a substitute member to serve on the Committee for all matters involving the case in question.

p. Any determinations by the Committee as to the grade of the appealing student shall be final within the School of Law. The Dean, faculty member and student will be given notification of the decision of the Committee.

q. The Committee may request the assistance of other members of the law faculty in reviewing the written work submitted by the student and written work of other students used for comparison purposes. The request of assistance of other members of the law faculty will be for the purpose of determination of the use of factors extraneous to the course work in determining the student's grade.

23. STUDENT COMPLAINT PROCEDURE

The Cecil C. Humphreys School of Law at the University of Memphis is subject to the ABA Standards for Approval of Law schools. The Standards may be found at http://www.americanbar.org/groups/legal_education/resources/standards.html. Under ABA Standard 512(a), a law school “shall establish, publish, and comply with policies with respect to

addressing student complaints." Under ABA standard 512(c), a "complaint" is a communication in writing that seeks to bring to the attention of the law school a significant problem that directly implicates the school's program of legal education and its compliance with the Standards."

23.1 Procedures for Submitting a Complaint

To bring a complaint, a student at the Law School must take the following steps:

a. A student must hand deliver the complaint in writing to a member of the Student Complaint Review Committee ("Review Committee"). The Review Committee is composed of the Associate Dean for Academic Affairs, the Assistant Dean for Administration, and the Assistant Dean for Student Affairs.

b. The complaint must describe in detail the behavior, program, or process complained of, and demonstrate how it implicates the Law School's program of legal education and the school's compliance with a particular ABA Standard.

c. The complaint must provide the name of the student submitting the complaint, the student's University of Memphis email address, an address where the student receives U.S. mail, and a phone number where the student can be reached.

23.2 Procedures for Addressing a Complaint

a. Once a complaint is delivered, a member of the Review Committee will acknowledge the receipt of the complaint in writing to the mailing address provided in the complaint within seven business days.

b. A member of the Review Committee must either meet with the student to discuss the resolution of the complaint or mail a written response to the substance of the complaint to the mailing address provided in the complaint within thirty business days.

c. The written response must either state a decision regarding the substance of the complaint with an explanation for that decision, or explain steps that the Law School will take to resolve or further investigate the complaint.

d. Absent exceptional circumstances, the Review Committee shall endeavor to fully investigate and resolve all complaints within ninety business days from the date of the complaint.

23.3 Procedures for Appealing a Resolution

a. A student may appeal the Review Committee's resolution to the Dean.

b. The student must hand deliver the appeal to the Dean or Dean's designee in writing within seven business days of the date of resolution.

c. The appeal must describe in detail the grounds for appeal. The appeal may not include complaints not covered in the original complaint.

d. The Dean shall endeavor to respond to the appeal in writing to the mailing address provided in the complaint within thirty business days from the date the appeal was submitted.

e. The Dean's decision is final.

23.4 Maintenance of Records of Student Complaints

The Assistant Dean for Administration shall maintain a record of the student complaints, resolutions, and appeals for a period of eight years.

24. NOTIFICATIONS

Notifications to students concerning class assignments, attendance, and all other matters pertaining to the Law School and its activities may be given by faculty or the Law School administration as follows:

a. by posting in the mails for delivery by regular mail to the address of a student set forth in the records maintained by the Law School's Registrar; or

b. by posting on the bulletin boards on the second floor of the Law School; or

c. by delivery to a student=s mail folder at the Law School.

Any notification so given shall be deemed received by the student.

25. UNIVERSITY POLICIES & PROCEDURES AFFECTING STUDENTS

In addition to the Academic Regulations as set forth herein governing the rights and responsibilities of law students, the policies and procedures of the university as set forth in the most recent edition of the Student Handbook of The University of Memphis apply to law students. Such policies and procedures include, but are not limited to:

I. Privacy Rights of Parents & Students -- Notice to Students

II. Harassment Policy

III. Student Appeal Procedure for Discrimination

IV. Withdrawal or Temporary Suspension due to Severe Psychological Disturbance

V. Students with Disabilities

26. CONFORMITY WITH RULES AND REGULATIONS OF THE UNIVERSITY AND OTHER ENTITIES

These academic regulations shall be interpreted and construed in such a way as to be consistent with the rules and regulations of The University of Memphis, the Tennessee Board of Regents, the Supreme Court of Tennessee, the American Bar Association or other accrediting entity, and the laws of the State of Tennessee and of the United States.

27. SEVERABILITY OF PROVISIONS

If any provision in these Academic Regulations shall be held invalid or in contravention of the rules and regulations of the University, or of the laws of the State of Tennessee or the United States, then the remainder of these Academic Regulations shall not be affected thereby.

APPENDIX I

Standards for Attainment of the J.D. Degree

Attainment of the J.D. degree awarded by the Cecil C. Humphreys School of Law at the University of Memphis means that the student has, in the judgment of the faculty, acquired an acceptable level of mastery of essential skills that the faculty has determined to be prerequisite to entering the practice of law. The purpose of the curriculum of the School of Law is to enable students to acquire these skills. All candidates for the J.D. degree must be capable of acquiring, and ultimately demonstrating, mastery of these skills. The requisite level of mastery includes the ability to perform these skills under circumstances, including time constraints and other performance requirements that reflect the realities of the practice of law.

In acquiring these skills, it is essential that the candidate behave honestly, responsibly, fairly and professionally. It is also essential that the candidate regularly and punctually be prepared for and attend scheduled obligations and that the candidate meet deadlines.

To the extent that resources permit, the Law School curriculum is intended to enable students to acquire skills other than those essential skills listed below, but the curriculum, taken as a whole, is intended to insure that students master these essential skills:

1. Intellectual Skills:

    1. Knowledge. Ability to identify, define and describe a core body of American legal terminology and classifications, literature (i.e. sources of law), principles and concepts, and judicial and administrative systems.

    2. Comprehension. Ability to paraphrase, explain, compare, organize, and interpret legal knowledge.

    3. Application. Ability to apply legal knowledge in performing legal research and in **identifying legal issues in factual situations that differ from those in which the knowledge was first encountered.**

    4. Analysis. Ability to formulate legitimate arguments and responses for resolution of legal issues in new factual situations, and to support those arguments and responses, both directly and by analogy, with sources of law.

    5. Evaluation. Ability to evaluate and criticize the quality of legal analysis in terms of both reasoning and support in sources of law.

    6. Synthesis. Ability to apply skills of analysis and evaluation to a complex body of legal knowledge to create an organized and original intellectual product.

2. Communication Skills:

   1. Ability to acquire and preserve information from both oral and written sources.

   2. Ability to communicate effectively the candidate's knowledge, comprehension, application, analysis, evaluation, and synthesis skills.

   3. Ability to communicate effectively and responsively in a public forum.

FIRST YEAR LAW STUDENTS
FIRST DAY ASSIGNMENTS
FALL 2016

SECTION 11

Contracts **NEWMAN** **111-section 11**

- Download the reading-assignments list from the course TWEN site and complete the first reading assignment.

Torts I **MCCLURG** **112-both sections**

1. Required book: PROSSER, WADE & SCHWARTZ'S TORTS: CASE AND MATERIALS (Foundation Press 13th ed. 2015).

2. Pick up a copy of the Supplemental Materials for Torts I (SM) from the box outside my office (Room 372). These should be available in the first week of August.

3. First week assignments: Tuesday: SM pp. 1–8; Casebook pp. v-vi; 1–9 (omitting Weaver v. Ward); 17–20. Thursday: No additional reading assignment. Carefully re-review Garratt v. Daily from the prior assignment, which we will start at the first class, but not complete.

4. Register for the Torts I TWEN site, and go to "Course Materials" for more complete course instructions and documents.

Legal Methods I **WILSON** **113-both sections**

- Please refer to the Syllabus on the Legal Methods TWEN Course.

Civil Procedure **BOCK** **114-section 11**

- Starting Monday, August 8, please register for the "Civ Pro I - Section 011" TWEN site. The syllabus and the assignments for the first full week of classes will be posted there.

Property I **BRASHIER** **115-section 11**

- For our first class, please read pages 1-18 in the casebook.

FIRST YEAR LAW STUDENTS
FIRST DAY ASSIGNMENTS
FALL 2016

SECTION 12

Contracts **MAMLYUK** **111-section 12**

- Read and outline the Preface and Chapter 1 of Knapp, Crystal, Prince, Problems in Contract Law: Cases and Materials (7th edition, 2012) (pages xxi to 29) and, afterwards, read Chapter 1 of Knapp, Crystal, Prince, Problems in Contract Law: Cases and Materials (8th edition, 2016) (pages 1 to 27) (will be distributed via email).

Torts I **MCCLURG** **112-both sections**

Required book: PROSSER, WADE & SCHWARTZ'S TORTS: CASE AND MATERIALS (Foundation Press 13th ed. 2015).

- Pick up a copy of the Supplemental Materials for Torts I (SM) from the box outside my office (Room 372). These should be available in the first week of August.
- First week assignments: Tuesday: SM pp. 1–8; Casebook pp. v-vi; 1–9 (omitting Weaver v. Ward); 17–20. Thursday: No additional reading assignment. Carefully re-review Garratt v. Daily from the prior assignment, which we will start at the first class, but not complete.
- Register for the Torts I TWEN site, and go to "Course Materials" for more complete course instructions and documents.

Legal Methods I **WILSON** **113-both sections**

- Please refer to the Syllabus on the Legal Methods TWEN Course.

Civil Procedure **SCHAFFZIN** **114-section 12**

INTRODUCTION: What do you imagine might be covered in a class called "Civil Procedure"? What sort of clients do you think should be concerned that their lawyers understand procedure? Why do we have procedure? How did procedure affect the litigation in *A Civil Action*?

- Read *A Civil Action* by Jonathan Harr. The book reads like a novel. Just enjoy your first read through it. Don't worry about how the book will apply to the course. We will return to portions of the book throughout the semester.
- Enroll in my class on Lexis's Blackboard Webcourse.
- Read my Syllabus posted on Blackboard.
- Read chapter 1 in *Civil Procedure: A Coursebook*.

SECTION 12 CONTINUED

Property I **KIEL** **115-section 12**

August 16: An Introduction to Property Law

- Review Syllabus (TWEN)
- Problem #1 – Who Owns the Watch? (TWEN)

August 17: Competing Interests in Property Law Generally

- *Jacque v. Steenberg Homes, Inc.* (TWEN)
- *State v. Shack* (TWEN)

August 19: Continue with *Jacque* and *Shack* cases

- Introduction to Acquisition of Property – First Possession
- *Pierson v. Post*, including notes 3 - 5 (p. 18)

FALL 2016
FIRST YEAR STUDENTS' BOOKLIST
All books are required unless otherwise indicated.

SECTION 11

CONTRACTS – LAW-0111-011 – NEWMAN

CONTRACTS (CASEBOOK)
FARNSWORTH, 8TH ed., 2013 – ISBN: 978-1609300975

TORTS I – LAW-0112-011 – MCCLURG

TORTS (CASEBOOK)
PROSSER, WADE & SCHWARTZ, 13TH ed., 2015 – ISBN: 978-1609304072

Recommended - 1L OF A RIDE: WELL-TRAVELED PROF ROADMAP TO SUCCESS
MCCLURG, 2ND ed., 2013 – ISBN: 978-0314283054

Recommended – LAW OF TORTS: EXAMPLES & EXPLANATIONS
GLANNON, 5TH ed., 2015 – ISBN: 978-1454850113

LEGAL METHODS I – LAW-0113-011 – WILSON

LEGAL REASONING & LEGAL WRITING
NEUMANN, 7TH ed., 2013 – ISBN: 978-1454826972

LEGAL ANALYSIS
ROMANTZ, 2ND ed., 2009 – ISBN: 978-1594602795

BASIC LEGAL RESEARCH
SLOAN, 6TH ed. 2015 – ISBN: 978-1454850403

THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION
20TH ed. – ISBN 978-0692400197

CIVIL PROCEDURE I – LAW-0114-011 – BOCK

CIVIL PROCEDURE (CASEBOOK)
FRIEDENTHAL, 11TH ed., 2013 – ISBN: 978-0314280169

CIVIL PROCEDURE SUPPLEMENT (2016-2017)
FRIEDENTHAL, ISBN: 978-1634607582
[Supplement is on backorder and might arrive close to or after classes start.]

PROPERTY – LAW-0115-011 – BRASHIER

PROPERTY (CASEBOOK)
DUKEMINIER, 8TH ed., 2014 – ISBN: 978-1454837602

FALL 2016
FIRST YEAR STUDENTS' BOOKLIST
All books are required unless otherwise indicated.

SECTION 12
CONTRACTS – LAW-0111-012 – MAMLYUK

PROBLEMS IN CONTRACT LAW (CASEBOOK)
KNAPP, 7TH ed., 2012 – ISBN: 978-0735598225

RULES OF CONTRACT LAW STAUTORY SUPPLEMENT
KNAPP, 2015-2016 – ISBN: 978-1454840596

TORTS I – LAW-0112-012 – MCCLURG

TORTS (CASEBOOK)
PROSSER, WADE & SCHWARTZ, 13TH ed., 2015 – ISBN: 978-1609304072

Recommended - 1L OF A RIDE: WELL-TRAVELED PROF ROADMAP TO SUCCESS
MCCLURG, 2ND ed., 2013 – ISBN: 978-0314283054

Recommended – LAW OF TORTS: EXAMPLES & EXPLANATIONS
GLANNON, 5TH ed., 2015 – ISBN: 978-1454850113

LEGAL METHODS I – LAW-0113-011 – WILSON

LEGAL REASONING & LEGAL WRITING
NEUMANN, 7TH ed., 2013 – ISBN: 978-1454826972

LEGAL ANALYSIS
ROMANTZ, 2ND ed., 2009 – ISBN: 978-1594602795

BASIC LEGAL RESEARCH
SLOAN, 6TH ed., 2015 – ISBN: 978-1454850403

THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, 20TH ED.
ISBN 978-0692400197

CIVIL PROCEDURE I – LAW-0114-012 – SCHAFFZIN

CIVIL PROCEDURE: A COURSEBOOK
GLANNON, 2ND ed., 2014 – ISBN: 978-1454851332

CIVIL PROCEDURE SUPPLEMENT
GLANNON, 2016 – ISBN: 978-1454875338

PROPERTY I – LAW-0115-012 – KIEL

PROPERTY (CASEBOOK)
DUKEMINIER, 8TH ed., 2014 – ISBN: 978-1454837602

UNDERSTANDING PROPERTY LAW
SPRANKLIN, 3RD ed., 2012 – ISBN: 978-1422498736

INSTRUCTIONS FOR REGISTERING FOR WESTLAW, TWEN & THE LEGAL METHODS TWEN COURSE

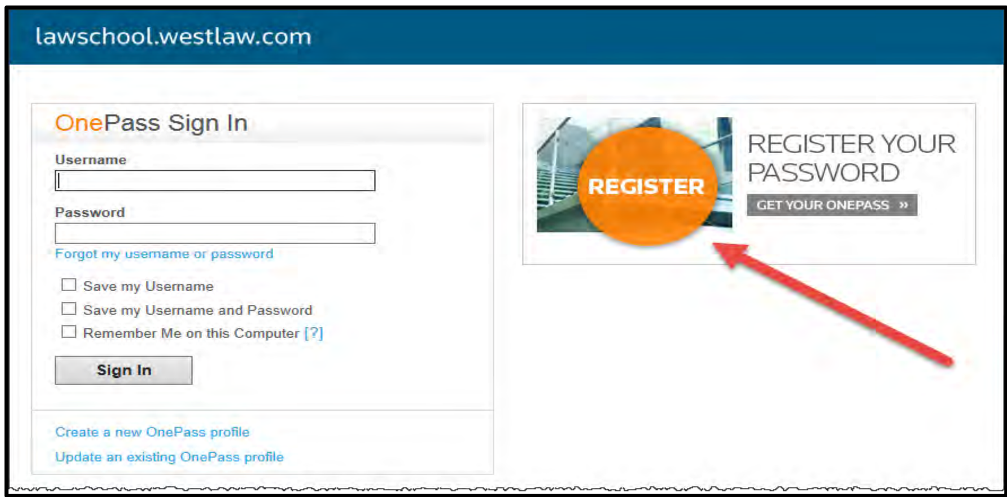
All 1Ls will use Westlaw and TWEN during the fall semester. To gain access to TWEN, you must first register for Westlaw access. After you register for Westlaw access, register for the Legal Methods TWEN Course.[1]

Registering for Westlaw/TWEN Access

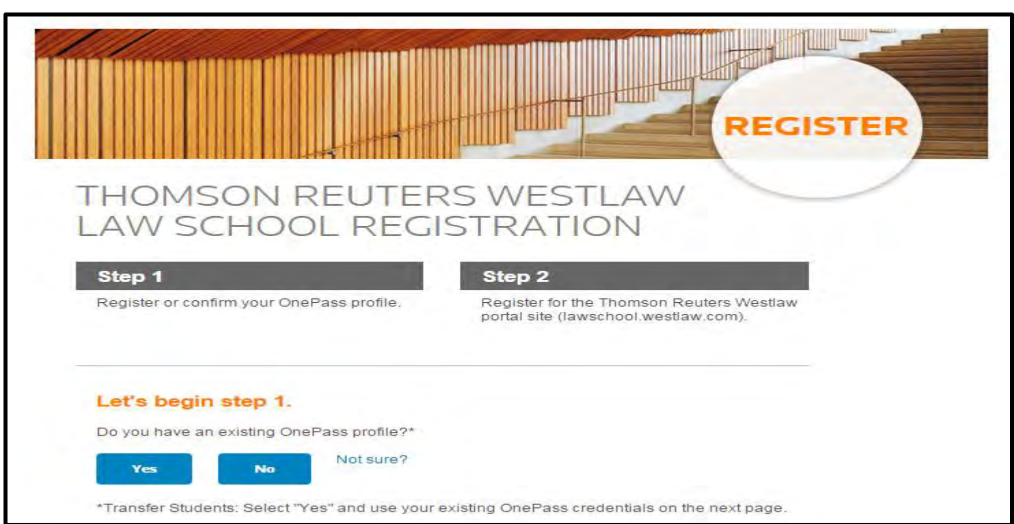
1. Obtain your Westlaw Password from Linda Hayes.

2. Go to www.lawschool.westlaw.com.

3. Click the Register link located on the right.

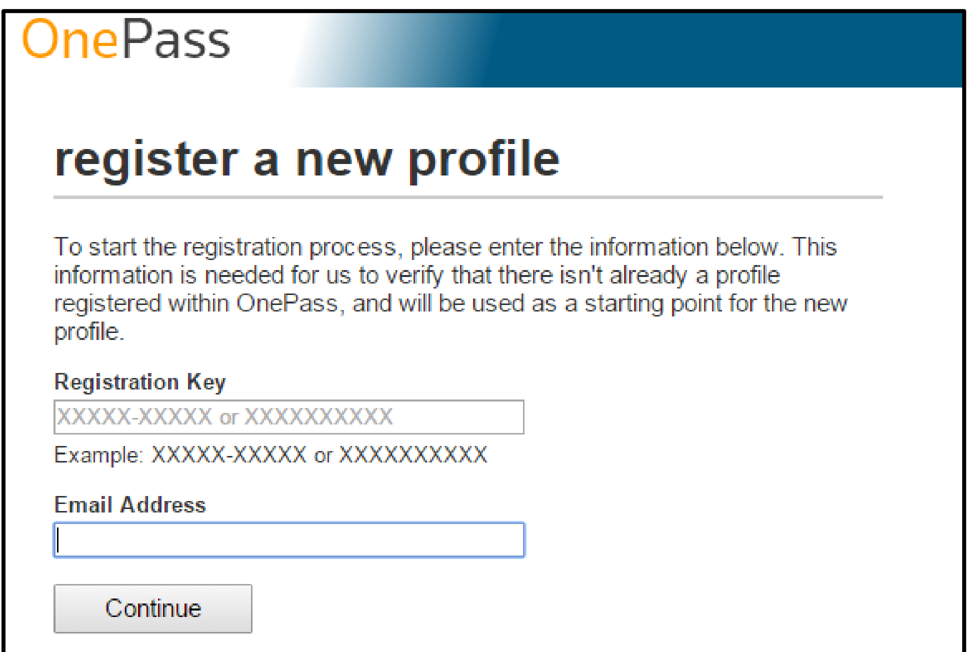


4. Select No in response to whether you have an existing OnePass profile.

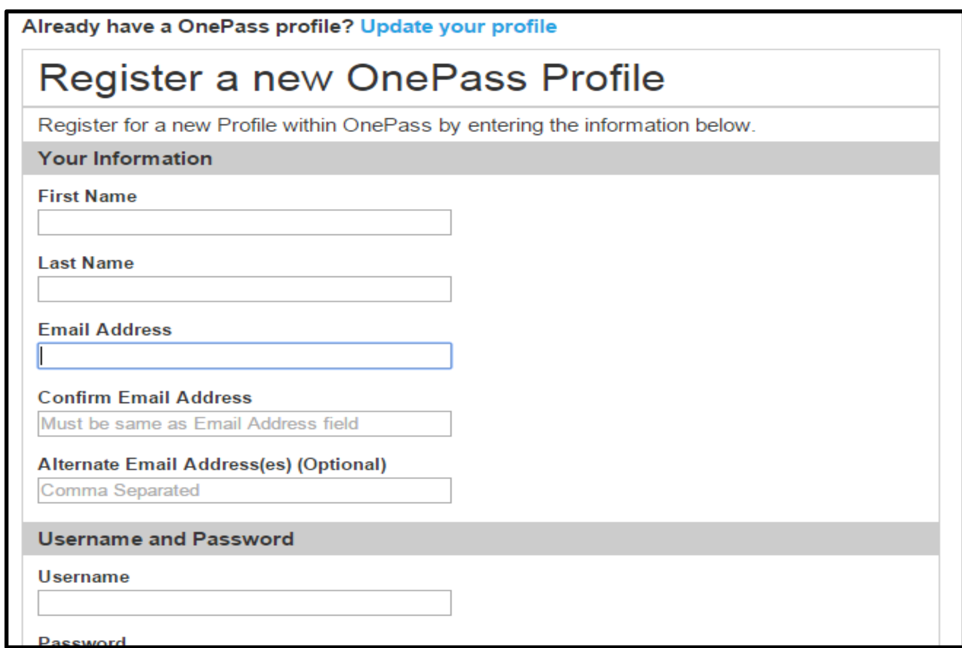


[1] Several other classes will also use TWEN. Please review the first assignments and syllabi for your other classes to determine whether you need to register for additional TWEN Courses.

5. Fill in the Westlaw Registration Key provided to you by Linda Hayes and your preferred email address in the appropriate boxes. Click Continue.



6. Fill out the registration information. Click Create Profile.



7. You are now registered for Westlaw and TWEN. Later in the semester, you will learn how to conduct legal research on Westlaw.

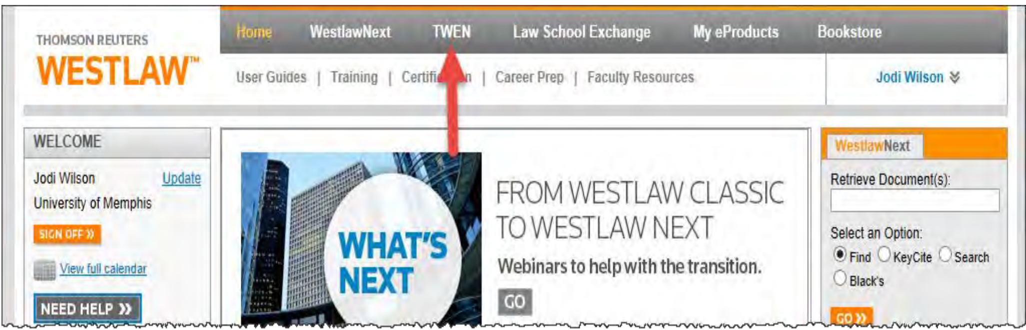
8. If you have problems registering for Westlaw, contact Westlaw technical support at (800) 850-WEST.

Enrolling in the Legal Methods TWEN Course

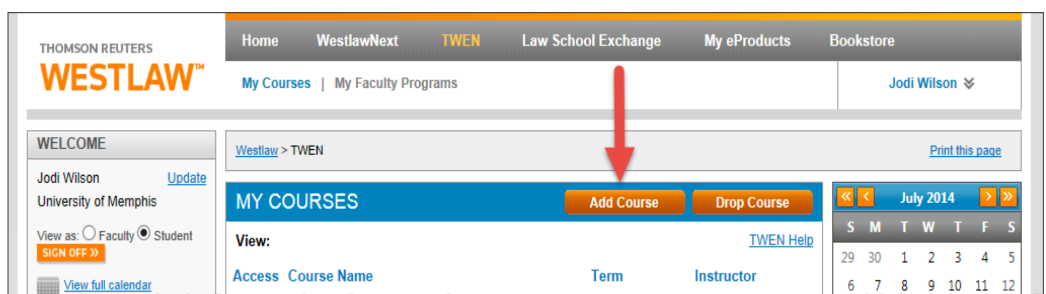
1. Go to www.lawschool.westlaw.com.

2. Enter your OnePass Username and Password. Click Sign In.

3. You should now see the Westlaw "Home" page. Click TWEN at the top of the page.

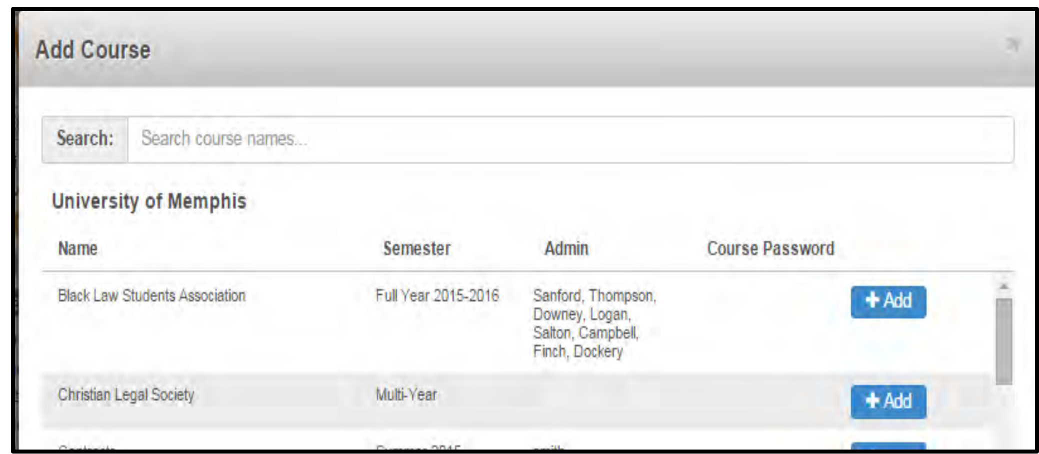


4. You should now see the "My Courses" page. Click Add Course at the top of the My Courses page.



5. The TWEN courses that are available for you will be displayed. Under University of Memphis, you should see a course named LEGAL METHODS – Wilson (Full Year 2016-2017). Click Add.

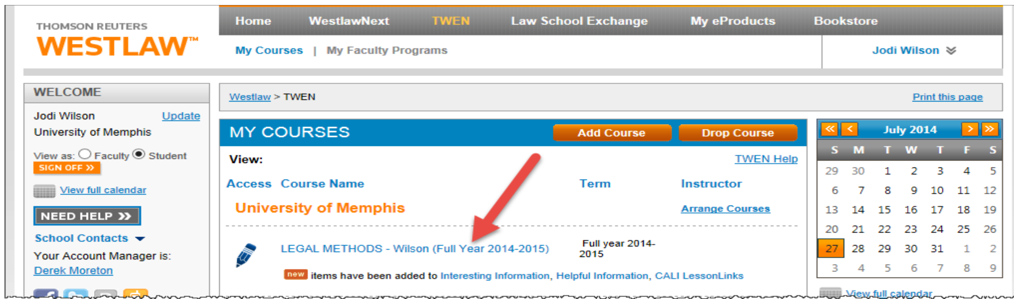
   ➢ NOTE: If your other professors are also using TWEN, you may want to add those courses now too.



6. Scroll to the bottom of the window and click Close.

7. This will take you back to the My Courses page. You should see all of the courses you added.

8. On your My Courses page, click the link for LEGAL METHODS – Wilson (Full Year 2016-2017) to enter the Legal Methods TWEN Course.



9. If you have problems registering for TWEN Courses, contact Westlaw technical support at (800) 850-WEST.

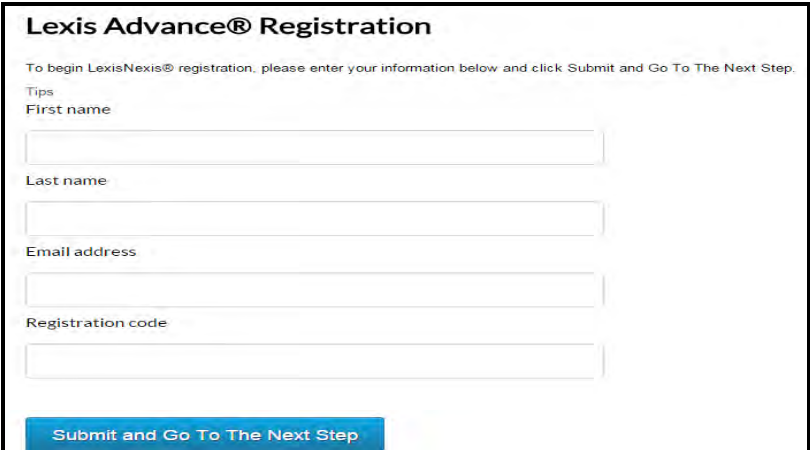
INSTRUCTIONS FOR REGISTERING FOR LEXIS ACCESS
and
REGISTERING FOR A WEB COURSE ON BLACKBOARD

All 1Ls will use Lexis during the fall semester. Thus, all 1Ls should register for Lexis access *now*. If a professor instructs you to register for a Web Course on Blackboard, then you will first need to register for Lexis access and *then* register for the Web Course. You only need to register for a Web Course on Blackboard if one of your professors uses Blackboard in his or her course; review your course syllabi and first assignments for this information.

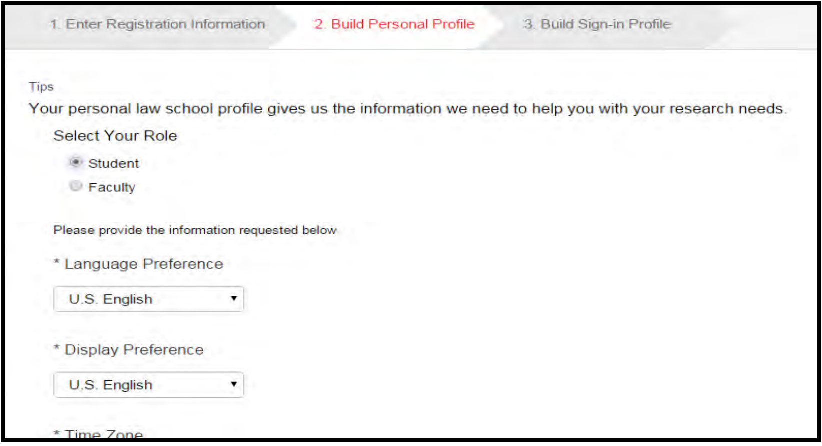
Registering for Lexis Access

1. Go to www.lexisnexis.com/register.

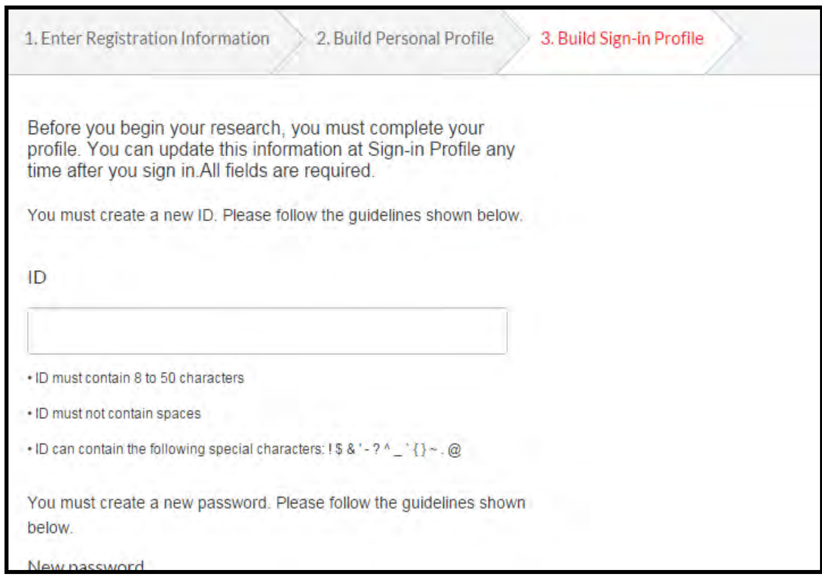
2. Enter your name, your preferred email address, and the University of Memphis Registration Code provided to you by Ms. Hayes. Click Submit.



3. Complete your Personal Profile and click Submit.



4. Complete your Sign-In Profile and click Finish.



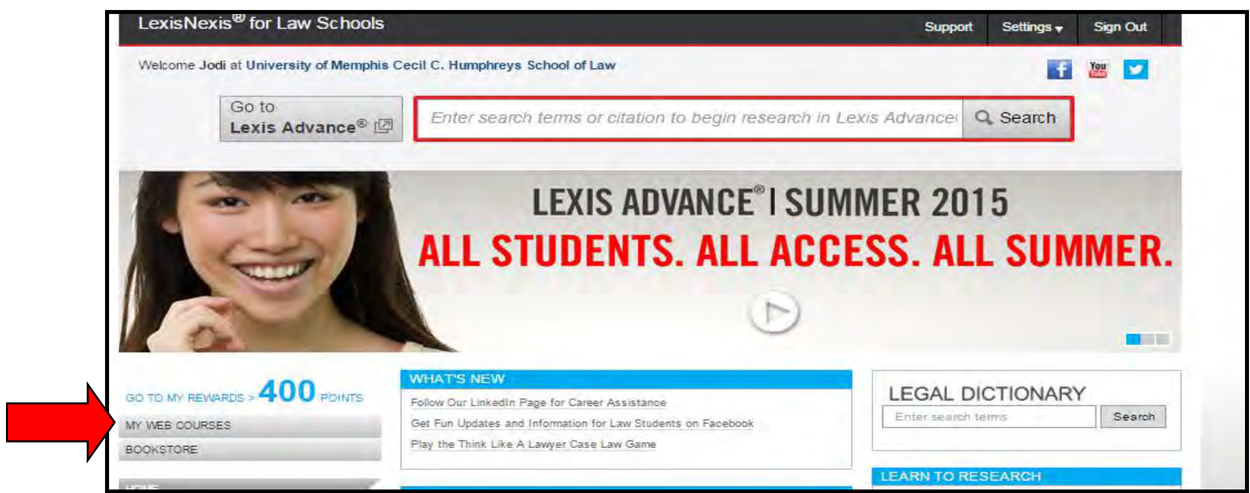
5. After you set up your Lexis Profiles, you will be taken back to the Lexis Law School Home Page. Later in the semester, you will learn how to conduct legal research on Lexis.

6. If you have problems registering for Lexis access, contact your Lexis representative, Lindsey Watson, at Lindsey.Watson@lexisnexis.com or the Lexis Law School Support Line at 1-800-45-LEXIS.

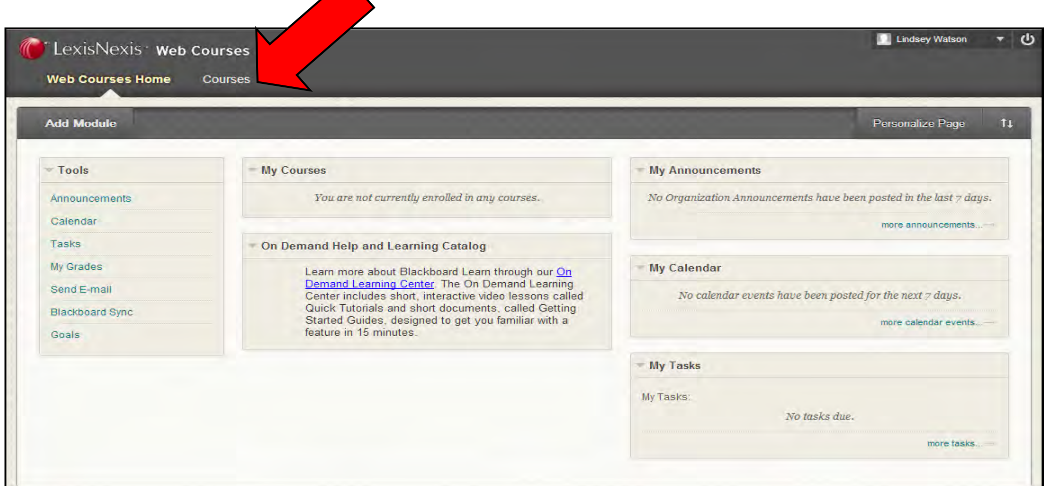
Registering for a Web Course on Blackboard

1. Go to www.lexisnexis.com/lawschool and sign in using the username and password you created.

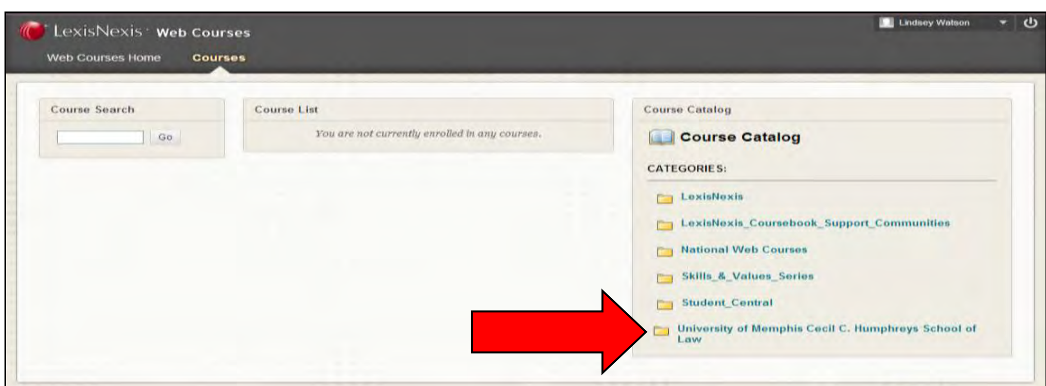
2. Click on My Web Courses.



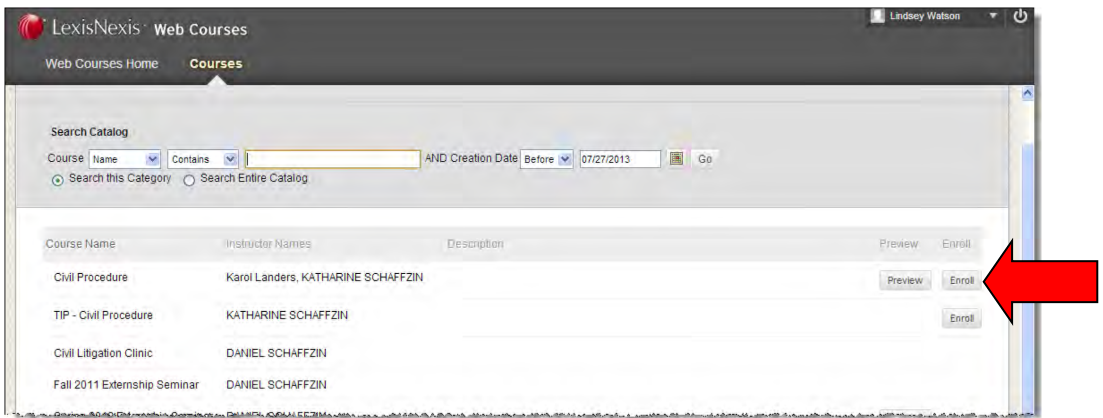
3. You will be taken to the Web Courses Home Page. Click on Courses at the top of the page.



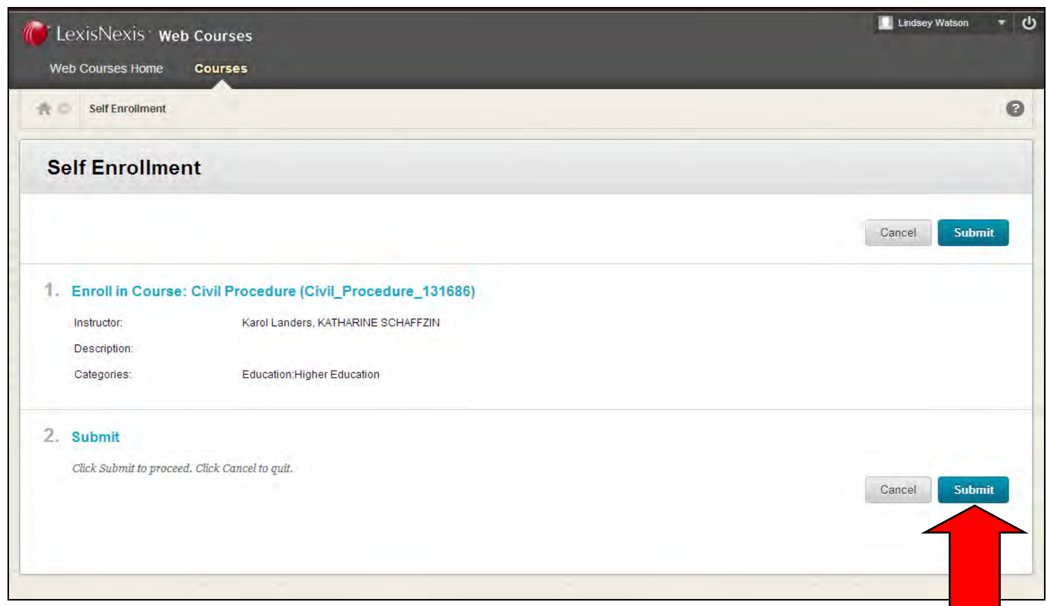
4. In the Course Catalog, click on University of Memphis Cecil C. Humphreys School of Law.



5. Find your course in the list and click Enroll.



6. Click Submit to confirm your enrollment. Once you receive the "Action Successful" message, return to the Web Courses Home to access the page.



7. If you have problems registering for a Web Course, contact your Lexis representative, Lindsey Watson, at Lindsey.Watson@lexisnexis.com or the Lexis Law School Support Line at 1-800-45-LEXIS.

MANDATORY CAREER SERVICES ORIENTATION

During Orientation, you will be provided with an overview of the services we offer, Symplicity training, a preview of the calendar of events, an overview of job search tools, and an introduction to the Pro Bono Program.

You are welcome to attend any programs sponsored by the CSO. As a 1L, please keep in mind the National Association for Legal Placement does not allow us to provide one-on-one career guidance until October 15th nor can you initiate contact with future employers until December 1st. Mandatory one-on-one career guidance appointments begin after October 15th.

SAVE THE DATE

OCTOBER 19, 2016
12:00 PM
WADE AUDITORIUM

please turn over

THE UNIVERSITY OF
MEMPHIS.
Cecil C. Humphreys School of Law

MANDATORY CAREER SERVICES ORIENTATION

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SAVE THE DATE

OCTOBER 19, 2016
12:00 PM
WADE AUDITORIUM

please turn over

WHO WE ARE:

Elizabeth G. Rudolph, JD, MSN
Assistant Dean, Career Services

Chesney Falk McAfee
Law School Counselor

Stephanie Hope
Administrative Secretary

Career Services Office (CSO)
Room 236
901-678-3217
lawcareerservices@memphis.edu

WHAT WE DO:

- One-on-One Career Counseling
- Resume & Cover Letter Workshops and Reviews
- Job Search Strategies
- Professionalism Programs
- On Campus Interviews
- Judicial Clerkship Guidance
- Mock Interviews & Interviewing Techniques
- Practice Area Pathways
- Pro Bono Program Administration
- And More

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- Judicial Clerkship Guidance
- Mock Interviews & Interviewing Techniques
- Practice Area Pathways
- Pro Bono Program Administration
- And More

About

Admissions

Programs

Current Students

Faculty

Careers

Library

About

FLOOR PLANS

Whether you're trying to find a professor's office or just want to take a two-dimensional tour, we encourage you to become familiar with our building.

Level 0

The lower level is home to our Legal Clinic with exterior entrance, student locker area and mailboxes, student organization offices, and the library stacks.

Level 1

Main lobby, student lounges, bookstore, auditorium, and the library main level entrance and circulation area are on Level 1.

Level 2

You'll find two large classrooms, administrative offices and library stacks, and study rooms on this level.

Level 3

Level 3 is home to the historic courtroom, a practice courtroom, two large classrooms, and faculty offices, as well as additional library stacks.

Level 4

Come here to see the magnificent river view from the Ball Reading Room, the Law Review suite, and learning commons and offices.

Apply to Memphis Law

News & Events

Alumni & Support

ABA Required Disclosures

Full sitemap

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The University of Memphis does not discriminate against students, employees, or applicants for admission or employment on the basis of race, color, religion, creed, national origin, sex, sexual orientation, gender identity/expression, disability, age, status as a protected veteran, genetic information, or any other legally protected class with respect to all employment, programs and activities sponsored by the University of Memphis. The following person has been designated to handle inquiries regarding non-discrimination policies: Michael Washington, Director for Institutional Equity. For more information see University of Memphis Equal Opportunity and Affirmative Action.

Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities which receive Federal financial assistance. Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance..." 20 U.S.C. § 1681 - To Learn More, visit Title IX and Sexual Misconduct.

2016 Parking Information

The University of Memphis negotiates reduced parking rates annually for law students. Students can park elsewhere, but these garages have reduced costs.

Garage Name	Address	Contact #	Prices
Mud Island Parking Garage	125 North Front Street	901.576.7223	$62.00/monthly $248.00/semester
Econo Lodge Parking Garage	22 North Third Street	901.522.9237	$40.00/monthly $160.00/semester
Republic Parking Garage*	35 Monroe Avenue	901.526.5465	$60.00/monthly covered $47.00/monthly rooftop
Towne Park Shoppers Garage	85 N. Front Street	866.223.7056	$45.00/monthly

* The Law School does not negotiate a student rate with Republic Parking Garage, but the garage offers an unofficial student discount.

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Econo Lodge Parking Garage	22 North Third Street	901.522.9237	$35.00/monthly $140.00/semester
Republic Parking Garage*	35 Monroe Avenue	901.526.5465	$60.00/monthly covered $47.00/monthly rooftop

* The Law School does not negotiate a student rate with Republic Parking Garage, but the garage offers an unofficial student discount.

Michigan State University
Japan
May 13 – June 11, 2013
http://law.msu.edu/japan/

Penn State Law
Montreal, Quebec, Canada
May 15 – June 18, 2013
http://law.psu.edu/academics/specialized_fields_of_study/international_and_transnational_law/education_abroad/montreal_program

Loyola University New Orleans
Rio de Janeiro, Brazil
May 18 – June 2, 2013
http://loyno.edu/ip/brazil

The Catholic University of America Columbus School of Law
Rome, Italy
May 18 – June 8, 2013
http://www.law.edu/summerabroad

University of Missouri-Kansas City
Beijing, China
May 18 – June 9, 2013
http://www1.law.umkc.edu/academic/china/program_features.htm

St. Louis University
Madrid, Spain
May 19 – June 29, 2013
http://www.slu.edu/school-of-law-home/centers-of-excellence/center-for-international-and-comparative-law/study-abroad/spain

Hamline University
Norway
May 20 – June 21, 2013
http://law.hamline.edu/study_abroad/norway.html

Loyola University New Orleans
Moscow, Russia
May 24 – June 16, 2013

http://loyno.edu/ip/russia

Hofstra Law
Pisa, Italy
May 25 – June 8, 2013
http://law.hofstra.edu/Academics/studyabroad/summerprograminpisa/index.html

Touro College Jacob D. Fuchsberg Law Center
Vietnam
May 25 – June 27, 2013
http://www.tourolaw.edu/summerprograms/pages/programInfo.aspx?pID=7

Santa Clara University
Shanghai, China
Classes: May 26 – June 14, 2013
Internships: June 17 ~ July 26, 2013
http://law.scu.edu/international/shanghai.cfm

Santa Clara University
Vienna & Budapest
Vienna: May 26 – June 14, 2013
Budapest: June 17 – June 21, 2013
Internships: June 24 ~ July 26, 2013
http://law.scu.edu/international/vienna-bratislava-budapest.cfm

Santa Clara University
Costa Rica
Classes: May 26 – June 21, 2013
Internships: June 24 ~ August 3, 2013
http://law.scu.edu/international/costa-rica.cfm

Southwestern Law School
Vancouver, British Columbia, Canada
May 26 – June 26, 2013
http://www.swlaw.edu/academics/international/summer/canada

Southwestern Law School
Buenos Aires, Argentina
May 26 – June 28, 2013
http://www.swlaw.edu/academics/international/summer/argentina

Santa Clara University
Hong Kong
Classes: May 27 – June 14, 2013
Internships: June 17 ~ July 26, 2013
http://law.scu.edu/international/hong-kong-sar-china.cfm

Santa Clara University
Singapore
Classes: May 27 – June 14, 2013
Internships: June 17 ~ July 26, 2013
http://law.scu.edu/international/asean.cfm

Temple University
Rome, Italy
May 27 – June 27, 2013
http://www.law.temple.edu/Pages/International/Study_Abroad_Rome.aspx

Florida International University
Seville, Spain
May 27 – July 3, 2013
http://law.fiu.edu/academic-information/international-and-graduate-studies-2/summer-study-abroad/

University of Georgia
Beijing & Shanghai, China
May 27 – June 19, 2013
http://www.law.uga.edu/china-summer-program

University of San Diego
Barcelona, Spain
May 27 – June 21, 2013
http://www.sandiego.edu/law/study_abroad/barcelona/index.php

University of San Diego
Florence, Italy
May 27 – June 22, 2013
http://www.sandiego.edu/law/study_abroad/florence/index.php

Southwestern Law School

Guanajuato, Mexico
May 28 – June 28, 2013
http://www.swlaw.edu/academics/international/summer/mexico

Touro College Jacob D. Fuchsberg Law Center
Berlin, Germany
May 28 – June 29, 2013
http://www.tourolaw.edu/summerprograms/pages/programInfo.aspx?pID=1

Touro College Jacob D. Fuchsberg Law Center
India
May 28 – June 29, 2013
http://www.tourolaw.edu/summerprograms/pages/programInfo.aspx?pID=5

Howard University
Cape Town, South Africa
May 28 – July 4, 2013
http://www.law.howard.edu/49

Golden Gate University School of Law
Paris, France
June 1 – 30, 2013
http://law.ggu.edu/law/academics/study-abroad/paris-summer-program#program-description

Washington University & Case Western University
Utrecht, Netherlands
June 1 – July 13, 2013
http://law.wustl.edu/summer_institute/
http://law.case.edu/summer-institute/

Santa Clara University
Sydney, Australia
Classes: June 2 – June 21, 2013
Internships: June 24 ~ August 2, 2013
http://law.scu.edu/international/sydney.cfm

Santa Clara University
Tokyo, Japan
Classes: June 2 – June 25, 2013
Internships: July 1 ~ July 26, 2013

http://law.scu.edu/international/tokyo.cfm

University of New Mexico
Madrid, Spain
June 2 – June 29, 2013
http://lawschool.unm.edu/international-law/madrid

American University Washington College of Law
Chile & Argentina
June 2 – 30, 2013
http://wcl.studioabroad.com/index.cfm?FuseAction=Programs.ViewProgram&Program_ID=10540

American University Washington College of Law
London, Brussels, Paris & Geneva
June 2 – 30, 2013
http://wcl.studioabroad.com/index.cfm?FuseAction=Programs.ViewProgram&Program_ID=10541

American University Washington College of Law
The Hague, Netherlands
June 2 – 30, 2013
http://www.wcl.american.edu/hague/

American University Washington College of Law
Israel
June 2 – 30, 2013
http://wcl.studioabroad.com/index.cfm?FuseAction=Programs.ViewProgram&Program_ID=10543&Type=O

American University Washington College of Law
Turkey
June 2 – 30, 2013
http://wcl.studioabroad.com/index.cfm?FuseAction=Programs.ViewProgram&Program_ID=10544

University of Miami
Greece & Italy
June 6 – July 1, 2013
http://www.law.miami.edu/summerabroad

University of Tulsa
Dublin, Ireland
June 7 – July 7, 2013
http://www.utulsa.edu/law/study-abroad

University of Miami
London, England
Human Rights or Entrepreneurship: July 7 – 27, 3013
Evidence: July 7 – August 3, 2013
http://www.law.miami.edu/summerabroad

University of Miami
Germany, Austria, Hungary, Czech Republic, Slovenia, Venice
June 9 – July 1, 2013
http://www.law.miami.edu/summerabroad

New England Law, Boston
Galway, Ireland
June 9 – July 19, 2013
http://www.nesl.edu/students/international_galway.cfm

Whittier Law School
Mexico City, Mexico
June 9 – 28, 2013
http://www.law.whittier.edu/index/centers-programs/study-abroad/mexico/

Santa Clara University
The Hague, Netherlands
June 10 – June 21, 2013
http://law.scu.edu/international/the-hague.cfm

Willamette University College of Law
China
June 10 – July 7, 2013
http://www.willamette.edu/wucl/innovative/abroad/china/index.html

Santa Clara University
Munich, Germany
Classes: June 16 – July 15, 2013

Internships: July 16 ~ August 9, 2013
http://law.scu.edu/international/munich-summer-ip.cfm

Loyola University New Orleans
Spetses, Greece
June 16 – 30, 2013
http://loyno.edu/ip/spetses-greece

Santa Clara University
Istanbul, Turkey
Classes: June 16 – July 5, 2013
Internships: July 8 – August 2, 2013
http://law.scu.edu/international/istanbul.cfm

Penn State Law
Florence, Rome & Siena, Italy
June 16 – July 12, 3013
http://law.psu.edu/academics/specialized_fields_of_study/international_and_transnational_law/education_abroad/florence_rome_siena

Southwestern Law School
London, England
June 16 – July 19, 2013
http://www.swlaw.edu/academics/international/summer/itlaw/
http://www.swlaw.edu/academics/international/summer/england

Santa Clara University
Geneva, Switzerland
Classes: June 23 – July 19, 2013
Internships: July 1 ~ August 2, 2013
http://law.scu.edu/international/geneva.cfm

Michigan State University
Bialystok, Poland
June 23 – July 19, 2013
www.law.msu.edu/poland

University of Georgia
Brussels, Belgium & Geneva, Switzerland
June 24 – July 18, 2013

http://www.law.uga.edu/brussels-geneva

Santa Clara University
Oxford, England
June 26 – August 2, 2013
http://law.scu.edu/international/oxford.cfm

Whittier Law School
Toulouse, France
June 28 – July 26, 2013
http://www.law.whittier.edu/index/centers-programs/study-abroad/france/

University of Arkansas
St. Petersburg, Russia
June 29 – July 27, 2013
http://studyabroad.uark.edu/Find_Your_Program/University_of_Arkansas_Faculty-led_Programs/St_Petersburg_Law_Institute/Dates_Deadlines.html

University of Tulsa
Tianjin, China
June 29 – July 27, 2013
http://www.utulsa.edu/law/study-abroad

Duke University
Geneva, Switzerland or Hong Kong
June 30 – July 30, 2013
http://law.duke.edu/summerinstitutes/

Loyola University New Orleans
Vienna, Austria
June 30 – July 27, 2013
http://loyno.edu/ip/vienna-austria

Whittier Law School
June 30 – July 24, 2013
Tel Aviv & Ramat Gan, Israel
http://www.law.whittier.edu/index/centers-programs/study-abroad/israel_summer/

William & Mary Law School
Madrid, Spain

June 30 – July 31, 2013
http://law.wm.edu/academics/programs/studyabroad/spain/index.php

American University Washington College of Law
Geneva, Switzerland
July 1 – July 19, 2013
http://www.wcl.american.edu/internationalorganizations/

George Washington University
Munich, Germany
July 1 – 26, 2013
July 15 – 26, 2013
http://www.law.gwu.edu/Academics/degrees/summer_programs/munich/Pages/Munich.aspx

St. Mary's University School of Law
Innsbruck, Austria
July 1 – August 2, 2013
http://www.stmarytx.edu/law/index.php?site=innsBruckProgram

University of San Diego
London, England
July 1 – August 3, 2013
http://www.sandiego.edu/law/study_abroad/london/index.php

University of San Diego
Paris, France
July 1 – August 3, 2013
http://www.sandiego.edu/law/study_abroad/paris/index.php

Whittier Law School
Barcelona, Spain
July 1 – 26, 2013

Touro College Jacob D. Fuchsberg Law Center
Croatia
July 7 – August 3, 2013
http://www.tourolaw.edu/summerprograms/pages/programInfo.aspx?pID=6

Touro College Jacob D. Fuchsberg Law Center

Israel
July 7 – August 9, 2013
http://www.tourolaw.edu/summerprograms/pages/programInfo.aspx?pID=4

University of Vienna
Strobl, Austria
July 13 – August 10, 2013
http://shs.univie.ac.at/shs

University of Tulsa
Buenos Aires Argentina
July 14 – August 9, 2013
http://www.utulsa.edu/law/study-abroad

Whittier Law School
Nanjing, China
July 14 – August 3, 2013
http://www.law.whittier.edu/index/centers-programs/study-abroad/china/

Michigan State University
Rijeka & Dubrovnik, Croatia
July 17 – August 12, 2013
http://law.msu.edu/croatia/

University of Tulsa
Autumn in London
August 17 – November 29, 2013
http://www.utulsa.edu/law/study-abroad

Temple University
Tokyo, Japan
January 4 – April 25, 2014
http://www.law.temple.edu/Pages/International/Semester_Abroad_in_Tokyo.aspx

Tsinghua University School of Law
LL.M. Program in Chinese Law
Beijing, China
http://www.nesl.edu/students/international_galway.cfm

Cecil C. Humphreys School of Law

Current Students

BLACK LAW STUDENTS ASSOCIATION

The National Black Law Students Association (BLSA) is the nation's largest student-run organization representing nearly 6,000 minority law students from over 200 chapters and affiliates throughout the United States. Since its foundation in 1966, BLSA has been seeking to promote the professional needs of African-American and minority law students by promoting professional competence and increasing awareness of the needs of the community.

The Benjamin L. Hooks Chapter of BLSA at the Cecil C. Humphreys School of Law is devoted to providing opportunities and benefits for students and the community. BLSA provides its members with professional networking and mentorships, study tips and aids, social events, and the opportunity to participate in community service/pro bono activities. In addition, our Thurgood Marshall Mock Trial Team and Frederick Douglass Moot Court Team continue to succeed and compete in the Southern Region of BLSA's competitions, as well in the national competitions. BLSA makes it a point to be available and accessible to all students, not solely African-American students.

2016-2017 Executive Board

- President: Dawn M. Campbell
- Vice-President: Kevin E. Christopher
- Executive Secretary: Misty L. O'Neal
- Treasurer: Christian A. West-Coleman
- Community Service Chair: Naomi Reaves

- Professional Liaison: Patrick J. Hillard
- Activities/Fundraiser Chair: Noor S. Obaji
- Parliamentarian: Danny G. Bounds

For more information, please visit NBLSA's website! (www.nblsa.org)

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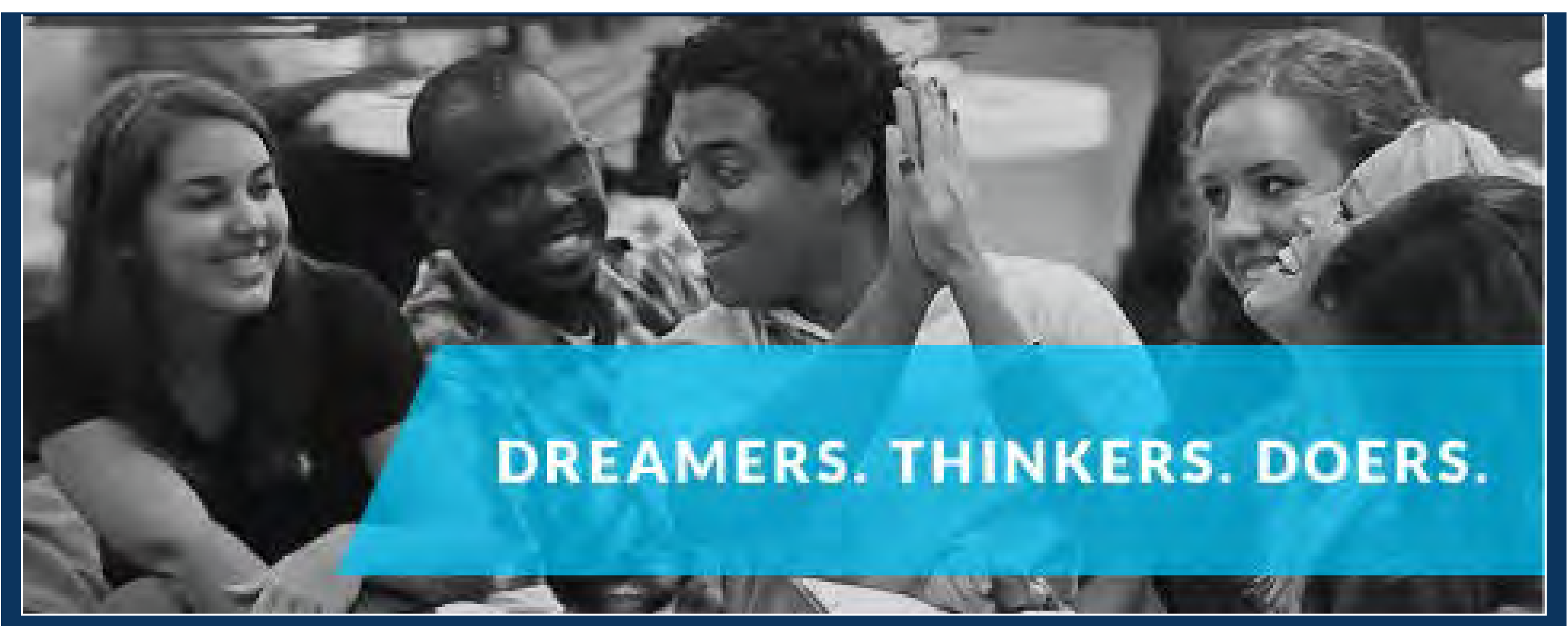

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Cecil C. Humphreys School of Law

Current Students

FEDERALIST SOCIETY

The Society's main purpose is to sponsor fair, serious, and open debate about the need to enhance individual freedom and the role of the courts in saying what the law is rather than what they wish it to be. We believe debate is the best way to ensure that legal principles that have not been the subject of sufficient attention for the past several decades receive a fair hearing. Throughout the school year, this organization will host many events over controversial and important topics that will challenge students and professors alike to consider both sides of the arguments and make a well educated decision on which side offers the best support.

- Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law.
- The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order. It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Society seeks both to promote an awareness of these principles and to further their application through its activities.
- This entails reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of

these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.

2015-2016 Executive Board:

- President - Hunter Yoches
- Vice President - Briana Lynch
- Secretary - Tara Brown
- Treasurer - Fredrick Culver
- Director of Communications - Alexis Peddy
- 1L Representative (Section 11) - Christopher Burt
- 1L Representative (Section 12) - Connor Kohlscheen

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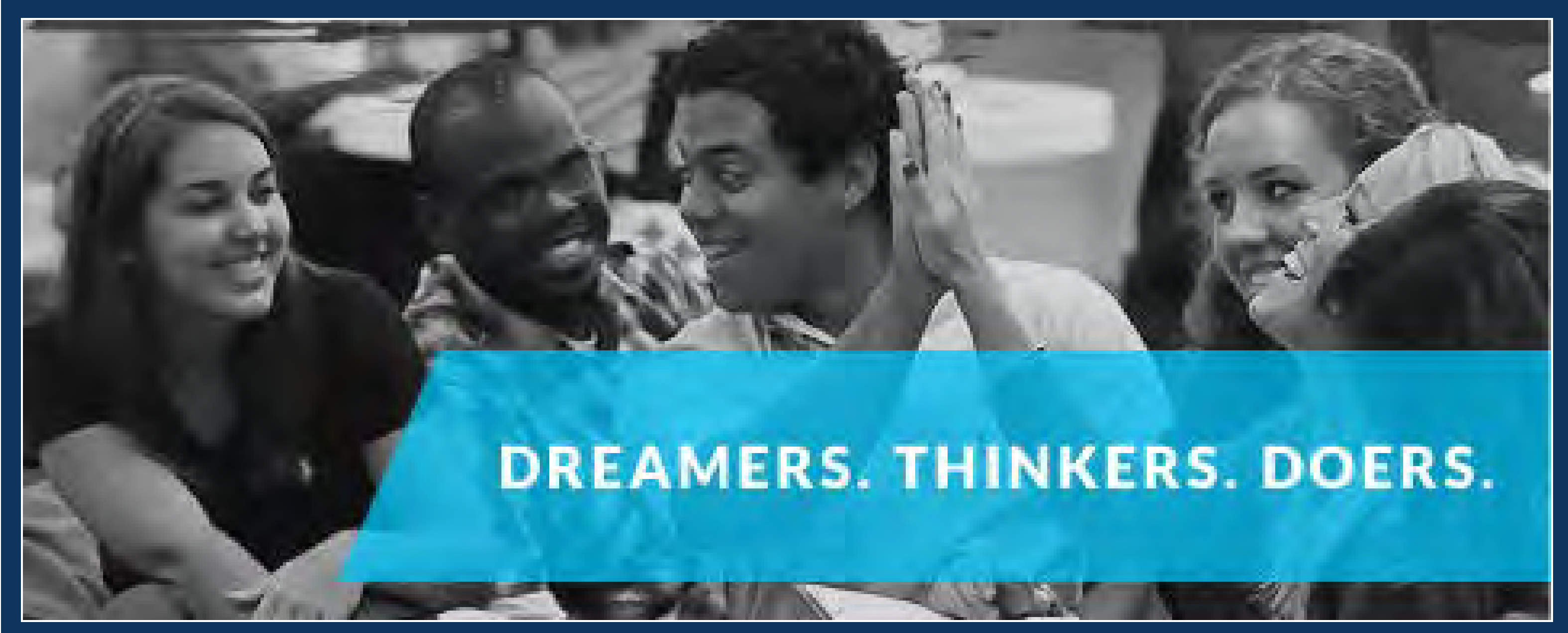

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Cecil C. Humphreys School of Law

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HEALTH LAW SOCIETY

Purpose

The Health Law Society ("HLS") is dedicated to exploring the intersection between medical health care and the judicial system. The HLS examines not only the traditional areas of health law, but also delves deeper into local and national health policy concerns. The HLS strives to enhance the experience and knowledge of its members and the entire Memphis law community.

Summary

The Health Law Society is a new student organization at the University of Memphis, Cecil C. Humphreys School of Law. The Society is dedicated to exploring the intersection between medical health care and the judicial system. The Society examines not only the traditional areas of health law, but also delves deeper into local and national health policy concerns. The Society strives to enhance the experience and knowledge of its members and the entire Memphis law community.

In its first year, the Society offered its members many networking and leadership opportunities. The Society hosted a "speed networking" event. At the event, local health lawyers had short one-on-one mentoring sessions with law students. The event was a huge success and will occur yearly. The Society provided another networking opportunity by partnering with the health law section of the Memphis Bar Association for a happy hour-networking

event. The happy hour allowed students to interact with health lawyers in an informal and comfortable atmosphere. The relationships established at these events have led to many lawyer-student mentoring relationships.

The members of the Society contributed short summaries of legal issues to the health law section of the Memphis Bar Association's newsletters. This was a great way to introduce the Society members to the local health law community and to display their writing skills. Lastly, the members of the Society were given the wonderful opportunity to meet both Fred Grey and Dr. Jim Jones at the law school's inaugural health law symposium. Fred Grey, attorney, represented both Martin Luther King, Jr. and the participants of the Tuskegee Syphilis Study. Dr. Jim Jones is the author of Bad Blood, a book detailing the Tuskegee Syphilis Study and analyzing the effects of institutionalized discrimination on marginalized segments of a population. It was truly a once in a life time opportunity to meet such inspirational health law figures! The Society is looking forward to another year full of health law

Officers

President
J. Lauren Ball - jlhill7@memphis.edu

Vice-President
Demi Dalrymple - ddlrympl@memphis.edu

Treasurer
Emily Bragg - ebbragg@memphis.edu

Secretary
Caroline Gordon - cgordon2@memphis.edu

Public Relations Chair
Brian Burns - bdburns@memphis.edu

Events Chair
Mary Smith - mksmith5@memphis.edu

HLS Constitution

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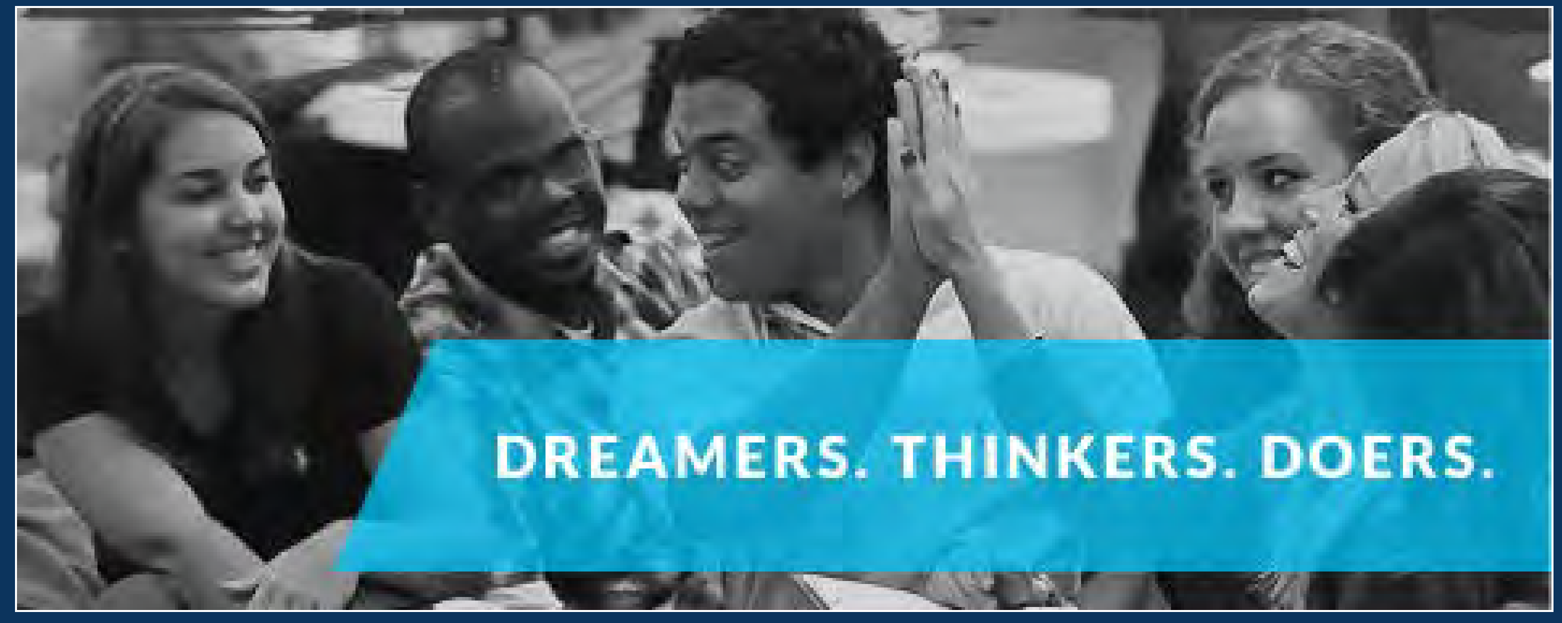

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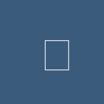
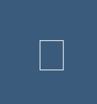
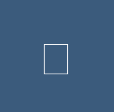
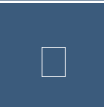
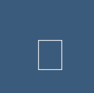
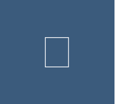

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Cecil C. Humphreys School of Law

Current Students

PUBLIC ACTION LAW SOCIETY

The Public Action Law Society (PALS) at the University of Memphis is a student-led organization that seeks to promote volunteerism, community service, and a pattern of activities that will instill in participants a desire to continue in pro bono work after becoming attorneys. PALS coordinates volunteers for a number of different organizations. Volunteers are connected to community service organizations that match the students' interests and abilities.

PALS 2016-17 Board Members (pictured above)

- Top row, left to right: Misty O'Neal, Adam Ryan, Katie Abernathy, Mathew Jehl
- Bottom row, left to right: Preston Dennis, Briana Lynch, Danielle Salton, Maggie McGowna, Kara Bidstrup

PALS Pages:

- Alternative Spring Break
  - Memphis Law student application
  - Out-of-state application
- History of Alternative Spring Break

Alternative Spring Break News Coverage

- Memphis Flyer LGBT Article
- 2014 ASB Video
- 2014 ASB Flyer
- Channel 3 News Clip
- Commercial Appeal Article
- Memphis Flyer Article
- Photo Album
- News Clip
- Daily Helmsman Article
- News Clip

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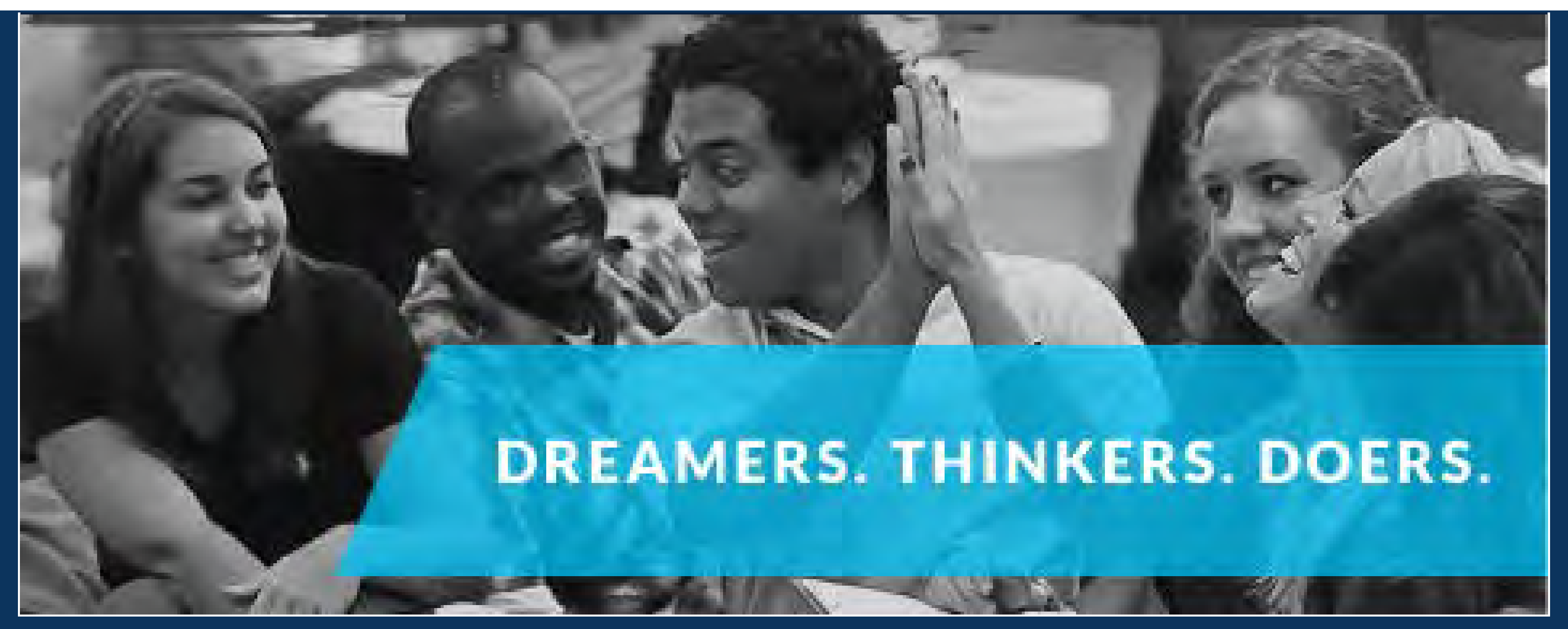

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Current Students

STUDENT BAR ASSOCIATION

The SBA is dedicated to connecting all Memphis Law students into one body to foster fellowship and cooperation as well as advance the aims and purposes of the law school.

Duties of the association include creating forums to resolve student issues, plan student's activities, and partner with other university departments for the advancement of common interests. All Memphis Law students are automatically members of the SBA.

We hope that this site will provide useful information about SBA activities and information about events at the law school. Click on the links below to navigate our site and to find important documents, information regarding meetings, upcoming events and opportunities to participate on SBA committees. Please feel free to contact any of the SBA officers with your comments and concerns.

Follow us on Facebook or Snapchat (@sbamemphislaw) to receive the most up to date information about our upcoming events!

SBA Committee Information
SBA Constitution

For information on SBA election rules, upcoming meeting announcements, agendas and minutes, as well as all other SBA-related updates, please visit the SBA TWEN page by clicking HERE.

The SBA is an Administrative Council comprised of the Executive Board and the Board of Bar Governors. The following students were elected for the Administrative Council for the 2016-2017 academic year:

- Sydney Trujillo, President
- Grant Kehler, Vice-President
- Regan Sherwood, Executive Director
- Mel Borrelli, Secretary
- Alex Anderson, Treasurer
- Forrest Edwards, Bar Association Representative and Election Commissioner
- Kelsey Walton, Director of Student Affairs
- Stephanie Tasch, Director of Communications
- Rebecca Holden, Director or Events
- Whitney Trujillo, Community Service Liaison
- Jake Brown, 3L Bar Governor
- Dawn Campbell, 3L Bar Governor
- Dylan Holzemer, 3L Bar Governor
- Holly Stanford, 3L Bar Governor
- Kelly Hagy, 2L Bar Governor
- Tyler Tollison, 2L Bar Governor
- Hallie Flanagan, 2L Bar Governor
- Fred Culver, 2L Bar Governor
- Kaitlyn Cornett, 1L Bar Governor for Section 12
- Andrew Roach, 1L Bar Governor for Section 12
- Trevor Schrader, 1L Bar Governor for Section 11
- Richard Vaughan, 1L Bar Governor for Section 11

SBA 1L Bar Governors

SBA 2L Bar Governors

SBA 3L Bar Governors

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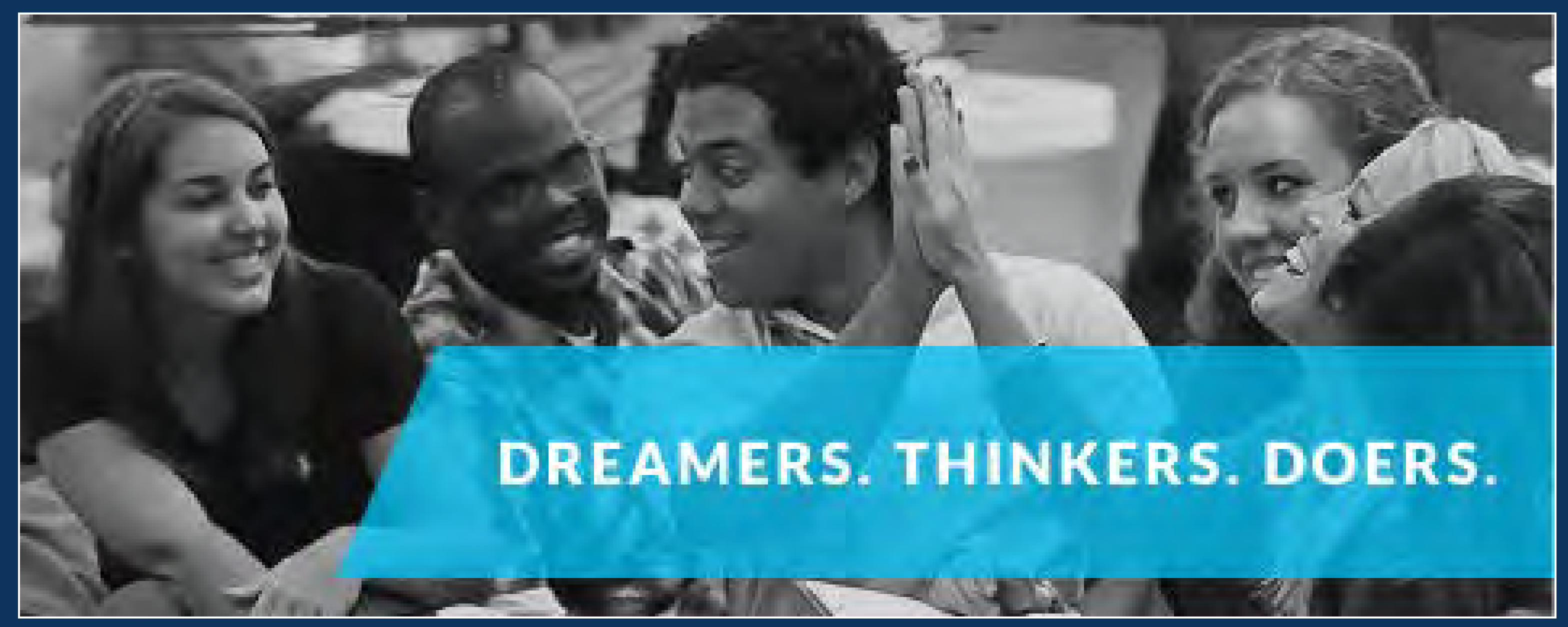

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Cecil C. Humphreys School of Law

ESTIMATED TUITION & COSTS

The value of your legal education at the University of Memphis Cecil C. Humphreys School of Law compares very favorably with that available at other state-assisted and private institutions. University tuition and fees are determined by the Tennessee Board of Regents and are subject to change each year.

The estimated costs for the 2015-2016 academic year (Fall & Spring Semesters) are as follows:

	In-State	Out-of-State
Tuition & Fees	$18,387*	$26,247
Room & Board	$9,764	$9,764
Books/Supplies	$1,969	$1,969
Transportation	$2,484	$2,484
Misc./Personal	$3,202	$3,202
Loan Fees	$530	$530
Total	$36,336	$44,196

*Based on full-time enrollment for the academic year. Part-time tuition & fees are billed by the credit hour. Tuition and fees above includes a $20 per credit hour law library fee with no maximum (30 hours for entering students in the 2015-2016 academic year).

Border Counties Tuition Waiver

In an effort to accommodate students from neighboring counties, the University of Memphis School of Law will consider qualified non-resident students as border county residents for purposes of admission and tuition. To qualify for the Border County Tuition Waiver, students must document their permanent residence in one of the five counties listed below. This tuition waiver is determined primarily from information provided on the application for admission to the law school. The School of Law Admissions Office may require applicants to submit additional documentation. Questions about eligibility for the Border County Tuition Waiver should be directed to the Law School Admissions Office.

Eligible Counties include: Crittenden County, Arkansas and Desoto, Marshall, Tate & Tunica Counties in Mississippi

Note: Students on non-immigrant visas are not eligible for the Border County Tuition Wavier

Confirmation

Applicants selected for the entering class will be extended an offer of acceptance in writing. Applicants who choose to accept the offer must confirm their acceptance by April 13th or, in the case of an applicant who is accepted after April 1, within two weeks of receipt of notification. A $250 seat deposit is required of all accepted students regardless of residency. $200 of the deposit is applied towards fall tuition and $50 is an orientation fee. This

deposit is non refundable.

An applicant who does not confirm and/or pay the seat deposit within the deadline specified in the acceptance letter will forfeit his or her seat in the entering class.

A mandatory orientation and registration program for entering students is held each fall prior to the beginning of classes. Details concerning the orientation session are sent to accepted students in late spring.

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Financing Your Education

Student Financial Aid Office
103 Wilder Tower
Memphis, TN 38152

Phone: (901) 678-4825
Fax: (901) 678-3590

Programs Available

- **Scholarships (handled by the Law School):**
  http://www.memphis.edu/law/futurestudents/scholarships.php

- **Loans:**
  http://www.memphis.edu/financialaid/law/aidprog3.php

- **Work Study:**
  http://www.memphis.edu/financialaid/student_employment/

Applying for Financial Aid

- Apply for a federal PIN at www.pin.ed.gov and keep it in a safe place.

- Each year, you must complete the Free Application for Federal Student Aid (FAFSA) with the current year's tax information. The website is www.fafsa.gov.
  - FAFSA becomes available online every year on January 1.
  - The University of Memphis' federal school code is **003509**.
  - FAFSA applies to Fall/Spring/Summer.

Types of Loans

FEDERAL LOANS

- Handled by the Student Financial Aid Office (main campus)
- Requires FAFSA results for the appropriate academic year
- First-time borrowers must complete the Entrance Counseling and Master Promissory Note (MPN) online at www.studentloans.gov.
- Must be enrolled at least part time (6 law credit hours)
- Must maintain a cumulative GPA of 2.0

- **Federal Direct Unsubsidized Loan:**
  - Loan is initially listed as an OFFER on myMemphis.
  - Variable, market-based interest rate that changes every July 1 but is capped at 8.25%
  - Interest is charged while you are in school and during grace and deferment periods.
  - Repayment begins 6 months after you graduate or drop below part time.
  - Annual/academic year limit of $20,500
  - Graduate/professional aggregate limit of $138,500 (includes undergraduate loans)

- **Federal Direct Graduate PLUS:**
  - Apply online at www.studentloans.gov after June 1 each year
  - Requires a credit check
  - Variable, market-based interest rate
  - Interest charged from date of first disbursement
  - Repayment begins 60 days after last disbursement.
  - Can apply for in-school deferment
  - Requires completion of a separate Master Promissory Note (MPN)
  - Amount requested plus all other aid cannot exceed “Cost of Attendance”

ALTERNATIVE LOANS

- Should be used as a last resort
- Requires a credit check
- Can be used to supplement federal loans but cannot exceed “Cost of Attendance”
- Provided through private banking/lending institutions so FAFSA not required
- Several offer Bar Study Loans
- Research different lenders and their repayment options.
- Suggested list of lenders at http://www.memphis.edu/financialaid/altloans.php

Other Pertinent Information

- If you are completing your FAFSA based on estimated income, you will need to make a correction to your FAFSA shortly after you file your actual income tax return with the IRS. There will be an option on the FAFSA to link your information (electronically) with the IRS, using the Data Retrieval Tool. (**Note**: Parental income information not required.)

- If your file is selected in a process called “verification,” you will need to submit a verification worksheet, a copy of your income tax transcript, and all other required forms/documents to the Student Financial Aid Office.

- A Budget Adjustment Form may be completed for additional allowable expense(s), which requires certain documentation.

- It is the responsibility of the student to notify our office if there is a change in residency status (from out-of-state to in-state), of any anticipated outside scholarships, and of any potential fee waivers, etc. that could cause your total aid/awards to exceed your “Cost of Attendance.”

- Complete withdrawal or academic exclusion can have serious repercussions.

Financial Aid Checklist

______File your income taxes early

______Apply for a federal PIN at www.pin.ed.gov

______Complete FAFSA at www.fafsa.gov

______List The University of Memphis' federal school code: 003509

______Check myMemphis (under **Account$ tab**) for award status or missing documents

______Enroll in at least part time (6 law hours)

______Sign up for eRefunds (direct deposit) with the Bursar's Office

______Attend class and maintain Satisfactory Academic Progress (2.0 cumulative GPA)

______Learn your U-ID number (in lieu of SSN)

2015-16 Cost of Attendance

(Based on 15 hours per semester)

	In-State	Out-of-State
Tuition//Fees	$18,387	$26,247
Room/Board	9764	9764
Books	1969	1969
Travel	2484	2484
Miscellaneous	3202	3202
Loan Fees	530	530
TOTAL	**$36,336**	**$44,196**

NOTE: Your total financial aid award (loans, fee waivers, scholarships, veterans' benefits, vocational rehabilitation benefits, etc.) cannot exceed your "Cost of Attendance."

Contact Information

Joanna M. Darden
(901) 678-2743
jpullis@memphis.edu (preferred contact)

www.memphis.edu/financialaid

Cecil C. Humphreys School of Law

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SCHOLARSHIPS

A number of scholarships are available to entering students, including academic merit awards, diversity awards, and awards for students with demonstrated financial need. Some scholarship awards are based on the information in the application, while others require additional information. If you are interested in being considered for first-year scholarships, you are encouraged to complete the optional application questions and submit any necessary information. Scholarship award letters are usually sent by April 1st.

Through state appropriations and the generous donations of law school alumni and friends, over $600,000 in scholarship assistance has traditionally been awarded in previous academic years. Awards range from $1,000 to full in-state tuition.

First-Year Scholarships

A variety of scholarship awards are available for first-year students, including academic merit awards, diversity awards, and awards for students with demonstrated financial need. Many of these scholarships are renewable for subsequent years. Some scholarship awards are based on the information in the application for admission, while others require additional information.

If you are interested in being considered for first-year scholarships, you are encouraged to complete the optional application questions and submit any necessary information. Scholarship recipients will be notified as soon as possible of their scholarship award, usually by April 1st. In order to ensure full consideration for scholarships, applicants should submit their application for admission by the March 15th priority deadline.

Rising Second- and Third-Year Student Scholarships

(Returning Law Students Only)

Returning law students interested in applying for law scholarships have multiple options. There are two different online scholarship applications. Please review the various types of funding and make sure you complete the appropriate online application(s). When applying for a scholarship, students are advised to pay close attention to each of the mandatory application requirements.

LAW SERVICE SCHOLARSHIPS: Online Service Application

Humphreys Fellowship, Herff, and Faculty Emeritus Renewal Applicants

Students interested in being a Humphreys Fellow should use this online application. Students who currently hold a Humphreys Fellowship, Faculty Emeritus or Herff Scholarship must complete this online application as well. You will be required to upload a current resume and answer a number of questions about your law interests. In order to be fully considered for one of these scholarships, you must consent to releasing your law school grade point average and class rank to the faculty and staff. Students who failure to upload a resume and give consent will not receive consideration. Please name your resume by your last name with uploading. DEADLINE is FEBRUARY 28, 2017.

TIGER SCHOLARSHIP MANAGER: TSM Application

- Go to your myMemphis account
- Click on "Account$" tab
- Sign in to your profile using Memphis credentials
- First page is "Your General Application"
- When completed please click on Blue "Finish & Continue" button
- Your "recommended Opportunities" will be available for you based on your answers
- Detailed information on scholarship is available by clicking the "apply" button

MEMPHIS ACCESS AND DIVERSITY SCHOLARSHIPS

Students interested in being considered for Memphis Access and Diversity Scholarships need to complete the Tiger Scholarship Manager application. You will be asked to complete a 250 word essay on how you contribute to diversity at the University of Memphis School of Law. Please review the diversity criteria prior to applying. Current Memphis Access and Diversity recipients must complete this online application as well. Candidates will be notified in June after Spring 2017 grades and class rank have been released. No resume or letters of recommendation are required. DEADLINE: March 24, 2017.

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OTHER LAW SCHOOL ENDOWED SCHOLARSHIPS

There are a number of scholarships that are awarded to law students annually. These endowed scholarships require applicants to complete the Tiger Scholarship Manager application. All scholarships require applicants to also upload a resume. Please save your resume document as your last name first, then first name before you upload it online (i.e. "Smith, John"). To access these scholarships, interested returning law students should follow the instruction below after accessing their myMemphis account. The deadline is March 24, 2017. For further details regarding the scholarship process please refer to the PowerPoint presentation linked below.

- Returning Students Only - Scholarship Process Overview PowerPoint
- Scholarship List for First-Year Students
- Scholarship List for Returning Students

Outside Scholarships

A list of outside scholarships, criteria, award amounts, and deadlines are listed below. For more information on each scholarship, click the scholarship name for a full application. These scholarships are not administered by the University of Memphis School of Law. Also, please use the links at the bottom of the page to connect to scholarship search engines that may be helpful in finding alternative sources of school financing.

Scholarship	Amount	Deadline
The National Bar Association - Ben F. Jones Chapter Scholarship	Unspecified	October
The Richard Linn American Inn of court Mark T. Banner Scholarship	$5,000	November
Donald W. Banner Diversity Scholarship	$5,000	January
Baker Hostetler Diversity Fellowship Program	$0 - $25,000	October
Constangy, Brooks and Smith, LLP	$3,000	November 28
Scholarship Foundation of Santa Barbara Applications available here October 1	Unspecified	January
Richard D. Hailey AAJ Law Student Scholarship	$1,000	May
Harry A. Blackmun Scholarship	Varies	June

Phi Kappa Phi Fellowship	Varies	April
Phi Kappa Phi Love of Learning	$500	June
GP LSAT Prep Law Student Scholarship	$1,000	January & June
Robert Masur Fellowship Competition	$1,000	March
Alia Herrera Memorial Scholarship	$3,000	May
Richard D. Hailey Law Student Scholarship	$1,000	May
Trial Advocacy Scholarship	$2,500	May
Mike Eidson Scholarship	$5,000	May 1
Baker Donelson Diversity Scholarship	$10,000	June
Anne Schneider Chapter of Lawyers' Association for Women of Jackson, TN. Application requests should be addressed to: Mary Jo Middlebrooks, Middlebrooks & Gray, P.A.P.O. Box 1085, Jackson, TN 38302	$1,500	September 10
Avon N. Williams & Robert Lillard Law Scholarship	$1,500	November 1
Howard Fox Memorial Scholarship	Varies	April 1
Salvi, Schostok, & Pritchard P.C	$5,000	March
Charles R. Ullman & Associates	Varies	April 15
DRI's Law Student Diversity Scholarship	$10,000	April 19
American Association for Justice (AAJ) Law Student Scholarships	Varies	May 1
Trusp Young Lawyers Scholarship	$1,000	
Appelman Law Firm Criminal Defense Law Scholarship	$1,000	
Michigan Auto Law Diversity Scholarship	$2,000	May 1

Federal Communications Bar Association Foundation	$2,500-$10,000	April 1
Farzad Family Law Annual Scholarship	$3,000	December 15
Step Ahead Scholarship	Varies	April 15
Davis Devin Livingston Scholarship	$3,000	July 15
Appel Law Firm Scholarship	$1,000	July 1
Bond & Botes Financial Hardship Scholarship	$2,000	July 16
Meinhart Smith & Manning PLLC Law Scholarship	$1,000	August 10
Luvera Law Firm Scholarship	$2,000	August 10
Staver Law Group	$2,000	November 15
Asian Heritage Law Scholarship	$1,000	August 1
Injury Lawyer News Disability Scholarship	$1,000	December 31
A Step Ahead Foundation	Varies	April 15
Access To Advocacy Award	$5,000	May 31
The Cohen, Placitella, Roth Scholarship	$2,500	May 31
Goodman Acker, P.C. Law Scholarship	$1,000	December 1
The Reeves Law Group Scholarship	$3,000	December 15
Sally & Fitch, LLP Scholarship	$1,000 & $1,500	March 1
Los Angeles DUI Attorney Diabetes Scholarship	$1,000	June 15
Kevin P. Landry Don't Text and Drive Scholarship	$1,000	April 1

Sattiraju Employment Law Scholarship	$1,000	December 30
AIAG Law Marketing Scholarship	$1,250	April 30
American Accident Awareness Attorney Scholarship	$2,000	May 30
Chattanooga Bar Foundation	Up to $2,500	May 30
Barbri Law Preview Scholarship	$10,000	April 15
Michael Weiner Scholarship for Labor Studies	$10,000	November 7
Morgan & Morgan For The People Scholarship	$2,000	December 1
Public Defender Scholarship	$1,000	January 15
Sattiraju Employment Law Scholarship	$1,000	December 31
White Collar Criminal Defense Scholarship	$1,000	May 1
Law Enforcement Family Member Scholarship	$1,000	August 31

Scholarship Search Engines

FastWeb - http://www.fastweb.com

StudentScholarshipSearch - http://www.studentscholarshipsearch.com

FinAid - http://www.finaid.org

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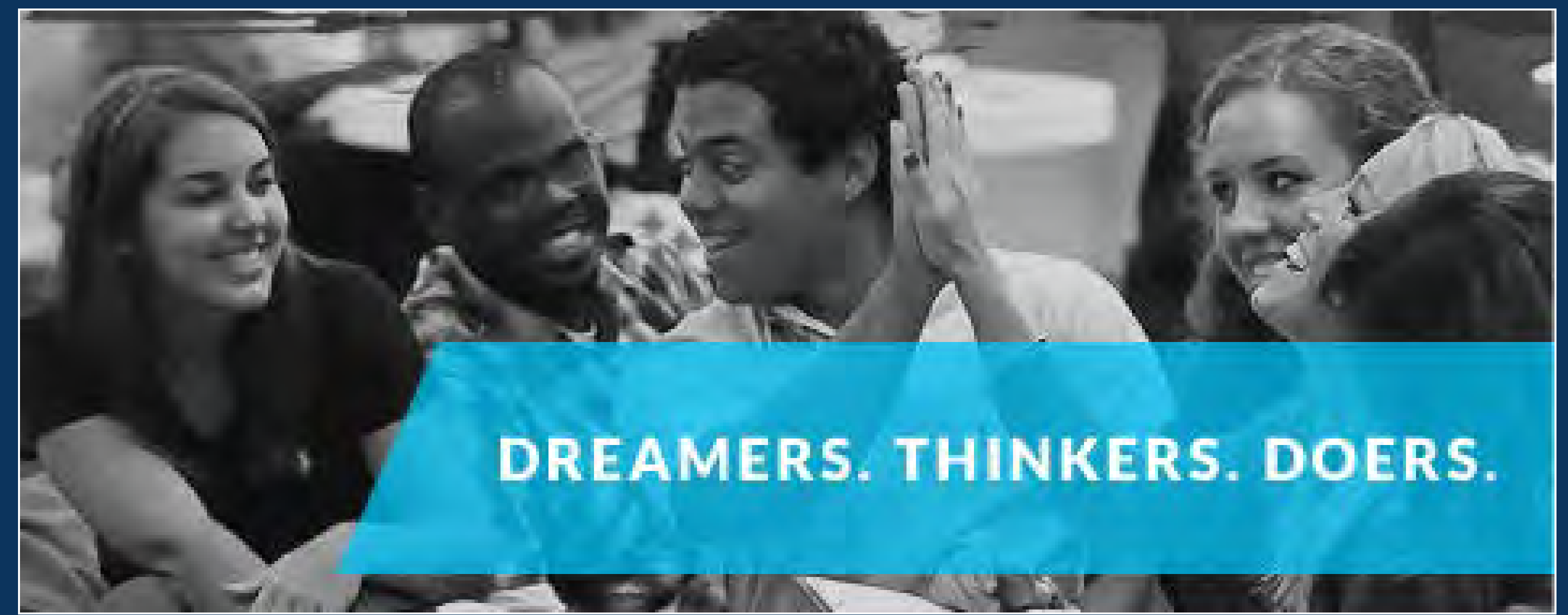

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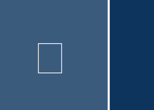
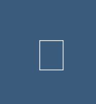
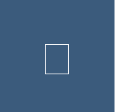
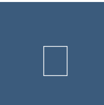
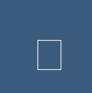
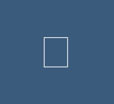

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Last Updated: 2/9/17 | University of Memphis | Memphis, TN 38152 | Phone: 901.678.2000

The University of Memphis does not discriminate against students, employees, or applicants for admission or employment on the basis of race, color, religion, creed, national origin, sex, sexual orientation, gender identity/expression, disability, age, status as a protected veteran, genetic information, or any other legally protected class with respect to all employment, programs and activities sponsored by the University of Memphis. The following person has been designated to handle inquiries regarding non-discrimination policies: Michael Washington, Director for Institutional Equity. For more information see University of Memphis Equal Opportunity and Affirmative Action.

Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities which receive Federal financial assistance. Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance..." 20 U.S.C. § 1681 - To Learn More, visit Title IX and Sexual Misconduct.

University of Memphis
Cecil C. Humphreys School of Law

Honor Council Report

Pursuant to Academic Regulation 21.8 the 2012 – 2013 Honor Council presents the following information:

Referrals:

a. Number of referrals: 9
b. Honor Code provisions implicated: 21.4(j), (k), (g), (l), (m), (n)
c. Number of dismissed referrals: 1

Probable Cause Hearings:

a. Number submitted to probable cause hearings: 8
b. Honor Code Provisions implicated: 21.4 (j), (k), (g), (l), (m), (n)
c. Number of dismissed allegations: 2

Final Hearings:

a. Number of final hearings: 6
b. Honor Code provisions implicated: 21.4 (j), (g), (l), (m), (n)
    a. Determination: Violation
    b. Sanction: Community Service
    c. Status: The time for review has expired without request for review
c. Honor Code provisions implicated: 21.4 (j)
    a. Determination: Violation
    b. Sanction: Explanatory paper
    c. Status: The time for review has expired without request for review
d. Honor Code provisions implicated: 21.4 (j)
    a. Determination: Violation
    b. Sanction: Community Service
    c. Status: The time for review has expired without request for review
e. Honor Code provisions implicated: 21.4(j)
    a. Determination: Violation
    b. Sanction: Letter of explanation with corroborating evidence
    c. Status: Time for review has not expired
f. Honor Code provisions implicated: 21.4 (j)
    a. Determination: No Violation
g. Honor Code provisions implicated: 21.4(k)
    a. Determination: No Violation

University of Memphis
Cecil C. Humphreys School of Law

Honor Council Report

Pursuant to Academic Regulation 21.8, the 2013–2014 Honor Council presents the following information:

Referrals:

a. Number of referrals: 28
b. Honor Code provisions implicated: 21.4, (a), (j), (k)
c. Number of dismissed referrals: 1

Probable Cause Hearings:

a. Number submitted to probable cause hearings: 6
b. Number of Probable Cause hearings waived by accused: 22
c. Honor Code provisions implicated: 21.4, (a), (j), (k)
d. Number of dismissed allegations: 2

Final Hearings:

a. Number of final hearings: 25
b. Honor Code provisions implicated: 21.4 dishonesty and misconduct – 18 Hearings
    a. Determination: Violations
    b. Sanction: 5 page papers for each student found in violation
    c. Status: 3 students appealed the Honor Council decision. On appeal, the panel upheld the Honor Council's finding that there was a violation and the panel also affirmed the sanctions. The appeal panel only saw fit to amend the final status of the violation to a non-reportable offense to any state Bar examiner's office. The Council affirmatively amended the holding for all similarly situated students to reflect that the offense would be non-reportable to any state Bar examiner's office.
c. Honor Code provisions implicated: 21.4 (j), (k) – 4 Hearings
    a. Determination: Violations
    b. Sanction: None. However, the Council requested a letter of explanation to be included in the students' file for completeness
    c. Status: The time for review has expired without request for review
d. Honor Code provisions implicated: 21.4 (j)
    a. Determination: No Violation
e. Honor Code provisions implicated: 21.4(a)
    a. Determination: No Violation
f. Honor Code provisions implicated: 21.4 (a)
    a. Determination: Violation
    b. Sanction: Letter grade drop
    c. Status: The decision was vacated because of potential inconsistent results

University of Memphis
Cecil C. Humphreys School of Law

Honor Council Report

Pursuant to Academic Regulation 21.8 the 2014 – 2015 Honor Council presents the following information:

Referrals:

a. Number of referrals: 13
b. Honor Code provisions implicated: 21.4 (b), (f), (j), (k)
c. Number of dismissed referrals: 3

Probable Cause Hearings:

a. Number submitted to probable cause hearings: 2
b. Honor Code Provisions implicated: 21.4 (b)
c. Number of dismissed allegations: 0

Final Hearings:

a. Number of final hearings: 10

b. Honor Code provisions implicated: 21.4 (b)
   a. **Determination**: Violation
   b. **Sanction:** Expulsion from Law Review and academic probation for one year
   c. **Status:** Overturned on Appeal

c. Honor Code provisions implicated: 21.4 (b)
   a. **Determination:** Violation
   b. **Sanction:** Expulsion from Law Review and academic probation for one year
   c. **Status:** Overturned on Appeal

d. Honor Code provisions implicated: 21.4 (f)
   a. **Determination:** Violation
   b. **Sanction**: Five hours of pro bono in addition to the graduation requirement of 40 hours, suspension from 2L OCI's, a letter of explanation to be added to the student's record for Bar purposes, and a letter of apology explaining the student's misconduct
   c. **Status:** Time for review has expired

e. Honor Code provisions implicated: 21.4 (j) & (k)
    a. **Determination:** Violation
    b. **Sanction:** No sanction
    c. **Status:** Time for review has expired

f. Honor Code provisions implicated: 21.4(j) & (k)
    a. **Determination:** Violation
    b. **Sanction:** No sanction
    c. **Status:** Time for review has expired

g. Honor Code provisions implicated: 21.4 (j) & (k)
    a. **Determination:** Violation
    b. **Sanction**: No Sanction
    c. **Status:** Time for review has expired

h. Honor Code provisions implicated: 21.4 (j) & (k)
    a. **Determination:** Violation
    b. **Sanction**: No sanction
    c. **Status:** Time for review has expired

i. Honor Code provisions implicated: 21.4 (j) & (k)
    a. **Determination:** Violation
    b. **Sanction**: No sanction
    c. **Status:** Time for review has expired

j. Honor Code provisions implicated: 21.4 (j) & (k)
    a. **Determination:** Violation
    b. **Sanction**: No sanction
    c. **Status:** Time for review has expired

k. Honor Code provisions implicated: 21.4 (j) & (k)
    a. **Determination:** Violation
    b. **Sanction**: No sanction
    c. **Status:** Time for review has expired

Cecil C. Humphreys School of Law

Pro Bono Program

Student and Supervisor Handbook

The University of Memphis
Cecil C. Humphreys School of Law
Career Services Office
901-678-3217
lawcareerservices@memphis.edu

INTRODUCTION

At the heart of the legal profession is the ethical requirement that attorneys should pursue equal justice under the law. The University of Memphis Cecil C. Humphreys School of Law (hereinafter "Law School") commits to instilling this value in its students. Because access to justice is not free, lawyers have an obligation to provide pro bono services to those unable to afford counsel. Rule 6.1 of the Model Rules of Professional Conduct states that "[a] lawyer should aspire to render at least (50) hours of pro bono public legal services per year." The objective of the Law School's Pro Bono Program is to nurture this ethical obligation in students.

PRO BONO REQUIREMENT & QUALIFICATIONS

Pro Bono Graduation Requirement

As a condition of graduation, a student entering the Law School in fall 2012 or thereafter must perform forty (40) hours of supervised pro bono work. Students may receive pro bono graduation credit for no more than five (5) hours of pro bono work performed in the first semester of Law School. In order to receive credit beginning in the second semester, all first year law students must complete 15 hours of coursework, attend the Pro Bono Orientation, and complete the Pro Bono Pledge. May graduation candidates must complete all pro bono work by April 1 of their last semester. August graduation candidates must complete all pro bono work by July 1 of their last semester. December graduation candidates must complete all pro bono work by November 1 of their last semester.

Pro Bono Service Defined

Pro bono service is a direct legal service that a student provides without compensation or academic credit. Pro bono service must be supervised by a licensed attorney. Some examples of pro bono work that qualify include:

- Unpaid work for a judge;
- Unpaid work for a government entity;
- Unpaid work for a legal aid or public interest organization, e.g., Memphis Area Legal Services Inc., Community Legal Center, Court Appointed Special Advocates Association (CASA);
- Unpaid work for a licensed attorney, law firm, or corporate counsel undertaken on behalf of a low-income individual who does not pay for the students' work or the work of a lawyer, firm, or corporate counsel for representation; or
- Pre-approved unpaid work for a nonprofit charitable organization that responds to a legal problem, e.g., work for a domestic violence shelter on orders of protection or a defender re-entry program that helps re-establish voting rights.

Pro Bono Work That Does Not Qualify

Pro bono service undertaken in an externship or legal clinic for academic credit does not fulfill the pro bono requirement. Service that a student performs on pro bono cases while in a paid position does not qualify. Service at a private firm that a student undertakes after completion of an internship *does* qualify for pro bono credit, so long as the student receives no compensation for the service and performs the service on a pro bono case or matter.

Student service in a Registered Student Organization ("RSO") does not count toward the pro bono requirement unless the service is a direct legal service. For example, a student will not receive credit for attending an RSO general meeting, but may receive credit for participating in a service project that an RSO sponsors, e.g., Alternative Spring Break with PALS.

Commuting, Training, and Observation Time

The hours that a student spends commuting to and from a placement site do not count toward fulfillment of the pro bono requirement. The time that a student spends in training or observing may count toward fulfillment of the pro bono requirement, so long as such time does not exceed 20 percent of the time that the student spends at a particular placement. The time spent in Pro Bono Orientation does not count toward fulfillment of the pro bono requirement.

PROCEDURE FOR RECEIVING PRO BONO CREDIT

A student must comply with the following steps in order to receive pro bono credit:

1. Attend mandatory Pro Bono Orientation and complete the Pro Bono Pledge (although a student may receive credit for up to 5 hours of pro bono work during the first semester and before the orientation, so long as the other requirements are met).
2. Find a placement or placements by searching the pre-approved placement list or creating a new project.
    a. Students needing assistance in finding a placement should meet with the Public Interest Counselor in the Career Services Office.
    b. For any student initiated project, the student must first submit a Student Initiated Project Form for pre-approval by the Public Interest Counselor.
3. Secure a placement supervisor.
4. Meet with the placement supervisor to review the assignment, verify that there is no conflict of interest, and advise the supervisor of his or her responsibilities.
5. Perform pro bono work.
6. Ask the supervisor to complete and submit a Supervisor Certification Form to the Public Interest Counselor.

Orientation

All students must attend the Pro Bono Orientation before starting any service beyond the five (5) hours of service allowed during the first semester. The time spent in Pro Bono Orientation does not count toward the forty hour pro bono requirement. The Career Services Office will offer Pro

Bono Orientation every year. During orientation, students will familiarize themselves with procedures necessary for receipt of pro bono credit. Upon completion of orientation, students must submit a Pro Bono Pledge.

Finding a Placement

Students may find placements by 1) searching the Pre-Approved Placements List, 2) taking advantage of pro bono opportunities publicized in On Legal Grounds or on Symplicity, or 3) by independently initiating and developing a project suited to their particular interests. If a student initiates a placement, the student must submit a Student Initiated Project Form and procure pre-approval of the Public Interest Counselor *before* starting service. If a student is denied, the student can appeal to the Assistant Dean of Career Services. If approval is denied a second time, the student can make a final appeal to the Associate Dean for Academic Affairs.

Each student is ultimately responsible for finding a suitable placement or placements. Students should meet with the Public Interest Counselor to discuss suitable potential public service opportunities.

Students may choose to serve in several different placements. In fact many students find it valuable to try out various types of law through their pro bono projects. The student is responsible for contacting the agency offering a placement and to offer his or her services on a volunteer basis. In the event a placement agency asks a student to commit more than forty hours, the student must complete the project and the number of hours of service to which he or she has agreed in order to receive pro bono credit.

Finding a Placement Supervisor

All qualifying pro bono work must be supervised by a licensed attorney. The student is responsible for finding a placement supervisor. A licensed attorney should supervise law-related pro bono work. Law students cannot act as a placement supervisor. Supervisors are responsible for training, assigning tasks, overseeing projects, and evaluating the student's performance.

Initial Placement Meeting

During a student's initial meeting with the placement supervisor, the student and supervisor should discuss the project in detail, establish deadlines, responsibilities, a work schedule, and identify any potential conflicts of interest. Students should make available the Pro Bono Handbook to their supervisor, if needed. The supervisor must fill out a Supervisor Certification Form at the end of the student's service. It is the student's responsibility to submit the completed form to the Career Services Office.

Reporting Hours

Students must submit the following forms to the Public Interest Counselor in the Career Services Office:

1. Pro Bono Pledge
2. Supervisor Certification Form
3. If applicable: Students who initiate a pro bono project must submit a StudentInitiated Project Form before starting service.

The Placement Supervisor or student must submit a Supervisor Certification Form. The student is responsible for assuring that the supervisor has submitted a certification form. Such forms are available under the Pro Bono section of the Career Services website. Such forms are also available in the Career Services Office. Failure to report hours and submit the required forms by the appropriate deadline will result in denial of credit for pro bono hours from the placement agency. Forms may be submitted in person or via email to the Public Interest Counselor.

STUDENT AND SUPERVISOR RESPONSIBILITIES

Unauthorized Practice of Law

Supervisors and students must understand that law students are not authorized to practice law. Students may not, under any circumstance, provide legal advice, make appearances in court, or otherwise act as an attorney. No organization, program, individual, or client may rely on a student's work product in taking or forbearing legal actions. A student who is concerned that he or she has been asked to engage in the practice of law or is not subject to adequate supervision should contact the Public Interest Counselor immediately.

Professionalism

Students are expected to perform service in a timely and professional manner. This includes dressing in a professional manner, being on time, informing the supervisor of student progress in performing assignments, meeting all assigned deadlines and expectations, providing competent service, and treating all individuals with respect. If the supervisor will not certify that the student has met these responsibilities, the student will not receive pro bono credit for the time served.

Confidentiality

While performing pro bono service, students may work on active cases under the supervision of an attorney. Students should remember that this work is protected by the attorney-client privilege and subject to the confidentiality provision of the Rules of Professional Conduct. Students should familiarize themselves with these rules before beginning service.

Conflict of Interest

During the initial placement meeting, students should identify and address any potential conflicts of interest arising from a case or matter. Although unusual, a conflict of interest arises when a student has competing responsibilities to a client, the court, or the student's own interest in remaining ethical. For example, a conflict of interest arises if a student previously represented or worked with a client with an interest adverse to those of a client who the student would represent in the pro bono placement. If questions regarding conflicts of interest should arise, a student should immediately address those concerns with the supervisor and with the Public Interest Counselor.

INTERESTED PRO BONO PARTNERS

Organizations, programs, or individuals interested in having law student volunteers should contact the Public Interest Counselor to discuss the proposed pro bono opportunity.

FREQUENTLY ASKED QUESTIONS ABOUT THE PRO BONO PROGRAM

Q: Briefly, what is the pro bono requirement?
A: Students must perform forty (40) hours of pro bono service in order to graduate from the Law School.

Q: What happens if a student does not meet the forty hour pro bono requirement?
A: If a student does not meet the pro bono requirement, he or she will not be allowed to graduate, and the Law School will not certify him or her for admission to the Bar.

Q: When can a student begin work on the pro bono graduation requirement?
A: Students can perform up to five (5) hours of pro bono work during the first semester of the 1L year. In order to get credit for any additional pro bono hours, students must have completed 15 hours of coursework, attended the Pro Bono Orientation, and sign the Pro Bono Pledge.

Q: What are the deadlines for completion of pro bono work?
A: Students graduating in May must complete and report forty hours of service by April 1. Students graduating August must complete and report forty hours of service by June 1. Students graduating in December must complete and report forty hours of service by November 1.

Q: Can a student fulfill the pro bono requirement outside of Memphis?
A: Yes. While most students will probably serve in the Memphis area, students may find placements outside of the area, so long as the placements are on Symplicity or are preapproved. Thus, students can opt to perform pro bono service during the summer or over an academic break.

Q: May a student work at more than one place to satisfy the forty-hour requirement?
A: Yes, some students may complete the majority of their hours at a single placement, however, they are encouraged to fulfill the requirement with various placements as needed.

Q: May students perform more than forty hours of pro bono service?
A: Absolutely. Forty hours is only the minimum. Please note, awards are given at graduation for students who exceed these requirements.

Q: Does service for a faculty member qualify for pro bono hours?
A: Not unless the service is not for academic credit, is uncompensated and qualifies as pro bono work. The Law School encourages faculty to commit time to pro bono work and supervise students' pro bono work. If a faculty member supervises his or her graduate assistant's service, the faculty member must certify that the student's service is in addition to the work performed to satisfy the assistantship. Furthermore, clinic students often keep their cases after the end of a semester and after they have received academic credit. The additional hours count as pro bono hours.

Q: What are some examples of organizations that qualify for pro bono placement?
A: Some examples include: legal aid offices, the Public Defender's Office, the District Attorney's Office, public interest law firms non-profit organizations, a private firm or attorney performing pro bono work, government entities or Judges.

Q: Can students perform pro bono work at their place of employment?
A: A student who gives additional time after completion of employment tasks and who receives no compensation for work on a pro bono case or matter may receive pro bono credit for such work.

Q: How does the placement process work?
A: Students can find placements on the preapproved placement list in the Career Services Office or listed on Symplicity or its equivalent, or find their own placement. Pro Bono opportunities are also publicized in the On Legal Grounds blog as well as on class Facebook pages. A student must obtain preapproval for a student-initiated project.

Q: Whom do I contact with questions or concerns about the Pro Bono Program?
A: Please contact the Public Interest Counselor. The Public Interest Counselor assists students in finding placements and resolving issues they may encounter during a project. The Public Interest Counselor also works with placement supervisors to address their needs and concerns.

Cecil C. Humphreys School of Law

Pro Bono Program

Pre-Approved Pro Bono Placements

Career Services Office
Tel: 901·678·3257 Fax: 901·678·4107
lawcareerservices@memphis.edu

Aging Commission of the Mid-South
www.agingcommission.org

Legal Assistance Program
(901) 222-4100

The Aging Commission of the Mid-South (ACMS) is the designated Area Agency on Aging and Disability (AADD) for Fayette, Lauderdale, Shelby, and Tipton Counties in West Tennessee. The ACMS spearheads planning efforts to ensure the state of Tennessee are ready to accommodate the growing aging population and undertakes advocacy efforts on behalf of older adults and adults with disabilities.

Alternative Spring Break – Public Action Law Society
http://www.memphis.edu/law/career/asb2015.php

Public Action Law Society ASB Coordinator
Professor Christina Zawisza, PALS advisor
czawisza@memphis.edu

The Public Action Society hosts Alternative Spring Break ("ASB") annually. ASB began in 2010 when 15 Memphis law students traveled to Miami to help Haitians stranded in the US apply for temporary protected status. In Spring 2011, PALS brought ASB to Memphis and hosted 37 law students from 8 law schools in 3 areas: (1) Pro Se Divorce, (2) Advance Directives, and (3) Non-Profit Organizations. In 2012, year, PALS hosted 62 students (29 from Memphis) in four areas: (1) Pro Se Divorce, (2) Advance Directives, (3) Legislative Drafting, and (4) Immigration. In 2013, PALS continued to expand its program to allow for more student participation in different areas of the law and offered tracks in (1) Pro Se Divorce, (2) Advance Directives, (3) Immigration in Knoxville, (4) Immigration in Memphis, (5) Human Trafficking Research Track, (6) Public Interest Advocacy Research Track, and (7) Criminal with Street Court. In 2014, PALS offered additional tracks in Voter Restoration and Veteran's Issues. In 2015, PALS is offering tracks in (1) Family Law, (2) Immigration, (3) Criminal Defense (both in juvenile and restoration of rights), (4) Research & Writing (LGBT rights), and (5) Elder Law.

American Civil Liberties Union of Tennessee
www.aclu-tn.org

Internships & Law Clerk Program
(615) 320-7142

The ACLU of Tennessee (ACLU-TN) is dedicated to translating the guarantees of the Bill of Rights into realities for all Tennesseans. Some of the issues ACLU-TN fights for include: the right to free speech and expression; the right to freely practice any religion or no religion; the right to equal treatment; the right to reproductive freedom; and the right to privacy. Law student volunteers are involved in research and preparation of legal memoranda, fact investigations, client and witness interviews, discovery, pre-trial motions, handling expert witnesses, as well as accompanying lawyers at court appearances.

Center for Arkansas Legal Services
http://www.arlegalservices.org/

Main office in Little Rock
(501) 376-3423

Center for Arkansas Legal Services (CALS) is one of two free legal aid organizations in Arkansas (the other being Legal Aid of Arkansas) that provides civil legal assistance to low-income Arkansans. The types of issues CALS deals with include: consumer law, education law, employment law, family law, health law, housing law, individual rights law, public benefits, veterans/military benefits, and wills and estates. CALS has multiple offices in El Dorado, Fort Smith, Hot Springs, Little Rock, Pine Bluff, Russellville, and Texarkana.

Community Legal Center
http://www.clcmemphis.com/

Meg Jones, Executive Director
megjonesclc@gmail.com
(901)543-3395

Irene Hallett, Pro Se Clinic Supervisor
clcprose@gmail.com
(901) 222-3813

The Community Legal Center (CLC) offers legal services to thousands of lower income individuals and families in the Memphis area. Cases the CLC handles include: landlord/tenant disputes, garnishments, conservatorships & guardianships, commercial contract disputes, probate matters, non-contested divorces, adoptions, and obtaining child support. CLC also offers the following services to low-income immigrants: asylum, u-visas, t-visas, change of status, and voluntary departure. Law students can volunteer by contacting Meg Jones or volunteer with the Pro Se Clinic by contacting Irene Hallett.

Court Appointed Special Advocates (CASA)
http://memphiscasa.org/

Reniere Hayes
Coordinator of Recruitment & Training
rhayes@memphiscasa.org
(901) 405-8422

CASA volunteers are appointed by judges to watch over and advocate for abused and neglected children, to make sure they don't get lost in the overburdened legal and social service system. Volunteers stay with a case until it is closed and the child is placed in a safe, permanent home. Law students can volunteer and will be thoroughly trained and well-supported by CASA staff. You must pass

a background check, participate in a 30-hour pre-service training course and agree to stay with a case until it is closed.

Criminal Justice Center
Victim-Witness Ambassadors

District Attorney Amy Weirich's office
201 Poplar Avenue, Memphis, TN
When: Monday - Friday (except holidays) 8:30- 1:30 - or until courts are finished with their dockets.

Victim/witness ambassadors will perform much of the same functions that a receptionist does—welcoming victims and witnesses when they arrive, answering basic questions about the court process and layout of the building. When the witnesses are needed in court, the ambassadors will be notified by the District Attorney's office and assist the witnesses in finding the court. Ambassadors will not be expected, and will be strongly discouraged from, to provide counseling to victims.

The majority of people subpoenaed are instructed to appear at 9 a.m. and there is no guarantee when their case will be handled, often resulting in them waiting all day. Victims and witnesses often find a confusing, cold and intimidating building when they arrive. There is no central location for witnesses to wait for their case to be handled. These deficiencies lead to inefficiency in locating witnesses when needed in court as well as victims sitting in court near the defendant or the defendant's family.

State law requires that separate space be available for victims and witnesses of the District Attorney's office. The District Attorney's does not have sufficient personnel to cover victim/witness needs.

The county has located space for a victim/witness waiting room that should be available by **July 1, 2016**. The District Attorney's office and the Crime Victim's Center will provide training.

Disability Law & Advocacy Center of Tennessee
www.dlactn.org/

West Tennessee Office: (901) 458-6013
Middle Tennessee Office: (615) 298-1080
East Tennessee Office: (865) 670-2944

Disability Law & Advocacy Center of Tennessee (DLAC) advocates for the rights of Tennesseans with disabilities to ensure that they have an equal opportunity to be productive and respected members of our society. Some of the issues DLAC assists with include: abuse and neglect outside of the home; discrimination in housing, transportation, and employment; access to programs and services; access to education; obtaining and utilizing assistive technology; and access to vocational rehabilitation.

Families of Incarcerated Individuals
Doorways Re-Entry Program
http://familiesofincarcerated.org/

Jimmie McKinzie
jmckinzie@familiesofincarcerated.org
(901) 726-6191

Families of Incarcerated Individuals, Inc. (FII) is a non-profit organization that serves families who are affected by incarceration. FII goals and objectives include: to provide a forum for families to address concerns regarding incarceration; to provide incarceration prevention and intervention services to youth in affected families; and to assist families and inmates in re-adjusting to life free of incarceration. The Doorways Reentry Program provides one-on-one mentoring to female offenders from Mark Luttrell Correctional Center and assists with reintegration.

Hope Academy
http://www.mcsk12.net/schools/hope.aca/site/index.shtml

Michael J. Smith
(901) 405-8421

The Shelby County Juvenile Court partners with Memphis City Schools to provide juvenile education services and mentoring to youth in juvenile detention. Seventy-five percent of juvenile detainees will be allowed to re-enter Memphis City Schools, so Hope Academy fills the gap while youth are detained. Ninety-five percent of the students are males and need male mentors.

JAG Corps

Air Force: http://www.afjag.af.mil/
Army: http://www.goarmy.com/jag.html
Coast Guard: http://www.uscg.mil/legal/
Marines: http://www.marines.com/being-a-marine/roles-in-the-corps/command-element/judge-advocate
Navy: http://www.jag.navy.mil/

Each JAG Corps division has opportunities for students to intern during the summer. (Note that if you are hired for a paid internship, your hours cannot count towards the Pro Bono Program. However, if you continue to volunteer after your paid internship is complete, these hours will count towards the pro bono requirement.) JAG interns get hands-on experience in a wide number of legal fields, including civil, criminal and international law. Interns often get to draft briefs, conduct a claims investigation, interview witnesses, and assist in the preparation of courts-martial.

Justice for our Neighbors

http://tnjfon.org/

Nashville
Adrienne Kittos, TN JFON Legal Director
adrienne.tnjfon@gmail.com

Justice for our Neighbors (JFON) is a faith driven ministry, welcoming immigrants into our communities by providing free legal services, education, and advocacy. TN JFON offers monthly clinics to assist in different areas of immigration law including: advice and counsel, adjustment of status, family petitions, temporary protected status, naturalization applications, self-petitions under the Violence Against Women Act, T-Visas for victims of trafficking, special immigrant juvenile status, NACARA, and U Visas for victims of violent crime.

Juvenile Court's Foster Care Review Board

Shelby County
thomas.coupe@shelbycountytn.gov
(901) 405-8581

The foster care review board is composed of citizen volunteers appointed by the juvenile court judge. The board advises the court about the permanency process of each child in foster care. In order to serve on the board you must attend a two-hour monthly meeting, be able to interview people from various backgrounds and demonstrate an interest in child welfare.

Legal Aid of Arkansas
www.arlegalservices.org

West Memphis Office:
Kevin de Liban
kdeliban@arlegalaid.org
(870) 732-6370, ext. 2206
Simion Lucuta
slucuta@arlegalservices.org
(870) 732-6370, ext. 2204

Legal Aid of Arkansas (LAA) is one of two legal service organizations (the other being the Center for Arkansas Legal Services) that provides civil legal assistance for low-income Arkansans. LAA has offices in Batesville, Harrison, Helena, Highland, Jonesboro, Mountain View, Newport, Springdale, and West Memphis. LAA's West Memphis office is located just 15 minutes from the law school. The types of issues LAA deals with include: consumer law, education law, employment law, family law, health law, housing law, individual rights law, public benefits, veterans/military benefits, and wills and estates.

Legal Aid of East Tennessee
www.laet.org

Terry Woods (Johnson City & Knoxville Offices)
twoods@laet.org
(865)637-0484
Charles E. McDaniel (Chattanooga Office)
cmcdaniel@laet.org
(423) 756-4013

Legal Aid of East Tennessee (LAET) serves over 26 counties from Chattanooga to Johnson City, providing a wide range of civil legal assistance and advocacy to people with low income. LAET has offices in Chattanooga, Cleveland, Knoxville, Johnson City, Maryville, and Morristown. Law students should contact the Pro Bono Project Director in the area they would like to volunteer.

Legal Aid Society of Middle Tennessee and the Cumberlands
www.las.org

Legal Aid Society takes civil cases on behalf of low income clients. Legal Aid Society serves 48 counties and has offices in Clarksville, Columbia, Cookeville, Gallatin, Murfreesboro, Nashville, Oak Ridge, and Tullahoma. Law students can intern at any of the 8 offices.

- Clarksville (931) 552-6656
- Columbia (931) 381-5533
- Cookeville (931) 528-7436
- Gallatin (615) 451-1880

- Murfreesboro (615) 890-0905
- Nashville (615) 244-6610
- Oak Ridge (865) 637-0484
- Tullahoma (931) 455-7000

Memphis Area Legal Services
http://www.malsi.org/

Linda Warren Seely
lseely@malsi.org
(901) 523-8822

Memphis Area Legal Services, Inc. (MALS) is the primary provider of civil legal representation to low income families in western Tennessee. MALS assists clients in the areas of: domestic violence; mortgage foreclosure, eviction, or homelessness; wrongful denial of benefits; consumer fraud or predatory lending; child welfare; elder law; bankruptcy; and general advice and counsel on family law. MALS has two locations: Memphis and Covington. Law students can volunteer on different cases or get involved in a variety of projects such as the Saturday Legal Clinic, the Attorney of the Day Clinic, the Pro Se Divorce Project, the Bankruptcy Project or Conservatorship Project.

Memphis Bar Association
Law Rules Program
http://www.memphisbar.org/displaycommon.cfm?an=1&subarticlenbr=297

Anne Fritz
afritz@memphisbar.org
(901) 527-3573

The Memphis Bar Association has a community outreach program entitled "Law Rules: The Importance of the American Legal System." The goal of the program is to put members of the MBA before classrooms, civic and church groups, and business organizations to educate the general public on the importance of a fair and impartial justice system and the rule of law. Law students can get involved by speaking to different groups with local attorneys.

Memphis City Attorney's Office
http://www.memphistn.gov/framework.aspx?page=14

Herman Morris, City Attorney
cityattorney@memphistn.gov
(901) 576-6614

The City Attorney's Office, or Law Division, for the City of Memphis is headed by the City Attorney, Herman Morris, and his staff attorneys. Staff attorneys work in two basic areas: Service and Litigation. Attorneys working in the service area are assigned to provide legal advice to various divisions of City

government as well as a number of boards and commissions. City attorneys working in Litigation area defend lawsuits filed against the City. Note that externships with the City Attorney's Office will not count as pro bono hours. However, if you continue your service after your externship is completed, these hours will count.

Memphis Immigration Advocates, Inc.

www.miamemphis.org/

Allison Wanamaker
258 N. Merton St.
Memphis, TN 38112
Phone: (901) 244-4367
Fax: (901) 284-0303

Memphis Immigration Advocates, Inc. is the only non-profit law firm in Memphis whose core mission is to provide low-cost immigration representation to low-income clients. MIA was founded by a group of experienced Memphis immigration attorneys who recognized a need in our community. Office doors opened October 7, 2013 at our start-up location on Union Avenue. MIA provides direct representation and legal consultations to low-income immigrants residing within the Mid-South. We also engage in community education and administrative advocacy in the Memphis metro area. In order to address the recent humanitarian crisis at the U.S./Mexico border, MIA has temporarily shifted its focus to meet the urgent needs of unaccompanied minors and young asylum seekers. On a temporary basis, MIA will be referring other immigration matters to partner agencies in the region. Although MIA may make limited exceptions to this temporary policy, referring "non-emergency" cases to other agencies will allow MIA to focus our resources on helping those who are seeking asylum or Special Immigrant Juvenile Status.

Memphis Public Interest Law Center

Jamie Johnson
info@mpilc.org
(901) 406-0419

Memphis Public Interest Law Center is a non-profit public interest law firm that began conducting activities in 2012. MPILC's mission is to fill a gap in the legal services available in the Memphis community - a gap is services between those who qualify for pro bono or subsized legal services and those who can afford typical, market rate legal fees. MPILC fills this gap through provision of legal support, education, and advocacy.

MPILC serves two groups of clients: 1) Underserved populations, i.e. individuals or groups who do not qualify for subsidized legal services and who also cannot afford private-market rate legal services, and individuals who do qualify for such services but are not selected to receive them, and 2) Those facing underserved issues, i.e. issues of significant public interest that are not politically popular, financially feasible, or, for reasons unknown, addressed by the current legal community in the Memphis area.

MPILC has identified the following program areas and their corresponding areas of law as underserved issues in the local community:
1. Livable Communities Project: Environmental, Environmental Justice, issues affecting neighbors and neighborhood groups
2. Consumer Project: Fair Housing, Disability, Predatory Lending, Tenant-Landlord, FDCPA, TCPA
3. Civil Rights Project: Education, Homelessness, GLBT, Special Need, Immigration, Juvenile Rights, Elder Abuse
4. Family Project: Domestic Violence, Child Support Enforcement, Stalking, Controlling Spouse/Ex-Spouse

In 2013, MPILC's work will focus on Housing.

Memphis and Shelby County Office of Planning and Development

www.shelbycountytn.gov/index.aspx?NID=18

Josh Whitehead
125 N. Main St. Suite 468
Memphis City Hall
Memphis, TN 38103-2084
Ph: (901) 576-7197
Fax: (901) 576-6603

The agency deals with public policy issues that include residential, commercial, and industrial land use development standards; transportation and service delivery; and capital improvements. Work performed by DPD involves the collection and evaluation of data, research and analysis of options and alternatives, and the selection and implementation of projects and programs. DPD also makes recommendations and suggestions to the Memphis City Council and Shelby County Board of Commissioners, citizen advisory groups, and other agencies on comprehensive land use policies and plans, zoning recommendations, special permits, hazard mitigation, and subdivision regulations. The division is also directly responsible for the administration of the Unified Development Code (the Zoning Code and Subdivision Regulations), special use permits, site plan approvals, and street mapping.

Memphis Urban Debate League

www.memphisdebate.org

(901) 604-5644

The Memphis Urban Debate League (MUBL) is a partnership between Memphis City Schools and a private group of civic leaders organized as the MUBL board. MUBL provides Memphis urban youth the opportunity to learn the literacy, critical thinking, and life skills they need to be successful. Over 23 MCS high schools currently participate in 6 citywide tournaments throughout the school year. Each summer, MUDL organizes a free debate institute to prepare students for the upcoming season. Law students can volunteer to be a judge at debates, coach a team, or give general help with league operations.

Peer Power

Malcolm Rawls, Director of Development
mvrawls@gmail.com

Peer Power is a non-profit organization that teaches public school students college and job readiness skills. Law students are needed to lead law-related programs, such as teaching basic advocacy or writing skills, and to counsel students on careers in the legal field. *Law Review* has developed a partnership with Peer Power to teach writing workshops and would like extend this partnership to other students within the law school.

Project Homeless Connect

Josh Spickler, PALS, MBA, & Community Alliance for the Homeless
joshspickler@gmail.com

Twice a year, the Memphis community comes together for a massive one-day event to provide homeless individuals in Memphis and Shelby County with all the resources and services needed to leave homelessness. One of the resources offered to homeless individuals is legal assistance through a civil advice clinic and a criminal Street Courts program. Law students are needed to help with organizing the program, client intake, file preparation, and can shadow attorneys during consultations. To get involved, contact Josh Spickler or the current PALS President.

Pro Se Divorce Project

Matt Macaw (Divorce Incorporated)
mrmacaw@divorceincorporatedonline.com
(901) 672-7745

Matt Macaw from Divorce Incorporated and MALS hosts a monthly Pro Se Divorce Project at the Shelby County Courthouse in Room 134. During the project, "clients" referred from MALS learn how to represent themselves in a divorce. Law student volunteers will be paired up with the pro se litigants and help them fill out pro se divorce forms. Each project takes approximately 2 hours.

Shelby County District Attorney's Office
http://www.scdag.com/

Steve Jones
Steve.Jones@scdag.com

The District Attorney General and her staff prosecute all criminal cases on behalf of Memphis and Shelby County. Law students can intern at the DA's office to receive pro bono credit. Note that externship hours do not count as credit unless you take on additional work after your externship hours are completed.

Shelby County Head Start Program
http://www.shelbycountytn.gov/index.aspx?nid=252

John Lovelace
Executive Director
lovelace-j@scgheadstart.com
(901) 922-0712

Shelby County Head Start Program is a comprehensive child development program that serves preschool children ages 3-5 and their families. The program promotes school readiness by enhancing the social and cognitive development of children through the provision of educational, health, nutritional, social and other services to enrolled children and families. The Head Start program engages parents in the learning of their children and helps them make progress toward their educational, literacy, and employment goals.

Shelby County Pretrial Services
http://www.shelbycountytn.gov/index.aspx?NID=250

Richard Harrell
richard.harrell@shelbycountytn.gov

Pre-Trial Services is a comprehensive criminal justice agency offering programs that are alternatives to incarceration. Its operations range from bond settings immediately following the arrest process to providing supervision of offenders convicted and placed on county probation. Additionally, Pre-Trial Services also teaches classes on anger management, batterers' intervention, job readiness, and parenting.

Shelby County Public Defender's Office
http://www.shelbycountytn.gov/index.aspx?NID=106

Stephen C. Bush
Chief Public Defender
stephen.bush@shelbycountytn.gov
Phyllis Aluko

The Public Defender's office provides legal representation to indigent clients in all criminal matters in the General Sessions Court, Criminal Court, and Circuit Court of Shelby County. Law students can intern at the PD's office to receive pro bono credit. Note that externship hours do not count as credit unless you take on additional work after your externship hours are completed.

Shelby County Ryan White Program
http://www.shelbycountytn.gov/index.aspx?NID=2311

Dorcas Young
dorcas.young@shelbycountytn.gov
(901) 379-7512

The Ryan White Program is a federally funded program that provides medical and supportive services for people living with HIV/AIDS who are low income, uninsured or underinsured and have no other resources available to meet these needs. The Ryan White Program Office is the unit for overseeing the legislative, programmatic, and fiscal compliance of federal funds. Although the office does not provide direct services to clients, it is responsible for subcontracting funds to area clinics and community based organizations for service delivery. The Ryan White Program Offices also ensures collaborative, comprehensive planning by key stakeholders, including people living with HIV/AIDS, in the design of a system of quality HIV care throughout the region.

Southern Migrant Legal Services
www.trla.org

The Southern Migrant Legal Services is federally-funded and handles the legal needs of migrant and seasonal workers statewide.

Southeast Tennessee Legal Services
www.selegal.org/

Southeast Tennessee Legal Services (STLS) is a Project of Texas RioGrande Legal Aid, Inc. STLS is a public interest law firm seeking justice and opportunity for Tennesseans. Their programs are for victims of domestic violence and some consumer cases.

Special Education Advocate

Wendi Albert, Social Work Intern with MALS
wendikalbert@gmail.com

Students interested in Civil Rights or Education law have the unique opportunity to be a Special Education Advocate. Special Education Advocates will volunteer through Memphis Area Legal Services to be partnered with a child with needs and his or her parent to help them receive accommodations required in the public school system.

Tennessee's Department of Children's Services

http://www.tn.gov/youth/

Shelby County
901-578-4179

Southwest Region (Jackson, TN)
Regional General Counsel
LeAnn B. Rial
LeAnn.Rial@tn.gov
(731) 421-2032

The Tennessee Department of Children's Services is the state's public child welfare agency, overseeing child protective services, permanency, and juvenile justice. All volunteers must go through an extensive background check and clearance. To make your time at the placement worth it, they ask volunteers to commit a certain amount of time in the beginning. There are opportunities for interns to assist with drafting pleadings, interview witnesses, prepare cases for court, attend/observe court, prepare court orders and participate in post-court follow-up.

Tennessee Immigrant and Refugee Rights Coalition

http://www.tnimmigrant.org/

The Tennessee Immigrant and Refugee Rights Coalition (TIRRC) is a statewide, immigrant and refugee-led collaboration whose mission is to empower immigrants and refugees throughout Tennessee to develop a unified voice, defend their rights, and create an atmosphere in which they are recognized as positive contributors to the state. Students have volunteered with TIRRC in the past to help immigrants receive Deferred Action for Childhood Arrival and Naturalization.

Tennessee Justice Center
www.tnjustice.org

The Tennessee Justice Center is a non-profit, public interest law and advocacy firm serving families in need. TJC gives priority to policy issues and civil cases in which the most basic necessities of life are at stake, and where their advocacy can benefit families statewide.

Unity Solutions
www.jedmitchelllaw.com/unity-solutionslutions

Justin Edward Mitchell
1661 International Place
Memphis, TN 38120
901-494-0159
jedmitchell.law@gmail.com

Unity Solutions is a faith-based, neighborhood-based, 501(c) non-profit legal services corporation. Unity Solutions is comprised of volunteer attorneys, law students, and others dedicated to providing faith-based legal solutions to not only existing problems, but also root causes. Among other partnerships, Unity Solutions works with Advance Memphis (www.advancememphis.org) and Christ Community Health Services (www.christcommunityhealth.org)

Volunteer Income Taxpayer's Assistance (VITA) Program
http://www.irs.gov/Individuals/Free-Tax-Return-Preparation-for-You-by-Volunteers

Interim Dean & Professor William Kratzke
wkratzke@memphis.edu
(901) 678-3221

Students from Memphis Law are starting a VITA program under the supervision of Dean Kratzke. The VITA program provides free current year income tax preparation assistance for low-income taxpayers in Shelby County. From February until early April, the VITA program will operate on Wednesday afternoons. Students must go through training and pass an online test to volunteer.

West Tennessee Legal Services
www.wtls.org

- Main office/Jackson (731) 423-0616
- Dyersburg (731) 285-8181
- Huntingdon (731) 986-8975
- Selmer (731) 645-7961

West Tennessee Legal Services (WTLS) is a non-profit organization that provides civil assistance to individuals, families, and communities located in West Tennessee. WTLS serves 17 counties: Benton, Carroll, Chester, Crockett, Dyer, Decatur, Gibson, Hardeman, Hardin, Haywood, Henry, Henderson, Lake, McNairy, Madison, Obion, and Weakley. WTLS handles the following types of cases: access to health/medical care, securing or retaining housing, ensuring compliance with Fair Housing laws, securing or retaining income, personal freedom and security rights, parental rights with state action, rights of persons in institutions, freedom of all persons from abuse, family issues, education rights, consumer rights, and community education.

Youth Court

Avis P. Lamar
avis.lamar@shelbycountytn.gov
(901) 405-8720

Youth Court is the Juvenile Court of Memphis and Shelby County's first juvenile delinquency diversion and peer-justice program. Using restorative justice principles, Youth Court is dedicated to rehabilitating first-time nonviolent offenders by holding them accountable and educating them about citizenship. Volunteers help prepare high school students to prosecute, defend and to serve as bailiffs and jurors in "real" sentencing hearings of juvenile offenders. Law students (2L & 3L) are encouraged to volunteer by serving as jury monitors and court clerks. Court hearings are held at the Juvenile Court on the first and third Thursdays of each month from 5 to 7 pm. Only 4 law students will be able to volunteer per semester.

PRO BONO INFORMATION

Requirement:

All students must perform forty (40) hours of supervised *pro bono* work in order to graduate.

Definition:

Pro bono service is supervised law-related public service that a student provides without compensation or academic credit. *Pro bono* service must be supervised by a licensed attorney. Some examples of *pro bono* work that qualify include unpaid work for a government entity, public interest organization or a licensed attorney undertaken on behalf of a client that does not pay for the representation.

Steps to receive *pro bono* credit:

1. Attend Orientation
2. Sign and return a *Pro Bono* Program Pledge during Orientation
3. Read the *Pro Bono* Program Handbook
    - http://www.memphis.edu/law/documents/probono-programhandout.pdf
    - Also located in Symplicity's document library.
4. Find a *Pro Bono* placement
    - Check out the list of Pre-approved Placements list located on the website at http://www.memphis.edu/law/documents/pre-approved_probonoplacements.pdf and in Symplicity's document library.
    - If you want to initiate your own project, feel free to brainstorm with a career counselor and make sure to submit a Student-Initiated Project Form located on the website at http://www.memphis.edu/law/documents/student-initiatedprojectform.docx before serving.
    - Check the Blog, Upcoming Events and Symplicity for additional projects coming up.
5. Serve
    - Go over the program with your supervisor, check for conflicts and serve.
6. Turn in (or make sure your supervisor turns in) a Supervisor Certification Form to the Career Services Office
    - http://www.memphis.edu/law/documents/supervisor-cert2016.docx
7. Track your hours
    - At the end of each semester, you will receive an email verifying the hours you have received. Note, you will NOT receive hours if your Supervisor Certification Form has not been submitted.
    - Once you have completed 40 hours or more, you will receive a copy of the *Pro Bono* Program Completion Letter that will be placed in your file with the registrar's office.
8. Go above and beyond
    - Students who exceed the minimum requirements are eligible for awards and recognition at graduation.

Questions? Please feel free to ask. Contact us via email at lawcareerservices@memphis.edu or by phone at (901) 687-3217. We are here to help and want to make this a good experience for each of you.

Pro Bono Program
(901) 678-3217 (phone)
(901) 678-4107 (fax)

Career Services Office
lawcareerservices@memphis.edu

SUPERVISOR CERTIFICATION FORM

Thank you for participating in our Pro Bono Program. Please note that students will not receive pro bono credit until this form is submitted. You may return this form to the student to submit or submit it to the contact information above. For more information on our Pro Bono Program, please visit http://www.memphis.edu/law/career-services/pro-bono.php.

Volunteer Student

Name: ____________________________________ Email: ________________________________

Year of Graduation: _________________________ Health Law? Yes ☐ No ☐

Supervisor

Name: ____________________________________ Title: ________________________________

Phone Number: ____________________________ Email: ________________________________

Project Information

Project Name (e.g., Saturday Legal Clinic): ____

Amount of hours volunteered (not including time in training): _____________________________

Amount of time in training: __________________

Date(s) of project: __________________________

Nature of the student's work performed: ____

____

____

Evaluation

Was the student's performance satisfactory? Yes ☐ No ☐

Did the student serve without compensation? Yes ☐ No ☐

Would you supervise another student through the Pro Bono Program? Yes ☐ No ☐

Certification

Supervisor Signature: ______________________________________ Date: _________________

ALENA M. ALLEN

ASSOCIATE PROFESSOR, CECIL C. HUMPRHEYS SCHOOL OF LAW
UNIVERSITY OF MEMPHIS
1 N. FRONT STREET
MEMPHIS, TN 38103
AMALEN5@MEMPHIS.EDU
901.218.9518

ACADEMIC APPOINTMENT

University of Memphis, Cecil C. Humphreys School of Law, Memphis, TN
Associate Professor of Law, 2014-present (with tenure 2016)
Assistant Professor of Law, 2010-2014

. Courses: Torts I, Torts II, Health Law Survey, Health Law Finance and Regulation, and Health Law Seminar

Committee Assignments: Clery Committee (university-wide), Faculty Grants Committee Social Sciences, Business and Law (university-wide), Dean Search, Faculty Recruitment, Diversity, Grade Normalization, Honors and Awards, Curriculum, Admissions, and Teaching Assignments (elected), Ad Hoc Promotion and Tenure Guidelines Committee (chair).

Honors:
2015 Maxine Smith Fellow (Tennessee Board of Regents)
2013-2014 Memphis Research Scholars Grant, University of Memphis
2013 Professor of the Year (voted on by third year class)
2012-2013 American Society of Medicine, Law, & Ethics/SLU Health Law Scholar
2012-2013 Memphis Research Scholars Grant, University of Memphis

University of Arkansas, Fayetteville, AR
Visiting Associate Professor of Law, Fall 2016

EDUCATION

Yale Law School, New Haven, Connecticut
Juris Doctorate, June 2003
Activities: Morris Tyler Moot Court Board
Editor, *The Yale Journal on Regulation*
Black Law Students Association

Loyola University, New Orleans, Louisiana
B.A., *magna cum laude*, Psychology, December 1999
Honors: Dean's List (all semesters)

PUBLICATIONS

Dense Women, 76 OHIO ST. L.J. 847 (2015)

Regulating Health and Wealth, 35 CARDOZO L. REV. 309 (2013)

State Mandated Disability Insurance as Salve to the Consumer Bankruptcy Imbroglio, 2011 BYU L. REV 1327 (2011)

"Drugs General Requirements," in David Adams, Richard Cooper, and Martin Hahn, eds., FOOD AND DRUG LAW AND REGULATION (The Food and Drug Law Institute 2008) (with coauthors)

EXPERIENCE

Claudia & Lee, Memphis, TN April 2009-July 2010
Stay at Home Mom. Provided full-time care for my infant daughter. Managed household for family of four. Regularly provided advice and analyses regarding viable configurations for Lego creations and Thomas the Train track routes. Managed complex search and recovery missions for pacifiers, shoes, backpacks, keys, socks, and various other necessities. Mediated intense disputes with specialization in disputes over toys and sitting on my lap. Taught basic first year courses: how to sleep through the night, learning to use a sippy cup, patty-cake, and waving.

Arnold & Porter LLP, Washington, DC August 2007 – April 2009
Healthcare/ FDA Associate. Member of a 16 lawyer-healthcare group. Provided advice and analyses on calculating the various metrics that are reported to federal agencies or that set price ceilings (e.g., AMP, Best Price, and ASP). Drafted and negotiated contracts with wholesale distributors, hospitals, pharmacy benefit managers, and employees. Summarized the recent amendments to the Food Drug and Cosmetic Act and assisted in writing a client advisory. Drafted comment letter to CMS regarding the calculation of AMP (average manufacturer price) and bundled sales. Drafted a Medicaid compliance policy for a client. Assisted in responding to executive branch subpoena requests by reviewing documents and interviewing employees regarding allegations of illegal marketing practices by a pharmaceutical company. Trained sales representatives on PhRMA code, False Claims Act, and permissible marketing practices. Reviewed promotional materials and advertisements for compliance with applicable laws.

The Honorable Paulette Delk, Memphis, TN August 2006- July 2007
Law Clerk. Judicial law clerk to a federal bankruptcy judge. Prepared the weekly docket by summarizing pleadings. Conducted research and wrote draft opinions regarding a myriad of bankruptcy issues under Chapter 7, 11, and 13. Assisted in the drafting of speeches and presentations for continuing legal education programs and bankruptcy seminars.

The Honorable Samuel H. Mays, Jr., Memphis, TN August 2005 - July 2006
Law Clerk. Judicial law clerk to a federal district court judge. Summarized briefs and assisted in drafting opinions for the civil docket covering a host of legal issues including: evidence, Title VII, RICO, ERISA, ADA, intellectual property, and state laws on contracts and torts.

Baker Botts LLP, Houston, TX September 2003 - July 2005
Employee Benefits Associate. Member of a 15-lawyer employee benefits group. Worked with colleagues, plan sponsors, fiduciaries, actuarial consultants, and other service providers to design, implement, and administer employee benefit programs and executive compensation arrangements. Prepared documents in connection with drafting, amending, merging, and

terminating all types of benefit plans including: defined benefit plans, defined contribution plans, stock option plans, employee stock ownership plans, deferred compensation arrangements, and welfare plans. Advised clients concerning operational and compliance issues with the IRS. Assisted the diversity committee in devising strategies to help recruit and retain minority attorneys.

Jeremy W. Bock

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1 North Front Street, Memphis, TN 38103
(901) 678-5070 ▪ jwbock@memphis.edu

CURRENT POSITION

The University of Memphis, Cecil C. Humphreys School of Law
Assistant Professor of Law, Aug. 2013 – present
Courses: Civil Procedure I/II, Intellectual Property Survey, Patent Law

EDUCATION

University of California, Berkeley, School of Law, J.D., 2004
Massachusetts Institute of Technology, S.B., 1997, M.Eng., 1998 (Electrical Engineering & Computer Science)

CLERKSHIP

Hon. Alan D. Lourie, U.S. Court of Appeals for the Federal Circuit
Law Clerk, Sept. 2004 – Sept. 2005

PUBLICATIONS AND WORKS IN PROGRESS

Patent Quantity, U. HAW. L. REV. (forthcoming 2016).

Does the Presumption of Validity Matter? An Experimental Assessment, 49 U. RICH. L. REV. 417 (2015).

Restructuring the Federal Circuit, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 197 (2014).

- Selected for 6th Annual Junior Scholars in Intellectual Property Workshop, Michigan State University College of Law

Neutral Litigants in Patent Cases, 15 N.C. J.L. & TECH. 233 (2014).

An Empirical Study of Certain Settlement-Related Motions for Vacatur in Patent Cases, 88 IND. L.J. 919 (2013).

ACADEMIC CONFERENCES AND PRESENTATIONS

Presenter, "Patents as Proxies," April 2016, PatCon6, Boston College Law School.

Presenter, "Patent Quantity," February 2016, Works-in-Progress in IP Colloquium, University of Washington School of Law.

Invited Commenter, "The Disclosure Function of the Patent System," November 2015, *Vanderbilt Law Review* Symposium at Vanderbilt Law School.

Presenter, "Patent Quantity," October 2015, Intellectual Property Scholars Roundtable, Texas A&M University School of Law.

Presenter, "The Patent System's Two-Sided Agency Problem," August 2015, Intellectual Property Scholars Conference, DePaul College of Law.

Presenter, "Black-Box Patenting," April 2015, PatCon5, University of Kansas School of Law.

Discussant, Intellectual Property Works-in-Progress Panel, March 2015, Conference of Asian Pacific American Law Faculty, Northeastern University School of Law.

Presenter, "An Error-Cost Assessment of the Presumption of Validity," February 2015, Works-in-Progress in IP, U.S. Patent & Trademark Office.

Selected Presenter, "Is there a 'July Effect' in Appellate Decisions? Lessons from Patent Law," September 2014, Roundtable on Empirical Methods in Intellectual Property, IIT Chicago-Kent College of Law.

Presenter, "An Experimental Assessment of the Presumption of Validity," August 2014, 14th Annual Intellectual Property Scholars Conference, U.C. Berkeley School of Law.

Presenter, "An Experimental Assessment of the Presumption of Validity," August 2014, SEALS Annual Conference.

Presenter, "Perceptions of Agency Fallibility Among Likely Jurors: An Experiment with the Patent Office," April 2014, PatCon4, University of San Diego School of Law.

Presenter, "Perceptions of Agency Fallibility Among Likely Jurors: An Experiment with the Patent Office," March 2014, Legal Scholars Conference, Arizona State University, Sandra Day O'Connor College of Law.

Presenter, "Rethinking Patent Liquidity," February 2014, Works-in-Progress in IP, Santa Clara University School of Law.

Selected Participant, "Error-Correction at the Federal Circuit," October 2013, 6th Annual Junior Scholars in Intellectual Property Workshop, Michigan State University College of Law (blind review selection process for participants).

Presenter, "Error-Correction at the Federal Circuit," August 2013, Intellectual Property Scholars Conference, Benjamin N. Cardozo School of Law.

Presenter, "Does Familiarity Breed Contempt? Perceptions of Agency Fallibility in the Jury Pool," June 2013, Workshop on Research Design for Causal Inference, Northwestern University School of Law.

Presenter, "Dogfooding at the Federal Circuit: A Proposal for Enhancing the Error-Correction Feedback Loop," April 2013, PatCon3, IIT Chicago-Kent College of Law.

Presenter, "Rethinking the Two-Sided Patent Suit: A Proposal for Neutral Litigants in Patent Cases," February 2013, Works-in-Progress in Intellectual Property, Seton Hall University School of Law.

Presenter, "Killing Two Birds with One Party: Using Neutral Third Parties to Represent the Public Interest and to Dampen Overzealous Advocacy in District Court Patent Litigation," August 2012, Intellectual Property Scholars Conference, Stanford Law School.

Presenter, "An Empirical Study of Certain Settlement-Related Motions for Vacatur in Patent Cases," January 2012, Work-in-Progress Workshop, U.C. Hastings College of Law.

NON-ACADEMIC PANELS AND EVENTS

Panelist, "A Case for and Against Patent Reform," November 2014, Leo Bearman, Sr. American Inn of Court (Memphis, TN).

Panelist, "Intellectual Property in the New Technological Age," May 2012, hosted by the Federal Judicial Center and the Berkeley Center for Law & Technology (annual educational program for federal judges).

PRIOR APPOINTMENTS / POST-J.D. LEGAL EXPERIENCE

University of California, Berkeley, School of Law
Berkeley Center for Law & Technology
Senior Visiting Scholar / BCLT Fellow, May 2011 – May 2013

Private Practice – Law Firms/In-House
Patent litigation, prosecution, and related counseling, Oct. 2005- Mar. 2011

BAR ADMISSIONS

2000, U.S. Patent & Trademark Office (Reg. No. 45,482)
2004, California
2006, District of Columbia

Demetria D. Frank, Assistant Professor of Law
University Of Memphis, Cecil C. Humphreys School of Law
1 N. Front Street | Memphis, Tennessee | Ph: 901-678-4948 | demetria.frank@memphis.edu

Academic Appointments

University of Memphis, Cecil C. Humphreys School of Law
Assistant Professor of Law June 2013 – present

Courses Taught: Evidence, Federal Courts, Pretrial Litigation Practice and Trial Advocacy.

University of Wyoming College of Law
Assistant Professor of Law August 2011 – May 2013

Courses Taught: Evidence, Torts, Trial Practice, Summer Trial Institute & Appellate Advocacy

Education

University of Texas School of Law Austin, Texas
Doctorate of Jurisprudence May, 2005
Texas Journal on Civil Liberties and Civil Rights, Staff Member

University of Houston Houston, Texas
Bachelor of Arts, Political Science May, 2002

Cum laude graduate with minor in Interpersonal Communications
Omicron Delta Kappa, National Leadership Honors Society

Publications

The Proof is in the Prejudice: Implicit Racial Bias & the Uneven Treatment of Rule 404(b) Uncharged Act Evidence—A Proposal. Forthcoming.

The Medical Device Federal Preemption Trilogy: Salvaging Due Process for Injured Patients. 35 S. Ill.U. L.J. 453 (2011).

Presentations

Dynamic Voir Dire: Six Steps to Getting a Great Jury. Continuing Legal Education Course Presenter, University of Wyoming College of Law; Laramie, Wyoming, April, 2013.

Foundation, Foundation, Foundation: A Foundational Evidence Review for Practitioners. Continuing Legal Education Course Presenter, Albany County Bar Association; Laramie, Wyoming, November 7, 2011.

Hot Topics in Asbestos Litigation, Speaker, American Bar Association Toxic Tort and Environmental Sections, Annual Meeting; Phoenix, Arizona, March 29, 2007.

Legal Employment Experience

Six years of practice as an attorney with significant litigation and trial experience with over 75 cases resolved through settlement negotiation, mediation and trials as first and second-chair attorney. Practice primarily focused on toxic tort and products liability litigation.

Brent Coon & Associates, PC August 2009-June 2011
Attorney & Litigation Manager

The City of Dallas December 2007 – September 2009
Associate Municipal Court Judge
Assistant City Attorney

Waters & Kraus, LLP July 2004 – August 2007
Associate Attorney
Summer Associate

Other Research Experience

University of Texas School of Law September 2003 – May 2005
Research Assistant to Professor Loftus Carson

Bar Membership

Admitted to the Texas State Bar, 2005

LEE HARRIS

Current Position:

FedEx Professorship in Law (since 2012) (tenured in 2011)
University of Memphis Law School,
1 North Front Street, Memphis, TN 38103
Tel: (901) 678-1393
Email: laharris@memphis.edu
SSRN: http://ssrn.com/author=118242

Education

2003	**J.D.**, **Yale Law School**
	Earl Warren Legal Scholarship (NAACP Legal Defense Fund)
2000	**B.A.**, **Morehouse College**, major in International Studies, minor in Economics
	Magna Cum Laude; Phi Beta Kappa; Tobe Johnson Award for the Political Science Student of the Year; Departmental Recognition for Highest G.P.A.; Fellow, Institute for International Public Policy; Congressional Black Caucus Foundation Scholarship; Morehouse Full Tuition Scholarship
1998-99	**General Course, London School of Economics and Political Science,**
	Men's Varsity Basketball Team

Previous Positions

2012-present	FedEx Professorship in Law, Univ. of Memphis Law School
2009-2012	Associate Prof. of Law, Univ. of Memphis Law School
2007-2008	Visiting Associate Prof. of Law, George Washington Univ. School of Law
December 2007	Visiting Prof. of Law, Ecole de Management, Grenoble, France
2005-2009	Assistant Prof. of Law, Univ. of Memphis Law School
2002-2003	Coker Teaching Fellow and Assistant in Instruction, Yale Law School (Prof. Ian Ayres/Contracts)
2003	Teaching Fellow, Yale Univ. Economics Department
2003-2005	Associate, Baker, Donelson, Bearman, Caldwell & Berkowitz, Commercial Litigation, Memphis, TN

Teaching & Research Interests

Teaching Interests:

Contracts I & II
Business Associations/Corporations
Mergers & Acquisitions
Corporate Finance
Corporate Tax

Research Interests:

Corporate Law
Law & Economics
Empirical Legal Studies
Race & Socio-economic status

Bibliography

Books

CORPORATIONS AND OTHER BUSINESS ENTITIES: A PRACTICAL APPROACH (Aspen 2011)

MASTERING CORPORATIONS & OTHER BUSINESS ENTITIES (Carolina Academic Press 2009, 2d Edition 2015)

Selected Recent Articles

1. *Corporate Elections and Tactical Settlements*,
   39 J. CORP. L. 221 (2014)
2. *CEO Retention*,
   24 FLA. L. REV. 1753 (2013)
3. *The Politics of Shareholder Voting*,
   86 N.Y.U. L. REV. 1761 (2011)
4. *Shareholder Campaign Funds*,
   58 UCLA L. REV. 167 (2010)
5. *Missing in Activism: Retail Investor Absence in Corporate Elections,*
   2010 COLUM. BUS. L. REV. 101 (2010), discussed in *The Economist* magazine.
6. *A Critical Theory of Private Equity*,
   35 DEL. J. CORP. L. 259 (2010), *reprinted in* 2 FINANCIAL FRAUD L. REPORT 262 (March 2010)
7. *Tort Reform as Carrot-and-Stick*,
   46 HARV. J. LEGIS. 163 (2009), *reprinted in* A. POPPER, TORT REFORM: ESSAYS, CASES & MATERIALS (2010) and selected for 2007 Yale-Stanford Junior Faculty Forum

Admissions, Personal & Miscellaneous

Bar Admissions: Tennessee (2003); U.S. District Court, Western District of Tennessee (2003).

Hobbies & Interests: Cooking • Running • Yoga • Restaurant Recommendations.

Personal: Married to Prof. Alena Allen and two children, Claudia Harris (7) and Lee Allen Harris (10).

LISA M. GEIS

THE UNIVERSITY OF MEMPHIS CECIL C. HUMPHREYS SCHOOL OF LAW
1 North Front Street, Suite 101, Memphis, TN 38103
901-678-3226 lgeis@memphis.edu

EXPERIENCE

The University of Memphis Cecil C. Humphreys School of Law (June 2016 – present)
Director - Children's Defense Clinic
Visiting Assistant Professor of Law

- Design and direct a juvenile defense program providing specialized representation for children involved in delinquency matters in Shelby County Juvenile Court.

DC Law Students In Court Program (July 2014 – May 2016)
Member law schools: The George Washington School of Law, UDC David A. Clarke School of Law, The American University, Georgetown University, Howard University School of Law

Clinical Professor & Supervising Attorney – *Juvenile Justice Clinic* (January 2015 – May 2016)

- Created a children's justice and policy clinic with a focus on holistic representation of children in contact with DC Superior Court Family Division.
- Supervised law students assigned to representing clients charged in delinquency matters, providing representation of children facing a variety of challenges including educational and behavioral needs, homelessness, and LGBT issues.

Clinical Professor & Supervising Attorney – *Criminal Division* (July 2014 – May 2016)

- Supervised law students representing indigent, adult defendants charged in DC Superior Court from arraignment through parole release.
- Co-design and teach seminar component of course which includes jurisdiction specific litigation theory and skill development as well as on-going discussion concerning system reform and social justice.

University of the District of Columbia, David A. Clarke School of Law (August 2012 – July 2014)
Juvenile & Special Education Law Clinic – Took Crowell Institute for At-Risk Youth

Clinical Instructor & Supervising Attorney

- Co-taught special education law and advocacy during clinic seminar sessions.
- Supervised student-driven case management including motions practice, administrative law hearings, and school discipline proceedings.
- Counseled students as to legal theory, lawyering competencies, and proficient legal writing.
- As member of multi-agency Family Court Training Committee, facilitated training for the DC Office of Social Services Probation Intake, the Office of the Attorney General, superior court judges, and the DC juvenile defense bar as to regulations pertaining to truancy proceedings in the family court.

Rutgers School of Law - Camden Children's Justice Clinic (September 2010 – August 2012)
John D. and Catherine T. MacArthur Foundation Models for Change Fellow
Juvenile Indigent Defense Action Network (JIDAN-NJ) - Post Disposition Representation Project

This pilot program provided representation for adjudicated juveniles placed in the custody of New Jersey's Juvenile Justice Commission who were primarily detained in secure facilities as part of the statewide initiative.

- Developed protocol for referral system and ongoing representation of confined youth in conjunction with the NJ Office of the Public Defender.
- Implemented systemic reform through impact appellate litigation.
- Advocated for services addressing special education needs, mental health, medical treatment, and safe conditions of confinement.
- Collaborated with residential community homes, families, home-based service providers, and local educators to ensure a continuum of rehabilitation and promote successful reentry.
- Coordinated with partners and stakeholders to prepare regular foundation grant reports.

ARTICLES

Courtroom, Classroom, Commitment: Special Education & Disability Rights to Keep Youth Out of Secure Facilities, Atlanta's John Marshall Law Journal *(Forthcoming – Spring 2016).*

An IEP for the Juvenile Justice System: Incorporating Special Education Law Throughout the Delinquency Process, The University of Memphis Law Review, Volume 44, No.4, July 2014.

The Harmful Use of Isolation in Juvenile Facilities: A Report from the New Jersey Post-Disposition Project, 38 Wash. U. J.L. & Pol'y 241(2012), (co-author with Sandra Simkins & Marty Beyer).

SELECTED PRESENTATIONS & LECTURES

Symposiums

The University of Memphis Law Review Annual Symposium – ***Juvenile Court In Transition: Where Have We Been and Where We are Going***, Memphis, TN (February 2014)

Atlanta's John Marshall Law Journal 2015 Dean Robert D'Agostino Symposium – ***Decreasing Youth Incarceration through Quality Juvenile Defense***, Atlanta GA (March 2015) (Symposium presented in conjunction with the National Juvenile Defender Center)

Trainings& Workshops

Annual Juvenile Defender Leadership Summit, National Juvenile Defender Center
(Seattle, WA – 2011; Scottsdale, AZ - 2013)

- *Using Suspension & Expulsion Hearings to Win Your Case in Court*, Workshop Co-Panelist (2013)
- *Incorporating Education & Disability Law into Your Defense*, Workshop Co-Panelist (2013)
- *Combating Confinement at Disposition and Post Disposition*, General Plenary Session Speaker (2011)
- *Challenging the Use of Isolation*, Workshop Presentation (2011)

Council for Court Excellence Training, Family Court Training Committee of DC Superior Court, Washington DC (March 2014)

- *The DC Accountability Amendment Act of 2013: What You Need to Know About Truancy & the Court*

New Jersey Office of the Public Defender Juvenile Training, Trenton, NJ (November 2010 & May 2012)

- *Post Disposition Representation Project Protocol*

Law School & University Presentations

Georgetown University Law Center - ***Post-Commitment Representation Practicum***, Washington DC (March 2014)

- *My Time in Juvie: The New Jersey Post-Disposition Representation Project*

Rutgers School of Law – Camden, ***Children's Justice Clinic***, Camden, NJ
Presentations include:

- *Courtroom, Classroom, Commitment: Special Education & Disability Rights to Prevent Juvenile Incarceration* (Spring 2015)
- *An IEP for the Juvenile Justice System: Special Education & Representing Juveniles* (Spring 2013)
- *Post Disposition Representation: An Avenue for System Reform,* (Fall 2013)
- *The Overuse of Isolation in Juvenile Facilities,* (Fall 2012)

American University Washington Semester Program – Criminal Division Justice (Spring 2014)

- *They're Not "Just Short Adults":An Introduction to Juvenile Justice*

EDUCATION

University of the District of Columbia - David A. Clarke School of Law, Washington, DC
LL.M. (concentration in Clinical Education, Social Justice, & Systems Change), May 2014

- Juvenile & Special Education Clinic, Took Crowell Institute for At-Risk Youth

Rutgers School of Law - Camden, Camden, NJ
Juris Doctorate, May 2010

AWARDS:

The Reed Smith Clinical Excellence Award for demonstrating excellence in both classroom work and by providing outstanding client representation.

2009 Mary Philbrook Student Public Interest Award for dedication and service to the Juvenile Justice Program, development of an innovative intake model used by public defenders across NJ, and dedication to the Street Law Program.

Pro Bono Award for Significant Service for exceptional commitment to the pro bono ethic.

The Catholic University of America, Washington, DC
Bachelor of Arts, May 1988

BAR ADMISSIONS

State of New Jersey	(admitted 2011)
United States District of New Jersey	(admitted 2012)
District of Columbia Bar	(admitted 2012)
United States Supreme Court	(admitted 2015)

OTHER LEGAL EXPERIENCE

New Jersey Office of the Public Defender (Camden County) (Summer 2009)
John D. and Catherine T. MacArthur Foundation Models for Change Fellow
Juvenile Indigent Defense Action Network (JIDAN-NJ) – Initial Detention Hearing Project

- Actively participated in the Foundation's nationwide Models for Change JIDAN initiative to improve the quality of and early access to legal representation accorded to youth in juvenile courts.
- Provided representation for juveniles at initial detention hearings
- Collected and analyzed data regarding the detention hearing process and outcomes for project reports.

ORGANIZATIONS & COMMITTEES

The Catholic University of America National Alumni Association Board of Governors *(2015 - present)*

University of the District of Columbia - David A. Clarke School of Law Faculty Affairs Committee
(LL.M. Representative: 2013-2014)

National Juvenile Defender Leadership Summit Regional Caucus

- 2016 – present: Central Region; 2013-2016: Mid-Atlantic Region; 2011 & 2012: Northeast Region

BORIS N. MAMLYUK
Assistant Professor of Law
University of Memphis
Cecil C. Humphreys School of Law
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Memphis, TN 38103 USA
(901) 678-2202 (office)
bmamlyuk@memphis.edu
September 10, 2016

WEB

Profile: http://www.memphis.edu/law/facultystaff/bio/mamlyuk.php
SSRN: http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1541890
Blogs: http://cjicl.org.uk/author/borismamlyuk/
http://www.huffingtonpost.com/boris-mamlyuk/

PROFESSIONAL EXPERIENCE

University of Memphis, Cecil C. Humphreys School of Law (Memphis, TN)
— *Assistant Professor of Law (Tenure-track)*: Aug. 2011 – present
- *Courses*: Contracts; Public International Law; International Business Transactions; Comparative Law; Sales (Spring 2012).

Harvard Law School (Cambridge, MA)
— *Junior Faculty, Institute for Global Law & Policy (IGLP)*: Jan. 2015
- Co-convenor of comparative law stream reading discussion group for Ph.D. and post-doctoral participants;
- Provide institutional teaching and support for select institutional events.

Ohio Northern University, Pettit College of Law (Ada, OH)
— *Visiting Assistant Professor of Law*: Aug. 2010 – July 2011
- *Courses*: Administrative Law; Law of International NGOs; Rule of Law Seminar; Jurisprudence

Cornell Law School (Ithaca, NY)
— *Visiting Scholar*: 2007 – 2008; 2009 – 2010
— *J.S.D. Candidate*: (2010 – 2014)
- Conducted original research; organized and participated in graduate legal studies research colloquia and graduate conferences; Int'l Law Editor (Wex, Cornell Legal Information Institute [LII]); *Organized Keynote Lecture*: "Popular Constitutionalism Abroad," Sen. Mike Gravel, Spring 2008; *Organizer*: Inter-university graduate law student conference (Spring 2010).

State University, Higher School of Economics (Moscow, Russia)
— *Lecturer*: Spring 2009
- *Seminars*: Law and Civil Society; Contemporary Russian Law & Politics

Columbia University, Harriman Institute (New York, NY)
— *Visiting Scholar*: Spring 2008
- Conducted archival research (John N. Hazard Manuscript Collection).

Watt, Tieder, Hoffar & Fitzgerald, LLP (Irvine, CA)
— *Associate*: 2005 – 2007
- Admitted to practice before all courts of California and all federal district courts in California; handled and resolved numerous civil cases involving suretyship, federal and state contract, construction and real estate law; researched and prepared numerous pleadings in state and federal courts, including state appellate briefs and related pleadings.

University of California, Hastings College of the Law (San Francisco, CA)
— *Teaching Assistant*: Fall 2004

EDUCATION

University of Turin, Faculty of Law
— *Ph.D. in Law, Economics and Institutions*: April 2011
- Centre for Comparative Analysis of Law, Economics & Institutions (CLEI)
- Collegio Carlo Alberto Fellowship (IEL Programme, Moncalieri, Italy)
- Fulbright Fellow (Moscow, Russia) (2008-2009)
- *Dissertation*: Russia's Two Twenty-Years' Crises (1919-1939) & (1989-2009): Economic Constraints on the Development of International Law
- *Research Interests*: Post-Soviet transition & transitology, international law, international environmental law, comparative law, law and economics, law and development, critical legal studies, legal transplant studies.
- *Supervisors*: Ugo Mattei & Michele Graziadei
- *External Examiners*: William B. Simons (Leiden); Michele Vellano (Turin); Giudetta Cordero-Moss (Oslo).

University of California, Hastings College of the Law (San Francisco, CA)
— *Juris Doctor (J.D.)*: May 2005
- *Member*: Hastings Constitutional Law Quarterly (CLQ)
- *Articles and Symposium Editor*: Hastings Int'l and Comp. L. Rev. (HICLR)
- *Member and Student Coach*: Jessup International Law Moot Court Team
- *President*: Hastings International and Comparative Law Society (HICLS)
- *Judicial Extern*: Justice Richard Aronson, California Court of Appeal (Fourth District, Div. Three); Judge Leslie Tchaikovsky (U.S. Bankruptcy Court, N.D. Cal.); Chief Judge John W. Sedwick (U.S. District Court, District of Alaska).

University of London, School of Oriental and African Studies (London, UK)
— *Exchange Study*: Fall 2004
- Researched international and comparative law and institutions; audited Russian Law (Prof. William Butler) at University College London; *Observer*: Nov. 2004 Ukrainian presidential election ("Orange Revolution"), Kiev, Ukraine.

California State University, Fullerton (Fullerton, CA)
— *Bachelor of Arts, English (Magna Cum Laude)*: May 2002
- "Award for Excellence in English" (top student in graduating class)

AWARDS / HONORS

- *Fulbright Fellowship* (Moscow, Russia) – 2008-2009
  - Research Affiliation: Institute of State & Law, Russian Academy of Sciences
  - Teaching Position: State University, Higher School of Economics (Moscow, Russia); Spring 2009 Seminars: Law and Civil Society; Contemporary Russian Law & Politics
- *Ph.D. Fellowship* (2007-2010): Fondazione Collegio Carlo Alberto, Torino, Italy;
- *Blum Scholarship* (merit scholarship), UC Hastings (2002-2005)
- *US Congress*: Certificates of Special Recognition for Outstanding Service to the Community, presented by Congressmen David Drier and Gary Miller; *California State Assembly*: Certificate of Recognition, presented by CA Assemblyman Robert Pacheco; *County of Los Angeles*: Certificate of Recognition, presented by Los Angeles Country Mayor Michael Antonovich.

PUBLICATIONS (BOOKS)

- PERPETUAL TRANSITION: EARLY SOVIET & POST-SOVIET INTERNATIONAL LEGAL THEORY (Martinus Nijhoff) (*forthcoming*)
  - General Editor (William Simons, Leiden)

PUBLICATIONS (ARTICLES & BOOK CHAPTERS)

- *Decolonization as a Cold War Imperative: Bandung and the Soviets*, *in* BANDUNG, THE GLOBAL SOUTH, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES (Luis Eslava, Michael Fakhri, and Vasuki Nesiah, eds., Cambridge: Cambridge University Press, 2016) (forthcoming).
- *The Ukraine Crisis, Cold War II, and International Law*, 16:3 GERMAN LAW JOURNAL 479 (Summer 2015) (invited submission; peer-reviewed).
- *Early Soviet Property Law in Comparison with Western Legal Traditions*, *in* RESEARCH HANDBOOK ON POLITICAL ECONOMY AND LAW (John D. Haskell, Ugo Mattei, eds., Edward Elgar Publishers, 2015) (invited submission);
- *Cold War Protagonists*, *in* 'THE BEST IN THE WEST': EDUCATOR, JURIST, ARBITRATOR: LIBER AMICORUM IN HONOUR OF PROFESSOR WILLIAM BUTLER (Natalia Iu. Erpyleva, Maryann E. Gashi-Butler, eds., Wildy, Simmonds & Hill Publishers, 2014) (invited submission);
- *Russia and Regional Trade Integration in a Historical Perspective: A Response to William E. Butler*, 44 U. MEM. L. REV. 619 (2014) (commentary to keynote lecture delivered by Prof. William Butler);
- *Regionalizing Multilateralism: The Effect of Russia's Accession to the WTO on Existing Regional Integration Schemes in the Former Soviet Space*, 18 UCLA J. INT'L L. & FOR. AFF. 207 (2014);
  - *Original conference paper published in* Francis Snyder and Yi Lu, eds., THE FUTURE OF TRANSNATIONAL LAW: EU, USA, CHINA AND THE BRICS [L'AVENIR DU DROIT TRANSNATIONAL: UE, USA, CHINE ET LES BRICS] (Bruxelles: Bruylant 2015).
- *Russian International Law: Cold War & Post-Soviet Dynamics*, *in* THE LEGAL DIMENSION IN COLD-WAR INTERACTIONS: SOME NOTES FROM THE FIELD (William Simons, Tatiana Borisova, *eds*., M. Nijhoff 2012);

- *Reviewed in* W.E. Butler, *Soviet Law and the Cold War*, 7 J. COMP. L. 334 (2012)
- *Reviewed in* William Simons, Tatiana Borisova, *Introduction*, *in* THE LEGAL DIMENSION IN COLD-WAR INTERACTIONS: SOME NOTES FROM THE FIELD (William Simons, Tatiana Borisova, *eds*., M. Nijhoff 2012);

- *Russia & Legal Harmonization: an Historical Inquiry Into IP Reform as Global Convergence and Resistance*, 10 WASH. U. GLOBAL STUD. L. REV. 535 (2011);
  - *available at*, CORNELL LAW SCHOOL WORKING PAPERS SERIES (March 5, 2010) (http://scholarship.law.cornell.edu/clsops_papers/71/);
- *Comparative International Law*, 36 BROOKLYN J. INT'L L. 385 (2011) (with Ugo Mattei);
  - *Excerpt republished in* Ю.С. Шемшученка, О.В. Кресіна, ред., ІДЕЯ ПОРІВНЯЛЬНОГО МІЖНАРОДНОГО ПРАВА: PRO ET CONTRA (Київ; Львів: Ліга-прес, 2015) [Yu. S. Shemshuchenka, Oleksiy V. Kresin, eds., COMPARATIVE INTERNATIONAL LAW: PRO ET CONTRA (Kiev; Lviv: Liga Press, 2015);
- *Analyzing the Polluter Pays Principle Through Law and Economics*, 18 SOUTHEASTERN ENV. L. J. 44 (2010);
- *Book Review: International Law – a Russian Introduction* (V.I. Kuznetsov, B.R. Tuzmukhamedov, *eds*.), 35 REV. OF CENTRAL AND EAST EUROPEAN LAW 111 (2010);
- *The Prophecy of Radical Democracy and Social Populism*, 5 REVISTA INTERNACIONAL DE PENSAMIENTO POLÍTICO 260 (2009) (review of Roberto Unger, *The Self-Awakened: Pragmatism Unbound*) (in Spanish).
- *Capitalism, Communism … And Colonialism? A Critical Colonial Reading of 'Transitology' in the Former Soviet Union*, 9:2 GLOBAL JURIST 1 (2009), with John D. Haskell (SOAS), *available at* http://www.bepress.com/gj/vol9/iss2/art7/;
- IUC Independent Policy Report, *At the End of the End of History – Global Legal Standards: Part of the Solution or Part of the Problem*, 9:3 GLOBAL JURIST (2009) (collectively written by IUC Global Legal Standards Research Group);

PUBLICATIONS (IN PROGRESS)

- *Political Economy of a 21st Century Corporate Mass Merger: Walmart-Massmart and the Future of Global Governance* (with Dr. Karolina Zurek);
- *Vermont Yankee 2: Can the State of Vermont Win its Federalism Showdown Against the Nuclear Regulatory Commission?* (with John D. Haskell);

SELECTED CONFERENCE/MEDIA PARTICIPATION

- "Cold War Histories of International Law," co-panelist at Annual Meeting of Law and Society Association, New Orleans, LA (June 2-5 2016);
- International Law Beyond the Nation State? From People Power to ISIL/Daesh, co-panelist at 110th Annual Meeting of the American Society of International Law, Washington, D.C. (March 30-April 2, 2016);
- After Self-Determination: Localities and Universalities in the New Struggles for Territorial Sovereignty, University of Manitoba, Faculty of Law (March 26, 2015);
- Between the Law, Power and Principle: Self-Determination, Constitution Making and the Crisis in Ukraine, University of California, Berkeley School of Law (February 13, 2015);

- Junior Faculty, Institute for Global Law and Policy Annual Conference, Harvard Law School (Doha, January 2-11, 2015);
- Ukraine Workshop: A Case Study in the Viability of International Law, U.S. Military Academy (and co-sponsored by the U.S. Naval War College Stockton Center for the Study of International Law) (October 20-23, 2014);
- The Approaches of Liberal and Illiberal Governments to International Law Conference, University of Tartu (Estonia) / European Society of International Law Legal Theory Group (June 12-13, 2014);
- Docent, Institute for Global Law and Policy Workshop and Colloquium, Harvard Law School (June 1-7, 2014)
- Soviet International Law in Historical Context, presented at Law and History Workshop, University of Utah, School of Law (May 25-30, 2014);
- Docent & Participant, Institute of Global Law and Policy: the Workshop (Doha, Qatar) (January 3-14, 2014);
- National Traditions in International Law Textbook Writing, University of Glasgow, Faculty of Law (November 12-13, 2013) (by invitation);
- "Historicizing Russia's WTO Accession and Regional Trade Agreement Push," Commentary to Keynote Lecture delivered by Prof. William Butler, University of Memphis, School of Law, September 27, 2013;
- Participant, Workshop on Environmental Law and Economics, PERC/George Mason School of Law, Big Sky, Montana, October 2013;
- Docent & Participant, Institute of Global Law and Policy: the Workshop (Doha, Qatar) (January 3-14, 2013);
- "Political Economy of a 21st Century Corporate Mass Merger: Walmart-Massmart and the Future of Global Governance," Presentation with Dr. Karolina Zurek, Doha, Qatar, January 2013;
- "Status of Post-Soviet Regional Integration Treaties Following Russia's WTO Accession," 9th Annual WISH Conference, Shenzhen, China (November 29-December 3, 2012)
- "Teaching History, Historiography & International Law in an Introductory Public International Law Course," SALT Conference, Baltimore, Maryland (October 4-6, 2012)
- Docent & Participant, Institute of Global Law and Policy: the Workshop (Harvard Law School) (June 1-9, 2012)
- "TWAIL-ing Post-Soviet International Law," TWAIL: Capitalism and the Common Good, University of Oregon, School of Law (October 20-22, 2011)
- Teaching Assistant & Participant, Institute of Global Law and Policy: the Workshop (Harvard Law School) (June 1-13, 2011)
- "Comparative International Law," Comparative Law Works-in-Progress Workshop (Yale Law School & American Society of Comparative Law) (February 11-13, 2011)
- "Institute of Global Law and Policy: the Workshop" (Harvard Law School) (June 1-12, 2010)
- "Revisiting, Rather than Reinventing, the Comparative International Law Wheel" (LSE/SOAS, London) (January 14-16, 2010)
    - *Third Annual Post-Graduate Colloquium on International Law*;
- "Comparative International Law?" (University of Toronto, Faculty of Law) (January 29-30, 2010)
    - *Concerning States of Mind, Disturbing the Minds of States – 3rd Annual Toronto Group Conference*;

- Media Appearance / Political Discussant, EXPERTTV (January 25, 2009), *available at* http://tv.expert.ru/video/svz_250109/ (hour-long political analysis panel with Andrei Kortunov & Mikhail Delyagin);
- "Russia's Response to the 2008 Financial Crisis and the Impact on Future U.S./Russian Relations" (IUC-Torino) (December 2008)
  - *International University College of Turin – Law, Economics and Finance Annual Conference*;
- Media Appearance / Political Discussant, RUSSIATODAY (November 5, 2008) (30-min. news interview).
- "2008 U.S. Presidential Elections: Perspectives and Challenges" (American Center, Moscow) (October 24, 2008)
  - Invited Speaker for Russian Translation of Pres. Barack Obama's *Audacity of Hope*;
- "Reflections on Post-Soviet Law: The Theory of Lack Reexamined" (University of Toronto, Faculty of Law) (January 11-13, 2008)
  - *Mapping Emergent Terrains, Contesting Rigidified Traditions – 1st Annual Toronto Group Conference*;
- "The Law and Economics of the Polluter Pays Principle" (University of Toronto, Faculty of Law) (September 28-29, 2007)
  - *Canadian Law and Economics Association Annual Conference*;
- "Russia's Internet Regulation Regime—A Law and Economics Perspective" (Moscow State University) (October 12-13, 2007)
  - *Mass Information in Internet: Freedom and Responsibility* Co-organized: Centre for Socio-Legal Studies (Oxford University), Institute for Law and State (Russian Academy of Sciences), Institute for Problems of Information Security (Moscow State University);
- "Fifteen Years of Transitology – A Critical Perspective" (Aleksanteri Institute, University of Helsinki, Finland) (November 28-29, 2007)
  - *Revisiting Perestroika - Processes and Alternatives, Aleksanteri Conference*;
- *Organizer*: 2005 Rudolf B. Schlesinger Lecture on Int'l and Comparative Law,
  - Lecture by Laura Nader, *Law and the Theory of Lack*, 28 HAST. INT'L. & COMP. L. REV. 191 (2005).

OTHER

- U.S. Army ROTC Cadet, Summer 2001 (Ft. Knox, KY)
- Fluent Russian; Reading Spanish, Italian.
- Contributor (Int'l Law): Cornell Law School, Legal Information Institute, Wex.
- *Technical Skills*: Westlaw, LexisNexis, Bloomberg, STATA, Mathematica 7, MS Office, WordPerfect, CM/ECF
- *California Bar No*: 238084
- *Citizenship*: U.S.A.

ACADEMIC/PROFESSIONAL REFERENCES

- *Available upon request.*

JOHN M. NEWMAN

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Memphis, TN 38103
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ACADEMIC APPOINTMENTS

University of Memphis Cecil C. Humphreys School of Law

Assistant Professor *2015–present*
Courses: Antitrust Law, Conflict of Laws, Contracts I, Contracts II
Honors: Farris Bobango Faculty Scholarship Award (2016)

Visiting Assistant Professor *2014–15*

SCHOLARSHIP

Articles

Antitrust in Zero-Price Markets: Applications, 94 WASH. U. L. REV. __ (forthcoming 2016).

Antitrust in Zero-Price Markets: Foundations, 164 U. PA. L. REV. 149 (2015).

Copyright Freeconomics, 66 VAND. L. REV. 1409 (2013).

Personal Jurisdiction and Choice of Law in the Cloud, 73 MD. L. REV. 313 (2013) (with Damon Andrews).

Anticompetitive Product Design in the New Economy, 39 FLORIDA ST. U. L. REV. 681 (2012).

Student Notes

Raising the Bar and the Public Interest: On Prior Restraints, "Traditional Contours," and Constitutionalizing Preliminary Injunctions in Copyright Law, 10 VIRGINIA SPORTS & ENT. L.J. 323 (2011).

Holden Caulfield Grows Up: Salinger v. Colting*, the Promotion-of-Progress Requirement, and Market Failure in a Derivative-Works Regime*, 96 IOWA L. REV. 737 (2011).

Nonperiodical Materials

Innovation Policy for Cloud-Computing Contracts, *in* HANDBOOK OF RESEARCH ON DIGITAL TRANSFORMATIONS (Francisco-Xavier Olleros & Majlinda Zhegu eds., 2016).

Working Papers

The Myth of Free (Aug. 21, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2827277.

SELECTED LECTURES AND PRESENTATIONS

FedEx Institute of Technology, Emerging Innovations Series: Blockchains: Legal and Economic Issues (Oct. 20, 2016).

George Washington Institute of Public Policy and The Capitol Forum: Dominant Platforms Under the Microscope—Policy Approaches in the US and EU (Sept. 19, 2016).

U.S. Senate Policy Staff Working Group: Competition and Monopoly in Technology Markets (Sept. 16, 2016).

Fordham University School of Law Workshop Series: The Myth of Free (Sept. 15, 2016).

University of Memphis Cecil C. Humphreys School of Law Works-in-Progress Series: The Myth of Free (Sept. 9, 2016).

University of Arkansas School of Law–Fayetteville Faculty Exchange: The Myth of Free (Mar. 29, 2016).

Public Lecture at the Peking University School of Transnational Law: Antitrust Law in Zero-Price Markets (Nov. 25, 2014).

University of Memphis Cecil C. Humphreys School of Law Works-in-Progress Series: Antitrust in Zero-Price Markets (Sept. 12, 2014).

MEDIA

Quoted in Natalie Walters, *Users 'Pay Something' to Use Facebook*, THESTREET, Sept. 23, 2016.

Interview, Closing Bell, *Does Facebook Have a Transparency Issue?*, CNBC, Sept. 23, 2016.

Quoted in Hal Hodson, *Do We Need to Rein in Facebook and Google's Power?*, NEW SCIENTIST, Sept. 3, 2016.

Op-ed., *US Antitrust Regulators May Be Giving Free Apps a Free Pass*, BUSINESS INSIDER, Aug. 30, 2016.

Interview, 91.3 KUAF (NPR affiliate), Fayetteville, Arkansas, Mar. 31, 2016.

Op-ed., *Democratic Hopefuls Pursue a Contradictory Vision*, THE HILL, Feb. 15, 2016.

Op-ed., *Why Amazon's Work Practices Matter*, CLEV. PLAIN DEALER, Aug. 23, 2015.

Interview, 101.9 CFUV, Victoria, British Columbia, Aug. 19, 2015.

Quoted in Christie Smythe, *American Express Loses Antitrust Suit over Merchant Rules*, BLOOMBERG, Feb. 19, 2015.

Op-ed., *Fairer Ways to Stop the Lawyer Brain Drain*, DES MOINES REG., Aug. 26, 2014.

OTHER LEGAL AND ACADEMIC EXPERIENCE

U.S. Department of Justice, Antitrust Division, Washington, DC *2011–2014*
Trial Attorney, entry via Honors Program
Representative matters: *United States v. American Express Co.*, *United States v. ConAgra, Inc.*, *United States v. US Airways Grp.*, *United States v. AT&T Inc.*

Waldorf College, Forest City, IA *2011*
Guest Lecturer
Delivered lectures on IP and antitrust law to undergraduate Business Law class.

Professor Herbert Hovenkamp, Iowa City, IA *2010–2011*
Research Assistant
Drafted memos summarizing research on contemporary issues in connection with updating and revising leading treatise on antitrust law.

U.S. Department of Justice, Washington, DC *2010*
Summer Law Intern Program

Professor Christina Bohannan, Iowa City, IA *2009–2010*
Research Assistant
Analyzed and reported on copyright and conflict-of-laws issues surrounding works by Matisse and Chagall (University Museum permanent collection).

SELECTED *PRO BONO* AND VOLUNTEER EXPERIENCE

City of Memphis Americorps VISTA *2015–16*
Mentor

Blue Sky Photographs (now Heritage Photography Co.) *2013–14*
Pro Bono Counsel
Advised digital-photography startup on contract and IP dispute resolution.
Drafted IP licenses and service contracts.

D.C. Bar Advocacy & Justice Clinic *2012–14*
Pro Bono Counsel
Obtained $52,000 judgment on tenant's counterclaim against landlord for damages caused by housing-code violations.
Achieved advantageous outcome in ADR for low-income tenants facing eviction.

Liberty Square Building ESL Program *2012–13*
Volunteer Instructor
Taught weekly sessions of English courses to nonnative English speakers.

EDUCATION

University of Iowa College of Law *2011*
J.D., *with highest distinction* (GPA: 4.00)
Honors: Outstanding Scholastic Achievement Award, Order of the Coif,
Dean's Award, Faculty Award, Jurisprudence Award, College of Law Merit Scholar
Activities: Managing Editor, Volume 96, *Iowa Law Review*; Pro Bono Society

Iowa State University of Science & Technology *2007*
B.A., *Political Science*
Honors: Honors Program, Dean's List, National Merit Scholar
Activities: Senator, Government of the Student Body; Journalist, *Iowa State Daily*

BAR ADMISSIONS

Iowa (inactive), District of Columbia (2012–14, under Rule 49(c)(9)(C)), U.S. District Court for the District of Columbia (2014), U.S. District Court for the Eastern District of New York (2014).

Daniel M. Schaffzin

The University of Memphis Cecil C. Humphreys School of Law
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Phone: (901) 678-5056 • E-Mail: dschffzn@memphis.edu

Teaching Experience

THE UNIVERSITY OF MEMPHIS CECIL C. HUMPHREYS SCHOOL OF LAW, Memphis, TN
Assistant Professor of Law and Director of Experiential Learning, August 2011-Present
Visiting Assistant Professor of Law, August 2009-May 2011

Responsibilities and Accomplishments:

- Strategic oversight for Law School's Experiential Learning Program, now comprised of *seven* In-House Clinical Courses and a robust Externship Course.
- Designed and secured approval for five new In-House Clinic courses: Children's Defense Clinic, Housing Adjudication Clinic, Mediation Clinic, Medical-Legal Partnership Clinic, Neighborhood Preservation Clinic.
- Designed and secured approval of an updated Externship Course, which includes a classroom seminar and diverse field placements across the spectrum of federal and state judicial courts, government offices (criminal, civil, and administrative agency), health entities, not-for-profit organizations, and community law offices.
- Secured approximately $700,000 to date for hiring of new clinical faculty (including Director of Medical-Legal Partnership Clinic and Director of Children's Defense Clinic) and funding of post-graduate Neighborhood Preservation Fellowship.
- Current Course Package: Neighborhood Preservation Clinic (Fall and Spring Semesters); Externship Seminar (Fall, Spring, and Summer Semesters); Advanced Criminal Prosecution (Spring Intersession)
- Other Courses Taught: Civil Litigation Clinic, Housing Adjudication Clinic, Trial Advocacy, Contracts I and II

Service:

- Coach, University of Memphis National Trial Competition Team (2009-Present)
- *Ad Hoc* Civil Rights Institute Committee (2016-17)
- *Ad Hoc* ABA Standards Committee (2015-16; 2016-17)
- Faculty Recruitment Committee (Children's Defense Clinic Director) (2015-16)
- Faculty Advisor, Federal Bar Association (2015-Present)
- Faculty Advisor, Sports and Entertainment Law Society (2011-13; 2016-Present)
- Faculty Recruitment Committee (Medical-Legal Partnership Director) (2015)
- *Ad Hoc* Strategic Planning Committee (2014-15)
- Admissions Committee (2011-12; 2014-15)
- Faculty Advisor, In-School Mock Trial Competition (2009-2014)
- Curriculum Committee (2013-14)
- Untenured Ombudsperson (elected by untenured faculty) (2013-14)

- Student Diversity Committee (2012-14)
- Faculty Recruitment Committee (Health Law Director) (2012-13)
- *Ad Hoc* Law School Committee (2012-13)
- Faculty Recruitment Committee (Visiting Assistant Professor) (Spring 2012)
- Student Note Advisor, *University of Memphis Law Review* (2009-15)
- University of Memphis Professional Sports Counseling Panel (2011-Present)
- University Hearing Officer, Employee Grievance Appeals (2010-11)

UNIVERSITY OF NORTH DAKOTA SCHOOL OF LAW, Grand Forks, ND
Visiting Assistant Professor of Law, August 2007-May 2009

Annual Course Package: Clinic I and II (Housing and Employment Litigation)
Service Responsibilities and Honors:

- Coach, University of North Dakota National Trial Team
  - Regional Champion and National Round Qualifier, 2008 and 2009
- Elected Faculty Graduation Speaker by Class of 2008
- Elected Faculty Hooder by Class of 2009

Publications

(B)light at the End of the Tunnel? How a City's Need to Fight Vacant and Abandoned Properties Gave Rise to a Law School Clinic, 50 WASH. U. J. L. & POL'Y __ (2016) (forthcoming).

Fostering a Culture of Solutions: An Introduction to the Urban Revitalization Symposium Issue, 46 U. MEM. L. REV. 793 (2016) (by invitation).

So Why Not an Experiential Law School . . . Starting With Reflection in the First Year?, 7 ELON L. REV. 383 (March 2015) (by invitation).

Teamwork: Doctors and Lawyers Working Together Could Be Cure for Many, 51 TENN. B. J. 12 (Jan. 2015) (with E. Lay, C. McDaniel, L. Mutrie, A. Seamon, L. Seely, E. Todaro).

Warning! Lawyer Advertising May Be Hazardous to Your Health: A Call to Limit Commercial Solicitation of Clients in Pharmaceutical Litigation, 8 CHARLESTON L. REV. 319 (Winter 2013-14) (by invitation), reprinted in 63 DEFENSE L. J. 3 (2014).

Preaching to the Trier: Why Judicial Understanding of Law School Clinics is Essential to Continued Progress in Legal Education, 17 CLINICAL L. REV. 515 (2011) (with M. Jackson).

Landlord Weapon or Tenant Shield? A Proposal to Reform North Dakota's Residential Security Deposit Statute, 85 N.D. L. REV. 251 (2009) (Lead article).

Selected Presentations

Co-Presenter, *Preparing Lawyers for Community Engagement: Using Externships to Teach Students How to Collaborate, Communicate, and Be Catalysts for Change*, AALS Conference on Clinical Education, May 1, 2016.

Co-Presenter, *Best Practices for Externships: Confronting Challenges in Implementation and Seizing Opportunities for Further Growth and Respectability*, Externships 8 Conference, Cleveland, OH, March 5, 2016.

Presenter, *Avoiding Improper Closing Argument*, Continuing Legal Education Presentation to Tennessee Public Defender's Conference, Memphis, TN, October 22, 2015.

Panel Presenter, *Making Beautiful Music Together: Lawyers Team with Doctors in Medical-Legal Partnerships*, Tennessee Bar Association Annual Convention, Memphis, TN, June 19, 2015.

Presenter, *Avoiding Improper Closing Argument*, Continuing Legal Education Presentation to Shelby County District Attorney General's Office, Memphis, TN, June 10, 2015.

Co-Presenter, *Just What the Doctor Ordered: Multi-Disciplinary Clinics at the Forefront of Change*, AALS Conference on Clinical Education, Rancho Mirage, CA, May 6, 2015.

Panel Presenter, *Navigating the Complexities of the Legal Teaching Market*, AALS Conference on Clinical Education, Rancho Mirage, CA, May 5, 2015.

Poster Presenter, *Advancing Population Health: An Overview of Law-School Based Medical-Legal Partnerships*, National Medical-Legal Partnership Summit, McLean, Virginia, April 9, 2015.

Panel Presenter, *Collaborative, Patient-Centered, Value-Based Care: Introducing Medical-Legal Partnership*, Tennessee Bar Association CME/CLE, Nashville, TN, March 30, 2015.

Co-Presenter, *Is Subjective Assessment an Indispensable Cornerstone of Clinical Legal Education? Exploring the Role that Subjectivity Should Play in the Evaluation of Law Clinic Students*, Southern Clinical Conference, Williamsburg, VA, October 24, 2014.

Panel Presenter, *Excellent Public Housing Authority Approaches to Conducting Informal Hearings and Making Cost-Effective Use of Legal Services*, National Association of Housing and Rental Organizations, 2014 National Conference & Exhibition, Baltimore, MD, Oct. 18, 2014.

Co-Presenter, *Medical-Legal Partnership in Memphis*, Continuing Legal Education, Memphis, TN, October 16, 2014.

Panel Moderator, *Evolution of Title VII, Remaking America: 50 Years of Title VII of the Civil Rights Act of 1964*, Memphis, TN, June 23, 2014.

Co-Presenter, *Educating Money (and Other Motivators): Teaching Social Justice and Life Balance to Future For-Profit Attorneys*, AALS Conference on Clinical Education, Chicago, IL, April 29, 2014.

Work-in-Progress Presenter, *Building on Best Practices: Legal Education in a Changing World*, AALS Conference on Clinical Education, Chicago, IL, April 29, 2014.

Plenary Session Moderator, *How Can We Answer The Call To Reform Legal Education When We Agree On Nothing? Developing Principles And Ranges Of Acceptability & Excellence*, Externships 7 Conference, Denver, CO, March 1, 2014.

Co-Presenter, *Beyond Best Practices: Externships in the New Best Practices Publication*, Externships 7 Conference, Denver, CO, March 1, 2014.

Moderator, *New Clinicians 4: Seizing On The Opportunities And Challenges Of The Field Supervisor Relationship*, Externships 7 Conference, Denver, CO, March 2, 2014.

Invited Panel Presenter, *Domestic Violence Housing and Victim's Rights*, Memphis Shelby County Domestic Violence Housing Summit, Memphis, TN, December 2, 2013.

Co-Presenter, *Partnerships with Purpose: Seizing on the Opportunities and Challenges of the Field Supervisor Relationship in the New Era of Law School Externships*, Southern Clinical Conference, Fayetteville, AR, August 30, 2013.

Invited Panel Presenter, *Hot Button Issues in Field Placement Courses*, Southeastern Association of Law Schools (SEALS) Annual Conference, Palm Beach, FL, August 4, 2013.

Invited Discussant and Paper Presenter, *Experiential Legal Education – Assessing the Present and Imagining the Future*, Southeastern Association of Law Schools (SEALS) Annual Conference, Palm Beach, FL, August 4, 2013.

Poster Presenter, *Clinic Student as Teacher: Developing Professionalism and Transferrable Skills Through Student-Led Community Workshops*, AALS Conference on Clinical Education, San Juan, PR, April 26, 2013.

Co-Presenter, *Clinical Legal Education: The Lay of the Land*, CLEA New Clinicians Conference, San Juan, PR, April 26, 2013.

Presenter, *Introduction to Tennessee General Sessions Civil Courts*, Tennessee Access to Justice Commission Pro Se Litigant Video Project (On-demand video recorded and published in April 2013).

Co-Presenter, *Ethical Concerns in Closing Arguments*, Tennessee District Attorneys General Conference Trial Advocacy Institute, Memphis, TN, March 14, 2013.

Poster Presenter, *Excuses, Excuses: Uncovering, Understanding and Responding to Student Resistance to Enrolling in Clinic*, AALS Conference on Clinical Education, Los Angeles, CA, April 30, 2012.

Co-Presenter, *Expanding Clinical Opportunities to Promote Access to Justice and Community Engagement*, Southern Clinical Conference, Knoxville, TN, March 16, 2012.

Co-Presenter, *Necessary Control or Control Freak: For and Against Faculty Selection of For-Credit Field Placements For Externship Students*, Externships 6 Conference, Boston, MA, Mar. 3, 2012.

Poster Presenter, Educating Judges on Clinical Education, AALS Annual Meeting, San Diego, CA, January 2009.

Co-Presenter, *UND Clinical Education Program: Courses in Reflective Lawyering, North Dakota Judicial Education Commission*, Bismarck, ND, November 2008.

Co-Presenter, *Landlord-Tenant Law in North Dakota: A Primer*, People's Law School, Grand Forks, ND, March 2008.

Service to the Clinical Teaching Community

Planning Committee, 2016 AALS Conference for Clinical Legal Education, Baltimore, MD, April 30-May 3, 2016

Planning Committee, 2016 AALS New Clinicians Workshop, April 30, 2016, Baltimore, MD

Co-Chair, Externships Committee, AALS Clinical Section, May 2015-Present

Member, New Clinicians Committee, Clinical Legal Education Association, 2013-Present.

Member, Externships Committee, Clinical Legal Education Association, 2012-Present.

Chair, Planning Committee, 2015 Southern Clinical Conference, Memphis, TN, Oct. 22-24, 2015.

Contributing Editor, Clinical Law Prof Blog, April 2014-April 2015

Member, Teaching Innovations Committee, AALS Clinical Section, 2012-2014.

Member, Awards Committee, AALS Clinical Section, 2013-2014.

Planning Committee, 2015 CLEA New Clinicians Conference, Rancho Mirage, CA, May 4, 2015.

Planning Committee, 2014 Southern Clinical Conference, Williamsburg, VA, October 23-25, 2014.

Planning Committee, Externships 7 Conference, Denver, CO, February 27-March 2, 2014.

Planning Committee, 2013 CLEA New Clinicians Conference, San Juan, PR, April 26, 2013.

Planning Committee Member and Working Group Leader, 2013 Southern Clinical Conference, Fayetteville, AR, August 28-30, 2013.

Working Group Leader, AALS Conference on Clinical Legal Education, San Juan, PR, April 26-May 1, 2013.

Planning Committee, 2012 Southern Clinical Conference, Knoxville, TN, August 28-30, 2012.

Working Group Leader, AALS Conference on Clinical Legal Education, Seattle, WA, June 12-16, 2011.

Service to the Legal Community

Member, Mayor's Environmental Team (E-Team), Memphis, TN, January 2015-Present.

Board Member, Tennessee Alliance for Legal Services (TALS), May 2011-Present.

Education Committee, Tennessee Access to Justice Commission, April 2012-Present.

Administrative Hearing Officer, Memphis Housing Authority, January 2012-Present.

Commissioner, Memphis Civil Service Commission, August 2012-September 2014.

Cabinet Member, Memphis Area Legal Services Campaign for Equal Justice, 2011-14.

Education

TEMPLE UNIVERSITY BEASLEY SCHOOL OF LAW, Philadelphia, PA
J.D, *Cum Laude*, May 2000

- *Temple Law Review*
- Dean's Honor List
- Distinguished Class Performance: Legal Research and Writing, Trial Advocacy, Criminal Law, Civil Procedure
- Beth Farnbach Award for outstanding student contribution to the community

TEMPLE UNIVERSITY , Philadelphia, PA
B.A., Journalism, *Magna Cum Laude*, May 1996 (University Honors Program)

Bar Membership

Admitted in Tennessee, Pennsylvania (inactive) New Jersey (Retired), and North Dakota (Retired); United States District Court for the District of North Dakota; United States District Court for the Eastern District of Pennsylvania

Prior Legal Experience

GLAXOSMITHKLINE **,** Philadelphia, PA
Counsel, U.S. Legal Operations, Sales and Marketing, Oct. 2005-Aug. 2007

- Provided day-to-day advice to diabetes franchise and pediatric vaccine brand teams, as well as Pennsylvania and New Jersey sales regions (management and field representatives), concerning product promotion, fraud and abuse, and compliance issues.
- Prepared and delivered training presentations to marketing and sales personnel regarding commercial practices policies and corporate ethics.
- Conducted training of physician-speakers, including live and teleconference presentations concerning corporate policies on and government regulation of product promotion.
- Negotiated numerous contracts on behalf of in-house marketing clients.

PEPPER HAMILTON LLP, Philadelphia, PA
Associate, Health Effects Litigation Group, Sep. 2000-Sep. 2005

- Represented pharmaceutical and medical device manufacturers in products liability litigation and governmental inquiries.
- Interviewed clients, prepared witnesses, presented oral arguments, conducted depositions, performed extensive legal research, and drafted numerous pleadings, briefs and memoranda.
- Coordinated national discovery, including supervision of junior associates and contract attorney teams, creation of discovery plans and coordination of electronic and hard copy document reviews and productions.
- Engaged in active pro bono practice, including examination of witnesses and extensive brief writing in successful death penalty appeal in Pennsylvania.
- As co-chair of Summer Associate Committee in 2004 and 2005, responsible for coordination of 22 summer associates, including mentoring and evaluation.
- Served as formal mentor to new litigation associates, including substantive review and editing of written work product. Prepared and delivered presentations during new litigation associate training sessions.

OFFICE OF THE UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF PA
Clinical Intern, January 2000-May 2000

- Prepared and conducted mock trials, sentencing hearings, negotiations and criminal investigations.
- Observed and attended trials and court proceedings.

Office of The District Attorney, Philadelphia County, PA
Clinical Intern**,** August 1999-December 1999

- Tried preliminary hearings and municipal court trials.
- Completed curriculum focusing on evidentiary and procedural issues.

Other Professional Experience

Embassy of Israel, Washington, DC
Public Affairs Officer, August 1996-August 1997

- Addressed public on the Middle East peace process and US-Israel relations (more than 25 speaking engagements).
- Authored and coordinated speeches and editorials for the Ambassador of Israel to the United States.
- Developed, wrote and disseminated embassy publications on a variety of subjects, including higher education opportunities in Israel.

Professional Affiliations and Honors

American Association of Law Schools, Clinical Section, Member, 2009-Present

Clinical Legal Education Association, Member, Fall 2007-Present.

Leo Bearman, Sr. American Inn of Court, Memphis, TN, Barrister, 2011-2014.

Randy H. Lee American Inn of Court, Grand Forks, ND, Master, 2008-2009.

Pennsylvania Bar Association Pro Bono Award, May 2005.

Community Affiliations

Memphis Neighborhood Blight Elimination Charter
Steering Committee Member, 2015-Present

Tennessee Alliance for Legal Services
Board of Directors, 2012-Present

Beth Sholom Synagogue of Memphis, Memphis, TN
Executive Committee**,** 2012-2015.
Board of Directors, January 2010-Present.
Co-Chair, Rabbinic Search Committee, 2013.

Memphis Jewish Community Center, Memphis, TN
Board of Directors, 2011-2014.

Hillel of Greater Philadelphia, Philadelphia, PA
Board of Directors, September 2003-June 2007.

Camp Ramah in the Poconos, Jenkintown, PA/Lakewood, PA
Board of Directors, July 2004-October 2008.

KATHARINE TRAYLOR SCHAFFZIN

University of Memphis
Cecil C. Humphreys School of Law
1 N. Front Street
Memphis, TN 38120
901-678-1623
k.schaffzin@memphis.edu

TEACHING EXPERIENCE & CERTIFICATIONS

UNIVERSITY OF MEMPHIS CECIL C. HUMPHREYS SCHOOL OF LAW, Memphis, TN
DIRECTOR OF FACULTY DEVELOPMENT, May 2012-present
ASSOCIATE PROFESSOR, August 2011-present
ASSISTANT PROFESSOR, August 2009-August 2011
Courses Taught:

- Civil Procedure I & II
- Evidence
- Trial Advocacy

Other Teaching Responsibilities:

- Coach, University of Memphis Trial Team (2009-2012)
- Note Advisor, University of Memphis Law Review
- Advisor, University of Memphis Mock Trial Competition

Service Responsibilities:

- Chair (2012-present), Member (2009-2010; 2011-present), Faculty Recruitment Committee
- Member, Strategic Planning Committee (2009-2011)
- Federal Clerkship Advisor (2010-present)
- Member, Admissions Committee (2010-2011)
- Member, University of Memphis Alumni Association, Cecil C. Humphreys School of Law Chapter Board (2010-present)
- Member, University Faculty Convocation Planning Committee (2009-present)

UNIVERSITY OF NORTH DAKOTA SCHOOL OF LAW, Grand Forks, ND
ASSISTANT PROFESSOR, July 2006-May 2009
Courses Taught:

- Evidence
- Professional Responsibility
- Trial Advocacy
- Constitutional Law II: Civil Rights & Civil Liberties

Other Teaching Responsibilities:

- Coach, UND Trial Team (National Trial Competition: 2008 National Finalists)
- Coordinator, Carrigan Cup Trial Competition

Service Responsibilities:

- Faculty Senator, University Senate (2008-2009)
- Co-Chair (2007-2008), Member (2006-2007), Faculty Selection Committee
- Member, Admissions Committee (2007-2009)
- Member, Promotions & Tenure Drafting Committee (2007-2008)

NATIONAL INSTITUTE OF TRIAL ADVOCACY, Louisville, CO
CERTIFIED TEACHER OF TRIAL ADVOCACY SKILLS, June 2006
Successfully completed NITA's Teacher Training Program in the art of teaching trial skills to practicing trial attorneys and student advocates.

TEMPLE UNIVERSITY BEASLEY SCHOOL OF LAW, Philadelphia, PA
HONORABLE ABRAHAM L. FREEDMAN FELLOW & LECTURER IN LAW, July 2004-May 2006
Courses Taught:

- Professional Responsibility
- Legal Research & Writing, a graded, two-semester course
- Evidence (in collaboration with Professor Louis Natali)
- Contracts I (in collaboration with Professor William Woodward, Jr.)
- Civil Procedure II (in collaboration with Professor Anthony Bocchino)

PUBLICATIONS

Katharine Traylor Schaffzin, ***The Great and Powerful Oz Revealed: The Ethics and Wisdom of the SCOTUS Leaks in National Federation of Independent Business v. Sebilius***, 7 CHARLESTON L. REV. 317(Winter 2012-13; by invitation).

Katharine Traylor Schaffzin, Associate Professor, University of Memphis Cecil C. Humphreys School of Law, William & Mary Law Review Symposium on the Restyled Federal Rules of Evidence (Oct. 28, 2011), ***in*** 53 WM. & MARY L. REV. 1435, 1435 (April 2012).

Katharine Traylor Schaffzin (contributing editor), Anthony J. Bocchino & David A. Sonenshein, ***A Practical Guide to Federal Evidence*** (10th ed. 2011).

Katharine Traylor Schaffzin (contributing editor), Anthony J. Bocchino & David A. Sonenshein, ***Federal Rules of Evidence with Objections*** (10th ed. 2011).

Katharine Traylor Schaffzin, ***Out with the Old: An Argument for Restyling "Sacred Phrases" Retained in the Proposed Amendments to the Federal Rules of Evidence***, 77:4 TENN. L. REV. 1 (Summer 2010).

Katharine Traylor Schaffzin, ***Eyes Wide Shut: How Ignorance of the Common Interest Doctrine Can Compromise Informed Consent***, 42:1 U. Mich. J.L. Reform 71 (Fall 2008).

Katharine Traylor Schaffzin, ***Deference to a Hearing Panel?: Emerging Trends in the Disciplinary Decisions of the Supreme Court of North Dakota – 2004-2007***, 83:3 N.D. L. REV. 887 (2007; by invitation).

Katharine Traylor Schaffzin, ***An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It***, 15 B.U. PUB. INT. L.J. 49 (2005).

Note, ***A Reexamination of the Evidentiary Weight of Adverse Inferences Drawn from an Employee's Invocation of His Fifth Amendment Silence***, 73 TEMP. L. REV. 379 (2000).

SCHOLARLY PRESENTATIONS

TENNESSEE DISTRICT ATTORNEYS GENERAL CONFERENCE, University of Memphis Cecil C. Humphreys School of Law, Memphis, TN
2013 TRIAL ADVOCACY COURSE,
SPEAKER, March 14, 2013
Presented course on Prosecutorial Ethics in Closing Arguments.

ADVISORY COMMITTEE ON EVIDENCE RULES FALL MEETING, William & Mary Law School, Williamsburg, VA
SYMPOSIUM ON THE RESTYLED FEDERAL RULES OF EVIDENCE,
PANELIST, October 28, 2011
Presented results of empirical research on student reaction to restyled Federal Rules of Evidence, critique of Advisory Committee's failure to restyle "sacred phrases," and effect of restyled rules on reference to tacit admissions.

SOUTHEASTERN ASSOCIATION OF LAW SCHOOLS ANNUAL MEETING, Palm Beach, FL
WORKSHOP ON EVIDENCE: PROPOSED CHANGES TO THE FEDERAL RULES OF EVIDENCE,
SPEAKER, July 31, 2010
Presented research on the current project to rewrite the Federal Rules of Evidence into plain English and its implications.

THE UNIVERSITY OF KENTUCKY COLLEGE OF LAW, Lexington, KY
DEVELOPING IDEAS CONFERENCE, SPEAKER, May 12-14, 2010
Presented current research on the "state of mind" exception to the hearsay rule. Critiqued current research of junior legal scholars.

THE ASSOCIATION OF AMERICAN LAW SCHOOLS ANNUAL MEETING, New York, NY
NEW LAW PROFESSORS SECTION, PRESENTER, January 2-6, 2007
Presented poster entitled "Clickers for Conversation" at annual meeting.

STATE BAR ASSOCIATION OF NORTH DAKOTA, Grand Forks, ND
CONTINUING LEGAL EDUCATION: THE DISCIPLINARY PROCESS, TRUST ACCOUNTS & RECENT NORTH DAKOTA DISCIPLINARY CASES, SPEAKER, February 2007
Presented Continuing Legal Education course to members of the State Bar Association of North Dakota.

LEGAL EXPERIENCE

CHAMBERS OF THE HONORABLE JAMES KNOLL GARDNER,
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
LAW CLERK, January 2003 –July 2004
Performed legal research and drafted bench memoranda, orders, and opinions concerning a variety of federal and state issues, both civil and criminal. Made recommendations to and deliberated with the Judge regarding jurisdictional, discovery, and evidentiary disputes, as well as the disposition of motions, bench trials, sentencing, and other matters.

MAZUR, CARP & RUBIN, P.C., New York, NY
LITIGATION ASSOCIATE, CONSTRUCTION PRACTICE GROUP, April 2002-January 2003
Represented owners, contractors, and sub-contractors as plaintiffs and defendants in contract litigation, arbitration, mediation, and contract negotiation. Attended oral arguments, mediations, depositions, and settlement negotiations. Acted as second chair in state courts. Performed legal research, managed discovery, and drafted memoranda, motions, briefs, construction contracts, and surety bonds.

PEPPER HAMILTON LLP, Philadelphia, PA
LITIGATION ASSOCIATE, CONSTRUCTION PRACTICE GROUP, September 2000-March 2002
Represented owners, contractors, and sub-contractors in federal and state contract litigation and arbitration. Also represented defendants in products liability and commercial litigation. Performed legal research, managed discovery, and drafted memoranda, motions, and briefs. Successfully moved state court to enter summary judgment in defendant's favor in $30 million construction dispute. Represented indigent property owner in ***pro bono*** premises liability matter from case inception through arbitration.
SUMMER ASSOCIATE, Summer 1999
Conducted research and drafted memoranda for various practice groups.

BAR MEMBERSHIP

Admitted in Pennsylvania (inactive), New Jersey (retired), and New York (inactive).

EDUCATION

TEMPLE UNIVERSITY BEASLEY SCHOOL OF LAW, Philadelphia, PA
LL.M. in Legal Education received May 2006
Honorable Abraham L. Freedman Fellowship

J.D. received May 2000
TEMPLE LAW REVIEW:
- Associate Managing, Articles, Research Editor (1999-2000): Performed the duties of a managing editor, articles editor, and research editor, including editing and managing articles submitted by staff members for publication, reviewing articles submitted by outside authors for publication, and incorporating cite-checks into galleys.
- Staff Member (1998-1999)

Temple University Scholarship Recipient (full tuition merit scholarship)
Dean's List
Barrister's Award Winner for Excellence in Trial Advocacy

LASALLE UNIVERSITY, Philadelphia, PA
B.A., ***magna cum laude***, received May 1997
Major: Political Science
Minor: French
General University Honors
Christian Brothers Scholarship Recipient (full tuition merit scholarship)
Dean's List

CHESTNUT HILL COLLEGE, Philadelphia, PA
Diocesan Scholar, September 1992-May 1993 (full tuition merit scholarship)

- Attended college courses in the mornings during senior year of high school

PROFESSIONAL ORGANIZATIONS & COMMUNITY ACTIVITIES

MEMPHIS JEWISH FEDERATION, Memphis, TN
MEMBER, BOARD OF DIRECTORS, July 2011-Present
Govern activities of Memphis Jewish Federation, an organization that raises funds and delivers services to local constituents in need, as well as promotes individual involvement in and travel throughout Israel.

MEMPHIS JEWISH COMMUNITY CENTER, Memphis, TN
MEMBER, EARLY CHILDHOOD CENTER COMMITTEE, August 2010-Present
Work with parents, administration, and teachers to plan and coordinate activities, fundraisers, and events related to preschool.

INSTITUTE FOR PHILOSOPHY IN PUBLIC LIFE, Grand Forks, ND
MEMBER, BOARD OF DIRECTORS, December 2008-August 2012
Govern activities of Institute established to relate philosophy to the daily lives of the public. The Institute brings regional, national, and international philosophers together with members of the public in various settings, including through the weekly public radio broadcast of "Why?"

SMITH MEMORIAL PLAYGROUND & PLAYHOUSE, Philadelphia, PA
MEMBER, BOARD OF DIRECTORS, October 2005-December 2009
Advised Board of Directors on legal matters concerning ongoing rehabilitative reconstruction of historic playground and playhouse.

STATE BAR ASSOCIATION OF NORTH DAKOTA, Grand Forks, ND
MEMBER, ASPIRATIONAL GOALS DRAFTING COMMITTEE, August 2008-May 2009
Drafted Aspirational Goals of attorney conduct for consideration and adoption by the State Bar Association of North Dakota.

U.S. SUPREME COURT HISTORICAL SOCIETY, Washington, DC
CHAIR, NORTH DAKOTA MEMBERSHIP COMMITTEE, August 2007-August 2008
Served to promote membership in the U.S. Supreme Court Historical Society in North Dakota.

FRANKLIN LEARNING CENTER HIGH SCHOOL, Philadelphia, PA
COACH, JOHN J. BRADWAY HIGH SCHOOL MOCK TRIAL COMPETITION, October 2001-April 2007
Instructed high school students on the rules of evidence and the skill of trial advocacy.

JODI L. WILSON

CECIL C. HUMPHREYS SCHOOL OF LAW
THE UNIVERSITY OF MEMPHIS
1 NORTH FRONT STREET ▪ MEMPHIS, TN 38103
901.678.5730 (P) ▪ 901.678.0753 (F)
JODI.WILSON@MEMPHIS.EDU

CURRENT ACADEMIC APPOINTMENT

CECIL C. HUMPHREYS SCHOOL OF LAW MEMPHIS, TN
THE UNIVERSITY OF MEMPHIS
DIRECTOR OF LEGAL METHODS (JULY 2009 – PRESENT)
ASSOCIATE PROFESSOR OF LAW (AUGUST 2016 – PRESENT)
ASSISTANT PROFESSOR OF LAW (JULY 2009 – AUGUST 2016)

- Courses: Legal Methods I, Legal Methods II, Legal Methods for TIP Scholars, Professional Responsibility, and ADR: Arbitration
- Selected Service: Advisor to Freshman Moot Court, Note Advisor, Advisor to Association for Women Attorneys – Student Chapter, ABA Standards Committee (Chair, 2015-2016), Admissions Committee, Dean's Advisory Committee, Library Collection Development Committee, Orientation Committee, Promotion and Tenure Subcommittee, Recruitment Committee, Self-Study Committee, and University Teaching and Learning Advisory Committee (Chair, 2013-2014)

EDUCATION

WASHINGTON UNIVERSITY SCHOOL OF LAW ST. LOUIS, MO
JURIS DOCTOR – MAY 2001
- *Washington University Law Quarterly*, Staff Member & Associate Editor 1999-2001
- Order of the Coif 2001
- Alumni Association Prize (Highest Average in Law School Career, Class Valedictorian) 2001
- Breckenridge Scholarship Prize (Highest Academic Average for Senior Year) 2001

UNIVERSITY OF ARKANSAS FAYETTEVILLE, AR
BACHELOR OF ARTS – MAY 1998
- Psychology Major
- *Summa Cum Laude* 1998

PRIOR EMPLOYMENT

BASS, BERRY & SIMS, PLC MEMPHIS, TN
ASSOCIATE (OCTOBER 2007 – JUNE 2009)
- Represented clients in civil litigation and securities industry arbitration, with an emphasis on arbitration of customer disputes and unfair competition/raiding claims.
- Prior firm merged with Bass, Berry & Sims, PLC in October 2007.

CECIL C. HUMPHREYS SCHOOL OF LAW MEMPHIS, TN
THE UNIVERSITY OF MEMPHIS
LEGAL METHODS ADJUNCT PROFESSOR (AUGUST 2007 – MAY 2009)

TATE LAZARINI BRADY & DAVIS, PLC MEMPHIS, TN
ASSOCIATE (FEBRUARY 2005 – OCTOBER 2007)
- ❖ Represented clients in civil litigation and securities industry arbitration, with an emphasis on arbitration of customer disputes and unfair competition/raiding claims.

CATES, KUROWSKI, BAILEY & SHULTZ, LLC BELLEVILLE, IL
ASSOCIATE (OCTOBER 2003 – FEBRUARY 2005)
- ❖ Represented clients in civil litigation and arbitration, with an emphasis on class actions.
- ❖ Prior firm merged with Cates, Kurowski, Bailey & Schultz, LLC in October 2003.

THE CATES LAW FIRM, LLC ST. LOUIS, MO
ASSOCIATE (JULY 2003 – OCTOBER 2003)
- ❖ Represented clients in civil litigation and arbitration, with an emphasis on class actions.
- ❖ The Cates Law Firm, LLC formed following restructuring of prior firm in July 2003.

CARR, KOREIN, TILLERY, KUNIN, MONTROY, CATES,
KATZ & GLASS, LLC (& SUCCESSOR FIRMS) BELLEVILLE, IL
ASSOCIATE (NOVEMBER 2001 – JULY 2003)
LAW CLERK (MAY 1999 – NOVEMBER 2001)
- ❖ Represented clients in civil litigation and arbitration, with an emphasis on class actions.

PRACTICAL EXPERIENCE

- ❖ Appellate and Trial Level Experience
- ❖ Arbitration Experience
- ❖ Federal Forum – Seventh Circuit, Eleventh Circuit, Ninth Circuit, Various District Courts, and Judicial Panel on Multi-District Litigation
- ❖ State Forum – Illinois, Missouri, Tennessee, and New York
- ❖ Arbitral Forum – AAA, FINRA, and NYSE
- ❖ Class Action (Emphasis in Health Care Issues and Consumer Protection), Insurance Defense, Personal Injury, Corporate Litigation, and Securities-related Arbitration
- ❖ Client Interaction and Counseling
- ❖ Motions Practice – research, draft, and argue
- ❖ Discovery Practice – defend and take depositions, prepare witnesses, and conduct written discovery
- ❖ Research and Writing – research various areas of law for internal purposes and submission to court and arbitral forums; draft documents for submission to federal, state, and arbitral forums at trial and appellate level
- ❖ Prepare cases for trial and final hearing; assist in presenting cases at evidentiary hearings, trial, and final hearings
- ❖ Extensive involvement in negotiating and drafting settlement terms for nationwide health care and consumer fraud litigation

PROFESSIONAL ADMISSIONS

ILLINOIS BAR (INACTIVE) 2001
MISSOURI BAR (INACTIVE) 2002
TENNESSEE BAR 2005
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS 2001
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE 2007
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT 2006

PROFESSIONAL MEMBERSHIPS & SERVICE

AMERICAN BAR ASSOCIATION
TENNESSEE BAR ASSOCIATION
MEMPHIS BAR ASSOCIATION
-LEADERSHIP FORUM (2008)
ASSOCIATION FOR WOMEN ATTORNEYS
LEGAL WRITING INSTITUTE
-LISTSERV COMMITTEE (2012-PRESENT), CHAIR (2014-PRESENT)
ASSOCIATION OF LEGAL WRITING DIRECTORS
-SURVEY COMMITTEE (2012- PRESENT), CO-CHAIR/CHAIR (2013- PRESENT)
AALS LEGAL WRITING, REASONING, AND RESEARCH SECTION
-WELCOMING COMMITTEE CHAIR (2010), MEMBER (2014)

PROFESSIONAL HONORS

ADVOCATE CIRCLE AWARD FOR INDIVIDUALS 2006
Presented by Memphis Area Legal Services in honor of work performed on behalf of victims of Hurricane Katrina.

BOARD OF GOVERNORS CHAIR AWARD SEPT. 2002
Presented by the American Academy of Otolaryngology – Head & Neck Surgery in honor of work performed in health care litigation on behalf of physicians and other health care providers.

PUBLICATIONS

Proceed with Extreme Caution: Citation to Wikipedia in Light of Contributor Demographics and Content Policies, 16 VAND. J. ENT. & TECH. L. 857 (2014).

Teaching by Engaging; Engaging by Gaming, THE LEARNING CURVE, Summer 2013, at 11.

How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act, 63 CASE W. RES. L. REV. 91 (2012).

Students Can't Avoid What They Can't See: Helping Students Recognize Ethical Pitfalls, THE SECOND DRAFT, Fall 2012, at 11.

PRESENTATIONS

Solicited Presenter, *Assessing and Citing to Nontraditional Sources*, Thirty-Fourth Annual Meeting of the Association of Reporters of Judicial Decisions, Nashville, TN (August 6, 2015).

Presenter (Poster Presentation), *Wikipedia on the Rise: Teaching Legal Writers to Assess Non-Traditional Sources*, Legal Writing Institute 2014 Biennial Conference, Philadelphia, PA (June 29-July 2, 2014).

Presenter, with Robert B. Vandiver, Jr., *Joint Representation in Bankruptcy ~ Ethical Considerations*, American Bankruptcy Institute, Memphis Consumer Bankruptcy Conference 2014, Memphis, TN (June 6, 2014).

Presenter, *Preventing Prosecutorial Misconduct in Closing*, Federal Defender's Office CLE, Memphis, TN (Sept. 27, 2013).

Presenter, *The Wikipedia-as-Authority Phenomenon: Should You Join the Crowd?*, University of Memphis Cecil C. Humphreys School of Law Faculty Research Presentation, Memphis, TN (Sept. 18, 2013).

Presenter, *Encouraging Class Engagement with Poll Everywhere*, Third Colonial Frontier Legal Writing Conference: Technology and the Teaching of Legal Research & Writing, Duquesne University School of Law, Pittsburgh, PA (March 16, 2013).

Presenter, *New Opportunities in Research Instruction, Billable Hours: Not Just for Practice Anymore*, Legal Writing Institute One-Day Workshop, University of North Carolina School of Law, Chapel Hill, NC (Dec. 7, 2012).

Panelist, *Recruiting, Training, and Managing Adjunct Professors*, Southeastern Association of Law Schools, 2011 Annual Conference, Hilton Head Island, SC (July 27, 2011).

Presenter, *Changing Students' Perspectives about Legal Writing*, Second Annual Empire State Legal Writing Conference, St. John's University School of Law, New York, NY (May 13, 2011).

Presenter, *Grading, Critiquing, and Conferencing Papers: All Without Losing Your Mind*, Legal Writing Institute One-Day Workshop, University of Tennessee College of Law, Knoxville, TN (Dec. 4, 2010).

Presenter, *The Unauthorized Practice of Law in a Virtual Practice World*, University of Kentucky College of Law Developing Ideas Conference, Lexington, KY (May 2010).

Presenter, *A Rose by Any Other Name: Reevaluating the Attorney Licensing Scheme*, University of Memphis Cecil C. Humphreys School of Law Faculty Work-in-Progress Session, Memphis, TN (April 2, 2010).

Panelist, *So You Want to Be a Law Professor?*, The University of Memphis Cecil C. Humphreys School of Law, Memphis, TN (Feb. 12, 2010).

Presenter, *Current Status of Health Care Litigation*, Co-Presentation to Board of Governors, American Academy of Otolaryngology – Head & Neck Surgery, Annual Meeting, Oklahoma City, OK (Nov. 2003).

Presenter, *Current Status of Health Care Litigation*, Co-Presentation to Board of Governors, Co-Presentation at American Academy of Otolaryngology – Head & Neck Surgery, Annual Meeting, Oklahoma City, OK (Sept. 2002).

Presenter, *Class Action Litigation for Bundling and Downcoding*, Oklahoma Academy of Otolaryngology – Head & Neck Surgery, Annual Meeting, Branson, MO (May 2002).

Presenter, *Practical Steps to Level the Playing Field for Academic and Community Otolaryngologists*, Co-Presentation to American Academy of Otolaryngology – Head & Neck Surgery, Legislative Briefing Day, Washington, D.C. (March 2002).

Presenter, *Class Action Litigation for Bundling and Downcoding*, Co-Presentation to American Academy of Otolaryngology – Head & Neck Surgery, Legislative Briefing Day, Washington, D.C. (March 2002).

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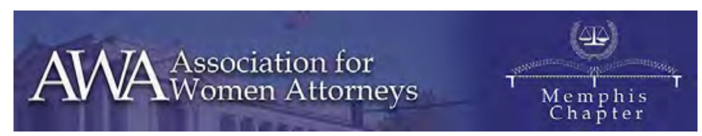

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The University of Memphis: Cecil C. Humphreys School of Law is located at 1 North Front Street, Memphis, TN 38103. Phone 901.678.2421 © 2016 University of Memphis

Implicit (Unconscious) Bias
A New Look at an Old Problem

Friday, November 18, 2016 • 8:00 a.m. – 5:00 p.m.

University of Memphis Cecil C. Humphreys School of Law

Approved: 7 hours CLE (6 general, 1 dual) and 8 SHRM recertification credits
HRCI recertification credits are pending.

Introduction

Thought by some to be an "old" problem, explicit bias continues to influence virtually all areas of American life including the business world, the media, education, and our justice systems. In addition, decision-makers may also be influenced by implicit (unconscious) bias. How implicit bias operates including strategies that will assist decision-makers in recognizing, shaping and managing its influence is the subject of this must attend conference that will provide "A New Look At An Old Problem."

Explicit bias refers to bias that is a product of conscious, intentional discriminatory behaviors. In contrast, implicit bias refers to the more recent and controversial belief that automatic, unintentional biases and stereotypes people experience toward members of social groups or categories of people other than their own, can influence their decision-making and systemically and adversely affect members of certain groups. The importance of this topic is illustrated by the recent mandate by the U. S. Department of Justice requiring more than 33,000 of its agents and attorneys to undergo training to eliminate the influence of implicit bias in law enforcement decisions.

Nationally recognized experts will explore these timely and important topics.

Schedule

8:30 – 9:00 a.m. **Registration**

9:00 – 9:30 a.m.
Welcome and Program Introduction
Welcome to Law School: Peter Letsou, Esq., Dean, University of Memphis Cecil C. Humphreys School of Law

Introduction to Program: Otis Sanford, Professor and Hardin Chair of Excellence in Journalism, University of Memphis

9:30 – 11:30 a.m. **Panel One**
Introduction to the Concepts and Controversy Surrounding Implicit (Unconscious) Bias
This panel will introduce the concept of implicit bias and discuss its psychological, social and factual underpinnings and its legal consequences.

Moderator:
Jacqueline M. O'Bryant, Esq., Coordinator of Law School Diversity, Director, Tennessee Institute for Pre-Law, University of Memphis Cecil C. Humphreys School of Law

Speakers:
Hon. Bernice B. Donald, Judge, United States Court of Appeals for the Sixth Circuit

James Finberg, Esq., Altshuler Berzon, San Francisco, CA.

Professor Gregory Mitchell, Esq., Ph.D., Professor of Law, University of Virginia School of Law

Maurice Wexler, Esq., Baker Donelson Bearman Caldwell & Berkowitz, PC, Memphis, TN

11:30 – 11:45 a.m. **Break**

11:45 a.m. – 12:45 p.m. **Panel Two**
Implicit Bias In Our Justice System, Law Enforcement, Educational Institutions, the Media, and the Business World (Part 1)
Leading professionals will lead conference attendees in a series of exercises and discussions that will allow us to assess the reality of implicit bias in a number of areas, including business, education, our judicial systems, law enforcement and the media. Attendees will learn how to identify areas where implicit bias is most likely to influence decision-making.

Moderator:
Demetria Frank, Esq., Professor, University of Memphis Cecil C. Humphreys School of Law

Speakers:
Christine Chambers Goodman, Esq., Professor, Pepperdine School of Law

Darrell D. Jackson, Esq., Ph.D., Professor, University of Wyoming School of Law

Katharine Kores, Esq., District Director, Memphis District Office of the U. S. Equal Employment Opportunity Commission

Altha Stewart, M. D., Associate Professor and Director, Center of Excellence for Health in Justice Involved Youth, University of Tennessee Health Science Center

Quinn Thompson-Slaughter, Director, Global Diversity and Talent Acquisition, International Paper, Memphis, TN

12:45 – 2:00 p.m.
Lunch and Keynote Address
Exploring implicit bias and how the failure to understand and acknowledge it can negatively affect decision making.

Speaker:
Paulette Brown, Esq., Locke Lord, LLP, Morristown, New Jersey, Immediate Past President of the American Bar Association

2:00 – 3:00 p.m. **Panel Two**
Implicit Bias In Our Justice System, Law Enforcement, Educational Institutions, the Media, and the Business World (Part 2)

3:00 – 3:15 p.m. **Break**

3:15 – 5:00 p.m. **Panel Three**
Where Do We Go From Here?
Expert panelists will address strategies and organizational goals that aim to produce fair and non-discriminatory decision-making. Panelists also will discuss specific examples of how diversity and implicit bias initiatives can positively influence organizational success.

Moderator:
Professor Otis Sanford, Professor and Hardin Chair of Excellence in Journalism, University of Memphis

Speakers:
Paulette Brown, Esq., Locke Lord, LLP, Morristown, New Jersey, Immediate Past President of the American Bar Association

Demetria Frank, Esq., Professor, University of Memphis Cecil C. Humphreys School of Law

William Gibbons, Esq., Executive Director, University of Memphis Public Safety Institute; President, Memphis and Shelby County Crime Commission; and, Immediate Past Commissioner, State of Tennessee Commission on Safety and Homeland Security; former District Attorney General

Daniel Kiel, Esq., Professor, University of Memphis Cecil C. Humphreys School of Law

Hon. Jon P. McCalla, Judge, United States District Court for the Western District of Tennessee

Hon. Dan H. Michael, Judge, Memphis and Shelby County Juvenile Court

Dan Norwood, Esq., Norwood & Atchley, Memphis, TN

5:00 – 5:15 p.m. **Concluding Remarks**
Linda Klein, Esq., Baker Donelson Bearman Caldwell & Berkowitz, P.C. Atlanta, GA.; President, The American Bar Association

5:15 – 6:00 p.m. **Reception**
Reception for presenters and attendees.

Cecil C. Humphreys School of Law

ANNUAL FUND PLEDGE FORM

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Email ____

Employer ____________________________________ Title ____________________________________

Address ____

STREET CITY STATE ZIP

PLANNED GIVING OPPORTUNITIES

☐ I am interested in receiving information on life income plans.

☐ I am interested in receiving information on estate planning.

☐ I am interested in receiving information on including the University of Memphis in my will.

MATCHING GIFTS

If you and your spouse are employees (or retirees) of a company that makes charitable contributions, you can multiply the impact of your gift to the University of Memphis.

☐ My employer/spouse's employer will match my gift. Employer: ______________________________________

☐ I have enclosed the matching gift form, which I have obtained from my employer/spouse's employer.

THE UNIVERSITY OF MEMPHIS

Cecil C. Humphreys School of Law

One Program, Two Degrees

The Tennessee Board of Regents has officially approved the dual JD/MA program offered by the Cecil C. Humphreys School of Law and the Department of Political Science at the University of Memphis. Over the years, both undergraduate and graduate students at the University of Memphis have requested a joint program incorporating the law JD and the Political Science MA degree programs. The advantage of such a program is that credit toward degrees in these career-related disciplines can be earned simultaneously if admissions and curricula are carefully structured. Many reputable institutions elsewhere, such as Yale, Duke, Syracuse, Tulane and Cincinnati, have similar programs. None of them, however, are close to Memphis, so by adding the program, the U of M has provided a competitive edge for students in the Mid-South.

Admission

Acceptance in the dual-degree program will require separate admission to each program. However, for applications to the joint program, the Department of Political Science will accept LSAT scores in lieu of GRE scores. Completion of one degree is not contingent upon completion of both.

Requirements

Students may earn a maximum of 16 hours of dual credit for law courses taken at the law school. The remaining hours toward the MA in Political Science must be taken in the Department of Political Science. For students in the dual-degree program, their first year of law school must only include classes that are part of the JD program. The following courses will qualify for both the JD and the MA in Political Science:

Required Law Courses

Constitutional Law (4 hours)
Criminal Law (3 hours)
Criminal Procedure I (3 hours)

Elective Law Courses

Administrative Law (3 hours)
Criminal Procedure II (2 hours)
Federal Courts A (2 hours)
Federal Courts B (2 hours)
Civil Rights (3 hours)
Constitutional Law Seminar (2 hours)
Tennessee Constitutional Law (2 hours)
Jurisprudence (2 hours)
International Law (3 hours)
Comparative Law (3 hours)
Immigration Law (3 hours)
Environmental Law (3 hours)

"After finishing my BA in Political Science, I couldn't decide whether I wanted to go to law school or graduate school. The JD/MA dual-degree program allowed me to do both! For just 20 credit hours in graduate classes and 16 transferable law credits, I was able to earn my master's in Political Science along with my law degree. In a recovering economy, it helps to have additional options. I highly recommend any of the dual-degree programs at the University of Memphis School of Law."

— John Marek, JD/MA '11
Campaign Manager–Steve Cohen 2012 Congressional Campaign

Political Science Contact:
Dr. Michael Sances
Assistant Professor
msances@memphis.edu
Clement Hall

901.678.2395

Law Admissions Contact:
Dr. Sue Ann McClellan
Assistant Dean of Admissions
Recruitment and Scholarships
Cecil C. Humphreys School of Law
smcclell@memphis.edu
901.678.5403

Law School Contact:
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Assistant Professor
Cecil C. Humphreys School of Law
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901.678.2202

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memphis.edu/law

CERTIFICATE IN TAX LAW

Objective:

The Law School wishes to award the Tax Law Certificate to students who demonstrate proficiency in tax law by successfully completing fifteen credit hours of tax courses with a certain minimum gpa, both in tax courses and in all law school courses. Tax courses are noted below. Students must also engage in tax-related service activities.

REQUIREMENTS FOR THE CERTIFICATE IN TAX LAW

Required Courses:

A student must successfully complete all of the following courses:

Basic Income Tax (3 hours)
Corporate Tax (3 hours)
Partnership Tax (3 hours)

Elective Courses:

In addition, a student must earn sufficient credit hours in any of the following courses to bring the total credit hours up to 15:

Estate Planning (3 hours)
International Taxation (3 hours)
Mergers & Acquisitions (2 hours)
Nonprofit Organizations (3 hours)
Tax Policy seminar (2 hours)

Tax-Related Service:

A student must perform 25 hours of tax-related service (i.e., unpaid) activity. VITA hours count towards fulfilling this requirement as does work in the tax office of MALS. An appropriate externship experience will satisfy this requirement.

A student must achieve an overall gpa of at 2.5. Students must achieve a gpa of 3.0 in the courses applicable to the Tax Law Certificate.

REGISTRATION FOR TAX LAW CERTIFICATE

Print name: ____

Preferred phone number: ____

Preferred email address: ____

Today's Date: __________________________

I am currently in my –

2d year, 1st semester ______

2d year, 2d semester ______

3d year, 1st semester ______

3d year, 2d semester ______

4th year ______

Please turn your form into the Tax Certificate faculty advisor.

THE UNIVERSITY OF
MEMPHIS.
Legal Clinic
1 Front Street

Cecil C. Humphreys School of Law

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CIVIL LITIGATION CLINIC

In the Civil Litigation Clinic, Memphis Law students represent indigent clients in a variety of cases – generally arising from landlord/tenant, consumer protection, and debtor/creditor disputes – pending in the General Sessions, Circuit or Chancery Courts of Shelby County.

Student attorneys engage in the examination of law and advocacy, actively navigating ethical, substantive, procedural, and evidentiary issues in the context of case work, classroom seminars, in-class case rounds and presentations, weekly case team meetings, and group and individual simulations. Through the vehicle of live-client representation, student attorneys also make continuous use of essential skills to address the ever-changing needs of clients.

Emphasis is placed on allowing Civil Litigation Clinic student attorneys to reflect upon their experiences in light of issues such as rapport-building and control in the lawyer-client relationship, professionalism, diversity, and the role of lawyers in social change work. Student attorneys also gain continuous exposure to collaborative lawyering, working together with their supervising attorney and class members to confront and address the many case, office, and time management issues arising in their representations.

Faculty: Daniel M. Schaffzin, Assistant Professor of Law and Director of Experiential Learning

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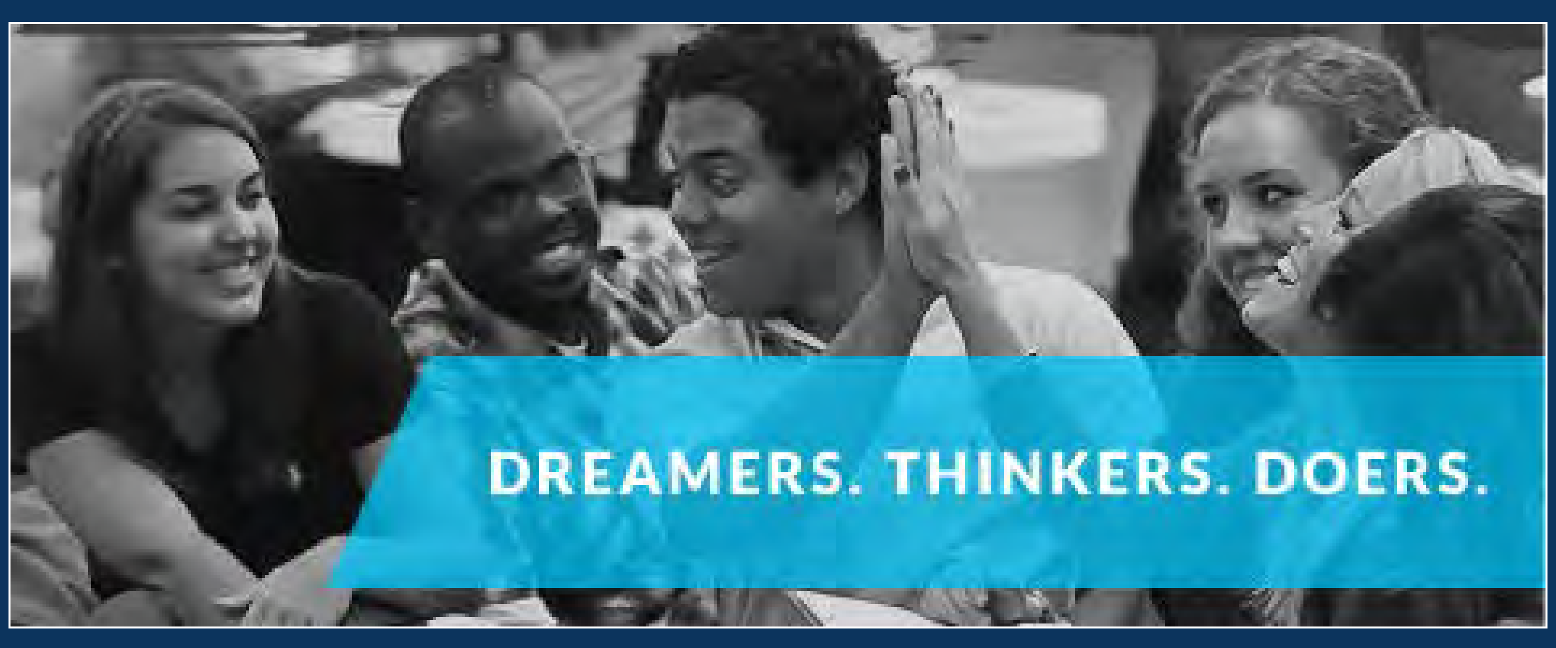

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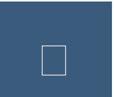
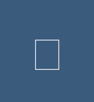
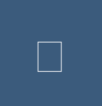
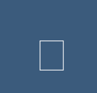
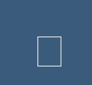
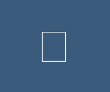

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Cecil C. Humphreys School of Law

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ELDER HEALTH LAW ADVOCACY CLINIC

The Elder Health Law Advocacy Clinic provides students with the opportunity to focus on substantive health law while representing elderly clients in need of legal assistance to address health care issues, such as:

- Execution and administration of advance healthcare directives
- Access to quality health care and long term care
- Eligibility for Medicare and TennCare Choices
- Long-term care insurance
- Diminished capacity and conservatorship
- Social Security and Supplemental Security Income disability
- Resident's rights in long term care facilities
- Discharge planning
- End of life and hospice care
- Medical futility

Students will develop core legal skills while conducting client and witness interviews, engaging in factual development, legal research and writing, problem solving, written and oral communication and drafting of legal documents. Students will deal with HIPAA privacy issues relating to the disclosure of individually identifiable medical information and will deal with ethical situations involving clients with diminished capacity, medical decision making, and conservatorship. Students should expect some litigation and courtroom experience, as well as opportunities for advocacy before administrative agencies.

In addition, as a component of the Clinic orientation and weekly case review class sessions, student attorneys will have the opportunity to interact with health care providers, non-profit agencies, and governmental units that are a part of the aging network and that deal with health care and the elderly, such as the Office of the Long Term Care Ombudsman, the Baptist Memory Care Center, and the Mid-South Coalition for Comfort Care and Bioethics. Finally, one-third of each student's grade will be based on that student's research, development and presentation of a community legal education program to a group of seniors concerning an elder health law issue of the student's choice.

Faculty: Donna S. Harkness, CELA, Professor of Clinical Law and Director, Elder Law Clinic, Elder Health Law Advocacy Clinic.

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Cecil C. Humphreys School of Law

STUDENT TESTIMONIALS

Jenna McDonald (JD '14) - Child and Family Litigation Clinic - Spring 2014 Speaking about herself and fellow Memphis Law student, Paige Munn

"This case was the most demanding, yet rewarding, case we worked on this semester. We both remember the feelings of shock and outrage we felt after first reading the petition....We were completed overwhelmed with joy, excitement, and satisfaction when the paternal grandparents received custody of the children. The Magistrate ruled in our favor and granted nearly all the relief that we requested. We were able to see the case through, from beginning to end, and leave the case with feelings of achievement and comfort that the girls will no longer suffer at the hands of their own father. The case molded our entire clinical experience and provided us with a head start into our legal careers. We are certain that we will carry memories from this case as we move on, and we are optimistic that we helped provide a much brighter future for the girls."

Aurelia Patterson, 3L - Child and Family Litigation Clinic – Spring 2014 Speaking about herself and fellow Memphis Law student, Paige Munn

"Working in the legal clinic has presented us with unforgettable memories and expanded our knowledge of the law tremendously. As 2Ls, we were not only able to study the law of international child abduction, but also educate other attorneys, and even the Magistrate, of the law's direct applicability to the case at hand! It is especially rewarding to know that all our hard work and research will help guide the Magistrate in a direction that will allow him to protect the children from harm at the hands of their parents, which is truly what matters the most.

This case was easily the most fascinating case that we worked on this semester. One of the challenges of this case is something we discussed extensively during case review—culture. The individuals involved in this case were from Africa and thus used to a different culture than ours. Alongside the culture gap was the language barrier.

The legal issues in this case were hands down the most intriguing part of our experience in clinic. When we were drafting our trial brief, we really had to parse the Uniform Child Abduction Prevention Act, and federal and state law on female genital mutilation. Much to our surprise, these laws fit the facts of our case precisely. It was truly captivating to perform the fact/law analysis of this case and see the law play out for the exact reason that it was enacted. It was very rewarding to hear from both attorneys how well we did on the trial brief."

Eric Mogy (JD '12) - Attorney, Wagerman/Katzman Law Firm - Civil Litigation Clinic – Spring 2011

"Working in the Civil Litigation Clinic was one of the most rewarding experiences of my law school career. Participating as a student attorney gave me the practical real world experience that you just can not get inside a regular classroom. Whether it was meeting with actual clients, negotiating with opposing counsel, or trying a case

in a real court of law, each aspect helped contribute to my readiness as a lawyer once I passed the bar. The clinic also taught me the nuts and bolts of organization, which is key no matter what type of law you practice. I can honestly say that being a student attorney in the Civil Litigation Clinic was instrumental to setting me on the right path as an attorney."

Seth Guess (JD '12) - Elder Law Clinic, Spring 2012

"Participating in the Elder Law Clinic was a highlight of my law school experience. Working directly with a client and solving real life legal problems was both challenging and rewarding. It was an excellent opportunity to put book learning into practice. For students wishing to acquire hands-on experience in a supervised setting, I thoroughly recommend taking a clinic course."

Chris Lewis (JD '12) - Elder Law Clinic, Fall 2011

"The legal clinics are a very valuable learning tool and greatly enrich the law school experience in many ways. Two of the most valuable aspects of the clinics are the level of involvement with clients' cases and the opportunity to directly interact with clients. In the legal clinics, you get to handle all aspects of the representation. This begins with the initial interview and does not end until the case is resolved. This gives you great hands-on experience that was unparalleled in my legal education. Getting to interact and be responsible for clients' cases was another of the many great benefits of participating in the legal clinics. Filling this role while in a controlled clinic setting is something that no other law school learning opportunity can provide. That is the opportunity to try to resolve all issues in a case and if you cannot you know that there is a leader in the field of law at your side to guide you through whatever matters you cannot resolve on your own. This allows for a deeper learning experience than any law book can provide."

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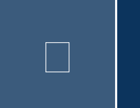
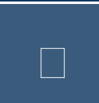
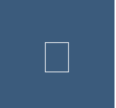
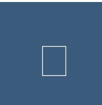
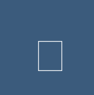
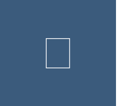

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THE UNIVERSITY OF MEMPHIS SCHOOL OF LAW
SPRING 2016 EXTERNSHIP PROGRAM

OBJECTIVES, POLICIES, AND PROCEDURES

The University of Memphis Externship Program is designed to expose law students to legal practice in a wide range of contexts while providing a framework for understanding and managing the practical, ethical, and personal challenges that are an inherent part of the legal profession. Stepping outside of the traditional classroom, externs are presented with the opportunity to learn by doing and observing under the direction of a field placement supervisor. To maximize this hands-on learning experience, externs participate in a faculty-led seminar in which they reflect upon and assess the skills, relationships, issues, and mindsets that prevail in the practice setting.

While specific objectives will necessarily vary across the spectrum of field placements, the Externship Program aims to help each student extern achieve the following goals:

- To strive toward *practice readiness* through continued development of legal skills, including research and writing;
- To better understand the day-to-day work of a lawyer;
- To apply classroom learning to the world of legal practice;
- To develop the habits of a *reflective practitioner* who understands how to learn from experience;
- To identify, explore and address issues of legal ethics and professional responsibility;
- To evaluate and utilize various approaches to problem solving in the context of real-life legal work;
- To improve upon essential communication and relationship-building skills;
- To explore career interests and goals; and
- To build professional and personal networks.

Through participation in both the field placement and classroom seminar aspects of the Externship Program, it is anticipated that students will further hone their lawyering skills at both practical and theoretical levels, learning from experience, from synthesis, from critique, and from responsibility.

Policies and Procedures of the Externship Program

A. Student Eligibility

1. Prerequisites to Application and Enrollment

Students who have successfully completed their required first year of coursework and at least 28 credit hours toward graduation are eligible to enroll in the Externship Program. Additional prerequisites may be set upon request by specific field placement offices and/or at the discretion of the Director of Experiential Learning. In exceptional circumstances, the prerequisites may be waived with the approval of the Director of Experiential Learning in consultation with the Associate Dean for Academic Affairs.

2. Academic Standing

Students must be in good academic standing in the semester preceding their participation in the Externship Program.

In consultation with the Associate Dean of Academic Affairs, the Director of Experiential Learning retains the discretion to base program admission on a student having compiled an academic record that exceeds the good standing requirement. A student falling below good academic standing (placed on academic probation) while participating in the Externship Program may continue participating barring extraordinary circumstances.

3. *Limitations on Externship Credit and Enrollment*

Students may enroll in the Externship Program subject to the following limitations:

a. In accordance with the Law School's Academic Regulations, not more than a total of twelve (12) credit hours may be utilized toward satisfying graduation requirements by satisfactorily completing the following courses: Any Externship, Law Review, Moot Court (including credit for participation on travel teams), and independent research.

b. For satisfying graduation requirements, a student is permitted a total of three (3) externships, two (2) clinic courses, or a combination of one (1) clinic and two (2) externship courses. A student may not repeat the same clinic or externship.

c. A student may not enroll in both a Clinic course and the Externship Program in the same semester or summer session.

d. Students may not take more than a total of sixteen (16) hours, including enrollment in the Externship Program, in the semester (or its equivalent in the summer) in which they are enrolled in the Externship Program.

e. For enrollment purposes, students who have already taken and received credit for the participation in the Externship Program will not receive priority for enrollment in the Externship Program for a second semester

or summer session.

f. The Director of Experiential Learning, after consultation with the Associate Dean of Academic Affairs, may grant waivers, on a case-by-case basis, to permit repetition of a placement in the Externship Program or enrollment in the Externship Program that may result in the student exceeding the ungraded credit limitation or the limitation on the number of externships in which the student may enroll.

B. Student Application Requirements

1. *Pre-Application Processes*

a. Prior to applying for enrollment in the Externship Program, students must thoroughly familiarize themselves with the Objectives and Goals of the Externship Program as well as the Program's Policies and Procedures.

b. Although not required, interested students should make every effort to attend the Externship Information Session that will be held in advance of registration each semester. Students should also be encouraged to meet with the Director of Experiential Learning to discuss any questions or concerns in advance of moving forward with applications for enrollment.

2. *Application Process*

Students must apply for an Externship Program placement by completing the Externship Program Application. It is anticipated that the application will be distributed to students via electronic means (e-mail, law school website, Simplicity, etc.) and made available in the Office of the Director of Experiential Learning. In addition to submitting the completed application, students may be asked to submit a cover letter, a current professional resume, a writing sample, and/or a current law school transcript.

3. *Security Clearance*

Many externship field placements (primarily judicial and government) require a security clearance, a process that may take several months. If a student seeks an externship field placement that requires security clearance, it is expected that the student will work with the Director of Experiential Learning to provide the field placement with all information necessary to secure that clearance.

C. Standards for Selection of Students for Externships

Offers for enrollment in the Externship Program will be made by and at the discretion of the Director of Experiential Learning. In making enrollment decisions, the following factors will be considered:

1. *Compatibility*

The Director of Experiential Learning will assess whether the placement a good fit for the student and whether the student has the legal, professional, interpersonal and intellectual

skills for a productive externship experience in the particular placement. In making this determination, the Director may examine the student's law school transcript, though academic performance will not necessarily be conclusive. In addition, an interview with the student, input from faculty, consultation with the prospective field placement, and performance in other experiential learning settings may be considered.

2. *Reason for Wanting to Participate in the Placement*

The Director of Experiential Learning will consider whether the placement fits into the educational goals and career interests of the student.

3. *Compliance with Requirements and Prerequisites*

The Director of Experiential Learning will consider whether the student has complied with all placement and Externship Program requirements and prerequisites.

D. Requirements after Acceptance of an Externship Placement

1. *Acceptance and Registration*

Once a student accepts an offer to enroll in the Externship Program, that student will be formally enrolled by the Registrar's office. Once enrollment is complete, a student will not be permitted to drop the Externship course without petitioning for and receiving approval of the Director of Experiential Learning to withdraw from the course.

2. *Withdrawal*

If a student accepts an offer for enrollment in the Externship Program, he or she will not be able to withdraw the commitment except for compelling reasons. To obtain permission for withdrawal, the student must immediately, upon the knowledge of such compelling reasons, petition in writing to the Director of Experiential Learning. The petition must specify the compelling reasons for withdrawal. Failure to petition and receive approval may result in a grade of "Unsatisfactory" for the course and jeopardize the student's chances of being considered for future enrollment in the law school's Experiential Learning courses, including clinical programs and externships.

3. *Compensation*

Students may not accept compensation of any kind for externship work. Where it is the practice of a particular field placement to reimburse reasonable out-of-pocket expenses related to the placement, the extern may receive such reimbursement.

4. *Fulfillment of Externship Placement Requirements*

Subject to the Policies and Procedures of the Externship Program, externs must comply with all working hours requirements and conditions implemented by the field placement. Field placement will generally run from the first day of instruction through the last day of instruction of the academic semester or session. It is expected that the extern will be at the placement each week of the semester or summer session. Students must complete their externship in the semester or term they begin it. A student who fails to complete an externship or who receives a grade of "Unsatisfactory" may be barred from future

enrollment in any of the law school's Experiential Learning courses, including clinical programs and externships.

5. *Completion of Externship Seminar Requirements*

Student externs will be required to attend and fulfill the requirements of a regularly convened, faculty-led classroom seminar designed to focus on and enhance the learning that the externs will be doing in their field placements.

Requirements for the classroom seminar, as well as for submission of Externship-related work product and time sheets, will be specified in the course syllabus for the Externship Program.

In general, it is anticipated that students will be expected to reflect on their field placement experiences through a series of written assignments, including a Final Self-Assessment and Reflection Memorandum. Written assignments may focus on the effective development of legal skills; confidentiality, ethics, and professional responsibility; expectations, conduct, and realities of externship work; learning from experience and reflection; workplace communication and feedback; workplace teams and leadership; community and social responsibility of lawyers; the legal system; developing lawyer skills; and job stress and job satisfaction.

6. *Confidentiality*

The extern is expected to hold in strictest confidence all communications received in the course of the externship placement that are not matters of public record, and to adhere fully to the standards of professional conduct set forth in the Code of Professional Responsibility of the American Bar Association, the Tennessee Rules of Professional Conduct, and any other applicable rules of professional ethics (e.g., codes of judicial conduct)

7. *Conflicts of Interest*

All externs must avoid conflicts of interest based on past or concurrent employment (or volunteer work) situations. Some externship field placements may prohibit an extern from engaging in concurrent employment or volunteer work. An extern who does plan to engage in concurrent employment or volunteer work during the externship semester must confer with the Director of Experiential Learning, the externship field placement supervisor, and the employment or volunteer work supervisor before the start of an concurrent externship/employment work arrangement. Externs with questions about a potential conflict should immediately consult the Director of Experiential Learning.

8. *Unlawful Practice of Law*

Within their placements, externs may have the opportunity for contact with clients or potential clients, the court, other attorneys, etc. Externs should be extremely cautious in their communications so that they are limited to and do not overstep the scope of work that they are authorized to perform. All communications should be prefaced by disclosing the student's extern status.

9. *Professionalism*

Externs are required to exhibit professional conduct at all times during their externships. Students will be appropriately attired as determined by the field placement supervisor. Students will attend all called meetings of the field placement supervisor and/or the faculty supervisor, unless excused by the appropriate party. Students will be familiar with the appropriate Rules of Procedure and other assigned materials.

In the sole judgment of the Director of Experiential Learning, any extern failing to achieve an acceptable level of professionalism may have the academic credit for his/her placement reduced or eliminated.

10. *Removal from Externship Program*

At the discretion of the Director of Experiential Learning, students may be removed from the Externship Program for unsatisfactory or untimely work, unethical conduct, violation of any agreements with the field placement supervisor or law school, breaches of confidence, inappropriate behavior or attire, violation of any rules of court, or at the request of the field placement supervisor.

Credit and Grading

A. Grading

1. Upon completion of the Externship semester, all externs will be assigned a grade of Excellent, Satisfactory, or Unsatisfactory.

2. The determination of grade assignment and credit allocation will be made by the Director of the Experiential Learning after receiving a student evaluation prepared by the field placement supervisor at semester's end. The assigned grade and allocation of credit will be based upon satisfactory and timely completion of the requisite externship hours and work assigned during the placement, satisfactory participation in the classroom seminar component of the Externship Program course (including consideration of the work product), the evaluation of the field placement supervisor, and the student's compliance with all course requirements.

3. At the discretion of the Director of Experiential Learning, any student enrolled in an externship placement who fails to comply with any requirements of the Externship Program (set forth herein or in the course materials), of the Student Honor Code, or appropriate regulations governing the profession, may be assigned a grade of "Unsatisfactory," awarded no credit and be barred from future enrollment in any of the law school's Experiential Learning courses, including clinical programs and externships.

Cecil C. Humphreys School of Law

EXTERNSHIP STUDENT TESTIMONIALS

Zach Hoyt - Class of 2013

Spring 2012 Externship Program – Field Placement EEOC Hearings Unit. Summer 2012 Externship Program – Field Placement with U.S. Attorney's Office (W.D. TN)

"At the time I started my first externship, my idealistic view of the law that I had coming into school was on life support after three semesters of doctrinal classes focused on the technical interpretation and operation of the law. Getting out and working with real people and real problems in my externship reminded why I went to law school in the first place. Seeing how the law worked in practice also made the occasionally dry doctrinal subject much more interesting. Getting feedback from mentors was an invaluable aid in developing practical legal skills and gave me a chance to form relationships with future colleagues. Finally, the externship program helped me figure out what direction I wanted to focus my career on by exposing me to different areas of practice. I strongly encourage every student to take advantage of the externship program."

Jenna Dillier - Class of 2013

Summer 2012 Externship Program - Field Placement with U.S. Bankruptcy Court Judge David S. Kennedy

"Participating in the Externship Program was a wonderful experience for me. I learned more than I could have ever hoped for. Not only was I able to see real legal issues in an authentic setting, but I gained a deeper understanding of the judicial decision-making process as well. It was a great feeling to be able to put my classroom knowledge to use outside the classroom. I now feel more comfortable about what to expect inside of a courtroom and believe this experience has bettered prepared me to become a practicing attorney.

Externing in the United States Bankruptcy Court was an enlightening experience which allowed me to learn more about the field of bankruptcy law. Without this experience I would not have been able to discover my interest in this area of the law. Judge Kennedy is an amazing judge, not to mention, a remarkable individual. Judge Kennedy freely shares his wisdom and offered a wonderful new perspective for me about the judicial decision-making process. I truly appreciated the time my supervisor devoted to teaching and mentoring. I highly recommend a judicial externship for students who want to learn more about the judicial decision-making process."

Deanna Windham

Administrative Law Judge, Equal Employment Opportunity Commision, Memphis District Office, Federal Sector Hearings Unit. Externship Field Placement Supervisor, Summer 2011 - Present

"Through this program, students provide valuable assistance to the administrative judges in performing their day-to-day tasks and duties, and in the process, help further the overall mission of the EEOC to stop and remedy unlawful workplace discrimination. This benefits not only the students and the EEOC but also provides a public service to the federal workforce in our district."

Current and former experiential learning students are encouraged to submit testimonials to Professor Daniel Schaffzin (dschffzn@memphis.edu).

EXPLORE LAMBUTH CAMPUS

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Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities which receive Federal financial assistance. Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance..." 20 U.S.C. § 1681 - To Learn More, visit Title IX and Sexual Misconduct.

WHAT CAN HAPPEN WHEN YOU ARE FOUND TO BE A JUVENILE DELINQUENT IN TENNESSEE?

What is a Juvenile Delinquent Offense?

It is an act that would be a crime if you were an adult. You probably already know the immediate results of getting in trouble with the law as a juvenile. You can be taken into custody, you may have to go to court, and you can be found guilty and be adjudicated as delinquent.

What are the other long-term costs of committing a juvenile offense?

This pamphlet aims to give you a brief overview of the potential other results of committing offenses as a juvenile in Tennessee. For a more in depth discussion, please visit www.beforeyouplea.com/tn.

The Basics

If you're found to be **guilty** of committing an offense in juvenile court, you're adjudicated, not convicted. Only adults in Tennessee, and juveniles tried as adults, can be convicted of a crime.

You may be **transferred** to adult criminal court, tried as an adult and potentially ***convicted*** if you are 16 or older at the time of the alleged offense and the offense, if committed by an adult, would constitute: first degree murder, second degree murder, aggravated rape, rape of a child, aggravated robbery, especially aggravated robbery, kidnapping, especially aggravated kidnapping, and an attempt to commit any of the above crimes.

Access to your Juvenile Records

Generally, the public is **not** allowed access to your juvenile records. The public **may access** your records if you are 14 or older at the time you've committed the offense and the offense you've committed, if committed by an adult, would constitute: first degree murder, second degree murder, aggravated murder, aggravated rape, rape of a child, aggravated robbery, especially aggravated robbery, kidnapping, and especially aggravated kidnapping.

How Will Being Found a Juvenile Delinquent Affect My Future?

- **Military personnel** will be able to see all of your juvenile history. Juvenile convictions may bar you from enlisting, depending on the nature of the offense.
- Your **school** may be notified of your adjudication and you could be **suspended** or **expelled** for your behavior.
- Your juvenile adjudication could make it harder to get into **college**.
- **If you're applying for financial aid**, you'll have to fill out the Free Application for Federal Student Aid (FAFSA), which asks if you have any drug *convictions*. Since adjudications are not convictions, you may answer "no".
- **A juvenile adjudication could impair your ability to get a job.** Employers differ on whether they ask about juvenile adjudications or just adult convictions. If a potential employer does a background check on you, your juvenile offense will likely come up, unless you've had it expunged. (**For government jobs**, there is no such thing as an expunged record!)
- **A juvenile adjudication could prevent enrollment in Job Corps**
- **<u>Public housing authorities</u>** have the right to **evict your entire family** for an offense you commit as a juvenile, even if the offense does not occur on the public housing property.
- **<u>Sex Offender Registry</u>**: You **must** register on the Sex Offender Registry if found guilty of an offense that, if committed by an adult would be: aggravated rape, rape, rape of a child (victim at least 4 years younger than offender), aggravated rape of a child, and criminal attempt to commit any of these offenses
    - **Consequences of Registry: Ineligible** for federally assisted housing AND enlistment in the military
- **<u>Methadone Offender Registry</u>**: You **must** register with the Meth Offender Registry if you are found guilty of an offense that, if committed by an adult, would be manufacture of methamphetamine, or initiation of methamphetamine manufacture.
- **<u>Immigration</u>**: Adjudications and convictions are treated differently by immigration laws. An adjudication can still have **serious consequences**. You may be deported, prohibited from applying for legal status, including getting your green card, lose your visa or lawful status, be barred from re-entry, detained in a secure facility, and lose eligibility for other immigration relief, including Deferred Action for Childhood Arrivals

Can your records be expunged?

Having your records expunged means that you are having them erased. For the most part, it's as if your adjudication never happened. Although you may be able to have your court records expunged…

- Expungement of your *court* record <u>does not apply</u> to law enforcement records. **Files, fingerprints, DNA samples and photographs will remain on law enforcement databases.**
- The fact that you've previously had a record erased may be used to determine whether you are eligible for pre-trial diversion at a later date.

This pamphlet was prepared as a public service by Student Attorneys in the Child and Family Litigation Clinic at the University of Memphis Cecil C. Humphreys School of Law. We hope it is helpful to you.

(901) 678-5301

THE UNIVERSITY OF MEMPHIS LAW REVIEW

VOLUME 47 | 2016–2017 | BOOKS 1–4

Authors and Readers,

Thank you for visiting the University of Memphis Law Review website. We strive to publish volumes of the highest quality. Our goal is to provide authors with a professional editing process and readers with useful and insightful legal scholarship. We see our role as integrally tied to the Law School's reputation. Memphis is an excellent law school, and we are proud to call it our own. Because of that, we want every author and reader to see the individualized commitment that we bring to the editing process.

Our published authors include professors, judges, and attorneys from throughout the country who write on a variety of novel legal topics. We do not limit publication to specific jurisdictions but rather seek to publish the best articles. We value articles that are clear, concise, and well-structured: these are the articles that further legal debate and are useful to the legal community.

Volume 47's Editorial Board hopes to build upon the Law Review's reputation for developing great relationships with their authors and producing excellent Volumes. From the moment an author accepts an offer for publication, the Law Review staff seeks to communicate effectively. Throughout the editing process, our Bluebooking staff will find and correct citations, allowing our Articles Editors to focus on a single article as a whole. In this way, the author receives integrated and effective feedback—rather than sporadic communication—from a member of the staff who knows the structure, theme, and thesis of the article by heart.

We are always open to direct submission of articles. If you would like to submit an article for publication, please email your résumé, cover letter, and article to our Articles Editor, Jordan Emily, at jmemily@memphis.edu. If you have questions about subscribing to the University of Memphis Law Review, please contact our Business Editor, Will Podesta, at wcpdesta@memphis.edu. Please also feel free to contact me at lwgruby@memphis.edu with any questions.

Respectfully,

Lyle Gruby
Editor-in-Chief
Volume 47 of the University of Memphis Law Review

THE FRAGILE FORTRESS: JUDICIAL INDEPENDENCE IN THE 21ST CENTURY

UNIVERSITY OF MEMPHIS LAW REVIEW SYMPOSIUM

April 7, 2017

AGENDA*

Time	Session	Location
8:00	**Breakfast/Registration**	Atrium
9:00	**Opening/Welcome Remarks** Peter V. Letsou, Dean of the Law School Andrew McClurg, Faculty Advisor to Law Review Pablo J. Davis, Symposium Editor	Wade Auditorium
9:15	**Judicial Independence: An Overview from Impeachment to Court-Packing** Hon. R. David Proctor, U.S. District Court for the Northern District of Alabama	Wade Auditorium
9:45	**Constraints & Boundaries I: Sentencing, Intelligence** Hon. Sterling Johnson, Jr., U.S. District Court for the Eastern District of New York: *Restrictions on Judicial Sentencing Discretion: Feeney Amendment Revisited* Prof. Patrick Walsh, Federal Law Enforcement Training Center: *Use of Secretly-Acquired Intelligence Evidence in Federal Criminal Proceedings*	Wade Auditorium
10:55	**Constraints & Boundaries II: Subpoenas, Campaigns** Prof. and Dean Emeritus John DiPippa, UALR Bowen School of Law: *Can a Legislative Committee Subpoena a Sitting State Judge?* Prof. Eric Kasper, University of Wisconsin–Eau Claire: *When Judges Campaign: Free Speech and Restrictions on Fundraising*	Wade Auditorium
11:55	**Lunch**	Student Lounge
12:45	**Judicial Independence & Rule of Law—A Hemispheric Perspective** Hon. Zarela Villanueva, Chief Justice, Supreme Court of Costa Rica	Wade Auditorium
1:30	**The Impact of Threats of Violence on Judges' Independence** Hon. Timothy J. Corrigan, U.S. District Court for the Middle District of Florida	Wade Auditorium
2:10	**Judicial Independence—Within & Between Chambers** Prof. Justin Walker, University of Louisville Brandeis School of Law: *Should Judges Be Forced to Disclose Their Chambers Papers upon Retirement?* Hon. Bernice B. Donald, U.S. Court of Appeals for the Sixth Circuit *The Intrajudicial Factor in Judicial Independence: Reflections on Collegiality & Dissent*	Wade Auditorium
3:10	**Political Criticism of Judges: Real Threat to Judicial Independence?** Hon. Michael B. Mukasey, Former US Attorney General; Former Chief Judge, U.S. District Court for the Southern District of New York:	Wade Auditorium
3:40	**Judicial Independence: Theory & Practice, Questions & Discussion** *An open panel discussion involving all the speakers, with audience questions/comment*	Wade Auditorium
4:55	**The Fragile Fortress: Closing Remarks** Pablo J. Davis, Symposium Editotr	Wade Auditorium

**This agenda is subject to slight modifications between now and the date of the Symposium.*

THE UNIVERSITY OF MEMPHIS.
Cecil C. Humphreys School of Law

Law Review Annual Symposium

Friday, March 18, 2016

THE LEGAL IMPLICATIONS OF RESTORING A CITY

The University of Memphis, a Tennessee Board of Regents institution, is an Equal Opportunity/
Affirmative Action University. It is committed to education of a non-racially identifiable student body.
UOM376-FY1516/2C50. IMEC.

Law Review Annual Symposium

THE LEGAL IMPLICATIONS OF RESTORING A CITY

The University of Memphis Law Review will take a close look at the legal solutions to the growing problem of vacant, abandoned, and blighted properties in major US cities including a historical overview of the problem, the implications on the surrounding community and novel legal solutions.

Speakers include attorneys from UT Austin School of Law, Notre Dame Law School, Southern University Law Center, and the ABA Forum on Affordable Housing and Community Development. Five and one quarter (5.25) hours of CLE credit have been approved.

For more information contact
Kelly Peevyhouse
kmsters1@memphis.edu
571-239-4643

8:00-9:00AM — **Sign-in and Breakfast**
Wade Auditorium Lobby

9:00-9:15AM — **Welcome Address and Opening Remarks**
Greg Wagner, Editor in Chief
University of Memphis Law Review

Danny Schaffzin, Assist. Prof. of Law
and Director of Experiential Learning
University of Memphis, Cecil C. Humpreys
School of Law

9:15-10:00AM — **Revitalizing Urban Cities: Linking the Past to the Present**
A. Mechele Dickerson, Arthur L. Moller
Chair in Bankruptcy Law and Practice
University of Texas at Austin School
of Law

10:00-10:35AM — **The New Debtor City**
Christopher K. Odinet,
Assistant Professor of Law
Southern University Law Center

10:35-10:45AM — **Break**

10:45-11:30AM — **Inclusive Communities: Urban Revitalization, Geographic Desegregation and Disparate Impact Under the Fair Housing Act**
J. William Callison, Partner
Faegre Baker Daniels LLP,
Denver, Colorado

11:30-11:45AM — **Brief Address**
Jim Strickland, Mayor, City of Memphis

11:45AM-12:45PM — **Lunch Break**
Lunch provided for paying registrants

Brief Address
Peter V. Letsou, Dean
The University of Memphis
Cecil C. Humphreys School of Law

12:45- 1:30PM — **Affirmatively Furthering Neighborhood Choice**
James J. Kelly Jr., Clinical Professor of Law
Notre Dame Law School

1:30-2:15PM — **Land Banking in Tennessee: A Promising Solution for Positive Growth**
Sohil Shah, Associate
Polsinelli PC

2:15-2:25PM — **Break**

2:25-3:10PM — **Are We Holding Ourselves Back? Ways that Land Use and Building Regulations Can Encourage Abandonment or Stimulate Reinvestment**
Steve Barlow, Partner at Brewer & Barlow;
Adjunct Professor, Memphis Law

Tommy Pacello, President, Medical District
Collaborative

Josh Whitehead, Planning Director,
Memphis & Shelby County Office of
Planning & Development; Adjunct
Professor, Memphis Law

3:10-3:55PM — **Neighborhood Blight as a Collaborative Policy Movement**
Kermit Lind, Clinical Professor Emeritus,
Cleveland-Marshall School of Law

Joe Schilling, Senior Research Associate,
Urban Institute

3:55-4:05PM — **Closing Remarks**
Kelly Peevyhouse, Symposium Editor
University of Memphis Law Review

THE UNIVERSITY OF MEMPHIS LAW REVIEW ANNUAL SYMPOSIUM

IN RE VALOR: POLICY AND ACTION IN VETERANS LEGAL AID

The University of Memphis Law Review will take a close look at legal solutions to issues in veterans legal aid from national and local perspectives. Speakers include attorneys from Harvard Law School, Yale Law School, William & Mary Law School, University of Missouri School of Law, John Marshall Law School, NOVA Southeastern University Law Center, Shelby County General Sessions Court and Memphis Area Legal Services. Four and one third (4.33) hours of CLE credit have been approved.

Breakfast provided by Commercial Bank & Trust Company

For more information contact Clint Crosier at ccrosier@memphis.edu or (865) 332-8429.

Symposium Agenda:

8:00 a.m. - 9:00 a.m.
Sign-in and Breakfast
Wade Auditorium Lobby

9:00 a.m. - 9:15 a.m.
Opening Remarks

Dean Peter V. Letsou, The University of Memphis Cecil C. Humphreys School of Law

Christopher Honeycutt, Maj. USAF (ret), The University of Memphis Veterans Resource Center

9:15 a.m. - 9:55 a.m.
Bridging the Legal Services Gap & Recognizing the Impact Legal Assistance has on Transition, Reintegration, And Ultimately Stabilization

Jayme Cassidy, Staff Attorney/Adjunct Professor, Veterans Law Clinic, NOVA Southeastern University Law Center

9:55 a.m. - 10:40 a.m.
Perspective on the Veterans Clinic Model at Law Schools: Lessons Learned by an Instructor and Student

Angela Drake, Veterans Clinic Instructor and Supervising Attorney, University of Missouri Law School

10:40a.m.- 10:50 a.m.
Break

10:50 a.m. - 11:35 a.m.
Post 9/11 Veterans: As Colleagues and Clients

Patricia Roberts, Clinical Professor of Law and Director, Clinical Programs, and Director, Lewis B. Puller, Jr. Veterans Benefits Clinic, William & Mary Law School

11:35 a.m. - 12:35 p.m.
Lunch

Gordon Ball Fourth Floor Scenic Reading Room

12:40 p.m. – 1:20 p.m.
The Credibility Trap: Some Notes on VA Evidentiary Law and Procedure

Daniel Nagin, Clinical Professor of Law, Faculty Director, WilmerHale Legal Services Center & Veterans Legal Clinic, Harvard Law School

1:20 p.m. – 2:00 p.m.
Emerging Issues in Veterans Law

Michael Wishnie, Deputy Dean for Experiential Education; William O. Douglas Clinical Professor of Law; Supervising attorney and director, Jerome N. Frank Legal Services Organization, Yale Law School.

2:00 p.m. – 2:10 p.m.
Break

2:10 p.m. – 3:10 p.m.
Panel Discussion

Moderated by **Albert C. Harvey, Gen. USMCR (ret.),** Shareholder, Lewis Thomason

Panelists:

The Honorable Bill Anderson, Shelby County General Sessions Court, Division 7

Linda Warren Seely, Director of Pro Bono Projects and Campaign for Equal Justice, Memphis Area Legal Services

Jake Dickerson, Attorney, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC.

Edward Farmer, Staff Attorney, Veterans Legal Support Center and Clinic, The John Marshall Law School

Ellen Donati Flechas, Donati Law

3:10 p.m. - 3:20 p.m.
Closing Remarks

Clint Crosier, Symposium Editor, The University of Memphis Law Review

THE UNIVERSITY OF MEMPHIS
LAW REVIEW
ANNUAL SYMPOSIUM

FRIDAY, FEBRUARY 28, 2014

SYMPOSIUM EDITION

A Symposium Edition of the University of Memphis Law Review will be dedicated to Juvenile Court Transition and Reform in conjunction with this event. If you would like to subscribe to the *University of Memphis Law Review* or receive the Symposium Edition, please contact the Law Review Business Editor at *lawreview_businesseditor@memphis.edu*.

CLE CREDIT

5 hours of CLE credit have been applied for. To earn full credit for attendance, participants must complete a CLE form at the event in order to receive CLE credit.

Juvenile Courts in Transition:

Where We Have Been and Where We are Going

QUESTIONS?

Contact Sandy Newcombe
University of Memphis Law Review
Symposium Editor
snewcomb@memphis.edu
901-552-6032

THE UNIVERSITY OF MEMPHIS | Cecil C. Humphreys School of Law

Friday, February 28, 2014
Wade Auditorium
The University of Memphis Cecil C. Humphreys School of Law
1 N. Front. St., Memphis, TN 38103

AGENDA

THE UNIVERSITY OF MEMPHIS LAW REVIEW ANNUAL SYMPOSIUM

Juvenile Courts in Transition: Where We Have Been and Where We are Going

8:00 a.m. - 9:00 a.m.
Sign-in and Breakfast
Historic Lobby

9:00 a.m. - 9:15 a.m.
Opening Remarks
Dean Peter Letsou, The University of Memphis
Cecil C. Humphreys School of Law

9:15 a.m. – 9:45 a.m.
Protecting the Rights of Juveniles Through Enforcement of Section 14141
Winsome Gayle, Special Litigation Counsel with the Special Litigation Section of the U.S. Department of Justice, Civil Rights Division

9:45 a.m.- 10:15 a.m.
Success in Shelby County: A Roadmap to Systematic Juvenile Reform
Sandra Simkins, Clinical Director at Rutgers University and DOJ Juvenile Court Monitor for JCMSC

10:15 a.m. – 10:45 p.m.
Independent, Ethical, and Zealous Advocacy for All Children of Memphis and Shelby County
Stephen C. Bush, Shelby County Public Defender

10:45 a.m. – 11:00 a.m.
Break

11:00 a.m. – 11:30 a.m.
A New Juvenile Court: Successes and Challenges in the Wake of DOJ Intervention
Tom Coupe', Supervising Attorney and Coordinator for Judge's Action Center at the Juvenile Court of Memphis and Shelby County

11:30 p.m.- 12:00 p.m.
The "Other" Missouri Model: Systemic Juvenile Injustice in the Show Me State
Mae Quinn, Director; Juvenile Law and Justice Clinic, Washington School of Law

12:00 p.m. – 1:00 p.m.
Lunch
Fourth Floor Gordon Ball Scenic Reading Room
(lunch provided for ticket holders)

1:00 p.m. – 1:30 p.m.
Bringing Facts into Fiction: The First "Data-Based" Accountability Analysis of the Differences Between Presumptively Open, Discretionarily Open, and Closed Child Dependency Court Systems
William Wesley Patton, UCLA David Geffen School of Medicine, Department of Psychiatry, Lecturer; Professor and J. Alan Cook and Mary Schalling Cook Children's Law Scholar, Whittier Law School

1:30 p.m. – 2:00 p.m.
An IEP for the Juvenile Justice System: Incorporating Special Education Law throughout the Delinquency Process
Lisa M. Geis, Clinical Instructor, Juvenile & Special Education Law Clinic, University of the District of Columbia - David A. Clarke School of Law

2:00 p.m. – 2:10 p.m.
Break

2:10 p.m. – 2:40 p.m.
Blended Sentencing in Tennessee Courts
Arthur Horne, III, Esquire, Horne & Wells, PLLC

2:40 p.m. – 3:40 p.m.
The Evolving Role of Attorneys in Juvenile Court
Moderator: Magistrate Dan Michael, Chief Magistrate with the Juvenile Court of Memphis and Shelby County

Panelists: Sandra Simkins, Mae Quinn, Tom Coupe', and Julian Adler, Director of the Red Hook Community Justice Center in Brooklyn, NY.

3:40 p.m. – 4:00 p.m.
Closing Remarks
Magistrate Dan Michael, Chief Magistrate with the Juvenile Court of Memphis and Shelby County

THE UNIVERSITY OF MEMPHIS. | Cecil C. Humphreys School of Law

Symposium Edition

A Symposium Edition of the University of Memphis Law Review will be dedicated to Human Trafficking in conjunction with this event. If you would like to subscribe to the University of Memphis Law Review or receive the Symposium Edition, please contact the Law Review Business Editor at *lawreview_businesseditor@memphis.edu.*

CLE Credit

Six hours of CLE credit and 2.25 hours of Dual Ethics Credit have been applied for. To earn full credit for attendance, participants must complete a CLE form at the event.

QUESTIONS?

Contact Jessica Bradley
University of Memphis Law Review
Symposium Editor
jbrdley1@memphis.edu
(256) 655-7387

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2013 Law Review Symposium

Breaking the Silence:

Legal Voices in the Fight Against Human Trafficking

March 22

SYMPOSIUM AGENDA

Friday, March 22, 2013

Wade Auditorium
The University of Memphis Cecil C. Humphreys School of Law
1 N. Front. St., Memphis, TN 38103

8:00 a.m. - 9:00 a.m.
Sign-in and Breakfast
Wade Auditorium Lobby

9:00 a.m. - 9:10 a.m.
Opening Remarks
Dean William Kratzke, *The University of Memphis Cecil C. Humphreys School of Law*

9:10 a.m. - 9:55 a.m.
Abolishing Online Sex Trafficking: Imposing Criminal Culpability on Advertisers Facilitating the Sexual Exploitation of Minors
Ryan Dalton, *Director of Anti-Trafficking Operations, Operation Broken Silence*

9:55 a.m. - 10:40 a.m.
Game Plan to Fight Human Trafficking: Lessons From Super Bowl XLVI
Abigail Kuzma, *Director & Chief Counsel of Consumer Protection, Indiana Attorney General's Office; Indiana Protection of Abused and Trafficked Humans Task Force; International Fellow in Human Trafficking, National Attorneys General Training and Research Institute*

10:40a.m.- 10:50 a.m.
Break

10:50 a.m. - 11:35 a.m.
Seeking Justice for Victims of Human Trafficking Through Civil Litigation
Naomi Jiyoung Bang, *Clinical Professor, Asylum and Human Trafficking Clinic, South Texas College of Law; Senior Attorney, FosterQuan Immigration Firm*

11:35 a.m. - 12:45 p.m.
Lunch
Student Lounge

12:45 p.m. – 3:00 p.m.
Special Presentation and Panel Discussion
Domestic Minor Sex Trafficking and Legislation Related to Appropriate Victim Response
Moderated by **Samantha Vardaman,** *Senior Director of Shared Hope International*

Panelists:
Shamere McKenzie, *Policy Assistant, Shared Hope International; Trafficking Survivor*
Amy Weirich, *Shelby County District Attorney General*
Margie Quin, *Assistant Special Agent in Charge, Tennessee Bureau of Investigation*
Lt. Wilton Cleveland, *Memphis Police Department Sex Crimes Division*
Rachel Sumner, *Survivor Advocate, Operation Broken Silence*
Jonathan Skrmetti, *Assistant United States Attorney, Civil Rights Unit, Western District of Tennessee US Attorney's Office; Adjunct Professor of Law, University of Memphis Cecil C. Humphreys School of Law*

3:00 p.m. – 3:15 p.m.
Catered Break
Wade Auditorium Lobby

3:15 p.m. – 4:00 p.m.
Analysis of the Federal Sex Trafficking Statute
Steve Parker, *Chief Civil Rights Unit, Western District of Tennessee US Attorney's Office*
Jonathan Skrmetti, *Assistant United States Attorney, Civil Rights Unit, Western District of Tennessee US Attorney's Office; Adjunct Professor of Law, University of Memphis Cecil C. Humphreys School of Law*

4:00 p.m. – 4:45 p.m.
Transportation and Human Trafficking
Alicia Wilson, *Attorney-Advisor, Office of the General Counsel, United States Department of Transportation*

4:45 p.m. - 5:00 p.m.
Closing Remarks
Andrew Solarski, *The University of Memphis Public Action Law Society Alternative Spring Break Coordinator*
Jessica Bradley, *The University of Memphis Law Review Symposium Editor*

Cancellation/Refund Policy
Prepaid registrations cancelled by March 21, 2012 will be fully refunded. Cancellations made after that date will not be refunded.

Symposium Edition
A Symposium Edition of the *University of Memphis Law Review* will be dedicated to Cultural Competency and the Death Penalty in conjunction with this event. If you would like to subscribe to the *University of Memphis Law Review* or receive the Symposium Edition, please contact the Law Review Business Editor at *lawreview_businesseditor@memphis.edu*.

CLE Credit
Program attendees will be eligible for 6.25 hours of general CLE credit. To earn this credit, attendees must complete a CLE form at the event.

Registration
Visit *www.memphis.edu/law/currentstudents/lawreview/symposium.php* to register.

Questions?
Contact **Isaac Kimes**
University of Memphis Law Review
Symposium Editor
iukimes@memphis.edu
(901) 300-6417

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The University of Memphis Law Review
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THE UNIVERSITY OF
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2012 Law Review Symposium

Cultural Competency and the Death Penalty

March 29 & 30

Thursday, March 29

5:30 p.m. – 7:00 p.m. Symposium Reception (invitation only)
Flight Restaurant Loft Space, 97 Monroe Ave., Memphis, TN 38103

The Symposium Reception will thank the authors and panelists for their participation. Heavy hors d'oeuvres, wine, and beer will be served. There will be a short performance by a Memphis musician.

8:00 p.m. – 10:00 p.m. Symposium Party (open to the public)
The Brass Door, 152 Madison Ave., Memphis, TN 38103

The Brass Door is an Irish pub. The party will take place in the restaurant's lower level, The Cavern.

Friday, March 30

Wade Auditorium, The University of Memphis Cecil C. Humphreys School of Law
1 N. Front. St., Memphis, TN 38103

8:00 a.m. – 9:00 a.m. Sign-in and Breakfast
Historic Lobby of the University of Memphis
Cecil C. Humphreys School of Law

9:00 a.m. – 9:15 a.m. Opening Remarks
Dean Kevin H. Smith,
The University of Memphis Cecil C. Humphreys School of Law

W.J. Michael Cody,
Burch, Porter & Johnson, PLLC, former Attorney General of Tennessee, and former United States Attorney for the Western District of Tennessee

9:15 a.m. – 9:55 a.m. Capital Punishment, Cultural Competency, and Litigating Intellectual Disability
Jeffrey Usman, Assistant Professor of Law,
Belmont Law School, Nashville, Tennessee

10:00 a.m. – 10:40 a.m. Challenges and Opportunities in Bringing the Lessons of Cultural Competence to Bear on Capital Jury Selection
Bidish J. Sarma, Deputy Director of the Capital Appeals Project in New Orleans, Louisiana

10:40 a.m. – 10:50 a.m. Break

10:50 a.m. – 11:30 a.m. Capital Prejudice
J. Richard Broughton, Assistant Professor of Law, University of Detroit Mercy School of Law, former Capital Case Unit lawyer at the United States Department of Justice, Washington, D.C., and former Assistant Attorney General of Texas for Capital Litigation

11:30 a.m. – 12:30 p.m. Lunch
Student Lounge

12:30 p.m. – 1:10 p.m. Developing the Life Histories of Foreign National Capital Clients
Danalynn Recer, Executive Director of Gulf Region Advocacy Center, Houston, Texas

1:15 p.m. – 2:05 p.m. Shelby County Panel Discussion
Moderator: Judge John T. Fowlkes, Shelby County Criminal Court

Panelists: Judge James C. Beasley, Shelby County Criminal Court; Shelby County District Attorney General Amy P. Weirich; and Gerald Skahan, Shelby County Public Defender Capital Defense Coordinator

2:05 p.m. – 2:15 p.m. Break

2:15 p.m. – 2:55 p.m. Torture and Culture in Guantanamo's Capital Cases
Scharlette Holdman, Executive Director of the Center for Capital Assistance, New Orleans, Louisiana

Samantha Kennedy, attorney licensed in Louisiana

3:00 p.m. – 3:40 p.m. Breaking the Frame: Responding to Gang Stereotypes in Capital Cases
Bradley MacLean, Tennessee Post-Conviction Defender and Vanderbilt Law School adjunct professor

John Hagedorn, Professor of Criminology, Law, and Justice, University of Illinois-Chicago

3:40 p.m. – 3:50 p.m. Break

3:50 p.m. – 4:50 p.m. Satanic Panic and Defending the "West Memphis Three"
Judge Dan Stidham, defense attorney for Jessie Misskelley, current Greene County District Court Judge (Arkansas)

Jason Baldwin of the West Memphis Three

4:50 p.m. – 5:00 p.m. Closing Remarks

J. Richard Broughton

Jason Baldwin

Amy P. Weirich

Danalynn Recer

Judge John T. Fowlkes

About the Symposium

The University of Memphis Law Review invites you to attend its annual Symposium that will be held at the Cecil C. Humphreys School of Law on Friday, March 30, 2012 from 9:00 a.m. – 5:00 p.m. This Symposium will explore "Cultural Competency and the Death Penalty."

In the sentencing phase of a death penalty trial, the life story of the defendant is presented to a jury. Some stories are easier to tell than others because they have familiar themes – a broken home, deficient education or drug use. Others can be more complex, necessitating a new method of representation: cultural competency.

This special symposium will analyze well-known stories such as the West Memphis Three and Guantanamo. Speakers will also address timely cases involving foreign nationals, intellectual disability and more.

Open to the public.
Visit *www.memphis.edu/lawreview/symposium.php* to register.

Registration:
$125 for those seeking CLE credit
$40 for attendees not seeking CLE credit
Free for students, professors, government employees, and university staff.

Program attendees will be eligible for 6.25 hours of general CLE credit. Breakfast, lunch and refreshments for the duration will be provided. Parking vouchers will be distributed at the event for the Brinkley Parking garage, located directly across from the law school.

For more information contact
Isaac Kimes at *iukimes@memphis.edu*
or (901) 300-6417.

THE UNIVERSITY OF MEMPHIS LAW REVIEW

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Invisible Inequality: The Two Americas of Military Sacrifice

DOUGLAS L. KRINER* & FRANCIS X. SHEN**

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* Associate Professor, Boston University Department of Political Science.

** McKnight Land-Grant Professor & Associate Professor of Law, University of Minnesota; Director, Shen Neurolaw Lab; Executive Director of Education and Outreach, MacArthur Foundation Research Network on Law and Neuroscience.

*** We thank Ryan Pesch and Morgan Carlson for excellent research assistance, and we thank members of the University of Chicago Public Law Workshop for helpful feedback. Support for this research was provided by Boston University and the University of Minnesota Law School. Shen notes that his work is *Ad Maiorem Dei Gloriam*.

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Abstract: Through a series of empirical investigations—including analysis of over 500,000 American combat casualties from World War II through Iraq and Afghanistan—we show in this Article that there is growing socioeconomic inequality in military sacrifice and that the relative invisibility of this inequality has major political ramifications. Today, unlike in World War II, the Americans who die or are wounded in war are disproportionately coming from poorer parts of the country. We argue that these Two Americas of military sacrifice constitute *invisible* inequality because the issue is routinely overlooked by scholars, policymakers, and the public. We then use seven original surveys of American public opinion to uncover a variety of social, legal, and political consequences of this inequality. With Congress unlikely to act, and courts unwilling to intervene, we argue that the best path forward is to generate a renewed public debate over inequality in military sacrifice. To this end, we show empirically that such a conversation could transform public opinion. Ignoring inequality in military sacrifice is both morally comforting and politically beneficial. But it is at odds with empirical reality, and, most importantly, with our American ideals of shared sacrifice.

I. INTRODUCTION

The central issues of the 2016 presidential campaign are coming into focus: addressing economic inequality at home, and defining America's military strategy abroad amidst new terrorist threats. These issues will be debated thousands of times.

Yet these many debates will overlook a connection between the two: America's economic downturn means that increasingly it is not the governing class, but the working class that dispropor-

tionately sends soldiers to fight and bears the burden of physical and mental war wounds.

For members of both parties it is politically convenient to overlook these Two Americas of military sacrifice. But in this Article, we show that ignoring this invisible inequality has not made it go away.

Through a series of empirical investigations—including analysis of over 500,000 American combat casualties from World War II through Afghanistan, combined with seven unique surveys of American public opinion—we reveal that, even more than previous wars, Iraq and Afghanistan have been working class wars. This inequality is normatively troubling, but it also has significant social and political consequences. Inequality in pre-service opportunities can translate into inequality in post-service health outcomes. For example, soldiers returning home to fewer resources may be at greater risk of developing mental disorders. We also show how non-fatal casualties remain largely invisible in the political sphere. This invisibility has artificially inflated public support for wars and for the leaders who wage them.

The emergence of these Two Americas and its consequences are cause for concern. Yet equally problematic is the failure of legislatures and courts to even acknowledge, let alone address, these disparities. With neither legislatures nor courts likely to act without prompting, we argue that the most viable response is a renewed public debate over inequality in military sacrifice. We present experimental data suggesting that such a conversation could have real policy consequences.

The Article proceeds in five parts. We begin in Part II with a discussion of the legal literature on veterans' affairs, finding that it typically makes little mention of inequality in sacrifice. We also report original survey data in which we find that the American public is not aware of the distribution of war sacrifice.

The omissions by scholars, and the views of the American public, would both be warranted if no inequality exists. Thus, we turn in Part III to the empirical question: who is dying, and who is returning wounded, in America's wars? The answer is stark: more than in any conflict since World War II, today's human costs are being borne by America's working class.

In Part IV, we examine the social and political consequences of this invisible inequality. Focusing on mental health, we discuss how soldiers returning home to weaker social support struc-

tures are at greater risk of developing mental disorders. Then, we turn to the political sphere in Part V. We show with new data that Americans view inequality in military sacrifice differently from other forms of inequality, and we also show that if knowledge of this inequality is communicated, it reduces public support for war. Yet, we also find that wounded in action casualties are less visible and politically salient than fatalities. Thus, even when American soldiers return home wounded in large numbers, it is not likely to slow American politicians from sending new recruits into the battle zone again.

In light of these many empirical findings uncovered in the Article, we conclude in Part VI with a discussion of why this inequality remains invisible and what to do about it. We call for a national conversation on the human costs of war. The invisible inequality of military sacrifice should be invisible no more.

II. THE INVISIBLE INEQUALITY OF MILITARY SACRIFICE

American society is increasingly concerned with economic inequality as seen in the Occupy movement of 2011 and the rhetoric and policy proposals of the 2016 presidential candidates. Legal scholarship is filled both with articles concerning inequality and redistribution[1] and with commentaries on the need to aid military veterans.[2]

Given this attention to inequality on the one hand, and military veterans on the other, one would think that inequality in military sacrifice is a well-known and researched fact—that is not the case. As we will show in this Part, scholars do not routinely ad-

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1. Gillian Lester, *Can Joe the Plumber Support Redistribution? Law, Social Preferences, and Sustainable Policy Design*, 64 TAX L. REV. 313, 315 (2011) ("[A] great deal of legal scholarship concerns itself with questions of inequality and redistribution . . . .").

2. *See, e.g.*, Benjamin Pomerance, *Fighting on Too Many Fronts: Concerns Facing Elderly Veterans in Navigating the United States Department of Veterans Affairs Benefits System*, 37 HAMLINE L. REV. 19, 22 (2014); Thomas J. Reed, *Parallel Lines Never Meet: Why the Military Disability Retirement and Veterans Affairs Department Claim Adjudication Systems Are a Failure*, 19 WIDENER L.J. 57, 59–60 (2009); Robert R. Gagan, *Thank Veterans; Help Veterans*, 88 WIS. LAW., Feb. 2015, at 7; Tara Shockley, *Veterans Legal Initiative: Showing Appreciation for Service Through Legal Assistance*, 50 HOUS. LAW., May/June 2013, at 16.

dress the issue (Section A), and nearly half of all Americans are not even aware that such inequalities exist (Section B).

A. Scholarship on Veterans Affairs

There is a robust legal literature on veterans' affairs.[3] In 1989, the Department of Veterans Affairs ("VA") was created as a cabinet-level position.[4] At about that same time, VA administrative decisions became subject to judicial review in the United States Court of Veterans Appeals ("CVA") through enactment of the Veterans' Judicial Review Act in 1988.[5] This Act, as well as the Veterans Claims Assistance Act passed in 2000 ("VCAA"), aimed to improve the process for administering veterans claims.[6] Litigation and commentary on the VCAA is now extensive.[7]

---

3. Notably, in 2009 the Veterans Law Review was first published by the U.S. Department of Veterans Affairs. 1 VETERANS L. REV. (2009) http://www.bva.va.gov/VLR.asp. Excellent work such as THE ATTORNEY'S GUIDE TO DEFENDING VETERANS IN CRIMINAL COURT 199 (Brockton D. Hunter & Ryan C. Else eds., 2014), has highlighted a range of legal issues specific to veterans.

4. Department of Veterans Affairs Act, Pub. L. No. 100-527, § 2, 102 Stat. 2635 (1988).

5. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

6. 38 U.S.C. §§ 5100, 5102–5103A, 5106–5107, 5126 (2013); Terrence T. Griffin & Thomas D. Jones, *The Veterans Claims Assistance Act of 2000: Ten Years Later*, 3 VETERANS L. REV. 284, 284 (2011).

7. Veterans' Judicial Review Act, Pub. L. No. 100-687. For scholarship on this topic, see, e.g., Michael P. Allen, *Due Process and the American Veteran: What the Constitution Can Tell Us About the Veterans' Benefits System*, 80 U. CIN. L. REV. 501 (2011); Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 CONN. L. REV. 155 (1992); James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223 (2001); Jeffrey Parker, *Two Perspectives on Legal Authority Within The Department of Veterans Affairs Adjudication*, 1 VETERANS L. REV. 208 (2009); James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 252 (2010) ("[T]he VA adjudication system today is very different from the one that existed prior to the VJRA, but the adjudication system has not necessarily improved."); Rory E. Riley, *Simplify, Simplify, Simplify-an Analysis of Two Decades of Judicial Review in the Veterans' Benefits Adjudication System*, 113 W. VA. L. REV. 67 (2010).

There has been much written on the Court of Appeals for Veterans Claims ("CAVC").[8] Scholars have also examined the emergence and efficacy of specialized veterans' treatment courts,[9] as well as training for family court judges on how to work with those returning from combat.[10]

Both in and beyond law reviews, extensive scholarly attention has been given to the physical and mental health of veterans.[11] This has led to action on issues such as traumatic brain injury and mental health treatment for veterans, in part due to an influential

---

8. *See* VETERANS APPEALS GUIDEBOOK: REPRESENTING VETERANS IN THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS (Ronald L. Smith ed., 2013).

9. *See, e.g.*, Alana Frederick, *Veterans Treatment Courts: Analysis and Recommendations*, 38 L. & PSYCHOL. REV. 211 (2014); Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563 (2010); Mark A. McCormick-Goodhart, *Leaving No Veteran Behind: Policies and Perspectives on Combat Trauma, Veterans Courts, and the Rehabilitative Approach to Criminal Behavior*, 117 PENN ST. L. REV. 895 (2013); Tabatha Renz, *Veterans Treatment Court: A Hand Up Rather Than Lock Up*, 17 RICH. J. L. & PUB. INT. 697 (2014); Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. CRIM. & CIV. CONFINEMENT 357 (2009); John Furman Wall, IV, *The Veterans Treatment Court Program Act: South Carolina's Opportunity to Provide Services for Those Who Have Served*, 65 S.C. L. REV. 879 (2014); Rosendo Garza Jr., Note, *"The Soldier Bears the Deepest Wounds and Scars of War": Mobilizing Connecticut to Implement a Veterans Treatment Court*, 46 CONN. L. REV. 1937 (2014); C. Philip Nichols, Jr., *Veterans Courts: A New Concept for Maryland*, MD. B.J. March–Apr. 2014, at 42.

10. *See* Evan R. Seamone, *Educating Family Court Judges on the Front Lines of Combat Readjustment: Toward the Formulation and Delivery of a Core Curriculum on Military Family Issues*, 52 FAM. CT. REV. 458 (2014).

11. *See, e.g.*, THE PRAEGER HANDBOOK OF VETERANS' HEALTH: HISTORY, CHALLENGES, ISSUES, AND DEVELOPMENTS (Thomas W. Miller ed., 2012); Kathy Cerminara & Olympia Duhart, *Introduction: Wounds of War: Meeting the Needs of Active-Duty Military Personnel and Veterans with Post-Traumatic Stress Disorder*, 37 NOVA L. REV. 439 (2013); Charles W. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 NEW ENG. J. MED. 13, 13 (2004); Matthew Jacupcak et al., *Anger, Hostility, and Aggression Among Iraq and Afghanistan War Veterans Reporting PTSD and Subthreshold PTSD*, 20 J. TRAUMATIC STRESS 945 (2007).

RAND study that labeled traumatic brain injury and related mental disorders as "invisible wounds" of the wars.[12]

Paul Rieckhoff, the Director of Iraq and Afghanistan Veterans of America, commented in 2009 that "[t]hey call brain trauma 'the invisible wound'; well, there's nothing less visible than being uncounted."[13] It is certainly the case that today, more so than even a decade ago, military leaders are publicly recognizing brain trauma, including mental injuries, as true wounds of war.

In January 2010 in Washington D.C., before an audience at a Suicide Prevention Conference, then United States Secretary of Veterans Affairs Eric Shinseki announced a sobering statistic: "[o]n average, eighteen Veterans commit suicide each day."[14] It has become common knowledge that a record percentage of America's returning combat veterans are committing suicide;[15] that

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12. TERRI TANIELIAN ET AL., INVISIBLE WOUNDS OF WAR: SUMMARY AND RECOMMENDATIONS FOR ADDRESSING PSYCHOLOGICAL AND COGNITIVE INJURIES (2008), http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG720.1.pdf. On a longer historical trajectory, we also now recognize more wounds of war than we did in previous eras. DAVID A. GERBER, FINDING DISABLED VETERANS IN HISTORY, *in* DISABLED VETERANS IN HISTORY 3 (David A. Gerber ed., 2000) ("[T]he visibility of . . . disabled veterans . . . has increased in this [20th] century . . . ."); *see also* Brockton D. Hunter, *Echoes of War: Combat Trauma, Criminal Behavior, and How We Can Do Better This Time Around*, *in* THE ATTORNEY'S GUIDE TO DEFENDING VETERANS IN CRIMINAL COURT 2–3 (Brockton D. Hunter & Ryan C. Else eds., 2014).

13. Paul Solotaroff, *The Iraq War's Invisible Wounded*, MEN'S J., Oct. 6, 2009, http://www.mensjournal.com/magazine/print-view/the-iraq-wars-invisible-wounded-20131108. Rieckhoff went on to say:

> The VA and DOD paid no attention to this problem the first four years of the war, and now there are all these guys in need of treatment with no clear way to get it. A lot don't even know they have head trauma, or are too afraid to admit it. They think if they raise their hand for help, it's the end of their service career.

Id.

14. Eric K. Shinseki, Sec'y, Dep't of Veterans Affairs, Remarks at the Suicide Prevention Conference (Jan. 11, 2010), http://www.va.gov/opa/speeches/2010/10_0111hold.asp.

15. Olympia Duhart, *Soldier Suicides and Outcrit Jurisprudence: An Anti-Subordination Analysis*, 44 CREIGHTON L. REV. 883, 884 (2011); Lindsay I. McCarl, *"To Have No Yesterday": The Rise of Suicide Rates in the Military and Among Veterans*, 46 CREIGHTON L. REV. 393, 395 (2013) ("The number of suicides has increased significantly since the beginning of the Iraq and Afghanistan

many are being diagnosed with Post-Traumatic Stress Disorder ("PTSD");[16] and that the Department of Veterans Affairs needs to improve its provision of mental health services.[17]

In these and other ways, much that was once "invisible" is now in the public square for open debate. But our review of many related contemporary literatures finds very little discussion of the systemic economic inequality undergirding the experiences of returning veterans.[18]

There is some occasional, often tangential, mention of the issue.[19] For instance, psychologist Robert Klein suggested in the early 1980s, in the wake of Vietnam, that inadequate VA care has contributed to the creation of "a whole new underclass of alienat-

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wars, despite the implementation of VA-sponsored programs to help stave off deaths of our war-beaten warriors.").

16. *See* ERIN P. FINLEY, FIELDS OF COMBAT: UNDERSTANDING PTSD AMONG VETERANS OF IRAQ AND AFGHANISTAN (2011); Tiffany M. Chapman, *Leave No Soldier Behind: Ensuring Access to Health Care for PTSD-Afflicted Veterans*, 204 MIL. L. REV. 1, 8 (2010).

17. *See, e.g.*, TIMOTHY A. KELLY, HEALING THE BROKEN MIND: TRANSFORMING AMERICA'S FAILED MENTAL HEALTH SYSTEM (2009).

18. There is legal literature on the inequalities experienced by African-American veterans. *See, e.g.*, BENJAMIN FLEURY-STEINER, DISPOSABLE HEROES: THE BETRAYAL OF AFRICAN AMERICAN VETERANS (2012); Benjamin Fleury-Steiner et al., *From the Battlefield to the War on Drugs: Lessons from the Lives of Marginalized African American Military Veterans*, 6 ALB. GOV'T L. REV. 464 (2013). For discussion of race and military participation, see Amy C. Lutz, *Race-Ethnicity and Immigration Status in the U.S. Military*, *in* LIFE-COURSE PERSPECTIVES ON MILITARY SERVICE 68 (Janet M. Wilmoth & Andrew S. London eds., 2013). However, we do not find that there is a racial casualty gap. *See* DOUGLAS L. KRINER & FRANCIS X. SHEN, THE CASUALTY GAP: THE CAUSES AND CONSEQUENCES OF AMERICAN WARTIME INEQUALITIES (2010). For a review of the historical literature on inequality and military sacrifice and service, see our discussion in Chapter 2. *Id.* There have been a few longer treatments of military *service* and class. KATHY ROTH-DOUQUET & FRANK SCHAEFFER, AWOL: THE UNEXCUSED ABSENCE OF AMERICA'S UPPER CLASSES FROM THE MILITARY SERVICE—AND HOW IT HURTS OUR COUNTRY (2006).

19. At the national level, New York Congressman Charles Rangel, who has supported reinstituting the military draft, has complained that "[i]t's just not fair that the people we ask to fight our wars are people who join the military because of economic conditions." David M. Halbfinger & Steven A. Holmes, *Military Mirrors Working-Class America*, N.Y. TIMES, Mar. 30, 2003, http://www.nytimes.com/2003/03/30/international/worldspecial/30DEMO.html.

ed, unemployed citizens."[20] More recently, in the wake of the war in Iraq, physician Ronald Glasser has observed that the "Vietnam divide between those who serve and those who are served has become the foundation of the volunteer force" and that we have a "country that would send off Reserve and National Guard troops without becoming engaged nor demand an accounting of wartime policy, goals, and purposes."[21] He suggests that the Iraq War was "fought without any sense of pretense of communal sacrifice"[22] and that "privilege spells the difference between living and dying, between being crippled or blind for the rest of your life. Today once again, survival is a matter of class."[23]

On a similar theme, veteran and Rhodes Scholar Josiah Bunting III penned a 2004 essay in *The American Scholar* entitled "Class Warfare."[24] Bunting observed "[t]he diminishing numbers of war dead disclose another phenomenon: the withdrawal of . . . the privileged intellectual and professional and commercial classes, and their novitiates and children, from the active military service of our country."[25] He argued that this trend "is dangerous, it is unworthy, it is wrong."[26]

In 2014, United States Navy Lieutenant Commander Matthew Ivey identified the challenges of a shrinking all-volunteer force.[27] Ivey similarly recognized that "despite the disproportionate burdens suffered by the current all-volunteer military, very few Americans have called for a change to the current way of staffing the military."[28] Journalist Jorge Mariscal penned a 2007 online essay describing what he called the "poverty draft":

> Exactly who will have to fight and die in those wars will be determined by economic class. In order to

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20. ROBERT KLEIN, WOUNDED MEN, BROKEN PROMISES 199 (1981).
21. RONALD J. GLASSER, WOUNDED 122–23 (2006).
22. *Id.* at 128.
23. *Id.*
24. Josiah Bunting III, *Class Warfare*, THE AMERICAN SCHOLAR (Dec. 1, 2004), https://theamericanscholar.org/class-warfare/#.VQmPTOGm0UM.
25. *Id.*
26. *Id.*
27. Matthew Ivey, *The Broken Promises of an All-Volunteer Military*, 86 TEMP. L. REV. 525 (2014).
28. *Id.* at 528. For further history, see *id.* at 530–40.

> accomplish their goals, the recruiters and politicians will exploit the hopes and dreams of mostly well-intentioned youth from humble origins who are looking for a way to contribute to a society that has lost its moral compass. As they did in Vietnam and again in Iraq, young women and men will serve their country. But how well will their country have served them?[29]

Yet apart from these and similar exceptions, contemporary academic scholarship has not seriously explored inequality in military sacrifice. Indeed, as recently as 2013 a sociologist writing on the topic speculated (incorrectly) that "socioeconomic disadvantage has been associated with war-related mortality, although the same may not be true of the current wars."[30] If scholarship is generally not concerned with this inequality, can we say the same thing about the American public? We turn now to that question.

B. What Does the American Public Know About Inequalities in Military Sacrifice?

Since 2007 we have been conducting studies in which we ask the American public about how wartime casualties are distributed across the country.[31] And we have regularly found that a large segment of the population mistakenly believes there is shared sacrifice.

In a nationally representative sample of Americans polled in 2011, we asked each respondent: "Thinking about the American soldiers who have died fighting in Iraq and Afghanistan, what parts of the United States do you think they are coming from?"[32] Re-

29. Jorge Mariscal, *The Poverty Draft*, SOJOURNERS, June 2007, at 32, 35.

30. Alair MacLean, *A Matter of Life and Death*, *in* LIFE-COURSE PERSPECTIVES ON MILITARY SERVICE, *supra* note 18, at 213.

31. *See* KRINER & SHEN, *supra* note 18, at 92–103; Douglas L. Kriner & Francis X. Shen, *Conscription, Inequality, and Partisan Support for War*, J. CONFLICT RESOL. (forthcoming 2016).

32. We embedded our survey question in an Opinion Research Corporation CARAVAN omnibus poll administered in May 2011. CARAVAN is a twice-weekly telephone survey that employs a random-digit dialing ("RDD") methodology to ensure a nationally representative sample of 1,000 adult Americans. This survey, which produced a sample of 1,010 respondents from the

spondents were then asked to choose one of the following options (or say "I don't know"): (i) More casualties are coming from poorer, less educated parts of the country; (ii) More casualties are coming from richer, more educated parts of the country; or (iii) There is not a significant difference in the share of casualties coming from rich/high-education and poor/low-education parts of the country.

The results, presented in Figure 1, are striking and paint a portrait of an evenly divided public. Just under half those surveyed (45%) believe that the country is equally sharing military sacrifice. This is roughly the same percentage as those who correctly believe that there is inequality.[33]

Closer analysis of our data suggests that rather than basing their answers on knowledge of the facts, many Americans simply adopt the position of their preferred political party. The strongest predictor of a respondent's answer to this question is his or her partisan affiliation. A clear majority of Republicans, 57%, believe that shared sacrifice exists. Only 35% of Republicans believe that there is inequality in casualties. By contrast, for Democrats, the numbers are reversed, with 30% believing that shared sacrifice exists and 60% believing there is inequality. Given the lack of reliable information concerning casualty inequality in the public sphere, many Americans simply draw on their partisan priors to inform their guesses.

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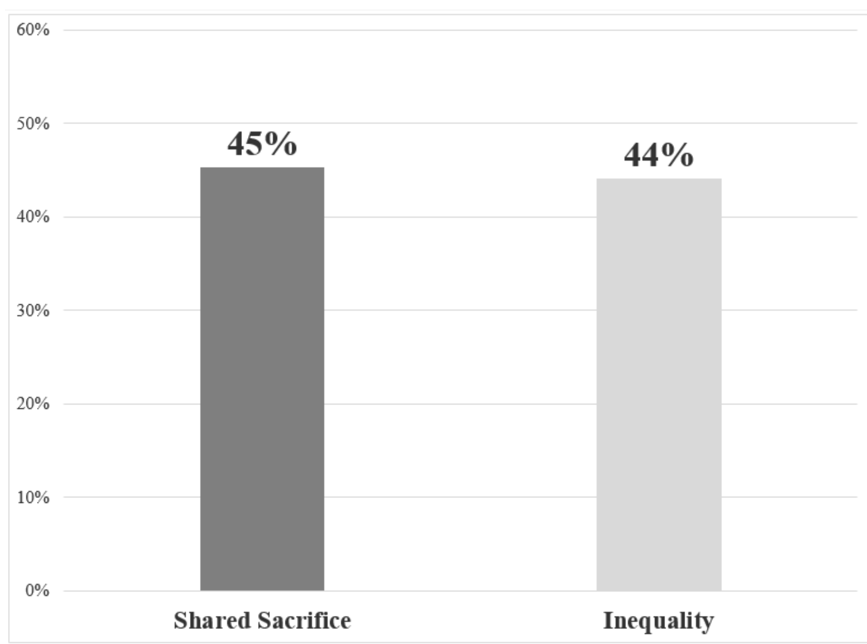
continental United States, was conducted from May 19–22, 2011. National news outlets such as CNN rely on Opinion Research Corporation because of its reputation for reliably providing truly nationally representative samples. CARAVAN data is also regularly used in political science research requiring nationally representative samples. The averages reported from this survey in Figure 1 and discussed in the text are the unweighted averages. We also ran a similar experiment with subjects recruited from Mechanical Turk in 2015. Even in this Turk sample, which is younger, more highly educated, and more liberal than a nationally representative sample, a sizeable portion of respondents believed there is not a casualty gap. Thirty-three percent of respondents said casualties come from rich and poor places equally. We also find evidence of a partisan gap. Republicans are more likely to believe a casualty gap does not exist than Democrats or independents.

33. In addition, eight percent chose the "I don't know" option and three percent responded that more casualties were coming from richer/more-educated parts of the country.

The result is that much of the public believes—as we will show, *mistakenly*—that American localities are sharing the human sacrifice of war equally.

Figure 1. Percentage of Americans Who Believe in Inequality versus Shared Sacrifice in War Casualties



What to Notice in Figure 1: We asked a nationally representative sample of Americans whether American soldiers who have died fighting in Iraq and Afghanistan were coming equally from rich and poor parts of the country ("shared sacrifice"), or more from poor parts of the country ("inequality"). The data presented in Figure 1 is striking because it shows that nearly half of all Americans believe there is shared sacrifice, even though the empirical data suggest otherwise.

III. THE TWO AMERICAS OF MILITARY SACRIFICE

In Part I we established that inequality in military sacrifice is rarely discussed in scholarship and often not acknowledged by the public. Given the widespread public uncertainty over how military sacrifice is shared across the country, in this Part we turn to

the actual data and ask: When America goes to war, who fights the battles, who dies, and who returns wounded?[34]

We began to ask these questions in 2004, and in this Article we make a novel extension of the work, as for the first time we examine non-fatal casualties, including casualties from the conflict in Afghanistan.

We find that both fatal and non-fatal casualties in America's wars have come from parts of the country that are lower on the socioeconomic ladder.[35] This Part explains why these Two Americas of military sacrifice have emerged, and how this distribution is more unequal than in past wars. Details of the statistical analyses are presented in the Appendix.

A. Poorer Areas of the Country Bear Greater War Sacrifice

While concerns about inequality and military sacrifice have periodically arisen since America's founding, empirical research to determine the existence of such inequalities and changes in them over time has progressed haphazardly since World War II.[36] Prior

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34. The discussion in this Part builds on previous discussion in KRINER & SHEN, *supra* note 18.

35. The analyses discussed in this Part show strong evidence of a socio-economic casualty gap between rich and poor, and high and low education *communities*. We do not have access to individual-level data, but it seems most plausible that there is also an individual-level gap, i.e. soldiers coming from poorer backgrounds are disproportionately bearing the costs. While plausible, we acknowledge that we cannot conclude definitively from the community-level casualty data alone that poorer individuals or individuals with lower levels of education are dying at higher rates than individuals with greater socio-economic opportunities. To do so would be to commit what social scientists call an error of "ecological inference." From aggregate-level data alone, we cannot make inferences about processes at the level of individuals. To address this, we have previously carried out a series of additional analyses—all suggesting that in fact there is an individual level gap. *See* KRINER & SHEN, *supra* note 18.

36. JOHN CHAMBERS, DRAFTEES OR VOLUNTEERS: A DOCUMENTARY HISTORY OF THE DEBATE OVER MILITARY CONSCRIPTION IN THE UNITED STATES, 1787–1973 (1975). Studies focusing on military enlistments, recruits, and personnel have been conducted by sociologists, historians, think tanks, and the popular press. CHRISTIAN G. APPY, WORKING-CLASS WAR: AMERICAN COMBAT SOLDIERS AND VIETNAM (1993); SUE BERRYMAN, WHO SERVES? THE PERSISTENT MYTH OF THE UNDERCLASS ARMY (1988); ROTH-DOUQUET & SCHAEFFER, *supra* note 18; Wilson, *infra* note 40; Tim Kane, *Who Bears the Burden? Demographic Characteristics of U.S. Military Recruits Before and*

analyses have varied significantly in approach and scope. Some have found strong, if limited, evidence that socioeconomically disadvantaged communities have borne a disproportionate share of the nation's casualties.[37] Others have yielded mixed results and uneven empirical support for assertions of a casualty gap.[38] Still others have produced no systematic evidence of a socioeconomic casualty gap.[39] Reviewing this motley state of affairs, sociologist Thomas C. Wilson observed that the variance may be "due in large

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After 9/11, THE HERITAGE FOUNDATION (Nov. 7, 2005), http://www.heritage.org/research/reports/2005/11/who-bears-the-burden-demographic-characteristics-of-us-military-recruits-before-and-after-9-11; *Military Recruitment 2010*, NATIONAL PRIORITIES PROJECT (June 30, 2011), https://www.nationalpriorities.org/analysis/2011/military-recruitment-2010. Indeed, since 1974 the federal government has mandated an annual Department of Defense report on social representation in the military. NESE F. DEBRUYNE & ANNE LELAND, CONG. RESEARCH SERV., RL32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES, LISTS AND STATISTICS (2015), https://www.fas.org/sgp/crs/natsec/RL32492.pdf. *See generally* JEANETTE KEITH, RICH MAN'S WAR, POOR MAN'S FIGHT: RACE, CLASS, AND POWER IN THE RURAL SOUTH DURING THE FIRST WORLD WAR (2004); EUGENE C. MURDOCK, PATRIOTISM LIMITED: 1862-1865 (1967); DAVID WILLIAMS, TERESA CRISP WILLIAMS & DAVID CARLSON, PLAIN FOLK IN A RICH MAN'S WAR: CLASS AND DISSENT IN CONFEDERATE GEORGIA (2002); DAVID WILLIAMS, RICH MAN'S WAR: CLASS, CASTE, AND CONFEDERATE DEFEAT IN THE LOWER CHATTAHOOCHEE VALLEY (1998); Tyler Anbinder, *Which Poor Man's Fight? Immigrants and the Federal Conscription of 1863*, 52 CIV. WAR HIST. 344 (2006).

37. Emily Buzzell & Samuel Preston, *Mortality of American Troops in Iraq*, 33 POPULATION AND DEV. REV. 555, 562 (2007); Albert J. Mayer & Thomas Ford Hoult, *Social Stratification and Combat Survival*, 34 SOC. FORCES 155, 155 (1955); M. Zeitlin, K. G. Lutterman & J. W. Russell, *Death in Vietnam: Class, Poverty, and the Risks of War*, 3 POL. & SOC'Y 313, 313 (1973).

38. Gilbert Badillo & G. David Curry, *The Social Incidence of Vietnam Casualties*, 2 ARMED FORCES & SOC'Y 397, 401 (1976); Arnold Barnett et al., *America's Vietnam Casualties: Victims of a Class War?*, 40 OPERATIONS RES. 856, 857 (1992); John Willis, *Variations in State Casualty Rates in World War II and the Vietnam War*, 22 SOC. PROBLEMS 558, 558 (1975).

39. CHARLES C. MOSKOS & JOHN S. BUTLER, ALL THAT WE CAN BE: BLACK LEADERSHIP AND RACIAL INTEGRATION THE ARMY WAY (1996); Brian Gifford, *Combat Casualties and Race: What Can We Learn from the 2003–2004 Iraq Conflict?*, 31 ARMED FORCES AND SOC'Y 201, 201 (2005); Janet Schaefer & Marjorie Allen, *Class and Regional Selection in Fatal Casualties in the First 18–23 Months of World War II*, 23 SOC. FORCES 165, 165 (1944).

part to the cumulative effect of methodological inconsistencies across studies and methodological flaws within them."[40]

Amidst these competing findings, we launched a new research project in 2004. The project represents the most comprehensive investigation to date of inequality and military casualties. We published some of these findings in a 2010 book, *The Casualty Gap*. Here, we extend our earlier analysis both to include the war in Afghanistan and to examine inequality in non-fatal casualties. Our analysis in this Article considers non-fatal casualty data through December 26, 2009, and fatal casualty data through July 4, 2011.[41]

The Department of Defense does not release data on the socioeconomic status of individual soldiers who have died or been wounded in America's wars. As a result, we cannot directly observe whether poorer Americans with fewer educational opportunities are disproportionately dying in or returning home wounded from the nation's wars. However, we can examine the communities from which our nation's wartime casualties hail. This allows us to examine whether communities at the bottom of the socioeconomic ladder have sustained higher casualty rates than communities at the top. Such casualty gaps between rich and poor communities are of great importance. First, as we will discuss in more detail shortly, soldiers returning home to socioeconomically disadvantaged communities may enjoy fewer and weaker support structures, which can exacerbate their reintegration into civilian life. Second, most Americans view and assess war through the lens of their local community's experiences with it. Casualty inequality

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40. Thomas C. Wilson, *Vietnam-era Military Service: A Test of the Class-Bias Theory*, 21 ARMED FORCES & SOC'Y 461, 464 (1995); John Modell & Timothy Hagerty, *The Social Impact of War*, 17 ANNUAL REV. OF SOC. 205, 219–20 (1991) (reaching a similar conclusion). Some previous studies analyze casualties from only a single state or region of the country. Other researchers focus more narrowly on a specific age cohort or restrict their analyses to short periods of time. Moreover, the measures used for socioeconomic status change from study to study, and many analyses examine only one potential explanation for inequalities in casualties, while failing to control for other possibilities. Finally, only a handful of analyses examine more than one conflict at a time. Wilson, *supra*, at 464.

41. We use the term "wounded" and "non-fatal casualty" to mean the same thing in this Article. *See infra* Section V.C. and note 193 for additional discussion of the challenges of precisely defining these terms.

between rich and poor communities insures that many Americans view the same war very differently; some see its human costs directly, while others are largely insulated from such costs.

We examined the relationship between the socioeconomic status of a community and its share of war sacrifice by looking at the relationship between county-level (or where available place-level) data on socioeconomic variables (such as income and education) and county-level casualty rates.[42] To gain historical perspective, we examined World War II, Korea, Vietnam, Iraq, and Afghanistan, the five wars on which data is available.[43]

Figure 2 illustrates the basic finding: The data show that while sacrifice was shared equally in World War II, beginning with the war in Korea, significant income gaps emerged. In raw, inflation-adjusted dollar terms, this income casualty gap increased over time from a $5,500 gap in Korea, to an $8,200 gap in Vietnam, and now to more than an $11,000 gap in Iraq and Afghanistan. More robust statistical analysis, controlling for a host of possibly confounding variables, confirms this basic finding.[44]

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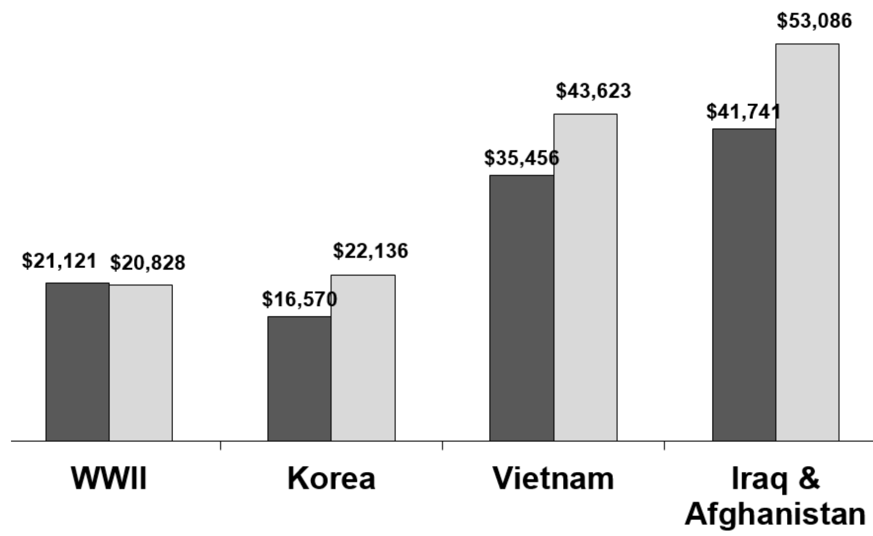
42. For details of the statistical analysis, see the Appendix as well as KRINER & SHEN, *supra* note 18, at 14. For a discussion of the ecological inference problem and efforts to overcome it, see particularly *id.* at 40–47. For Iraq and Afghanistan, we were able to use census "place" level data, a geographical unit even smaller than the county. Place refers to "Census Designated Place." The U.S. Census Bureau defines a "Census Designated Place" as a place "delineated to provide data for settled concentrations of population that are identifiable by name but are not legally incorporated under the laws of the state in which they are located." UNITED STATES CENSUS BUREAU: GEOGRAPHIC TERMS AND CONCEPTS – PLACE, https://www.census.gov/geo/reference/gtc/gtc_place.html (last updated Dec. 6, 2012).

43. For wars prior to World War II the requisite data is not available. *See* KRINER & SHEN, *supra* note 18, at 14.

44. *See* discussion in the Appendix.

Figure 2. Two Americas of Military Sacrifice: Difference in Median Family Income Levels Between High-Casualty Communities and Low-Casualty Communities



What to Notice in Figure 2: Figure 2 illustrates that since World War II, communities with higher casualty rates have had lower incomes than communities with lower casualty rates. To generate Figure 2, we divided all of the communities for each war into two groups: the first includes all communities whose casualty rates place them in the top quarter of the casualty distribution; the second group comprises all other communities.[45] From census data, we then calculated the average median family income for both groups. To provide a constant metric, we adjusted the income data from previous periods to reflect their value in year 2000 dollars.

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45. For World War II, Korea, and Vietnam, this analysis is at the county level. For Iraq and Afghanistan, it is at the place level. Because the total number of casualties in the wars in Iraq and Afghanistan is comparatively small, we used a slightly different coding scheme to identify high and low casualty communities in Iraq and Afghanistan. High casualty communities include the 700 census places that have suffered casualty rates of higher than 9.31 fatal casualties per 10,000 male residents. This represents the top twenty-five percent of all communities that suffered at least one casualty in the Iraq War. The low casualty communities in Iraq and Afghanistan are the census places that had not yet suffered a casualty in either war—more than eighty-five percent of all census places.

The discussion and data presented thus far pertain to fatal casualties. But what of those soldiers who are wounded? Do they, too, hail disproportionately from poorer parts of the country? This question is more salient than ever given that more than seven Americans were wounded in Iraq and Afghanistan for every service member killed, a ratio much greater than that observed in earlier wars (see Figure 4 below).

To investigate, we made a Freedom of Information Act ("FOIA") request to the Department of Defense ("DoD") for the number of wounded soldiers for each county in the United States.[46] Indicative of the challenge of studying wounded-in-action, one of our requests to the DoD was (we thought) a straightforward definitional query. We requested "the definitions used by the DoD to determine whether a soldier is considered 'wounded'." After all, how can one interpret the data on number of wounded if we don't know what counts as "wounded"?

In response, the Department of Defense, in conjunction with the Defense Manpower Data Center ("DMDC") wrote that we "cannot provide any definitions used by DoD to determine whether a soldier is considered wounded because this is a medical judgment."[47] We appealed but were not provided additional clarifying information. Thus, we proceeded with the analysis with a best-guess, but no clear certainty, on how the DoD actually determines if a soldier is considered wounded.[48]

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46. The request, FOIA 10-F-0284, was initially made in writing on November 19, 2009. We requested "1) The number of wounded soldiers from Operation Iraqi Freedom, by month, by branch, and by county; 2) The number of wounded soldiers from Operation Enduring Freedom, by month, by branch, and by county; and 3) The definitions used by the DOD to determine whether a soldier is considered 'wounded.'" *See* Letter from Paul J. Jacobsmeyer, Chief, Dep't of Def. Freedom of Info. Office, to author (May 18, 2010) (on file with authors). We received a partially responsive reply with a data file on May 18, 2010. *Id.*

47. Letter from Paul J. Jacobsmeyer, Chief, Dep't of Def. Freedom of Info. Office, to author (May 18, 2010) (on file with authors).

48. In our appeal letter we asked:

> Is it accurate to conclude then that the Department of Defense Manpower Data Center is wholly unaware of how its data on wounded soldiers is defined? For instance, the DMDC does not know whether its statistics include soldiers diagnosed with

We ran a similar analysis to that described above to see if the rate of wounded soldiers was correlated with the county's socioeconomic indicators. We found that once again there was an unequal relationship: Counties with lower education and income levels had higher percentages of their residents wounded in Iraq and Afghanistan.[49]

This relationship is seen vividly in Figure 3, which plots how non-fatal casualties are distributed across the country. We divided communities into deciles based on their median family income. Thus, the 10% of Americans living in the poorest communities are in the first income decile, and so on. If military sacrifice was evenly shared, then each decile would account for 10% of the soldiers wounded in action in Iraq and Afghanistan. On the left hand side, the dark gray shaded bars above the 10% line indicate that communities in the lower deciles generally shouldered more of the burden.[50] On the right hand side, by contrast, the light gray shaded bars are all *below* the 10% line suggest that those communities in the higher income brackets have not experienced as many non-fatal casualties.[51] Put slightly differently, the nation's poorest communities (those in the lowest three income deciles) have suffered fifty percent more non-fatal casualties than the nation's wealthiest communities (those in the top three income deciles).

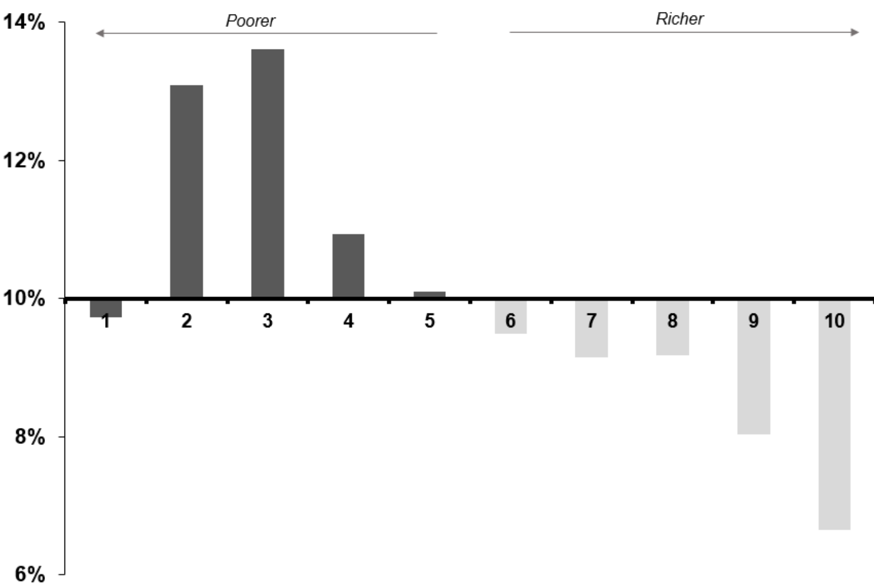
> sprained wrists and twisted ankles? And the DMDC doesn't know whether its data includes soldiers who are diagnosed with depression? Based on the FOIA response . . . [our] conclusion is that DMDC does not know the answers to these questions because they are "medical judgments."

49. Comparable data was not available in previous conflicts.

50. The exception in the lowest decile is consistent with military service data suggesting that the lowest income and lowest education communities do not have as many residents who meet the military's requisite qualifications. See an extended discussion in DOUGLAS L, KRINER & FRANCIS X. SHEN, THE CASUALTY GAP: THE CAUSES AND CONSEQUENCES OF AMERICAN WARTIME INEQUALITIES online app. B (2010), http://www.casualtygap.com/KrinerShen_TheCasualtyGap_OnlineAppendixB.pdf.

51. By matching the home of record information for each wounded soldier provided by the DOD with information on community median income levels from the U.S. Census, we found that communities in the bottom three income deciles suffered 4,573 casualties, while those in the top three deciles suffered only 2,995. *See* KRINER & SHEN, *supra* note 18.

Figure 3. Two Americas of Military Sacrifice: Distribution of Non-Fatal Casualties in Iraq and Afghanistan by Income Decile, Above and Below Equal Distribution (ten percent)



What to Notice in Figure 3: If one divides the nation into ten deciles by income, an equal distribution of casualties would produce ten percent casualties in each decile. But Figure 3 shows that there is inequality in the distribution of casualties: the five richest deciles (the light gray bars on the right) are all below-average, while the poorer deciles (the dark gray bars on the left) tend to take on above-average casualties. See text for discussion of data analysis that produced the Figure.

B. The Causes of the Casualty Gap

The evidence presented above makes clear that there are Two Americas of military sacrifice. Working class America is sacrificing at a higher rate than affluent America. Why is this the case?

There are two mechanisms in play, both of which have explanatory power: differential selection into the armed forces ("the selection mechanism") and then differential occupational assignment within the military ("the sorting mechanism"). We have

shown in previous work that both the selection and sorting mechanisms affect the unequal outcomes.[52]

One of the most straightforward explanations for inequality in wartime death is inequality in who serves in the military. For more than fifty years, an extensive literature at the crossroads of sociology, history, economics, and political science has investigated military manpower policies and changes in them over time.[53] Today, a small percentage of Americans serve in the military.[54] This has led to a civil-military gap along a number of dimensions.[55]

Men and women join the military for many reasons; for many, patriotism and a desire to serve are undoubtedly key factors. Yet an extensive literature also documents the critical importance of economic incentives in spurring enlistments throughout American history.[56] At the aggregate level, a number of studies have

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52. KRINER & SHEN, *supra* note 18, at ch. 3. Although we can only establish a casualty gap between rich and poor communities, the most likely explanation for this gap is that a parallel inequality exists at the individual level. The selection and sorting mechanisms described here provide a logic for why individuals from socioeconomically disadvantaged backgrounds are more likely to find themselves on the front lines of America's wars.

53. *See, e.g.*, BERRYMAN, *supra* note 36; JOHN CHAMBERS, *supra* note 36; GEORGE Q. FLYNN, THE DRAFT: 1940–1973 (1993); PETER KINDSVATTER, AMERICAN SOLDIERS: GROUND COMBAT IN THE WORLD WARS, KOREA AND VIETNAM (2003); MORRIS JANOWITZ, THE PROFESSIONAL SOLDIER, A SOCIAL AND POLITICAL PORTRAIT (1960); CHARLES C. MOSKOS, THE AMERICAN ENLISTED MAN: THE RANK AND FILE IN TODAY'S MILITARY (1970); THE ALL-VOLUNTEER FORCE: THIRTY YEARS OF SERVICE (Barbara A. Bicksler, Curtis L. Gilroy & John T. Warner eds., 2004); NAT'L RESEARCH COUNCIL, COMM. ON THE YOUTH POP. AND MILITARY RECRUIT., ATTITUDES, APTITUDES AND ASPIRATIONS OF AMERICAN YOUTH: IMPLICATIONS FOR MILITARY RECRUITMENT 219 (Paul Sackett & Anne Mavor, eds. 2003); Stuart Altman & Alan Fechter, *The Supply of Military Personnel in the Absence of a Draft*, 57 AM. ECON. REV. 19 (1967); Peter Karsten, *Consent and the American Soldier: Theory Versus Reality*, 12 PARAMETERS 42 (1982).

54. Ivey, *supra* note 27, at 557 ("[O]nly one-half of one percent of Americans served in the military at any given time during the past decade.").

55. PEW RESEARCH CTR., THE MILITARY-CIVILIAN GAP: WAR AND SACRIFICE IN THE POST-9/11 ERA 2 (2011), http://www.pewsocialtrends.org/files/2011/10/veterans-report.pdf.

56. For an example of the nuance that exists within this rich literature, see a recent study, Todd Woodruff, Ryan Kelty & David R. Segal, *Propensity to*

demonstrated strong correlations between the health of the economy and patterns in military enlistments. For example, in a 1994 RAND study of the factors correlated with the successful recruitment of high quality enlistments from 1978 to 1993, two of the factors with the greatest influence on the number of high quality recruits obtained by the Army were the youth unemployment rate and the rate of military pay growth relative to the civilian sector.[57]

This linkage continues to the present day. Reflecting on the surge in military enlistments during the economic troubles of 2008, which followed immediately on the heels of two of the most difficult recruiting years in recent memory in 2006 and 2007, Undersecretary for Personnel and Readiness David S.C. Chu readily acknowledged the faltering economy's role in boosting volunteering: "We do benefit when things look less positive in civil society."[58] Other analyses of enlistment decisions at the individual level demonstrate, logically, that the young men and women most likely to volunteer are those for whom the occupational and educational benefits that the military affords are most appealing compared to their options in the civilian labor market.[59] As summarized by mil-

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Serve and Motivation to Enlist among American Combat Soldiers, 32 ARMED FORCES & SOC'Y 353 (2006), suggesting institutional incentives are particularly important for the thirty percent new recruits who are "high-propensity" youth, i.e. those that had long planned on joining the military. *Id.* at 358. By contrast, among the seventy percent of recruits who had not thought seriously about enlisting while in high school, occupational and economic incentives were particularly important. *Id.* at 363.

57. The size of the military recruiting budget also had a strong impact on recruiting trends. BETH ASCH & BRUCE ORVIS, RECENT RECRUITING TRENDS AND THEIR IMPLICATIONS: PRELIMINARY ANALYSIS AND RECOMMENDATIONS 21 (1994), http://www.rand.org/content/dam/rand/pubs/monograph_reports/2005/MR549.pdf; *see also* Altman & Fechter, *supra* note 53, at 19–20; Charles Brown, *Military Enlistments: What Can We Learn from Geographic Variation*, 75 AM. ECON. REV. 228 (1985); John Warner & Beth Asch, *The Record and Prospects of the All-Volunteer Military in the United States*, 15 J. ECON. PERSP. 169 (2001).

58. William H. McMichael, *Economic Bust Creates Recruiting Boom*, ARMY TIMES, Dec. 30, 2008.

59. For example, in their analysis of military volunteerism from 1973 to 1978, sociologists Morris Janowitz and Charles Moskos found that college-educated men, who enjoyed great advantages in the civilian labor market, were significantly under-represented in the armed forces. While almost thirty percent of the military-aged male population had some college education in 1977, only

itary historian Peter Karsten, "Most volunteers, today and for the past 200 years, joined the service in order to gain economic rewards, social mobility, or skills needed later in civilian life."[60]

Recognizing these economic incentives, it is not surprising that Army recruits have come disproportionately from parts of the country that are lower on the socioeconomic scale.[61] The military has struggled in some years to meet its enlistment quotas, and as a result it has drawn on recruits with lower qualifications.[62] During

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five percent of new Army enlistees did. In 1964, more than seventeen percent of young men drafted into the service had some college education. Morris Janowitz & Charles C. Moskos Jr., *Five Years of the All-Volunteer Force: 1973–1978*, 5 ARMED FORCES & SOC'Y 171, 194–95 (1979).

60. Karsten, *supra* note 53, at 43. This is not to say that the relative importance of economic incentives has not changed over time. For example, surveying the history of 20th century manpower policy, Charles Moskos identifies three eras—the modern (1900–1945), the late modern (1945–1990), and the postmodern (1990–)—and he argues that across these periods the military has become increasingly viewed more through an "occupational" and less through an "institutional" lens. If correct, this trend could also contribute to the emergence of the socio-economic casualty gaps we observed in the Korean and Vietnam wars and the widening of these gaps in the Iraq War. CHARLES C. MOSKOS, JOHN ALLEN WILLIAMS & DAVID R. SEGAL, THE POSTMODERN MILITARY 14 (Charles C. Moskos, John Allen Williams & David R. Segal eds., 2000).

61. For example, Kriner and Shen's ZIP-code level analysis of Army recruiting data shows that the high income communities were significantly under-represented in Army recruiting. KRINER & SHEN, *supra* note 18, at 65. For an analysis of more recent Army recruiting data, see 2011 DOD POPULATION REPRESENTATION IN THE MILITARY SERVICES REPORT, app. tbl. B-41, http://prhome.defense.gov/portals/52/Documents/POPREP/poprep2011/appendixb/appendixb.pdf. An individual-level analysis of military recruits from the 1990s found that young people from high income families were significantly less likely to enlist in the military, all else being equal, than their peers from lower socioeconomic backgrounds. Amy Lutz, *Who Joins the Military?: A Look at Race, Class, and Immigration Status*, 36 J. POL. & MIL. SOC. 167 (2008). However, a recent analysis of individual-level data from the post-9/11 era finds little evidence of socioeconomic differences. Andrea Asoni et al., *Rich Man's War, Poor Man's Fight? Technological Change, Tactical Developments and the Demographic Composition of the American Military*, (Feb. 6, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2728702.

62. Ivey, *supra* note 27, at 550 ("[P]revious minimum academic and moral standards for enlistment were now being waived in order to make up for the recruiting shortfall.").

some of the relevant periods of recruitment for the wars in Iraq and Afghanistan, the Army lowered its recruitment standards[63] and offered larger financial incentives.[64] Such selection mechanisms have the potential to create casualty gaps. But this is only part of the story.

The vast majority of those who serve do not die in combat, and those who do die are not a random sample of the military population as a whole. As Colonel Samuel Hays wrote in *Army Magazine* in 1967, "In many ways the differences in sacrifice between those who are called to the service and those who are excused are less drastic than the differences which result from different assignments in the Services . . . no one could find much equity between pounding a typewriter in the Pentagon and carrying the M16 rifle in the jungles of Vietnam."[65]

Occupational assignment is far from random. Through a series of tests, the military assesses each new soldier's aptitudes and pre-existing skill sets and, on the basis of this information and additional evaluations, it assigns each soldier to the tasks thought to be best-suited to his or her personal skills and to the military's needs.[66] If soldiers assigned to positions with high risks of combat exposure differ systematically from soldiers assigned to occupations with lower levels of combat risk, occupational assignment, too, has the potential to generate a casualty gap.[67]

When one examines the difference between enlisted and officer casualty rates, we find strong evidence that occupational sorting leads to casualty gaps.[68] Casualty rates for the infantry and the enlisted ranks are more inversely related to community wealth and education than are non-infantry and officer casualty rates.[69]

Because lower-skilled recruits are more likely to come from less advantaged communities, and because they are subse-

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63. *Id.*

64. *Id.*

65. Samuel H. Hays, *Military Conscription in a Democratic Society*, ARMY MAG., Feb. 1967, at 31, *reprinted in* CHAMBERS, *supra* note 36.

66. The process of occupational assignment varies across service branches and varies across individuals as well. For instance, some recruits are given the option to select an occupational field.

67. *See* KRINER & SHEN, *supra* note 18, at 67–72.

68. *Id.*

69. *Id.*

quently more likely to be assigned to occupations with greater combat risks than are recruits with higher skills, the occupational assignment mechanism may produce a casualty gap, even if the military as a whole were representative of the civilian population.[70] Similarly, because the enlisted ranks come disproportionately from lower income/education communities, and because enlisted soldiers are more likely, on average, to see front line combat than are officers, assignment by rank also explains why a casualty gap can develop even if the military's overall demographics may roughly mirror society.

In sum: We believe there is extremely strong evidence that poorer parts of America are bearing a greater share of the human costs of war. In the next two Parts we explore some of the social and political consequences of these Two Americas of military sacrifice.

IV. INEQUALITY AND THE VETERAN'S BRAIN

A. The Wounds of War

Historical comparisons plainly illustrate the increasing prominence of combat wounds in recent conflicts. For example, the ratio of soldiers killed versus soldiers wounded in Iraq is striking in comparison to earlier conflicts. While the wounded/killed ratio was 1.65 in World War II, 1.9 in Korea, and 2.6 in Vietnam, in Iraq the ratio through March 2014 was 7.2, and in Afghanistan the ratio was 7.6.[71] Thus, when compared with Vietnam and Korea, the ratio of wounded to killed soldiers in Iraq/Afghanistan is

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70. Moreover, there are differences in the service branches. The Army, for instance, which accounts for a majority of the casualties, is not as representative of the population as a whole. OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS, POPULATION REPRESENTATION IN THE MILITARY SERVICES (2011), http://prhome.defense.gov/portals/52/Documents/POPREP/poprep2011/appendixb/b_41.html.

71. Ratios for World War II, Korea, and Vietnam were calculated using data from the Department of Defense. NESE F. DEBRUYNE & ANNE LELAND, CONG. RESEARCH SERVICE, RL32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES, LISTS AND STATISTICS (2015), https://www.fas.org/sgp/crs/natsec/RL32492.pdf. The Korean War ratio utilized the figure of 54,246 for worldwide military deaths. *Id.* at 9. Ratios for Iraq and Afghanistan were calculated using data from IRAQ COALITION CASUALTY COUNT, http://icasualties.org (last visited Mar. 10, 2016).

more than two and a half times larger. When compared to World War II, the ratio in Iraq/Afghanistan is more than four times as large.

The ratio of wounded to killed reflects advances in military medicine. For instance, the Army now utilizes Forward Surgical Teams ("FSTs"),[72] and they have proven effective at reducing casualties because of their rapid response.[73] But saving lives means that more soldiers are surviving with catastrophic injuries. As one nurse working in Baghdad remarked, "We're saving severely injured people, legs, eyes, parts of brains. These injuries are horrific."[74] And as one of the medical surgeons remarked about the recovery these soldiers can expect, "[w]e can save you, [but] [y]ou might not be what you were."[75]

Veterans are often returning with a variety of symptoms. This is so much the case that caretakers now use the term "polytrauma" to describe veterans with "multiple and complex physical

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72. Timothy C. Counihan & Paul D. Danielson, *The 912th Forward Surgical Team In Operation New Dawn: Employment Of The Forward Surgical Team During Troop Withdrawal Under Combat Conditions*, 177 MIL. MED. 1267, 1269 (2012) ("FST have been used widely since the onset of the Global War on Terror in both Iraq and Afghanistan.").

73. GLASSER, *supra* note 21, at 41 ("The efficiency of the new [FST] system, as well as the resulting survival rates, are quite extraordinary . . . .").

74. *Id.* at 47.

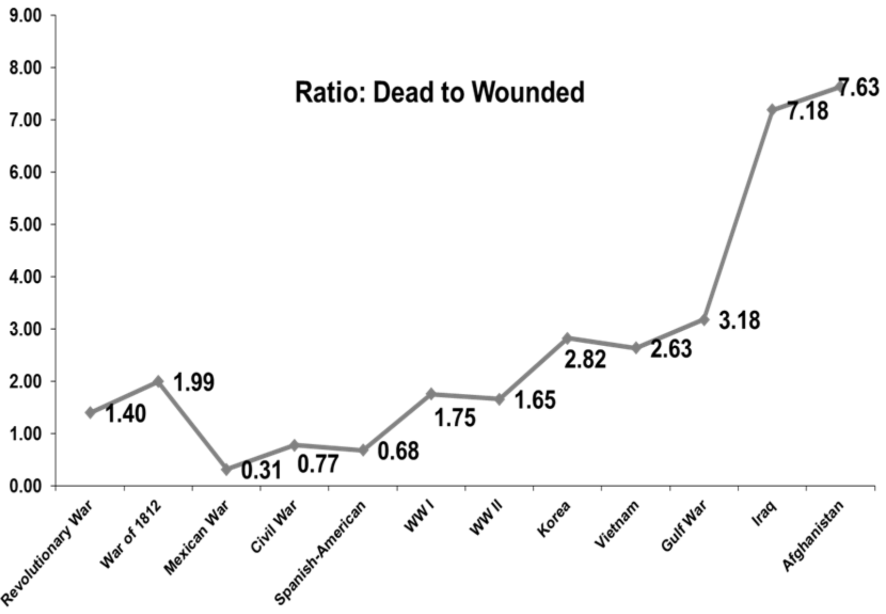
> Th[e] newest type of casualty coming out of this our newest war involves severe and devastating multiple traumas: severe head injuries, vision and hearing loss, nerve damage, bone fractures, contaminated wounds, severed limbs, transected spinal cords along with emotional and behavioral problems. And the numbers of patients with these multiple awful wounds increase every month of the war.

Id. at 143.

75. Robert Carroll, *quoted in* Karl Vick, *The Lasting Wounds of War: Roadside Bombs Have Devastated Troops and Doctors Who Treat Them*, WASH. POST (Apr. 27, 2004), http://www.washingtonpost.com/wp-dyn/articles/A44839-2004Apr26_2.html; *see also* Ann M. Hendricks & Jomana H. Amara, *Current Veteran Demographics and Implications for Veterans' Health Care*, *in* RETURNING WARS' WOUNDED, INJURED, AND ILL: A REFERENCE HANDBOOK 17 (Nathan D. Ainspan & Walter E. Penk eds., 2008) ("Battlefield medicine, evacuation procedures, and battlefield medical support services have evolved tremendously leading to greater survival rates for troops.").

and or psychological injuries."[76] The most common trio of symptoms are Traumatic Brain Injury ("TBI"), PTSD, and pain.[77] Many veterans also have substance abuse challenges.[78] Moreover, these substance use problems are comorbid with other psychiatric illnesses.[79]

Figure 4. Ratio of Killed in Action to Wounded in Action, Revolutionary War through Afghanistan



What to Notice in Figure 4: The graph illustrates how the United States' proportion of Killed in Action ("KIA") to Wounded in Action ("WIA") soldiers has increased substantially in the wars in Iraq and Afghanistan. This is due in large part to major advances in medical technology on the battlefield, which now allows many soldiers to avoid death from injuries that in earlier wars would have been fatal.

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76. John Linck & Jared Benge, *The Psychological Assessment of Veterans with History of Polytrauma*, *in* PSYCHOLOGICAL ASSESSMENT OF VETERANS 404 (Shane S. Bush ed., 2014).

77. *Id.* at 409.

78. Dominick Dephilippis et al., *Psychological Assessment of Veterans with Substance Use Disorders*, *in* PSYCHOLOGICAL ASSESSMENT OF VETERANS, *supra* note 76, at 177.

79. *Id.* at 185.

In addition to these types of brain injuries, the RAND Corporation's 2008 study of the psychological consequences of Operation Enduring Freedom ("OEF") and Operation Iraqi Freedom ("OIF") makes clear that our current wars have taken an immense toll on returning soldiers' mental health.[80] The data plotted in Figure 4 undercount the actual number of soldiers wounded in action because the data (from the DOD) used to generate Figure 4 do not include "mental" injuries as wounds.[81]

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80. Traumatic Brain Injury has been center stage since the start of the wars in Afghanistan and Iraq. Mild TBI is diagnosed when a person has:

> a traumatically-induced physiological disruption of brain function, as manifested by at least one of the following: (1) any period of loss of consciousness; (2) any loss of memory for events immediately before or after the event; (3) any alteration in mental state at the time of the accident (eg, feeling dazed, disoriented, or confused); and (4) focal neurological deficit or deficits that may or may not have been transient; but where the severity of the injury does not exceed the following: loss of consciousness of approximately 30 minutes or less; after 30 minutes, an initial Glasgow Coma Scale (GCS) of 13–15; and posttraumatic amnesia (PTA) not greater than 24 hours.

AM. CONG. OF REHABILITATION MED., DEFINITION OF MILD TRAUMATIC BRAIN INJURY (1993), https://www.acrm.org/wp-content/uploads/pdf/TBIDef_English_10-10.pdf. The Veterans Administration has made a number of changes in its services for veterans experiencing brain trauma, such as the creation of more robust rehab units. Kurt Samson, *VA Reinforces Stateside Rehab Units for Iraq Blast Injuries*, NEUROLOGY TODAY, Apr. 2006, at 18. The Government Accountability Office ("GAO") found in 2008 that the VA has improved its screening for Mild TBI, though it also suggested a number of policy reforms designed to make assessment more effective. U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-276, VA HEALTH CARE: MILD TRAUMATIC BRAIN INJURY SCREENING AND EVALUATION IMPLEMENTED FOR OEF/OIF VETERANS, BUT CHALLENGES REMAIN 5 (2008), http://www.gao.gov/assets/280/271988.pdf. We do not suggest, however, that it is only in recent wars that mental injuries have been prevalent. It has been observed well before that "[t]he power of the battlefield to break men can never be overstated." David Marlowe, *The Human Dimension of Battle and Combat Breakdown*, *in* MILITARY PSYCHIATRY: A COMPARATIVE PERSPECTIVE 7 (Richard A. Gabriel ed., 1986).

81. Moreover, it also excludes civilian casualties. An MIT project on the human costs of war tracks civilian casualties and a natural extension of our argument would be that civilian casualty counts should consider distributions across the socioeconomic spectrum. *See Iraq: the Human Cost*, MIT CTR. FOR INT'L STUDIES, http://web.mit.edu/humancostiraq/ (last visited Mar. 10, 2016).

Before moving on to discuss inequality and non-fatal casualties, we should be clear that we are *not* arguing that soldiers are somehow treated differently when coming off the battlefield with injuries. When a soldier is injured in Afghanistan or Iraq, he or she is typically transported to Landstuhl Regional Medical Center in Germany.[82] At Landstuhl, soldiers are treated for a variety of injuries and are screened for traumatic brain injury.[83] Soldiers are also evacuated to Landstuhl for psychiatric evaluations.[84] We have seen no studies suggesting differential treatment at these stages.

While in the Department of Defense's hospital system care may be state-of-the-art,[85] upon leaving active duty, the burden of care falls upon the medical services provided by the U.S. Department of Veterans Affairs.[86]

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82. Harold L. Timboe & Richard R. Timboe, *America's Wounded Warriors*, GPSOLO, Jan./Feb. 2005, at 26, 27, http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/amer wounded.html ("The Landstuhl Regional Medical Center in Germany receives casualties from Europe, Africa, and the Middle East."); *see also* Joachim J. Tenuta, *From The Battlefields to the States: The Road To Recovery. The Role of Landstuhl Regional Medical Center in US Military Casualty Care*, 14 J. AM. ACAD. ORTHOPAEDIC SURGEONS S45, S45–S47 (2006); Raymond Fang et al., *Critical Care at Landstuhl Regional Medical Center*, 36 CRITICAL CARE MED. S383 (2008); Brent A. Johnson, *Operation Iraqi Freedom: The Landstuhl Regional Medical Center Experience*, 44 J. FOOT & ANKLE SURGERY 177 (2005).

83. Kenneth E. Dempsey et al., *Landstuhl Regional Medical Center: Traumatic Brain Injury Screening Program*, 16 J. TRAUMA NURSING 6 (2009).

84. James R. Rundell, *Demographics of and Diagnoses in Operation Enduring Freedom and Operation Iraqi Freedom Personnel Who Were Psychiatrically Evacuated From The Theater Of Operations*, 28 GEN. HOSP. PSYCHIATRY 352, 352 (2006) ("Between the beginning of Operation Enduring Freedom (OEF; US military operations in Afghanistan) and Operation Iraqi Freedom (OIF; US military operations in Iraq) and July 2004, 12,480 medical, surgical and psychiatric evacuees from the theaters of operation were sent to the Landstuhl Regional Medical Center (LRMC) in Germany. The LRMC received virtually all evacuees leaving OEF and OIF during the reference period. One thousand two hundred sixty-four of those patients (10.1%) were sent to be managed primarily by psychiatry.").

85. GLASSER, *supra* note 21, at 48.

86. *Id.* at 49.

B. Social Determinants of Veterans' Brain Health

Recognizing that the number of wounded soldiers is large, what can be said about the relationship between the health of these soldiers and the socioeconomic inequality identified in Part II? To start, we note that veterans have experienced unemployment, housing difficulties, and mental health afflictions, including a high suicide rate.[87] But not *all* veterans have experienced this equally.[88] So the question becomes: What factors differentiate those veterans who experience mental injury from those who do not?

Decades of research on the social determinants of health have made clear this conclusion: "Life chances differ greatly depending on where people are born and raised."[89] Inequality in so-

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87. McCarl, *supra* note 15, at 398; Randi Jensen, *Military Suicidality and Principles to Consider in Prevention*, *in* WAR TRAUMA AND ITS WAKE: EXPANDING THE CIRCLE OF HEALING 156 (Raymond M. Scurfield & Katherine T. Platoni eds., 2013). Some of this may have been exacerbated by the use of the stop-loss policy, which "permits the retention of enlisted service members past the end of active obligated service (EAOS) as initially agreed upon in their enlistment contracts," and was used extensively in the wars in Iraq. Ivey, *supra* note 27, at 548. Court challenges to the military use of the stop-loss policy were unsuccessful, even for the National Guard. Stop-loss was halted in 2011. *Id.* ("Although the Stop-Loss policy is not purely an invention of recent conflicts, the last decade marks the first time the military has used the policy so broadly.").

88. Not explored in this Article are the differential experiences, and resulting treatment, of females as compared to males. We do not have a sufficient knowledge base yet. *See* Shirley M. Glynn, *Impact on Family and Friends*, *in* RETURNING WARS' WOUNDED, INJURED, AND ILL, *supra* note 75, at 175 ("Little information exists now on the special needs of female warfighters and their careers, and the research field is in its infancy."). However, there is some evidence that female soldiers have a greater incidence of psychiatric disorder. *See, e.g.*, Stephanie Booth-Kewley et al., *Predictors of Psychiatric Disorders in Combat Veterans*, 13 BMC PSYCHIATRY 130 (2013); Olympia Duhart, *PTSD and Women Warriors: Causes, Controls and a Congressional Cure*, 18 CARDOZO J.L. & GENDER 327 (2012); Rundell, *supra* note 84; Michelle Wilmot, *Women Warriors: From Making Milestones in the Military to Community Reintegration*, *in* WAR TRAUMA AND ITS WAKE, *supra* note 87, at 83–85.

89. Michael Marmot et al., *Closing the Gap in a Generation: Health Equity Through Action On The Social Determinants Of Health*, 372 LANCET 1661, 1661 (2008).

cioeconomic resources is related to inequality in health outcomes.[90]

This insight, while often used in conversations about cross-national heath policy, also has implications for U.S. social policy on veterans care. In short: Inequality in pre-service opportunity is likely to lead to inequality in post-service options, and thus to an unequal distribution of health outcomes. We posit that one (though certainly not the only) reason we see some soldiers develop mental health issues, while others are able to resume life more seamlessly, is a lack of social supports.[91]

We do not have direct evidence for this claim, and indeed we are not aware of a publicly available dataset that would allow us to answer it. But even without direct evidence, the circumstantial case seems to us very strong.[92]

To start, Naval Health Research Center researcher Stephanie Booth-Kewley conducted a longitudinal study of mental health outcomes in 1,113 Marines who served in Iraq in OIF or Afghanistan in OEF.[93] Eighteen percent of the Marines in the study received a psychiatric diagnosis during the observation period.[94] Common diagnoses were anxiety disorders, mood disorders, substance abuse disorders, adjustment disorders, and PTSD.[95] Included in the analysis was the Marine's education level, and the researchers found that even when controlling for combat exposure, more education was associated with a lower incidence of a psychi-

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90. We also know, from emerging research, that socioeconomic status affects brain development. Daniel A. Hackman & Martha J. Farah, *Socioeconomic Status and the Developing Brain*, 13 TRENDS COGNITIVE SCI. 65 (2009).

91. Sociologist Alair MacLean has recognized that "veterans may have worse health than non-veterans not because they served in the military, but because they came from socioeonomically disadvantaged backgrounds and have fewer years of schooling." MacLean, *supra* note 30, at 207.

92. Our observations here are necessarily preliminary, as "[r]esearchers are only just beginning to thoroughly explore the long-term consequences of physical and psychological wounds for service members' family relationships." Elaine Willerton et al., *Introduction: Military Families under Stress: What We Know and What We Need to Know*, *in* RISK AND RESILIENCE IN U.S. MILITARY FAMILIES 13 (Shelley MacDermid Wadsworth & David S. Riggs eds., 2010).

93. Booth-Kewley et al., *supra* note 88, at 130.

94. *Id.* at 135.

95. *Id.*

atric disorder.[96] Less education was associated with a greater incidence of PTSD,[97] anxiety disorders, and adjustment disorders.[98]

There is also evidence that, on average, the demographics of those treated for psychiatric disorders differs from those of the general fighting force. Psychiatrist James Rundell's study of soldiers treated for psychiatric disorders at Landstuhl found that enlisted soldiers were significantly more likely to be treated for psychiatric disorders than were officers.[99] Because enlisted soldiers are more likely to be from the lower rungs of the socioeconomic ladder, this suggests an uneven burden.[100]

Moreover, there is also evidence that PTSD varies by rank in the military: Officers are significantly less likely than enlisted personnel to develop PTSD.[101] Researchers suggest that this may

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96. *Id.* at 136 ("[S]ignificant predictors of mental disorder diagnosis included education level (more education was protective), marital status (being divorced was associated with the highest risk), total number of career combat deployments (multiple deployments was associated with the highest risk), combat exposure (moderate exposure was associated with the highest risk), and positive deployment experiences (a moderate level was the most protective).").

97. *Id.* at 138 ("Four additional variables had marginally significant ($p <$ .10) associations with PTSD: education, unit cohesion, positive deployment experiences, and total number of career combat deployments.").

98. *Id.* ("Other predictors of anxiety disorders ($p <$ .05) included female gender, education, number of combat deployments, and deployment stressors.").

99. Rundell, *supra* note 84, at 354. ("When compared with all returned OEF and OIF veterans (N=213,150), psychiatric evacuees were more likely to be . . . enlisted (96% vs. 86%; P<.001) . . . .").

100. Rundell also found that National Guard soldiers were more likely to be evacuated for psychiatric disorders than active-duty military. *Id.* ("When compared with all returned OEF and OIF veterans (N=213,150), psychiatric evacuees were more likely to be . . . National Guard/Reserve, as opposed to active-duty military (34% vs. 26%; P<.001).").

101. Jessica Wolfe et al., *Course and Predictors of Posttraumatic Stress Disorder Among Gulf War Veterans: A Prospective Analysis*, 67 J. OF CONSULTING & CLINICAL PSYCHOL. 520, 526 ("[O]fficer rank could serve a protective function. Officers in our study showed negligible levels of PTSD, suggesting that nonofficer rank was influential in the exacerbation of PTSD over time. This protective effect could relate to any number of factors, including differences in entrance-level characteristics, differences in training and preparation, or variations in actual wartime exposure. Although we cannot know for certain, it is possible that these vulnerabilities do not appear until certain contextual resources (e.g., the support of the military environment) are withdrawn."); *see also* David T. Holmes et al., *Preliminary Evidence of Psychological Distress*

be both because the enlisted soldiers have different entry-level characteristics and because they have fewer supports upon the end of their service commitment.[102]

In addition, a number of other studies have identified social class as a risk factor for a range of veteran health outcomes:

- Soldiers who return to strong support environments may fare better in terms of mental health than peers who lack such supports.[103]

- Social support can help to prevent the onset of PTSD.[104]

- Veterans with stronger social networks are less likely to have PTSD.[105]

- The incidence of depression in veterans is correlated with education level and rank.[106]

- Substance abuse may be exacerbated by low-income status.[107]

Among Reservists in the Persian Gulf War, 186 J. NERVOUS & MENTAL DISEASE 166 (1998).

102. Wolfe et al., *supra* note 101, at 526.

103. Bradley E. Belsher et al., *The Social Context of Post-Trauma Adjustment in Veterans*, *in* THE PRAEGER HANDBOOK OF VETERANS' HEALTH, *supra* note 11, at 200.

104. Chris R. Brewin, Bernice Andrews & John D. Valentine, *Meta-analysis of Risk Factors for Posttraumatic Stress Disorder In Trauma-Exposed Adults*, 68 J. OF CONSULTING & CLINICAL PSYCHOL. 748 (2000); Emily J. Ozer, Suzanne R. Best, Tami L. Lipsey & Daniel S. Weiss, *Predictors of Posttraumatic Stress Disorder and Symptoms in Adults: A Meta-Analysis*, 129 PSYCHOL. BULL. 52 (2003).

105. It is not clear, however, if this correlation is causation. It could be that those veterans who develop PTSD cause their friends/families to distance themselves. MacLean, *supra* note 30, at 217.

106. Anne M. Gadermann et al., *Prevalence of DSM-IV Major Depression Among U.S. Military Personnel: Meta-Analysis and Simulation*, 177 MIL. MED. 47, 57 (2012) ("Current prevalence among military personnel was estimated to be higher for women than men, young than old, the unmarried than the married, and those with lower than higher rank and education. These correlates are broadly consistent with those found in general population surveys.").

Beyond the veteran her/himself, there are ripple effects on family members. A family's economic standing affects how well they adjust during the soldier's deployment.[108] If a veteran returns from deployment injured, family members must often pick up the slack, and this compounds the economic crunch. Family members "may be forced to take unpaid leave . . . [or] relinquish jobs or sources of income."[109] As one wife of an injured soldier said, "We are nobody . . . we don't have a lot of money."[110] There can even be ripple effects in terms of child maltreatment, as a stable income (as well as two-parent families and low drug use) reduces the likelihood of child maltreatment in the face of deployment, while family stress during deployment can do the opposite.[111]

In these many ways, the Two Americas of military sacrifice extend well beyond the battlefield.

V. THE POLITICAL COSTS OF CASUALTY INEQUALITY

Inequality in military casualties most directly affects injured service members themselves and the families and communities that care for them when they return home. However, the political ramifications of casualty inequality are also considerable.

In this Part, we examine how greater public awareness of wartime sacrifice, including its significant inequality dimension, may have profound consequences for military policymaking in America. We show that Americans view inequality in military sacrifice as qualitatively different from and more troubling than inequality in other spheres of American life (Section A), informing Americans of inequality changes their support for war (Section B),

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107. Dephilippis et al., *supra* note 78, at 187 ("Substance use can cause and/or be a consequence of psychosocial problems such as low income . . . .").

108. Shelley A. Riggs & David S. Riggs, *Risk and Resilience in Military Families Experiencing Deployment: The Role of the Family Attachment Network*, 25 J. FAM. PSYCHOL. 675, 681 (2011) ("[I]mportant contextual layers are intergenerational processes, the military unit, and the family's social and economic resources.").

109. Lee Lawrence, *Physically Wounded and Injured Warriors and Their Families: The Long Journey Home*, *in* WAR TRAUMA AND ITS WAKE, *supra* note 87, at 145.

110. *Id.* at 146.

111. Deborah A. Gibbs et al., *Child Maltreatment Within Military Families*, *in* RISK AND RESILIENCE IN U.S. MILITARY FAMILIES, *supra* note 92, at 123.

and that non-fatal casualties are less politically salient than fatal casualties (Section C). The combination of these effects suggests that the invisibility of casualty inequality artificially inflates public support for war and the leaders who wage it.

A. Is Inequality in Military Sacrifice Different From Other Forms of Inequality?

Increasing levels of socioeconomic inequality affect virtually every aspect of contemporary American life, including educational opportunity, health outcomes, and exposure to crime. No doubt inequality in casualties is related to these other types of inequality. And this raises the question: should we pay special attention to inequality in military sacrifice?

We believe the answer is *yes*. Americans find inequality in military sacrifice to be particularly troubling because it violates a long-cherished norm of shared martial sacrifice. Indeed, George Washington labeled shared service obligations as a core responsibility of democratic citizenship: "Every citizen who enjoys the protection of a free government, owes not only a portion of his property, but even of his personal service to the defense of it."[112] Risking and laying down one's life for the defense of country is the greatest sacrifice the state can ask of its citizens. As a result, there are strong reasons to believe that Americans will view inequality in military sacrifice as qualitatively different from inequality arising in other realms.

To explore how the public views military service relative to other high risk occupations, we included the following question on an internet-based survey: "Many jobs and careers require sacrifices of various types. Compared to other jobs and careers that involve high risk, do you think that military service is a unique type of career?" More than ninety percent of respondents answered that a job in the military is, indeed, different from other high-risk jobs.[113]

The vast majority of Americans may agree that military service is different from other forms of high-risk occupations. But is inequality in military sacrifice more normatively troubling than other forms of inequality that are pervasive in contemporary Amer-

112. See KRINER & SHEN, *supra* note 18, at 4 n.7.
113. Additional details on this experiment are provided in the Appendix.

ican society? To explore this question, we conducted a follow-up internet-based survey. First, all participants in the survey were told about inequality in military sacrifice.[114] Each participant was then asked: "Do you think it is important to address inequality in military sacrifice?" Eighty-two percent of the sample replied "Yes." We then followed up with those who answered yes and asked, "Do you think inequality in military sacrifice is more important to address than other types of inequality in American life?" Seventy-one percent said yes, it is more important.

The survey data is consistent with the common-sense practices evident in so many aspects of American life. We provide uniformed soldiers with upgraded seats on plane flights; we salute them at sporting events; and we annually celebrate their sacrifices on Memorial Day and Veterans Day. While other occupations also involve risk to physical health, Americans agree that there is something unique about sacrifice as part of the U.S. military.

B. How Americans React to Information About Inequality

One potential mechanism to ameliorate inequality in military sacrifice is to reduce overall sacrifice: that is, to be more hesitant before sending troops into combat. Political scientists have established that "casualty aversion" affects policymaking.[115]

The theory owes its origin to political theorist Immanuel Kant.[116] The crux of his logic focused on how democratic publics would hold their leaders accountable for costly wars. The public must pay both the financial costs of waging war as well as the toll it exacts in blood. As a result, only in the most exigent of circumstances will democratic citizens support going to war. And by ex-

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114. The text provided was: "There is evidence that the American soldiers who are dying in combat and those who are returning home wounded come disproportionately from parts of the country that are lower on the socioeconomic scale. That said, many jobs require sacrifices, and there is socioeconomic inequality in many aspects of American society."

115. *See* Douglas L. Kriner & Francis X. Shen, *Reassessing American Casualty Sensitivity: The Mediating Influence of Inequality*, 58 J. CONFLICT RESOL. 1174 (2013); Douglas L. Kriner & Francis X. Shen, *How Citizens Respond to Combat Casualties: The Differential Impact of Local Casualties on Support for the War in Afghanistan*, 76 PUB. OPINION Q. 761 (2012).

116. IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS 113 (Ted Humphrey trans., 1983) (1795).

tension, they will punish at the ballot box leaders who plunge their countries into costly foreign wars. This basic logic is the foundation of many arguments for the influential "democratic peace" theory.[117]

Recent history, however, fails to comport with Kant's compelling logic. Repeatedly, the American public has supported the use of military force to achieve a wide array of foreign policy objectives.[118] Moreover, while public support for recent wars in Iraq and Afghanistan has fallen as their costs mounted, both wars and the leaders who waged them long enjoyed significant public support, despite costs and casualty figures that far exceeded those promised by politicians in Washington.[119] The democratic brake on costly military policies was much weaker than posited.[120]

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117. *See generally* BRUCE BUENO DE MESQUITA & DAVID LALMAN, WAR AND REASON: DOMESTIC AND INTERNATIONAL IMPERATIVES (1992); JAMES LEE RAY, DEMOCRACY AND INTERNATIONAL CONFLICT: AN EVALUATION OF THE DEMOCRATIC PEACE PROPOSITION (1995); DAN REITER & ALLAN STAM, DEMOCRACIES AT WAR (1998); BRUCE RUSSETT, CONTROLLING THE SWORD: THE DEMOCRATIC GOVERNANCE OF NATIONAL SECURITY (1990); Bruce Bueno de Mesquita, James Morrow, Randolph Siverson & Alastair Smith, *An Institutional Explanation of the Democratic Peace*, 93 AM. POL. SCI. REV. 791 (2003); Zeev Maoz & Bruce Russett, *Normative and Structural Causes of Democratic Peace, 1946–1986*, 87 AM. POL. SCI. REV. 624 (1993); Clifton T. Morgan & Sally Campbell, *Domestic Structure, Decisional Constraints, and War*, 35 J. CONFLICT RESOL. 187 (1991).

118. Richard Eichenberg, *Victory Has Many Friends: U.S. Public Opinion and the Use of Military Force, 1981-2005*, 30 INT'L SECURITY 140, 140–77 (2005).

119. For example, the Congressional Budget Office estimated the Iraq War itself would cost $14 billion and then $8 to $10 billion a month for an unspecified period of time. The Bush administration estimated the war would cost approximately $50 billion, and it fired Larry Lindsay for speculating that the war might cost as much as $200 billion. Seth Cline, *The Underestimated Costs, and Price Tag, of the Iraq War*, U.S. NEWS AND WORLD REPORT (March 20, 2013), http://www.usnews.com/news/blogs/press-past/2013/03/20/the-underestimated-costs-and-price-tag-of-the-iraq-war; James Fallows, *Paying the Costs of Iraq for Decades to Come*, THE ATLANTIC (Mar. 29, 2013), http://www.theatlantic.com/politics/archive/2013/03/paying-the-costs-of-iraq-for-decades-to-come/274477/. Most contemporary estimates of the Iraq War's costs are in the trillions. JOSEPH STIGLITZ & LINDA BILMES, THE THREE TRILLION DOLLAR WAR: THE TRUE COST OF THE IRAQ CONFLICT x (2008).

120. On casualties and public support for the Iraq War, see Christopher Gelpi, Peter D. Feaver & Jason Reifler, *Success Matters: Casualty Sensitivity*

Would citizens be more reticent to support ongoing wars and to engage in new ones if they were informed of the significant socioeconomic inequality sacrifice that has characterized recent American wars? To answer this question, in previous research we conducted a series of experiments embedded on nationally representative public opinion surveys.

In the first experiment, conducted in September of 2007, we explored the influence of information about inequality in sacrifice on popular evaluations of the Iraq War.[121] Subjects assigned to our control group were told nothing about inequality in military sacrifice. Subjects in our main treatment group were told that many of America's more than 3,700 casualties to date in the Iraq War hailed from socioeconomically disadvantaged casualties.[122] Four and a half years after the commencement of the Iraq War, most Americans had firmly made up their minds either to support or oppose the conflict. However, we found that even this modest treatment significantly raised opposition to the Iraq War. In our treatment group, 62% of respondents judged the Iraq War a mistake versus only 56% in the control group, a modest but statistically significant difference.[123] If questions of inequality in sacrifice had received sustained attention and national debate, the adverse consequences on support for the Iraq War likely would have been far greater.

In 2009 we conducted a similar experiment on a second nationally representative survey to examine the influence of information about the Two Americas of military sacrifice on Americans' willingness to support the use of force in future endeavors. All subjects were told of the number of American service members

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and the War in Iraq, 30 INT'L SECURITY 7 (2005/2006); Douglas L. Kriner & Francis X. Shen, *Iraq Casualties and the 2006 Senate Elections*, 32 LEGIS. STUD. Q. 507, 516–23 (2007); Erik Voeten & Paul Brewer, *Public Opinion, the War in Iraq, and Presidential Accountability*, 50 J. CONFLICT RESOL. 809 (2006). On the costs of the Iraq War, see STIGLITZ & BILMES, *supra* note 119.

121. *See* KRINER & SHEN, *supra* note 18, at 96–97.

122. In both this and the experiment that follows we included a second experiment treatment claiming that military sacrifice is shared equally. This treatment produced results substantively similar to those observed in the control. This suggests that most Americans implicitly assume shared sacrifice, unless provided with information explicitly contradicting it.

123. *See* KRINER & SHEN, *supra* note 18, at 94–97.

who died in World War II, Korea, Vietnam, and Iraq. Those in the control group received no further information. Those in the inequality treatment group were told that in most of these wars poor communities have suffered significantly higher casualty rates than rich communities.

Following an established literature in political science that measures casualty sensitivity, we then asked all respondents how many casualties they would be willing to accept for the United States to achieve a range of foreign policy goals: stabilizing a democratic government in Liberia; stopping ethnic cleansing in Darfur; eliminating Iran's nuclear program; and killing or capturing al Qaeda operatives in Somalia.

In each case except the humanitarian intervention (Darfur), we found that Americans informed of casualty inequality in previous wars were significantly less willing to sustain casualties in future military missions. Moreover, these effects were even stronger among residents of communities that had experienced inequality in military sacrifice firsthand in the form of disproportionately high casualty rates in the Iraq War.[124]

C. The Invisible Politics of Non-Fatal Casualties

Although the constraint exercised by public opinion on costly military policies is perhaps not as strong as theory suggests, a mass of empirical scholarship confirms that American support for war sours as war costs mount.[125] A robust literature has examined the effects of fatal combat casualties on presidential approval,[126] support for the military campaign,[127] and presidential and congressional election results.[128]

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124. *See* Kriner & Shen, *supra* note 115, at 1186–89.

125. Following John Mueller's lead, most studies on the effects of war casualties have defined casualties as battle deaths. JOHN MUELLER, WAR, PRESIDENTS, AND PUBLIC OPINION (1973).

126. Richard Eichenberg, Richard Stoll & Matthew Lebo, *War President: The Approval Ratings of George W. Bush*, 50 J. CONFLICT RESOL. 783, 784–89 (2006); Michael Nickelsburg & Helmut Norpoth, *Commander-in-Chief or Chief Economist? The President in the Eye of the Public*, 19 ELECTORAL STUD. 313 (2000).

127. PETER FEAVER & CHRISTOPHER GELPI, CHOOSING YOUR BATTLES: AMERICAN CIVIL-MILITARY RELATIONS AND THE USE OF FORCE 102–05 (2004); ERIC V. LARSON, CASUALTIES AND CONSENSUS: THE HISTORICAL ROLE OF CASUALTIES IN DOMESTIC SUPPORT FOR U.S. MILITARY OPERATIONS 5–49

Similarly, scholarship confirms that presidents and members of Congress who support costly wars pay a price at the polls.[129] Particularly in the smaller scale wars that characterize American military actions since World War II, casualties have been the primary way in which most Americans see a war's costs.[130] However, the literature is almost completely silent on

(1996); Adam J. Berinksy & James N. Druckman, *Public Opinion Research And Support For The Iraq War*, 71 PUB. OPINION Q. 126, 129–31 (2007); William A. Boettcher III & Michael D. Cobb, *Echoes of Vietnam?: Casualty Framing and Public Perceptions of Success and Failure in Iraq*, 50 J. CONFLICT RESOL. 831, 848–49 (2006); Scott Gartner & Gary Segura, *War, Casualties, and Public Opinion*, 42 J. CONFLICT RESOL. 278, 279–81 (1998); Gelpi, Feaver & Reifler, *supra* note 120.

128. Timothy Cotton, *War and American Democracy: Electoral Costs of the Last Five Wars*, 30 J. CONFLICT RESOL. 616, 618–25 (1986); Christopher Gelpi, Jason Reifler & Peter Feaver, *Iraq the Vote: Retrospective and Prospective Foreign Policy Judgments on Candidate Choice and Casualty Tolerance*, 29 POL. BEHAV. 151, 160–66 (2007); Christian Grose & Bruce Oppenheimer, *The Iraq War, Partisanship, and Candidate Attributes: Explaining Variation in Partisan Swing in the 2006 U.S. House Elections*, 32 LEGIS. STUD. Q. 531, 533–36 (2007); David Karol & Edward Miguel, *The Electoral Cost of War: Iraq Casualties and the 2004 U.S. Presidential Election*, 69 J. POL. 633 (2007); Kriner & Shen, *supra* note 120, at 509–13.

129. Jamie Carson et al., *The Impact of National Tides and District-Level Effects on Electoral Outcomes: The U.S. Congressional Elections of 1862-63*, 42 AM. J. POL. SCI. 887, 894–98 (2001); Scott Sigmund Gartner & Gary M. Segura, *All Politics Are Still Local: The Iraq War and the 2006 Midterm Elections*, 41 POL. SCI. & POL. 95, 96–98 (2008); Scott Sigmund Gartner, Gary M. Segura & Bethany A. Barratt, *War Casualties, Policy Positions, and the Fate of Legislators*, 53 POL. RES. Q. 467, 469–70 (2004); Christian Grose & Bruce Oppenheimer, *supra* note 128, at 533–36; Karol & Miguel, *supra* note 128, at 633–36; Kriner & Shen, *supra* note 120, at 509–13; Douglas L. Kriner & Andrew Reeves, *The Influence of Federal Spending on Presidential Elections*, 106 AM. POL. SCI. REV. 348, 350 (2012).

130. John Aldrich et al., *Foreign Policy and the Electoral Connection*, 9 ANN. REV. POL. SCI. 477, 481 (2006) ("Combat casualties are important because the willingness to pay the costs of war is one of the central mechanism by which public opinion might affect foreign policy choices."); Scott S. Gartner, *Secondary Casualty Information: Casualty Uncertainty, Female Casualties, and Wartime Support*, 25 CONFLICT MGMT. & PEACE SCI. 98, 99–101 (2008).

whether increases in non-fatal casualties produce similar dynamics.[131]

We argue that there are strong reasons to expect non-fatal casualties—despite their large numbers and the significant socioeconomic inequality they create—to be less politically salient than fatal casualties. First, Americans may simply discount wounds versus deaths as they seek to measure the human costs of war. Second, non-fatal casualties may be less visible than fatal casualties.

As the existing political science literature recognizes, the return of a wounded soldier often does not generate the same community response as the return of a deceased soldier. The death of a soldier is typically followed by a well-attended funeral and considerable local media attention.[132] The return of a wounded soldier does not usually trigger the same sort of coverage in local media outlets; however, this is a claim subject to further examination since stories in the popular press have appeared in major newspapers and magazines.[133] For instance, in 2004 the *New York Times Magazine* ran a cover story on returning soldiers which gar-

131. An important, if sometimes overlooked, exception is Jeffrey Milstein's study of Vietnam. JEFFREY S. MILSTEIN, DYNAMICS OF THE VIETNAM WAR: A QUANTITATIVE ANALYSIS AND PREDICTIVE COMPUTER SIMULATION 20, 55 (1973), https://kb.osu.edu/dspace/bitstream/handle/1811/24664/1/DYNAMICS_OF_THE_VIETNAM_WAR.pdf. Milstein's definition included non-fatal casualties: "U.S. casualties are measured by ten times the number of U.S. troops killed in action, plus the number of wounded requiring hospitalization, plus half the number wounded not requiring hospitalization." *Id.* at 20. Thus, Milstein was able to conclude from his analysis that "[t]he most significant costs to the American people were the number of American 'boys' killed and wounded in Vietnam." *Id.* at 55. This notable exception aside, however, the field has relied on battle deaths as their measure of casualties. *See* Karol & Miguel, *supra* note 128 (examining the localized electoral effects of Iraq War casualties in the 2004 Presidential election).

132. Gartner & Segura, *supra* note 129, at 95.

133. *See, e.g.*, Solotaroff, *supra* note 13. Systematic analysis of media coverage does not yet exist, and indeed such systematic analysis of battle deaths is just now emerging. Scott L. Althaus et al., Uplifting Manhood to Wonderful Heights? Newspaper Reporting of American Combat Deaths from World War One to Gulf War Two, Presentation at Midwest Political Science Association (April 3–6, 2008), http://faculty.las.illinois.edu/salthaus/Publications/uplifting%20manhood%20paper.pdf.

nered significant attention.[134] Investigative journalism by *Washington Post* reporters spurred reforms at Walter Reed Army Medical Center.[135] And journalist Mark Benjamin won awards for his continued investigative journalism on the return of wounded soldiers, and the military's sub-standard treatment of them.[136]

Moreover, if the returning soldier's wounds are not physically visible, community members or even family and friends may not know the true extent of the soldier's hardships. This lower visibility could theoretically dampen the likelihood of individual event response, the transmission of elite cues concerning wartime costs, and sustained coverage of the full consequences of war in media outlets. To the extent that the costs paid by wounded soldiers are more removed from the public eye, the behavior of the public and public officials should not be altered.[137]

In an empirical analysis, detailed in the Appendix, we find that, at least in the 2006 midterms—an election in which the Iraq War was perhaps the most salient issue—non-fatal casualties did not have the same resonance with voters as fatal casualties. This does not mean that non-fatal casualties *never* have electoral ramifications.[138] However, if they did not in this context it is quite likely

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134. Sara Corbett, *The Permanent Scars of Iraq*, N.Y. TIMES (Feb. 15, 2004), http://www.nytimes.com/2004/02/15/magazine/the-permanent-scars-of-iraq.html.

135. Kathy A. DeBarr, *To Hell and Back: Wounded Warriors Return Home to Fight Yet Another Battle*, 5 CAL. J. HEALTH PROMOTION 58, 61–63 (2007).

136. *See UPI's Benjamin Honored for Military Reporting*, UPI.COM, Feb. 4, 2004, http://www.upi.com/Business_News/Security-Industry/2004/02/04/UPIs-Benjamin-honored-for-Army-reporting/29781075950000/.

137. Of course, the significantly greater number of non-fatal casualties may compensate for the lower visibility of any one non-fatal casualty. Moreover, wounded soldiers have the ability to directly engage in the political process. These countervailing forces suggest an alternate hypothesis that non-fatal casualties may have just as significant if not even more so political ramifications as fatal casualties. We test between these competing hypotheses in the analyses that follow.

138. In the only other analysis of the electoral effects of non-fatal casualties on electoral outcomes, Karol and Miguel find modest evidence ($p < .10$) that a state's wounded in action rate depressed support for President George W. Bush in 2004 after controlling for the killed in action casualty rate. Karol & Miguel, *supra* note 128, at 633. However, the relationship between KIA rates and Bush's electoral fortunes was statistically stronger. *Id.*

that non-fatal casualties also fail to encourage voters to punish the incumbents for costly military policies at the ballot box in many other conflict environments. If voters punished pro-war incumbents for fatal and non-fatal casualties to the same degree, the democratic constraint on costly military policies would be considerably stronger.

D. Non-fatal Casualties and Public Support for the War in Afghanistan

To further assess the relative influence of information about fatal and non-fatal casualties on public support for war we employed a survey experimental approach.[139]

Subjects were randomly assigned to one of five experimental groups. In the first treatment group, we told subjects that 2,312 American service members had been killed to date in Afghanistan. In treatments two and three, we instead told subjects the number of non-fatal casualties sustained in Afghanistan. In the second treatment we informed subjects that 17,674 Americans had been wounded in action. The third treatment was identical to the second; however, this treatment reported a much larger figure, 217,674, which represents the estimated non-fatal casualty count when expanding the definition to include non-physical wounds, such as PTSD and other brain injuries, the estimated numbers are orders of magnitude higher. The fourth treatment also used the larger figure of non-fatal casualties, but it informed subjects that of these 17,674 were physical wounds while the rest were "invisible" wounds of war, such as depression and PTSD. Our final treatment was identical to the fourth, but it also informed subjects of the number of fatal casualties sustained in Afghanistan. Complete wording for each treatment is provided in the Appendix.

From March 1 to March 3, 2014, we recruited an online convenience sample of 337 subjects. Demographics, and additional details on the experimental method are reported in the Appendix.

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139. Because fatal and non-fatal casualty rates are highly correlated, it is difficult to assess their relative influence on public opinion by examining aggregate time series opinion data alone. In an experimental approach, we can directly manipulate the information that subjects receive about casualties sustained in a conflict and examine how support for war varies across informational cues.

After reading a screen with some basic background information concerning the study, subjects were randomly assigned to one of the five treatment groups described above. All subjects were then asked the same question taken from previously published polls conducted by *NBC News/The Wall Street Journal*: "Do you think the war in Afghanistan against the Taliban and Al Qaeda has been very successful, somewhat successful, somewhat unsuccessful, or very unsuccessful?"

Because subjects were randomly assigned to one of the treatment groups, the resulting differences in means across treatments are unbiased. Figure 5 presents the percentage of respondents answering that the Afghan War has been very or somewhat successful across the five treatment groups.[140]

Consistent with the hypothesis that non-fatal casualties may not have the same resonance with the American public as fatal casualties, we observe a large and statistically significant ($p = .05$) difference in war support between the KIA and WIA treatments. Whereas only 44% of respondents who were only told of the 2,312 deaths judged the war very or somewhat successful, that number increased to 59% among the group told that 17,674 American soldiers had been wounded.[141] A difference this large is very unlikely to have emerged by random chance alone. Instead, the data strongly suggests that information about fatal casualties sustained in war can significantly lower support more than information about non-fatal casualties, even when the latter total is many times larger than the former.

Subjects in our third treatment group were told about the 200,000+ Americans wounded in war, physically or otherwise. In this treatment, we provided no additional context, but simply reported the estimated total of 217,674 wounded Americans. De-

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140. The control group baseline is omitted here for ease of presentation. The mean in this control (50%) lies between that in the KIA and WIA treatments.

141. For comparative reference, the last time that the NBC/Wall Street Journal asked this question in January 12–15, 2013, fifty-five percent of Americans said that the war was either very or somewhat successful. *See* Mark Murray, *NBC/WSJ Poll: Public Lowers Expectations Heading into Obama's 2nd Term*, NBC NEWS (Jan. 17, 2013 3:30 PM), http://firstread.nbcnews.com/_news/2013/01/17/16570498-nbcwsj-poll-public-lowers-expectations-heading-into-obamas-2nd-term (citing polling data).

spite the staggeringly high total, the percentage of respondents in this treatment who judged the war a success was virtually identical to that in the WIA treatment, 58% versus 59%. Moreover, this figure is also significantly higher than that observed in the KIA treatment. It is striking that even when the number of non-fatal casualties reported is orders of magnitude larger, we find that public opinion is more opposed to the war when fatal casualties are discussed.

Our fourth treatment allows us to examine whether providing additional context for the much larger estimated figure of 217,674 American soldiers wounded in Afghanistan influences public support for the war. Subjects in this treatment were informed that only 17,674 of these non-fatal casualties involved physical wounds; the remainder suffered more "invisible" wounds, such as PTSD. The additional information had no effect on evaluations of the war, with virtually the same percentage judging the Afghan War a success as in the previous two non-fatal casualties treatments.

Finally, our fifth treatment was identical to the fourth, but it also informed subjects of the number of American soldiers who had died to date in Afghanistan. As shown in the final bar of Figure 5, the small additional prompt about the number of fatal casualties significantly decreased support for the war in Afghanistan with only 44% in this treatment judging the war a success. This difference in means across treatments four and five is statistically significant ($p < .10$). Finally, we can compare treatment five with our initial KIA treatment. Both informed subjects of the number of American soldiers who had died in the war; however, the final treatment added information about the very large number of non-fatal casualties the war has also produced. Did learning about non-fatal casualties further depress evaluations of the Afghan War? Our data suggests that it did not. The percentage judging the war a success was exactly the same in our first (KIA only) and last (KIA plus non-fatal casualty information) treatments. The differences in means presented in Figure 5 are supported by more robust ordered logit analyses reported in the Appendix.

The data tell a compelling story. They plainly suggest that the true driver of popular assessments of the Afghan War was information on *fatal* casualties; information about the much larger numbers of non-fatal casualties failed to lower popular beliefs about the war's success.

This has immediate and tangible ramifications for politics and policy. To an extent unparalleled in American history, the wars in Iraq and Afghanistan have produced many more non-fatal than fatal casualties. And yet, non-fatal casualties fail to rally public sentiment against costly wars to the same extent as fatal casualties. This invisibility allows policymakers to wage war relatively free from the traditional democratic constraints on their actions.

Figure 5: Beliefs about Afghan War's Success by Experimental Treatment

% Believing War a Success
60%
50%
40%
30%
20%
10%
0%
44%
59%
58%
57%
44%
KIA
WIA
Total wounded
Total wounded + note
KIA + total wounded + note

What to Notice in Figure 5: The experimental data presented in Figure 5 illustrate that evaluations of the War in Afghanistan are most affected by fatal, and not non-fatal casualties, suggesting that the wounded in action remain more politically invisible. The mean in each of the three wounded casualty information treatments is significantly higher than in either of the two treatments reporting fatal casualty information, $p < .10$.

VI. DISCUSSION

We have shown to this point that there are indeed Two Americas with respect to military sacrifice; however, this reality is not routinely acknowledged. Moreover, we have shown that non-fatal casualties are rising vis-à-vis fatal casualties, yet those non-fatal casualties do not register politically in the same way.

In this final Part we discuss the implications of these findings. Why don't scholars and policymakers acknowledge this invisible inequality? Do current law and policy adequately account for the challenges posed by inequality in military sacrifice? Is there a legal avenue for reform? If not, what type of intervention is warranted? We consider in turn:

(A) Why the inequality of military service remains invisible;

(B) Why the inequality is worth addressing;

(C) Why current legislative attempts to improve care for veterans are not sufficient to address the inequality;

(D) Why courts are unlikely to intervene; and

(E) What would happen *if* the American public learned of the inequality?

A. Why Don't We Want To Talk About the Inequality of Military Service?

It is not always easy to talk about class and military sacrifice in America.[142] But why? What explains the invisibility of inequality in military sacrifice in policy debates? To explore this question, we replicated the analysis reported in Part II on subjects recruited to take an online survey.[143]

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142. This has been noted in the context of military inequality. GLASSER, *supra* note 21, at 128 ("Social and economic class in America has never been a comfortable thing to talk about in private, much less to discuss in public."). Bunting observed that there is a "national uneasiness about the profoundly unequal sharing of the military burden in the early years of the twenty-first century." Bunting, *supra* note 24. He also wrote, "The issue of military conscription is deeply controversial, of course; and it is one of a family of public policy questions, recurrent and vexed, upon whose difficulties people advance, make nervous reconnaissances, and then withdraw, unwilling to engage them fully." *Id.*

143. From February 14–15, 2015, we recruited 314 subjects via Mechanical Turk to take an online survey on which we asked whether they believed there was a casualty gap. Additional details are provided in the Appendix.

We asked an internet convenience sample of 314 Americans: "Thinking about the American soldiers who have died fighting in Iraq and Afghanistan, what parts of the United States do you think they are coming from?" As in the survey described above, respondents had three choices: (i) More casualties are coming from poorer, less educated parts of the country; (ii) More casualties are coming from richer, more educated parts of the country; or (iii) There is not a significant difference in the share of casualties coming from rich/high education and poor/low education parts of the country.

But this time, we added another layer to our analysis by asking these same respondents to answer the question, "What do you think is the primary reason that motivates young men and women to join the United States Armed Forces?" Subjects were able to type in a response, and we then coded the responses into three variables: whether the respondent cited only patriotic motivations; only economic motivations; or a mix of the two. Twenty-five percent of respondents listed only patriotic motivations. Fifty-three percent of the respondents listed only socioeconomic motivations.

Differential beliefs in motivations for enlisting were correlated with being mistaken about inequality. People who believe in shared sacrifice also tend to believe that individuals join the military for purely patriotic, rather than economic, reasons. Whereas 65% of respondents who believe in a casualty gap cited socioeconomics as the only main motivation for enlisting, only 30% of those who rejected the existence of a casualty gap did so.[144]

The survey data suggests to us that part of the refusal to face up to inequality in military sacrifice is due to the belief that the unequal results are solely the result of freely-made individual choices.

The allure of choice is well documented in decades of research by social psychologists. Much of this work has built on Melvin Lerner's (1980) "just world" hypothesis that humans prefer to believe that individual choice, rather than the surrounding situation, is responsible for outcomes. The phenomenon is at work in law, and has been well documented by legal scholars such as Jon

144. This difference is statistically significant, $p < .001$.

Hanson and colleagues.[145] There is, in particular, a large body of literature in psychology discussing how the desire to believe that one is living in a just world can affect attitudes toward inequality and redistributive policies.[146]

For instance, experimental data show that we prefer to point to a rape victim's "poor choices" to explain the victim's assault, and like to give ourselves credit for individual hard work instead of fully appreciating the situational context.[147] The conclusion from this large body of research is clear: our situations determine our actions more than we would like to admit. The world is not "just," but we go to great lengths to make it so in our heads.

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145. *See* Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L. J. 1 (2004); Jon Hanson & Adam Benforado, *The Costs of Dispositionism: The Premature Demise of Situationist Law and Economics*, 64 MD. L. REV. 24 (2005); Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1106 (2004); Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 132 (2003); Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying Racial Oppression in America*, 41 HARV. C.R.-C.L. L. REV. 413 (2006).

146. Lauren D. Appelbaum, Mary Clare Lennon & J. Lawrence Aber, *When Effort Is Threatening: The Influence of the Belief in a Just World on Americans' Attitudes Toward Antipoverty Policy*, 27 POL. PSYCHOL. 387, 390 (2006). *See generally* MELVIN J. LERNER, THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION (1980); RESPONSES TO VICTIMIZATIONS AND BELIEF IN A JUST WORLD (Leo Montada & Melvin J. Lerner eds., 1998); Roland Bénabou & Jean Tirole, *Belief in a Just World and Redistributive Politics*, 121 Q. J. ECON. 699 (2006). These attitudes, of course, are not held uniformly by Americans and vary according to how the issue is framed or worded. Christopher Faricy & Christopher Ellis, *Public Attitudes Toward Social Spending in the United States: The Differences Between Direct Spending And Tax Expenditures*, 36 POL. BEHAV. 53, 58 (2014) ("[T]he way a social program is presented and framed to the public will have a substantial impact on citizens' support for it"); *see also* Max Rose & Frank R. Baumgartner, *Framing the Poor: Media Coverage and U.S. Poverty Policy, 1960–2008*, 41 POL'Y STUD. J. 22 (2013); Gregory A. Huber & Celia Paris, *Assessing the Programmatic Equivalence Assumption in Question Wording Experiments Understanding Why Americans Like Assistance to the Poor More Than Welfare*, 77 PUB. OP. Q. 385 (2013).

147. Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 COLUM. J. GENDER & L. 1, 1–2 (2011).

Reframing issues to downplay fundamental tensions is common in the realm of inequality in military service. In their book *Tragic Choices*, former Dean of Yale Law School and now Federal Judge Guido Calabresi, with law professor Philip Bobbit, addressed the issue head on. Recognizing that military manpower policies are not givens, but are the result of political choices, Calabresi and Bobbit observe that "[b]y making the result seem necessary, unavoidable, rather than chosen, it attempts to convert what is tragically chosen into what is merely a fatal misfortune."[148]

Like Calabresi and Bobbit, we believe that "[h]onesty is the most influential brace in the tragic equilibrium."[149] As the authors argue, "[t]he failure to make society aware of its implicit choices will diminish, with each averting of the eyes, the values of openness and honesty."[150]

The empirical reality is that the "choice" to join the military is contingent on a number of factors. To be sure, many who serve cite non-economic reasons, chief amongst them patriotic duty.[151] Some acknowledge that the economic benefits are also a factor.[152] Others point out that they didn't join for the money at all.[153] Some look to the military after deciding their lives are not what they want them to be.[154] They cite discipline, structure, and honor as

148. GUIDO CALABRESI & PHILLIP BOBBITT, TRAGIC CHOICES 21 (1978).

149. *See id.* at 26.

150. *Id.* at 48.

151. *See* Adam Silow, *Why They Chose the Military*, THE PRESS DEMOCRAT: TEEN LIFE (Aug. 29, 2012), http://teenlife.blogs.pressdemocrat.com/12004/why-they-chose-the-military/ (quoting many teens in a high school recruiting program as joining for patriotic reasons).

152. *See* Stacy Bare, *Why I Joined the Army*, HUFFPOST (Jan. 30, 2012), http://www.huffingtonpost.com/stacy-bare/army-experience_b_1240598.html (acknowledging that he received a free college education).

153. Matt, Comment to *Why Did You Join?*, RANGERUP (Aug. 18, 2010, 11:01 AM), http://rhinoden.rangerup.com/why-did-you-join/; Jeremy Leo, Comment to *Why Young People Join the Military*, WORDPRESS (Mar. 16, 2010, 9:49 PM), http://counterrecruiter.wordpress.com/2007/08/03/why-young-people-join-the-military/#comment-5688 ("[T]oo many young kids are joining the military of late just for money and all the wrong reasons.").

154. *See, e.g.*, *The Girls Guide to the AIR FORCE: The Reasons Why We Join*, HUBPAGES (Mar. 28, 2012), http://hotpinkcombtboots.hubpages.com/hub/the-girls-guide-to-surviving-air-force-basic-military-training-the-embracing-the-military-lifestyle.

important reasons they join.[155] Some join because they think it is their moral responsibility.[156] Others join to support or give back to the country.[157] Many cite the desire to protect loved ones.[158] Those who currently serve may cite the attack of September 11th as an inspiration.[159] Many join because of family members who have done the same.[160]

In sum, the reasons for military service are plentiful and diverse. It is clear that many serve for non-economic reasons; it is equally clear that many decide in part based on economic considerations.[161]

Despite these complexities about whether the choice to serve is truly a voluntary one, government officials have regularly invoked the voluntary nature of today's military. Former Defense Secretary Donald Rumsfeld offered an illustrative response in 2003. When asked about the possibility of a draft, Secretary

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155. Victoria Swingler, Comment to *Why We Joined,* NAVYGIRL.ORG (May 31, 2006), http://www.navygirl.org/whywejoined.htm (Responders Yatsu, Mace, and Gonzalez also expressed this sentiment); Steve Sybert, Comment to *Why Did You Join?*, *supra* note 153 (saying he needed direction and didn't have work ethic).

156. Mark Daily, *Why I Joined*, L.A. TIMES http://www.latimes.com/local/la-me-daily16feb16_essay-htmlstory.html (saying he joined because he thought it was the duty of a humanist; killed in explosion in Iraq).

157. Drew Z., Comment to *Why Did You Join?*, *supra* note 153 (giving a sentiment similar to responder Clifford Fargason, among others).

158. Rye MacCallan, Comment to *Why Did You Join?*, *supra* note 153.

159. Alex Kingsbury, *The Pros and Cons of Military Service*, USNEWS.COM (Oct. 21, 2010, 9:12 AM), http://www.usnews.com/news/articles/2010/10/21/the-pros-and-cons-of-military-service?page=3 (citing an increase in a public service incentive since 9/11); twenty-two other responders on message threads mentioned 9/11. *See Why We Joined*, *supra* note 155; *Why Did You Join?*, *supra* note 153.

160. Thirty-seven separate commenters and sources mention following in a family tradition or being inspired by a family member. *See Why Did You Join?*, *supra* note 153.

161. As political theorist Michael Sandel has pointed out, "[t]he term 'volunteer' is something of a misnomer. Soldiers do not volunteer in the way that people volunteer to work in the local soup kitchen on Thanksgiving – that is, to serve without pay. The volunteer army is a professional army, in which soldiers work for pay." MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS, THE TANNER LECTURES ON HUMAN VALUES 110 (1998), http://tannerlectures.utah.edu/_documents/a-to-z/s/sandel00.pdf.

Rumsfeld replied, "We have people serving today – God bless 'em – because they volunteered. They want to be doing what it is they're doing. . . . Today . . . every single person there is there because they stuck their hand up, said "I'd like to do that."[162] Reactions such as Rumsfeld's prevent an honest accounting of the issue of military sacrifice and economic inequality.

B. Should We Care About Inequality in Military Sacrifice?

For some, the Two Americas of military sacrifice are neither surprising nor cause for concern. Consider, for the purposes of comparison, inequality and another American institution, McDonald's. It would not be surprising to learn that those working on the front lines of McDonald's are disproportionately from lower-income neighborhoods.[163] Nor would it be shocking to find that those in upper management at McDonalds are more likely to have had better educational opportunities. These market forces—that put low-education, low-skilled workers on the fry griddles and high-education, high-skilled managers into upper level corporate offices—is what shareholders want because it maximizes efficiency of operations. Not only are we less inclined to see a moral problem with McDonald's operations, an argument can be made that McDonald's provides its entry-level workers with important opportunities for career advancement that they would not obtain otherwise. If this market logic holds in the military service context as well, then Americans should expect a casualty gap, and the gap should not affect their support for war efforts.

Indeed, many have pointed out that positive benefits can flow from the military's reaching out to individuals of lower socio-

162. *Pentagon Briefing*, TRANSCRIPTS, CNN.COM (Jan. 7, 2003, 11:02), http://transcripts.cnn.com/TRANSCRIPTS/0301/07/se.02.html.

163. This is generally the case in the fast-food industry. *See* SYLVIA ALLEGRETTO ET AL., FAST FOOD, POVERTY WAGES: THE PUBLIC COST OF LOW-WAGE JOBS IN THE FAST-FOOD INDUSTRY 6 (2013), http://laborcenter.berkeley.edu/pdf/2013/fast_food_poverty_wages.pdf; KATHERINE S. NEWMAN, NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY 4–7 (1999); Orley Ashenfelter & Stepan Jurajda, *Cross-country Comparisons of Wage Rates: The Big Mac Index* 8–10, 12–14 (Oct. 2001), http://crei.cat/conferences/Unemployment_in_Transition_Economies_Developments,_Challenges_and_Lessons_from_the_EU_and_the_US_/activities/sc_conferences/12/ashenfe.pdf.

economic status.[164] Military service can be an important mechanism for improving economic attainment. Sociologists Pamela Bennett and Katrina Bell McDonald have reviewed the evidence and conclude that, at least for some, the military can be a "turning point" for disadvantaged youth.[165] In terms of Black social mobility, Colin Powell says, "let the rest of American society open its doors to African Americans and give them the opportunities they now enjoy in the armed forces."[166] There may be society-wide benefits too, if one agrees with Judge Richard Posner's argument that "the true consequence of the demographics of the armed forces—a consequence that communitarians should applaud—is that the nation's admiration for these scions of the lower middle class helps to bind the different income classes together."[167]

While we don't doubt the value of social mobility provided to some soldiers in the military, we take the view that the U.S. Armed Forces is not just another employer. As our data discussed earlier showed, this assessment is shared by many if not most Americans. This view starts with Defense Department Form 4, the form an American soldier signs when they enlist or re-enlist in the armed forces. On the second page of the form, individuals are instructed: "My enlistment/reenlistment agreement *is more than an employment agreement*."[168] The language of the form codifies what our civics class teaches us: military service is more than just a job. It is service to the nation that may place one in harm's way.[169]

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164. *See* Alair MacLean & Glen H. Elder Jr., *Military Service in the Life Course*, 33 SOCIOLOGY 175, 184–85 (2007); Robert J. Sampson & John H. Laub, *Socioeconomic Achievement in the Life Course of Disadvantaged Men: Military Service as a Turning Point, Circa 1940-1965.* 61 AM. SOC. REV. 347, 347 (1996), http://scholar.harvard.edu/sampson/files/1996_asr_laub.pdf.

165. Pamela R. Bennett & Katrina Bell McDonald, *Military Service as a Pathway to Early Socioeconomic Achievement for Disadvantaged Groups*, *in* LIFE-COURSE PERSPECTIVES ON MILITARY SERVICE, *supra* note 18, at 120.

166. COLIN POWELL & JOSEPH E. PERSICO, MY AMERICAN JOURNEY 501 (1995).

167. Richard A. Posner, *An Army of the Willing*, THE NEW REPUBLIC (May 18, 2003), http://www.newrepublic.com/article/army-the-willing.

168. ARMED FORCES OF THE U.S. DEF. TECH. INFO. CTR., FORM DD 4 2 (Oct. 2007), http://www.dtic.mil/whs/directives/forms/eforms/dd0004.pdf.

169. As Robert Osgood has observed,

> [T]he nation's ability to sustain a defense program is not only a matter of the gross national product, per capita income, and

When he took office on January 20, 2009, President Barack Obama concluded his inaugural speech by recalling the words of Thomas Paine: "Let it be told to the future world . . . that in the depth of winter, when nothing but hope and virtue could survive . . . that the city and the country, alarmed at one common danger, came forth to meet [it]."[170] What President Obama didn't quote were the sentences immediately before and after this passage. If he had, he would have also told the nation:

> I call not upon a few, but upon all: not on this state or that state, but on every state . . . It matters not where you live, or what rank of life you hold, the evil or the blessing will reach you all. The far and the near, the home counties and the back, the rich and the poor, will suffer or rejoice alike.[171]

> the other objective criteria of economic strength but, just as much, a reflection of what the citizenry, its political representatives, and government officials are willing to sacrifice in terms of competing values for the sake of a particular national strategy.

ROBERT OSGOOD, LIMITED WAR: THE CHALLENGE TO AMERICAN STRATEGY 275 (1957).

170. Barack Obama Inaugural Address (Jan. 20, 2009) (alteration in original), http://www.whitehouse.gov/blog/inaugural-address/.

171. The quote is from Thomas Paine's *Common Sense, The Crisis*. It appeared in the *Philadelphia Journal* in December 1776, and George Washington had it read to his troops at Valley Forge to boost their morale. The full quote reads:

> Quitting this class of men, I turn with the warm ardor of a friend to those who have nobly stood, and are yet determined to stand the matter out: I call not upon a few, but upon all: not on this state or that state, but on every state: up and help us; lay your shoulders to the wheel; better have too much force than too little, when so great an object is at stake. Let it be told to the future world, that in the depth of winter, when nothing but hope and virtue could survive, that the city and the country, alarmed at one common danger, came forth to meet and to repulse it. Say not that thousands are gone, turn out your tens of thousands; throw not the burden of the day upon Providence, but "show your faith by your works," that God may bless you. It matters not where you live, or what rank of life you hold, the evil or the blessing will reach you all. The

In our view, inequality in military service runs counter to the American ethos of shared sacrifice.[172] That said, we do not advocate for a return to the draft.[173] What we should do, however, is recognize inequality as another cost of war—a cost that should be addressed through even better resources for wounded veterans and for the families of the fallen.

We agree with Matthew Ivey, who writes:

> Any moral society would demand that the basic needs of veterans be met in exchange for the sacrifices that their country has asked of them. Supporting our troops and our veterans must go beyond bumper stickers and political bluster. The true measure of our society will be defined by how we treat our returning veterans.[174]

> far and the near, the home counties and the back, the rich and the poor, will suffer or rejoice alike. The heart that feels not now is dead; the blood of his children will curse his cowardice, who shrinks back at a time when a little might have saved the whole, and made them happy. I love the man that can smile in trouble, that can gather strength from distress, and grow brave by reflection. 'Tis the business of little minds to shrink; but he whose heart is firm, and whose conscience approves his conduct, will pursue his principles unto death.

THOMAS PAINE, THE CRISIS (1776), http://www.ushistory.org/paine/crisis/c-01.htm.

172. We agree with law professor Florence Wagman Roisman, who, writing in the context of veterans homelessness, concludes that our current system "is hardly a model of gratitude for the wealthiest, most powerful nation on earth; it can and should be corrected." Florence Wagman Roisman, *National Ingratitude: The Egregious Deficiencies of the United States' Housing Programs for Veterans and the "Public Scandal" of Veterans' Homelessness*, 38 IND. L. REV. 103, 176 (2005).

173. We agree with Ivey: "Going forward, it is important to acknowledge the inefficiency and possible immorality of the draft. It is equally important to acknowledge that the last decade of U.S. military involvement overseas has expressed immorality and inefficiency in the all-volunteer force." Ivey, *supra* note 27, at 561.

174. *Id.*

And we believe that a step in that direction involves an honest assessment of inequalities in who has made these sacrifices.[175]

C. Are Veterans Already Receiving the Care They Need?

Our concerns about inequality would be significantly mitigated if veterans—rich and poor alike—received compensatory resources in recognition of their sacrifice. But, as many commentators have pointed out, today's health care for veterans remains sub-par.

The VA has, almost since its inception, been criticized.[176] In 2013 a scholar summarized the sentiment in this way: "Most

175. Although we find them, at least at present, to be a political non-starter, we encourage efforts to expand national service. Ivey, for instance, has suggested that we might make national service a prerequisite for some benefits (such as serving in certain civilian leadership positions). *Id.* Military sociologist Charles Moskos also proposed a national service solution. *See generally* CHARLES C. MOSKOS, A CALL TO CIVIC SERVICE (1988). National service, however, has not gained traction in Congress. *See* Congressional Commission on Civic Service Act, H.R. 1444, 111th Cong. (2009). Perhaps this will change in the future due to the advocacy of groups such as Service Nation. SERVICE NATION, http://www.servicenation.org/ (last visited Mar. 15, 2016).

176. Historically there are many instances of the country's failure to adequately provide health care for returning soldiers. In the wake of World War I, for instance, the federal Veteran's Bureau was created amidst "widespread frustration among veterans and veterans' groups, legislators, and the popular press with problems ranging from excessive red tape and the slow processing of claims to an appalling lack of services and unfair determination of eligibility." Rosemary A. Stevens, *The Invention, Stumbling, and Reinvention of the Modern U.S. Veterans Health Care System, 1918-1924*, *in* VETERANS' POLICIES, VETERANS' POLITICS: NEW PERSPECTIVES ON VETERANS IN THE MODERN UNITED STATES 38 (Stephen R. Ortiz ed., 2012); *see also* ROBERT KLEIN, WOUNDED MEN, BROKEN PROMISES 22 (1981) ("Disgust with the VA is nationwide, and its expression is often visceral."). As one World War I quip went:

> God and the military veteran we adore …
> In times of danger, not before;
> The Danger pass'd and all things righted
> God is forgotten and the veteran slighted.

KLEIN, *supra*, at 20; *see also* Lawrence Ingraham & Frederick Manning, *American Military Psychiatry*, *in* MILITARY PSYCHIATRY: A COMPARATIVE PERSPECTIVE 25 (Richard A. Gabriel ed., 1986) ("American attempts to understand and respond to battle stress casualties have ranged from the positively brilliant to the positively pathetic.").

agree that the system has vastly improved in recent years, but it remains for many a challenging bureaucratic maze whose efficiency depends on the responsiveness and attentiveness of individuals who are often overwhelmed."[177]

To be sure, the Veterans Administration has taken many positive steps toward improving care. For instance, the VA's Health Services Research and Development Service ("HSR&D") has funded Centers of Excellence and Centers of Innovation.[178] Treatment of schizophrenia has advanced in the VA system in parallel with relevant advances in the understanding of and treatments for schizophrenia.[179] The military also provides a large number of support services designed to help veterans reintegrate into the workforce.[180] Yet much work remains to be done.[181]

The administration of veterans' disability claims continues to be a contested space. Historically, there was great concern with fraud. During the United States Civil War "all symptoms or claimed disabilities that were not accompanied by verifiable physical injury were considered malingering unless proven otherwise."[182] And, to be sure, there remain valid concerns today about

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177. Lawrence, *supra* note 109, at 142.

178. *Health Services Research and Development*, VA HSR&D CENTERS, http://www.hsrd.research.va.gov/centers/ (last visited Mar. 15, 2016). At least one commentator suggests that investments such as these will "generate innovative programs of healthcare that will provide a leading direction for healthcare in the United States for the twenty-first century." Thomas W. Miller, *Centers of Excellence in the Department of Veterans Affairs*, *in* THE PRAEGER HANDBOOK OF VETERANS' HEALTH, *supra* note 11, at 20.

179. Daniel N. Allen & Gerald Goldstein, *Schizophrenia Spectrum and Other Psychotic Disorders*, *in* PSYCHOLOGICAL ASSESSMENT OF VETERANS, *supra* note 76, at 233.

180. Nathan D. Ainspan, *Finding Employment as a Veteran With a Disability*, *in* RETURNING WARS' WOUNDED, INJURED, AND ILL, *supra* note 75, at 106–09.

181. *See, e.g.*, Patricia E. Roberts, *Post-9/11 Veterans: Welcoming Them Home As Colleagues and Clients*, 45 U. MEM. L. REV. 771 (2015); Jayme M. Cassidy, *Suddenly Discharged the Combat Continues: Eliminating the Legal Services Gap to Ensure Veterans' Success After Leaving Military Service*, 45 U. MEM. L. REV. 837 (2015).

182. Shane S. Bush, *Assessment of Symptom and Performance Validity in Veterans*, *in* PSYCHOLOGICAL ASSESSMENT OF VETERANS, *supra* note 76, at 436.

malingering amongst veterans.[183] But to its credit, the VA now uses a "benefit of the doubt" approach when assessing veterans' disability claims.[184] When experts are unsure about the presence of a disability, the scales should tip in the veteran's favor.

Yet despite improvements, today's VA is still underperforming. As recently as July 21, 2015, President Obama announced that he was "still not satisfied" with the VA.[185] There is a great backlog for veterans seeking services.[186] Of particular concern for the argument of this Article is the VA's treatment for brain injuries. Even when receiving treatment, a large percentage of veterans report being unsatisfied.[187]

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183. *Id.* at 437; Thomas Freeman, Melissa Powell & Tim Kimbrell, *Measuring Symptom Exaggeration In Veterans With Chronic Posttraumatic Stress Disorder*, 158 PSYCHIATRY RESOL. 374, 376 (2008).

184. A unique standard of proof applies in decisions on claims for veterans benefits. Unlike other claimants and litigants, pursuant to 38 U.S.C. § 3007(b), a veteran is entitled to the "benefit of the doubt" when there is an "approximate balance of positive and negative evidence." *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (Vet. App. 1990); *see also* Rory E. Riley, *The Importance of Preserving the Pro-Claimant Policy Underlying the Veterans' Benefits Scheme: A Comparative Analysis of the Administrative Structure of the Department of Veterans Affairs Disability Benefits System*, 2 VETERANS L. REV. 77, 115 (2010).

185. Press Release, Office of the Press Sec'y, *Remarks by the President to the VFW National Convention*, THE WHITE HOUSE (July 21, 2015), https://www.whitehouse.gov/the-press-office/2015/07/21/remarks-president-vfw-national-convention.

186. DAVID GODFREY, VETERANS APPEALS GUIDEBOOK: REPRESENTING VETERANS IN THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS 41 (Ronald L. Smith ed., 2013) ("The Department of Veterans Affairs receives about 900,000 claims for benefits each year and has a current backlog of about 600,000 claims.").

187. *VA Mental Health Care: Hearing on Access to VA's Mental Health Care Before the H. Comm. on Veterans Affairs*, 113th Cong. (July 10, 2014) (statement of Warren Goldstein, Assistant Director for TBI and PTSD Programs, National Veteran Affairs and Rehabilitation Commission The American Legion) ("Two troubling numbers stood out in a recent survey conducted by The American Legion to evaluate the effectiveness of treatments provided by VA when treating veterans suffering from Posttraumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI)—fifty-nine percent and thirty percent. Fifty-nine percent of veterans surveyed reported 'no improvement' or that they were 'feeling worse' after having undergone TBI and PTSD treatment. Nearly a third of veterans, 30 percent, stated they had terminated their treatment plan before it reached conclusion.").

Law professor Olympia Duhart is one of many who have argued that "the entire Veterans Affairs ("VA") regulatory scheme reflects an outmoded cultural refusal to acknowledge the mental and emotional strains of war."[188] Looking at the history of veterans' health care in the Bush and Clinton administrations, a different set of commentators observed that "[m]ental and behavioral healthcare was seen as fundamentally separate from physical healthcare."[189] As one of us (Shen) has argued elsewhere, the material dualism distinction between "physical" and "mental" is problematic in light of neuroscientific insights that all mental life is instantiated in the physical brain.[190]

Recognizing the neurobiological underpinnings of mental life would likely lead to more resources for the treatment of mental injuries. This is in part because it would lead to a change in how the military conceptualizes "wounded in action."

The official Department of Defense definition of "Wounded in Action" reads this way:

> A casualty category applicable to a hostile casualty, other than the victim of a terrorist activity, who has incurred an injury due to an external agent or cause. The term encompasses all kinds of wounds and other injuries incurred in action, whether there is a piercing of the body, as in a penetration or perforated wound, or none, as in the contused wound. These include fractures, burns, blast concussions, all effects of biological and chemical warfare agents, and the effects of an exposure to ionizing

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188. Olympia Duhart, *Soldier Suicides and Outcrit Jurisprudence: An Anti-Subordination Analysis*, 44 CREIGHTON L. REV. 883, 900 (2011). Duhart has similarly criticized the failure of the military to allow the Purple Heart to be awarded to those whose only injury is PTSD. *Id.* at 902 ("[T]he government's stance on the debate makes clear that in its assessment, PTSD struggles earned in battle do not merit recognition generally associated with sacrifice and valor.").

189. Patrick H. Deleon & Paul C. Lewis, *Foreword*, *in* PSYCHOLOGICAL ASSESSMENT OF VETERAN, *supra* note 76, at xii.

190. *See* Francis X. Shen, *Sentencing Enhancement and the Crime Victim's Brain*, 46 LOY. U. CHI. L.J. 405, 406–07 (2014); Francis X. Shen, *Mind, Body, and the Criminal Law*, 97 MINN. L. REV. 2036 (2013).

> radiation or any other destructive weapon or agent. The hostile casualty's status may be categorized as SI ["seriously ill or injured"], VSI ["very seriously ill or injured"], or NSI ["not seriously injured"].[191]

The WIA category covers many of the injuries soldiers suffer, but the operative phrase "due to an external agent or cause" excludes a number of injuries historically thought to be "internal" or "mental," but which are today readily recognized by many in the neuroscientific community as being a physical injury just as concrete as a broken bone. PTSD is not considered a "brain injury" because a brain injury is considered a disruption in brain function *from an external source*.[192] We think this accounting should change, and returning soldiers who develop Post-Traumatic Stress Disorder should count as "wounded" soldiers.[193]

We recognize that expansion of this sort would require careful consideration of the causal relationship between military service and the mental disorder.[194] The notion of a *service-connected* disability remains at the heart of Veterans Administra-

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191. DEP'T OF DEF., DEPARTMENT OF DEFENSE INSTRUCTION NUMBER 1300.18 37 (2008), http://www.dtic.mil/whs/directives/corres/pdf/130018p.pdf.

192. John D. Otis et al., *The Psychological Assessment of Veterans with Pain and Pain-Related Disorders*, *in* PSYCHOLOGICAL ASSESSMENT OF VETERAN, *supra* note 76, at 393.

193. A related issue came up in 2008 and 2009, when the Department of Defense considered whether soldiers suffering from PTSD should be eligible to receive the Purple Heart. Explaining the DOD's reasoning for answering no, Defense Department spokeswoman Eileen Lainez said, "PTSD is an anxiety disorder caused by witnessing or experiencing a traumatic event; it is not a wound intentionally caused by the enemy from an 'outside force or agent,' but is a secondary effect caused by witnessing or experiencing a traumatic event." Jeff Schogol, *Pentagon: No Purple Heart for PTSD*, STARS AND STRIPES (Jan. 6, 2009), http://www.stripes.com/articleprint.asp?section=104&article=59810. For coverage in the blogosphere, see Ilona Meagher, *Reaction to DoD Decision Against Awarding Purple Heart to Veterans with Combat PTSD*, PTSD COMBAT BLOG (Jan. 11, 2009), http://ptsdcombat.blogspot.com/2009/01/reaction-to-dod-decision-against-purple.html.

194. Shen, *Mind, Body, and the Criminal Law*, *supra* note 190, at 2103 ("Chief amongst the concerns . . . [is] the issue of causation. The evidentiary concern is: how could a court verify, beyond a reasonable doubt, that the victim experienced a mental injury?").

tion disability claims today.[195] To gain disability benefits, the veteran must not only demonstrate evidence of the disability, but evidence that the disability is sufficiently connected to the veteran's military service.[196] Although scientific advances may allow us in the future to make more precise connections between combat exposure and precise brain injuries, at present the causal links between exposure to combat, and in particular explosions, and Traumatic Brain Injury ("TBI") remain uncertain.[197]

Of course, in the future this may change. Today, the assessment of substance use disorders is only beginning to use biomarkers.[198] But some "predict that it won't be long before a substantial amount of testing will be done under a magnet during a functional MRI procedure."[199] To that end, the National Center for PTSD has been actively studying the neurobiology of PTSD, including the use of new psychotherapies.[200]

Aware of the many deficiencies of the VA system, on May 24, 2014, President Obama told the nation in his Memorial Day radio address that "taking care of our veterans and their families is a sacred obligation."[201] We agree. We also agree with Obama's

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195. Jonathan Krisch, *Judge, Jury, and the Gatekeeper: Admitting and Weighing Expert Testimony in Veterans' Claims Adjudication and the Federal Courts*, 4 VETERANS L. REV. 41, 57 (2012) ("Veterans alleging that a current disability is related to their service in the United States Armed Forces may apply to VA for compensation. If their disability was incurred in or aggravated by service ("service-connected"), they are awarded various levels of benefits depending on the severity of their disability.").

196. Nema Milaninia, *The Crisis at Home Following the Crisis Abroad: Health Care Deficiencies for US Veterans of the Iraq and Afghanistan Wars*, 11 DEPAUL J. HEALTH CARE L. 327, 335 (2008) ("The requirement that the injury be 'service connected' is often the basis of legal dispute by veterans in need of expansive medical coverage or pension plans, particularly when the degree of the disability has a significant economic impact.").

197. MILITARY NEUROPSYCHOLOGY (Carrie Kennedy & Jeffrey Moore eds., 2010); Katherine H. Taber et al., *Blast-Related Traumatic Brain Injury: What Is Known?*, 18 J. NEUROPSYCHIATRY 141 (2006).

198. Dephilippis et al., *supra* note 78, at 190–91.

199. Allen & Goldstein, *supra* note 179, at 234.

200. Matthew J. Friedman, *The National Center for PTSD*, *in* 4 THE PRAEGER HANDBOOK OF VETERANS' HEALTH, *supra* note 11, at 107–10.

201. Office of the Press Sec'y, *Weekly Address: Paying Tribute to Our Fallen Heroes this Memorial Day*, THE WHITE HOUSE (May 24, 2014), https://www.whitehouse.gov/the-press-office/2014/05/24/weekly-address-

observation that these veterans have "done their duty," and it is time that "this country does ours – now and for decades to come."[202] Yet for all of the rhetoric, the reality of the Obama Administration's and Congress's treatment of veterans is that it does not acknowledge—anymore than the courts do—the systemic inequality of military sacrifice.

A 2014 scandal at the VA Hospital in Phoenix—in which widespread delays for veterans made headlines—resulted in close scrutiny from Congress and the resignation of U.S. Veterans Affairs Secretary Eric Shinseki.[203] An August 2014 report from the VA Office of Inspector General "identified serious conditions . . . that resulted in delays, some significant, in veterans' access to health care services."[204]

In response, the Veterans Access to Care through Choice, and Accountability, and Transparency Act of 2014 ("the Act") was signed into law on August 7, 2014.[205] The Act provided ten billion dollars to immediately aid veterans who had gone without care[206] as well as five billion dollars for the VA to use for internal improvement.[207] Additionally, the Act contained provisions for authorizing leases on twenty-seven medical facilities,[208] established

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paying-tribute-our-fallen-heroes-memorial-day. The term "sacred obligation" had been used before, e.g. the title of a May 3, 2011 Congressional hearing on veterans affairs was called, "Sacred Obligation: Restoring Veteran Trust and Patient Safety." *Sacred Obligation: Restoring Veteran Trust and Patient Safety*: *Hearing Before the H.R. Comm. on Veterans' Affairs*, 112th Cong. (2011), https://veterans.house.gov/hearing-transcript/sacred-obligation-restoring-veteran-trust-and-patient-safety.

202. Office of the Press Sec'y, *supra* note 201.

203. *Obama Accepts Veterans Affairs Chief Resignation with 'Regret'*, WESTLAW J. MED. MAPRAC., June 5, 2014, at 1 ("U.S. Veterans Affairs Secretary Eric Shinseki resigned May 30 after a political firestorm over widespread delays in veterans' medical care . . . .").

204. VA OFFICE OF INSPECTOR GEN., REVIEW OF ALLEGED PATIENT DEATHS, PATIENT WAIT TIMES, AND SCHEDULING PRACTICES AT THE PHOENIX VA HEALTH CARE SYSTEM 34 (2014), http://www.va.gov/oig/pubs/VAOIG-14-02603-267.pdf.

205. Pub. L. No. 113–146, 128 Stat. 1754 (2014).

206. *Id.* § 802(d).

207. *Id.* § 801(a).

208. *Id.* § 601(a).

new wait time goals,[209] and directly addressed many of the issues perceived to have led to the recent improprieties.[210] Finally, the Act called for accountability through investigations, reports, and third party audits, which promise to plague the VA for the foreseeable future.

There was some recognition in the Act that not all veterans had the same baseline access to health care services. Of particular note is section 38 C.F.R. section 64, which provides grants specifically designed to help extend care to "underserved veterans."[211] Underserved communities are areas that meet one or more of the following criteria:

> (1) Have a high proportion of minority group representation;
>
> (2) Have a high proportion of individuals who have limited access to health care; or
>
> (3) Have no active duty military installation that is reasonably accessible to the community.[212]

Yet these small bits of recognition fail to come close to recognizing the *structural* inequality—that is, the underlying socioeconomic makeup of the wounded warrior population—that pervades the provision of veterans' health care services more generally.

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209. *Id.* § 101(s)(1).

210. *See id.* § 209 (explicitly disallows forgery of data).

211. In addition, in many places throughout the Code it is explicitly stated that special consideration should be given to veterans living in rural areas. *See* 38 U.S.C. § 1720G(b)(5) (West 2015) ("The outreach shall include an emphasis on covered veterans and caregivers . . . living in rural areas."). Also, the Secretary is instructed in section 1703(a) to contract with other facilities to provide care to veterans who may have limited access. *Id.* § 1703(a).

212. 38 C.F.R. § 64.2. Limited access to healthcare, in turn, is defined by the Health Resources and Services Administration of the Department of Health and Human Services. 38 C.F.R. § 64.2; *see* U.S. DEP'T OF HEALTH & HUMAN SERVS.: *Medically Underserved Areas/Populations: Guidelines for MUA and MUP Designation*, HEALTH RES. & SERVS. ADMIN., http://www.hrsa.gov/shortage/mua/index.html (last updated June 1995).

Without addressing these structural issues, it is no wonder that even after passage of the landmark Act, we continue to see headlines such as these (all from calendar year 2015):

- *VA to Iraq War Vet: 'We're not accepting any new patients'* (describing how an Iraq War veteran was turned away from the VA when he requested an appointment to assess possible PSTD)[213]

- *Veterans Affairs Whistle-Blowers Blast New Agency Watchdog* (describing the disappointment of many former VA workers with the new VA Deputy Inspector)[214]

- *Veterans Still Waiting For Care at VA Hospitals* (describing long wait times and poor service for veterans in Arkansas)[215]

A centerpiece of the Act—the "Veterans Choice Card" system—allows veterans who have waited longer than thirty days for an appointment, or who live more than forty miles from a VA facility, to seek care from a third party. This would seem to at least partially address the needs of those with long wait times. Yet without addressing, or even acknowledging, the structural economic inequality, we remain skeptical that the Act will truly change the system.

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213. Patricia Kime, *VA to Iraq War Vet: 'We're Not Accepting Any New Patients,'* USA TODAY (July 1, 2015, 2:53 PM), http://www.usatoday.com/story/news/nation-now/2015/06/30/iraq-war-veteran-veterans-affairs-no-new-patients/29546453/.

214. Donovan Slack, *Veterans Affairs Whistle-Blowers Blast New Agency Watchdog*, USA TODAY (July 30, 2015, 5:51 PM), http://www.usatoday.com/story/news/politics/2015/07/30/veterans-affairs-whistle-blowers-blast-new-agency-watchdog/30890527/.

215. John Boyle & David B. Caruso, *Veterans Still Waiting for Care at VA Hospitals*, CITIZEN-TIMES (April 9, 2015, 9:47 AM), http://www.citizen-times.com/story/news/local/2015/04/09/veterans-still-waiting-care-va-hospitals/25480601/.

D. Are Courts Likely to Intervene?

In the face of inadequate policymaking from the executive and legislative branches, can we expect courts to successfully intervene? While we hesitate to predict too far into the future, recent case law suggests that this is unlikely.

Consider, by way of illustration, the lawsuit by Veterans for Common Sense ("VCS") against the Department of Veterans Affairs seeking injunctive and declaratory relief to remedy extensive delays in the provision of mental health care and disability compensation claims by the VA.[216]

While the district judge found for the VA, a three-judge panel on the Ninth Circuit Court of Appeals found that these delays violated veterans' Constitutional due process rights.[217] The ruling was described at the time as "an enormous legal victory."[218]

The victory, however, was short-lived. Just months later the Ninth Circuit, sitting *en banc*, ruled 10-1 that the court lacked jurisdiction to reprimand the VA in this way.[219] The court concluded that the "complaint sounds a plaintive cry for help, but it has been misdirected to us."[220] Congress was the culprit:

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216. Veterans for Common Sense v. Peake, 563 F. Supp. 2d 1049 (N.D. Cal. 2008), *aff'd in part, rev'd in part and remanded*, 678 F.3d 1013 (9th Cir. 2012).

217. Veterans for Common Sense v. Shinseki, 644 F.3d 845, 850 (9th Cir. 2011) *opinion vacated on reh'g en banc*, 678 F.3d 1013 (9th Cir. 2012) ("Veterans ask us to decide whether these delays violate veterans' due process rights to receive the care and benefits they are guaranteed by statute for harms and injuries sustained while serving our country. We conclude that they do."). Writing for the two-judge majority, Judge Stephen Reinhardt wrote that "The VA's unchecked incompetence has gone on long enough; no more veterans should be compelled to agonize or perish while the government fails to perform its obligations." *Id.* at 851.

218. Paul Sullivan, Executive Director of Veterans for Common Sense, *quoted in* Paul Muschick, *Veterans Deserve Better Treatment*, THE MORNING CALL (May 25, 2011), http://articles.mcall.com/2011-05-25/news/mc-watchdog-veterans-mental-health-be20110525_1_veterans-for-common-sense-ninth-circuit-court-district-court.

219. *Shinseki*, 678 F.3d at 1016, *cert. denied*, 133 S. Ct. 840 (2013) ("As much as we as citizens are concerned with the plight of veterans seeking the prompt provision of the health care and benefits to which they are entitled by law, as judges we may not exceed our jurisdiction.").

220. *Id.* at 1036.

> We would have preferred Congress or the President to have remedied the VA's egregious problems without our intervention when evidence of the Department's harmful shortcomings and its failure to properly address the needs of our veterans first came to light years ago. . . . We willingly acknowledge that, in theory, the political branches of our government are better positioned than are the courts to design the procedures necessary to save veterans' lives and to fulfill our country's obligation to care for those who have protected us. But that is only so if those governmental institutions are willing to do their job.[221]

The *en banc* decision echoed discussion earlier in the case history about separation of powers. Judge Alex Kozinski in dissent below had argued that "[m]uch as the VA's failure to meet the needs of veterans with PTSD might shock and outrage us, we may not step in and boss it around."[222]

The bottom line of *Veterans for Common Sense v. Shinseki*, and thus the bottom line for those hundreds of thousands of veterans awaiting VA responses to their mental health disability claims, is that *Congress* is the cause of the problem, and Congress holds the keys to real reform.

We are thus left with a circle of blame. The Courts blame Congress. Congress blames the VA. And the VA promises it will improve, but with a track record of broken promises. We suggest that this cycle will not be broken until we recognize that rampant economic inequality pervades the system. Inequality in military sacrifice, borne most especially by those who seek medical care upon returning from combat, is not just an administrative problem for Congress or the VA to "fix." It is a deep, systemic problem that requires courts—and us—to act.

But if courts are unlikely to act, then that leaves the academic community and the public as levers for change.

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221. *Shinseki*, 644 F.3d at 850–51.

222. *Id.* at 890–91 ("Congress erected a big 'keep out' sign for us in the Veterans' Judicial Review Act (VJRA) . . . .").

E. Fostering a National Debate on Inequality in Sacrifice

So what can be done? We believe that encouraging a national dialogue on the Two Americas of military sacrifice is both realistic and would be effective in shifting public opinion.

For example, in the first survey experiment detailed in Part IV we found that telling individuals just one additional bit of information about the presence or absence of a casualty gap had a considerable impact on respondents' beliefs of whether the war in Iraq was a mistake. This 6% point increase is of note in its own right; the magnitude of the effect is even more striking when we remember the modest nature of the inequality cue and the amount of information that most Americans already possessed on Iraq with which this new cue had to compete. If a simple cue about casualty inequality can change popular attitudes on a military venture to this extent in the Iraq context, it is quite possible that the acknowledgement of a casualty gap could have even larger effects in other environments in which popular attitudes are more malleable and not so polarized along partisan lines.

Indeed, our second experiment—exploring how information about a casualty gap in previous conflicts affected the public's willingness to use force in a range of future scenarios—showed evidence of much greater effects. In three of our four hypothetical scenarios, receiving the inequality information increased the percentage of Americans willing to sustain fewer than fifty casualties to achieve the stated objective by roughly 10% from the control group baseline.[223]

It is quite possible that an even more thorough accounting of the casualty gap, complete with vivid descriptions of individual soldiers and the effects of their deaths on poor communities could produce an even larger effect. Similarly, while our analyses of election data and follow-up experiment suggest that non-fatal casualties are less influential on public opinion, greater awareness and discussion of the lasting ramifications of non-fatal casualties for socioeconomically disadvantaged communities might heighten their political salience. Greater public awareness of non-fatal casualties and inequality of sacrifice would foster a more nuanced

223. Kriner & Shen, *supra* note 115, at 1183.

accounting of the human costs of war among both citizens and policymakers alike.

VII. CONCLUSION

The substantial empirical evidence amassed in this Article leads to the inescapable conclusion that there is socioeconomic inequality in military sacrifice. Americans wounded in war, as well as those who die, are disproportionately coming from poorer parts of the country. Moreover, wounded soldiers are more likely to return home to fewer community resources, which may negatively affect mental health. Yet courts have failed to recognize this reality, and policymakers have strong incentives to do the same because it reduces criticism of their deploying and keeping combat forces abroad. We have argued in this Article that such ignorance, whether willful or unintentional, is inexcusable in the face of the empirical evidence. Although it is politically convenient to overlook the Two Americas of military sacrifice, continuing to ignore the invisible inequality of America's modern warfare will not make it go away.

APPENDIX

In this Appendix we discuss additional details of various statistical analyses discussed in the main text.

I. DETAILS OF THE PUBLIC OPINION SURVEYS

In the main text, we discuss results from seven original public opinion surveys that we conducted between 2007 and 2015. We used two different types of survey instruments. For three of the surveys we used a truly nationally representative telephone survey, conducted by a professional polling organization. For the remaining four surveys we recruited subjects nationally through Amazon's Mechanical Turk service. In this section we discuss the details of each approach. Summary demographics for each of these samples are provided in Table A1.

Our questions were embedded on three separate CARAVAN omnibus surveys conducted by Opinion Research Corporation. CARAVAN is a twice-weekly telephone survey that employs a random-digit dialing (RDD) methodology to ensure a nationally representative sample of 1,000 adult Americans. Results from the questions embedded on CARAVAN surveys are presented in Part II and Section V.B. of the Article.

In Section V.A., Section V.C., and Section VI.A., we report results from original web-based surveys hosted on the web site Qualtrics. Research using Qualtrics-based experiments has been published in a number of academic fields, suggesting that it meets scholarly expectations for quality online web-based experiments.[224]

All subjects were recruited via modest payments made available through Amazon Mechanical Turk's payment service. No personally identifying information was collected. Studies assessing the quality of Turk subjects have found them to be engaged

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224. Studies relying on Qualtrics experiments include Matthew R. Ginther et al., *The Language of Mens Rea*, 67 VAND. L. REV. 1327 (2014); David L. Schwartz, Christopher B. Seaman, *Standards of Proof in Civil Litigation: An Experiment from Patent Law*, 26 HARV. J.L. & TECH. 429 (2013); and Francis X. Shen, et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306 (2011).

in the online experimental stimuli, and to be significantly more representative than the convenience samples that would otherwise be used.[225]

Samples recruited via Mechanical Turk are particularly well-suited for survey experimental research. Indeed, recent research by political scientist Adam Berinsky and his colleagues demonstrates that replicating experiments on samples recruited in this way yields very similar results to previously published studies with nationally representative samples.[226]

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225. Multiple studies have validated results using Amazon's Mechanical Turk on a variety of assessments, especially when compared to samples of convenience. *See, e.g.*, Tara S. Behrend et al., *The Viability of Crowdsourcing for Survey Research*, 43 BEHAV. RES. METHODS 800 (2011); Michael D. Buhrmester, Tracy Kwang & Samuel D. Gosling, *Amazon's Mechanical Turk: A New Source of Inexpensive, Yet High-Quality, Data?*, 6 PERSP. ON PSYCH. SCI. 3 (2011); Joseph K. Goodman et al., *Data Collection in a Flat World: The Strengths and Weaknesses of Mechanical Turk Samples*, 26 J. BEHAV. DECISION MAKING 213 (2012); Jon Sprouse, *A Validation of Amazon Mechanical Turk for the Collection of Acceptability Judgments in Linguistic Theory,* 43 BEHAV RES. METHODS 155 (2011).

226. Adam J. Berinsky et al., *Evaluating Online Labor Markets for Experimental Research: Amazon.com's Mechanical Turk*, 20 POL. ANALYSIS 351, 366 (2012).

Appendix Table A1: Demographics of Participants in the Surveys Reported in the Main Text.[227]

	CARAVAN (2011)	Mturk 1 (6/16-20/15)	MTurk 2 (7/23/15)	CARAVAN (2007)	CARAVAN (2009)	MTurk3 (3/1-3/15)	MTurk4 (2/14-15/15)	Nation as a whole[1]
% Republicans	40%	--	22%	36%	43%	23%	20%	41%
% Democrats	43%	--	57%	48%	51%	42%	42%	43%
% College degree	38%	49%	51%	39%	40%	46%	53%	28%
Median income	$35k-$40k	$20k-40k	--	$40k-$50k	$40k-$50k	$20k-$40k	$20k-$40k	$42,693
% Male	50%	41%	52%	50%	50%	48%	55%	49%
Median age	55-59	32	32	50-54	55-59	30	33	36
% White	82%	66%	76%	81%	82%	77%	78%	72%

227. The national percentage of citizens with a college degree, percentage male, median age, and racial demographics was calculated based on data from the 2010 US Census. The source for the percentage of citizens in each political party was is a survey by NBC News, Wall Street Journal. Methodology: Conducted by Hart and McInturff Research Companies, November 1 - November 3, 2012 and based on 1,800 telephone interviews. Sample: National registered voters. The source for the median personal income in 2012 figures is the Bureau of Business & Economic Research. *Per Capita Personal Income by State*, BUREAU OF BUS. & ECON. RESEARCH (Apr. 2, 2013), https://bber.unm.edu/econ/us-pci.htm.

II. DETAILS OF STATISTICAL ANALYSIS IN PART III OF THE MAIN TEXT[228]

Part III in the main text discussed inequality in military sacrifice. In this section of the Appendix we present the details of our analytic strategy to examine the relationship between a community's socio-economic status and its share of American war casualties in World War II, Korea, Vietnam, and Iraq. We elaborate on the data and present the full results of the statistical models used to generate the figures and tables presented in the main text.

A. Data

To assess whether casualty gaps emerged in each of our nation's last four major wars, we had to construct measures of community casualty rates across the country. This involved first determining the total number of casualties—herein defined as soldiers killed in wartime in combat zones—that came from each county or place for each war, and then dividing those casualties by the relevant county or place population to obtain a per-capita casualty rate.[229]

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228. Additional details of related analyses are available in *The Casualty Gap*, including an additional round of analyses modeling Vietnam casualty rates at the place level as a robustness check on our county-level results. DOUGLAS L. KRINER & FRANCIS X. SHEN, THE CASUALTY GAP: THE CAUSES AND CONSEQUENCES OF AMERICAN WARTIME INEQUALITIES 136–60 (2010).

229. We also ran models using casualty counts as dependent variables and controlling for county or place population as an independent variable. While there were inconsistencies across model specifications, the patterns largely mirrored those we discuss here. The inconsistencies across specification are likely due to the fact that population and casualty counts are very highly correlated and hence multicollinearity is a problem in the count models. Because complete individual-level data on wounded soldiers is unavailable for several conflicts, we limit ourselves to examining soldiers killed in action. To keep our focus on those soldiers killed in the theater of war, we limited our casualty counts for the Korean War to those soldiers who died between June 1950 (as North Korean forces invaded South Korea on 6/24/50) and July 1953 (as the Military Armistice Agreement was signed on 7/27/53). This only dropped 42 observations. For Vietnam, we limited our casualty counts to those soldiers who died between August 2, 1964 (when the U.S.S. Maddox was first attacked in the Gulf of Tonkin) and March 29, 1973 (when the last U.S. soldiers left Vietnam). Again, this included almost all soldiers in the casualty files.

We obtained raw casualty data on individuals killed in World War II, Korea, and Vietnam from a series of casualty databases maintained by the United States National Archives.[230] For Iraq and Afghanistan, we used data made publicly available by the Statistical Information Analysis Division ("SIAD") of the Department of Defense.[231] Our casualty data for Operation Iraqi Freedom includes all soldiers killed through December 31, 2008. Our casualty data for Operation Enduring Freedom includes all soldiers killed through July 4, 2011. These data files, for each war, provided individual casualty records with information on the deceased soldier's home of record prior to entering the armed forces.[232] We

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230. For World War II, we used the World War II Honor List of Dead and Missing Army and Army Air Forces Personnel. *See World War II Honor List Dead and Missing Army and Army Air Forces Personnel*, NAT'L ARCHIVES (June 1946), http://www.archives.gov/research/arc/ww2/army-casualties/. The vast majority of casualties come from this Army and Air Force datafile. *Id.* The data on Korea and Vietnam deaths and casualties comes from databases archived by the United States National Archives as part of its Access to Archival Databases (AAD) System. All data was downloaded (first in summer 2005 and subsequently in early 2009 after minor file updates) from the AAD website. *Access to Archival Databases*, NAT'L ARCHIVES, http://www.archives.gov/aad/ (last visited Mar. 17, 2016). For Korea, we utilized the "Records of Military Personnel Who Died as a Result of Hostilities During the Korean War, ca. 1977 - 11/1979." The database was created by the Department of Defense, Directorate for Information Operations and Reports, Manpower Management Information Division. For Vietnam, we used the "Records with Unit Information on Military Personnel Who Died During the Vietnam War, created ca. 1983 - 12/18/2005, documenting the period 6/8/1956 - 10/10/2003" (COFFELT file) and the "Records of Deceased, Wounded, Ill, or Injured Army Personnel, Including Dependents and Civilian Employees, 1/1/1961 - 12/1981." The first database is maintained by the Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports, Statistical Information Analysis Division. The second database was created by the Adjutant General's Office.

231. This data is now maintained and publicly available through the Defense Manpower Data Center. *Defense Casualty Analysis System*, https://www.dmdc.osd.mil/dcas/pages/casualties.xhtml (last visited Mar. 23, 2016).

232. The COFFELT database tracking Vietnam casualties provides home state and city, not county (which is the lowest geographical unit for which complete 1970 census data is available), information for each casualty. Aggregating from the city to county level generally posed few problems, as we were able to assign counties based on cross-referenced census data. For some cities, addi-

then tallied these individual casualties by the smallest possible geographic unit for which both casualty and complete census data was readily available. This was the county level for World War II, Korea, and Vietnam, though in Vietnam we also had a sub-national sample of place-level data to use for limited analyses. We were able to use national, comprehensive place-level data for our analyses of fatal casualties in Iraq and Afghanistan.[233] For the Iraq and

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tional steps were necessary. For single cities such as New York City, which span two or more counties in a single state, we followed two methods. The first method, which we used in all of the statistical analyses in this Article, evenly divided such casualties for each city among all of the counties it spanned. The second method assigned each casualty to each county spanned by the city under the premise that deaths from a city spanning multiple counties could affect residents of all counties involved. The results across specifications for both our analyses are virtually identical regardless of which casualty rate operationalization is used. For towns such as Bethlehem, Pennsylvania, for which there is more than one city of the same name in a single state (less than five percent of the total), we also used two methods. First, we dropped all such casualties and ran our models. We then ran alternative models in which we randomly assigned each casualty to one of the towns. The two methods yielded nearly identical results. To construct the casualty rates presented we employed the first method.

233. The United States Census Bureau defines place as it refers to "Census Designated Place." The U.S. Census Bureau defines a "Census Designated Place" as a place "delineated to provide data for settled concentrations of population that are identifiable by name but are not legally incorporated under the laws of the state in which they are located." UNITED STATES CENSUS BUREAU: GEOGRAPHIC TERMS AND CONCEPTS – PLACE, https://www.census.gov/geo/reference/gtc/gtc_place.html (last updated Dec. 6, 2012). The Census Bureau notes that, "An incorporated place usually is a city, town, village, or borough, but can have other legal descriptions. . . . exclude[ing] Boroughs in Alaska . . . Towns in the New England states, New York, and Wisconsin . . . [and] Boroughs in New York." *Id.* The Census Bureau further distinguishes between "four major 'groups' that differentiate between populated places, other geopolitical and census units, institutional facilities, and terminated entries. Some subclasses relate an entry to a class different from its own, which is useful because a number of entries serve in more than one capacity." *Appendix J: FIPS Class Code Definitions*, http://webapp1.dlib.indiana.edu/virtual_disk_library/index.cgi/4293203/FID1358/DOC/ASCII/APP_J.ASC (last visited Mar. 23, 2016). Because "some sub-classes identify entries in different classes that are coextensive," we use as our unit of analysis the major group: Class-C, incorporated places. *Id.*

Afghanistan wounded analysis, we used the number of wounded in action, by county.[234]

Once we determined the total number of casualties per locale, we calculated the casualty rate by dividing through by a male population denominator to control for the significant variation in size across counties and places in the country. To make the casualty rate more accessible, we then multiplied the per-capita rate by 10,000.[235]

Using these measures, we are able to examine the relationships between a community's local casualty rate and its demographic characteristics, including its unemployment rate, median income, level of educational attainment, racial composition, rural farm population, median age, partisan composition, and geography. To operationalize these community demographics, we turned to various years of data publications by the United States Census Bureau.[236] The data collected in the decennial censuses are well timed to capture the demographic characteristics of the counties from which the wartime casualties occurred. We were able to match 1940 census data with WWII casualty data, 1950 census data with Korean casualties, 1970 census data with Vietnam casualties, and 2000 census data with the present conflicts in Iraq and Afghanistan.[237]

To measure income, we use median family income in all but our World War II models. For World War II, where the meas-

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234. Place-level data was not available for analysis of non-fatal casualties.

235. We also considered alternative models using other variables (e.g. number of males age 18–34) as the denominator. The results were nearly identical, as there were very high correlations between all of the alternative population denominator variables.

236. For the 1940, 1950, and 1970 census data, we utilized data files prepared by Michael Haines (2004) and published by the Inter-university Consortium for Political and Social Research (ICPSR). Michael R. Haines, *Historical, Demographic, Economic, and Social Data: The United States, 1790-2002 (ICPSR 2896)*, DATA SHARING FOR DEMOGRAPHIC RESEARCH, https://www.icpsr.umich.edu/icpsrweb/DSDR/studies/2896 (last visited Mar. 17, 2016). For the 2000 census data, we downloaded raw summary file 3 (sf3) files from the Census Bureau website and built a place-level database for analysis. U.S. CENSUS BUREAU, SUMMARY FILE 3: 2000 CENSUS OF POPULATION AND HOUSING (2007), https://www.census.gov/prod/cen2000/doc/sf3.pdf.

237. For analysis of the Vietnam conflict, we used 1960 census data instead of 1970 census data yields virtually identical substantive results.

ure was unavailable in the Census dataset, we use the very similar measure of median rent per month.[238] Education measures for all years were highly correlated with measures of income; as a result, we estimated separate income and education models. To measure partisanship, we included a measure of the percentage of county residents who voted for the Republican presidential candidate in the election immediately preceding each war: Wendell Willkie in 1940, Thomas Dewey in 1948, Barry Goldwater in 1964, and George W. Bush in 2000.[239] Because we do not have this partisanship variable measured at the place level, in the place-level models we included the state percentage for Bush in 2000. The coefficients and significance for the socioeconomic variables, however, were not sensitive to inclusion of this state level partisanship measure. To capture regional variation, we include a South regional dummy variable.[240] Information on demographic variables is available in Kriner and Shen (2010).

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238. Median rent is the same measure that Schaefer and Allen used. *See* Janet Schaefer & Marjorie Allen, *Class and Regional Selection in Fatal Casualties in the First 18-23 Months of World War II*, 23 SOCIAL FORCES 165–69 (1944). Median rent correlates with 1950 median income at .84 (with significance of $p<.001$). Alternative models were run using average and median value of owner-occupied dwellings. Because median and average value of owner-occupied dwellings correlate at .8 ($p<.001$) with median rent, the results were substantively the same. Finally, we also re-estimated the models using 1950 median income figures, which produced virtually identical results.

239. County-level returns for the 1940 and 1948 elections were obtained from the United States Historical Election Returns, 1824–1968 data file. *United States Historical Election Returns, 1824-1968 (ICPSR 1)*, ICPSR (Apr. 26, 1999), http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/1. Returns for the 1964 election were obtained from the General Election Data for the United States, 1950-1990. *General Election Data for the United States, 1950-1990 (ICPSR 13)*, ICPSR (Nov. 22, 2013), https://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/13.

240. The U.S. Census Bureau identifies four census regions: Northeast, Midwest, South, and West. *Census Bureau Regions and Divisions with State FIPS Codes,* CENSUS.GOV, http://www2.census.gov/geo/docs/maps-data/maps/reg_div.txt (last updated Mar. 17, 2016). The South region includes Delaware, Washington, D.C., Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, West Virginia, Alabama, Kentucky, Mississippi, Tennessee, Arkansas, Louisiana, Oklahoma, and Texas. *Id.*

B. Details of the Statistical Model

Having prepared our casualty and demographic databases, we developed county/place-level regression models. For each of the four conflicts, our dependent variable in all of the models is the casualty rate per 10,000 males. Our analysis is truly national, with virtually every county or place included for each war.[241] Our independent variables are the eight demographic measures, including either income or education (but not both simultaneously) in each regression.[242] Because our observations are clustered by state, we also cluster on the state and employ robust standard errors. The general form of our regression model is:

$$[1] \quad CASUALTY_RATE_i = \beta_0 + \beta_1 UNEMPLOYMENT_i + \beta_2 INCOME_i + \beta_3 AFR\text{-}AMERICAN_i + \beta_4 FARM_i + \beta_5 AGE_i + \beta_6 GOP_PREZ_i + \beta_7 SOUTH_i + \varepsilon_i$$ [243]

Results for regression analyses of casualties suffered in World War II, Korea, and Vietnam are presented in Kriner and Shen (2010, 52). Here, we update our earlier analyses to include an assessment of casualty inequality in the war in Afghanistan. Regression results for the Iraq War, the war in Afghanistan, and the two combined, are reported in Table A2. Consistent with the alternative analyses presented in the article itself, this regression analysis shows a strong and significant negative relationship between a community's median family income and its casualty rate across both wars.

241. In models that included county-level partisanship measures, the counties from Alaska were dropped because Alaska reports its election returns by election district and not county.

242. We avoid including both education and income measures in the same regression due to problems of multicollinearity. The two variables are very highly correlated at the county and place levels and, following standard practice in many economic analyses, we choose to run separate models.

243. εi is an error term, and the other variables in the model are defined as discussed above.

Appendix Table A2. Results of Ordinary Least Squares Regression Analysis of Casualty Rates, Iraq and Afghanistan

	Iraq	Afghanistan	Iraq +Afghanistan
UNEMPLOYMENT	0.421	-3.628	-4.049
	(2.308)	(2.601)	(3.329)
INCOME	-0.015***	-0.005**	-0.020***
	(0.003)	(0.002)	(0.004)
RACE	-1.000***	-1.011	-2.011***
	(0.361)	(0.627)	(0.730)
RURAL	3.271	-3.095***	0.177
	(2.616)	(0.985)	(2.453)
AGE	-0.019	-0.021	-0.040**
	(0.012)	(0.015)	(0.020)
PARTISANSHIP	-1.847	-2.621*	-4.469*
	(1.125)	(1.328)	(1.696)
SOUTH REGION	0.390**	0.713*	1.104**
	(0.187)	(0.423)	(0.442)
CONSTANT	3.397***	2.845**	6.242***
	(0.720)	(1.356)	(1.461)
Observations	19,413	19,413	19,413
R-squared	0.001	0.001	0.001

Notes on Table A2: Robust standard errors are reported in parentheses. All significance tests are two-tailed, and significance is indicated as follows: *** $p<0.01$, ** $p<0.05$, * $p<0.10$

III. THE CHALLENGE OF ECOLOGICAL INFERENCE

The analyses presented in Part III of the main text and just described in further detail above show strong evidence of a socioeconomic casualty gap between rich and poor *communities*. That is, in recent wars communities with lower median incomes and levels of education have sustained casualty rates that are systematically higher than those experienced by communities with higher median incomes and levels of educational attainment.

This casualty gap at the community level is normatively troubling. In all of the experiments in which we exposed subjects to information about a casualty gap presented in the text, we were explicit that this was a gap between rich and poor communities.

The logical question raised by the strong evidence for a casualty gap between rich and poor communities is whether a parallel gap arises at the individual level; that is, are *individuals* from lower socioeconomic backgrounds dying disproportionately in America's wars?

The two mechanisms described in Part III suggest a gap at the individual level. Military manpower scholarship has long established that the economic benefits military service affords are more attractive to young men and women from socioeconomically disadvantaged backgrounds who lack greater opportunity in the civilian job market. Moreover, new recruits from socioeconomically disadvantaged backgrounds are more likely to lack the skills that help one be assigned to a position within the military that is more insulated from combat risks.

The most logical explanation for the community-level casualty gap described in the text is that it results from a parallel gap at the individual level. However, from the analysis of aggregate-level data alone we cannot conclusively prove the existence of inequalities in sacrifice between rich and poor individuals. In *The Casualty Gap*, we undertook a number of additional rounds of analysis to seek more insight into this question.[244] For example, we were able to exploit variation in casualty rates within a city to show that casualties hail from neighborhoods that are significantly poorer than the city average. These additional analyses are con-

244. KRINER & SHEN, *supra* note 228, at 40–47.

sistent with the hypothesis that socioeconomically disadvantaged Americans are more likely to die in military service than their peers with greater socioeconomic opportunity. However, even these analyses cannot overcome the ecological inference barrier completely. Without data on individual soldiers' socioeconomic backgrounds prior to entering the military, we cannot conclude definitively that a casualty gap exists between individuals from socioeconomically advantaged and disadvantaged backgrounds. However, multiple rounds of empirical analysis suggest that that this is the most likely explanation for the patterns we observe between rich and poor communities.

IV. DETAILS OF THE 2006 SENATE ELECTIONS ANALYSIS IN SECTION V.C

In Section V.B we examined the effect of casualties on political outcomes. To test whether non-fatal casualties are indeed less politically visible and influential than fatal casualties, we examined the influence of state-level fatal and non-fatal casualty rates on the electoral fortunes of Republican candidates in the 2006 Senatorial elections. The Iraq War was extremely salient in 2006. According to a national exit poll of more than 13,000 Americans, 67% of voters answered that the Iraq War was either extremely or very important to their vote choice.[245] In that election, Democrats nationwide ran on a "Six for '06" plan. The plan's final item promised a "significant transition" in Iraq, and indeed, in the very first months following the Democratic takeover of Congress the Democratic majority pushed through a Defense budget that endeavored to mandate a timetable for withdrawal from Iraq. As such, the 2006 midterms present a critical case in which to look for the electoral ramifications of non-fatal casualties.

Data on soldiers killed in the Iraq War and their home state of residence is made publicly available by the Department of Defense. Data on non-fatal casualties is not reliably released, which

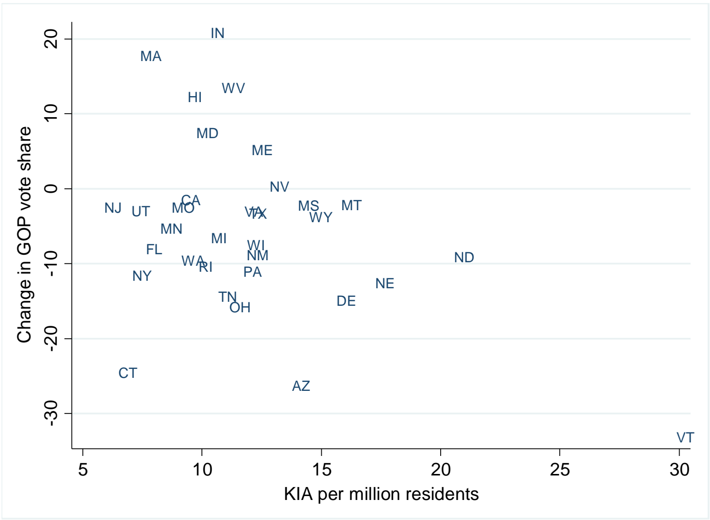
245. *See 2006 Election Exit Polls*, CNN.COM, http://www.cnn.com/ELECTION/2006/pages/results/states/US/H/00/epolls.0.html (last visited Mar. 17, 2016). By contrast, in 2008 only ten percent of Americans listed Iraq as the most important issue guiding their choice between Obama and McCain. 2008 Election Exit Polls, CNNPOLITICS.COM, http://www.cnn.com/ELECTION/2008/results/polls/#val=USP00p6 (last visited Jan. 22, 2016).

is one of the main reasons that the bulk of empirical scholarship on casualties and their consequences has focused exclusively on fatal casualties. However, through a Freedom of Information Act request, we obtained data on the number of non-fatal Iraq War casualties from each state in each month of the war.[246] We then divided each state's fatal and non-fatal casualty tally by the state's population as obtained from the 2000 Census to create state-level fatal and non-fatal casualty rates.

To illustrate the relationship between a state's casualty rate (fatal or non-fatal) and Republican electoral fortunes graphically, Figure A1 reports a pair of scatter plots.

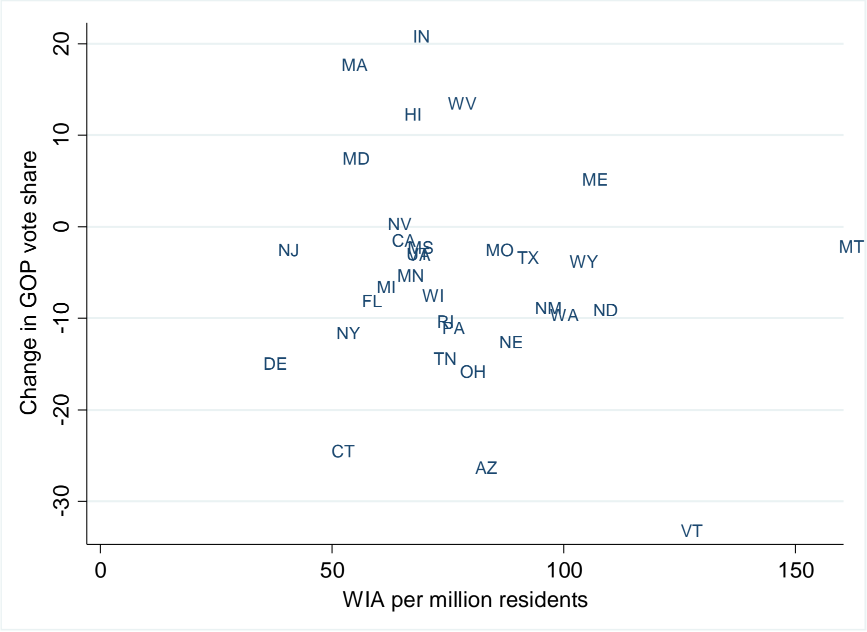
Appendix Figure A1: Scatter Plots of State Iraq War Fatal and Non-Fatal Rates and Change in GOP Vote Share, 2000 to 2006 Senatorial Elections

Fatal Casualties



246. The data made available by the Department of Defense also provided some information at the county level. However, a significant percentage (approaching a majority in the early years of the war) of the non-fatal casualties were reported as hailing from an "unknown" county within a state. It is important to emphasize that the home state information refers not to where the soldier was based before deploying to Iraq, but his or her home of record upon applying to the armed forces. For an extended discussion of this data, we refer interested readers to KRINER & SHEN, *supra* note 5, at 178–79.

Figure A1, continued: Non-Fatal Casualties



On the y-axis is the change in the Republican candidate's vote share from 2000 to 2006. Using the change in vote share provides an important measure of control as it allows us to assess the GOP's performance in a state in 2006 against an earlier baseline. On the x-axis is the state's casualty rate per million residents. The top panel illustrates the relationship for fatal casualties. The bottom panel illustrates the relationship for non-fatal casualties. Consistent with past research, there is a strong inverse relationship between a state's *fatal* casualty rate and how the Republican Party's candidate fared in the 2006 Senate elections. Firmly tied in the public conscience to President Bush and his costly war parties, the incumbent party in power suffered significant losses in 2006, particularly in the states that had suffered the most fatal casualties. The two are correlated at $r = -.41$, which is statistically significant, $p < .02$.

By contrast, as illustrated in the bottom panel, we see little evidence of a relationship between non-fatal casualty rates and Republican electoral fortunes. The two are only weakly related at $r = -.18$, and the correlation is not statistically significant ($p = .35$).

At first blush, non-fatal casualties do not seem to impose the same political costs on incumbents as fatal casualties.

To explore this relationship further, we replicated an earlier analysis of the 2006 Senate elections but this time include both fatal and non-fatal casualty rates in the statistical model.[247] This approach allows us to assess the relationship between a state's fatal and non-fatal casualty rates and GOP electoral fortunes after controlling for a number of alternative factors that could be driving variation in Republican vote share.

Part V, Section C reports the conclusion that non-fatal casualties did not affect electoral outcomes in the same way that fatal casualties did. Here we present that regression analysis that led to that conclusion.

To examine the relationship between a state's non-fatal casualty rate and electoral outcomes, we specified a regression model that included a series of important control variables. In addition to casualties, an extensive literature has identified opponent quality and campaign spending as two of the most important predictors of a candidate's electoral fortunes.[248] To account for

247. Douglas L. Kriner & Francis X. Shen, *Iraq Casualties and the 2006 Senate Elections*, 32 LEGIS. STUD. Q. 507 (2007). In this earlier article, we examined the relationship between local casualty rates and GOP Electoral fortunes at both the state and county level. Here, however, we focus only on the state level because county home of record information is reported as "unknown" for a significant percentage of Iraq War non-fatal casualties in the DOD data.

248. For opponent quality, see GARY JACOBSON, POLITICS OF CONGRESSIONAL ELECTIONS (2004); Donald Philip Green & Jonathan S. Krasno, *Rebuttal to Jacobson's "New Evidence for Old Arguments,"* 34 AM. J. POL. SCI. 363 (1990); Donald Philip Green & Jonathan S. Krasno, *Salvation for the Spendthrift Incumbent: Reestimating the Effects of Campaign Spending in House Elections*, 32 AM. J. POL. SCI. 884 (1988); and Peverill Squire, *Challenger Quality and Voting Behavior in Senate Elections*, 17 LEGIS. STUD. Q. 247 (1992). For campaign spending, see Alan I. Abramowitz, *Explaining Senate Election Outcomes*, 82 AM. POL. SCI. REV. 385 (1988); Alan I. Abramowitz, *Campaign Spending in U.S. Senate Elections*, 14 LEGIS. STUD. Q. 487 (1989); Alan Gerber, *Estimating the Effect of Campaign Spending on Senate Election Outcomes Using Instrumental Variables*, 92 AM. POL. SCI. REV. 401 (1998); Gary C. Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 AM. POL. SCI. REV. 769 (1978); Gary C. Jacobson, *The Effects of Campaign Spending in House Elections: New Evidence for Old Arguments*, 34 AM. J. POL. SCI. 334 (1990); and Gary C. Jacobson, *Money and Votes Reconsidered: Congressional Elections, 1972–1982*, 47 PUB. CHOICE 7 (1985). An additional

changes in opponent quality, we coded each Republican's opponent according to the eight-point ordinal scale created by political scientists Don Green and Jonathan Krasno, and we calculated the change in this measure across the two electoral cycles. To control for the influence of campaign expenditures, we include the change in the percentage of total campaign expenditures by the Republican candidate from 2000 to 2006.[249]

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political factor that may have influenced the change in GOP vote share is any change in the incumbency status of the Republican candidate from the 2000 to the 2006 campaign. All of the models were re-estimated with two dummy variables that indicate whether the GOP candidate went from being a challenger (either facing an incumbent or vying for an open seat) to an incumbent from 2000 to 2006 or vice versa. All of our results remain virtually identical in this expanded specification. These augmented models show the expected negative relationship between a shift from incumbent to challenger status and GOP vote share at both the state and county levels. A complementary shift from challenger to incumbent status, however, had no effect at the state level and, contra expectations, a negative correlation with the change in GOP vote share at the county level. The relationship is almost certainly spurious. Only three states involved a Republican challenger from 2000 (2002 for James Talent) running in 2006 as an incumbent—Virginia, Nevada, and Missouri. In the Virginia race, George Allen lost to James Webb; in Nevada, John Ensign handily beat Jack Carter, but not by the same margins as he trounced his Democratic opponent, who lacked a presidential name, in 2000; and the Missouri races were decided by razor-thin margins in 2000, 2002, and 2006. A confluence of national trends and idiosyncratic factors, not any change in incumbency status, determined the results of these three elections.

249. Green & Krasno, *Salvtion for the Spendthrift Incumbent*, *supra* note 248. Because Green and Krasno's scale was designed to measure challenger quality, it required one minor modification. If the Republican candidate faced an incumbent senator, we coded the opponent quality score at its maximum value of 8. Prior studies have adopted varied operationalizations of relative campaign spending. To control for several outliers in Republican-opponent spending, in this model we took the log of both major candidates' expenditures as reported to the Federal Elections Commission and calculated the percentage of this total spent by the Republican. All of our results are robust across other operationalizations, such as the change in the percentage of unlogged total expenditures spent by the Republican candidate and the change in the ratio of Republican to Democratic spending. Following Jacobson, Green and Krasno, and others, we recoded the handful of missing expenditure data points as $1,000. All of these were minor, dark-horse candidates with little in the way of a formal campaign apparatus.

In addition to factors specific to the Senate race at hand, scholars have long documented the connections between presidential performance and the success of their co-partisans in presidential elections, even in midterm contests.[250] To account for this in the current context, we include a measure of President Bush's share of the two-party vote in each state in the 2004 election. Additionally, a number of previous studies have debated the relative impact of economic conditions on congressional election outcomes.[251] To control for economic factors, we include measures, obtained from the Bureau of Labor Statistics, of the change in the state unemployment rate during the year preceding the 2006 midterm elections. Voters in areas of increasing unemployment may be more likely to punish Republican candidates in this era of unified Republican control of Congress and the presidency.

Finally, the models also control for two important demographic constituency characteristics that might be correlated with considerable change in Republican electoral fortunes from the peacetime election of 2000 to the wartime 2006 contest: the percentage of residents aged 18 to 64 who were serving in the military and the percentage of all residents who were veterans of the armed forces.[252] Conventional wisdom suggests that military communities have largely rallied around the president and his policies; if correct, Republican candidates may have performed better relative

250. Alan I. Abramowitz & Jeffrey A. Segal, *Determinants of the Outcomes of U.S. Senate Elections*, 48 J. POL. 433 (1986); Lonna Rae Atkeson & Randall W. Partin, *Economic and Referendum Voting: A Comparison of Gubernatorial and Senatorial Elections*, 89 AM. POL. SCI. REV. 99 (1995); James E. Campbell, *The Presidential Surge and its Midterm Decline, 1868-1988*, 53 J. POL. 477 (1991); James E. Campbell & Joe A. Sumners, *Presidential Coattails in Senate Elections*, 84 AM. J. POL. SCI. 513 (1990); Thomas M. Carsey & Gerald C. Wright, *State and National Factors in Gubernatorial and Senatorial Elections: A Rejoinder*, 42 AM. J. POL. SCI. 1008 (1998).

251. *See, e.g.*, GARY JACOBSON, GARY & SAMUEL KERNELL, STRATEGY AND CHOICE IN CONGRESSIONAL ELECTIONS (1981); MICHAEL S. LEWIS-BECK & TOM W. RICE, FORECASTING ELECTIONS (1992); Alberto Alesina & Howard Rosenthal, *Partisan Cycles in Congressional Elections and the Macroeconomy*, 83 AM. POL. SCI. REV. 373 (1989); Peverill Squire, *Candidates, Money and Voters: Assessing the State of Congressional Elections Research*, 48 POL. RES. Q. 891 (1995).

252. These demographic controls were constructed from data obtained from the U.S. Census Bureau's summary files (sf3) for the 2000 Census.

to their 2000 baseline in these areas than in otherwise comparable communities. Additionally, an extensive literature at the elite level has examined the different perspectives that veterans bring to questions of military policy; however, expectations for electoral behavior in states or counties with large veteran contingents at the mass level are less clear.[253] It is possible that communities with large contingents of veterans, like those with high percentages of active-duty personnel and their families, rallied around the president and the Republicans in the 2006 midterms; alternatively, residents of such communities may have viewed the war and the administration's military policies through a distinctly different and more critical lens and adjusted their voting behavior accordingly. The empirical affords insight into these competing hypotheses.

Table A3 presents the results of our linear regression model.[254] The model in column 1 includes only the fatal casualty rate variable, and the relevant coefficient is negative and statistically significant. Confirming the bivariate relationship illustrated in the top panel of Figure 1, Republican electoral fortunes declined as a state's fatal casualty rate increased, even after controlling for a host of other factors long held to influence election outcomes. Model 2 estimates the same specification, but examines the relationship between non-fatal casualty rates and the change in Republican vote share. The relevant coefficient is negative, but substantively very small and it is not statistically significant. Finally, model 3 re-estimates our model but includes both fatal and non-fatal casualty rates simultaneously. The coefficient for fatal casualty rates remains strongly negative and highly statistically signifi-

253. On the civil-military gap, see, e.g., Samuel P Huntington, *Conservatism as an Ideology*, 51 AM. POL. SCI. REV. 454 (1957); RICHARD K. BETTS, SOLDIERS, STATESMEN, AND COLD WAR CRISES (1991); PETER FEAVER & RICHARD H. KOHN, SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY (2001); and PETER D. FEAVER & CHRISTOPHER GELPI, CHOOSING YOUR BATTLES: AMERICAN CIVIL-MILITARY RELATIONS AND THE USE OF FORCE (2004).

254. In Kriner & Shen, *supra* note 247, at 514, 526 n.11, we drop Connecticut and Vermont, as Joe Lieberman and Jim Jeffords switched partisan affiliation after 2000. Replicating the models in Table 1 excluding these two states yields virtually identical results. The coefficient for fatal casualty rates remains strongly negative and statistically significant in both models 1 and 3. The coefficient for non-fatal casualty rates is positive in this specification in both models 2 and 3.

cant. By contrast, the coefficient for a state's non-fatal casualty rate is small, positive, and not statistically significant.

Appendix Table A3: Results of Ordinary Least Squares Regression Analysis of State Iraq War Fatal and Non-Fatal Casualty Rates and 2006 GOP Senatorial Electoral Fortunes

	(1)	(2)	(3)
KIA per million residents	-1.36***		-1.57***
	(0.41)		(0.50)
WIA per million residents		-0.10	0.08
		(0.10)	(0.10)
% Bush 2004	0.60**	0.48	0.57**
	(0.26)	(0.30)	(0.26)
Change in opponent quality	-0.03	-0.18	-0.08
	(0.71)	(0.84)	(0.72)
Change in GOP spending	0.25	0.24	0.25
	(0.15)	(0.18)	(0.15)
Change in unemployment	14.03**	9.72	14.98**
	(6.40)	(7.39)	(6.58)
% in Military	5.29*	4.73	5.41*
	(3.06)	(3.58)	(3.09)
% Veterans	0.41	-0.11	-0.03
	(1.40)	(1.78)	(1.53)
Constant	-21.97	-20.18	-19.16
	(16.76)	(20.11)	(17.30)
Observations	33	33	33
R-squared	0.44	0.22	0.45

Notes on Appendix Table A3: Robust standard errors are reported in parentheses. All significance tests are two-tailed, and significance is indicated as follows: *** p<0.01, ** p<0.05, * p<0.10

V. DETAILS OF STATISTICAL ANALYSIS IN SECTION V.D

In the main text, Part V, Section D discusses results from a web-based experiment exploring the effect of casualties on support

for war. In this section we discuss additional methodological details about the experiment.

Concerns about subjects' compliance with task instructions are of special concern with online experiments because subjects cannot be monitored while engaged in the experimental tasks.[255] To address this issue, experimental psychologists have developed "attention filters" designed to ascertain whether subjects are in fact following instructions and paying attention to the material being presented to them online. In our experiment reported here, we employed a modified version of the filter developed by psychologist Daniel Oppenheimer and his colleagues.[256] The design of the primary attention filter question was such that users who did not read carefully would see, in large font, a headline reading "Background Questions on Sources for News" as well as another large, bold question: "From which of these sources have you received information in the past month?" A series of check-box options were provided (e.g., local newspaper, local TV news). Subjects reading carefully, however, were instructed *not* to check any of the boxes, but instead to type "123" into the text box provided. The results presented in this Article are based only on the "good" subjects, i.e. those subjects who were paying attention.

As mentioned in the main text, after receiving one of the experimental prompts chosen at random all subjects were then asked the same question taken as previously utilized in published polls conducted by NBC News/The Wall Street Journal: "Do you think the war in Afghanistan against the Taliban and Al Qaeda has been very successful, somewhat successful, somewhat unsuccessful, or very unsuccessful?"

We employed this measure of public support for the Afghan War for both theoretical and practical reasons. First, a large literature has argued that popular belief about whether or not a military operation is succeeding is the linchpin of public support for

255. A filter employed after data collection allowed for the experiment to exclude from the dataset subjects with duplicate IP addresses.

256. *See* Daniel M. Oppenheimer et al., *Instructional Manipulation Checks: Detecting Satisficing to Increase Statistical Power*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 867, 867–68 (2009) (describing a filter in which subjects must carefully read instructions which, counter to the boldface headline above the instructions, tell subjects not to actually click on an answer to the question).

war.[257] Second, this question wording, with its explicit reference to the Taliban and Al Qaeda, has consistently generated higher levels of public support for the war than alternative question wordings in national polls. It is important to emphasize that, if anything, our experimental study is biased against finding any effects for casualty information on support for the war. After more than a dozen years of fighting, most Americans have made up their mind on the conflict and are unlikely to be swayed by a modest prompt of new information about the conflict and its costs. If we had conducted this experiment earlier in the war when public opinion was more malleable, we would expect stronger effects. As such, selecting a question wording that produces the strongest levels of *ex ante* support for the war affords the best estimates of the potential influence of fatal and non-fatal casualty information on war support.

The main text presents basic difference in means results. However, to insure the robustness of our results, we also estimated an ordered logit regression model to assess the influence of each of our experimental treatments on beliefs about the war's success, controlling for each individual respondent's demographic characteristics.

The ordered logit model allows us to use our question's full four-point answer range (very successful; somewhat successful; somewhat unsuccessful; very unsuccessful) as the dependent variable, with higher values equaling a more positive assessment of the war and its progress. Our main independent variables of interest are indicators for assignment to each experimental treatment, with treatment 1 (KIA information only) being the omitted baseline category.[258] This allows us to see examine whether the three non-fatal casualties treatments and the final treatment presenting both fatal and non-fatal casualty information raised or lowered war support above the KIA treatment baseline. Finally, our ordered logit model includes a number of standard demographic controls includ-

257. *See, e.g.*, CHRISTOPHER GELPI, PETER D. FEAVER & JASON REIFLER, PAYING THE HUMAN COSTS OF WAR: AMERICAN PUBLIC OPINION AND CASUALTIES IN MILITARY CONFLICTS (2009).

258. As discussed in the text, the experiment also had a control group that received no information about the number of fatal or non-fatal Afghan War casualties. The coefficient for the variable identifying assignment to the control group is positive but not statistically significant. The only significant differences are between the KIA treatments and the WIA treatments.

ing each respondent's gender, race, and age, partisan affiliation, educational attainment, and two measures of religious affiliation.[259] The results are presented in Table A4.

Even after controlling for a host of individual-level factors that might affect Americans' assessment of progress in the war in Afghanistan, we continue to find a significant gulf between those informed of the number of Americans who have died in Afghanistan compared to those told only about the number of American soldiers wounded in the war. The coefficient for our WIA treatment (17,674 soldiers with physical wounds) is positive and statistically significant. Subjects in this treatment were significantly more likely to judge the war a success than those who learned the total number of American soldiers killed in Afghanistan. The coefficients for the two additional wounded treatments providing either a much larger estimated number of non-fatal casualties (treatment 3) or this number with a brief explanation about the "invisible" wounds of war (treatment 4) are also positive, and not significantly different from the WIA coefficient. Finally, the coefficient for treatment 5, which informed subjects of both the number of fatal-casualties and gave them the full accounting of non-fatal casualties is significantly smaller than both the WIA coefficient and the coefficient for treatment 4, which provided subjects exactly the same information except for the number of KIAs in the war.[260] Thus, the ordered logit regression analysis yields the same conclusion as the simple assessment of differences in means: fatal casualties have a significantly greater impact on popular assessments of the war in Afghanistan than non-fatal casualties.

259. Roughly three quarters of our sample identified as being Catholic, Protestant, or having no religion. Of the remaining quarter, the vast majority identified as "other," with only four percent of the entire sample identifying as Jewish or Muslim. Catholics and atheists were the only two groups whose war assessments differed from others, on average.

260. Wald tests confirm that the coefficient for treatment 5 is significantly smaller than the coefficient for treatment 4, p = .06.

Appendix Table A4. Results from Ordered Logit Analysis of Beliefs about Afghan War Success

No casualty information	0.362
	(0.348)
WIA (17,674)	0.677**
	(0.338)
Total wounded (217,674)	0.328
	(0.327)
Total wounded + PTSD note	0.479
	(0.378)
KIA (2,312) + Total wounded + PTSD note	-0.182
	(0.365)
Republican	0.370
	(0.293)
Democrat	0.107
	(0.236)
Male	0.297
	(0.216)
Age	-0.007
	(0.009)
College graduate	0.102
	(0.221)
White	-0.469*
	(0.272)
Atheist	-0.773***
	(0.259)
Catholic	0.770***
	(0.296)
Observations	337

Notes on Table A4: Robust standard errors are reported in parentheses. All significance tests are two-tailed, and significance is indicated as follows: *** $p<0.01$, ** $p<0.05$, * $p<0.10$

Logic from the Supreme Court that May Recognize Positive Constitutional Rights

PHILLIP M. KANNAN*

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"Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality [that is, the necessary means] that permits a life of dignity and well-being, [that is, to a protected right]. . . ."[1]

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1. U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment* (June 16, 1972), http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503 [hereinafter *Stockholm Declaration*].

I. INTRODUCTION: BACKGROUND AND PURPOSE

Professor Christopher Serkin recently characterized the general understanding of the nature of rights protected by the United States Constitution as follows: "The Constitution is typically thought to create only negative rights--rights that constrain the government from acting in certain proscribed ways."[2] This is especially true in the judicial branch;[3] however, as the discussion below demonstrates, the United States Supreme Court ("the Court" or "Supreme Court") might be prepared to recognize tightly constrained positive constitutional rights.[4]

In an earlier article, I argued that the Constitution does recognize and protect positive rights and, in fact, that the positive right-negative right dichotomy is illusory.[5] What appears to be a negative right can be rearticulated into what appears to be a positive right[6] and vice versa.[7]

A recent Supreme Court case exemplifies the illusory nature of this distinction. In *McCullen v. Coakley*,[8] the Court stated the issue to be decided as follows: "Petitioners are individuals who approach and talk to women outside [abortion clinics], attempting to dissuade them from having abortions. The statute prevents petitioners from doing so near the facilities' entrances. The

2. Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 346 (2014).

3. *See, e.g.*, DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 204 (1989) (Brennan, J., dissenting) ("The Court's baseline is the absence of positive rights in the Constitution and a concomitant suspicion of any claim that seems to depend on such rights. From this perspective, the DeShaneys' claim is first and foremost about inaction (the failure, here, of respondents to take steps to protect Joshua), and only tangentially about action (the establishment of a state program specifically designed to help children like Joshua)."); *see also* Jackson v. City of Joliet, 715 F.2d 1200, 1202 (7th Cir. 1983) ("[T]he Constitution is a charter of negative rather than positive liberties.").

4. *See infra* Part III.

5. *See* Phillip M. Kannan, *But Who Will Protect Poor Joshua DeShaney, A Four-Year-Old Child with No Positive Due Process Rights?*, 39 U. MEM. L. REV. 543, 545 (2009).

6. *See id.* at 568.

7. *See id.* at 567.

8. 134 S. Ct. 2518 (2014).

question presented is whether the statute violates the First Amendment."[9] This issue can be phrased in positive right language as: Must the state provide space on the public sidewalk in which the petitioners may approach and talk to women outside such facilities? It may also be phrased in negative rights terms as: May the state deny petitioners the right to approach and talk to women outside such facilities? The Court ultimately held that the state may not "clos[e] a substantial portion of a traditional public forum to all speakers."[10] The Court could have rephrased this as a positive right, namely, that the state must keep open an adequate portion of a traditional public forum to all speakers. A preference for the negative version is traditionally prevalent in court opinions; however, change may be on the horizon.

The Supreme Court may be moving away from its history of refusing to recognize and protect positive constitutional rights. The Court's opinion in the recent case *Glossip v. Gross* provides support for the existence of positive rights protected by the Constitution and for the illusory nature of distinguishing between positive and negative rights.[11]

Although there are no authoritative definitions of positive right and negative right, there are attempts to correlate negative rights with a prohibition or limitation of government action. Thus, the First Amendment provision that "Congress shall make no law . . . abridging the freedom of speech"[12] is held out as recognizing a negative right that only prohibits Congress from enacting legislation limiting the speech of persons protected by the Constitution. Under this interpretation, Congress would have no obligation to enable or facilitate free speech because imposing such a requirement would be seen as recognizing a positive right. Clearly, this understanding devalues the role of governments. Just as the United States government did not and could not constitutionally allow a mob in Little Rock, Arkansas, to use violence and intimidation to prevent African American children from attending a formerly all-

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9. *Id.* at 2525.
10. *Id.* at 2541.
11. 135 S. Ct. 2726 (2015).
12. U.S. CONST. amend. I.

white high school,[13] the police could not stand idly by and allow a mob to beat a protestor who was attempting to burn an American flag.[14] People exercising their First Amendment right of free speech have a right to be protected from mobs that would silence them; otherwise, the right to free speech would be merely theoretical.

When one goes beyond the plain language of the Free Speech Clause and considers its functionality, it is clear that it is a positive, as well as a negative, right. Moreover, as I illustrated in my earlier article, rights that are articulated so as to appear to only be negative rights can be rephrased as positive rights.[15] In spite of the fact that the dichotomy of positive rights and negative rights is inconsistent with "the actual state of things,"[16] the Supreme Court and lower courts have continued to assume its existence and to give it legal significance.[17] The purpose of this Article is to demonstrate that the constitutional landscape may be changing. Perhaps the conservative members of the Court, the Justices who traditionally deny the existence of positive rights, are beginning to realize that the categorical rule against positive rights is detri-

13. *See* Cooper v. Aaron, 358 U.S. 1, 12 (1958) ("The next school day was Monday, September 23, 1957. The Negro children entered the high school that morning under the protection of the Little Rock Police Department and members of the Arkansas State Police. But the officers caused the children to be removed from the school during the morning because they had difficulty controlling a large and demonstrating crowd which had gathered at the high school. On September 25, however, the President of the United States dispatched federal troops to Central High School and admission of the Negro students to the school was thereby effected. Regular army troops continued at the high school until November 27, 1957. They were then replaced by federalized National Guardsmen who remained throughout the balance of the school year.") (citation omitted).

14. *See* Kannan, *supra* note 5, at 564 n.122 (referring to Cass R. Sunstein, *A New Deal For Speech,* 17 HASTINGS COMM. & ENT. L.J. 137, 145 (1994) (asserting that "positive dimensions" of the First Amendment "consist of a command to government to take steps to ensure that the system of free expression is not violated by legal rules giving too much authority to private [citizens]")).

15. Kannan, *supra* note 5, at 567–68.

16. This is a phrase used often by Chief Justice John Marshall to focus attention on the actual facts from which the case arose and the context in which they exist. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. 543, 591 (1823); Worcester v. Georgia, 31 U.S. 515, 520, 543, 546 (1832).

17. *See* Kannan, *supra* note 5, at 587–92.

mental to some important constitutional doctrines they favor. For example, in the majority opinion written by Justice Alito and joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas (the conservative wing of the Court) in *Glossip v. Gross*,[18] the Supreme Court stated a major premise, on which it ultimately relied for its holding, which is more consistent with "the actual state of things," namely, that there are "positive" rights protected by the Constitution.

To develop the argument supporting this conclusion, Part II analyzes *Glossip v. Gross* and the case on which it is based, *Baze v. Rees*.[19] Part III then constructs an argument which concludes that the principle from *Baze* and *Glossip* is that a constitutional end implies existence of constitutional means to realize the end, and that the means at times will be positive rights. Part IV demonstrates that the argument developed in Part III is analogous to and consistent with the logic the Court used in *Griswold v. Connecticut* to recognize a constitutional right of privacy.[20] Part V analyzes and discusses *District of Columbia v. Heller*,[21] a case that arguably recognizes and applies the general principle developed in this Article.[22] Part VI summarizes the struggle over abortion rights and posits the role the general principle advocated in this Article may play in that struggle. Part VII concludes that in addition to inherent rights and peripheral-penumbral rights that have been recognized by the Supreme Court as emanating from enumerated rights, there are rights that are the necessary means for achieving protected rights.

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18. 135 S. Ct. 2726 (2015).

19. 553 U.S. 35 (2008) (plurality opinion). The plurality opinion written by Chief Justice Roberts constitutes the holding of the Court. *Glossip*, 135 S. Ct. at 2738 n.2 ("In *Baze*, the opinion of The Chief Justice was joined by two other Justices. Justices Scalia and Thomas took the broader position that a method of execution is consistent with the Eighth Amendment unless it is deliberately designed to inflict pain. Thus, as explained in Marks v. United States, The Chief Justice's opinion sets out the holding of the case." (citations omitted)).

20. 381 U.S. 479 (1965).

21. 554 U.S. 570 (2008).

22. *See infra* Part III.

II. ANALYSES OF *BAZE V. REES* AND *GLOSSIP V. GROSS*

In the canonical case *McCulloch v. Maryland*,[23] Maryland challenged the authority of the United States to establish the Bank of the United States.[24] In upholding the power of Congress to do so, Chief Justice Marshall, in his opinion for the Court, interpreted the "necessary and proper" clause in the Constitution.[25] This required the Court to explore the means-end relationship regarding the limited powers the Constitution granted to Congress. The Court's interpretation gave Congress broad discretion when legislating a means to an end: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[26] Applying this interpretation, the Court upheld Congress's creation of the Bank of the United States by concluding: "Throughout this vast republic . . . revenue is to be collected and expended, armies are to be marched and supported."[27] Congress's incorporation and operation of the Bank of the United States was a constitutional means to achieve its enumerated taxing power,[28] power to declare war,[29] and power to raise and support armies.[30]

The interpretation of the necessary and proper clause stated in *McCulloch v. Maryland* can be applied to test the constitutionality of a specific, identified means to an end; however, it does not consider the question: If the Constitution or a law enacted under it establishes an end, must there exist a constitutional means for achieving that end? This question was answered by the Court, al-

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23. 17 U.S. 316 (1819).
24. *Id.* at 321–22.
25. *Id.* at 413–22; U.S. CONST. art. I, § 8, cl. 18 (granting Congress the authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").
26. *McCulloch*, 17 U.S. at 421.
27. *Id.* at 408.
28. U.S. CONST. art. I, § 8, cl. 1.
29. U.S. CONST. art. I, § 8, cl. 11.
30. U.S. CONST. art. I, § 8, cl. 12.

most two hundred years later, in *Baze v. Rees*[31] and *Glossip v. Gross*.[32]

Baze involved challenges to the means selected by Kentucky for executing prisoners sentenced to death—lethal injection. In Kentucky, death row inmates claimed that Kentucky's lethal injection protocol constituted cruel and unusual punishment in violation of the Eighth Amendment.[33] This protocol included injecting the prisoner with a series of three drugs.[34] The first, sodium thiopental, is intended to cause the prisoner to be unconscious and not suffocate in that state as a result of the second drug or experience pain from the third.[35] The prisoners claimed that Kentucky's protocol did not include adequate measures to assure that sodium thiopental would be administered properly so as to achieve these objectives.[36] They claimed that this constituted unnecessary risk and that subjecting them to this unnecessary risk violated the Eighth Amendment prohibition against cruel and unusual punishment.[37] A plurality of the Court rejected that claim,[38] reasoning as follows:

> We begin with the principle, settled by *Gregg*, that capital punishment is constitutional. It necessarily follows that there must be a means of carrying it out. Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does

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31. 553 U.S. 35 (2008) (plurality opinion).
32. 135 S. Ct. 2726 (2015).
33. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."); *Baze*, 553 U.S. at 41 ("Petitioners . . . contend that the lethal injection protocol is unconstitutional under the Eight Amendment's ban on 'cruel and unusual punishments' . . . .").
34. *Baze*, 553 U.S. at 44.
35. *Id.* ("The proper administration of the first drug ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs.").
36. *Id.* at 49.
37. *Id.* at 47.
38. *Id.*

> not demand the avoidance of all risk of pain in carrying out executions.[39]

The prisoners' theory that any unnecessary risk of pain constituted cruel and unusual punishment, if accepted by the Court, would render all means of execution unconstitutional since all means are subject to error and thereby would make capital punishment itself unconstitutional. This would effectively defeat the well-established holding in *Gregg* that capital punishment is constitutional.[40] Instead of the "unnecessary risk" of harm standard, the Court applied a principle under which the prisoners must propose an alternative to Kentucky's protocol. The Court imposed high standards on the alternative: "To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain."[41] Because the prisoners failed to meet this burden-of-proof requirement, the Court affirmed the Kentucky Supreme Court's decision that Kentucky's procedure was consistent with the Eighth Amendment.[42]

Seven years after issuing its opinion in *Baze*, the Court heard *Glossip*, which was also a challenge to lethal injections as a means of carrying out the death sentence. In this case, the prisoners claimed that Oklahoma's lethal-injection protocol violated the Eighth Amendment because it created an unacceptable risk of severe pain.[43] The Court summarized their theory as follows: "They argue that midazolam, the first drug employed in the State's current three-drug protocol, fails to render a person insensate to pain."[44] The Court rejected their claim for two independent reasons. The first was based on *Baze*: "[T]he prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain."[45] The second was a failure by the prisoners "to establish that Oklahoma's use of a massive dose of

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39. *Id.* (citation omitted).
40. Gregg v. Georgia, 428 U.S. 153, 177 (1976) ("It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers.").
41. *Baze*, 553 U.S. at 52.
42. *Id.* at 63.
43. Glossip v. Gross, 135 S. Ct. 2726, 2731 (2015).
44. *Id.*
45. *Id.*

midazolam in its execution protocol entails a substantial risk of severe pain."[46]

In explaining its first reason for rejecting the prisoners' theory, the Court affirmed and restated the following analysis used by the plurality in *Baze*:

> [I]n *Baze*, seven Justices agreed that the three-drug protocol [used by Kentucky] does not violate the Eighth Amendment.
>
> Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, "[i]t necessarily follows that there must be a [constitutional] means of carrying it out." And because some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain. . . . Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether.[47]

The Court, as it had done in *Baze*, again refused to allow a backhanded overruling of *Gregg v. Georgia* and its affirmation of the constitutionality of the death penalty.

III. THE PRINCIPLE FROM *BAZE* AND *GLOSSIP*: A CONSTITUTIONAL END IMPLIES THE EXISTENCE OF CONSTITUTIONAL MEANS TO REALIZE THE END

In refusing to hold that all means of carrying it out were a violation of the Eighth Amendment, and thereby declaring the death penalty unconstitutional, the Court applied a theory of constitutional logic that should be appropriate beyond the Eighth Amendment. Stated in a more general form, the constitutional logic used by the Court in *Baze* and *Glossip* is that when there is an end or right protected by the Constitution, there must be a constitutional means to attain that end or right. The hypothesis of this Ar-

46. *Id.*
47. *Id.* at 2732–33 (citations omitted).

ticle is that this general form is a constitutional principle derived from *Baze* and *Glossip*; it will be referred to as the "General Principle" in the remainder of this Article.

The argument proving the General Principle can be constructed by recasting the logic used by the Court in *Baze* and *Glossip* as follows. If a right were protected by the Constitution, but all means of realizing that right were unconstitutional, that right would provide no benefit to the people nor would it be an effective restraint on the government; functionally, the right itself would be removed from the Constitution. This would be contrary to the intention of those who drafted and ratified the Constitution and the Bill of Rights. It would also be contrary to the Supreme Court's principle for interpreting the Constitution: "[E]very word [in the Constitution] must have its *due force*, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added."[48] Giving due force to a constitutional right requires a means through which it can be realized.

IV. The Argument Used to Establish the General Principle is Analogous to the Logic Applied by the Court to Recognize Un-enumerated Constitutional Rights in *Griswold v. Connecticut*

The logic discussed in Part III has been applied in the past by the Supreme Court to recognize constitutionally protected rights that were not listed in the Constitution or Bill of Rights as specific guarantees.[49] One of the most important examples of this is the Court's analysis in *Griswold v. Connecticut*,[50] in which the Court recognized a constitutionally protected right of privacy.[51] In *Gris-*

48. Wright v. United States, 302 U.S. 583, 588 (1938) (emphasis added) (quoting Holmes v. Jennison, 39 U.S. 540 (1840)).

49. Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."); *see also* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

50. *Griswold*, 381 U.S. at 479.

51. *Id.* at 485 ("The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."). It is interesting to note that a right to privacy is included in the European Convention for the Protection of Human Rights. European Convention on Hu-

wold, a Connecticut law made it a crime for married couples to use contraceptive devices and for a physician to advise couples about contraceptive devices.[52] The Court found that the Connecticut law did not violate any *enumerated* constitutional provision.[53] It held, consistent with the Ninth Amendment,[54] that there were other rights, *un-enumerated*, but still protected by the Constitution.[55] The Court's logic in arriving at this holding begins with the premise that each enumerated right created peripheral rights.[56] For example, in the First Amendment:

> The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community.[57]

Regarding the First Amendment, the Court held that it created a right of association that included more than "the right to attend a meeting [and that] it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means."[58] The Court then gave its logic for declaring the existence of, and protection for, these peripheral constitutional rights: "Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment *its existence is necessary in making the express guar-*

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man Rights, art. 8. This right was recognized as creating obligations on the part of the government to protect members of the public, that is, as a positive right, by the European Court of Human Rights. Lopez Ostra v. Spain, 436 Eur. Ct. H.R. 515 (1994), https://www.escr-net.org/docs/i/673084 (follow "Lopez_Ostra_v_Spain_Decision.doc" hyperlink for document).

52. *Griswold*, 381 U.S. at 480.

53. *Id.* at 481–86.

54. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparate others retained by the people.").

55. *Griswold*, 381 U.S. at 484.

56. *Id.* at 483.

57. *Id.* at 482 (citations omitted).

58. *Id.* at 483.

antees fully meaningful."[59] What is important for this Article is that, in *Griswold*, the Court developed a logical process which recognized un-enumerated rights called peripheral rights, and that the Court found them enforceable even if the peripheral rights were positive rights.[60]

In the reasoning of the preceding paragraph, the Court discussed the First Amendment; however, that was merely a particular example of its overall logic. It was in no way meant to suggest that the logic only applies to the First Amendment. In fact, in *Griswold* the Court combined peripheral rights from the First, Third, Fourth, and Fifth Amendments to form the constitutionally protected right of privacy.[61]

V. A SUPREME COURT DECISION WHICH SUPPORTS THE GENERAL PRINCIPLE

No decided Supreme Court case better represents the application and recognition of the General Principle than *District of Columbia v. Heller*.[62] The plaintiff, Dick Anthony Heller, challenged a District of Columbia law, which "totally ban[ned] handgun possession in the home."[63] Heller claimed this law violated his rights under the Second Amendment[64] to keep and bear arms.[65] The Court held that the strict scrutiny standard must be applied to

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59. *Id.* (emphasis added).

60. *See id.* at 482–83.

61. *Id*. at 484. Finding a peripheral right protected by the Constitution by implication from several enumerated rights is an indication that the Bill of Rights is as much a system of rights as a "bill," that is, a list of unrelated rights. When interpreting the Bill of Rights, one should take into account the systems dynamics of the document as a whole and the multidimensional nature of each of the enumerated rights.

62. 554 U.S. 570 (2008).

63. *Id.* at 628.

64. U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

65. *Heller*, 554 U.S. at 573 ("We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.").

the District of Columbia's law.[66] In striking down this law, the Court stated:

> As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," would fail constitutional muster.[67]

The Court then held that the District of Columbia had an obligation to provide Heller with the means of exercising this constitutional right; this meant that the District must issue Heller a license.[68] This holding may be interpreted as applying the principle that when there is an end or right protected by the Constitution, the state must provide a constitutional means to attain it, i.e., a means to an end. The Supreme Court's opinion provides strong evidence that this is the interpretation the majority intended when it cited, with approval,[69] the following quotation from the Alabama Supreme Court: "A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional."[70] If it were so inter-

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66. *See id.* at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

67. *Id.* at 628–29 (citations omitted) (quoting Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007)).

68. *Id.* at 635.

69. *Id.* at 629.

70. State v. Reid, 1 Ala. 612, 616–17 (1840).

preted, *Heller* would clearly constitute precedent for the General Principle of this Article, specifically that when there is an end or right protected by the Constitution, there must be a constitutional means to attain that end or right.[71]

VI. AN ONGOING STRUGGLE THAT COULD LEAD TO A TEST CASE FOR THE GENERAL PRINCIPLE

The battle over abortion rights continues to this day, and it has been fought in legislatures, in courts, in the media, and on the streets.[72] A brief review of the tactics and successes of the anti-abortion rights groups from *Roe v. Wade*[73] to the present will develop the factual and legal settings from which there might arise a Supreme Court case in which the General Principle advocated by this Article could be argued.

Roe, the Plaintiff, challenged Texas criminal statutes that criminalized abortions unless they were "for the purpose of saving the life of the mother."[74] The Court acknowledged the social, as well as the legal dimensions of this conflict as follows: "We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires."[75] The Court reaffirmed its holding in *Griswold* "that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[76] This right may be limited by a state, said Justice Blackmun in his opinion for the Court, only if the state could prove "a compelling state interest,"[77] and that its statutes were

71. *See supra* Part III.

72. *See, e.g.*, Caitlin E. Borgmann, *Roe v. Wade at 40:* Roe v. Wade's *40th Anniversary: A Moment of Truth for the Anti-Abortion-Rights Movement?*, 24 STAN. L. & POL'Y REV. 245 (2013) (tracing the history of the conflict between pro-abortion and anti-abortion forces and analyzing the present climate of that struggle).

73. 410 U.S. 113 (1973).

74. *Id.* at 118.

75. *Id.* at 116.

76. *Id.* at 152. The Court held that this right of privacy was founded in the Fourteenth Amendment's concept "of personal liberty and restrictions upon state action." *Id.* at 153.

77. *Id*. at 156.

"narrowly drawn to express only the legitimate state interest at stake."[78] This is the familiar strict scrutiny test, which is by far the most demanding standard imposed on government actions.[79] This was the standard applicable to state regulations that restricted abortions during the period before viability of the fetus, the point called the "compelling point" by the Court.[80] The compelling point was approximately at the end of the first trimester of pregnancy.[81] After the compelling point, the states were free to enact laws to "regulate the abortion procedure in ways that are reasonably related to maternal health,"[82] a standard much lower than strict scrutiny. The Court gave examples of the types of laws that could satisfy this lower constitutional standard; these include "requirements as to the qualifications of the person who is to perform the abortion . . . [and] the facility in which the procedure is to be performed."[83] *Roe* also allows states to enact restrictions that vary depending on the length of the pregnancy.[84]

As discussed below, states recognized authoritative advice[85] when they saw it and began to pass laws that made both obtaining and performing an abortion costlier, more inconvenient, and more difficult.[86] Anti-abortion groups viewed the five-to-four *Roe* decision as reversible if one of the justices in the majority re-

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78. *Id.* at 155.

79. *See, e.g.*, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273 (2007) ("[T]he requirement of [strict scrutiny] also contrasts with an intermediate form of scrutiny under which the government, in defending challenged legislation, must point to an interest that is 'important.' Within this hierarchy, [strict scrutiny] stand[s] at the top.").

80. *Roe*, 410 U.S. at 163.

81. *Id.*

82. *Id.* at 164.

83. *Id.* at 163.

84. *Id.* at 150. ("Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.").

85. *See* Phillip M. Kannan, *Advisory Opinions by Federal Courts*, 32 U. RICH. L. REV. 769 (1998) (demonstrating that the Supreme Court may give what amounts to advisory opinions in dicta and by discussing examples).

86. *See infra* notes 98–101 and accompanying text.

tired and was replaced by a justice who opposed abortion.[87] It was widely anticipated and theorized that when President Reagan appointed Justice O'Connor this goal had been achieved.[88]

Planned Parenthood v. Casey[89] gave the Court the opportunity to test this hypothesis. At issue in *Casey* was the Pennsylvania Abortion Control Act ("PACA").[90] The judgment of the Court was given by Justice O'Connor, Justice Kennedy, and Justice Souter in a joint opinion.[91] They announced early in Section I of the joint opinion: "[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed."[92] The Court repeated this reassuring message later in Section IV: "Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding."[93] In spite of this reassuring rhetoric, *Casey* did reverse important holdings in *Roe*. Perhaps the most important of these is that the strict scrutiny standard for state regulations applicable before viability under *Roe* is replaced by an "undue burden" standard in *Casey*.[94] Under this standard, a state regulation that has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abor-

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87. *See* Christopher E. Smith & Thomas R. Hensley, *Unfilled Aspirations: The Court-Packing Efforts of Presidents Regan and Bush*, 57 ALB. L. REV. 1111, 1117–18 (1994) (noting that Reagan and Bush attempted to "pack the Supreme Court with Justices who would undo the objectionable liberal decisions of the preceding three decades," and one reason Reagan chose O'Connor was because O'Connor "explicitly criticized the reasoning in *Roe* and . . . endorsed government restrictions on abortion"(citations omitted)).

88. *See* Ronald Reagan, *Interview with Eleanor Clift, Jack Nelson, and Joel Havemann of the Los Angeles Times*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM (June 23, 1986), http://www.reagan.utexas.edu/archives/speeches/1986/62386e.htm (Opposition to *Roe* on the bench grew when President Reagan, who supported legislative restrictions on abortion, began making federal judicial appointments in 1981. Reagan denied that there was any litmus test: "I have never given a litmus test to anyone that I have appointed to the bench . . . . I also place my confidence in the fact that the one thing that I do seek are judges that will interpret the law and not write the law.").

89. 505 U.S. 833 (1992).

90. Relevant provisions are reproduced in *Casey*, 505 U.S. at 902 (appendix to the opinion of O'Connor, Kennedy, and Souter, JJ.).

91. *Id.* at 843.

92. *Id.* at 846.

93. *Id.* at 879.

94. *Id.* at 874.

tion of a nonviable fetus" is unconstitutional.[95] Not only is this substantive component of the undue burden standard less protective than strict scrutiny of the woman's right, the new standard also shifts the burden of proof from the state having to prove the elements of strict scrutiny to the woman seeking an abortion, who now has to identify an obstacle that is impeding her abortion and then prove that it is a substantial impediment.[96] The strict scrutiny standard was replaced by a "reasonable relation" standard.[97] The actual holding of the Court is thus in conflict with its rhetoric.

The Court continues on to provide examples of types of state pre-viability regulations which may be constitutional.[98] These examples include means by which the state, parents, or guardian of a minor "may express profound respect for the life of the unborn;"[99] measures "designed to persuade her to choose childbirth over abortion;"[100] and "[r]egulations designed to foster the health of a woman seeking an abortion."[101] Next, the Court considered post-viability state regulation and concluded:

> We also reaffirm *Roe's* holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[102]

After establishing the general doctrines summarized in the preceding paragraphs, the Court turned to the specific requirements of PACA. The first of these is that informed consent must be given after the pregnant woman is provided with information describ-

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95. *Id.* at 877.

96. *See* Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (reversing the appellate court for enjoining abortion restriction where plaintiffs had not proven that the requirement imposed an undue burden).

97. *See* Gonzales v. Carhart, 550 U.S. 124, 166 (2007) ("Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends.").

98. *Casey*, 505 U.S. at 877.

99. *Id.*

100. *Id.* at 878.

101. *Id.*

102. *Id.* at 879 (quoting Roe v. Wade, 410 U.S. 113, 164–65 (1973)).

ing the fetus, the medical assistance for child birth, child support, adoption agencies, and after a 24 hour waiting period.[103] In upholding this part of PACA, the Court reconsidered its decisions in *Akron v. Akron Center for Reproductive Health, Inc.* (Akron I)[104] and *Thornburg v. American College of Obstetricians and Gynecologists*[105] and overruled both.[106] The information requirement and waiting period were upheld even if they were intended by the State to express a preference for childbirth over abortion.[107] Reporting requirements in PACA were also upheld under the undue burden test.[108]

The only section of PACA struck down by the Court under the undue burden standard was the requirement that wives notify their husbands of their intent to have an abortion.[109] This provision did not survive under the new standard because it would give the husband "[a] troubling degree of authority over his wife."[110]

As a result of *Casey*, states that wanted to restrict the constitutionally protected rights of pregnant women who wanted abor-

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103. *Id.* at 881.

104. 462 U.S. 416, 451 (1983) (invalidating sections of Akron's "Regulations of Abortions" ordinance that dealt with parent consent, informed consent, a twenty-four-hour waiting period, and the disposal of fetal remains).

105. 476 U.S. 747, 764 (1986) (affirming the holding which invalidated specific provisions of Pennsylvania's 1982 Abortion Control Act).

106. *Casey*, 505 U.S. at 882 ("To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases are inconsistent with *Roe's* acknowledgment of an important interest in potential life, and are overruled." (citations omitted)).

107. *Id.* at 883 ("[W]e depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.").

108. *Id.* at 900–01.

109. 18 PA. STAT. AND CONS. STAT. ANN. § 3209 (West 1990); *see also Casey*, 505 U.S. at 898 ("These considerations confirm our conclusion that § 3209 is invalid.").

110. *Casey*, 505 U.S. at 898. The Court justified its rejection of § 3209 by stating: "A State may not give to a man the kind of dominion over his wife that parents exercise over their children." *Id.*

tions had two new advantages: (1) the state restrictions must meet only an undue burden standard rather than the most demanding standard in constitutional law, strict scrutiny;[111] and (2) by combining the examples given in *Roe* of pre-viability restrictions that would be upheld even under strict scrutiny with those upheld in *Casey* under the undue burden standard, states have a catalogue of examples and models to choose from, extrapolate from, build on, and generalize. Many states have used this catalogue extensively. More specifically, they have enacted:

> [Laws banning] common abortion procedures; requirements that abortions be performed in hospitals; licensure, reporting, and other requirements for abortion facilities; limits on the performance of abortions after fetal viability; requirements for parental consent or notice for minors, or husband consent or notice for married women; mandatory delivery of information designed to discourage abortions; waiting periods; and bans on publicly funded abortions or use of public facilities for abortions[112] . . . . [And] pre-abortion ultrasound requirements [to] try to persuade women to forego abortion[113] . . . . [And] abortion clinic standards . . . [and] healthcare professionals' right to refuse to provide treatment . . . .[114]

Each of the conditions listed above makes abortions more expensive; more time consuming; less convenient; less accessible; a more difficult moral choice; less autonomous; and/or riskier for the woman seeking an abortion and for the person or institution willing to provide it. If a trend of building burden on burden becomes prevalent, even if no single one would constitute an undue burden under *Casey*, the cumulative result could be that the means to the constitutionally protected rights of pregnant women are ef-

111. *Id.* at 874 ("Only where state regulation poses an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

112. Borgmann, *supra* note 72, at 253.

113. *Id.* at 259.

114. *Id.* at 261.

fectively foreclosed, especially for poorer women.[115] Under these circumstances, a pregnant woman could assert the positive right, advocated in this Article, called the General Principle.[116] Under that principle, she would claim that because she has constitutionally protected rights even under *Casey*, the government must provide her constitutional means to achieve those rights.

The case *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*[117] may provide Planned Parenthood of Greater Texas Surgical Health Services ("Texas Surgical") the opportunity to persuade the Court that the General Principle should be applied. In this case Texas Surgical challenged two provisions of a Texas statute:

> The first requires that a physician performing or inducing an abortion have admitting privileges on the date of the abortion at a hospital no more than thirty miles from the location where the abortion is provided. The second mandates that the administration of abortion-inducing drugs comply with the protocol authorized by the Food and Drug Administration (FDA), with limited exceptions.[118]

The abortion clinics petitioned the Supreme Court for certiorari to reverse the holdings of court of appeals, and certiorari was granted in November 2015, with Texas Surgical being consolidated with other cases and renamed *Whole Woman's Health v. Cole*.[119] In their petition, the clinics assert that other provisions of

115. *See Abortion and Down Syndrome*, N. Y. TIMES, Aug. 25, 2015, at A18 ("[Ohio] lawmakers . . . [have] plowed ahead with 16 abortion restrictions, all signed by Mr. Kasich, since 2011. . . . These measures are part of a larger national effort to undermine reproductive rights and, eventually, to overturn *Roe v. Wade* in full . . . .").

116. *See supra* Part III.

117. 748 F.3d 583 (5th Cir. 2014), *cert. granted sub nom.* Whole Woman's Health v. Cole, 136 S. Ct. 499 (2015) (mem.); *see also* Adam Liptak, *Texas Abortion Providers Ask Supreme Court to Reverse Ruling on Clinics*, N.Y. TIMES (Sept. 3, 2015), http://www.nytimes.com/2015/09/04/us/politics/supreme-court-ruling-abortion-clinics-texas.html.

118. *Abbott*, 748 F.3d at 587.

119. Whole Woman's Health v. Cole, 136 S. Ct. 499 (2015) (mem.); *see also* Liptak, *supra* note 117.

this law have caused twenty of the forty-one abortion clinics in Texas to close,[120] and these two provisions would reduce the number of abortion clinics in Texas to ten.[121]

The impact of these two provisions of the Texas law on women seeking abortions was summarized as follows: "The Plaintiffs presented evidence that, as a result of the closure of approximately one third of Texas abortion clinics and the remaining clinics' inability to meet the inevitably increased demand, approximately 22,000 women per year will be precluded from accessing abortion services in Texas."[122]

It is these 22,000 women who would have standing to bring a suit under the General Principle that Texas must offer them a means for them to obtain a lawful abortion. They would argue that they have a well-established, constitutionally protected right to an abortion and that the state must provide a means by which they can realize that right. Just as the District of Columbia must provide Heller with a means to exercise his constitutionally protected right of self-defense in his home, Texas must provide women seeking an abortion in Texas a means to that end.

VII. CONCLUSION

Constitutionally protected rights do not exist as isolated points on a plane. Each is a multi-dimensional complex of rights. For example, although the Second Amendment does not mention self-defense, the Supreme Court recognized it as an "*inherent*" component of the rights expressed to keep and bear arms.[123] In *Griswold v. Connecticut*, the Court recognized that each constitutionally protected right had peripheral-penumbral constitutionally

120. Liptak, *supra* note 117 ("Other parts of the law have already caused about half of the state's 41 abortion clinics to close. If the contested provisions take effect, Wednesday's filing said, the number of clinics will again be halved.").

121. *Id.*

122. *Abbott*, 769 F.3d at 345 (Dennis, J., dissenting).

123. District of Columbia v. Heller, 554 U.S. 570, 628 (2008) ("As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right.").

protected rights.[124] For example, regarding the First Amendment, the Court stated: "[T]he First Amendment has a penumbra where *privacy* is protected from governmental intrusion."[125] In addition to recognizing and protecting rights that are *inherent* to or *peripheral* to enumerated constitutionally protected rights, this Article argues that there are constitutionally protected rights which are *means* necessary for protecting the enumerated and un-enumerated rights, and further, that the state must provide these means.

This argument is based on *Baze* and *Glossip*, which established the principle that where the state has a constitutional power to achieve a specific objective or outcome, there must be constitutional means for carrying out or achieving the objective or outcome.[126] The General Principle posited in this Article[127] makes the logical extrapolation from *Baze* and *Glossip* that when a person has a constitutionally protected right, the state must provide a constitutionally protected means to achieve it. Thus, each complex, multidimensional, constitutionally protected right includes (1) inherent rights, (2) peripheral-penumbral rights, and (3) necessary means for achieving constitutionally protected rights.

The General Principle posited in this Article reflects the basic logic of Principle 1 of the Stockholm Declaration.[128] In the context of U.S. law, the General Principle has been applied by the Supreme Court in *Baze* and *Glossip* regarding the Eighth Amendment and, very probably, in *District of Columbia v. Heller* regarding the Second Amendment. This Article posits that the General Principle applies to *all* constitutionally protected rights. As courts begin to recognize the multidimensional aspects of constitutionally protected rights, particularly the General Principle that when there is an end or right protected by the Constitution, there must be a constitutional means to attain that end or right, the landscape of

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124. 381 U.S. 479, 484 (1965) ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

125. *Id.* at 483 (emphasis added).

126. *See supra* Part III.

127. *See supra* Part III.

128. *See Stockholm Declaration*, *supra* note 1 ("Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality [that is, the necessary means] that permits a life of dignity and well-being, [that is, to a protected right]. . . .").

analysis and application of existing constitutional interpretation may begin to shift from a blunt categorical refusal to recognize positive rights to a more nuanced normative analysis. Conservative Justices, for example, may be willing to accept a positive right under the Second Amendment.

Learning Outcomes in a Flipped Classroom: A Comparison of Civil Procedure II Test Scores Between Students in a Traditional Class and a Flipped Class

KATHARINE T. SCHAFFZIN*

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I. INTRODUCTION

By now, many legal educators have heard of a "flipped classroom," even if they may not be familiar with its meaning. The odds are great that more and more law students have experienced a flipped classroom in high school, college, or even in law school,[1] although they may be unfamiliar with the pedagogical term. After learning about how the flipped classroom is being adapted for the law school course,[2] I became convinced that such an approach to teaching could benefit my students' learning outcomes.

In January 2014, I decided to adapt my own Civil Procedure II materials to this new format. Unbeknownst to my students, I tracked the performance of this class to compare it to that of my Civil Procedure II class from the preceding year.[3] Assigning the same readings from the same texts in both 2013 and 2014,[4] I changed only the mode in which I delivered the material to my students. Information I had previously presented to my class in 2013 in the form of a lecture interspersed with Socratic dialogue I now provided to the 2014 class online in advance of class and indefinitely thereafter in the form of PowerPoint slides with my lec-

1. *See generally infra* Part II.

2. I heard about flipped learning as early as 2013, but I was not inspired to make a change until I heard Michele Pistone of Villanova Law School speak about the practice and her LegalED website at the 2014 Annual Meeting of the Association of American Law Schools in January 2014 in New York, New York.

3. The idea of comparing the performance of the 2013 and 2014 classes belongs to Andrea Curcio of Georgia State University Law School. Professor Curcio urged me to empirically study the results of my experiment in teaching methods in response to my guest blog post on LegalED.

4. Both classes read assignments from JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON, & HELEN HERSHKOFF, CIVIL PROCEDURE: CASES & MATERIALS (West, 10th ed. 2009), LEWIS A. GROSSMAN & ROBERT G. VAUGHN, A DOCUMENTARY COMPANION TO *A CIVIL ACTION* (Foundation Press, 4th ed. 2008), and JONATHAN HARR, A CIVIL ACTION (no specific edition was assigned). Admittedly, each class was assigned the most current rules supplement which differed slightly, as one might expect. *Compare* JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON, & HELEN HERSHKOFF, 2012–2013 CIVIL PROCEDURE: SUPPLEMENT (West 2012), *with* JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON, & HELEN HERSHKOFF, 2013–2014 CIVIL PROCEDURE: SUPPLEMENT (West 2013).

ture interposed as voiceover. Although I had also assigned hypothetical problems to the class in 2013, it was not uncommon that we would not have time to discuss all of those assigned problems in class. Inside the classroom in 2014, however, the class worked through assigned problems and many more requiring students to apply the content read and viewed in advance of class to hypothetical situations. I administered final examinations in both April 2013 and 2014 that were fifty percent identical. The content of the course and half the examination were the same in 2013 and 2014. The only thing that had changed was how I delivered that content to students.

This article documents my experience flipping a law school course in Civil Procedure. In Part II, I introduce the reader to the concept of flipped learning, as well as its development.[5] In Part III, I describe the evolution of the traditional law school learning environment and discuss new trends in legal pedagogy.[6] In Part IV, I explain the similarities and differences between my traditional course in Spring 2013 and my flipped course in 2014.[7] In Part V, I compare the performances of my 2013 and 2014 classes on the same exam and draw conclusions therefrom.[8] In Part VI, I conclude that the flipped learning experience was, overall, a success, although the objective performance of students on my exam was statistically insignificant.[9]

II. WHAT IS FLIPPING AND WHY IS IT POPULAR?

The concept of a flipped classroom is relatively new; in 2007, two chemistry teachers first developed it in a high school classroom in Colorado.[10] The idea took hold quickly and educa-

5. *See infra* Part II.
6. *See infra* Part III.
7. *See infra* Part IV.
8. *See infra* Part V.
9. *See infra* Part VI.
10. NOORA HAMDAN ET AL., THE FLIPPED LEARNING MODEL: A WHITE PAPER BASED ON THE LITERATURE REVIEW TITLED *A REVIEW OF FLIPPED LEARNING* 3 (2013) ("Two rural Colorado chemistry teachers, Jonathan Bergmann and Aaron Sams, are often referred to as the pioneers of Flipped Learning. Concerned that students frequently missed end-of-day classes to travel to other schools for competitions, games or other events, they began to use live video recordings and screencasting software in 2007 to record lectures, demonstra-

tors from high schools, then colleges, and in recent years, even a few law schools quickly began adopting this teaching method.[11] What is involved? "As its name suggests, flipping describes the inversion of expectations in the traditional college lecture."[12] Essentially, educators reverse what typically happens in a classroom with what usually happens at home.

> A flipped classroom inverts the traditional education model so that the content is delivered outside of class, while class time is spent on activities normally considered "homework." For example, students may access instructional material through videos, podcasts or online tutorials before the class meeting. Then during class time, students work on activities which force them to apply what they have learned.[13]

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tions, and slide presentations with annotations."); Catherine A. Lemmer, *A View from the Flip Side: Using the "Inverted Classroom" to Enhance the Legal Information Literacy of the International LL.M. Student*, 105 LAW LIBR. J. 461, 464–65 (2013); *Seven Things You Should Know About . . . Flipped Classrooms*, EDUCAUSE (Feb. 2012), http://net.educause.edu/ir/library/pdf/ELI7081.pdf; *The Teacher's Guide to Flipped Classrooms*, EDUDEMIC, http://www.edudemic.com/guides/flipped-classrooms-guide/ (last visited Mar. 14, 2016); Antonio Membrillo, *The Flipped Classroom*, PREZI (Jan. 16, 2014), https://prezi.com/dynqyw5ubkio/the-flipped-classroom/ ("Many factors influenced the creation and adoption of the flipped classroom model. However, two specific innovators played a key role. Teachers Jonathan Bergman and Aaron Sams at Woodland Park High School in Woodland Park, CO, discovered software to record PowerPoint presentations. They recorded and posted their live lectures online for students who missed class.").

11. *See infra* Section II.A.

12. Dan Berrett, *How 'Flipping' the Classroom Can Improve the Traditional Lecture*, CHRON. HIGHER ED. (Feb. 19, 2012), http://chronicle.com/article/How-Flipping-the-Classroom/130857 ("It takes many forms, including interactive engagement, just-in-time teaching (in which students respond to Web-based questions before class, and the professor uses this feedback to inform his or her teaching), and peer instruction."); *see* K.K. DuVivier, *Goodbye Christopher Columbus Langdell?*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10475, 10476 (2013).

13. Candice Benjes-Small & Katelyn Tucker, *Keeping up with . . . Flipped Classrooms*, ASS'N C. & RES. LIBR, http://www.ala.org/acrl/publications/keeping_up_with/flipped_classrooms; Nicole Larson, *The Flipped*

In theory, students walk into the classroom with a greater understanding of the material than they would otherwise have walking into a traditional classroom. "But the techniques all share the same underlying imperative: Students cannot passively receive material in class . . . . Instead they gather the information largely outside of class, by reading, watching recorded lectures, or listening to podcasts."[14]

The process of flipped learning, also called an inverted classroom or reverse instruction,[15] seems simple: present information before class and do homework together in class.[16] However, this explanation "does not adequately represent the practice of what researchers are calling the flipped classroom. This definition would imply that the flipped classroom merely represents a reordering of classroom and at-home activities. In practice, however, this is not the case."[17] There is much more to flipping a class than putting a lecture online and doing homework in class. The process involves "a 'pedagogical approach in which direct instruction moves from the group learning space to the individual learning space, and the resulting group space is transformed into a dynamic, interactive learning environment where the educator guides students as they apply concepts and engage creatively in the subject

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Classroom Inverts Traditional Teaching Methods, PREZI (Feb. 13, 2014) ("The flipped classroom inverts traditional teaching methods, delivering instruction online outside of class and moving 'homework' into the classroom.").

14. Berrett, *supra* note 12.

15. DuVivier, *supra* note 12, at 10480.

16. JACOB BISHOP & MATTHEW A. VERLEGER, THE FLIPPED CLASSROOM: A SURVEY OF THE RESEARCH 5 (2013), http://www.asee.org/public/conferences/20/papers/6219/view ("'Inverting the classroom means that events that have traditionally taken place inside the classroom now take place outside the classroom and vice versa.'").

17. *Id.*; JESSICA YARBRO ET AL., EXTENSION OF A REVIEW OF FLIPPED LEARNING 5 (2014), http://flippedlearning.org/cms/lib07/VA01923112/Centricity/Domain/41/Extension%20of%20Flipped%20Learning%20Lit%20Review%20June%202014.pdf ("The terms 'flipped classrooms' and 'Flipped Learning' are not synonymous and it is a common mistake usually perpetuated in the opening paragraph of articles written on the topic. What is often defined as 'school work at home and home work at school' is overly simplistic and does not cover the range of active engagement within a flipped classroom using a Flipped Learning approach.").

matter.'"[18] By encouraging the development of innovative teaching methods, flipped learning also encourages and facilitates the use of new technologies and techniques to educate the class.[19]

Additionally, instead of assigning problems for students to solve alone as homework, the instructor guides students as they work through problems, or other interactive activities, during class as a whole.[20] This offers a number of benefits. First, "[t]he immediacy of teaching in this way enables students' misconceptions to be corrected well before they emerge on a midterm or final exam. The result, according to a growing body of research, is more learning."[21] Second, from an assessment perspective, the professor has the advantage of measuring student learning in the moment. Third, and most touted, students engage in active, collective learning as a whole. It is in this way of inverting the traditional in-class delivery of substantive information and at-home application of such substantive information with an at-home delivery of content and in-class application of that content that a class is flipped.

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18. YARBRO ET AL., *supra* note 17 (citation omitted); *see* Lemmer, *supra* note 10, at 465.

19. YARBRO ET AL., *supra* note 17 ("By moving from a flipped class to actively engaging in Flipped Learning, teachers are able to implement new or various methodologies into their classrooms."); *see also* Lemmer, *supra* note 10, at 465 ("[F]lipped classrooms use technology to invert the traditional teaching environment. Although there is no single model, the term is generally used for those class structures that use technology to deliver online instructional materials as preclass homework and then repurpose class time for individual or group lab work. The instructional materials become a study aid to help students complete the research assignment in the lab. During lab sessions, the professor serves as a coach or advisor, encouraging students in individual or collaborative efforts.").

20. Berrett, *supra* note 12 ("And when they are in class, students do what is typically thought to be homework, solving problems with their professors or peers, and applying what they learn to new contexts. They continue this process on their own outside class."); *Teachers "Doing the Flip" to Help Students Become Learners*, THE DAILY RIFF (May 13, 2011, 11:57 AM), http://www.thedailyriff.com/articles/teachers-doing-the-flip-to-help-students-become-learners-531.php ("[T]he teacher becomes the 'guide on the side' where students are using the class/school experience as a fully interactive experience WITH the teacher—instead of the teacher being the one-way traditional talking head.").

21. Berrett, *supra* note 12.

A. The History of Flipping

Flipped learning is less than a decade old. In 2007, two high school chemistry teachers at Woodland Park High School in rural Woodland Park, Colorado, Jonathon Bergman and Aaron Sams, began screencasting their lectures to students online.[22] Their goal was to keep those students who were absent or involved in extracurricular activities involved in learning the assigned material without falling behind.[23] Flipped classrooms quickly evolved beyond Woodland Park High School. "In 2012, Bergmann and Sams founded the Flipped Learning Network, a non-profit organization that seeks to help educators make the switch" from more traditional teaching methods to a flipped learning model.[24] The Flipped Learning Network developed the four pillars of flipped learning: flexible environment, learning culture, intentional con-

22. Emily Atteberry, *"Flipped Classrooms" May Not Have Any Impact on Learning*, USA Today (Dec. 5, 2013), http://www.usatoday.com/story/news/nation/2013/10/22/flipped-classrooms-effectiveness/3148447/ ("The flipped classroom trend first took root in 2007 when high school teachers Jonathan Bergmann and Aaron Sams began offering their lectures in PowerPoint version online to students who missed class."); *The Teacher's Guide to Flipped Classrooms*, *supra* note 10 ("Many factors influenced the creation and adoption of the flipped classroom model. However, two specific innovators played a key role. Teachers Jonathon Bergman and Aaron Sams at Woodland Park High School in Woodland Park, CO, discovered software to record PowerPoint presentations. They recorded and posted their live lectures online for students who missed class."); HAMDAN ET AL., *supra* note 10, at 3 ("Two rural Colorado chemistry teachers, Jonathan Bergmann and Aaron Sams, are often referred to as the pioneers of Flipped Learning. Concerned that students frequently missed end-of-day classes to travel to other schools for competitions, games or other events, they began to use live video recordings and screencasting software in 2007 to record lectures, demonstrations, and slide presentations with annotations.").

23. *The Teacher's Guide to Flipped Classrooms*, *supra* note 10; Membrillo, *supra* note 10 ("Many factors influenced the creation and adoption of the flipped classroom model. However, two specific innovators played a key role. Teachers Jonathan Bergman and Aaron Sams at Woodland Park High School in Woodland Park, CO, discovered software to record PowerPoint presentations. They recorded and posted their live lectures online for students who missed class.").

24. Atteberry, *supra* note 22.

tent, and professional educator to help share this novel teaching method with others.[25]

Flipped classrooms were "made mainstream through the Khan Academy,"[26] although Khan, a supplier of free online education, does not adopt the term "flipped classroom" to describe its methods.[27] Instead, Maureen Suhendra, a member of Khan's school implementation team, explains the difference as follows:

> The flipped classroom in the traditional sense is that teachers are assigning videos for homework, and they'll come to class and work out problems together. Students are still all moving at the same pace. Khan Academy is much more about a customized learning experience—working on different math exercises at a different time. It's a vision is of a self-paced, customized learning experience.[28]

So Khan has adapted a flipped learning model to provide a personal, self-paced program of instruction similar to that provided by a tutor.[29] Whatever they call it, Khan has helped bring flipped learning to the forefront of modern American teaching methods.

The flipped classroom concept is drawing interest from a broad spectrum of educators. Research shows that "[t]eachers who are flipping their classes are not necessarily only new-to-the-profession teachers, or those with a high degree of computer skills

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25. *The Four Pillars of F-L-I-P,* FLIPPED LEARNING NETWORK (2014), http://flippedlearning.org/cms/lib07/VA01923112/Centricity/Domain/46/FLIP_handout_FNL_Web.pdf.

26. Lemmer, *supra* note 10, at 465 (citing *About*, KHAN ACADEMY, http://www.khanacademy.org/about (last visited Aug. 1, 2013)); *see* DuVivier, *supra* note 12 at 10480.

27. Karen Springen, *Flipping the Classroom: A Revolutionary Approach to Learning Presents Some Pros and Cons*, SCHOOL LIB. J. (April 1, 2013), http://www.slj.com/2013/04/standards/flipping-the-classroom-a-revolutionary-approach-to-learning-presents-some-pros-and-cons/#_ ("Khan, which offers free how-to videos, doesn't completely embrace the term 'flipped classroom.'").

28. *Id.* (quoting Maureen Suhendra, a member of Khan's school implementation team).

29. *Id.* ("The current educational system is too much of a 'one-size-fits-all model,' says Suhendra. Not the Khan Academy. . . . 'In essence, Khan Academy can become a personalized tutor for students.'").

and comfort with technology."[30] In fact, a 2014 study conducted by the Flipped Learning Network and Sophia Learning of 2,358 educators responding to 36 questions revealed that "42% of flippers have been teaching for 16 years or more."[31] Not surprisingly, math and science teachers were among the most likely to flip their classes (33% and 38%, respectively).[32] Researchers, however, were surprised to discover that the number of teachers of English or language arts flipping their classrooms had increased "from 12% in 2012 to 23% in 2014."[33] There is really no educational constituency that could not adopt flipped learning if it chose to do so.

B. The Perceived Benefits of Flipping

The potential benefits of flipped learning are numerous, contributing to its popularity. Although there is a great deal of cross-over, most of these perceived benefits can be categorized as either improving learning outcomes[34] or satisfying the goals of modern educational administrations.[35] Flipped learning arguably enhances learning outcomes by allowing students to work somewhat at their own paces by reviewing online content as many times as they would like,[36] correcting student misunderstanding in the moment,[37] increasing student-teacher interaction in an ever-growing class,[38] and enhancing critical thinking skills.[39] It also helps educators meet the challenges that modern administrations impose by providing countless opportunities for assessment of student learning[40] and efficiently offering student-teacher interaction despite large class sizes in a way online competitors cannot,[41]

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30. YARBRO ET AL., *supra* note 17, at 6.
31. *Id.*
32. *Id.*
33. *Id.*
34. Berrett, *supra* note 12; *see infra* notes 37–63 and accompanying text.
35. *See infra* notes 37–63 and accompanying text.
36. *See* Berrett, *supra* note 12.
37. *See* DuVivier, *supra* note 12.
38. *See The Teacher's Guide to Flipped Classrooms*, *supra* note 10.
39. *See infra* note 50.
40. *See* Berrett, *supra* note 12.
41. *See* Springen, *supra* note 27.

while still enabling students a modified self-paced learning module similar to those made attractive by online education.[42]

One of the key factors driving increased adoption of the flipped classroom is poor learning outcomes from "the traditional one-size-fits-all model of education."[43] This concern is compounded by ever-growing class sizes.[44] "One of the main advantages of a flipped classroom is that it allows students to play back, as many times as they need, those parts of lectures they did not understand the first go-round."[45] Additionally, collective class time is not wasted on one student who needs greater clarification; the confused student can replay the online content of a flipped class as often as he or she wishes without delaying the rest of the class.[46] This ability to watch the online instruction when and as often as the student chooses empowers students with "greater control over the pace of instruction" while holding students accountable for their own learning.[47] In my personal experience, I had many students inform me how valuable they found this increased sense of control to be.

Additionally, flipped learning enhances faculty interaction with students by creating space during scheduled class meetings for dialogue. Moreover, "[t]he immediacy of teaching in this way enables students' misconceptions to be corrected well before they emerge on a midterm or final exam. The result, according to a growing body of research, is more learning."[48] Correcting student misunderstanding in real time is a distinct advantage offered by flipped learning.

One of the most beneficial aspects of flipped learning is the challenge it presents to students to think critically, in the moment, during class as they apply what they learned before class to prob-

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42. *See infra* note 58.

43. *The Teacher's Guide to Flipped Classrooms*, *supra* note 10.

44. Sam Dillon, Tight Budgets Mean Squeeze in Classrooms, N.Y. TIMES (Mar. 6, 2011), http://www.nytimes.com/2011/03/07/education/07classrooms.html.

45. DuVivier, *supra* note 12, at 10480; Springen, *supra* note 27.

46. Springen, *supra* note 27.

47. Benjes-Small, *supra* note 13.

48. Berrett, *supra* note 12 ("More important, 'you can get better student-learning outcomes.'" (quoting Harrison Keller, vice provost for higher-education policy at University of Texas at Austin)).

lems or exercises posed to the group. In a traditional class, "[s]tudents have only a passive role in the lecture process, and cognitive psychologists have found that audiences have difficulty remembering information if it is conveyed only through listening."[49] Unlike in a traditional course, "the cognitive strain that flipping imposes on students accounts for much of its success—and the resistance it engenders."[50] Several researchers have concluded that flipped learning creates such cognitive strain to the benefit of students.[51]

Karen Rhea is a lecturer and director of the introductory mathematics program at the University of Michigan at Ann Arbor. Along with two colleagues, she has been studying whether students learning calculus in a flipped classroom have made greater gains in understanding the concepts than those students learning in a traditional lecture class. The program administered:

> concept inventories to students before they started calculus and after they finished, and calculated the difference relative to the maximum gain they could have made. Students in Michigan's flipped courses showed gains at about twice the rate of those in traditional lectures at other institutions who took the same inventories. The students at Michigan who fared worst—a group of 12 who were at risk of failing the course—showed the same gain as those who demonstrated the largest increase in understanding from traditional lectures elsewhere.[52]

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49. DuVivier, *supra* note 12.

50. Berrett, *supra* note 12. Although researchers agree that flipped learning does challenge critical thinking, other teaching methods may similarly challenge students. *Id.* ("Ultimately that strain is what is most important, not whether the course is flipped, says Carl E. Weiman, associate director of the White House Office of Science and Technology Policy. He has documented gains when relatively inexperienced physics graduate students and postdoctoral researchers lecture hundreds of students but stop intermittently to quiz and give feedback on the students' understanding of key concepts.").

51. *See infra* notes 53–63 and accompanying text.

52. Berrett, *supra* note 12.

A similar study at Harvard University focused on the learning gains of physics majors and nonmajors enrolled in physics.[53] The "results from using peer instruction show that, on the force concept inventory, nonmajors who take [the flipped physics] class outperform physics majors who learn in traditional lectures."[54]

In 1979, before web-based technology existed to flip a class as described above, Edward Kimball and Larry Farmer conducted an experiment at Brigham Young University J. Reuben Clark Law School wherein Kimball taught three sections of Evidence, employing a different teaching method in each. In the first section, Kimball used the traditional method and assigned a conventional casebook. In the second section, he assigned reading from a treatise and prepared problems that the class would then discuss in class. In the final section, he assigned reading from an Evidence treatise, used a computer program for students to work through the same prepared problems and to compare his own prepared answers to those problems, and offered periodic, voluntary class sessions to answer student questions. All students were given the same final exam. The results across all three sections were statistically insignificant.[55]

Flipped learning involves what is often referred to as "blended" instruction mixing online learning with face-to-face instruction. Studies show that such blended learning—whether in the form of a flipped classroom or otherwise—generates "'deeper learning experiences for the students.'"[56] In September 2010, the U.S. Department of Education ("DOE") compared the effectiveness of face-to-face teaching and online instruction.[57] "Based on the analysis of more than fifty empirical studies of online learning

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53. *Id.*

54. *Id.*

55. Todd E. Pettys, *The Analytic Classroom*, 60 BUFF. L. REV. 1255, 1276–77 (2012) (citing Edward L. Kimball & Larry C. Farmer, *Comparative Results of Teaching Evidence Three Ways*, 30 J. LEGAL EDUC. 196 (1979)).

56. Lemmer, *supra* note 10, at 466–67 (quoting Rita Shackel, *Beyond the Whiteboard: E-Learning in the Law Curriculum*, 12 QUEENSLAND U. TECH. L. & JUST. J. 105, 109–10 (2012)).

57. *Id.* at 466 (citing Barbara A. Means et al., *Evaluation of Evidence-Based Practices in Online Learning*, U.S. DEP'T OF EDUC. (Sep. 2010), http://www2.ed.gov/rschstat/eval/tech/evidence-based-practices/finalreport.pdf); *see* Pettys, *supra* note 55, at 1303–05.

conducted between 1996 and 2008, the report [of the DOE's comparative research] found purely online education 'as effective as classroom instruction, but no better.'"[58] The DOE's research varied, however, in studies comparing purely face-to-face instruction with a blend of online learning and face-to-face instruction.[59] The DOE research "found an average of thirty-five percent stronger learning outcomes for students taught in a blended format."[60] Blended courses are "'more successful and increase student satisfaction with the learning experience.'"[61] Interestingly, the DOE report concluded that

> there is nothing about a blend of online and face-to-face instruction per se that should improve student learning. Rather, the significantly improved outcomes for students taught in blended settings may flow simply from the fact that those students are exposed to more instructional materials than students whose primary encounters take place in a classroom.[62]

The blended flipped learning format necessarily provides students with more educational materials than the traditional class by providing more online content in advance of class, as well as greater interaction during class.

Not only may flipped learning improve student learning outcomes, it may also solve some educational challenges posed by institutional administrators. Specifically, flipped learning may respond to pressure from university administrations, accrediting bodies, and other groups for increased assessment of student learn-

58. Lemmer, *supra* note 10, at 466 (citing Means et al., *supra* note 57); *see* Pettys, *supra* note 55, at 1303–05.

59. Lemmer, *supra* note 10, at 466 (citing Means et al., *supra* note 57); *see* Pettys, *supra* note 55, at 1303–05.

60. Lemmer, *supra* note 10, at 466 (citing Means et al., *supra* note 57); *see* Pettys, *supra* note 55, at 1303–05.

61. Lemmer, *supra* note 10, at 466 (quoting Shackel, *supra* note 56, at 109–10).

62. Lemmer, *supra* note 10, at 466 (citing Means et al., *supra* note 57); *see* Pettys, *supra* note 55, at 1303–05.

ing.[63] In a flipped classroom, teachers witness student understanding, or the lack thereof, during class and can deal with it appropriately by making adjustments in real time. "[F]rustrations that students experience or incorrect learning patterns they develop can be reduced when students work on problems in the classroom while being guided by teachers or peers, as dictated by the flipped classroom model."[64] Because flipped learning provides daily opportunities for informal assessment, problems can be addressed immediately, before they manifest themselves in student performance on less frequently assessed examinations.

In addition to demanding greater assessment of student learning to improve the "product" schools offer to students, academic institutions are increasingly facing budget cuts.[65] Modern educational programs have consistently responded to tighter budgets by increasing class sizes and the student-to-teacher ratio. To the detriment of the student, economic forces mandate that class sizes cannot be reduced to allow greater interaction between student and teacher.[66] According to Harrison Keller, vice provost for higher-education policy at the University of Texas at Austin, however, flipped learning "allows colleges, particularly large research institutions with big classes, to make the traditional lecture model more productive . . . . 'If you do this well, you can use faculty members' time and expertise more appropriately, and you can also use your facilities more efficiently.'"[67] Flipped learning, thus, may mitigate the harmful impact of increased class size on student learning.

Flipped learning also helps educators respond to the demands of administrators to become more competitive in an educa-

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63. Berrett, *supra* note 12.

64. DuVivier, *supra* note 12, at 10480.

65. *See* Joyce E. McConnell, *The Future of Legal Education and the Profession*, W. VA. LAW., July–Sept. 2013, at 12; Ashby Jones & Jennifer Smith, *Amid Falling Enrollment, Law Schools are Cutting Faculty*, WALL STREET J. (Jul. 15, 2013, 4:39 PM), http://www.wsj.com/articles/SB10001424127887323664204578607810292433272.

66. Berrett, *supra* note 12.

67. Berrett, *supra* note 12 (quoting Harrison Keller); *see also* Bishop, *supra* note 16, at 6 ("The theoretical foundations used for justifying the flipped classroom typically focus on reasons for not using classroom time to deliver lectures.").

tional landscape that now offers a great deal of information to students working at their own pace for free online, for example, through MOOCs and online institutions.[68] "'I see a paradigm shift, and it's coming soon,' says Michael S. Palmer, an associate professor of chemistry and assistant director of the Teaching Resource Center at the University of Virginia. 'Content is not going to be the thing we do. We're going to help unpack that content.'"[69] Traditional educators are no longer the only sources of substantive information, but they have become the most expensive. Thus, providing students with an understanding and mastery of that information is the advantage that traditional educators hold over online for-profit institutions and free Internet sources. Harvard Physicist Eric Mazur suggests that: "Simply transmitting information should not be the focus of teaching; helping students to assimilate that information should."[70] Flipped learning allows educators to provide the information to students online in advance of class and then dig deep to struggle towards understanding and mastery together as a collective with the teacher guiding the way.

C. Perceived Concerns About Flipping

Despite the many cited potential benefits of flipped learning, educators have identified a variety of concerns preventing its uniform adoption. There are several criticisms of flipped learning, including that: embarking upon such an endeavor is extremely labor intensive;[71] flipped learning feels uncomfortable to educators, putting them on the spot in the moment to respond to unpredictable situations that may arise in class;[72] students who perceive flipped learning as more work will punish teachers with bad stu-

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68. Berrett, *supra* note 12. "MOOC" stands for Massive Open Online Course, wherein tens of thousands of students may enroll in a class, either for free or for a tuition-based fee, offered by a professional MOOC provider, often with the assistance or cooperation of more traditional brick-and-mortar colleges and universities. Juliana Marques & Robert McGuire, *What is a Massive Open Online Course Anyway? MN+R Attempts a Definition*, MOOC NEWS AND REVIEWS (June 7, 2013), http://moocnewsandreviews.com/what-is-a-massive-open-online-course-anyway-attempting-definition/#ixzz3UHrShTSm.

69. Berrett, *supra* note 12 (quoting Michael S. Palmer).

70. *Id.* (quoting Eric Mazur).

71. *See infra* notes 77–82 and accompanying text.

72. *See infra* note 83 and accompanying text.

dent evaluations;[73] the online materials utilized are too passive compared to the traditional presentation of those materials in class;[74] the flipped classroom involves so much student involvement that it conflicts with the Socratic Method;[75] and even that flipped learning is simply the Socratic Method in new packaging.[76]

There is no doubt that flipping one's class requires an investment in redeveloping the course to replace the in-class presentation of material with similar content available online. "Teachers and site administrators continued to be in agreement that the following hindrances may be keeping them from flipping their classrooms: . . . needed instruction on how to 'make' or 'find high quality videos;' and how to 'best utilize' the additional classroom time."[77] At the very least, flipping tasks the teacher with identifying existing teaching material suitable for relaying the content and making that available electronically.[78] At worst, faculty would develop their own online materials for electronic distribution to the class.[79] In either case, those implementing flipped learning take on the additional burden of planning interactive activities, problems, or course discussions on which the class can focus during the class meeting.[80] The initial attempt to flip a course is labor intensive and this concern prevents some educators from adopting this teaching method.[81]

Related to these concerns about the increased work required to flip a course are those that student expectations of teacher availability will similarly increase. By making content available online at the student's leisure, some are concerned that teachers will be forced to answer students' additional questions about the

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73. *See infra* notes 84–87 and accompanying text.

74. *See infra* notes 88–90 and accompanying text.

75. *See infra* notes 91–93 and accompanying text.

76. *See infra* note 94 and accompanying text.

77. YARBRO ET AL., *supra* note 17, at 15.

78. *Id.*

79. *Id.*

80. *Id.*

81. Berrett, *supra* note 12 ("It can also be very labor-intensive for faculty members who do not have teaching support, she adds, if it requires a professor to read questions that students submit before class (which is characteristic of just-in-time teaching). 'For a normal, straight-ahead professor, there's a steep learning curve,' Ms. Franklin says.").

online materials beyond their expected work day, as students may pose questions electronically any time they find convenient.[82] This concern focuses on the perception of universal accessibility of the teacher because the teacher's materials are universally accessible. Of course, such notions arise anytime a teacher is digitally available, either by posting an online syllabus or responding to email. They can be easily defeated with clear communication of a teacher's appropriate boundaries.

Moreover, flipped learning demands flexibility from those implementing it and that is a difficult hurdle for some teachers. Where an instructor in a traditional class may have relied on preplanned notes to disseminate information to students pursuant to that plan, the flipped classroom invites much greater spontaneity. The interactive nature of the class time requires the faculty member to be flexible even when put on the spot in a situation the educator did not predict. Melissa E. Franklin, chair of Harvard's physics department, states that several "colleagues have tried flipping . . . but few have stuck with it. It demands that faculty members be good at answering students' questions on the spot, even when their misconceptions are not yet clear because they are still processing the information."[83] While some educators may view their inflexibility as a challenge flipped that learning may help them overcome, others may simply be ill-suited for the flipped format.

Because of the labor-intensive nature of flipped learning and the challenge to a teacher's flexibility that it presents, several educators are concerned that they risk receiving negative student evaluations that could affect their promotion, tenure, and merit salary increase decisions.[84] Such concerns are apparently valid, as the "average score on a student evaluation of a flipped course is about half what the same professor gets when using the traditional lecture."[85] Student resistance to flipped learning may be attributable to the increased amount of material presented outside of class, perceived by students as more work or extra class time, or the increased cognitive challenge offered within the classroom.[86] Many

82. Springen, *supra* note 27.
83. Berrett, *supra* note 12 (quoting Melissa E. Franklin).
84. *Id*.
85. *Id.*
86. *See supra* text accompanying note 50.

students complain that flipped educators should "just teach,"[87] demonstrating their expectations from and past experiences with more traditional educational styles and their misunderstanding of the instructor's goals in implementing flipped learning.

Some critics of flipped learning complain that online material presented in lieu of in-class presentation is too passive.[88] According to Lisa Nielsen, author of *Teaching Generation Text*, "Listening to a lecture is nothing new. I just don't believe it's the most effective way to learn."[89] It is certainly possible that an educator may post passive lectures online. In such a case, the professor was probably replacing passive lectures in class with the passive lectures online and, at least hopefully, adding more active learning to the class meeting, which should still be an improvement over a live, passive lecture. Moreover, while this valid criticism may apply to some online materials, it is certainly overcome where more innovative online materials are utilized. Critics continue, however, noting that "not everything is flippable. 'Nothing is going to replace the experience of being a member of an audience that has a group discussion or debate,' says *School Library Journal* blogger Joyce Valenza."[90] It is probably true that not everything is flippable, but the more active engagement promoted in the flipped class meeting should provide exactly the experience of being a member of a group discussion or debate.

Some educators resist flipped learning in favor of retaining the Socratic Method to engage students. These teachers believe that a flipped classroom sacrifices actual instruction in order to increase opportunities for student collaboration and activities generated and led by students.[91] This criticism applies to those flipped classes featuring student interaction with minor faculty involvement. Proponents of flipped learning, however, would suggest that a key role for teachers "'is to lead from behind.' In other words, the teacher has the task of 'observation, feedback and assessment'

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87. Robert Talbert, *Three Critical Conversations Started and Sustained by Flipped Learning*, FAC. FOCUS NEWSL. (Mar. 2, 2015), http://ww1.facultyfocus.com/eletter/profile/1/216.html?ET=facultyfocus:e216:281629a:&st=email.

88. Springen, *supra* note 27 ("The 'home' portion of the flipped classroom can be too passive for many educators' taste.").

89. *Id.*

90. *Id.*

91. HAMDAN ET AL., *supra* note 10, at 11.

and guiding the learners' thinking, in the best spirit of the Socratic Method."[92] Similarly, critics complain that flipped learning "undervalues the power of good, engaging, face-to-face Socratic teaching."[93] This concern certainly applies to those engaging Socratic teachers; but for those less successful at coaxing a productive Socratic dialogue, blended methods such as flipped learning could offer a more effective alternative.

Yet another critique of flipped learning posits that it is not a new or novel teaching method, even suggesting that it is simply a retooled version of the Socratic Method.

> Professors have flipped courses for decades. Humanities professors expect their students to read a novel on their own and do not dedicate class time to going over the plot. Class time is devoted to exploring symbolism or drawing out themes. And law professors have long used the Socratic method in large lectures, which compels students to study the material before class or risk buckling under a barrage of their professor's questions.[94]

Admittedly, flipped learning may be a modern take on the Socratic Method. Law faculties have successfully implemented the Socratic Method as a primary teaching method for nearly two centuries. Updating a successful teaching method by infusing the benefits of modern technology may prove to enhance students' learning outcomes.

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92. *Id.*

93. *Id.*

94. Berrett, *supra* note 12; *see also* Springen, *supra* note 27 ("Aside from the technology involved, it's not necessarily a new idea. 'In the 1970s, when I was a classroom English teacher, I flipped my classroom, and I didn't even know it,' says Doug Johnson, the director of media and technology for the Mankato Area Public Schools in Minnesota. 'I'd ask my kids to read the text at home, and then I'd use the class time to discuss the lesson. Now, instead of asking kids to read, we're asking them to watch videotape lessons. I sense this is something like old wine in a new bottle.'").

III. THE ROLE OF FLIPPED LEARNING IN LAW SCHOOL PEDAGOGY

A. The Langdellian Model

Law school is a fairly modern concept. Because law is a profession, "legal training was viewed as entirely vocational, not academic, in nature" in pre-Revolutionary America.[95] Legal training took the form of attendance at Inns of Court meetings in London, where prospective attorneys would gain practical training.[96] Additionally, future lawyers accepted apprenticeships with practicing attorneys, in the earliest form of experiential learning.[97] Apprenticeships gained in popularity at the turn of the 18th century as the more common method of legal training, while American travel to Inns of Court meetings in London became less palatable for obvious reasons.[98]

In approximately 1784, private law schools began to emerge to meet the academic needs of a growing bar.[99] In 1817, Harvard University founded Harvard Law School—the oldest continually operating law school in the country.[100] Harvard named Christopher Langdell dean of the law school in 1870. Langdell is credited with developing the framework for modern legal education, including the implementation of the Socratic Method to decipher the law from appellate decisions.[101]

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95. Michele R. Pistone & John J. Hoeffner, *No Path But One: Law School Survival in an Age of Disruptive Technology*, 59 WAYNE L. REV. 193, 204 (2013).

96. *Id.*

97. *Id.* at 204–05.

98. *Id.* at 205 n.47.

99. *Id.* at 206.

100. *Id.*

101. *Id.* at 207 ("[I]t can accurately be said that the modern law school was born during Langdell's quarter century as dean. For generations of law students, for instance, the case method and the Socratic method of teaching have seemed essential—or at least ever-present—characteristics of law teaching, but they became a standard part of the fabric of law school life only during or slightly after Langdell's tenure."); DuVivier, *supra* note 12, at 10476 ("Christopher Columbus Langdell is often credited with sparking the first revolution in law school teaching when he introduced the case method at Harvard Law School in the early 1870s.").

Langdell approached legal education as any other academic field of study. He stated, "[c]onsidered as a science," law "consists of certain principles or doctrines. To have a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer."[102] To foster this academic approach, Langdell developed the case method of learning the law and the Socratic Method for teaching it.[103]

> In the case method, leading cases or case excerpts are assembled into a case book. Before each class, students are assigned a selection of cases to review. Then, during class, the professor calls on individual students to present their briefs of a given case. The professor guides the students through a question-and-answer process to ensure the class appreciates the holding in each case and its significance to the body of law being studied.[104]

These advances marked a significant reform to legal education at the time.[105]

Langdell's Socratic Method offered a more active approach to learning, requiring students to think critically on their feet.[106] As discussed in Part II above, the passive dissemination of information is a less effective teaching method.[107] "Cognitive psychology shows that if new knowledge is processed more deeply and

102. Pistone & Hoeffner, *supra* note 95, at 208.

103. *Id.* at 207–08; DuVivier, *supra* note 12, at 10476.

104. DuVivier, *supra* note 12, at 10476; *see also* Pistone, *supra* note 95, at 208 ("Langdell's 'scientific approach [would] infer the corpus of general legal rules from the reasoning used by courts' and then 'use such reasoning to predict outcomes in future cases.'").

105. *See* DuVivier, *supra* note 12, at 10477 (citing SUSAN A. AMBROSE ET AL., HOW LEARNING WORKS; SEVEN RESEARCH-BASED PRINCIPLES FOR SMART TEACHING (2010)).

106. *See id.* at 10476.

107. *See supra* notes 50–52 and accompanying text.

actively, it is much more likely to be retained and retrieved."[108] Through the Socratic Method,

> Instead of passively listening to lectures and taking notes, students were now expected to read real cases and derive principles of law for themselves through Socratic questioning. Thus, to the extent the Socratic Method is a discussion, it would track with research that shows discussion methods are more effective than lectures for achieving the main goals of student retention, transfer of knowledge to new situations, development of problem solving, thinking, attitude change, and motivation for additional learning.[109]

It seems, therefore, that the Socratic Method offered a significant improvement over traditional lectures.[110]

The vast majority of law schools have maintained this casebook and Socratic Method approach to teaching for nearly two centuries—and with good reason. "[T]he Socratic methodology used in most first-year courses was one of the few aspects of law school teaching praised in Educating Lawyers, the 2007 study of law schools conducted by the Carnegie Foundation for the Advancement of Teaching."[111] Because it demands active learning, the Socratic Method remains an effective teaching pedagogy in modern classrooms.

B. Post-Modern Legal Education

Despite the advancement of the case method and Socratic Method, they have become so ingrained into the fabric of law school pedagogy that the legal academy has made little room for potentially more effective post-modern pedagogical reforms.

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108. DuVivier, *supra* note 12, at 10477 (citing SUSAN A. AMBROSE, HOW LEARNING WORKS; SEVEN RESEARCH-BASED PRINCIPLES FOR SMART TEACHING (2010)).

109. *Id.* at 10476.

110. *Id.* at 10477.

111. W. Warren H. Binford, *New Ideas in Law and Legal Education: Envisioning a Twenty-First Century Legal Education*, 43 WASH. U. J.L. & POL'Y 157, 174 (2013).

While the Socratic Method and case method may have been significant improvements upon the teaching methods employed in early nineteenth century law schools, it is possible that other teaching methods developed in the last two centuries may offer even greater progress. Specifically,

> the way many professors employ the Socratic Method may undermine its value. The only student that is actively learning is the one who is under the inquisitional fire of the professor's barrage of questions. The exchange may still be a relatively passive learning experience for the rest of the students in the class who are simply listening and trying to glean the message they should take from the repartee between the professor and their classmate.[112]

Additionally, after the commercialized standardization of casebooks by publishers, "most twentieth century law professors subscribed to the static, lifeless materials developed by third parties and students were compelled to buy and read those materials regardless of price or relevance. To this day, the case method and the standardized casebook dominate legal education methodology in the United States."[113] With modern technological advances, there is certainly room to improve upon both the case method and the Socratic Method. "The Digital Revolution offers twenty-first century law professors the opportunity to return to the customized, engaged curricula exemplified by the revolutionary pedagogical methods of Dean Langdell and his colleagues."[114]

Technology is already forcing modernization of the case method. In recent years, "publishers again are compelling change in legal education; but this time, they are moving away from the standardized, hardbound casebook and utilizing digital technologies to modularize, diversify, and enrich legal education materials."[115] As the case method enters the digital age, so too may the

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112. DuVivier, *supra* note 12, at 10477.
113. Binford, *supra* note 111, at 160–61.
114. *Id.* at 162.
115. *Id.* at 161.

Socratic Method. Thus, flipped learning may be a pedagogical reform ripe for adoption by the legal academy.

In recent years, law schools have not sat on the sidelines when opportunities to adapt technology to the classroom have arisen.

> One could argue that legal educators pioneered digital education when Harvard Law School and the University of Minnesota Law School incorporated the Center for Computer-Assisted Legal Instruction (CALI) over three decades ago in 1982. Today, CALI hosts over 950 online interactive tutorials available in more than thirty-five law subjects. Nearly every law school in the United States is a member of CALI.[116]

One would not expect law schools to shy away from the advantages offered by flipped learning, especially in light of its similarities to the Socratic Method, which has proven particularly well-suited for the law school classroom.

As discussed above, flipped learning shares some similarities with the Socratic Method by presenting students with material in advance of class and then delving deeply into that material during class.[117] Moreover, it can blend easily with the case method; there is no reason for legal educators to stop assigning appellate decisions to their students in advance of class along with other online materials. In fact, technology and online resources already exist to aid law professors in flipping their classrooms. Specifically, "a small group of law school professors founded 'LegalED,' informally described as a Khan Academy for law schools. LegalED aims to move law school content online through recorded lectures so law students can watch the lectures at their convenience as many times as they needed."[118] LegalEd provides faculty with instruction on how to flip a course and develop personalized online

116. *Id.* at 171.
117. *See supra* note 94 and accompanying text.
118. Binford, *supra* note 111, at 172–73.

content for distribution to students and serves as a free online exchange of digital materials for class distribution.[119]

> By using Web-based technologies – technologies that are likely to become pervasive in mainstream higher education regardless of our initial eagerness to embrace them – faculty can expose students to some of their courses' foundations and frameworks before they enter the classroom. Confronted then with the need to rethink the chief purposes of live classroom sessions, faculty can focus on developing activities that build on those foundations and frameworks in ways aimed squarely at strengthening students' analytic capacities and solidifying students' understanding of the course material in the process.[120]

With such technological resources available, one would expect legal educators to be at the forefront of its development.

Nonetheless, law schools have been slow to adapt to flipped learning. In fact, "[i]n a spring 2013 conversation with Rishi Desai, a content producer from the Khan Academy, it was revealed that only one law professor had contacted the Khan Academy in the seven years since the organization was founded."[121] It seems that the legal academy is comfortable letting others advance the cutting edge. "While professors from Harvard Medical School and the Stanford University School of Medicine are reaching out to the Khan Academy to explore opportunities for collaboration, the legal academy has shown no interest, according to Desai."[122] One suggested reason for this stagnation

> is that law professors are smart enough to let other faculties serve as the guinea pigs in the development of, and experimentation with, digital tools and methodology in order to conserve limited law school resources. According to Paul McGreal,

119. *See* LegalED, http://legaledweb.com (last visited Mar. 12, 2016).
120. Pettys, *supra* note 55, at 1305–06.
121. Binford, *supra* note 111, at 165.
122. *Id.* at 166.

> Dean of the University of Dayton School of Law, "A lot of these teaching methods require more resources from law schools and teachers. Let's make sure they work."[123]

Given the research demonstrating the positive effect on learning outcomes of blended learning employed in other disciplines,[124] it may be time for the legal academy to stop watching others flip their courses and start doing it themselves.

Another suggested reason for the legal academy's resistance to flipped learning may be its complacency with an effective and proven pedagogy—the Socratic Method. "The disinterest of legal educators in new technologies can partially be explained by the legal academy's deep commitment to a culture and tradition of the Socratic methodology and institutional values that emphasize scholarship far above teaching."[125] For the reasons explained above, however, the past success of the Socratic Method should not be to the exclusion of further progress. In a time when law school applications are down nationally by over twenty percent,[126] it may be time for the legal academy to consider changing the way it does business.

IV. THE CIVIL PROCEDURE EXPERIMENT

A. Spring 2013: A Traditional Approach

During the Spring semester of 2013, I taught Civil Procedure II as I had in recent years. I assigned readings from four texts: *Civil Procedure: Cases & Materials*, by Jack H. Friedenthal, Arthur R. Miller, John E. Sexton, & Helen Hershkoff;[127] *2012–2013 Civil Procedure: Supplement,* by Jack H. Friedenthal,

123. *Id.* at 167.

124. *See supra* notes 52–62 and accompanying text.

125. Binford, *supra* note 111, at 167.

126. Karen Sloan, *Law School Enrollment Continues Historic Decline*, THE NAT'L L. J. (Dec. 16, 2014), http://www.nationallawjournal.com/id=1202679988741/.

127. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES & MATERIALS (West, 10th ed. 2009).

Arthur R. Miller, John E. Sexton, & Helen Hershkoff;[128] *A Documentary Companion to A Civil Action,* by Lewis A. Grossman & Robert G. Vaughn;[129] and *A Civil Action,* by Jonathan Harr.[130] The course was the mandatory two-credit counterpoint to Civil Procedure I which the same students had taken from me in the Fall of 2012. Civil Procedure II covered the following subjects: cross-claims, joinder, impleader, class actions, discovery, summary judgment, voluntary dismissal, judgment as a matter of law, res judicata, and collateral estoppel.

I presented students with the material in a style common to many traditional law school courses. Before class, I assigned readings from the Friedenthal casebook and supplement, and asked students to consider problems and discussion questions from Grossman and Vaughan's *A Documentary Companion*. During class, I would employ the Socratic Method[131] to discuss the material, posing critical questions to students to guide our discussion. Information I might have discussed in a lecture was instead embedded into the discussion questions (and, hopefully, the students' answers thereto). When time permitted, we walked through the questions raised in *A Documentary Companion* to discuss the application of the law to a different, but familiar, set of facts. Unfortunately, time did not always permit, especially in 2013 when my class hours had been cut from three to two to accommodate curricular reform. I found myself unable to engage in the drafting exercises, role plays, and discussions that extra credit hour had previously afforded.

B. Spring 2014: The Flipped Classroom

By the Spring semester of 2014, I had already taught the students enrolled in Civil Procedure II for a full semester in Civil Procedure I. I assigned readings from the same texts that I had used the previous year,[132] except that I assigned an updated *Supplement* by the same authors. We covered the same subjects as we

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128. JACK H. FRIEDENTHAL ET AL., 2012–2013 CIVIL PROCEDURE: SUPPLEMENT (West 2012).

129. LEWIS A. GROSSMAN & ROBERT G. VAUGHN, A DOCUMENTARY COMPANION TO *A CIVIL ACTION* (Foundation Press, 4th ed. 2008).

130. JONATHAN HARR, A CIVIL ACTION (1996).

131. *See supra* notes 103–05 and accompanying text.

132. *See supra* notes 127–30 and accompanying text.

had in the previous year, as well as counterclaims. I posted reading assignments from the casebook and supplement, as well as problems, discussion questions, drafting exercises, and role plays based loosely from *A Documentary Companion*, in advance of class. The course material was nearly unchanged from the previous year. Instead, I changed my method of delivering the material to students dramatically.

In Spring 2014, I flipped my Civil Procedure II course. In addition to posting reading assignments and problems in advance of class, I posted my PowerPoint slides with my own voiceover lecture online. Not only was I not hiding the ball, I handed it to them. Students could view my ten to twenty minute presentations before they tackled the reading assignments and problems, after they read the assignments, or both. The expectation was that they would arrive in class with a pretty good understanding of the material. We would spend a few minutes in class addressing any questions that arose before class. Then, we turned our attention to the problems, discussion, and exercises.

We spent approximately thirty-five to forty minutes applying theoretical procedural concepts to problems in a real case[133]—every class. I never had the problem of running out of time to cover the assigned problems or exercises. In fact, I had to assign more problems and exercises to take full advantage of the extra class time now available to me. We worked through the problems with me as a guide posing questions and follow-up questions to students in a manner quite similar to the Socratic Method. Sometimes, the students formed "law firms" to complete exercises in small groups. By the end of class, in theory, students had answers to the problems, had an understanding of the reasoning involved in solving the problems, and had exercised some critical thinking skills to get there. If students needed further clarification of an issue, they could review my online presentation again (from immediately after class until the final exam) and, of course, visit my office.[134]

Class meetings in the flipped class were invigorating for me as an educator. Each flipped class was a new opportunity for

133. Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988).

134. While I did not keep records of the number of students visiting me during office hours, I will note that I did not notice any increase or decrease in those visits.

me to creatively challenge students in a fresh way, which made preparing for class exciting. I was able to implement problems, role plays, drafting exercises, and group exercises that I had read about for years and, in some instances, recently cut from my course to accommodate the time constraints of curricular reform—all within one semester. Teaching in a flipped learning environment was fun for me.

Additionally, I was convinced at the end of every class that my students had learned more than I had been able to teach other classes in years past using a more traditional approach to teaching. Objectively, I knew that I had provided my students with more learning material than before, but I based my suspicions of greater learning on more than that. My ability to assess student learning in the moment and adjust in real time to help fill in gaps in student understanding or simply to spend more time on an issue troubling students certainly contributed to my confidence. Moreover, watching students collectively work through problems and exercises by applying the substantive material they had tackled independently convinced me that we had gone deeper into the material than I had ever gone before. Of course, these are my subjective impressions of student learning; I concluded that students had learned more and that they had had more fun doing it.

C. The Final Exam

Truth be told, the idea of empirically comparing student learning in my flipped classroom in 2014 with that in my traditional class in 2013 did not occur to me when I set out to flip my course. Accomplishing what initially appeared to me to be a nearly insurmountable task—the act of flipping the course—was my solitary goal from the outset. About thirteen weeks into the semester, however, the suggestion arrived from Professor Andrea Curcio of Georgia State University College of Law in response to a blog post I authored on LegalED.[135] She suggested that I administer an exam identical in part to the previous year's exam and compare the results. This article is the result of heeding her brilliant advice.

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135. Katharine Schaffzin, *Reflections of a First-Time Flipper*, LEGALED (Apr. 21, 2014), http://legaledweb.com/blog/2014/4/21/reflections-of-a-first-time-flipper-by-katherine.

Although I presented the course material quite differently in 2014 than I had in 2013, the subjects I covered and the reading assignments upon which I relied were virtually identical. To compare the learning outcomes of the students in the different learning environments, I administered a final examination in 2014 that was identical to the 2013 exam in fifty percent of the points awarded. Specifically, I repeated ten of the twenty multiple choice questions in 2014 that I had included in the 2013 exam. I also repeated one essay question in 2014 that I had used in 2013. I compared the learning outcomes of one class to the other on these identical questions to note if there was any discernible difference in performance.

V. THE RESULTS

Because my teaching methods differed so drastically from one year to the next, I hypothesized that I would see a significant improvement of student performance in 2014 over that in 2013. After all, the students in my flipped course received more educational material than those in my traditional class, I implemented blended instruction, rather than offering face-to-face or online exclusive content, and class was more active, interesting, and fun. All the empirical data supported my hypothesis.[136] Moreover, I walked out of every class in the flipped format confident that we had gone deeper into the material than I had ever gone in my traditional course.[137]

The data from my small empirical study, however, did not support my hypothesis. There was no statistical difference in the students' performance from one year to the next, despite the vastly different teaching methods I had employed. Any change in student performance on my exams from 2013 to 2014 was statistically insignificant. This held true for exam performance on both the essay[138] and multiple-choice[139] portions of the exams when considered in isolation.

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136. *See supra* notes 52–62 and accompanying text.

137. *See supra* Section IV.B.

138. The result of a T-Test with two tails and unequal variance was 0.945326 comparing performance on the identical essay questions from 2014 and 2013. The average raw score on the essay was 17.35455 in 2014 and 17.4017 in 2013.

The statistically insignificant difference in exam performance between students in my traditional course and my flipped course is less surprising when noted that the differences between undergraduate grade point averages of both classes were also statistically insignificant.[140] By this marker, the two classes had the same ability to perform on the final examination. The admissions indices and Law School Admissions Test scores of the 2013 class, however, were measurably higher than those of the 2014 class,[141] demonstrating that the students in 2013 may have had an advantage in their predicted performance in law school. It is certainly possible that the students' statistical performance advantage in 2013 canceled out any gains in learning outcomes realized by the 2014 class as a result of the flipped course.

A number of other factors may also have affected the empirical value of the data. First, the sample pool may simply have been too small to yield reliable results of statistical significance. After all, the sample from 2013 was comprised of only 56 students and the 2014 set included only 57 students. There may have been too few students studied to draw any reliable conclusion.

Additionally, when comparing two groups of students studying similar material through different methods, it is not unusual to find similar exam performance.

> Numerous literature surveys have found that, when researchers try to evaluate the comparative effectiveness of teaching methods by comparing the average exam performance of students taught by one method to the average exam performance of stu-

139. The result of a T-Test with two tails and unequal variance was 0.9416 comparing performance on the identical multiple-choice questions from 2014 and 2013. The average raw score on the multiple-choice section was 2.781818 in 2014 and 2.767857 in 2013.

140. The result of a T-Test with two tails and unequal variance was 0.80049 comparing students' undergraduate grade point averages ("UGPA") from 2014 and 2013. The average UGPA was 3.22 in 2014 and 3.24 in 2013.

141. The result of a T-Test with two tails and unequal variance was 0.00432 comparing students' admissions indices from 2014 and 2013. The average admissions index was 2.48 in 2014 and 2.64 in 2013. The result of a T-Test with two tails and unequal variance was 0.80049 comparing students' scores on the Law School Admissions Test ("LSAT") from 2014 and 2013. The average LSAT score was 152.9 in 2014 and 154.2 in 2013.

> dents taught by a different method, the different teaching methods commonly appear equally efficacious. To be sure, some individual students learn better when taught by one method rather than another. When comparing the average performance of students within groups, however, those individual differences tend to balance out, such that shifting from one group teaching method to another is unlikely to yield significant net learning gains for the group as a whole.[142]

The answer may simply lie in the fact that empirical studies such as these may not be the most effective method for assessing learning outcomes. Of course, an equally valid alternative conclusion could be that flipped learning, as I employed it, had no effect on the learning outcomes of my Civil Procedure students.

VI. CONCLUSION

The empirical data suggests that flipped learning should lead to increased student learning. My own data suggests that, at the very least, it does not decrease student learning in a law school setting. My personal experience leads me to conclude that flipped learning is an overall positive teaching method preferable to a traditional Socratic classroom. Both my students and I reported an enjoyable learning environment and, at the very least, I provided my class with additional educational materials online, which they appreciated. Although the data neither proved nor disproved my hypothesis, I remain convinced that my students learned substantive material on a deeper level.

I cannot prove that student learning improved in my flipped classroom over that of my traditional class. There are other practical reasons, however, to adopt a flipped learning model. Most pressing is the economic pressure facing modern law schools, which must prepare to compete in an increasingly online-only educational environment.

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142. Pettys, *supra* note 55, at 1277–78.

> The number of university leaders and faculty members who will have to confront that question is poised to skyrocket in the years ahead, as many of the nation's most respected institutions of higher education develop platforms for conveying to the public – for little or no charge – a great deal of the information that students historically have paid tens of thousands of dollars to obtain. There is no reason to believe, by the way, that the information traditionally conveyed in law schools' doctrinal classrooms will remain exempt from that revolution. Like their counterparts in other disciplines, many law professors may covet the opportunity to teach thousands of students around the world through creative uses of Web-based technologies.[143]

Blended learning in the form of a flipped classroom model will enable law schools to educate larger classes, while maintaining the face-to-face instructor support that online courses and MOOCs simply cannot provide.[144] Even if there is no definable learning advantage to implementing flipped learning, the overall advantages of such a platform outweigh those offered by the status quo.

Flipped learning demands greater effort from both educators and students than the more traditional Socratic Method. It also offers both parties a return on their investment of increased effort. I may not be able to objectively prove the success of my flipped course, but I am nonetheless convinced of its benefits. I intend to continue flipping my Civil Procedure and other courses, hopefully improving as an educator and a flipper with each effort.

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143. *Id.* at 1299. Stanford University computer science faculty member Daphne Koller "predicts that the increasing availability of well-taught free or low-cost online courses will push universities 'to change, because they will not be able to charge students for content any longer.'" *Id.* at 1302.

144. *See supra* notes 65–70 and accompanying text.

Droning On and On: A Tort Approach to Regulating Hobbyist Drones

JORDAN M. CASH*

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* J.D. Candidate, May 2016, The University of Memphis, Cecil C. Humphreys School of Law, Articles Editor, *The University of Memphis Law Review*, Volume 46. I would like to thank Professor Andrew McClurg and Kevin Brown for the work they put into helping me write this Note.

I. INTRODUCTION

Imagine being inside of your home and noticing a small device hovering outside of your window. You spot a camera attached to the floating machine, realizing that it is peering into your personal space and videoing you inside your home. A frenzy of thoughts and questions come to mind as you watch this device that is watching you. What is that thing? How long has it been there? Has this happened before without your knowledge? The device you see is an unmanned aircraft system ("UAS")—more commonly known as a drone[1]—equipped with a high-definition camera and a microphone to record the private activities that are occurring inside the home. The situation described above is one that many people have already been in, or will find themselves in, as drones enter the hands of private citizens.

UAS technology has the capacity to revolutionize many aspects of American society.[2] Despite the potential advantages of drone technology, their incorporation into the airspace creates substantial concerns that trouble both citizens and policymakers alike. Private, hobbyist drone use is expected to rapidly increase as the equipment becomes more accessible and affordable.[3] The drone industry is expanding exponentially, anticipating consumers to

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1. The terms drone and UAS will be used interchangeably throughout this Note. *See* FED. AVIATION ADMIN., U.S. DEP'T OF TRANSP., INTEGRATION OF CIVIL UNMANNED AIRCRAFT SYSTEMS (UAS) IN THE NATIONAL AIRSPACE SYSTEM (NAS) ROADMAP 7 (2013) [hereinafter ROADMAP] ("[T]he term UAS is used to emphasize the fact that separate system components are required to support airborne operations without a pilot onboard the aircraft."). Unmanned aircraft systems consist of three elements: unmanned aircraft, control station, and data link. *Id.* at 8. Some popular literature will use the acronyms UAS or UAV (Unmanned Aerial Vehicle), but technically UAV represents only the drone itself, while UAS refers to all the components that enable the drone to fly remotely. *Id.* at 7–8.

2. The use of UAS technology has endless potential applications in areas such as public safety and commercial enterprises; however, this Note focuses primarily on hobbyist or recreational use of drones.

3. *See* WELLS C. BENNETT, CIVILIAN DRONES, PRIVACY, AND THE FEDERAL-STATE BALANCE 3 (2014) ("As unmanned flight technology matures and grows ever cheaper, it will find its way into more private hands.").

spend more than 100 million dollars on drones in 2015.[4] Today, many advanced drones are commercially available in local hobby stores and on the Internet for less than a few hundred dollars.[5] These devices have features that allow the drone to maneuver like a miniature helicopter, and can be controlled through the operator's smartphone or mobile device.[6] Additionally, there are drones that are the size of a bug or a small bird that are beginning to catch the attention of hobbyist drone operators.[7] Drones have the ability to stay airborne for extended periods of time and can be outfitted with specialized surveillance technology that can violate a person's privacy from extremely high altitudes.[8] As drones become more affordable, the apprehension that hobbyists may use their personal drones in a way that invades the privacy of others becomes more alarming.

Given the attention and controversy that surrounds the increasing use of the technology, it is unsurprising that various policymakers have entered the arena of drone regulation. Drone availability is granting private citizens unprecedented access to low altitude airspace, while laws that were designed to address airplanes and helicopters cannot effectively address issues that stem from

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4. Tom Risen, *Drone Market Grows at CES 2015*, U.S. NEWS (Jan. 8, 2015, 5:40 PM), http://www.usnews.com/news/articles/2015/01/08/faa-touts-growing-drone-market-at-ces-2015. It is estimated that worldwide expenditures and drone related research could reach up to $89.1 billion over the next decade. *Id.* at 5. For an overview on what drone industry representatives expect as drones enter the markets, see DARRYL JENKINS & BIJAN VASIGH, ASS'N FOR UNMANNED VEHICLE SYS. INT'L, THE ECONOMIC IMPACT OF UNMANNED AIRCRAFT SYSTEMS INTEGRATION IN THE UNITED STATES (2013), http://robohub.org/_uploads/AUVSI_New_Economic_Report_2013_Full.pdf. Industry leaders hope to employee up to 100,000 people by 2025. *Id.* at 3.

5. Troy A. Rule, *Airspace in an Age of Drones*, 95 B.U. L. REV. 155, 157 (2015).

6. *Id.* at 157–60.

7. The Defense Advanced Research Projects Agency is currently creating a drone that is the size of a hummingbird that can fly up to eleven miles per hour for eight minutes. JAY STANLEY & CATHERINE CRUMP, AM. CIVIL LIBERTIES UNION, PROTECTING PRIVACY FROM AERIAL SURVEILLANCE: RECOMMENDATIONS FOR GOVERNMENT USE OF DRONE AIRCRAFT 3 (2011), https://www.aclu.org/files/assets/protectingprivacyfromaerialsurveillance.pdf [hereinafter ACLU REPORT].

8. The backpack craft, which is most used by hobbyist operators, can reach altitudes of up to 14,000 feet and stay in the air for up to 110 minutes. *Id.*

drone operations.[9] In 2012, Congress passed a law that requires the Federal Aviation Administration ("FAA") to develop a plan to safely integrate drones into the national airspace by September 2015,[10] which the FAA failed to meet.[11] The FAA is far behind the deadlines created by Congress and the regulations that govern the use of public,[12] commercial,[13] and private drones are in a perpetual state of fluctuation.[14] Federal lawmakers have proposed numerous bills aimed at filling gaps left in current federal drone legislation.[15] Likewise, state lawmakers are attempting to address the privacy concerns by enacting legislation aimed at preventing hobbyist and commercial drone operators from using their drones in an offensive manner.[16]

This Note argues that legislative attempts to regulate hobbyist and recreational use of drones are unnecessary because existing common law tort claims of general applicability can effectively deter invasions of privacy by recreational drone operators. "[T]he common law is not a static but a dynamic and growing thing. Its rules arise from the application of reason to the changing conditions of society."[17] The tort claims of aerial trespass[18] and intru-

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9. Rule, *supra* note 5, at 169–70.

10. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95 § 332, 126 Stat. 11, 73 (2012).

11. Keith Wagstaff, *FAA Misses Deadline for Creating Drone Regulations*, NBC NEWS (Oct. 1, 2015, 3:29 PM), http://www.nbcnews.com/tech/innovation/faa-misses-deadline-creating-drone-regulations-n437016.

12. This Note will not address the use of drone technology by government entities or any potential violations of Fourth Amendment rights. For information on the threat posed by law enforcement use of drones, see Robert Molko, *THE DRONES ARE COMING! Will the Fourth Amendment Stop Their Threat to Our Privacy?*, 78 BROOK. L. REV. 1279 (2013).

13. This Note will briefly touch on the subject of commercial drone use in an effort to explain the different considerations, as well as the similarities between drones that are used for recreational purposes and those that are used in a commercial context.

14. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF TRANSP., AUDIT REPORT NO. AV-2014-061, FAA FACES SIGNIFICANT BARRIERS TO SAFELY INTEGRATE UNMANNED AIRCRAFT SYSTEMS INTO THE NATIONAL AIRSPACE SYSTEM (2014) [hereinafter AUDIT REPORT].

15. *See, e.g.*, Drone Aircraft Privacy and Transparency Act of 2013, H.R. 1262, 113th Cong. (2013).

16. *See, e.g.*, TENN. CODE ANN. § 70-4-302(a)(6) (2012 & Supp. 2015).

17. Roach v. Harper, 105 S.E.2d 564, 568 (W. Va. 1958).

sion upon seclusion[19] are applicable to situations in which a private individual uses a drone in a way that interferes with another's private property or offends their personal space. As drone technology continues to develop and evolve, statutory solutions are likely to become outdated and obsolete, while tort claims of broad-ranging applicability are flexible enough to adapt to unpredictable technological advances. State legislation faces many challenges that are not implicated by addressing violations of privacy with common law tort claims. The legislation runs against the public interest, as it might have a chilling effect on the private experimentation with the technology. State legislation also runs the risk of being preempted by the enactment of federal laws that govern private drone use. Additionally, it is unclear how broadly the FAA regulations will reach once they are finalized.

Part II of this Note explores the background and current development of drone technology, focusing on drones used for recreational purposes by private parties. Part III examines the current legal landscape of drone integration into American society, addressing both federal and state legislative and regulatory efforts. Part IV discusses the common law torts of aerial trespass and intrusion upon seclusion, and analyzes how, although currently overlooked in the drone debate, they can adapt to provide remedies that would address unreasonable intrusions by hobbyist drones. Part V concludes this Note by offering brief closing remarks.

II. UNMANNED AIRCRAFT SYSTEMS

This Part discusses the historical development of UAS technology. It highlights the evolution of drone technology from a military tool to a technology that has limitless domestic applications. This Part also explains the current use of drone technology and the possible applications for UAS in the future as the equipment continues to become more affordable. Finally, this Part examines the privacy implications as drones become integrated into the national airspace.

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18. RESTATEMENT (SECOND) OF TORTS § 159(2) (1965).
19. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

A. History and Development of UAS Technology

In theory, the history of UAS is as long as the history of aviation itself.[20] Drone technology has traditionally been used as a military tool.[21] The evolution of drone technology is marked by stages of rapid expansion followed by episodes of inactivity.[22] This trend is due in large part to the fact that research and development is sparked by a reaction to a specific problem that arises during a specific conflict.[23] In response to the close combat missions fought in World War I, technologists began to develop the first operational remote piloted vehicle.[24] As the conflict between

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20. Early research in unmanned aircraft provided a framework that would be used by early developers of manned aircraft, such as the Wright brothers, who first achieved sustained flight in 1903. *Eyes in the Sky: The Domestic Use of Unmanned Aerial Systems: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, & Investigations of the Comm. on the Judiciary H.R.*, 113th Cong. 2 (2013) (statement of Christopher R. Calabrese, Legislative Counsel, American Civil Liberties Union); *see also* John Villasenor, *Observations from Above: Unmanned Aircraft Systems and Privacy*, 36 HARV. J. L. & PUB. POL'Y 462 (2013).

21. The Army became involved in unmanned flight research as early as 1918. *See* JOHN DAVID BLOM, UNMANNED AERIAL SYSTEMS: A HISTORICAL PERSPECTIVE, COMBAT STUDIES INST. PRESS 1 (2010), http://usacac.army.mil/cac2/cgsc/carl/download/csipubs/OP37.pdf; *see also, e.g.*, Neville Parton, *Introduction*, *in* ROYAL AIR FORCE DIRECTORATE OF DEF. STUDIES, UAVS: THE WIDER CONTEXT 4 (Owen Barnes ed., 2011) ("[T]he first flying bomb type device was developed during the First World War."); John Sifton, *A Brief History of Drones*, THE NATION (Feb. 7, 2012), www.thenation.com/article/166124/brief-history-drones# ("Air warfare has been with us for a hundred years, since the Italian invasion of Libya in 1911, and the development of drones was in the works from the start. The reason is simple: even with all the advantages offered by air power, humans still needed to strap themselves into the devices and fly them. There were limits to the risks that could be taken.").

22. *Foreword* to ROYAL AIR FORCE DIRECTORATE OF DEF. STUDIES, UAVS: THE WIDER CONTEXT, *supra* note 21, at 2.

23. *See* Christina J.M. Goulter, *The Development of UAVs and UCAVs: The Early Years*, *in* ROYAL AIR FORCE DIRECTORATE OF DEF. STUDIES, UAVS: THE WIDER CONTEXT, *supra* note 21, at 11.

24. BLOM, *supra* note 21, at 46 (2010) (describing "the Bug" as a prototype of the UAS, which "had a counter that measured the number of rotations made by the propeller" and at a preset number would drift towards the ground and towards a particular target); *see* Goulter, *supra* note 23, at 13 (explaining that the war ended before the tools were used in combat).

the Soviet Union and the United States worsened during the 1960s, the U.S. employed drones as a successful reconnaissance tool.[25] UAS were put to use during the Vietnam War due to the necessity for stealth in monitoring the activities on the North and South Vietnamese borders.[26] During this period, the research focused on creating technology that could reach higher altitudes and remain aloft for longer periods of time.[27]

During the 1980s, the development of UAS moved from an idea in need of innovation and proper management to a tool that played a significant role in military operations worldwide.[28] In 1990, Saddam Hussein invaded Kuwait giving developers an opportunity to learn from the use of UAS.[29] The UAS available at the time proved to be extremely valuable by providing information about enemy positions.[30] It was during this period that the technology expanded exponentially. Operations in Afghanistan and Iraq, following the 2001 attack of the World Trade Centers, provided another forum to experiment with new tools, demonstrated by the increase in the type and quantity of missions performed by

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25. *See* Goulter, *supra* note 23, at 11. This advance was made in reaction to the loss of the U2 Spyplane in 1960 over the USSR. *Id.*

26. *Id.* It can be argued that it was during this period that the technology really takes off. It is difficult to ignore the role played by cruise missiles and ballistic missiles when speaking about the military development of drones. *Id.* at 19. Cruise missiles are essentially a version of a drone that can be dispatched and guided in flight, but they cannot hover or return to base. Sifton, *supra* note 21.

27. BLOM, *supra* note 21, at 64. There was also progress made in the stealth capabilities of the UAS that could prevent them from being detected on a radar. *Id.* at 65.

28. During this period, the DARPA began to look for ways to create a long endurance UAS and merge them with new technologies. David Jordan & Ben Wilkins, *Unmanned Aerial Vehicles Operations Since the 1980s*, *in* ROYAL AIR FORCE DIRECTORATE OF DEF. STUDIES, UAVS: THE WIDER CONTEXT, *supra* note 21, at 28. There is little known about the breadth of DARPA's UAS research and development because many of their programs are concealed due to security concerns. *Id.* DARPA began to explore the idea of combining long endurance technologies with other emerging technologies, such as solar power. *Id.* The agency's efforts resulted in three small UAV's designed for reconnaissance and three other prototypes intended to serve as loitering cruise missiles. *Id.*

29. *Id.* at 30–32.

30. *Id.* at 31.

UAS.[31] The first armed drone was flown in Afghanistan in 2001, and the next year the CIA used an unmanned Predator drone in a targeted killing.[32] The CIA continues to use aggressive drone attacks in Pakistan, Yemen, and Somalia as a more accurate method of aerial attacks.[33]

B. Benefits and Capabilities of Domestic Drones

The potential uses of drone technology are seemingly endless. Currently, drones are being used by the Department of Homeland Security in performing border and port surveillance, by NASA for scientific research and environmental monitoring, by universities to conduct research, and to support other activities by government entities.[34] Drones can also be used by fire departments,[35] farmers to assist in agriculture and ranching,[36] humanitar-

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31. BLOM, *supra* note 21, at 105.

32. Sifton, *supra* note 21. This attack remains controversial because the target of the strike was a "tall man" purported to be Osama bin Laden. *Id.* Military officials were quick to acknowledge that the "tall man" was not bin Laden, but continue to claim that the targets of the strike were "legitimate" and "appropriate." *Id.*

33. Ajoke Oyegunle, Comment, *Drones in the Homeland: A Potential Privacy Obstruction Under the Fourth Amendment and the Common Law Trespass Doctrine*, 21 COMMLAW CONSPECTUS 365, 375–76 (2013). The drone program was expanded under President Barack Obama. *See* Matt Sledge, *The Toll of 5 Years of Drone Strikes: 2,400 Dead*, THE HUFFINGTON POST (Jan. 23, 2014, 7:32 PM), http://www.huffingtonpost.com/2014/01/23/obama-drone-program-anniversary_n_4654825.html (estimating that 2,400 people were killed by drone attacks in the five years since his administration initiated its program).

34. ROADMAP, *supra* note 1, at 25 (explaining that unmanned aircraft are currently operating in the NAS under very controlled circumstances).

35. Jay Stapleton, *The Drone Dilemma; Unmanned Aircraft Run Into Raft of Regulatory, Privacy Issues*, CONN. L. TRIB., Feb. 17, 2014, at 1 (describing a situation in which a man used a drone he owned personally to communicate hazards to firefighters below); *see also* Greg Jakubowski, *Preplanning & Incident Management Trends*, FIREFIGHTER NATION, Sept. 2013 (describing several situations in the firefighting and rescue context that could benefit from the deployment of drones).

36. This method of agriculture has been used in Japan since the early 1990s as a way to assist elderly farmers and prevent pesticides from entering residential areas. Sara Sorcher, *What Can Drones Do for You*, NAT'L J. (Apr. 11 2013), https://www.nationaljournal.com/s/81276/what-drones-can-do-you?q (arguing that using a drone to apply pesticides to crops is preferable to the current method of spraying the entire field, which wastes money, resources, man-

ian missions,[37] search and rescue operations,[38] mining and property related endeavors,[39] and as a delivery tool.[40]

Hobbyists have spent decades building and using remote-controlled aerial vehicles; however, the capabilities of the average drone greatly exceed expectations for the typical model airplane.[41] Drones come in a variety of sizes and capabilities that can be customized to fit the operator's needs.[42] Individuals are able to purchase and assemble drones, as well as equip the drone with other technologies that will expand the capabilities of the drone.[43] The

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power, and increases pollution). Ranchers can also use drones to test the air quality in feed lines, track livestock, and detect health problems in animals. *Id.*

37. The benefits for humanitarian missions include the ability to obtain samples from, or send medicine and other supplies to people in need when roads are inaccessible and manned aircraft are of short supply or unavailable. *Id.*

38. Sonia Waharte & Niki Trigoni, Supporting Search and Rescue Operations with UAVs, University of Oxford (unpublished manuscript), https://www.cs.ox.ac.uk/files/3198/submission_waharte.pdf.

39. *See* Robert Spence, *The Mining Sector Puts Drones to Work*, MINING GLOBAL (Sept. 24, 2014), http://www.miningglobal.com/tech/1167/The-Mining-Sector-Puts-Drones-to-Work (explaining the various ways in which the mining industry would benefit from the use of drones in the field). *See generally* Sorcher, *supra* note 36.

40. John Aziz, *Why You Should Be Excited About Amazon's Drone Delivery,* THE WEEK (Dec. 2, 2013), http://theweek.com/articles/455298/should-excited-about-amazons-drone-delivery.

41. Rule, *supra* note 5, at 159–60; *see also Radio Control*, ACAD. OF MODEL AERONAUTICS, http://www.modelaircraft.org/museum/radiocontrol.aspx (last visited Feb. 21, 2016).

42. Ben Jenkins, Note, *Watching The Watchmen: Drone Privacy and the Need for Oversight*, 102 KY. L.J. 161, 163 (2014) ("Drones can range in size from a traditional jet to an insect.").

43. There are a variety of surveillance and other technologies that can be attached to drones. ACLU REPORT, *supra* note 7, at 5–6. "High-power zoom lenses . . . "allow for significant zooming" to focus on specific people without a chance of them noticing. *Id.* at 5. Infrared imaging shows heat emitted by objects, so it can identify living things in the dark. *Id.* "Ultraviolet (UV) imaging can detect some materials not visible in natural or infrared light" and is likely to improve by becoming more sensitive and available at higher resolutions. *Id.* "Synthetic Aperture Radar" is a technology that can see through inclement weather conditions and vegetation, "and has the potential to penetrate the earth and walls. *Id.* "Video analytics" will allow the technology "not just to collect [the footage] but also to 'watch' video . . . . and [be able] recognize and respond to specific people, events, and objects." *Id.*

most commonly used drone among hobbyists is the backpack-craft-style drone.[44] A drone this size can be built, carried, and operated by a single person.[45]

C. The Privacy Threat from Hobbyist Drones

The improvement of drone technology has many positive applications, but also presents serious privacy concerns. New types of technology inevitably create new modes of human collaberation and conflict; and consequently, they create novel and interesting legal issues.[46] Model airplane operators and drone enthusiasts are quickly becoming proficient in UAS operation. The advancement of drone technology is eroding the limitations inherent to manned aircraft because UAS are affordable, require little maintenance, and hobbyists are permitted to fly with few restrictions and with little, if any, aviation qualification.[47]

As the cost of UAS technology decreases, more drones will be entering the airspace. Increasing drone use, especially drones equipped with camera and sensory devices, will inevitably lead to new threats that an operator will violate an individual's right to privacy. For example, on YouTube, there are hundreds of videos shot by hobbyist drone operators, recording everything from sporting events, DUI checkpoints, national parks, public beaches, and other public areas.[48] The amount of videos available gives some indication as to the prevalence of hobbyist drones. Peeping toms, as well as unsuspecting drone operators, will be able to use the technology to see people in their most intimate moments.[49]

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44. An example is an AeroVironment Raven that weighs 4 pounds, has a 4.5 feet wingspan, and can fly up to 14,000 feet and stay in the air for 110 minutes. *See id.* at 3.

45. *Id.*

46. Thomas Clark, *Drones in Our Future: Opportunity and Privacy Considerations*, CAL. ST. ASSEMBLY 2 (Aug. 8, 2014), http://ajud.assembly.ca.gov/sites/ajud.assembly.ca.gov/files/reports/Drones%20Background%20Paper.pdf.

47. 14 C.F.R. § 91 (2015) (demonstrating the lack of restrictions that govern hobbyist drone operators).

48. *See, e.g.*, Epic Drone Videos: Sharing the Worlds Best Drone Videos, YOUTUBE, https://www.youtube.com/channel/UC9FmF7MZlsl3QCWtuCAnOeQ (last visited Feb. 25, 2016).

49. This inadvertently happened in 2004 when the New York police helicopter equipped with night vision found a couple engaged in sexual relations on

Numerous reports indicate the pervasiveness of drones and demonstrate reactions of people who have come face to face with a bothersome drone. In Seattle, a woman heard a noise outside that sounded like a weed eater, but it was actually a drone hovering by her third story window.[50] In another drone incident, a woman spotted a drone hovering at her bedroom window on the 26th floor of her apartment building as she was dressing.[51] The woman described the situation as "freaky" and immediately notified the building security personnel.[52] Recently, a family reported a drone that was flying around their home as they were enjoying dinner on their patio.[53] The drone subsequently crashed into a tree in the yard and the family was able to recover a memory chip from the drone.[54] The memory chip revealed pictures of the family's activities that afternoon, as well as photos from other houses.[55]

Additionally, this is a problem when private people are recorded by drones in a public place. There have been a number of incidents taking place at public beaches where drones have reportedly been lurking around unsuspecting sunbathers.[56] Following a

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a dark, private rooftop balcony. *See* Jim Dwyer, *Police Video Caught a Couple's Intimate Moment on a Manhattan Rooftop*, N.Y. TIMES (Dec. 22, 2005), www.nytimes.com/2005/12/22/nyregion/22rooftop.html.

50. Rebecca J. Rosen, *So This is How It Begins: Guy Refuses to Stop Drone-Spying on Seattle Woman*, THE ATLANTIC (May 13, 2013), http://www.theatlantic.com/technology/archive/2013/05/so-this-is-how-it-begins-guy-refuses-to-stop-drone-spying-on-seattle-woman/275769/ (describing an incident in which a woman spotted a drone hovering over her yard outside of her home at the third story window).

51. Christina Sterbenz, *Should We Freak Out About Drones Looking in Our Windows?*, BUSINESS INSIDER (Sept. 24, 2014, 2:22 PM), http://www.businessinsider.com/privacy-issues-with-commercial-drones-2014-9.

52. *Id.*

53. Corey Vaughn, *Drone Drops in on Family*, THE DAILY IBERIAN (Jan. 30, 2015), http://www.iberianet.com/news/drone-drops-in-on-family/article_9cf3b2c0-a89a-11e4-bd19-4f0d9d2b404f.html.

54. *Id.*

55. *Id.*

56. Joseph Serna, *As Hobby Drone Use Increases, So Do Concerns About Privacy, Security*, L.A. TIMES (June 21, 2014, 4:58 PM), http://www.latimes.com/local/la-me-drone-hobbyist-20140622-story.html (describing situations in California where a mother notified the lifeguard that a drone was hovering over her and her daughter snapping photos as they tanned;

Los Angeles Kings game, a group of celebrating fans noticed a drone was buzzing around their heads and videoing the festivities following the Stanley Cup.[57] The fans, angered that the drone was recording them, retaliated by hitting the drone down using a t-shirt and smashing it with a skateboard.[58] The police that responded to the incident stated that, if the owner came to claim his drone, they must give it back to him and do little else, because flying a drone in public is not illegal.[59]

In addition to private party concerns, several organizations are issuing blanket bans on drones in specific areas or events. The common sighting of drones in the national parks[60] caused the National Park Service to release a temporary ban on the use of drones in national parks.[61] The National Football League issued a statement that banned the use of drones at the 2015 Superbowl.[62] Major League Baseball banned Indians pitcher Trevor Bauer's drone that he built during offseason after he used it to take aerial shots during spring training.[63]

There are concerns that drone use will further erode personal privacy if the information collected by UAS is distributed to

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and in Connecticut, where a drone operator was attacked by a woman who accused him of snapping pictures of her).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* (describing two incidents in national parks, the first at Mt. Rushmore, where ranger confiscated a drone after it flew around the monument and over the heads of visitors, and the second at Zion National Park in Utah where volunteers "watched a drone buzz over a herd of big horn sheep, separating the adults from the young").

61. Press Release, Nat'l Park Serv., Unmanned Aircraft to be Prohibited in America's National Parks (June 20, 2014), http://www.nps.gov/cure/learn/news/unmanned-aircraft-prohibition.htm (quoting National Park Service Director Jonathon Jarvis, "[w]e have serious concerns about the negative impact that flying unmanned aircraft is having in parks, so we are prohibiting their use until we can determine the most appropriate policy that will protect park resources and provide all visitors with a rich experience.").

62. Michael S. Schmidt & Michael D. Shear, *Drones Spotted, but Not Halted, Raise Concerns*, N.Y. TIMES, Jan. 30, 2015, at A1.

63. Extra Mustard, *Indians Pitcher Flies Drone Over Spring Training, MLB Promptly Bans It*, SPORTS ILLUSTRATED (Feb. 20, 2015), http://www.si.com/extra-mustard/2015/02/20/cleveland-indians-trevor-bauer-drone-banned.

consumer data brokers. In a statement by Senate Commerce Committee Chairman Jay Rockefeller, he pointed out that "consumers are 'already under assault' from the multi-billion dollar data broker industry 'dedicated to tracking our health status, our shopping habits, and our movements.'"[64] As drone technology continues to become more pervasive, the "worry that drones . . . could be yet another way for private companies to track where we are and what we are doing" becomes more serious.[65] The effect on society could be damaging if people begin to believe that someone is always monitoring their behavior.[66]

III. CURRENT LEGAL LANDSCAPE

This Part addresses the current efforts by the federal and state government to regulate drone use. Section A discusses action taken by of the Federal Aviation Administration, which is the federal government's primary regulatory authority for nearly every aspect of the aviation activities. Section B provides an overview of federal legislative attempts and executive weigh-ins on the issue. Section C provides a brief account of the executive regulatory efforts. Section D highlights state regulatory attempts and some of the problems associated with the state legislative action.

A. Federal Aviation Administration

The FAA is the division of the Department of Transportation that is in charge of regulating the national airspace by ensuring it is used in a safe and efficient manner.[67] The FAA regulates aircraft design, manufacture, repair, and operation by publishing a set of rules in the Code of Federal Regulations.[68] Generally, no air-

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64. Clark, *supra* note 46, at 5.

65. *Id.*

66. Psychologists have found that people tend to behave differently when they feel like are being observed which could create a chilling effect on an individual's general decision-making and behavior. M. Ryan Calo*, People Can Be So Fake: A New Dimension to Privacy and Technology Scholarship*, 144 PENN ST. L. REV. 809, 842–43 (2010).

67. ROADMAP*, supra* note 1, at 14.

68. 14 C.F.R. pt. 23, 25 (2015); *see also* Clark, *supra* note 46, at 5. The FAA also releases clarification and policy documents in the form of agency orders, advisory circulars, and notices-to-airmen. They license pilots, regulation

craft may operate in the national airspace without some sort of approval from the FAA.[69]

1. FAA Modernization and Reform Act of 2012

It is not shocking that the FAA is under tremendous pressure from legislators, manufacturers, and commercial industry representatives to develop a strategy to safely integrate drones into the national airspace system ("NAS").[70] The FAA Modernization and Reform Act of 2012 ("FMRA") required the FAA to develop a plan to safely integrate UAS into the NAS.[71] The purpose of the law was to introduce drones for domestic use by revamping the nation's air traffic control system and to accelerate the expansion of drone use by September 30, 2015.[72] The FMRA requires that the Secretary of Transportation, in consultation with the industry representatives and other federal agencies who employ UAS,[73] to develop a comprehensive plan to safely facilitate the integration of civil UAS into the national airspace by the September 2015 deadline.[74] The comprehensive plan supports coordination and integra-

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commercial airlines, oversee the operation of air traffic control, issue certificates to who can operate in the airspace.

69. Clark, *supra* note 46, at 2.

70. The FAA first approved use of UAS in 1990. Press Release, Fed. Aviation Admin., Fact Sheet – Unmanned Aircraft Systems (UAS) (Feb. 15, 2015), https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=18297.

71. The FMRA is an appropriations and reform law. FAA Modernization and Reform Act of 2012, Pub. L. No. 112–95, 126 Stat. 11 (2012).

72. *Id.*

73. The agencies involved in the integration of UAS include, but are not limited to, the following: the Department of Transportation, Defense, Commerce, Homeland Security, National Aeronautics and Space Administration, and the Federal Aviation Administration. *Id.*; *see* ROADMAP, *supra* note 1, at 7 ("The FAA will coordinate these integration activities with other United States Government agencies, as need, through the Interagency Planning Committee (IPC).").

74. FAA Modernization and Reform Act of 2012, Pub. L. No. 112–95, § 332, 126 Stat. 11, 73 ("The plan required . . . shall contain, at a minimum, recommendations or projections on . . . the best methods to enhance the technologies and subsystems necessary to achieve safe and routine operation of civil unmanned aircraft systems . . . a timeline for the phased-in approach [to integration] . . . airspace designation for cooperative manned and unmanned aircraft systems into the national airspace system . . . [and the] establishment of a pro-

tion of research and development, explaining that an assessment of the needs and prioritization of activities are essential to integrating UAS.[75] The FAA failed to meet the deadline for creating national drone regulations.[76]

The FAA faces difficulty as they attempt to craft regulations that are not overly broad or too narrow.[77] They must clarify which regulations apply to these types of aircrafts to ensure that the definition is broad enough to encompass all forms of unmanned aircraft, without unintentionally regulating current operators in the NAS, such as manned aircraft.[78] The "requirements [for UAS] will vary depending on the nature and complexity of the operation, aircraft or component system limitations, pilot and other crewmember qualifications, and the operating environment."[79] The FAA considers unmanned aircraft to be an aircraft flown by a pilot, despite the fact that there is no pilot onboard. Due to this assumption, existing regulations and policies will be applied to unmanned aircraft.[80] The current procedures that apply to manned aircraft are

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cess to develop certification, flight standards, and air traffic requirements for civil unmanned aircraft systems at test ranges . . . ."); *see also* ROADMAP*, supra* note 1, at 18.

75. JOINT PLANNING AND DEV. OFFICE, *supra* note 4, at 13.

> Integration of UAS into the NAS will require: review of current policies, regulations, environmental impact, privacy considerations, standards, and procedures; identification of gaps in current UAS technologies and regulations, standards, policies, and procedures; development of new technologies and new or revised regulations, standards, policies, and procedures; and the associated development of guidance material, training, and certification of aircraft systems, propulsion systems, and airmen.

ROADMAP*, supra* note 1, at 7.

76. Wagstaff, *supra* note 11.

77. "Ultimately, UAS must be integrated into the NAS without reducing existing capacity, decreasing safety, negatively impacting current operators, or increasing the risk to airspace users or persons and property on the ground any more than the integration of comparable new and novel technologies." ROADMAP, *supra* note 1, at 4.

78. *Id.* at 4.

79. *Id.* at 23.

80. *Id.* at 9.

not suitable for UAS.[81] The complete integration of the UAS in other airspace classes will require the development of new or supplemental procedures.[82]

The FMRA establishes three categories of UAS with separate rules that apply to each.[83] The three broad categories of UAS are public, civil, and private drones. Currently, public and civil drone operators must obtain FAA approval before operating drones.[84] Public drones are owned and operated by a governmental entity, which must apply for a certificate of authorization or waiver.[85] Civil drones, those used for commercial or business purposes, must obtain a special airworthiness certificate from the FAA by demonstrating that they can operate safely within assigned flight test areas and will cause no harm.[86] The FMRA contains a carve-out provision with respect to drones that are flown for recreational purposes.[87] Hobbyists are permitted to use the national

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81. *Id.* at 25. "Existing airworthiness standards have been developed from years of operational safety experience with manned aircraft and may be too restrictive for UAS in some areas and inadequate in others." *Id.*

82. *Id.* at 18.

83. FAA Modernization and Reform Act of 2012, Pub. L. No. 112–95, § 333(b), 126 Stat. 11, 76. The decision on which UAS will have these special rules will be based on a determination of "which types of unmanned aircraft systems, if any, as a result of their size, weight, speed, operational capability, proximity to airports and populated areas, and operation within visual line of sight do not create a hazard to users of the national airspace system or the public or pose a threat to national security." *Id.*

84. *Public Operations (Governmental)*, FED. AVIATION ADMIN., http://www.faa.gov/uas/public_operations/ (last updated Sept. 11, 2015); *Civil Operations (Non-governmental)*, FED. AVIATION ADMIN., http://www.faa.gov/uas/civil_operations/ (last updated Mar. 17, 2015).

85. *Public Operations (Governmental)*, *supra* note 84.

86. Drones used for commercial purposes fall into this category. *Id.*

87. FAA Modernization and Reform Act § 336 ("[T]he Administrator of the Federal Aviation Administration may not promulgate any rule or regulation regarding a model aircraft, or an aircraft being developed as a model aircraft, if . . . the aircraft is flown strictly for hobbyist or recreational use . . . ."). Recent reports indicate however, that model airplanes may be subject to the new FAA rules regarding small UAS. *See* Gregory S. McNeal, *FAA's Proposed Drone Rules May Address Toy Drones,* FORBES (Jan. 29, 2015 11:26 AM), http://www.forbes.com/sites/gregorymcneal/2015/01/29/in-a-surprise-change-faas-proposed-drone-rules-will-address-toy-and-hobbyist-drones/.

airspace without any advanced permission, if they abide by the standards set forth in section 336 of the FMRA.[88]

2. FAA's Authority to Regulate Hobbyist Drones

The authority of the FAA to regulate the national airspace is premised on the fact that "'air travel is inherently interstate travel' and thus falls within federal jurisdiction based on the Commerce Clause."[89] With the rise of hobbyist drones, that by their very definition operate at less than 500 feet of altitude and often do not travel interstate, the federal authority over such operations is arguably uncertain.[90] Under current FAA regulations, the FAA contends that drones used for recreational purposes must follow the guidelines set forth in Advisory Circular 91-57 ("AC 91-57"), released in 1981.[91] AC 91-57 "outlines, and encourages voluntary compliance with safety standards for model aircraft operators."[92] The suggestions include that the operators stay a

> sufficient distance from populated areas[,] . . . do not operate model aircraft in the presence of spectators until the aircraft is sufficiently flight tested and

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88. FAA Modernization and Reform Act § 336. The conditions include that the aircraft is flown strictly for recreational purposes, the aircraft is not more the 55 pounds, the aircraft operates in a way that does not interfere with any manned aircraft, and that when flown within 5 miles of an airport, the operator gives the prior notice to the air traffic controller. *Id.* Drones used for recreational use or hobby are prohibited from flying above 400 feet, operating near airports, flying at night and must stay within the line of sight of the operator. *Model Aircraft Operations*, FED. AVIATION ADMIN., http://www.faa.gov/uas/model_aircraft/ (last updated Feb. 10, 2016).

89. Rule, *supra* note 5, at 198 (quoting Jeffrey A. Berger, Comment, *Phoenix Grounded: The Impact of the Supreme Court's Changing Preemption Doctrine on State and Local Impediments to Airport Expansion*, 97 NW. U. L. REV. 941, 965 (2003)).

90. *Id.* at 198–99.

91. DEP'T OF TRANSP., FED. AVIATION ADMIN., MODEL AIRCRAFT OPERATING STANDARDS, ADVISORY CIRCULAR 91-57 (1981) [hereinafter AC 91-57].

92. Respondent's Motion to Dismiss at 5, Huerta v. Pirker, No. CP-217 (N.T.S.B. 2014) (explaining that AC 91-57 does not distinguish between model airplanes that are flown for recreational use or those that are flown for a commercial or business purpose).

> proven airworthy[,] . . . do not fly model aircraft higher than 400 feet above the surface[,] . . . [and] when flying aircraft within 3 miles of an airport, notify the control tower, or flight service station.[93]

In a later policy statement issued in 2007, the FAA clarified that to qualify as a model airplane, the operator must only fly the aircraft for recreational purposes.[94]

The carve-out provision for recreational drones in the FMRA also contains language that nothing will limit the FAA's authority to take action against an individual who uses their model aircraft in a way that endangers the safety of the NAS.[95] In an attempt to regulate drone operators, the FAA issues cease and desist letters.[96] It is important to note that the guidelines established by the FAA with regard to model airplanes and recreational drones do not carry the weight of the law[97] and the FAA has not attempted to enforce them as such until recently.[98]

Thus far, one operator has successfully challenged the FAA's authority to regulate hobbyist drone use.[99] An administrative judge found for the operator, who argued that the attempts to

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93. AC 91-57, *supra* note 91.

94. Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 6689-01 (Feb. 13, 2007) (to be codified at 14 C.F.R. pt. 91).

95. FAA Modernization and Reform Act of 2012, Pub. L. No. 112–95, § 336(b), 126 Stat. 11, 77.

96. Michael Berry & Nabiha Syed, *Litigation Pushes Back Against FAA Enforcement*, WASHINGTON POST (Sept. 24, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/24/litigation-pushes-back-against-faa-enforcement/.

97. The FAA is required to adhere to the requirements of the to the Administrative Procedures Act ("APA"), which lays out the process for which a federal agency may enact rules and regulations. Administrative Procedures Act, 5 U.S.C. § 553 (2013). This process is required for any informal rulemaking that will bind the public to comply. *Id.; see also* Decisional Order, Huerta v. Pirker, No. CP-217 (N.T.S.B. Mar. 6, 2014). For more information on the APA, see Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002).

98. FED. AVIATION ADMIN., INTERIM OPERATIONAL APPROVAL GUIDANCE 08-01: UNMANNED AIRCRAFT SYSTEMS OPERATIONS IN THE U.S. AIRSPACE SYSTEM 6 (2008).

99. Decisional Order, Huerta v. Pirker, No. CP-217 (N.T.S.B. Mar. 6, 2014).

regulate the use of UAS through the Advisory Circular and the policy statements are not valid because they were not subjected to the requirement for agency rulemaking set out in the Administrative Procedures Act.[100] It is clear that the FAA does have the power to bring action against hobbyist that use drones in a way that will impact high altitude flights or operate near airports, but their authority with regard to safe, low altitude operations remains to be seen.[101] Examined holistically, the FAA's regulations regarding hobbyist drones are vague and arbitrary.[102]

B. Federal Legislative Attempts

Given that the FAA is struggling to implement regulation, it is unsurprising that the legislative process has taken hold of the issue. Federal bills aimed at drone usage largely focus on their use by public officials[103] and are attempts to fill gaps that are perceived in the FMRA.[104] The Preserving America Privacy Act includes

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100. The APA requires that a governing agency publish a notice of the proposed rule in the Federal Register that includes the time and place of the proceeding regarding the proposed rules to give interested persons an opportunity to review and submit their views on the proposed rules. Administrative Procedures Act, 5 U.S.C. § 553.

101. Rule, *supra* note 5, at 164.

102. Most drones operate on a system that controls the drone through some type of video that can be seen on the operator's handheld device. *See id.* at 157. These are naturally meant to be operated outside of the operator's line of sight, and commonly are. *Id.* at 163–64. The recently released FAA plan for small commercial drones require that those drones stay below 500 feet, but it is unclear what the purpose is served by 100 feet altitude difference for hobbyist and commercial drones. Bart Jansen, *FAA Unveils Drone Rules; Obama Orders Policy for Agencies*, USA TODAY (Feb. 16, 2015, 8:12 AM), http://www.usatoday.com/story/news/2015/02/15/faa-drone-rule/23440469/.

103. This Note does not address issues raised by government or public use of drones.

104. *See* Drone Aircraft Privacy and Transparency Act of 2013, H.R. 1262, 113th Cong. (2013) (requiring that every applicant for a UAS certificate to include in its application information on how it intends to collect, use and retain information; require FAA to make these applications available on its website; prohibit law enforcement from using UAS for investigation and intelligence purposes without a warrant, subject to certain exceptions; and require any UAS application by law enforcement to include a minimum data statement); Preserving Freedom from Unwarranted Surveillance Act of 2012, S. 3287, 112th Cong. (2012); Cameron Cloar, *Unmanned Aircraft: Filling US Airspace – And Court-*

specific provisions that address the use of a drone by a private citizen to capture any type of visual image or recording that would be highly offensive to a reasonable person.[105] The Drone Aircraft Privacy and Transparency Act of 2013 would obligate the Secretary of Transportation to "establish procedures to ensure that the integration of unmanned aircraft systems into the national airspace is done in compliance with privacy principles."[106] Another proposed federal bill that, if passed, would apply to hobbyist drones is the No Armed Drones Act, which would modify the FMRA to prevent armed drones from entering the national airspace.[107]

C. Executive Regulatory Efforts

The White House released an executive memorandum addressing privacy concerns posed by both public and private drone operators on February 15, 2015.[108] The memo was designed to

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rooms?, LAW360 (July 5, 2012, 12:44 PM), http://www.law360.com/articles/355118/unmanned-aircraft-filling-us-airspace-and-courtrooms.

105. Preserving American Privacy Act of 2013, H.R. 637, 113th Cong. § 319f (2013) ("It shall be unlawful to intentionally operate a private unmanned aircraft system to capture, in a manner that is highly offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of a individual engaging in a personal or familial activity under circumstances in which the individual had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there was a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used").

106. H.R. 1262 § 338. This was reintroduced in 2015 as the Drone Aircraft Privacy and Transparency Act of 2015. Drone Aircraft and Transparency Act of 2015, S. 635, 114th Cong. (2015).

107. No Armed Drones Act of 2013, H.R. 1083, 113th Cong. (2013).

108. Memorandum from President Barack Obama, Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems (Feb. 15, 2015), https://www.whitehouse.gov/the-press-office/2015/02/15/presidential-memorandum-promoting-economic-competitiveness-while-safegua; *see also* Kevin Robillard & Erin Mershon, *Obama to Issue Drove Privacy Order,* POLITICO (July 23, 2014, 7:01 PM), http://www.politico.com/story/2014/07/executive-order-drone-privacy-barack-obama-109303.html#ixzz38PrOcxLj; Charles D. Tobin et al., *FAA Proposes Commercial Drone Rules As White House Issues Executive Memo*, HOLLAND & KNIGHT (Feb. 17, 2015), http://www.hklaw.com/publications/FAA-Proposes-

address the privacy and transparency issues raised by various members of congress and civil liberty groups. The memo directed at the National Telecommunications and Information Administration ("NTIA") to develop operational guidelines for drone use that will "develop and communicate best practices for privacy, accountability and transparency issues regarding commercial and private UAS use."[109] The NTIA is a section of the Commerce Department and would work with other government agencies to develop guidelines for commercial drone operators.[110] The NTIA has conducted similar investigations involving multi-stakeholder privacy interests for issues that arose during the introduction of technology such as mobile application and facial recognition.[111]

D. State Legislative Actions

"Concerns over privacy tend to manifest themselves at the local level," meaning that states are largely responsible for enacting legislation restricting the private use of drones.[112] Thus far, twenty-six states have enacted legislation and six have enacted resolutions concerning drone use.[113] In 2013, forty-three states

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Commercial-Drone-Rules-As-White-House-Issues-Executive-Order-02-17-2015/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original.

109. Tobin et al., *supra* note 108; *see also* Gregory S. McNeal, *Drones Face Critical Moment as White House Prepares to Act*, FORBES (Nov. 30, 2014, 6:23 PM), http://www.forbes.com/sites/gregorymcneal/2014/11/30/drones-face-critical-moment-as-white-house-prepares-to-act/.

110. McNeal, *supra* note 109.

111. Tobin et al., *supra* note 108.

112. Raymond L. Mariani, *Rise of the Drones: The Growing Proliferation of Unmanned Aircraft in the National Airspace System*, THE BRIEF, Summer 2014, at 18, 23; *see also* Melanie Reid, *Grounding Drones: Big Brother's Tool Box Needs Regulations Not Elimination*, 20 RICH. J. L. & TECH. 9, 25 (2014).

113. *Current Unmanned Aircraft State Law Landscape*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx (last updated Feb. 26, 2016); Allie Bohm, *The Year of the Drone: An Analysis of State Legislation Passed This Year*, AM. CIV. LIBERTIES UNION (Nov. 7, 2013, 8:50 AM), https://www.aclu.org/blog/technology-and-liberty/year-drone-roundup-legislation-passed-year [hereinafter *The Year of the Drone*] ("[I]t is . . . remarkable that many bills were enacted the first session out of the gate given that legislation often takes multiple years to marinate and gain legislator and public

considered bills related to domestic drones and eight states enacted legislation related to drone use.[114] Four of the states simply appropriated money for programs related to drones, generally for the purpose of promotion rather than restriction.[115] The reluctance to enact legislation that would restrict private use may be due to of economic considerations or because they are being considered as locations for drone test sites.[116]

Not all states share this sentiment with regard to drones. Of the nine that imposed restrictions, most deal with law enforcement and other governmental agencies, on which this Note does not address.[117] In 2013, three states enacted legislation that aimed at imposing restrictions on the private use of drone technology.[118] Idaho approved the first UAS bill, which is aimed at protecting people from surveillance by UAS.[119] Oregon also passed drone legislation

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support before passing."); *see, e.g.*, S.B. 1221, 27th Legis., Reg. Sess. (Haw. 2013).

114. *Current Unmanned Aircraft State Law Landscape*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx (last updated Feb. 26, 2016); *see* Allie Bohm, *Status of 2014 Domestic Drone Legislation in the States*, AM. CIV. LIBERTIES UNION (April 22, 2014, 10:30 AM), https://www.aclu.org/blog/technology-and-liberty/status-2014-domestic-drone-legislation-states [hereinafter *Status of 2014 Domestic Drone Legislation*]; *see also, e.g.*, FLA. STAT. ANN. § 934.50 (West 2015).

115. *2013 State Unmanned Aircraft Systems (UAS) Legislation*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/research/transportation/2013-state-unmanned-aircraft-systems-uas-legislation.aspx (last updated July 21, 2015).

116. Hawaii, Maryland, Nevada, and North Dakota are the four states that passed these types of bills. *See id.* Interestingly, of these four states that enacted this type of promotional legislation, Hawaii, Nevada, and North Dakota were selected to operate a test range under the FAA's research and development plan. *See generally id.*

117. Oregon, Montana, Idaho, Texas, Illinois, Tennessee, Virginia, North Carolina, and Florida are states that enacted this type of legislation. *See id.*

118. *The Year of the Drone*, *supra* note 114; *see also, e.g.*, OR. REV. STAT. ANN. § 837.380 (West, Westlaw through 2015 Reg. Sess.), *Current Unmanned Aircraft State Law Landscape*, *supra* note 113.

119. *2013 State Unmanned Aircraft Systems (UAS) Legislation, supra* note 115. The bill prohibits individuals from using a drone to take photographs of private property without obtaining the owner's prior written permission. *Id.* (citing S.B. No. 1134, 62nd Leg., 1st Reg. Sess. (Idaho 2013)). Idaho has the

in 2013, which focuses on private property.[120] Texas passed legislation concerning drones used to capture images in certain types of circumstances.[121] The law creates two new crimes: the illegal use of an unmanned aircraft to capture images and the offense of possessing or distributing the image.[122]

Five states enacted legislation regarding drones in 2014. Indiana became the first state to enact UAS legislation in 2014,[123] which established that it is a crime for a person to intentionally, electronically survey the private property of another without first obtaining permission.[124] In Louisiana, it is unlawful to intentional-

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most sweeping of the regulations which allows a person to assert a private cause of action and recover "actual and general damages" from someone who uses a drone to photograph them, without written consent for the purpose of publicly disseminating such recording, defines an "Unmanned Aircraft System," requires warrants for their use by law enforcement, establishes guidelines for their use by private citizens and provides civil penalties for damages caused by improper use. *Id.*

120. *Id.* If a person has notified the drone operator on a previous occasion that they do not wish for the operator to fly the drone over their property, a landowner can bring an action against that operator for flying the drone lower than 400 feet over their property. *Id.* (citing OR. REV. STAT. § 837.380 (West 2013), *amended by* OR. REV. STAT. ANN. § 837.380 (West, Westlaw through 2015 Reg. Sess.)). The law also requires that the DOA must report to legislative committees on the status of federal regulations and whether UAS's operated by private parties should be registered in a manner similar to the requirement for other aircraft. *Id.* (citing OR. REV. STAT. § 837.360 (West 2013), *amended by* OR. REV. STAT. ANN. § 837.360 (West, Westlaw through 2015 Reg. Sess.)).

121. *Id.* (citing Texas Privacy Act, TEX. GOV'T CODE ANN. § 423 (West, Westlaw through 2015 Reg. Sess.)) (enumerating many lawful uses for unmanned aircraft, including their use in airspace designated as an FAA test site, use in connection with a valid search warrant and use in oil pipeline safety).

122. *2013 State Unmanned Aircraft Systems (UAS) Legislation*, *supra* note 115. Texas Privacy Act §§ 423.003–.004. "Image" is defined broadly as any sound wave, thermal, ultraviolet, visible light or other electromagnetic waves, odor, or other conditions existing on property or an individual located on the property. *Id.* at § 423.001.

123. *2014 State Unmanned Aircraft Systems (UAS) Legislation*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/research/transportation/2014-state-unmanned-aircraft-systems-uas-legislation.aspx (last updated July 2, 2015) (citing IND. CODE § 35-46-8-5 (Lexis Nexis 2009)).

124. *Id.* (citing IND. CODE § 35-46-8-5 (Lexis Nexis 2009)). Note this law does not apply specifically to drone technology but more generally to all surveillance technology.

ly use a drone to carry out surveillance directed at a specific location without the owner's prior written permission.[125] North Carolina law creates a civil cause of action for those whose privacy is violated.[126] Tennessee adopted two new laws in 2014.[127] The first makes it a misdemeanor for any private entity to use a drone to conduct video surveillance of a person who is hunting or fishing without their consent.[128] The second law provides that it is a crime for a person to use UAS to knowingly conduct surveillance of an individual or their property.[129] Wisconsin enacted a law that regulates the use of a drone by a person, with the intent to observe another individual, in a place where they have a reasonable expectation of privacy.[130]

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125. *Id.* (citing LA. STAT. ANN. § 14:337 (Westlaw through 2015 Reg. Sess.)). The crime is punishable by a fine of up to $500 and imprisonment for six months. *Id.* A second offense can be punished by a fine up to $1,000 and one-year imprisonment. *Id.*

126. *2014 State Unmanned Aircraft Systems (UAS) Legislation*, *supra* note 123 (citing N.C. GEN. STAT. ANN. § 15A-300.1 (West 2014)). The new law prohibits any entity from conducting UAS surveillance of a person or private property and also prohibits taking a photo of a person without their consent for the purpose of distributing it. *Id.* The bill creates several new crimes: using UAS to interfere with manned aircraft, a class H felony; possessing an unmanned aircraft with an attached weapon, a class E felony; the unlawful fishing or hunting with UAS, a class 1 misdemeanor; harassing hunters or fisherman with a UAS, a class 1 misdemeanor; unlawful distribution of images obtained with a UAS, a class 1 misdemeanor; and operating a UAS commercially without a license, a class 1 misdemeanor. *Id.* (citing H.B. 1099, 2013 Gen. Assemb., Reg. Sess. (N.C. 2014)).

127. *Id.* (citing TENN. CODE ANN. § 70-4-302 (2012 & Supp. 2015); TENN. CODE ANN. § 39-13-609 (West, Westlaw through 2016 2nd Reg. Sess.)).

128. *Id.* (citing TENN. CODE ANN. § 70-4-302(a)(6) (2012 & Supp. 2015)).

129. *Id.* (citing TENN. CODE ANN. § 39-13-609(a)(1) (West, Westlaw through 2016 2nd Reg. Sess.)). It also makes it a crime to possess those images (Class C Misdemeanor) or to otherwise use them (Class B Misdemeanor). *Id.* The law also identifies 18 lawful uses of UAS, including the commercial use of UAS under FAA regulations, professional or scholarly research and for use in oil pipeline and well safety. *Id.*; *see also* BENNETT, *supra* note 3, at 5 ("[O]ne can escape liability by showing that, upon learning the images were obtained unlawfully, the drone operator promptly destroyed or stopped publicizing them." (citing TENN. CODE ANN. §§ 39-13-609)).

130. *Id.* (citing WIS. STAT. ANN. § 942.10 (West, Westlaw through 2015 Act 150)).

In 2015, twenty states passed legislation concerning drone use and eight of these new laws are concerned with regulating private, hobbyist drone operators.[131] Arkansas prohibits the use of a drone to commit any acts that would constitute an act of voyeurism[132] and outlawed the use of UAS to collect or record information about critical infrastructure without consent.[133] Florida enacted new legislation that prohibits the use of a UAS to capture images of privately owned property or the owner, tenant, or occupant of a property without first obtaining consent from said party if it can fairly be said that a reasonable expectation of privacy exists.[134] Illinois created a task force that would consider and prepare recommendations for both the private and commercial use of UAS within the state.[135] Maryland passed legislation that prevents other entities other than the state from enacting law that regulate the testing or operation of UAS.[136] Mississippi enacted legislation that specifies that using a drone to commit any type of "peeping Tom" activities is a felony if the victim is under the age of sixteen.[137] North Dakota provides limitations on how hobbyists can use UAS for surveillance purposes.[138] Tennessee enacted legislation to fur-

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131. *See generally Current Unmanned Aircraft State Law Landscape*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx (last updated Feb. 26, 2016).

132. *Id.* (citing ARK. CODE ANN. § 5-16-101(b) (West, Westlaw through 2015 Reg. Sess. & 2015 1st Ex. Sess.)).

133. *Id.* (citing ARK. CODE ANN. § 5-60-103(b) (West, Westlaw through 2015 Reg. Sess. & 1st Ex. Sess.)).

134. *Id.* (citing FLA. STAT. ANN. § 934.50 (West 2015)).

135. Unmanned Aerial System Oversight Task Force Act, Pub. L. No. 099-0392, 2015 Gen. Assemb. (Ill. 2015).

136. *Current Unmanned Aircraft State Law Landscape, supra* note 113 (citing MD. CODE ANN., ECON. DEV. § 14-301(b) (West, Westlaw through ch. 1–6 of 2016 Reg. Sess.)).

137. *Current Unmanned Aircraft State Law Landscape, supra* note 113 (citing MISS. CODE ANN. § 97-29-61 (West, Westlaw through end of 2015 Reg. Sess.)).

138. *Current Unmanned Aircraft State Law Landscape, supra* note 113 (citing N.D. CENT. CODE ANN. § 29-29.4-05 (West, Westlaw through ch. 484 of 2015 Reg. Sess.)).

ther the regulation of drones by prohibiting the use of a drone to capture images of open-air events and firework displays.[139]

E. Problems Faced by Legislative Attempts

It is interesting that as of yet, no plaintiff has brought a claim against another private citizen for the unlawful use of drones to invade or trespass on his or her property.[140] The enactment of this type of legislation ignores that there is already a body of existing, general privacy laws that are technology neutral that can be applied to protect privacy from varied forms of surveillance.[141] Many of the laws passed by the states are unnecessarily broad and could be found to infringe on certain fundamental rights.[142]

1. Preemption

The federal government has authority over the national airspace and should the Congress pass legislation aimed at civilian drone use, the state legislation would be rendered useless.[143] State attempts to impose curfews at airports or prevent flight over certain areas are often held to be federally preempted, demonstrating that there is precedent for preemption of state legislation regarding the

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139. *Current Unmanned Aircraft State Law Landscape, supra* note 113 (citing TENN. CODE ANN. § 39-13-609 (West, Westlaw through 2016 2nd Reg. Sess.)).

140. BENNETT, *supra* note 3, at 7.

141. *Id.* at 4.

142. Idaho's restrictions, for example, would likely inhibit a journalist from using a drone to collect information about a traffic situation absent the consent of all the people operating their vehicles on the road. Allie Bohm, *The First State Laws on Drones*, AM. CIV. LIBERTIES UNION (April 15, 2013, 3:13 PM), https://www.aclu.org/blog/first-state-laws-drones. It could prevent an aerial photographer from using the drones to take photos of public facilities for upcoming publications. *Id.*

143. Preserving American Privacy Act of 2013, H.R. 637, 113th Cong. § 3119i (2013). The language of the bill arguably implied that the law would preempt state regulation of drones that are flying between states. *See also* Margot E. Kaminski, *Drone Federalism: Civilian Drones and the Things They Carry*, 4 CALIF. L. REV. CIR. 57, 73 (2013) (explaining the preemption of state drone regulations).

national airspace.[144] The Preserving American Freedom Act contains language that arguably could be construed to preempt drone regulation passed by the state and would regulate drones flown state to state.[145]

The FAA's authority over airspace and privacy consideration was expanded in the FRMA.[146] Congress acknowledged the FAA's interest in privacy matters by altering the FAA's mission, calling on the FAA to conduct a study on the integration of the UAS integration into national airspace on individual privacy.[147] The language of the statement clearly shows that Congress intends for the FAA to do research on the future of privacy implications. Although the FAA claims that it will not be delving deeply into the privacy issues posed by drone use, officials acknowledge that there are privacy challenges that will be addressed as they integrate UAS into the national airspace.[148] The FAA proposed and requested public input on the privacy research for the test site programs,

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144. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973); San Diego Unified Port Dist. v. Gianturco, 651 F.2d 1309-10 (9th Cir. 1981); Kaminski, *supra* note 143, at 73.

145. "Nothing in this Act shall be construed to preempt any State law regarding the use of unmanned aircraft systems *exclusively within the borders of that State*." Preserving American Privacy Act of 2013 § 3119i (2013) (emphasis added); *see also* Kaminski, *supra* note 143, at 73 (explaining that this language could have the effect of preempting state regulations that apply to drones that are flying from state to state).

146. BENNETT, *supra* note 3, at 8 (arguing that the plan "presupposes at least some federal guidance with respect to 'private' privacy").

147. *Id.* at 12 ("The study should address the application of existing privacy law to UAS integration; identify gaps in existing law, especially with regard to the use and retention of personally identifiable information and imagery; and recommend next steps for how the FAA can address the impact of widespread use of UAS on individual privacy as it prepares to facilitate the integration of UAS into the national airspace." (quoting Explanatory Statement, Consolidated Appropriations Act of 2014, H.R. 3547, 113th Cong., Division L. at 6 (Jan. 14, 2014))).

148. *Id.* at 9. When selecting the sites that would be used for testing drones, FAA's administrator Michael Huetra justified the FAA's slow pace with privacy concerns, explaining that the concerns of privacy "necessitates an extensive review of the privacy impacts of the test site program." *Id.* (quoting Letter from Michael P. Huerta, Acting Administrator, Fed. Aviation Admin., to Michael Toscano, President and CEO, Ass'n for Unmanned Vehicle Systems Int'l (Sept. 21, 2012)).

which will serve as a basis for evaluating the privacy issues that will arise as drone use becomes more frequent. When the FAA publicized the test site selections, the announcement also issued privacy guidelines that the test site operators would be required to follow.[149] The agency emphasized that transparency, public involvement, and compliance with existing laws will be necessary as they research the privacy implications of expanded drone use.[150] The FAA's licensing power also will allow for transparency and notice to people whose privacy rights may be infringed.[151] These requirements issued for the test sites and licensing indicate that the FAA will at least temporarily be charged with the duty of ensuring privacy rights are not violated by the test site operators.[152]

2. Impeding Innovation

Today's drone experimenters are no different from inventors from the past who attempted to explore the world from a new point of view. This period of exploration should not be curtailed by unnecessary and limiting regulation. It would be better to see how drones and the technology evolves naturally, observing how people use drones and what problems arise as drones become more commonplace. The best way to do this is to allow existing state laws and common law doctrines to serve their remedial purpose.

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149. *Id.* at 10. Privacy considerations were required to be taken by the test site operators: to sign special contracts with the FAA that required them to keep records of all drone flights, to have a written plan for use and retention of drone-collected data, to maintain an openly available privacy policy, to annually assess compliance being assessed by the operator annually in a manner accessible to the public, to obey any applicable privacy laws, then existing or subsequently enacted, and to acknowledge that the FAA may suspend test site operations if the terms of the contract are not honored by the test site operator. *Id.*

150. JOINT PLANNING AND DEV. OFFICE, *supra* note 4, at 7.

151. Kaminski, *supra* note 143, at 67.

152. JOINT PLANNING AND DEV. OFFICE, *supra* note 4, at 4 (explaining that the agency did not seek to enter the privacy arena with the regulations, but instead seeks to "inform the dialogue among policymakers, privacy advocates, and the industry regarding broader questions concerning the use of UAS technologies in the NAS"); *see also* BENNETT, *supra* note 3, at 11–12 noting how Congress charged the FAA to undertake privacy research in this area).

3. Untested Legislation

Given that many of the laws enacted by the states remain untested, it is difficult to determine how effective any of this new legislation will be. Once the use of drones by private citizens becomes more commonplace, the new regulations on drones will be tested as to their effectiveness or legality. There is no consensus on which state laws will better regulate the use of drones or which law will withstand challenges.[153] The states are at best making educated guesses based on other precedents that do not specifically speak to the problems that could be caused by drone use.[154]

4. Violation of First Amendment Rights

Laws that restrict the ability of civilians to engage in legitimate information gathering will undoubtedly implicate First Amendment issues. The First Amendment protects an individual's right to privacy regarding speech, assembly, and religion.[155] Laws restricting ability in legitimate or essential information gathering will be made in the name of privacy but will still place restrictions on speech.[156] If drone restriction has a chilling effect on protected activities, that could be regarded as a violation of the fundamental right to free speech. The First Amendment's protection of speech and privacy is most at odds when applied to the media's information gathering rights. Some of these laws prohibit photos in public areas or objects and people in plain view.

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153. BENNETT, *supra* note 3, at 7 (stating that "[t]he uncertainty will frustrate the consensus about how best to regulate drones, snooping, and nongovernmental actors—and thus bolster states' prerogatives in the short run"); *see also* Kaminski, *supra* note 143, at 69–71 (explaining different state drone-related privacy laws).

154. BENNETT, *supra* note 3, at 7. "Two core assumptions inform modern drone policy: drones will allow for more aerial surveillance than other airborne platforms have to date, and more drones will soon find their way into more private hands." *Id.*

155. U.S. CONST. amend. I.

156. Kaminski, *supra* note 143, at 61.

5. Inconsistency Across the States

One of the benefits that accompanies state regulations is that the state government is best equipped to cater to the needs and values of the citizens in that state. But the inconsistency with regard to drone legislation across the states could present problems for operators as they attempt to comply with the various state regulations. Operators may not know of regulations of a state that they are visiting and could inadvertently violate a law, subjecting themselves to penalties. In sum, UAS could create "interesting jurisdictional issues for state courts."[157]

IV. COMMON LAW APPLICABILITY

Having analyzed the current efforts underway to regulate drone use, this Part argues that a common law approach may be superior, at least as a supplement, to a regulatory approach given the fast-changing nature of drone technology and use. "Privacy is one of the sensitive and necessary human values and undeniably there are circumstances under which it should enjoy the protection of law."[158] Specifically, this Part analyzes the common law torts of intrusion upon seclusion and trespass to argue that a tort approach to drone intrusions could prove to be a useful tool in the fast changing and complex world of emerging technology. The common law tort system is already in place as a regulatory tool and has the advantage of experience in application with regard to emerging technologies.[159] A tort approach may not eliminate all problems associated with regulating drones, but it can serve as an ancillary method of address privacy invasions by hobbyist operators as these arise. This approach would enable legislators to more carefully craft laws to address problems posed by drones, rather than creating solutions aimed to address hypothetical situations.

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157. Benjamin Kapnik, *Unmanned but Accelerating: Navigating the Regulatory and Privacy Challenges of Introducing Unmanned Aircraft into the National Airspace System*, 77 J. AIR L. & COM. 439, 464 n.156 (2012).

158. Leopold v. Levin, 259 N.E.2d 250, 254 (1970).

159. Andrew J. McClurg, *A Thousand Words Are Worth a Picture: A Privacy Tort Response to Consumer Data Profiling*, 98 NW. U. L. REV. 63, 97–98 (2003).

A. Intrusion Upon Seclusion

Samuel Warren and Louis Brandeis introduced the general idea that the law should protect the right to privacy in the publication, *The Right to Privacy*, in 1890.[160] Dean Prosser furthered the concept of invasion of privacy as a distinctive and independent right by explaining that there are four distinct types of invasions that can give rise to liability.[161] Intrusion upon seclusion is designed to protect the right to privacy by guarding our affairs from the "prying eyes and ears of others."[162] This is exactly why it is the most logical way to guard against the potential privacy violations as the law catches up with the technology.[163]

The second *Restatement of Torts* explains, "one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[164] As the *Restatement of Torts* points out, a claim of intrusion upon seclusion has a few essential elements. The intrusion must be intentional for the plaintiff to state a cause of action. This element of the tort is important since it focuses on behavior, which will avoid any First Amendment issues that are likely to arise with state legislative ac-

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160. Interestingly, the authors viewed the protection of privacy as increasingly important as new forms of technology began to appear. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (citing to "recent inventions and business method" as reasons to secure a right to privacy).

161. Jeffrey F. Ghent, Annotation, *Invasion of Privacy by Radio or Television*, 56 A.L.R. 3d 386, § 2a (1974). These include: "(1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness." *Id.*

162. *See* Nader v. Gen. Motors Corp., 255 N.E.2d 765, 768 (N.Y. 1970) (finding that observance that is deliberate and malicious can give rise to a remedy); *see also* Jane Yakowitz Bambauer, *The New Intrusion*, 88 NOTRE DAME L. REV. 205, 230 (2012) (explaining the rationale behind the tort of intrusion upon seclusion).

163. *See Nader*, 255 N.E.2d at 768 (N.Y. 1970); *see also* Bambauer, *supra* note 162, at 230 (explaining further the rationale behind the tort of intrusion upon seclusion).

164. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

tions.[165] Malicious intent is not always required in order to have an actionable invasion of privacy claim;[166] instead, some courts look at what the intruder did rather than what their purpose for the intrusion was.[167] The purpose of the operator of a drone and the actions taken by the drone operator should be a relevant inquiry when determining the culpability of the operator, further highlighting the applicability of the tort to drones.

A physical intrusion is not necessary for the tort to apply.[168] Courts have applied the tort to nonphysical intrusions, such as eavesdropping on private conversations and peering through windows.[169] Additionally, the comments to the *Restatement* stress that the tort protects against unwanted surveillance, even when there has been no trespass and the victim is unaware of the offensive conduct.[170] The significance of the torts application to nonphysical intrusions should not be understated. It shows that the tort can be adapted to apply to various situations in which a person's privacy has been invaded. Given the maneuverability and discrete characteristics of drones, the tort of intrusion upon seclusion should be applied to situations where an operator uses their drone to peer into the windows of homes or make recordings without the knowledge of the victim.[171]

A victim typically must be in a private place unless the intrusion involves access to matters that are not exhibited for public gaze.[172] The *Restatement* also notes that "there may be some matters about the plaintiff, such as his underwear or lack of it, that are

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165. Bambauer, *supra* note 162, at 230.

166. Love v. S. Bell Tel. & Tel. Co., 263 So. 2d 460, 466 (La. Ct. App. 1972).

167. *Id.*

168. RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977). The tort can be committed through "the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars." *Id.*

169. *See* Nader v. Gen. Motors Corp., 255 N.E.2d 765, 770 (N.Y. 1970) (holding that eavesdropping and peering through windows would obviously constitute an invasion of privacy); Hamberger v. Eastman, 206 A.2d 239 (1964).

170. RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977).

171. Baugh v. Fleming, No. 03-08-00321-CV, 2009 WL 5149928, at *2 (Tex. App. Dec. 31, 2009) (permitting a claim based on videotaping through the window of a home).

172. RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977).

not exhibited to the public gaze" which implies that it could be applied to drone operators, even if they are filming in a public place, if the filming is considered offensive.[173] Seclusion has also been found in public spaces if constant surveillance is used to track an individual.[174] Given the comments and court decisions that have found intrusions in a variety of situations, persistent recording of a location or tracking a person with a drone, even if done in a public place, may be actionable in some jurisdictions.

Additionally, this privacy tort does not require that information collected be disseminated to third persons, making it more widely applicable to a private citizen using their drone against another private citizen.[175] Courts instead examine the full extent of the defendant's behavior over a period of time in which the intrusion was taking place.[176] This analysis would be beneficial in the case against a drone operator, particularly if the conduct affected multiple people.

The tort of intrusion upon seclusion can be applied to wrongs committed by hobbyist drone operators without the problems that can result from forms of state legislation. The court in *Roach v. Harper*[177] stated, "[t]he common law is not a static but a dynamic and growing thing. Its rules arise from the application of

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173. *Id.*

174. Kramer v. Downey, 680 S.W.2d 524, 526 (Tex. App. 1984) (holding that incessant observations by a previous romantic partner, even though the defendant remained on public property to do so, was an intrusion that justified damages); Luken v. Edwards, No. C10-4097-MWB, 2011 WL 1655902, at *5 (N.D. Iowa May 3, 2011) (allowing an intrusion claim to proceed that was premised on the interception of phone conversations between the plaintiff and her counsel in the midst of a divorce proceeding).

175. *See* McDaniel v. Atlanta Coca-Cola Bottling Co., 2 S.E.2d 810, 817 (Ga. Ct. App. 1939) (stating that the general rule is that publication is not necessary to state a claim for intrusion); Hamberger v. Eastman, 206 A.2d 239, 242 (N.H. 1964) (finding that publication can impact the amount of damages awarded for the intrusion).

176. Biondich v. NBC Subsidiary (WMAQ-TV, Inc.), No. 1-09-2269, 2011 WL 9717470, at *3–6 (Ill. App. Ct. Jan. 21, 2011) (ruling against reporters who film plaintiffs in their homes after they objected).

177. Roach v. Harper, 105 S.E.2d 564, 566–68 (W. Va. 1958) (applying the tort of intrusion to a case in which a landlord had installed a listening device in the dwelling of a tenant to find that the landlord had intruded upon the tenant's privacy).

reason to the changing conditions of society."[178] Applying the tort of intrusion upon seclusion to a drone offense would reveal the specific problems that arise as drones enter the airspace. Additionally, this approach would not impede innovations and can be more readily adapted as the technology continues to change. This would enable policy makers to more carefully craft regulations that will address the issues, rather than creating solutions to an issue that has not yet become a problem. Intrusion can be modified by private agreements, which strongly resemble much of the state legislation language that the drone operator must obtain the property owners consent to operate a drone over their property, revealing the unnecessary nature of the state legislation.[179] By allowing a property owner to consent, the doctrine of intrusion can redefine what that particular owner objectively expects to be a reasonable invasion of their privacy.[180]

B. Aerial Trespass

Prior to the acknowledgement that privacy is a distinct right worthy of protection, courts had often protected the right to privacy under the "guise of property right."[181] The trespass doctrine has historically defended a property owner's right to exclude others from their land.[182] At common law, the space above and below a property was considered to belong to the owner. This is known as the *ad coelom* doctrine, short for the Latin phrase "*cuius est solum, eius usque ad coelum et ad infernos*," meaning "to him to whom the soil belongs, belongs also to heaven and to the depths."[183] As William Blackstone explained, "no man may erect any building, or the like, to overhang another's land . . . . So that the word 'land' includes not only the face of the earth but everything under it, or over it."[184] The idea that an owner of land also has interest in the space above the land is reflected in modern sources as aerial tres-

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178. *Id.* at 568.

179. Bambauer, *supra* note 162, at 254 (claiming that the First Amendment is not implicated with the use of the tort of intrusion).

180. *Id.*

181. Ghent, *supra* note 161.

182. Rule, *supra* note 5, at 175.

183. *See* Eric R. Claeys, *On the Use and Abuse of Overflight Column Doctrine*, 2 Brigham-Kanner Prop. Rts. Conf. J. 61, 61 (2013).

184. 2 WILLIAM BLACKSTONE, COMMENTARIES 18 (1766).

pass. The second *Restatement of Torts* states that "[f]light by aircraft in the air space above the land of another is a trespass if, by only if, (a) it enters into the immediate reaches of the air space next to the land, and (b) it interferes substantially with the other's use and enjoyment of his land."[185]

The Supreme Court rejected the traditional common law doctrine in the case of *United States v. Causby*, where the Court held that property rights extend only so far as needed for the person to use and enjoy their property.[186] The "enveloping atmosphere rule" announced in *Causby* established that landowners possess as much of the airspace above their property to which they can reasonably use and an invasion of this airspace is trespass subject to damages.[187] But there is no clear authority as to exactly how far this right extends, creating continued uncertainty regarding low-altitude airspace rights.[188] The *Causby* Court stated "the flight of airplanes, which skim the surface [of land] but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it . . . . [I]nvasions of it are in the same category as invasions of the surface."[189] The language of this statement indicates that it would be reasonable to expand the aerial trespass tort doctrine to situations that involve the use of drones.

A great example of the aerial trespass doctrine in action involves overhanging encroachment situations. The common law's treatment of overhanging encroachments as a trespass is analogous

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185. *See* RESTATEMENT (SECOND) OF TORTS § 159(2) (1965).

186. *See* United States v. Causby, 328 U.S. 256, 260–61 (1946). The court rejects this doctrine stating that "[i]t is ancient doctrine that at common law ownership of the land extended to the periphery of the universe . . . [b]ut that doctrine has no place in the modern world. *Id.*

187. *See* Todd Janzen, *How a 1940's Chicken Farmer Case Answered: Who Owns the Sky?*, JANZEN AG LAW BLOG (Jan. 30, 2016), http://www.aglaw.us/janzenaglaw/2016/1/28/united-states-v-causby-the-1940s-chicken-farmer-case-that-will-impact-drone-law.

188. *See* Rule, *supra* note 5, at 169 (arguing for a more definite altitude to govern whether a drone has committed a trespass); *see also* Colin Cahoon, Comment, *Low Altitude Airspace: A Property Rights No-Man's Land*, 56 J. AIR L. COM. 157, 198 (1990). "With no definitive standard yet enunciated, and courts mixed in their approach to the question, landowners must still wonder just exactly what their property rights are to the airspace above their land." *Id.* at 198.

189. *Causby*, 328 U.S. at 264–65.

to drone operations over the land of another. "If a tree, building, or other structure affixed to the ground extends over the property and encroaches" on the airspace directly above another's land, "the law typically will enforce the right of a person to exclude this encroachment."[190] In many states, a property owner even has the right to trim the overhanging shrubbery or trees in the air above their land.[191]

"The common trespass law doctrine draws no limitations upon the character of the trespasser," so it can be applied in a variety of situations and circumstances.[192] Under traditional trespass doctrine, flight by an aircraft constitutes a trespass if it enters into the immediate reaches of airspace next to the land and interferes with the owner's use and enjoyment of the land.[193] Drones are far superior to traditional aviation technology that was examined by the courts in trespass doctrine cases, but courts have demonstrated that the common law can be adapted to new and emerging technologies. This is demonstrated through the development of the law with regard to the emergence of the radio,[194] the Internet,[195] and the telephone.[196]

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190. Rule, *supra* note 5, at 182.

191. *See, e.g.*, Macero v. Busconi Corp., 12 Mass. L. Rep. 521 (Super. Ct. 2000) (stating that the law in Massachusetts "recognizes a right to self-help by which a property owner can cut the limbs or branches of a tree that invade his property as long as such cutting is done at the property line").

192. *See* RESTATEMENT (SECOND) OF TORTS § 159 (1965); *see also* Oyegunle, *supra* note 33, at 384.

193. *See id.*; Geoffrey Christopher Rapp, *Unmanned Aerial Exposure: Civil Liability Concerns Arising from Domestic Law Enforcement Employment of Unmanned Aerial Systems*, 85 N.D. L. REV. 623, 645 (2009).

194. *See generally Radio Spectrum Allocation*, FED. COMM. COMMISSION, www.fcc.gov/encyclopedia/radio-spectrum-allocation (last visited Feb. 25, 2016) (describing basic modern law that governs the property rights related to the radio).

195. *See generally* Michael L. Rustad & Diane D'Angelo, *The Path of Internet Law: An Annotated Guide to Legal Landmarks*, 2011 DUKE L. & TECH. REV. 12 (2011) (providing a general history of the complex legal landscape surrounding the property interest related to the Internet).

196. *See generally* Navarra v. Bache Halsey Stuart Shields, Inc., 510 F. Supp. 831 (E.D. Mich. 1981) (finding that eavesdropping with a telephone is actionable).

Courts must engage in a "subjective and unpredictable" analysis as to whether the alleged trespass enters into the "immediate reaches" of the land and whether it "interferes substantially" with the landowner's use of the land.[197] When applying this principle to an alleged trespass committed by the use of a drone, a court could apply a different rule that views the drone as a projectile rather than an aircraft.[198] Courts have held that it is actionable trespass to fire projectiles and to fly an advertising kite through the air above land even though no harm to the land or to the possessor's enjoyment of it has occurred.[199] In sum, this tort would be implicated if a drone operator uses their drone close enough to the land of another and if it interfered with their enjoyment of land.[200]

V. CONCLUSION

Currently, drone regulation is in a constant state of modification as the technology is rapidly evolving. Legislation that is aimed at solving the problem of drone technology invading privacy is unnecessary, likely unconstitutional—and with regard to state legislative actions—runs the risk of preemption. Additionally, the states that have enacted legislation aimed at drones vary significantly in their application and breadth, leading to confusion among drone operators. The legislation and regulatory attempts at addressing hobbyist drones are untested, meaning their effectiveness is unknown. Common law existing tort claims of general applicability have been utilized for years by courts to address situations involving emerging technologies and to avoid the pitfalls of other regulatory efforts. Statutory solutions are likely to become outdated and obsolete, while common law tort causes of action are flexible enough to adapt as new uses for drones are discovered. For the foregoing reasons, privacy invasions committed by private, hobby-

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197. Rule, *supra* note 5, at 170.

198. *Id.*

199. RESTATEMENT (SECOND) OF TORTS § 158 cmt. i. (1965) ("[I]n the absence of the possessor's consent or other privilege to do so, it is an actionable trespass to . . . fire projectiles . . . through the air above [the land], even though no harm is done to the land or to the possessor's enjoyment of it.").

200. For example, if an operator used their drone to video people lying by the pool in their backyard, this type of disruptive and interfering activity could be considered a trespass.

ist operators should be addressed by applying common law tort claims of intrusion upon seclusion and aerial trespass.

Pirate Battles in Outer Space: Preventing Patent Infringement on the 8th Sea

WILLIAM C. PANNELL

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I. INTRODUCTION

The news of the Challenger space shuttle explosion in 1986 shocked the nation.[1] The catastrophe occurred just seventy-three seconds into the launch due to a faulty o-ring in the solid fuel rocket that led to a chain of failures ending with the mixing and ignition of liquid oxygen and liquid hydrogen fuel.[2] The event was nationally televised, and millions of Americans helplessly watched

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1. Nick Greene, *Remembering Challenger, January 28, 1986*, ABOUT EDUC., http://space.about.com/cs/challenger/a/challenger.htm (last updated Jan. 27, 2016).

2. PRESIDENTIAL COMM'N ON THE SPACE SHUTTLE CHALLENGER ACCIDENT, REPORT OF THE PRESIDENTIAL COMMISSION ON THE SPACE SHUTTLE CHALLENGER ACCIDENT 19–21 (1986); Greene, *supra* note 1.

the disaster as it unfolded.[3] In the aftermath of the explosion, the Senate Committee on Commerce, Science, and Transportation ordered the Congressional Budget Office to perform a special study to determine the United States' future involvement in outer space.[4]

Twenty-six years prior to the Challenger incident, when the United States Shuttle Program was first created, the United States' policy was that space travel would be conducted almost exclusively in the public sector through the National Aeronautics and Space Administration ("NASA").[5] It was not until Congress enacted the Commercial Space Launch Act in 1984 that the private sector was allowed to launch spacecraft into outer space for the first time.[6] In 1990, the Launch Services Purchase Act was passed into law, requiring NASA to outsource the launches of its primary payloads to commercial launch providers.[7] By 2010, NASA extended its commercial launch preference to any "space goods, services, or activities," meaning that almost every launch beyond this point was to be contracted to the private sector.[8]

In the absence of a government space launch program, the commercial launch industry is a rapidly growing technological field valued at over $100 billion per year.[9] As with all technological advances, companies want to ensure that their future invest-

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3. Greene, *supra* note 1.

4. *See* Rudolph G. Penner, *Preface* to CONG. BUDGET OFFICE, SETTING SPACE TRANSPORTATION POLICY FOR THE 1990S (1986), https://www.cbo.gov/sites/default/files/99th-congress-1985-1986/reports/doc24c-entire_0.pdf.

5. *See* Nat'l Aeronautics and Space Act of 1958, Pub. L. No. 85-568, 72 Stat. 426 (1958); Timothy A. Brooks, *Regulating International Trade in Launch Services*, 6 BERKLEY TECH. L.J. 59, 60–61 (2001).

6. *See* Commercial Space Launch Act, Pub. L. No. 98-575, 98 Stat. 3055 (1984) (enabling the private sector to launch commercial launch vehicles into outer space).

7. Launch Services Purchase Program, 42 U.S.C. § 2465d (1990) (repealed 1998).

8. *See* OFFICE OF THE PRESIDENT, NATIONAL SPACE POLICY OF THE UNITED STATES OF AMERICA 10−12 (2010), https://www.whitehouse.gov/sites/default/files/national_space_policy_6-28-10.pdf.

9. GLENNON J. HARRISON, CONG. RESEARCH SERV., R42492, THE COMMERCIAL SPACE INDUSTRY AND LAUNCH MARKET 1 (2012), http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/R42492_04202012.pdf.

ments are protected. Traditionally, inventors have used patents as a tool to obtain an exclusive right granted by a national government to exclude others from making, using, or selling an invention for a limited period of time.[10] "Because patents are granted by national governments, they are inherently territorial and may only be enforced within the jurisdiction of the granting government."[11] This means that while the holder of a United States patent would enjoy legal protection for her invention within the United States' territories, the inventor would also need to file for a patent in every other country in which she wishes to receive protection.[12] This jurisdictional issue presents many problems for protecting inventions that have wide, international markets. But what about inventions that have *extraterrestrial* markets? After all, no one has jurisdiction over outer space.[13]

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10. Matthew J. Kleiman, *Patent Rights and Flags of Convenience in Outer Space*, AIR & SPACE LAW, 2011, at 4; *see* 35 U.S.C. § 271(a) (2013) ("Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.").

11. Kleiman, *supra* note 10, at 4; s*ee* JON O. NELSON, INTERNATIONAL PATENT TREATIES 1 (2007); Christopher Miles, Comment, *Assessing the Need for an International Patent Regime for Inventions in Outer Space*, 11 TUL. J. TECH. & INTELL. PROP. 59, 59–60 (2008).

12. Kurt G. Hammerle & Theodore U. Ro, *The Extra-Territorial Reach of U.S. Patent Law on Space-Related Activities: Does the "International Shoe" Fit as We Reach for the Stars?*, 34 J. SPACE L. 241, 247 (2008) [hereinafter *Extra-Territorial Reach*]; Kleiman, *supra* note 10, at 4 ("For this reason, an inventor must file a separate patent application in each country where it wishes to obtain exclusive rights to an invention."); Theodore U. Ro et al., *Patent Infringement in Outer Space in Light of 35 U.S.C. § 105: Following the White Rabbit Down the Rabbit Loophole*, 17 B.U. J. SCI. & TECH. L. 202, 206–07 (2011) [hereinafter *Patent Infringement in Outer Space*].

13. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, art. II, Oct. 10, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 8843 [hereinafter Outer Space Treaty] ("Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."); Kleiman, *supra* note 10, at 5 ("Once an object is in space, however, it transcends the boundaries and protections of any single terrestrial market or patent jurisdiction.").

"For years, inventors have been filing and obtaining patents for technologies that have either exclusive applicability in outer space or dual-use applicability both on Earth and in outer space."[14] But these inventions are only protected on Earth.[15] In the beginning of commercial space flight, the technology and cost of entry for joining the commercial space launch industry was a barrier, which kept the number of companies in the field relatively small.[16] As the industry grows, however, and more companies enter the market, "traditional terrestrial legal issues associated with intellectual property ('IP') law will find increasing applicability to such commercial outer space activities."[17]

To address this issue, Congress enacted the Patents in Space Act in 1998, giving the United States extraterritorial jurisdiction over "[a]ny invention made, used, or sold in outer space on a space object or component thereof under the jurisdiction or control of the United States" subject to exceptions for compliance with international treaties.[18] As discussed later in this Note, Congress unintentionally created a loophole by adding these exceptions, allowing infringers in the United States to use, control, and derive benefits from technology in outer space that treads on a United

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14. *Patent Infringement in Outer Space*, *supra* note 12, at 205; s*ee also USPTO Patent Full-Text and Image Database*, U.S. PATENT & TRADEMARK OFF., http://patft.uspto.gov/netahtml/PTO/search-bool.html (last visited Mar. 3, 2016) (finding over 5,600 patents in a quick search that reference to the term "outer space"); *USPTO Application Patent Full-Text and Image Database*, U.S. PATENT & TRADEMARK OFF., http://appft.uspto.gov/netahtml/PTO/search-bool.html (last visited Mar. 3, 2016) (finding over 4,400 patent applications in a quick search that reference the term "outer space").

15. *See* Outer Space Treaty, *supra* note 13, art. II; Kleiman, *supra* note 10, at 5 ("Once an object is in space, however, it transcends the boundaries and protections of any single terrestrial market or patent jurisdiction.").

16. *See* Kleiman, *supra* note 10, at 5.

17. *Patent Infringement in Outer Space*, *supra* note 12, at 205; *see also* Barbara Luxenberg, *Protecting Intellectual Property in Space*, *in* PROCEEDINGS OF THE TWENTY-SEVENTH COLLOQUIUM OF THE LAW OF OUTER SPACE, 172 (1984), http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1005&context=spacelawdocs; Kunihiko Tatsuzawa, *The Regulation of Commercial Space Activities by the Non-Governmental Entities in Space Law*, SPACE FUTURE (1988), http://www.spacefuture.com/archive/the_regulation_of_commercial_space_activities_by_the_non_governmental_entities_in_space_law.shtml.

18. 35 U.S.C. § 105 (2013); *see Patent Infringement in Outer Space*, *supra* note 12, at 208–09.

States patent without liability by registering their space vehicle in another country. This Note will suggest that a treaty should be made between the United States and the most technologically-advanced countries banning benefits derived from any technology used in outer space that would otherwise infringe on patents currently in force in the United States or any other participating countries.

II. THE JURISDICTION OF PATENT LAW

Before one can begin to understand patent law in outer space, one must have a basic understanding of United States patent law and its jurisdiction. For an inventor to obtain legal protection for an invention, the inventor must file a patent application in each country in which the inventor is interested in receiving jurisdictional protection.[19] A patent is a trade with a government. By filing a patent in a country, the inventor is given an exclusive property right by that country's government to exclude all other people in that country from making, using, or selling the invention for a limited period of time.[20] In exchange, the inventor must publicly disclose the invention with enough specificity so that a person skilled in the relevant field could make and use it.[21] The invention must

19. *Patent Infringement in Outer Space*, *supra* note 12, at 207; *Extra-Territorial Reach*, *supra* note 12, at 247; Kleiman, *supra* note 10, at 4 ("For this reason, an inventor must file a separate patent application in each country where it wishes to obtain exclusive rights to an invention.").

20. 35 U.S.C. § 271(a) ("Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States, or imports into the United States any patented invention during the term of the patent therefor, infringes the patent."); Kleiman, *supra* note 10, at 4; *see also* 35 U.S.C. § 261 ("[P]atents shall have the attributes of personal property.").

21. 35 U.S.C. § 112(a) ("The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor or joint inventor of carrying out the invention.").

be new, useful, and nonobvious to receive a patent.[22] In most cases, a patent cannot be obtained for any invention that has already been disclosed to the public, with the exception of some countries—like the United States—that allow for a one-year grace period under certain disclosure situations.[23] Because patents are issued by governments, and are therefore inherently territorial, it follows that no country has patent jurisdiction over outer space.[24]

A. Decca Ltd. v. United States

Although patent jurisdiction is territorial, this does not limit patent infringement liability to acts that physically occur on United States soil. For example, United States courts have interpreted the definition of "use" of an infringing system or apparatus in a manner that allows certain extraterritorial acts to trigger infringement under United States jurisdiction.[25] In its 1976 opinion in *Decca Ltd. v. United States*,[26] the Court of Claims was faced with determining whether the United States had jurisdiction over a claim about a worldwide navigational system called Omega.[27] Omega utilized three transmitting stations—two located in the United States and one located in Norway—to send signals to receivers on ships and aircraft.[28] By noting the time differences between the three signals, the receiver could calculate its distance from each transmitter and determine its location.[29] In its opinion, the Court

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22. *See id.* §§ 101–03. "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor . . . ." *Id.* § 101.

23. *Id.* § 102(a)(1)−(b)(1); Kleiman*, supra* note 10, at 4.

24. Outer Space Treaty, *supra* note 13, at art. II ("Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."); NELSON, *supra* note 11, at 1; Kleiman*, supra* note 10, at 4–5 ("Once an object is in space, however, it transcends the boundaries and protections of any single terrestrial market or patent jurisdiction."); *see* Miles, *supra* note 11, at 59–60.

25. *See generally* 35 U.S.C. § 271(a) ("Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.").

26. 544 F.2d 1070 (Ct. Cl. 1976) (per curiam).

27. *Id.* at 1074.

28. *Id.*

29. *Id.*

of Claims held that the important factors in determining whether the patented system was "used" within the United States were "(1) whether '*control* of a system' occurs on [United States] territory, (2) whether the system is '*owned'* by a [United States] entity, and (3) whether there is '*beneficial use*' in the [United States]."[30] The court held that the infringing technology utilized on United States registered ships was used within the United States because use occurred wherever the signals were received and used.[31]

B. NTP, Inc. v. Research in Motion, Ltd.

For almost thirty years, the *Decca* factors were the test for determining whether the United States had extraterritorial patent jurisdiction. But in 2005, the United States Court of Appeals for the Federal Circuit modified the test in its *NTP, Inc. v. Research in Motion, Ltd.* opinion.[32] This case centered around technology that allowed users to receive their emails on Blackberry devices through a wireless communication network.[33] When a user sends an email from her mobile device via the "push" technology at issue in this case, the email is sent to a relay where it is pushed to the end recipient without the necessity of a user-initiated connection to the mail server.[34] The issue in this case was that Research in Motion's relay was physically located in Canada but was being used in the United States.[35] Research in Motion claimed "that the entire accused system and method must be contained or conducted within the territorial bounds of the United States" for 35 U.S.C. section 271 infringement to apply.[36] The court was again charged with determining whether allegedly infringing activity occurred "within the United States" as required in section 271(a) of the Patent Act.[37] More specifically, the court considered "whether the using, offering to sell, or selling of a patented invention is an infringement

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30. *Patent Infringement in Outer Space*, *supra* note 12, at 210 (citing *Decca Ltd.*, 554 F.2d at 1083) (emphasis added).

31. *Decca Ltd.*, 544 F.2d at 1081, 1098.

32. 418 F.3d 1282 (Fed. Cir. 2005).

33. *Id.* at 1289–90.

34. *Id.*

35. *See id.* at 1313–15.

36. *Id.* at 1314.

37. *See id.* at 1311; *Patent Infringement in Outer Space*, *supra* note 12, at 210−11.

under section 271(a) if a component or step of the patented invention is located or performed abroad."[38] The Federal Circuit determined that when deciding the situs of the "use" of a system, a court should look to (1) the place where the system is *controlled* and (2) the place where the system obtains its *beneficial use*.[39] By combining the control and beneficial use factors from the *Decca* test and omitting the ownership element, the court created the new "the place at which the system as a whole is put into service" test.[40] Therefore, even if some of the necessary components of a protected system are not physically located in the United States, an infringement claim may still have extraterritorial reach under the *NTP* test as long as the user exercises a minimal amount of control over, and receives beneficial use from, the product within the United States.[41]

III. MARITIME LAW

With a foundational knowledge of the jurisdictional reach of United States patent law, one can move on to the second building block used in creating existing outer space law: jurisdiction under maritime law. As discussed above, outer space law is a tricky body of law because no single country has jurisdiction over outer space. Instead, most of the laws governing space are embodied in a collection of treaties, much like maritime law, signed by the major outer space exploring countries. In fact, many of the treaties governing outer space are modeled after maritime law because of the vast similarities and difficulties in governing an area over which no country has control. Due to the youth of outer space exploration, the collection of treaties governing it is relatively small and still developing. To better understand the intent of the treaties on outer space aimed at solving the problems arising in the field, it is important to first have a brief understanding of maritime law.

Maritime law is defined in the United Nations Convention on the Law of the Sea ("UNCLOS") as "all issues relating to the

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38. *NTP, Inc.*, 418 F.3d at 1315; *Patent Infringement in Outer Space*, *supra* note 12, at 211.

39. *NTP, Inc.*, 418 F.3d at 1317.

40. *Id.*; *Patent Infringement in Outer Space*, *supra* note 12, at 211.

41. *Patent Infringement in Outer Space*, *supra* note 12, at 211.

law of the sea."[42] All ships sailing in international waters must register in a country or "flag state."[43] By registering a ship in a flag state, that country's laws receive extraterritorial jurisdiction to follow the ship wherever it travels, turning the ship into what is known as a "floating island."[44]

A very important issue arises out of this floating island concept: ships do not have to register in the country in which their owners live or are incorporated.[45] In fact, most of the time they are not.[46] As with any law where jurisdiction is left to the involved parties to decide, forum shopping runs rampant.[47] Many ship owners abuse the flag state registration principle by registering their ships in the countries with the least regulation so they can sidestep many of the laws that would otherwise impose additional taxes, costs, and liability.[48] Over the years, this concept of maritime fo-

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42. United Nations Convention on the Law of the Sea pmbl., Dec. 10, 1982, 1833 U.N.T.S. 397.

43. Convention on the High Seas art. 6(1), Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11 ("Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas."); Kleiman, *supra* note 10, at 5 ("Similar to the Outer Space Treaty, under maritime law, a ship operates under the law of its country, or 'flag,' of registration.").

44. *Patent Infringement in Outer Space*, *supra* note 12, at 208; Glenn H. Reynolds, *Legislative Comment: The Patents in Space Act*, 3 HARV. J.L. & TECH. 13, 19 (1990).

45. *See* United Nations Convention on the Law of the Sea, *supra* note 42, art. 91.

46. *See* United Nations Conference on Trade and Development, *Review of Maritime Transport*, 44 tbl.2.5, U.N. Doc. UNCTAD/RMT/2014, (Nov. 20, 2014) [hereinafter U.N. Trade & Dev.] (estimating that Panama, Liberia, and the Marshall Islands—the three countries with the largest registered fleets based on deadweight tonnage—have national ownership of only 0.17%, 0.01%, and 0.30% of their registered vessels, respectively).

47. *See* B.J. Haeck, Note & Comment, Yamaha Motor Corp. v. Calhoun: *An Examination of Jurisdiction, Choice-of-Laws, and Federal Interests in Maritime Law*, 72 WASH. L. REV. 181, 208 (1997).

48. Kleiman, *supra* note 10, at 4 ("This system of national jurisdiction could enable companies to circumvent patents on space technologies by registering their spacecraft in countries where these patents are not on file, just as the owners of merchant ships often register their vessels under 'flags of conven-

rum shopping has become known as "flags of convenience."[49] "Due to lax regulations, minimal oversight, and poor record keeping in these countries, flags of convenience are often criticized for creating a permissive environment for criminal activities, poor working conditions, and environmental damage."[50] The flags of convenience issue has become a widespread, global problem with over fifty percent of the world's deadweight tonnage ("DWT") being carried by ships registered in Panama, Liberia, the Marshall Islands, and Hong Kong.[51] Furthermore, over seventy-five percent of all DWT is carried by the top ten flags of convenience States.[52]

While the laws of the flag states govern ships while they are traveling at sea, traveling at sea is not the end goal for most ships; most of them are transporting cargo from one country to another.[53] At each port, a ship is subject to the jurisdiction of the country where it is currently located.[54] While a ship registered in a state other than the United States could make, use, or sell a device that infringed on a United States patent while at sea, United States laws prevent incoming ships from participating in these activities once they reach United States territory.[55] One such law—of importance to this Note—prevents the importation of patented devic-

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ience,' such as Panama and Liberia, to avoid burdensome taxes and regulations in their home countries.").

49. *Id.* at 5 ("The term 'flag of convenience' refers to the practice of registering a ship in a country different from that of the ship's owners for the purpose of reducing operating costs and avoiding burdensome regulations.").

50. *Id.*; *see, e.g.*, The Common Maritime Policy, EUR. PARL. DOC. ch. 2 (1996), http://www.europarl.europa.eu/workingpapers/tran/w14/2_en.htm; Rex S. Toh & Sock-Yong Phang, *Quasi-Flag of Convenience Shipping: The Wave of the Future*, TRANSP. J., Winter 1993, at 31; *Flags of Convenience: Avoiding the Rules by Flying a Convenient Flag*, INT'L TRANSP. WORKERS' FED'N, http://www.itfglobal.org/en/transport-sectors/seafarers/in-focus/flags-of-convenience-campaign/ (last visited Mar. 3, 2016).

51. *See* U.N. Trade & Dev., *supra* note 46, at 44 tbl.2.5.

52. *See id.* (listing the top ten flags of registration states by the most deadweight tonnage shipped: (1) Panama, (2) Liberia, (3) Marshall Islands, (4) Hong Kong, (5) Singapore, (6) Greece, (7) Bahamas, (8) China, (9) Malta, and (10) Cyprus).

53. Kleiman, *supra* note 10, at 5.

54. *Id.*

55. *Id.*

es.[56] When a foreign ship arrives at one of the 360 designated ports in the United States, the United States Customs Department checks the ship's cargo to ensure that none of its contents contain any such items.[57] If it does, the ship is not allowed to unload its contents on United States soil.[58]

IV. OUTER SPACE LAW

Like maritime law, outer space law is a type of international law that is almost completely governed by treaties.[59] But because the treaties were "largely developed during the Cold War" and focused mostly on governing "the behavior of the major space powers" instead of regulating private space activities, it is debatable whether this body of international law has any application to

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56. 35 U.S.C. § 271(a) (2013) ("Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.").

57. *U.S. Public Port Facts*, AM. ASS'N PORT AUTHORITIES, http://www.aapa-ports.org/Industry/content.cfm?ItemNumber=1032 (last visited Mar. 4, 2016); 19 U.S.C. § 1337(a)(1)(B) (2013).

> (a) Unlawful activities; covered industries; definitions
>
> (1) Subject to paragraph (2), the following are unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provision of law, as provided in this section:
>
> . . .
>
> (B) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that—
>
> (i) infringe a valid and enforceable United States patent or a valid and enforceable United States copyright registered under title 17, United States Code; or
>
> (ii) are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent.

Id.

58. 35 U.S.C. § 271(a); 19 U.S.C. § 1337(a)(1)(B); *U.S. Public Port Facts*, *supra* note 57.

59. Miles, *supra* note 11, at 59–60.

private enterprises at all.[60] "Consequently, none of the major international space treaties specifically addresses [sic] how national patent laws may apply to activities in outer space."[61]

A. The Outer Space Treaty

The Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies ("Outer Space Treaty") was the first international, outer space treaty.[62] It was ratified in 1966 by the United States, the Soviet Union, and the United Kingdom but has since been signed by 128 countries.[63] The treaty discusses property rights with respect to outer space activities.[64] The Outer Space Treaty, and all other later treaties concerning outer space, has a shared concept of "non-appropriation," prohibiting nations from claiming any territory or resources in outer space or on celestial bodies.[65] The Outer Space Treaty also states that a space object launched into outer space must be registered in a country and that country "shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body."[66] By creating a framework of jurisdiction based on regis-

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60. Kleiman*, supra* note 10, at 4; Miles, *supra* note 11, at 59–60; *see* Rosanna Sattler, *Transporting a Legal System for Property Rights: From the Earth to the Stars*, 6 CHI. J. INT'L L. 23 (2005).

61. Kleiman*, supra* note 10, at 4.

62. *See* Outer Space Treaty, *supra* note 13.

63. *Id.* at 7; Comm. on the Peaceful Uses of Outer Space, Legal Subcomm. on Its Fifty-Third Session, *Status of International Agreements Relating to Activities in Outer Space as at 1 January 2014*, U.N. Doc. A/AC.105/C.2/2014/CRP.7 (Mar. 20, 2014); Miles, *supra* note 11, at 61.

64. *See, e.g.*, Outer Space Treaty, *supra* note 13, at art. II.

65. *Id.* at art. I ("The exploration and use of outer space . . . shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development . . . ."); *see also* Steven Freeland, *Up, Up, and . . . Back: The Emergence of Space Tourism and Its Impact on the International Law of Outer Space*, 6 CHI. J. INT'L L. 1, 11–12 (2005); Leo B. Malagar & Marlo Apalisok Magdoza-Malagar, *International Law of Outer Space and the Protection of Intellectual Property Rights*, 17 B.U. INT'L L.J. 311, 345 (1999); Miles, *supra* note 11, at 64, 70 ("One of the core principles enshrined in the OST is that the exploration and exploitation of outer space should be done for all nations, regardless of their level of development.").

66. Outer Space Treaty, *supra* note 13, at art. VIII; *see also* FRANCIS LYALL & PAUL B. LARSEN, SPACE LAW: A TREATISE 41 (2009) ("Of [the major

tration states, the Outer Space Treaty adopted a system analogous to the "floating island" principle in maritime law.[67] "Thus, the treaty permits countries to extend their laws—including their patent laws—" extraterritorially to their registered space objects.[68]

B. The Registration Convention

In 1975, the Convention on the Registration of Objects Launched into Outer Space ("Registration Convention") was created, describing how space objects were to be registered.[69] The Registration Convention implemented the Outer Space Treaty's registration requirements, stating that the "launching State" is responsible for registering a space object.[70] This, in effect, turned the Outer Space Treaty's "the appropriate state party to the Treaty" into the "launching state."[71] Even more importantly, the Registration Convention further defines the "launch state" as either (1) "[a] State which launches or procures the launching of a space object" or (2) "[a] State from whose territory or facility a space object is launched."[72] In other words, a "launch State" can be: (1) a state that launches a space object, (2) the state that procures the launching of a space object, (3) a state that has a space object launched from its territory, or (4) a state that has a space object launched from its facility. Like maritime law, the owner of a space object

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space treaties] the Outer Space Treaty of 1967 (OST) is generally accepted as foundational, containing in part at least principles of a generality that have passed into customary law."); *Patent Infringement in Outer Space*, *supra* note 12, at 208.

67. *Patent Infringement in Outer Space*, *supra* note 12, at 208; *see also* Reynolds, *supra* note 44, at 18–19 ("Though we may speak of aircraft, ships, or embassies as being 'U.S. soil' in a legal sense, this characterization was aptly described by the U.S. Supreme Court as 'a figure of speech—a metaphor' and not an accurate statement of their legal status.").

68. Kleiman, *supra* note 10, at 4; *see* LYALL & LARSEN, *supra* note 66, at 124–27; *see Extra-Territorial Reach*, *supra* note 12, at 275.

69. Registration of Objects Launched into Outer Space, Jan. 14, 1975, 28 U.S.T. 695, T.I.A.S. No. 8480.

70. Registration of Objects Launched into Outer Space, *supra* note 69, at art. II(1); *Patent Infringement in Outer Space*, *supra* note 12, at 208.

71. Miles, *supra* note 11, at 63.

72. Registration of Objects Launched into Outer Space, *supra* note 69, at art. I(a)(i)–(ii); *Patent Infringement in Outer Space*, *supra* note 12, at 208; Miles, *supra* note 11, at 63.

that meets these registration standards in more than one country is free to engage in "flags of convenience" type forum shopping by selecting under which country to register.

At the time the United States signed the Registration Convention, "U.S. patent law . . . [did] not provide protection for inventions made, used, or sold in outer space because the existing law [was] territorial in application."[73] According to the definitions under the Patent Act, "[t]he terms 'United States' and 'this country' mean the United States of America, its territories and possessions," limiting patent law jurisdictionally.[74] Courts have held in the past that United States laws typically do not have extraterritorial reach without Congress explicitly saying so.[75] More specifically, courts have held that United States patent law does not have extraterritorial effect and only applies to activities that take place within the United States' territorial limits.[76]

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73. Reynolds, *supra* note 44, at 14.

74. 35 U.S.C. § 100(c) (2013); Reynolds, *supra* note 44, at 14.

75. *See, e.g.*, Cunard S.S. Co. v. Mellon, 262 U.S. 100, 121−23 (1923) (holding that the 18th Amendment's prohibition of liquor sales in "the United States and all territory subject to the jurisdiction thereof" did not apply extraterritorially to U.S. registered ships outside of U.S. territorial waters); Lam Mow v. Nagle, 24 F.2d 316, 318 (9th Cir. 1928) (holding that a baby born to Chinese parents on a U.S. registered ship in international waters was not a U.S. citizen); Air Line Stewards and Stewardesses Association v. Nw. Airlines, Inc., 267 F.2d 170, 178 (8th Cir. 1959) (holding that U.S. labor laws do not apply to a U.S. registered aircraft outside of U.S. territory); United States v. 12536 Gross Tons of Whale Oil, 29 F. Supp. 262, 267 (E.D. Va. 1939) (holding that a U.S. registered ship was not a "point" in the U.S. with regards to the Merchant Marine Act of 1920).

76. *See, e.g.*, Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 531 (1972); Ocean Sci. & Eng'g, Inc. v. United States, 595 F.2d 572, 574 (Ct. Cl. 1979) (dictum) ("Of course, the constitutional power of Congress to make our patent laws applicable to processes carried out on U.S. flag ships and planes at sea is not challenged; the question is whether Congress has done so in view of the Supreme Court's doctrine of strict construction. Perhaps the patent bar will note the possible loophole in the coverage of the U.S. patent laws and will invite the attention of Congress to it. Meanwhile, it is well to adjudicate cases on other grounds when possible, as we do this case."); Decca Ltd. v. United States, 544 F.2d 1070, 1074 (Ct. Cl. 1976) (per curiam) ("In view of the foregoing, we think a decision founded on the fiction that for purposes of the Patent Laws, United States ships and planes wherever found, are United States territory, would be founded on water.").

C. The International Space Station

The United States has adopted one treaty that discusses intellectual property in outer space. In 1998, Japan, Russia, and the United States signed the Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America Concerning Cooperation on the Civil International Space Station ("Agreement Concerning the ISS"), which stated,

> [F]or purposes of intellectual property law, an activity occurring in or on a Space Station flight element shall be deemed to have occurred only in the territory of the [country] of that element's registry, except that for [European Space Agency]-registered elements any European Partner State may deem the activity to have occurred within its territory.[77]

The Agreement Concerning the ISS gave Japan, Russia, and the United States exclusive patent jurisdiction over their respective space modules.[78] This marked the first time that the major space powers instituted an international patent jurisdiction based upon the "floating island" concept, showing that international outer space law could actually be sustained.[79]

Another important concept that arose out of the Agreement Concerning the ISS is that it confirmed that the Outer Space Treaty's non-appropriation doctrine did not cover such intangible property rights as intellectual property.[80] By signing the treaty, the major space powers of the world implicitly stated that the non-appropriation doctrine of the Outer Space Treaty and its progeny

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77. Agreement Among the Government of Canada, Governments of the Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America Concerning Cooperation on the Civil International Space Station art. 21, Jan. 29, 1998, 1998 U.S.T. 212 [hereinafter Agreement Concerning the ISS].

78. Kleiman*, supra* note 10, at 5.

79. *See id.* 4–5.

80. Agreement Concerning the ISS, *supra* note 77, at art. 21; Miles, *supra* note 11, at 64–66.

only applied to physical property rights for objects that originated in outer space.[81]

D. Patents in Space Act

In 1989, when Congress enacted 35 U.S.C. section 105 (i.e., the "Inventions in Outer Space" provision of the Patent Act), it coordinated United States patent laws with the Outer Space Treaty and the Registration Convention and extended the reach of United States patent laws to United States-registered spacecraft.[82] Section 105(a) states that "[a]ny invention made, used or sold in outer space on a space object or component thereof under the jurisdiction or control of the United States shall be considered to be made, used or sold within the United States for the purposes of [United States patent laws]," *subject to a few exceptions*.[83]

The first of these exceptions state that jurisdiction under 35 U.S.C. section 105 will not extend to space objects that are "specifically identified and otherwise provided for by an international agreement to which the United States is a party."[84] The second exception is where the true problem resides: even if the space object would normally be under United States jurisdiction, United States patent law will not apply if the object is carried on the regis-

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81. If one can own intellectual property created in outer space under the Agreement Concerning the ISS, then this would imply that the Outer Space Treaty's ban on owning outer space property does not include such intangible property.

82. 35 U.S.C. § 105(a) (2013); *Patent Infringement in Outer Space*, *supra* note 12, at 208–09.

83. 35 U.S.C. § 105(a). The exceptions in the statute referenced in the text reads:

> [E]xcept with respect to any space object or component thereof that is specifically identified and otherwise provided for by an international agreement to which the United States is a party, or with respect to any space object or component thereof that is carried on the registry of a foreign state in accordance with the Convention on Registration of Objects Launched into Outer Space.

Id.; *Patent Infringement in Outer Space*, *supra* note 12, at 213. It should be noted that only the "control" element of the NTP test still remains in this equation. Therefore, space objects arguably fall into United States jurisdiction less easily than other extraterritorial objects.

84. 35 U.S.C. § 105(a); *Patent Infringement in Outer Space*, *supra* note 12, at 213.

try of a foreign state in accordance with the Registration Convention.[85] Therefore, any invention created on a United States registered spacecraft would be considered invented in the United States and any infringement suits would be under United States jurisdiction, but a country could simply avoid United States jurisdiction altogether by registering the space object in another applicable country.

V. ISSUES WITH OUTER SPACE PATENT LAW: THE LOOPHOLE

The second exception in 35 U.S.C. section 105(a) creates a loophole allowing individuals and companies to avoid liability under the prohibition outlined in the first part of the subsection. When a loophole is large enough that anyone who would be a potential infringer can use it, the law itself becomes ineffective, resulting in plaintiffs losing a remedy. Current patent law requires a company to apply for a patent in every country where its space object may potentially be infringed upon.[86] This can be a long, tedious, and expensive process in many cases.[87] Any country in which the company fails to obtain patent protection could become a loophole exploited by competitors through flags of convenience.[88] As discussed above, the Patents in Space Act only gives the United States extraterritorial jurisdiction over space objects that are not registered in another country in accordance with the Registration Convention.[89] Under the Outer Space Treaty and the Registration Convention, a space object can be registered in a country that "launches or procures the launching of" said space object.[90] This language is ambiguous enough to allow a company that is seeking to exploit stolen technology to avoid United States jurisdiction simply by launching its space object from any other coun-

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85. 35 U.S.C. § 105(a); *Patent Infringement in Outer Space*, *supra* note 12, at 213; Miles, *supra* note 11, at 65.

86. *See supra* note 19 and accompanying text.

87. *See* Kleiman, *supra* note 10, at 5.

88. *Id.*

89. *See supra* Section IV.D.

90. Registration of Objects Launched into Outer Space, *supra* note 69, at art. I(a)(i).

try where the stolen technology has not received patent protection.[91]

Consider this hypothetical: Acme Space Launch, a private entity incorporated and located in the United States, decides to get into the satellite television business but can not, or does not want to, expend resources on researching and developing the requisite technology to accomplish its goal. Acme instead builds a launch pad and facilities in a small foreign country and proceeds to build a spacecraft and satellite based on the disclosed technology in existing United States patents held by Acme's competitors. Once completed, Acme launches its "space objects" from the foreign country and puts the satellites into orbit. The satellites send transmissions to customers throughout the United States. In this scenario, the United States would not have jurisdiction over an infringement claim against Acme pursuant to 35 U.S.C. section 105(a).[92] Because the second exception to 35 U.S.C. section 105(a) overrides any of the United States jurisdiction granted in the main body of the legislation, a company in the above fact pattern can skirt liability even when the infringing technology is *owned* by Acme (a United States corporation), is *controlled* by Acme or Acme's cus-

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91. Bernhard Schmidt-Tedd & Michael Gerhard, *Registration of Space Objects: Which Are the Advantages for States Resulting from Registration?*, *in* SPACE LAW: CURRENT PROBLEMS AND PERSPECTIVES FOR FUTURE REGULATION 121, 126 (Marietta Benkö & Kai-Uwe Schrogl eds., 2005); Miles, *supra* note 11, at 63.

92. 35 U.S.C. § 105(a) (2013); ORG. FOR ECON. CO-OPERATION & DEV., SPACE 2030: TACKLING SOCIETY'S CHALLENGES 177 (2005); Kleiman, *supra* note 10, at 5 ("Because the term 'launching state' is broadly defined, a company could conceivably select an outer space flag of convenience by either incorporating its business in or launching its spacecraft from the desired country."); *see* LYALL & LARSEN, *supra* note 66, at 94; Michael Gerhard, *National Space Legislation - Perspectives for Regulating Private Space Activities*, *in* ESSENTIAL AIR & SPACE LAW 2: CURRENT PROBLEMS AND PERSPECTIVES FOR FUTURE REGULATION 75, 90 (Marietta Benkö & Kai-Uwe Schrogl eds., 2005) ("There seem to be certain tendencies towards a 'flag of convenience' situation in space law since some States are offering a legal framework that is very advantageous financially to private entities, which encourages them to establish themselves in these States' territory, while these States, are not willing to take full responsibility (and consequential liability) for the activities of such entities."); *International and National Laws § 7.3.1.1*, PERMANENT.COM, http://www.permanent.com/legal-international-laws.html (last visited Mar. 5, 2016).

tomers from the United States, or otherwise *benefits* Acme and Acme's consumers located in the United States—all the traditional factors that have been examined in extraterritorial jurisdiction determinations by the United States courts.[93] It should also be noted that a smaller country would welcome the Acme space program because of the tax proceeds, while Acme would benefit from the relatively low number of registered patents in that country. A private company could forum shop to decide which jurisdiction to apply to its space objects by changing where the company "is headquartered, where its production facilities are located, or even where it chooses to register the space object."[94]

Flags of convenience could have drastic economic effects on the private outer space industry. First, patents are meant to incentivize individuals to create new and innovative technology and to share it with the public.[95] In return, the individual receives a monopoly on that invention for a limited time so that the individual can recover any costs for development and earn a profit for her hard work.[96] The end goal for society is that this technology will be the foundation for further advancements in the same area for the betterment of mankind.[97] If a competitor company can sidestep patent laws by avoiding certain jurisdictions, then the monopoly is diminished, and the incentive to invent new technology is gone.

Second, any competitor companies that are able to sidestep patent laws would not only be able to market the same technology, but they would also be able to offer it to the consumer at a lower cost. Research and development expenses in outer space technology are enormous and must be passed on to the consumer through increased pricing. Companies avoiding liability through flags of convenience would not have these costs like the original inventors and could, therefore, offer their product for much lower prices than

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93. *See* NTP, Inc. v. Research in Motion, Ltd., 418 F.3d 1282 (Fed. Cir. 2005); Decca Ltd. v. United States, 544 F.2d 1070 (Ct. Cl. 1976) (per curiam).

94. Miles, *supra* note 11, at 63.

95. Kleiman, *supra* note 10, at 4; *see Patent Infringement in Outer Space*, *supra* note 12, at 221.

96. Kleiman, *supra* note 12, at 4; *see* 35 U.S.C. § 271(a).

97. *See generally* U.S. CONST. art. 1, § 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."); *Patent Infringement in Outer Space*, *supra* note 12, at 206.

the inventor. This would effectively run the inventor out of business. This competitive advantage would also put "considerable economic pressure on all space companies to register their spacecraft under flags of convenience, resulting in a race to the bottom, that would exacerbate the patent protection problem along with safety, environmental, and other regulatory problems traditionally associated with flags of convenience."[98]

The problems with an ineffective outer space patent system would affect the private outer space industry at large. If companies can easily avoid liability for patent infringement in the United States, the growth of the outer space program could be stunted due to the lack of incentives for new research that the United States patent program is meant to encourage.[99] Companies may be more likely to protect new technologies as trade secrets instead of sharing them with the public as patent filings, preventing future innovation inspired by the new technology.[100] Companies looking to develop new outer space technology may also "find it more difficult to secure private financing for research and development activities."[101] Accordingly, a solution to correct the problems associ-

98. Kleiman*, supra* note 10, at 6; *see* J. Jonas Anderson, *Hiding Behind Nationality: The Temporary Presence Exception and Patent Infringement Avoidance*, 15 MICH. TELECOMM. TECH. L. REV. 1, 41–42 (2008) (discussing the "temporary presence exception" used by ships to avoid liability for patent infringement).

99. *Patent Infringement in Outer Space*, *supra* note 12, at 221; Kleiman*, supra* note 10, at 4–5 ("Permitting space companies to evade patents using flags of convenience will lessen the value of these patents. . . . Basing the outer space patent system on the application of national patent laws to registered space objects could limit the effectiveness of patent protection for space technologies.").

100. Kleiman*, supra* note 10, at 4−6; *Patent Infringement in Outer Space*, *supra* note 12, at 221; *see also* Reynolds, *supra* note 44, at 15–17 ("Many of the most promising [space technologies] can *only* be reduced to practice in outer space, since they rely on microgravity or other unique characteristics of the space environment. Thus, a lack of patent protection would likely forestall research in these fields. . . . By failing to extend patent protection to space innovations made by smaller firms and research centers, we would systematically be depriving ourselves of our most valuable research resources."); JOE BIDEN, INVENTIONS IN OUTER SPACE, S. DOC. NO. 101-266, at 5 (2d Sess. 1990) (discussing that the addition of Exception 2 to § 105 to conform to the Outer Space Treaty may have resulted in the exact chilling effect that section 105 was meant to avoid).

101. Kleiman*, supra* note 10, at 4.

ated with the outer space "flags of convenience" needs to be implemented to prevent potentially detrimental damage to the outer space industry and innovation.

VI. PAST SUGGESTED SOLUTIONS

There have been many proposed solutions for solving the outer space "flags of convenience" problem. One such solution is to form an international patent jurisdiction.[102] A uniform and predictable patent law jurisdiction for governing outer space activities would help encourage inventors from around the world to research and share their ideas with each other, spawning new technology and companies in the field.[103] The major problem with this solution is that governments have traditionally resisted conceding their sovereignty to international organizations.[104]

One of the biggest issues with an international patent jurisdiction is the traditional difference in philosophies behind governments awarding patent protection in the first place.[105] Many European countries base their patents upon a "personality" justification while the United States relies on Lockean ideals.[106] Under the personality approach, an invention is seen as an extension of the inventor. In other words, "an idea belongs to its creator because the

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102. *See, e.g.*, LYALL & LARSEN, *supra* note 66, at 127 ("A general and uniform patent protection for inventions made in outer space would give investors confidence in outer space research and encourage such activities."); Kleiman, *supra* note 10, at 6 ("The ideal solution to the flag-of-convenience problem, at least as it relates to effective patent protection, is to create a new multinational patent jurisdiction for filing and enforcing patents in outer space.").

103. Kleiman, *supra* note 10, at 6 ("A recently published space law treatise, meanwhile, similarly argued that 'general and uniform patent protection for inventions made in outer space would give investors confidence in outer space research and encourage such activities.'" (quoting LYALL & LARSEN, *supra* note 66, at 127)).

104. LYALL & LARSEN, *supra* note 66, at 560–61 ("In the early days of space it was never likely that the US and the USSR . . . would consent to the transfer of their authority . . . to the control of an International Space Agency. . . . [I]t seems clear that in the immediate future a global international operational space agency will not be created."); Kleiman, *supra* note 10, at 6.

105. *See* Kleiman, *supra* note 10, at 6–7.

106. Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 303, 330 (1988).

idea is a manifestation of the creator's personality or self."[107] On the other hand, the Lockean approach to patents poses an "instrumental" argument. That is, a person's ideas are her instruments, and therefore, they belong to that person. This argument is best shown through the Constitution's copyright and patent clause, which grants Congress "the power to create intellectual property rights in order 'To promote the Progress of Science and useful Arts.'"[108]

While these differences may seem insignificant, ending with the same result of patent protection, these differences in ideals can create procedural variations in the way patents are awarded in each country. From the time Congress passed the Patent Act of 1790, just one year after the signing of the Constitution, until it enacted the Leahy-Smith America Invents Act in 2011, the United States used a first-to-invent system for determining patent priority.[109] The decision to enact the America Invents Act was motivated in part by the growing push to "promote harmonization of the United States patent system with the patent systems commonly used in nearly all other countries throughout the world."[110] While

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107. *Id.* at 330.

108. *Id.* at 303–04 (quoting U.S. CONST. art. I, § 8, cl. 8); *see also* Alexa L. Ashworth, *Race You to the Patent Office! How the New Patent Reform Act Will Affect Technology Transfer at Universities*, 23 ALB. L.J. SCI. & TECH. 383, 385 (2013).

109. *See* Jerome H. Reichman & Rochelle Cooper Dreyfuss, *Harmonization Without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty*, 57 DUKE L.J. 85, 90–91 (2007); Reynolds, *supra* note 44, at 15 ("Unlike the patent laws of most other countries, U.S. patent law generally provides that a patent will issue to the first person to invent the product or process she claims in her patent."); *id.* at 15 n.10 ("In most other countries, the general rule is that the patent goes to whoever is 'first to file,' regardless of who was in fact first to invent."); 157 CONG. REC. E1191 (daily ed. June 23, 2011) (speech of Hon. West).

110. David W. Trilling, *Recent Development: Recognizing a Need for Reform: The Leahy-Smith America Invents Act of 2011*, 2012 U. ILL. J.L. TECH. & POL'Y 239, 246 (2012).

> Converting the United States patent system from "first[-]to[-]invent" to a system of "first[-]inventor[-]to[-]file" will improve the United States patent system and promote harmonization of the United States patent system with the patent systems commonly used in nearly all other countries throughout the world with whom the United States conducts trade and thereby

this is a shift toward international alignment of different patent processes, the United States remained one of the only first-to-invent jurisdictions in the world for over 200 years, showing the reluctance of countries to concede their patent procedures.[111] Procedural differences, like the system to determine priority, run deep to the roots of why these governments award patents in the first place and why countries are not likely to agree to forfeit their sovereignty to an international organization with opposing ideals.

Perhaps a more significant reason why an international patent jurisdiction would likely fail is that every country in the world would need to sign the treaty in order for it to be effective. If only the large, spacefaring nations sign the treaty for an outer space patent jurisdiction, a company could build a launch pad in a small developing country and register there, creating a flags of convenience opportunity. This may seem like an expensive measure to avoid patent infringement, but it may be cheaper than incurring the high costs of research and development in the private outer space exploration industry.

Smaller nations have no incentive to sign a treaty to be governed by an international patent organization. Smaller nations typically see enforcement of larger nation's patents as a way to make the larger countries richer while making the smaller countries poorer.[112] With the outer space industry grossing over $100

> promote greater international uniformity and certainty in the procedures used for securing the exclusive rights of inventors to their discoveries.

Id. (quoting H.R. 1249, 112th Cong. § 146(p) (2011)).

111. *See* Miles, *supra* note 11, at 69.

> Perhaps the most contentious is the split between the United States, which follows a first-to-invent patent system, and the majority of other nations, including those who are currently, and are most likely to be space-faring, who follow a first-to-file patent system. Additionally, it has been suggested that substantive harmonization of patent law is not truly feasible nor advisable until developing nations are better equipped to meet their obligations under the existing international agreements.

Id. at 69−70.

112. *Patent Infringement in Outer Space*, *supra* note 12, at 230–31 ("Yet the 'traditional reluctance of terrestrial nations to surrender their sovereignty to international organizations' makes the implementation of such a system unlikely

billion every year,[113] smaller countries would rather collect the tax money and collateral benefits they could derive from a space program located in their country than sign a treaty that has nothing to offer them in return. Therefore, every country—both big and small—would need to sign the treaty to enforce all other countries' patents in order for an international patent regime to succeed, which seems unlikely.

Another proposed solution has been to provide tax incentives and government contracting preferences to companies that register their space objects in participating countries.[114] The idea behind this approach is to disincentivize private companies from filing for registration in flags of convenience states. The problem with this concept is the same as above: the amount of money that a government can provide in tax incentives cannot rival the immense costs of research and development involved in designing new technology for outer space. For instance, if Acme's research and development costs and licensing costs for patented technology accounted for forty percent of its total expenditures, then the United States government would need to give tax incentives that would match or exceed that amount to disincentivize Acme from exploiting the section 105 loophole by launching from a foreign country. Otherwise, it would still be more lucrative for a company to decline the tax benefits by registering in another country and using existing United States patented technology.

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in the foreseeable future." (quoting Kleiman*, supra* note 10, at 6)); *see also* Kleiman*, supra* note 10, at 6.

> While industrialized nations view robust intellectual property protection as a critical component of a technology-based economy, many developing nations are skeptical of strong intellectual property protections. Developing nations tend to believe that "intellectual property rights raise prices and profits for one country or company at the expense of the well-being of a developing nation" and that weak intellectual property protection is "a means of increasing access to the information and technology needed for economic growth."

Id. (quoting THE GLOBAL CHALLENGE OF INTELLECTUAL PROPERTY RIGHTS 11 (Robert C. Bird & Subhash C. Jain, eds., 2008)).

113. HARRISON, *supra* note 9, at 1.

114. Kleiman*, supra* note 10, at 6.

VII. THE BENEFICIAL USE SOLUTION

Perhaps the best solution to the flags of convenience problem in outer space law is one that already exists in maritime law. On earth, ships transport cargo from one country to another, and when the ship and its cargo reach their destination, they become subject to the laws of that country.[115] A ship entering the United States is subject to inspection by the United States Customs and Border Patrol, and any of its cargo that violates United States law is considered an "unfair act[] involved in importation of articles."[116] An exclusion order can be obtained through the United States International Trade Commission if it finds that the cargo being imported infringes a United States patent.[117] The cargo is then prohibited from entering onto United States soil.[118] But in space, "there is no 'destination country' with its own patent laws;" there are only the laws of the country where the spacecraft is registered.[119]

But many times in the outer space industry, *something* does enter into a destination country. The outer space industry is inher-

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115. *Id.* at 5; *see supra* Part III.

116. J. Stephen Simms, Comment, *Scope of Action Against Unfair Import Trade Practices Under Section 337 of the Tariff Act of 1930*, 4 NW. J. INT'L L. & BUS. 234, 235 (1982); *see* 19 U.S.C. § 1337(a)(1)(A) (2013); *supra* Part III.

117. *See* Simms, *supra* note 116, at 235; 19 U.S.C. § 1337(d).

> (d) Exclusion of articles from entry
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> (1) If the Commission determines, as a result of an investigation under this section, that there is a violation of this section, it shall direct that the articles concerned . . . be excluded from entry into the United States . . . . The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry.

Id.

118. 19 U.S.C. § 1337(d).

119. Kleiman*, supra* note 10, at 5; *see* Hughes Aircraft Co. v. United States, 29 Fed. Cl. 197, 242 (Fed. Cl. 1993) (holding that there was no infringement when the device for controlling the spacecraft was never actually in the U.S., was controlled from outside the U.S., and launched from outside U.S. territory); *see also Extra-Territorial Reach*, *supra* note 12, at 26365 (discussing that the court in *Hughes* would have to have found "direct control" of the satellite in the U.S. to establish U.S. extraterritorial jurisdiction over the claim).

ently technological, and many of the companies in this field transmit data in some form—such as radio, television, GPS, or photos—to their end users. The solution to the flags of convenience problem in outer space is to form a treaty between the largest spacefaring countries to ban any benefits derived from the use of technology that violates the patents of any of the signing countries. Creating such a ban in the most technologically advanced countries of the world would take away the large majority of consumers of the pirated technology. This solution, in effect, brings the beneficial use factor from the *NTP* test into the outer space patent jurisdiction discussion.[120]

In the past, courts have not held the "law of the flag" as absolute.[121] In fact, courts have been willing to ignore the foreign registry of ships for more important public policy considerations.[122] Just as companies outside the United States could build a machine outside of the United States that reads on a United States patent's claims, the company would not be able to derive any benefit from selling the machine within the United States.[123] Most proposed solutions to the outer space flags of convenience problem involve laws or treaties that are aimed toward the infringing companies themselves.[124] This Note's solution takes a passive approach by targeting the companies' potential customers. Because most companies are created for the purpose of, and are therefore incentivized by, making money, drastically limiting their consumer pool would make stealing United States patented technology unprofitable.

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120. *See* NTP, Inc. v. Research in Motion, Ltd., 418 F.3d 1282, 1314, 1317–18 (Fed. Cir. 2005) (stating that, for an infringement determination, a court should look to (1) the place where the system is *controlled* and (2) the place where the system obtains its *beneficial use*).

121. Kleiman*, supra* note 10, at 5 n.9.

122. *Id.* ("For instance, the U.S. Supreme Court held in *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005), that a foreign flag could not shield a cruise ship from the requirements of the Americans with Disabilities Act while the ship was in U.S. waters.").

123. *See generally* 35 U.S.C. § 271(a) (2013) ("Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.").

124. *See supra* Part IV.

This ban would work even if the United States were the only country to implement it. Some of the top-grossing outer space fields today include satellite servicing, space communications, and Earth observation data visualization.[125] These three areas of technology generate $380 billion worldwide, with the United States accounting for over fifty percent of consumption.[126] If the United States were to pass legislation banning any benefits derived from infringing technology within the country, companies who decide to evade the United States' jurisdiction would not be able to sell their product to over half of that product's potential market.[127] Over time, the loss in potential future profit a company could have made selling their product within the United States would outweigh the one-time costs for researching and developing new technology. The economic results of such legislation would be devastating enough to deter companies from using flags of convenience.

A ban on benefits derived, however, would not stop all outer space flags of convenience problems. Industries such as commercial space travel and space taxiing do not necessarily target consumers within the United States. Companies in these industries instead rely on customers coming to them and would not be affected by such a ban. This ban would only stop flags of convenience problems in outer space industries that derive their benefits terrestrially. A solution for fixing this other sector of private outer space activities is outside the scope of this Note and would still need to be devised and implemented along with this beneficial use solution.

VIII. CONCLUSION

The problems with flags of convenience have existed in maritime law for years, creating conditions ripe for criminal activi-

125. NAT'L AERONAUTICS AND SPACE ADMIN., PUBLIC-PRIVATE PARTNERSHIPS FOR SPACE CAPABILITY DEVELOPMENT: DRIVING ECONOMIC GROWTH AND NASA'S MISSION 4–7 (2014), http://www.nasa.gov/sites/default/files/files/NASA_Partnership_Report_LR_20140429.pdf.

126. *Id.* at 6–8.

127. *Id.*

ties, poor working conditions, and environmental damage.[128] The private outer space industry is a rapidly growing field that needs better regulations to ensure that loopholes do not allow companies to avoid liability.[129] By creating a treaty that places a ban on any benefits derived through use of patent infringing-technology, many of the flags of convenience problems in outer space could be eliminated. Because almost every benefit derived from a "space object" is inherently technological, a ban of these benefits in the most technologically advanced countries would greatly disincentivize patent pirating. Attacking the private entities' customer base would help reduce the incentives for private entities to infringe on patented technology. Even if no other large countries signed the treaty with the United States, there would likely be a substantial enough reduction in the customer base solely from a ban in the United States to disincentivize the infringement worldwide.

128. *Flags of Inconvenience*, *supra* note 10, at 5; *see, e.g.*, EUROPEAN PARLIAMENT DIRECTORATE-GENERAL FOR RESEARCH, *supra* note 50 ch. 2; Phang, *supra* note 50; INT'L TRANSP. WORKERS' FED'N, *supra* note 50.

129. Kleiman, *supra* note 10, at 4.

Spiritual-Treatment Exemptions to Child Neglect Statutes—*State v. Crank*: Vagueness and Establishment Clause Challenges to Selective Prosecution of Faith-Healing Parents

PABLO J. DAVIS*

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I. INTRODUCTION

Is justice served when a state statutorily protects parents who choose to treat their child's illness through prayer, rather than medical treatment, but then prosecutes the parents for child neglect—or worse—when their child suffers harm or dies as a result? Regardless of one's views of religion and medical science, the issue is a difficult one. Two foundational societal imperatives—the constitutionally enshrined freedom of religion and the duty of parents to protect their children from harm—can clash when parents

assert a faith-based right to choose spiritual means over medical care for their sick child.[1] In Tennessee, the child abuse and neglect statute exempts from liability parents whose faith leads them to choose "treatment by spiritual means through prayer alone" for their child, in lieu of medical care.[2] Similarly, nearly all states have a spiritual-treatment ("ST") exemption, though jurisdictions vary as to where the ST exemption fits in the overall statutory scheme, the scope of the exemption, and how courts have interpreted and applied the exemption—leading to confusion and controversy.[3]

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1. On religious freedom, see U.S. CONST. amend. I and TENN. CONST. art. I, § 3. On the universal legal duty of parents to care for their children, see *People v. Pierson*, 68 N.E. 243, 245–46 (N.Y. 1903). *See also* Baruch Gitlin, Annotation, *Parents' Criminal Liability for Failure to Provide Medical Attention to Their Children*, 118 A.L.R.5th 253 § 2[a] (2004) (citing 40A Am. Jur. 2d *Homicide* § 83 (1964)).

2. Tennessee's spiritual treatment exemption was adopted in 1994 via amendment of the aggravated child abuse, neglect, and endangerment statute, TENN. CODE ANN. § 39-15-402 (2014), which was originally enacted in 1989. State v. Crank, 468 S.W.3d 15, 21 (Tenn. 2015).

3. *See generally* Gitlin, *supra* note 1 (analyzing criminal cases arising from failure of parents to obtain medical aid for their children); Shirley Darby Howell, *Religious Treatment Exemption Statutes: Betrayest Thou Me with a Statute?*, 14 SCHOLAR 945 (2012) (questioning the existence of statutory religious exemptions to medical treatment for children); Janna C. Merrick, *Spiritual Healing, Sick Kids and the Law: Inequities in the American Healthcare System*, 29 AM. J.L. & MED. 269 (2003) (providing an overview of religious exemptions that exist in various states); Jennifer L. Rosato, *Putting Square Pegs in a Round Hole: Procedural Due Process and the Effect of Faith Healing Exemptions on the Prosecution of Faith Healing Parents*, 29 U.S.F. L. REV. 43 (1994) (analyzing the existing procedural due process doctrine as it relates to the prosecution of parents who engage in faith healing over medical treatment); Zaven T. Sa-

In *State v. Crank*, the Tennessee Supreme Court[4] *held,* first, that because the ST exemption applies only to members of the Christian Science and like churches, the statute gives fair notice of prohibited conduct and is not void for vagueness; and, second, that even if the ST exemption were held unconstitutional under the Establishment Clause, the exemption would be subject to elision and stricken from the statute—whose enforcement minus the exemption would leave the conviction standing and afford Defendant no relief. *State v. Crank,* 468 S.W.3d 15 (Tenn. 2015). The court in *Crank* was incorrect because the ST exemption leaves parents without fair warning of whether their decision to use spiritual treatment will be criminally prosecuted. Therefore, the court should have held the statute unconstitutionally vague, which would have been dispositive and led the court to vacate the conviction.[5]

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royan, *Spiritual Healing and the Free Exercise Clause: An Argument for the Use of Strict Scrutiny*, 12 B.U. PUB. INT. L.J. 363 (2003) (analyzing past United States Supreme Court decisions involving the Free Exercise Clause and suggesting the return of a strict scrutiny analysis in spiritual healing cases); Eric W. Treene, *Prayer-Treatment Exemptions to Child Abuse and Neglect Statutes, Manslaughter Prosecutions, and Due Process of Law*, 30 HARV. J. ON LEGIS. 135 (1993) (analyzing past Christian Science and faith healing cases).

4. References to the United States Supreme Court and to the high courts of Tennessee and other jurisdictions will be made explicit.

5. ST exemptions are also vulnerable to a powerful Equal Protection critique under the Fourteenth Amendment: on this view, such exemptions make children of parents who invoke a ST exemption a class of persons denied the protection afforded to other children. *See* Gregory Engle, *Towards a New Lens of Analysis: The History and Future of Religious Exemptions to Child Neglect Statutes*, 14 RICH. J. L. & PUB. INT. 375, 384–93, 395–98 (2010); Elizabeth A. Lingle, *Treating Children by Faith: Colliding Constitutional Issues*, 17 J. LEG. MED. 301, 324–28 (1996). *See generally* James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321 (1996). Like concerns drive the work of Children's Healthcare Is a Legal Duty, Inc., an advocacy group founded in 1983 by former Christian Scientist Rita Swan, and the lead plaintiff in *CHILD, Inc. v. Vladeck*. *See* Children's Healthcare is a Legal Duty, Inc. v. Vladeck, 938 F. Supp. 1466, 1484 (D. Minn. 1996); CHILD, INC., http://childrenshealthcare.org (last visited Mar. 21, 2016). For information on Rita Swann, see Merrick, *supra* note 3, at 272 (citing Ramona Cass, *We Let Our Son Die: The Tragic Story of Rita and Doug Swan*, 6 J. CHRISTIAN NURSING 6 (1987)). *See also* Committee on Bioethics, American Academy of Pediatrics, *Religious Objections to Medical Care*, 99 PEDIATRICS

While the court was right (if too tentative) in voicing concerns about the statute's constitutionality under the Establishment Clause, its application of the doctrine of elision so as to strike the entire ST exemption is a closer question; the case for more selective elision of that part of the exemption favoring certain religious faiths is at least tenable.

II. BACKGROUND AND ISSUES

To determine the constitutionality of Tennessee's ST exemption, the Tennessee Supreme Court evaluated the exemption, first, in the light of the Due Process requirement that a statute give clear notice to the public, or else fail for vagueness. The court then considered the exemption as it relates to the Establishment Clause, and finally determined how to apply the doctrine of elision. These issues are addressed below in the same order, followed by ST exemptions and pertinent case law.

A. Vagueness

The "void for vagueness" doctrine is grounded in fundamental notions of legality, anchored in the bedrock of the Fifth and Fourteenth Amendments' Due Process clauses.[6] The underlying policy is to avoid the twin dangers of a vague statute: failing to warn citizens of possible criminal liability, and leaving law enforcement too much room for arbitrary enforcement.[7] The United States Supreme Court ("U.S. Supreme Court") addressed the first, paramount, danger in *Lanzetta v. New Jersey*, a 1939 case involving a statute criminalizing "gang" membership without defining the term.[8] The Court declared, "[n]o one may be required at peril

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279, 279–80 (1997). From this standpoint, the holding in *Crank* is largely welcome. The Equal Protection argument, and the concern for the children of religious objectors, warrants the most serious consideration. However, these concerns lie outside the scope of this Comment, which assesses *Crank* with respect to vagueness, the Establishment Clause, and elision.

6. U.S. CONST. amends. V, XIV § 1.

7. *See* City of Chicago v. Morales, 527 U.S. 41, 52–56 (1999); Grayned v. City of Rockford, 408 U.S. 104, 108–13 (1972). *See generally* 16B AM. JUR. 2D *Constitutional Law* § 972 (2015). Another formulation of the vagueness doctrine posits a third danger, that of "proscrib[ing] conduct that . . . is normally innocent." State v. Sammons, 391 N.E.2d 713, 714 (Ohio 1979).

8. 306 U.S. 451, 453–54 (1939).

of life, liberty or property to speculate as to the meaning of penal statutes."[9] In the 1999 case, *City of Chicago v. Morales*, the U.S. Supreme Court struck down an ordinance barring "loitering" in any public place by "criminal gang members," whether with one another or with other persons, holding the ordinance triggered both dangers.[10] Justice Stevens, writing for the Court, criticized the ordinance's definition of "loiter" ("to remain in any one place with no apparent purpose") on the ground of vagueness:

> It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an "apparent purpose." . . . Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of "loitering," but rather about what loitering is covered by the ordinance and what is not.[11]

Similarly, in *Grayned v. City of Rockford*, the U.S. Supreme Court insisted laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[12] The Court overturned part of the defendant's conviction, holding the ordinance unconstitutionally vague, particularly because it involved First Amendment rights.[13]

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9. *Id.* at 453. The statute read, in part:

> Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons . . . who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other State, is declared to be a gangster.

Id. at 452. (quoting New Jersey, § 4, c. 155, Laws 1934). The Court pointedly noted: "The phrase 'consisting of two or more persons' is all that purports to define 'gang.'" *Id.* at 453.

10. 527 U.S. at 64.

11. *Id.* at 56–57.

12. 408 U.S. 104, 108 (1972).

13. *Id.* at 108–09. The anti-picketing ordinance under which Grayned had been convicted stated that "[a] person commits disorderly conduct when he knowingly . . . [p]ickets or demonstrates on a public way within 150 feet of any

B. Establishment Clause[14]

The very first provision of the First Amendment to the U.S. Constitution, the Establishment Clause, states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[15] The Establishment Clause clearly forbids states to sanction—that is, *establish*—an official church. But government is inevitably involved with religion in many lesser ways—for example, determining if an organization is a church and thus tax-exempt.[16] Such realities create the need for a test to identify when government becomes impermissibly enmeshed with religion. The U.S. Supreme Court has held that some degree of interaction between the state and religious groups, including regulation, is inevitable; "[e]ntanglement must be 'excessive' before it runs afoul of the Establishment Clause."[17]

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primary or secondary school building while the school is in session" but made an exception for pickets concerning a labor dispute. *Id.* at 107.

14. The Defendant in *Crank* also raised an Equal Protection challenge, arguing that allowing only certain religious groups to invoke the ST exemption denied members of other groups equal protection. The argument is closely related to that over the Establishment Clause. This Comment considers the latter but not the Equal Protection issue.

15. U.S. CONST. amend. I. Tennessee's equivalent is the "freedom of worship" provision of the State Constitution:

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

TENN. CONST. art. I, § 3.

16. In *Christ Church Pentecostal v. Tenn. State Bd. of Equalization*, the Tennessee Court of Appeals upheld the Equalization Board's determination that a café/bookstore area within a church was "not . . . an integral part of . . . the recognized purposes of a church," and therefore that segment of the church's operations was taxable. 428 S.W.3d 800, 812 (Tenn. Ct. App. 2013). The court held that such government regulation of religion did not violate the Establishment Clause because it was completely indifferent to religious doctrine and practice, i.e., neutral as to religion. *Id.* at 821.

17. Agostini v. Felton, 521 U.S. 203, 233 (1997) (holding a program for public-school teachers to give remedial instruction to some children in parochial

The traditional Establishment Clause test is the three-part inquiry established by the U.S. Supreme Court in *Lemon v. Kurtzman*, which applies to laws benefiting religion generally.[18] The *Lemon* test requires a governmental involvement with religion to (1) have a secular purpose, (2) neither advance nor inhibit religion, and (3) avoid excessive entanglement with religion.[19] In *Lemon*, the Court held a Pennsylvania law authorizing state reimbursement of certain religious-school expenses "excessively entangl[ing]," in part because the scheme required the government to examine school records to determine the share of expenditures attributable to secular and religious instruction.[20] The *Lemon* Court noted, "This kind of state inspection and evaluation of . . . religious content . . . is a relationship pregnant with dangers of excessive government direction of . . . churches."[21]

On the other hand, courts have given constitutional sanction to such governmental interactions with religion as property tax exemptions for churches, determining taxability of churches' commercial operations, and scheduling different faiths' access to shared worship facilities. These involvements were held permissible as rationally furthering legitimate secular purposes and neither promoting nor impeding religion.[22] Courts have even validated

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schools was a legitimate purpose, and neither advanced nor inhibited religion); *see also id.* at 234–35 (utilizing *excessive* entanglement analysis).

18. 403 U.S. 602, 612–13 (1971); *see* Larson v. Valente, 456 U.S. 228, 252 (1982).

19. *Lemon*, 403 U.S. at 612–13 (citing Waltz v. Tax Comm'n of New York, 397 U.S. 664, 673 (1970); Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).

20. *Id.* at 603.

21. *Id.* at 620. The *Lemon* Court also struck down a Rhode Island statute authorizing state payment of a salary supplement, in certain statutorily prescribed circumstances, to teachers in religious schools. *Id.* at 607–09.

22. *See Walz*, 397 U.S. at 675–76 (property tax exemptions not a governmental involvement with religion but rather a decision to forego involvement); Thompson v. Kentucky, 712 F.2d 1078, 1082 (6th Cir. 1983) (the impartial apportionment of access to a prison chapel for inmates of varying faiths penalized no faith group); Christ Church Pentecostal v. Tenn. State Bd. of Equalization, 428 S.W.3d 800, 821 (Tenn. Ct. App. 2013) (determining whether the taxability of church's cafe-bookstore is legitimate and secular in purpose).

Sunday closing laws, originally religiously motivated, but now held to have a broad, secular purpose.[23]

The U.S. Supreme Court has applied the more rigorous standard of strict scrutiny where governmental action favors particular religious faiths. In *Larson v. Valente*, a decade after *Lemon*, the Court struck down a Minnesota statute requiring certain churches to register with a state regulatory agency and to report contributions received as "not closely fitted to the furtherance of any compelling governmental interest."[24] The Court held the statute, in favoring some churches, was "fraught with the sort of entanglement that the Constitution forbids."[25] At the state level, the Texas Supreme Court in *HEB Ministries v. Texas Higher Education Coordination Board* held unconstitutional the state's regulation of a religious institution's use of the term "seminary."[26] Such an inquiry, the court held, impermissibly invaded the religious realm. Justice Wainwright, concurring, cautioned that "[t]he Board can no more prohibit a church from calling its school a seminary than it can prohibit a religious congregation from calling itself a church."[27]

23. In *McGowan v. Maryland*, the U.S. Supreme Court held state regulations do not run afoul of the Establishment Clause merely because they "coincide or harmonize with" religious tenets or practices, and that the original religious motivation for Maryland's Sunday beer-sales ban had evolved into a secular purpose. 366 U.S. 420, 442, 444–45 (1961) (providing "a uniform day of rest for all citizens"); *see* Martin v. Beer Bd. of Dickson, 908 S.W.2d 941, 952–53 (Tenn. Ct. App. 1995). For an even more sharply-drawn Establishment Clause issue, see *State v. Solomon*, where a Jewish businessman was convicted for operating his store on Sundays, choosing to close on Saturdays instead, in keeping with his religious faith. 141 S.E.2d 818, 833 (S.C. 1965). The *Solomon* court upheld the constitutionality of the Sunday-closing law due to its broad, secular purpose. *Id.* at 827.

24. 456 U.S. 228, 255 (1982).

25. *Id.*

26. 235 S.W.3d 627, 657 (Tex. 2007).

27. *Id.* at 678 (Wainwright, J., concurring); *see also* Boone v. Boozman, 217 F. Supp. 2d 938, 947 (E.D. Ark. 2002) (noting that Arkansas's religious exemption to immunization violates the Establishment Clause despite not specifying particular faiths because it gives preferential treatment to "recognized churches").

C. Elision

The question of whether the valid remainder of a partly unconstitutional law may stand alone has long perplexed courts. The principle by which the invalid parts may be removed, and the rest enforced, is variously known as severability, separability, or elision. In the words of one of the signal students of the doctrine, John Copeland Nagle, "[s]everability is usually an afterthought, a sifting through the statutory rubble to salvage whatever survives a ruling that part of a law is unconstitutional."[28] Nagle cautions, however, that severability deserves close attention because "[t]he question is . . . ubiquitous . . . . [and] can have profound consequences."[29]

A presumption of severability appears to have been the rule in the early legal history of the United States: when the U.S. Supreme Court held, in *Marbury v. Madison*, that one section of the Judiciary Act of 1789 was unconstitutional, the Court left the rest of the statute intact.[30] The Supreme Judicial Court of Massachusetts made the first significant departure from that earlier doctrine in the 1854 case of *Warren v. Mayor of Charlestown*, when it held that an unconstitutional statutory provision rendered an entire statute invalid.[31]

The modern trend has swung back towards severability, but not without controversy. The two-part modern test is descended from the 1932 U.S. Supreme Court holding in *Champlin Refining Company v. Corporation Commission*.[32] The first part asks wheth-

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28. John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 204 (1993).

29. *Id.* In the words of another legal scholar,

> Each time a court strikes down a statutory provision, it must determine whether to invalidate only the unconstitutional provision, or instead whether to invalidate the statute in its entirety or in substantial part. Severability is the doctrine of determining whether part or all of a statute can survive without the invalid provision.

Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate?*, 16 TEX. REV. L. & POL. 1, 3 (2011).

30. *See* Marbury v. Madison, 5 U.S. 137, 162 (1803); Nagle, *supra* note 28, at 212.

31. 68 Mass. (2 Gray) 84, 99–100 (1854); *see also* Nagle, *supra* note 28, at 211–12 (citing *Warren*, 68 Mass. (2 Gray) at 99–100).

32. 286 U.S. 210, 234 (1932).

er the legislature would have enacted the statute with the offending provision removed; the second, whether the remaining statute is capable of enforcement.[33] The first question can potentially lead courts down a speculative, even hypothetical, path.[34] In Tennessee, the rule of elision is recognized in the severability statute, which states that "the sections, clauses, sentences and parts of the Tennessee Code are severable . . . and any of them shall be excscinded if the code would otherwise be unconstitutional or ineffective."[35] In applying the rule, courts analyze the two *Champlin* questions.[36]

Elision can be seen as a last resort where a law's constitutionality is questioned. The principle of judicial restraint leads a court to consider a statute's constitutionality only when such consideration is absolutely unavoidable. When doing so, the court has an obligation to uphold a statute's constitutionality wherever possible.[37] In the 2003 case of *State v. Prater*, the Tennessee Court of

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33. *Id.*

> The unconstitutionality of part of an [A]ct does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Id. (citations omitted).

34. Nagle calls this speculative part predictive: "A court is . . . required to predict what the legislature would have done if it had known that part of the law it passed would be invalidated." Nagle, *supra* note 28, at 215.

35. TENN. CODE ANN. § 1-3-110 (2014); *see also* State v. Murray, 480 S.W.2d 355, 356 (Tenn. 1972).

36. *See* Davidson Cnty. v. Elrod, 232 S.W.2d 1, 3 (Tenn. 1950) (upholding statute despite its scope being broader than the caption, because after elision of the invalid parts, the law was capable of enforcement and its purpose of pensions for widows reflected legislative intent). *But see* Leech v. Am. Booksellers Ass'n, 582 S.W.2d 738, 755 (Tenn. 1979) (striking down the state obscenity statute as impermissibly vague because excision of the offending provisions would leave less than a whole, enforceable statute).

37. *See* State v. Lyons, 802 S.W.2d 590, 591–93 (Tenn. 1990) (reversing the criminal court's dismissal, for unconstitutional statutory vagueness, of indictment of Defendant on criminal trespass charges for preaching on high school grounds even after asked to leave by school superintendent, because superintendent's "lawful order" was clear and did not unlawfully impede protected conduct).

Criminal Appeals affirmed its duty "to indulge every presumption and resolve every doubt in favor of the constitutionality of the statute when reviewing the statute for a possible constitutional infirmity."[38]

As befits a last resort, the Tennessee Supreme Court has held "[t]he doctrine of elision is not favored."[39] After all, a court's decision whether to elide part of a statute has huge implications: if a court refuses to elide at all, an entire statute can fall due to the unconstitutionality of one provision; elision could lead a court to usurp legislative power by "mak[ing] a new law, not . . . enforc[ing] an old one."[40] In the 1950 case of *Elrod v. Davidson County*, the Tennessee Supreme Court cautioned that, in applying the first part of the two-part test, the "conclusion . . . that the Legislature would have enacted the Act in question with the objectionable features omitted ought not to be reached unless such conclusion is made fairly clear of doubt from the face of the statute. Otherwise, its decree may be judicial legislation."[41]

Elision remains a difficult and controversial topic; the lack of agreement even on its name is symbolic of the deeper doctrinal disagreement that surrounds it. It remains today the "vast and troubling terrain" John Copeland Nagle surveyed nearly a quarter-

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38. 137 S.W.3d 25, 31 (Tenn. Crim. Ct. App. 2003) (citing *Lyons*, 802 S.W.2d at 592).

39. Smith v. City of Pigeon Forge, 600 S.W.2d 231, 233 (Tenn. 1980) (citing *Elrod*, 232 S.W.2d at 2).

40. United States v. Reese, 92 U.S. 214, 221 (1875); Klukowski, *supra* note 29, at 9. *See generally* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994) (discussing the constitutional limits imposed on the doctrine of severability).

41. *Elrod*, 232 S.W.2d at 2. But one scholar cautions, "Severability doctrine should not confer on courts . . . a freewheeling remedial lawmaking power" and urges that the judicial power to sever be subjected to separation-of-power analysis. David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 688 (2008). "For that reason, severability should not turn on legislative intent but on the extent of the rewriting necessary to save the statute." *Id.* Indeed, fear of the separation-of-powers danger lurking in severability has led some scholars to question the constitutional validity of the doctrine entirely. Tom Campbell argues that when a court, following a holding of unconstitutionality, "does anything more than [strike down the statute as unconstitutional], it is legislating." Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495, 1496 (2011).

century ago.[42] As will be seen below, it plays an important role in the troubling case of *State v. Crank*.

D. Spiritual Treatment Exemptions

The story of religious claims to healing powers, and of popular belief in such powers, reaches back many centuries.[43] However, religiously-motivated parental decisions to forgo medical care for a child only began to come before the courts around the turn of the twentieth century—likely because before then, medical science was neither professionalized nor licensed by the state, and thus courts generally recognized no duty to obtain medical care for one's sick child.[44] Since the mid-1970s, most jurisdictions provide some form of statutory exemption from criminal liability for parents who choose religious, rather than medical, treatment for their sick child. The exemptions vary in scope and application, and there has been no simple trend over time. The following overview of early cases, the enactment of ST exemptions, and key subsequent cases from five states illustrates the difficulties courts have had with the exemptions and the sometimes contradictory outcomes that have emerged.

1. Early Cases

In the three quarters of a century before enactment of ST exemptions, parental spiritual-treatment defenses came before the courts on several occasions. An influential early test of the paren-

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42. Nagle, *supra* note 28, at 211 (quoting J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 456 (1990)).

43. *See* People v. Pierson, 68 N.E. 243, 245 (N.Y. 1903); Howell, *supra* note 3, at 950–52.

44. The New York Court of Appeals noted:

> Formerly no license or certificate was required of a person who undertook the practice of medicine. . . . [C]hapter 513 . . . of the Laws of 1880 [of New York] . . . is the first statute . . . we have found which prohibits the practice of medicine by any other than a person possessing a diploma from a medical college conferring . . . the degree of doctor of medicine, or a certificate from the constituted authorities giving him the right to practice.

Pierson, 68 N.E. at 246.

tal assertion of religious freedom to forgo medical care for a child is the 1903 case of *People v. Pierson*. In *Pierson*, New York's high court reinstated a father's conviction for failing to obtain medical care for his infant daughter, whose untreated whooping cough developed into catarrhal pneumonia, causing her death.[45] In strong language, the court set forth a clear hierarchy in which religious freedom must defer to the "peace [and] safety" of the state.[46] Although unable to invoke an ST exemption, the father denied a parent had a common-law duty to provide medical care for his child, asserting a constitutional right to choose spiritual treatment for his daughter.[47] The court noted, "[w]e place no limitations upon . . . the power of faith to dispel disease. . . . We merely declare the law as given us by the Legislature."[48] The court then pointedly quoted the state constitution, which recognizes the right to "the free exercise and enjoyment of religious profession and worship" but with the limitation that "liberty of conscience . . . shall not be so construed as to . . . justify practices inconsistent with the peace or safety of this state."[49] *Pierson* stands for the proposition that absent any special statutory exemption to the contrary, freedom of religion does not relieve a parent of the duty to furnish his or her child with all the child's necessaries, including medical attention when the child's health so requires.[50]

Pierson exerted strong influence on the courts of other jurisdictions, though not without exceptions. In the 1911 case of *Owens v. State*, the Oklahoma Court of Criminal Appeals upheld the child-endangerment conviction of a father who had failed to obtain medical treatment for his daughter, who died of typhoid fever.[51] On appeal, the defendant argued the jury should have been allowed to determine if his religious belief was a valid defense.[52] The court reasoned, relying heavily on *Pierson*, that the parental duty to provide medical attention for their child was not subject to

45. *Id.* at 244–47.
46. *Id.* at 246.
47. *Id.* at 244–45.
48. *Id.* at 247.
49. *Id.* at 246 (quoting N.Y. CONST., art. I, § 3).
50. *Id*. at 246–47.
51. 116 P. 345, 348 (Okla. Crim. App. 1911).
52. *Id.* at 345–46.

religious belief.[53] A contrary holding came from the Supreme Court of Florida in *Bradley v. State*, where the Florida Supreme Court overturned a father's manslaughter conviction for not obtaining medical attention for his severely burned daughter.[54] The father testified that rather than calling a physician, he was "trusting to the Lord and . . . believing in divine healing," but the court was silent as to this defense.[55] The court held the manslaughter statute did not cover the father's conduct, which it concluded did not constitute "[t]he killing of a human being by . . . culpable negligence"—it was the burns caused by the flames, not the father, that killed the girl.[56]

2. ST Exemptions

The history of ST exemptions, though barely four decades old, is marked by complexity and contradiction. Their genesis lies in the federal Child Abuse Prevention and Treatment Act ("CAPTA") enacted in 1974 to create uniform national legal standards on child abuse and neglect, and to promote state study and prevention efforts on the topic.[57] The statute included no religious exemption, leaving the issue to the administrative discretion of the Department of Health, Education and Welfare ("HEW"), which issued a regulation including this provision: "However, . . . a parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian."[58] The regulation made state receipt of federal

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53. *Id.* at 346; *see Pierson*, 68 N.E. at 246. The same court followed the *Owens* rule in *Beck v. State*, upholding a father's conviction for failing to obtain timely medical care for his son, who died of tetanus. 233 P. 495, 495 (Okla. Crim. App. 1925).

54. 84 So. 677, 679 (Fla. 1920).

55. *Id.* at 680. The dissent by Justice West, on the other hand, addresses the religious defense at some length and explicitly rejects it, relying in part on *Pierson* and a common-law parental duty of care. *Id.* at 679–83 (West, J., dissenting).

56. *Id.* at 679 (majority opinion).

57. The Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C.S. §§ 5101–5119c (1974)).

58. Child Abuse and Neglect Prevention and Treatment Program, 39 Fed. Reg. 43937 (Dec. 19, 1974) (to be codified at 45 C.F.R. § 1340 (removed and

assistance under the statute contingent upon acceptance of this provision—in effect, the federal government using its budgetary resources to push states to enact ST exemptions; most states did so.[59] In 1983, less than a decade after CAPTA's enactment, the Department of Health and Human Services ("HHS"), HEW's successor, adopted updated regulations removing the earlier requirement of an ST exemption.[60] Very few states repealed their exemptions, though, and a large majority of jurisdictions continue to retain them.[61]

A key beneficiary, and advocate, of ST exemptions has been The First Church of Christ, Scientist, commonly known as the "Christian Science Church," founded in Massachusetts in 1879 by Mary Baker Eddy.[62] Inspired in part by the New Thought movement which advocated metaphysical healing of illness, Eddy "discover[ed] . . . that Mind governs all . . . supremely" and the real

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reserved 80 Fed. Reg. 16577, 16579 (Mar. 30, 2015))). The quoted passage is in the section on harm to a child's health or welfare.

59. *Id.* CAPTA became law during the Nixon Administration; at least two prominent White House advisors, H.R. Haldeman and John Ehrlichman, were Christian Scientists, and are believed by some commentators to have influenced the HEW regulations. Caroline Fraser, *Suffering Children and the Christian Science Church*, THE ATLANTIC MONTHLY (Apr. 1995), http://www.theatlantic.com/past/docs/unbound/flashbks/xsci/suffer.htm.

60. *See* Engle, *supra* note 5, at 377 n.11 ("Nothing in this part should be construed as requiring or prohibiting a finding of negligent treatment or maltreatment when a parent or guardian practicing his or her religious beliefs does not . . . provide medical treatment for a child . . . ." (quoting 45 C.F.R. § 1340.2 (d)(3)(ii) (1983) (removed and reserved 80 Fed. Reg. 16579 (Mar. 30, 2015)). For comments on the change, see Child Abuse and Neglect Prevention and Treatment Program, 48 Fed. Reg. 3698 (Jan. 26, 1983), section on Definition of Negligent Treatment. Regarding the change from HEW to HHS, see U.S. Department of Health and Human Services, HHS HISTORICAL HIGHLIGHTS, http://www.hhs.gov/about/historical-highlights/index.html.

61. *See* Engle, *supra* note 5, at 377. As of February 2015, thirty-nine states, the District of Columbia, and Guam had some form of ST exemption. Nat. Ctr. for Prosecution and Child Abuse, *Religious Exemptions to Child Neglect*, NAT'L DIST. ATTORNEYS ASS'N (Feb. 2015), http://www.ndaa.org/pdf/2-11-2015%20Religious%20Exemptions%20to%20Child%20Neglect.pdf.

62. Hans A. Baer, *Christian Science*, ENCYCLOPEDIA OF RELIGION AND SOCIETY, http://hirr.hartsem.edu/ency/cscience.htm.

causes of disease were spiritual.[63] As suggested by the name Eddy chose for the church, Christian Science makes claims that its methods of healing are empirically verifiable. Eddy wrote that her system of treating disease "has proved itself, whenever scientifically employed, to be the most effective curative agent in medical practice."[64] Christian Science views the church's healing methods as incompatible with medical science, believing the two interfere with each other.[65]

3. Oklahoma

In *State v. Lockhart,* an Oklahoma appellate court upheld the jury instruction given by the trial court in a manslaughter case, where the parents' alleged failure to provide medical care for their 9-year-old son (who died of peritonitis) was a misdemeanor predicate offense to the first-degree manslaughter charge.[66] The jury instruction stated a parent could justifiably choose "not [to] provid[e] medical treatment for his child if instead that parent in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination" for the child.[67] Oklahoma's child endangerment statute in force at the time of the child's death protected parents' choice of "spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination," but with two provisos unlike Tennessee's exemption: the parental choice must be "in good faith" and "the laws, rules, and regulations relating to communicable diseases and sanitary matters" not violated.[68] The court found the ST exemption clearly induced reliance by the parents that choosing treatment by prayer would not lead to subsequent prosecution in the event treatment was unsuccessful.[69] The court found no

63. MARY BAKER EDDY, SCIENCE AND HEALTH: WITH KEY TO THE SCRIPTURES 13 (1888).

64. *Id.*

65. *See* Merrick, *supra* note 3, at 272.

66. 664 P.2d 1059, 1059–60 (Okla. Crim. App. 1983).

67. *Id.* at 1060.

68. *Id.* (quoting OKLA. STAT. tit. 21, § 852 (1975) (current version at OKLA. STAT. tit. 21, 852 (West 2002 & Supp. 2013)).

69. *Id.* at 1059.

vagueness in the ST exemption statute, but rather clear legislative intent to provide the protection.[70] *Lockhart* stands for the proposition that the ST defense will be allowed where the exemption induces reliance by parents. A 1988 amendment to Oklahoma's child endangerment statute narrowing the ST exemption by requiring provision of medical care "where permanent physical damage could result" provides a clear boundary line beyond which the ST exemption no longer protects parents.[71]

4. Ohio

In *State v. Miskimens*, where the parents chose prayer treatment for their thirteen-month old son's respiratory infection, of which he later died, both defendants and state attacked the state's ST exemptions as unconstitutional—the state on Establishment Clause grounds, among others, and the defendants on the ground of vagueness.[72] Ohio's ST exemption in force at the time included this proviso in the child-endangerment statute: "It is not a violation of a duty of care . . . when the parent . . . treats the . . . illness . . . of such child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body."[73] The trial court found the exemption, "based solely upon a religious preference of the accused," rife with Establishment Clause difficulties and held it unconstitutional on that ground.[74] In rejecting the defendants' free-exercise argument, the court relied on the 1944 U.S. Supreme Court case of *Prince v. Commonwealth* for the proposition that while religious freedom is absolute in matters of conscience, states may limit religious practice.[75] But the court also

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70. *Id.* at 1060.

71. OKLA. STAT. tit. 21, § 852 (1975) (current version at OKLA. STAT. tit. 21, 852 (West 2002 & Supp. 2013)).

72. 490 N.E.2d 931, 933–38 (Ohio Ct. Com. Pl. 1984).

73. *Id.* at 933 n.1 (quoting OHIO REV. CODE ANN. § 2919.21(A) (1984) (amended 2011)).

74. *Id.* at 934.

75. *Id.*; Prince v. Commonwealth, 321 U.S. 158, 166 (1944). In *Prince*, a guardian charged with violating the child-labor statutes by allowing a minor ward to distribute religious literature on the streets invoked a free-exercise First Amendment defense. *Id.* 160–64. The U.S. Supreme Court held that, as "*parens patriae*," the state may restrict religious conduct (though not belief) in order to protect a child's well-being. *Id.* at 166 (emphasis added). In the earlier

found the exemption irremediably vague, failing to define "tenets," "recognized," and other key terms whose determination would also "hopelessly involve the state" in entangling questions of religion.[76] Because the exemption's vagueness deprived the parents of fair notice (as well as leaving the state without clear guidelines for enforcement), the court voided the conviction.[77] *Miskimens* stands for the proposition that, even where the ST exemption invoked by parents is held unconstitutional on Establishment Clause grounds, statutory vagueness entitles the parents to relief.

5. California

In *Walker v. Superior Court,* the California Supreme Court upheld the denial of a motion to dismiss involuntary manslaughter and felony child endangerment charges against a Christian Scientist mother whose child died of medically untreated meningitis.[78] The court pointedly stated that "parents have *no* right to free exercise of religion at the price of a child's life."[79] California's ST exemption is in the child abuse and neglect statute, but the Walkers were prosecuted under manslaughter and felony child-endangerment statutes. The court rejected the argument that California law forced parents to guess when one statute's protections give way and the other statute's imposition of criminal liability become controlling; the law just required parents to "estimate rightly . . . the point at which their course of conduct becomes criminally negligent"—a requirement, and a kind of estimate, of

case of *Reynolds v. United States*, the U.S. Supreme Court upheld a man's bigamy conviction in spite of his religious defense; the Court held that religious belief is no defense to violation of a criminal statute. 98 U.S. 145, 167 (1879). "To permit [the defense] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.*

76. *Miskimens*, 490 N.E.2d at 934.

77. *Id.* at 938–39. Because of the notice issue, the court expressly made its holding of unconstitutionality of the ST exemption prospective only. *Id.* at 936; *see also* State v. Hermanson, 604 So. 2d 775, 775–76 (Fla. 1992) (parents were unconstitutionally denied fair notice of when their choice of spiritual treatment for their child would lose statutory protection).

78. 763 P.2d 852, 873 (Cal. 1988).

79. *Id.*

which the law is "full of instances."[80] The *Walker* court strikingly asserted the primacy of parental duty over the tenets of religious faith: "Imposition of felony liability for endangering or killing an ill child by failing to provide medical care furthers an interest of unparalleled significance."[81] *Walker* stands for the continued vigor of *Pierson*, and for the limitation of an ST exemption's effects to the statute that contains it.

6. Minnesota

The ST exemption's interaction with other statutes proved difficult in the Minnesota case of *State v. McKown*, as well.[82] In *McKown*, Christian Science parents were charged with second-degree manslaughter for choosing spiritual rather than medical means to treat their son's diabetes, of which he died; the court rejected their invocation of the ST exemption because that exemption was located in the child neglect statute, not the manslaughter statute, and the two were not *in pari materia*.[83] The court found, however, that the ST exemption's "broad[] word[ing], stating that a parent may in good faith 'select and depend upon' spiritual treatment and prayer, without indicating a point at which doing so will expose the parent to criminal liability," deprived the defendants of their Due Process right to fair notice.[84] Persuaded by the defendant parents' argument that the exemption induced reliance on their part, the court upheld the voiding of their conviction.[85]

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80. *Id.* at 871–72.
81. *Id.* at 869.
82. 475 N.W.2d 63, 65 (Minn. 1991).
83. *McKown*, 475 N.W.2d at 66.
84. *Id.* at 68.
85. *Id.* at 68–69. In another key case involving prosecution under a statute separate from the one containing the ST exemption, *Commonwealth v. Twitchell*, the court ruled that the exemption—phrased almost exactly like Tennessee's—was not intended by the legislature to serve as a defense to the involuntary manslaughter statute because the exemption was placed in the parental desertion and nonsupport statutory section. 617 N.E.2d 609, 615–16 (Mass. 1993). On statutory grounds, therefore, the court rejected the parents' "fair notice" argument for the spiritual-treatment defense. *Id.* at 615–17. However, the court reversed the conviction on the grounds the defendants might have relied on a misleading opinion by the state attorney general regarding the ST exemption. *Id.* at 618–20. A case where faith-healing parents obtained reversal of convic-

Like the *Walker* court, the *McKown* court refused to extend the ST exemption to a manslaughter statute via the canon of *in pari materia*; however, as in *Miskimens*, the court voided the conviction on grounds of vagueness.

7. Tennessee

Tennessee enacted its ST exemption in 1994, some two decades after most jurisdictions did so.[86] The exemption currently extends the following protection against prosecution for child neglect:

> Nothing in this part shall be construed to mean a child is abused, neglected, or endangered, or abused, neglected or endangered in an aggravated manner, for the sole reason the child is being provided treatment by spiritual means through prayer alone, in accordance with the tenets or practices of a recognized church or religious denomination by a duly accredited practitioner of the recognized church or religious denomination, in lieu of medical or surgical treatment.[87]

An early parental assertion of a religiously based right to forgo medical treatment for one's child, predating enactment of the ST exemption, was the 1983 case, *In re Hamilton*.[88] There, the father of a 12-year-old girl suffering from Ewing's Sarcoma refused to obtain medical care for his daughter, invoking his free-exercise rights under the First Amendment.[89] The court held Pam-

tion, but not by application of the ST exemption's protections, is *Craig v. State*, 155 A.2d 684, 689 (Md. 1959). In *Craig*, the appellate court reversed the parents' involuntary manslaughter conviction over the death of their infant daughter, holding that the state failed to prove the parents' gross negligence was the proximate cause of the child's death. *Id.*

86. 1994 Tenn. Pub. Acts ch. 978 (current version at TENN. CODE ANN. § 39-15-402(c) (2014)).

87. TENN. CODE ANN. § 39-15-402(c) (2014).

88. 657 S.W.2d 425, 428–29 (Tenn. Ct. App. 1983).

89. *Id.* at 426–27. In a remarkable coincidence, Pamela Hamilton's affliction was the same one Jessica Crank would suffer some twenty-five years later.

ela was a dependent and neglected child under the relevant state statute, and that under the doctrine of *parens patriae* the state had the right to limit the father's free exercise of religion so as to protect the child's health and well-being.[90] Between enactment of the ST exemption in 1994 and Jacqueline Crank's 2007 indictment, no assertion of parental religious freedom to forgo medical care for a sick child reached Tennessee courts—making *State v. Crank* a case of first impression.[91]

III. *STATE V. CRANK*

A. Background and History

In *State v. Crank,* the Tennessee Supreme Court upheld the criminal conviction of a Lenoir City, Tennessee mother for child neglect for failing to obtain medical treatment for her teenaged daughter, who contracted bone cancer and died.[92] Defendant Jacqueline Crank ("Jacqueline") and her teenaged daughter Jessica Crank ("Jessica") joined the Universal Life Church congregation established by Ariel Ben Sherman ("Sherman") in April 2001.[93] A personal relationship developed between Jacqueline and Sherman.[94] When fifteen-year-old Jessica developed shoulder trouble,

90. *Id.* at 429. The conviction of Pamela's father in *In re Hamilton* came under then TENN. CODE ANN. § 37-202(6)(iv) (1994), which is now TENN. CODE ANN. § 37-1-102(b)(12)(D), and which in both cases defines a "[d]ependent and neglected child" as one "[w]hose parent, guardian, or custodian neglects or refuses to provide necessary medical, surgical, institutional or hospital care for such child." *Id.* § 37-1-102(b)(12)(D).

91. The statute previously survived a vagueness challenge, but not with respect to the ST exemption. State v. Prater, 137 S.W.3d 25, 32 (Tenn. Crim. App. 2003) (noting that because the statute's *mens rea* requirement of "knowing" conduct clearly applied to the verbs "treats" and "neglects," the child abuse and neglect statute provided constitutionally sufficient warning of prohibited conduct).

92. 468 S.W.3d 15, 17–18 (Tenn. 2015).

93. *Id.* at 18.

94. *Id.* at 20. On at least one occasion, Sherman identified himself to a health professional as Jessica's father. *Id.* Sherman is not the most sympathetic figure. News reports of his death noted that he sought medical treatment for his cancer and pneumonia, and one religious-news website termed him a "hypocrite" for that reason. *Faith Healer Convicted in Girl's Faith Healing Death was a Hypocrite*, RELIGION NEWS BLOG (Jan. 10, 2013), http://www.religionnewsblog.com/27016/ariel-ben-sherman-faith-healing; Bob

Jacqueline took the daughter to see a chiropractor and, several weeks later, a nurse practitioner; both health professionals urged Jacqueline to take Jessica to the local emergency room, but Jacqueline chose instead "to turn to Jesus Christ, [her] Lord and [her] Savior . . . for Jessica's healing" by prayer.[95] The nurse practitioner, who observed bone disintegration on an x-ray of Jessica's shoulder, became concerned, verified that Jessica was never taken to the emergency room, and notified the police.[96] This led to the Department of Children's Services taking custody of Jessica and having her admitted to a hospital, where a physician diagnosed her with Ewing's Sarcoma, a rare bone cancer.[97] Jessica received treatment, was later transferred to hospice care, and died within three months of her original hospitalization.[98]

Jacqueline and Sherman were indicted in April 2003 for neglect of a child under the age of eighteen, due to their failure to provide Jessica with adequate medical care.[99] The trial court dismissed Sherman's indictment but it was reinstated on appeal and remanded for further proceedings.[100] On remand, Sherman was convicted of child neglect; he died during the pendency of his appeal.[101] The trial court initially dismissed the charge against Jacqueline, relying on a 2005 amendment to section 39-15-401 that made the statute's child neglect portion applicable only to children younger than thirteen.[102] The Court of Criminal Appeals, however, reversed the trial court and reinstated the indictment because it held the 2005 amendment could not be applied retroactively.[103]

Fowler, *Faith-Healer Sought Medical Care While Recommending Against Same for Teen*, KNOXVILLE NEWS SENTINEL (Jan. 7, 2013), http://www.knoxnews.com/news/local/faith-healer-sought-medical-care-while-recommending-against-same-for-teen-ep-359205398-356276851.html.

95. *Crank*, 468 S.W.3d at 19.

96. *Id.* at 19–20.

97. *Id.*; *Ewing Sarcoma*, U.S. NAT'L LIBRARY OF MED. MEDLINEPLUS (Mar. 23, 2014), https://www.nlm.nih.gov/medlineplus/ency/article/001302.htm.

98. *Crank*, 468 S.W.3d at 20.

99. *Id.* at 18 (citing TENN. CODE ANN. § 39-15-401(a) (Supp. 2001)).

100. *Id.*

101. *Id.*

102. *Id.* (citing TENN. CODE ANN. § 39-15-401 (Supp. 2005)).

103. *Id.* (citing State v. Sherman, No. E2006-01226-CCA-R3-CD, 2007 WL 2011032, at *4–5 (Tenn. Crim. App. July 12, 2007)).

After a pre-trial hearing on the effect of the ST exemption on the child-neglect charge, the trial court dismissed Jacqueline's constitutional claims and denied her motion to dismiss.[104] In a bench trial, the court found Jacqueline guilty of child neglect and sentenced her to eleven months and twenty-nine days of unsupervised probation.[105] On appeal, the conviction and sentence were affirmed.[106] The Tennessee Supreme Court granted an appeal, in which it affirmed the lower court.[107]

B. The Tennessee Supreme Court's Decision

In *Crank,* the Tennessee Supreme Court considered vagueness and Establishment Clause challenges, preceding the analysis with an overview of the exemption's legislative history.[108] Importantly, Defendant's challenge to the ST exemption was facial, rather than as-applied. A facial challenge states, in effect, that there is no way to apply the challenged statute or provision that would be constitutional.[109] This sets a high bar for Defendant to overcome—which is one reason why, aside from First Amendment cases, such challenges are quite rare. The court allowed this challenge, precisely because the statute implicated Defendant's First Amendment religious rights.[110]

After reviewing the facts, the court began with an analysis of the statute for vagueness; if the exemption were found imper-

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104. *Id.* at 19.

105. *Id.* at 19–21.

106. *Id.* at 21 (citing *Crank*, No. E2012-01189-CCA-R3-CD, 2013 WL 5371617, at *6–8 (Tenn. Crim. App. Sept. 26, 2013), *aff'd* 468 S.W.3d 15).

107. *Id.* at 31.

108. *Id.* at 22–30. The Court also considered a third issue, outside the scope of this Comment: whether Defendant was entitled to a hearing pursuant to the State Preservation of Religious Freedom Act ("PRFA"), holding that she was not because there was no evidence of legislative intent to make the PRFA retroactive. *Id.* at 30–31

109. Dorf, *supra* note 40, at 236–37 ("A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." (quoting United States v. Salerno, 481 U.S. 739, 745 (1987))); City of Chicago v. Morales, 527 U.S. 41, 111 (1999).

110. *Crank*, 468 S.W.3d at 24–25.

missibly vague, Defendant's conviction would be overturned.[111] "[T]he determinative inquiry," stated the court, "is whether [the] statute's 'prohibitions are not clearly defined and are susceptible to different interpretations as to what conduct is actually proscribed.'"[112] The court acknowledged the exemption "falls short of 'absolute precision.'"[113] However, the court resolved potential ambiguity, first, by construing statutory language "according to the fair import of its terms."[114] The court noted a dictionary defined "recognized" as "acknowledge[d] or treat[ed] as valid."[115] The court further found the term "duly accredited practitioner" pointed clearly to the Christian Science faith because that term is used by Christian Scientists to refer to a person within that church who is "authorized to practice healing."[116]

The legislative history of the ST exemption presented at the outset of the court's analysis included reference to the Tennessee House initial 93–0 vote in favor of a version of the 1994 Act with no ST exemption.[117] The court gave this fact considerable weight in its deliberation, reasoning that the unanimous approval of the earlier version made discernment of legislative intent less speculative than it might otherwise have been.[118] The court also noted statements by the ST exemption's primary legislative sponsors.[119] Particularly striking is State Senator Jim Holcomb's quoted remark: "The amendment was offered by the Christian Scientists,

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111. *Id.* at 22–23. The Court explicitly rejected the argument offered by the State, that if the ST exemption were found unconstitutionally vague, the proper remedy would be to excise it from the statute, "which would provide the [D]efendant no relief." *Id.* at 23 (alteration in original). The logic the Court rejected as to vagueness, it later employed in considering the Establishment Clause challenge.

112. *Id.* at 23 (quoting State v. Pickett, 211 S.W.3d 696, 704 (Tenn. 2007)).

113. *Id.* at 27 (quoting State v. McDonald, 534 S.W.2d 650, 651 (Tenn. 1976)).

114. *Id.* (quoting TENN. CODE ANN. § 39-11-104 (2014)).

115. *Id.* at 26 (citation omitted) (alteration in original).

116. *Id.* at 27.

117. *Id.* at 21–22.

118. *Id.* at 22. The Court later looks to the 93–0 vote as a guide in how to apply the doctrine of elision with regard to the Establishment Clause challenge. *Id.* at 27–30.

119. *Id.*

and it ensures that they are protected. . . . [I]t was offered by that group, and that is the reason that I put it in."[120] The legislative history, the court reasoned, makes the term "recognized" "less vague" and makes it "apparent" that "the exemption is effectively limited to members of religious groups that closely resemble the Christian Science Church."[121] The court distinguished *Hermanson,* where the Florida Supreme Court found it unconstitutional that one statute permitted conduct that another statute forbade.[122] The *Crank* court, in contrast, held "it cannot be said that our statutes simultaneously authorize and prohibit the same conduct," thus disallowing the vagueness claim.[123]

Turning to Jacqueline's Establishment Clause challenge, the court first invoked the maxim of judicial restraint, which cautions against adjudicating issues of constitutionality unless doing so is absolutely unavoidable.[124] The court reasoned there was no need to rule on the Establishment Clause: in the event the ST exemption were held unconstitutional, the only remedy would be to elide the exemption because the legislature "enacted the child abuse and neglect statute in 1989 without a[n] . . . exemption."[125]

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120. *Id.* at 21–22 (quoting *Hearing on S.B. 2562*, 98th Gen. Assemb., Reg. Sess. 2 (Tenn. 1994) (statement of Sen. Jim Holcomb)). Similarly, the primary sponsor in the House, Representative J.B. Napier, "recognized the amendment as 'relative to the Christian Science religion, which I have no objection to.'" *Id.* at 22 (quoting *Hearing on S.B. 2562*, 98th Gen. Assemb., Reg. Sess. 2 (Tenn. 1994) (statement of Rep. J.B. Napier)). Senator Holcomb's remarks were made to the full Senate, Representative Napier's in committee hearings.

121. *Id.* at 27; *see also* Treene, *supra* note 3, at 143–44 (arguing that provisions which require spiritual treatment by a duly accredited practitioner in accordance with the tenets of a recognized church "effectively limit the exemption to Christian Scientists").

122. *Crank*, 468 S.W.3d at 25; State v. Hermanson, 604 So. 2d 775, 776 (Fla. 1992).

123. *Crank*, 468 S.W.3d at 27.

124. *Id.* at 27–29. "This Court will not pass on the constitutionality of a statute, or any part of one, unless it is absolutely necessary for the determination of the case and of the present rights of the parties to the litigation." State v. Murray, 480 S.W.2d 355, 357 (Tenn. 1972) (citing State ex rel. Loser v. Nat'l Optical Stores, 225 S.W.2d 263, 268 (Tenn. 1950)).

125. *Crank*, 468 S.W.3d at 29. Note how this is the same logic that, on the vagueness issue, the Court refused to accept from the State. *See supra* text accompanying note 111. In its review of the statute's legislative history, the Court

Enforcing the statute sans ST exemption, in the court's view, best honors legislative intent.[126] But what if elision were applied not to the entire exemption but just to the language referring to "a recognized church"? The court briefly considered this possibility, which would simply leave an ST exemption for any parent who "provide[s] treatment by spiritual means through prayer in lieu of medical or surgical treatment," but the court rejected this as "indulging in judicial legislation."[127] The court reasoned that even if such an elision might cure the statute's possible constitutional infirmity, "we cannot say that our legislature would have enacted an exemption so broad [as to] encompass all instances in which a parent claims reliance on prayer in lieu of medical treatment for a child."[128] The court cautioned that the doctrine of elision gives no license to "completely re-write or make-over a statute."[129] Hypothetically applying elision to the entire ST exemption, the court reasoned that the remaining child abuse and neglect statute would contain no protection for parents' choice of ST—leaving the conviction standing. Since the hypothetical elision would afford Jacqueline no relief, the trial court's judgment was affirmed.[130]

IV. ANALYSIS OF DECISION

The challenge of *Crank* lies not just in the two chief constitutional issues raised—vagueness and the Establishment Clause—but in the way the two issues interact, even intertwine with one another. The Tennessee Supreme Court refused to invalidate the Tennessee child abuse and neglect statute or its ST exemption provision for vagueness, finding that its key terms ("prayer," "tenets," "church," "recognized," and "practitioner") clearly expressed the legislative intent to extend the exemption's protections exclusively to "members of religious groups that closely resemble the Chris-

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also noted that, initially, the House had voted unanimously to pass a version of the 1994 Act with no ST exemption. *Crank*, 468 S.W.3d at 21.

126. *Crank*, 468 S.W.3d at 29–30.

127. *Id.* at 29 (quoting State v. Tester, 879 S.W.2d 823, 830 (Tenn. 1994)).

128. *Id.*; *see Tester*, 879 S.W.2d at 830; *In re* Swanson, 2 S.W.3d 180, 189 (Tenn. 1999); *see also* Davidson Cnty. v. Elrod, 232 S.W.2d 1, 2 (Tenn. 1950).

129. *Crank*, 468 S.W.3d at 29 (quoting Shelby Cnty. Election Comm'n v. Turner, 755 S.W.2d 774, 778 (Tenn. 1988)).

130. *Id.* at 30.

tian Science Church" and thus the statute met the Due Process requirement to give fair notice.[131] With that, the vagueness issue shades quickly into Establishment Clause concerns. It would seem, at first glance, that the statute has gone from the frying pan into the fire, constitutionally speaking—no sooner does it pass the vagueness test with ease, than Establishment Clause alarm bells go off. But then the Tennessee Supreme Court applied the doctrine of elision in a manner that rendered the Establishment Clause issue moot and afforded Jacqueline Crank no relief.

The court denied that "[Tennessee's] statutes simultaneously authorize and prohibit the same conduct"—yet the same omission (of medical treatment) is allowed to some, who are permitted to meet their duty of parental care via religious means alone, and denied to others.[132] Insofar as the Florida case of *Hermanson* involved two contradictory statutes, one permitting the conduct in question, and the other forbidding it, the court was correct to distinguish—*Crank* involves no such clash of statutes.[133] Yet the court was too quick to distinguish *Hermanson*, for vagueness can result not only from confusingly clashing statutes but also from the confusing operation of a single statute. The Court denied this, stating that the [ST] exemption merely "protects from prosecution individuals whose conduct would otherwise qualify as child abuse or neglect."[134] But omitting to obtain medical attention for one's sick child *is* both authorized and forbidden by the exemption—authorized to members of some religious faiths and forbidden to members of other religious faiths.

Leaving the Establishment Clause aside for the moment, the vagueness question is whether the statute puts citizens on clear notice as to the state's regulation of their conduct, or instead "require[s] [them] at peril of life, liberty or property to speculate as to the meaning of penal statutes."[135] This fundamental Due Process

131. *Id.* at 26–27. For the "closely resembling" phrase, see *id.* at 27. The Court also relied on Treene, *supra* note 3, at 143–44 (arguing that the "duly accredited practitioner" and "recognized church" language of many ST exemptions effectively limits their protections to members of the Christian Science church).

132. *Crank*, 468 S.W.3d at 27.

133. *See* State v. Hermanson, 604 So. 2d 775, 775–76 (Fla. 1992).

134. *Crank*, 468 S.W.3d at 27.

135. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

question is in play—whether Tennessee's ST exemption is best understood as "simultaneously authoriz[ing] and prohibit[ing] the same conduct" or as "protect[ing] from prosecution individuals whose conduct would otherwise qualify as child abuse or neglect."[136] The persuasive authority of the *Miskimens* court furnishes valuable guidance, for there, as in *Crank*, there was no clash of statutes.[137] In *Miskimens*, the Ohio trial court correctly noted that the statute failed to define "tenets," "recognized," and other essential terms.[138] Tennessee's exemption similarly failed to define its key terms, and the Supreme Court's attempt to do so raised as many questions as it answered.[139]

The Tennessee Supreme Court relied on legislative history to further determine the statute's clarity. Resolving the vagueness issue with reference to legislative history imposes a questionable burden on citizens, imputing to citizens not only constructive knowledge of the law but also of committee debates and other steps of the legislative process. Certainly the court's reasoning is not without warrant: in *State v. Smith*, the Tennessee Court of Criminal Appeals held that "[t]he clarity in meaning required by due process may also be derived from legislative history."[140] However, the court's language in *Crank* is notably tentative at times regarding vagueness, as when it says that the legislative history makes the term "recognized" "less vague."[141] The modest

136. *Crank*, 468 S.W.3d at 27.

137. *See supra* Section II.D.4.

138. State v. Miskimens, 490 N.E.2d 931, 934–35 (Ohio Ct. Com. Pl. 1984).

139. In attempting to show the ST exemption is not vague, the Court states that "the legislative intent was for the exemption to apply to members of religious bodies which, like the Church of Christian Science, are established institutions with doctrines or customs that authorize healers within the church to perform spiritual treatment via prayer." *Crank*, 468 S.W.3d at 27. But this language does not clarify what is meant by "established," for instance, or what practice qualifies as a "doctrines or customs."

140. 48 S.W.3d 159, 168 (Tenn. 2000); *see also* State v. Wilkins, 655 S.W.2d 914 (Tenn. 1983); State v. Hayes, 899 S.W.2d 175, 181 (Tenn. Crim. App. 1995). In *Walker v. Superior Court*, the California Supreme Court stated a similar expectation of the public with regard to legislative history. 763 P.2d 852, 872–73 (Cal. 1998).

141. *Crank*, 468 S.W.3d at 27. The Court also cites to Treene, *supra* note 3, at 143–44 (arguing that provisions which require spiritual treatment by a duly

assertion, "less vague," seems shaky ground to support a finding that the statute is not void for vagueness, and appears to contradict the court's language, elsewhere in its opinion, that the ST exemption clearly applied only to churches "closely resembl[ing] the Christian Science Church."[142] The Tennessee Supreme Court's affirmative answer, based on narrowing the exemption's scope to one faith, purports to resolve vagueness by leading us straight into the thickets of the Establishment Clause. This is because exempting "members of religious groups that closely resemble the Christian Science Church" raises the specter of *Larson*, or, worse yet, *HEB Ministries*-like inquiry into theological, liturgical, and other religious traits—not to mention the privilege inherent in setting one faith up as the yardstick against which to assess others' "close resemblance."[143]

Highly persuasive authority for viewing with serious misgivings the *Crank* court's acceptance of special statutory protection to one religious faith comes from a 1996 federal case, *Children's Healthcare Is a Legal Duty, Inc. v. Vladeck*.[144] The *Vladeck* court held making Christian Science "sanatoria" (the church's centers devoted to healing by prayer) eligible for Medicare reimbursement amounted to religious favoritism that failed strict scrutiny.[145]

Particularly troubling is the Tennessee Supreme Court's use of a dictionary definition to establish the clarity of the word "recognized" as applied to a church, when it states that the word "broadly refers to something that is 'acknowledge[d] or treat[ed] as valid.'"[146] A clearer infringement of the Establishment Clause would be hard to find: "valid," with its senses of "correct" and "proper," evokes just the sort of state review and approval (or rejection) of individual churches' doctrine and practice the *HEB Ministries* court held unconstitutional.[147]

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accredited practitioner in accordance with the tenets of a recognized church "effectively limit the exemption to Christian Scientists.").

142. *Crank*, 468 S.W.3d at 27.

143. *Id.*; *see supra* Section II.B (citing Larson v. Valente, 456 U.S. 228, 244–52 (1982); HEB Ministries v. Tex. Higher Educ. Coordination Bd., 235 S.W.3d 627, 656–57 (Tex. 2007)).

144. 938 F. Supp. 1466 (D. Minn. 1996).

145. *Id.* at 1472–73.

146. *Crank*, 468 S.W.3d at 27 (citation omitted).

147. *HEB Ministries*, 235 S.W.3d at 678.

Finally, the Establishment Clause issue is intertwined with the vagueness issue because the definition of terms like "tenets," "recognized," "prayer," "church," and the like would, in the words of the *Miskimens* court, "hopelessly involve the state" in entangling questions of religion.[148]

The Tennessee Supreme Court acknowledged serious Establishment Clause concerns in a lengthy footnote near the end of its opinion, which stated in part:

> [T]he Establishment Clause issue gives us pause, as the statutory text and the legislative history, taken together, appear to indicate that the spiritual treatment exemption was enacted for the benefit of the Christian Scientist denomination of the Christian faith. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion," and the corresponding provision in the Tennessee Constitution provides "that no preference shall ever be given, by law, to any religious establishment or mode of worship."[149]

The Tennessee Supreme Court was correct to look with concern on the Establishment Clause issues raised in *Crank*, though its language did not go far enough. It is not clear whether the tentative nature of the court's language had to do with uncertainty as to whether the statute violates the Establishment Clause, or rather with the principle of judicial restraint, which led the court not to rule on the issue.

Ultimately, the vagueness challenge having been rejected, the *Crank* holding turns on the court's use of elision. The court foreclosed the Establishment Clause issue by hypothetically applying elision to the entire ST exemption. Whether to apply elision as broadly as the court hypothesized, or by more narrowly pruning the exemption of its favoritism, is a closer question than the court allows. The severability statute allows selective elision. Applying elision more surgically by cutting the "established church" verbi-

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148. State v. Miskimens, 490 N.E.2d 931, 934 (Oh. Ct. Comm. Pl. 1984).

149. *Crank*, 468 S.W.3d at 27 n.8 (quoting U.S. CONST. amend. I; TENN. CONST. art. I, § 3).

age would leave a child abuse and neglect statute containing an exemption for spiritual treatment, but not an exemption tethered to a particular faith and others "closely resembling" it. It is not so manifest that this would have thwarted legislative intent. The Tennessee Supreme Court appeared to dismiss the possibility out of hand, thereby denying Jacqueline relief. In short, once it found the statute not vague, the court's use of elision became dispositive.

Had the Tennessee Supreme Court dwelt more thoroughly on the alternative elision hypothesis, it might have entertained the possibility that adjudicating constitutionality under the Establishment Clause *was* necessary to its determination of the case—as necessary as the constitutional examination it so readily undertook with regard to vagueness. Eliding the entire exemption would be the proper remedy where unconstitutionality lay in giving benefits to religion generally, but the court never raised the latter issue. If, on the other hand, the statute's Establishment Clause infirmity lies in favoring certain faiths, more selective elision would be appropriate. This much the court recognized, but it concluded that using elision in this way would rewrite the statute—impermissible "judicial legislation."[150]

V. CONCLUSION

The fundamental problem with the Tennessee Supreme Court's holding in *Crank* was that the statute, with its ST exemption, failed to give Jacqueline Crank fair notice of what conduct was prohibited and what conduct allowed. To paraphrase the U.S. Supreme Court in *Morales*, the vagueness that dooms the Tennessee statute lies in the uncertainty it creates about which prayers are protected by the statute and which prayers are not.[151] As such, the proper course for the court was to void the conviction on the Due Process ground of vagueness. The Establishment Clause infirmities of the statute were equally clear. Less so was the proper application of the doctrine of elision; it is at least tenable that a more selective striking of the statutory language favoring particular

150. *See supra* Section II.C.

151. City of Chicago v. Morales, 527 U.S. 41, 57 (1999) ("The vagueness that dooms this ordinance is . . . the product of uncertainty . . . about what loitering is covered by the ordinance and what is not.").

churches would have been appropriate. The State's interest in protecting children is unassailable, an "interest of unparalleled significance" in the *Walker* court's eloquent phrase.[152] But in *Crank* the State asserted, and the court found, no warrant for the superior efficacy of Christian Science prayers over those of any other church, or, indeed, any mother or father, to heal an ailing child.

152. Walker v. Superior Court, 763 P.2d 852, 869 (Cal. 1998); *see also* People v. Pierson, 68 N.E. 243 (N.Y. 1903); 118 A.L.R.5th, *supra* note 1.

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Vacatur of Awards Under the Tennessee Uniform Arbitration Act: Substance, Procedure, and Strategies for Practitioners

STEVEN W. FELDMAN*

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I. INTRODUCTION

In 1983, the Tennessee General Assembly passed the Tennessee Uniform Arbitration Act ("TUAA" or "the Act").[1] The Act repealed all prior inconsistent laws on arbitration and reversed the common law rule that agreements to arbitrate a future dispute are unenforceable.[2] The prior version of the Tennessee arbitration statutes were codified at Tenn. Code Ann. sections 23-501 to 23-519 and were substantially unchanged from 1852 until the advent of TUAA.[3] Although most TUAA proceedings are between private parties, governmental entities, as allowed by law, may invoke TUAA.[4]

With a few exceptions, the legislature patterned TUAA after the Uniform Arbitration Act, which is a model statute that the National Conference of Commissioners on Uniform State Laws drafted in 1955 and that numerous American jurisdictions enacted

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1. TENN. CODE ANN. §§ 29-5-301 to -320 (2012).

2. Act of May 11, 1983, ch. 462, 1983 Tenn. Pub. Acts 946 (Tenn. 1983); Brown v. KareMor Int'l, Inc., No. 01A01-9807-CH-00368, 1999 WL 221799, at *2 (Tenn. Ct. App. Apr. 19, 1999) (comparing TUAA and common law).

3. *See* Meirowsky v. Phipps, 432 S.W.2d 885, 886 (Tenn. 1968) (describing pre-TUAA standards).

4. *Cf.* Chattanooga Area Reg'l Transp. Auth. v. T.U. Parks Constr. Co., No. 03A019712CH00524, 1999 WL 76074, at *5 (Tenn. Ct. App. Jan. 28, 1999) (stating the statute would need to include these entities by specific reference before they may enter into arbitration); Tipton Cty. Dep't of Pub. Instruction by Tipton Cty. Bd. of Educ. v. Delashmit Elec. Co., No. 02A01-9704-CH-00084, 1998 WL 158774, at *3 (Tenn. Ct. App. Apr. 7, 1998) (stating school boards, counties, and other political subdivisions in the state may invoke the Act).

thereafter.[5] Because of the close relation of TUAA and other states' arbitration statutes, TUAA provides that it "shall be construed as to effectuate its general purpose to make uniform the laws of those states which enact it."[6] On the other hand, Tennessee courts carefully point out that while "the objective of uniformity cannot be achieved by ignoring [the] utterances of other jurisdictions," sister court opinions on their Uniform Act are not binding upon Tennessee tribunals.[7] Indeed, the Tennessee Supreme Court has gone so far as to say, "We do not construe Tenn. Code Ann. [section] 29-5-320 as an inexorable command to make up a scorecard of the states that have accepted and rejected a particular interpretation of a provision of the Uniform Arbitration Act and then to follow the majority view without further discussion or analysis."[8]

Another important point of comparison is the Federal Arbitration Act ("FAA"),[9] which Tennessee courts cite frequently as persuasive—but not necessarily binding—authority in TUAA cases.[10] This comparison is also important because Tennessee state and federal courts both have jurisdiction of FAA cases. Thus, a claimant may properly file an action in state court to obtain relief under the governing FAA with respect to arbitration agreements

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5. *See* Stephen Wills Murphy, Note, *Judicial Review of Arbitration Awards Under State Law*, 96 VA. L. REV. 887, 891 (2010). In 2000, the National Conference of Commissioners approved a Revised Uniform Arbitration Act, which seventeen states (not including Tennessee) have adopted. All told, forty-seven states plus the District of Columbia have adopted the Uniform Arbitration Act or substantially similar legislation. *See id.*

6. TENN. CODE ANN. § 29-5-320 (2012); *see also* Buraczynski v. Eyring, 919 S.W.2d 314, 319 (Tenn. 1996); Wachtel v. Shoney's, Inc., 830 S.W.2d 905, 909 (Tenn. Ct. App. 1991) (providing good summary of the policies for consistent interpretation of uniform acts).

7. *Buraczynski*, 919 S.W.2d at 318–19 (quoting Holiday Inns, Inc. v. Olsen, 692 S.W.2d 850, 853 (Tenn. 1985)); *see also Wachtel*, 830 S.W.2d at 909 (stating a good summary of principles).

8. Morgan Keegan & Co. v. Smythe, 401 S.W.3d 595, 612 (Tenn. 2013).

9. 9 U.S.C. §§ 1–16 (2012).

10. *E.g.*, Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp., 320 S.W.3d 252, 257–59 (Tenn. 2010); Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 448, 450–51 (Tenn. 1996).

involving interstate commerce.[11] This article will make frequent use of decisions from other jurisdictions to address issues that are unclear or insufficiently addressed in TUAA case law.

TUAA has only grown in importance for the commercial law system since its enactment in 1983. Tennessee appellate courts have strongly endorsed TUAA as a fair and efficient alternative to conventional civil litigation.[12] Tennessee courts view arbitration as a "valuable tool"[13] that is "favored by legislative policy"[14] because it can make resolution of disputes "more efficient, more economical, and equally fair" to the parties.[15] Tennessee courts have said about TUAA, "[T]he legislature sought to facilitate and promote a quicker, more cost effective, less cumbersome, yet binding means of dispute resolution."[16]

In keeping with this pro-arbitration policy, courts have stated that the Tennessee arbitration statutes are remedial and any issue of interpretation "ought to be resolved in line with [their] liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars."[17] Therefore, Tennessee courts have observed that the scope of an arbitration agreement under TUAA (as opposed to

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11. *E.g.*, Frizzell Constr. Co. v. Gatlinburg, L.L.C., 9 S.W.3d 79 (Tenn. 1999).

12. *E.g.*, *Arnold*, 914 S.W.2d at 449 ("[A]rbitration is attractive because it is a more expeditious and final alternative to litigation." (quoting Boyd v. Davis, 897 P.2d 1239, 1242 (Wash. 1995))). Currently, a lively debate exists in the academic community on whether arbitration as applied to mass market consumer contracts is a fundamentally fair process. One commentator has said that "[m]any well-articulated and convincing critiques have been aimed at 'mandatory' arbitration, and some equally strong counterarguments have also been made." Meredith R. Miller, *Contracting Out of Process, Contracting Out of Corporate Accountability: An Argument Against Enforcement of Pre-Dispute Limits on Process*, 75 TENN. L. REV. 365, 369 (2008).

13. Golden v. Hood, No. E1999-02443-COA-MR3-CV, 2000 WL 122195, at *2 (Tenn. Ct. App. Jan. 26, 2000) (citing Tenn. R. S. Ct. 31 prmbl.).

14. Blount Excavating, Inc. v. Denso Mfg. Tenn., Inc., No. 03A01-9903-CV-00112, 1999 WL 1068678, at *3 (Tenn. Ct. App. Nov. 25, 1999).

15. *Golden*, 2000 WL 122195, at *2 (quoting Tenn. R. S. Ct. 31 prmbl.).

16. T.R. Mills Contractors, Inc. v. WRH Enters., L.L.C., 93 S.W.3d 861, 868 (Tenn. Ct. App. 2002) (citing cases).

17. 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:20 (4th ed. 2001) (alteration in original) (citations omitted).

its enforceability *vel non*)[18] must receive as "broad a construction as the words will allow."[19] A further consequence is that courts must resolve "any doubts" in favor of requiring arbitration.[20]

Nevertheless, as one authority observes, "[I]n spite of the increased use of arbitration, the law concerning arbitration is still considered to be esoteric and often misunderstood by attorneys and judges alike."[21] Compounding this challenge is that commentary is brief on TUAA arbitration and essentially unaddressed in law journals.[22] One of the most challenging TUAA topics is the action for vacatur (annulment) of an arbitral award, where claimants regularly prove unsuccessful in their efforts. Because actions for vacatur are often the most hotly-disputed matters between the arbitral parties, this article focuses on this subject to assist practitioners develop their strategies as they seek to advance their clients' interests.

After this Introduction, the next part of the article covers the arbitration essentials inclusive of definitions, the scope of judicial review, and the policy favoring finality of awards. The third

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18. Urology Assocs. v. CIGNA Healthcare of Tenn., No. M2001-02252-COA-R3-CV, 2002 WL 31302922, at *5 (Tenn. Ct. App. Feb. 18, 2003) (citing cases).

19. *Id.*

20. Dale Supply Co. v. York Int'l Corp., No. M2002-01408-COA-R3-CV, 2003 WL 22309461, at *7 (Tenn. Ct. App. Oct. 9, 2003); *see* Blount Excavating, Inc. v. Denso Mfg. Tenn., Inc., No. 03A01-9903-CV-00112, 1999 WL 1068678, at *2 (Tenn. Ct. App. Nov. 25, 1999) ("[Q]uestions of law are to be resolved with respect for the public policy concerning arbitration."); *id.* at *4 (explaining there is no requirement that the arbitration clause use the word "arbitration"); Wachtel v. Shoney's, Inc., 830 S.W.2d 905, 908 (Tenn. Ct. App. 1991); *see also* Wilks v. Pep Boys, 241 F. Supp. 2d 860, 863 (M.D. Tenn. 2003) (citing "any doubt" rule).

21. 27 AM. JUR. 3D *Proof of Facts* § 103 (1994).

22. *See* 27 JOSEPTH T. GETZ & MICHAEL I. LESS, TENNESSEE PRACTICE SERIES, CONSTRUCTION LAW HANDBOOK, ch. 14 (2013); 16 WILLIAM BROWN, ET AL., TENNESSEE PRACTICE SERIES, DEBTOR-CREDITOR LAW AND PRACTICE, pt. I, ch. 2, § 2:121 (2d ed. 2013); 13 ELLEN BRONAUGH VERGOS, TENNESSEE PRACTICE SERIES, LEGAL FORMS REAL ESTATE LEASES § 7:1 (2d ed. 2001 & Supp. 2015); 2 THOMAS LEVEILLE & LORI FARRIS FLEISHMAN, TENNESSEE LITIGATION FORMS AND ANALYSIS, ch. 18 (Sept. 2013); 1 LAWRENCE A. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE § 3:21 (2013); Lewis L. Laska, *A General Practitioner's Guide to Commercial Arbitration and the 1983 Tennessee Uniform Arbitration Act*, 20 TENN. B.J. 23 (1984).

part addresses TUAA agreements, awards, and related procedures. The fourth part provides an overview of the substantive and procedural aspects of vacatur and the modification of arbitral awards. The fifth part is the most extensive in the article and describes vacatur as a judicial control mechanism. This part addresses the standards for record review in vacatur cases and then examines at length the five statutory grounds for vacatur in Tennessee. The fifth part also covers a topic that has practically no Tennessee commentary, but bears noting by practitioners: whether Tennessee still recognizes common law arbitration. The section also covers common law grounds for vacatur. The most important candidates for common law (non-statutory) vacatur are the arbitrator's "manifest disregard of the law" in rendering the decision and where the arbitrator's decision violates public policy.[23]

In keeping with the title of this article, the sixth part contains a wide-ranging procedural and substantive critique of arbitration in Tennessee. Examples of the topics discussed in this section include the supposed superiority of arbitration over litigation, the questionable judicial gloss on TUAA regarding the narrow judicial standard of arbitral awards, the unduly permissive judicial stance toward a minimal record in arbitration proceedings, and many other substantive and procedural points. Throughout, the article will emphasize legal strategies for practitioners, especially in unclear or contested areas of Tennessee arbitration jurisprudence.

II. ARBITRATION ESSENTIALS: "ARBITRATION" DEFINED, THE SCOPE OF JUDICIAL REVIEW, AND THE NEED FOR FINALITY

A. "Arbitration" Defined

While not defined in TUAA, "arbitration"—a "matter of contract"[24]—"is a consensual proceeding in which the parties select decision-makers of their own choice and then voluntarily submit their disagreement to those decision-makers for resolution in

23. *See infra* Section V.I (analyzing cases explaining theory).

24. Frizzell Constr. Co. v. Gatlinburg, L.L.C., 9 S.W.3d 79, 84 (Tenn. 1999) (quoting AT&T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643, 648 (1986)); *see also* Mengel Co. v. Nashville Paper Prods. & Specialty Workers Union, No. 513, 221 F.2d 644, 647 (6th Cir. 1955) (explaining there is no independent right for a party to require arbitration without the right to have the issue determined by a court).

lieu of adjudicating the dispute in court."[25] Arbitration is a "quasi-judicial proceeding" that is adversarial in nature.[26] Ordinarily, it includes hearings, prior notice to the parties, documentary evidence, and witness testimony.[27] An arbitration award is tantamount to a court judgment and, unless the party in opposition proves in a vacatur proceeding that the award violated the applicable statutory criteria, it will be conclusive as to the parties' rights and liabilities.[28]

While, as indicated above, arbitration shares some general traits with conventional civil actions, it also differs significantly on the formalities of litigation. The most prominent distinction is arbitration's generally minimal reliance on the rules of evidence. Accordingly, when parties submit their dispute to arbitration, they "always risk[] procedural and evidentiary shortcuts."[29] Many

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25. Merrimack Mut. Fire Ins. Co. v. Batts, 59 S.W.3d 142, 149 (Tenn. Ct. App. 2001); *see also* Smith v. Bridgestone/Firestone, Inc., 2 S.W.3d 197, 206 (Tenn. Ct. App. 1999) ("Arbitration . . . is an 'adjudication' of conflicting interests by a neutral third party." (quoting Strozier v. Gen. Motors Corp., 635 F.2d 424, 425 (5th Cir. 1981))); Blount Excavating, Inc. v. Denso Mfg. Tenn., Inc., No. 03A01-9903-CV-00112, 1999 WL 1068678, at *4 (Tenn. Ct. App. Nov. 29, 1999) ("[A]rbitration is '[a] process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard.'" (alteration in original) (quoting *Arbitration*, BLACK'S LAW DICTIONARY (6th ed. 1990))). TUAA covers only binding arbitration; the parties alternatively may elect to use non-binding arbitration outside the statutory constraints. *Id.*

26. State v. R.I. Emp't Sec. All., Local 401, 840 A.2d 1093, 1097 (R.I. 2003).

27. *Merrimack Mut.*, 59 S.W.3d at 150. For a judicially-approved instance where the parties used an arbitration-like proceeding but where the parties employed measures to avoid the finality characteristic of arbitration and where an agent of the owner served as an arbitrator, see *Blount Excavating*, 1999 WL 1068678, at *1; *see also* Smith v. Smith, 989 S.W.2d 346, 348 (Tenn. Ct. App. 1998) (holding similarly).

28. Americas Ins. v. Seagull Compania Naviera, S.A., 774 F.2d 64, 67 (2d Cir. 1985); Container Tech. Corp. v. J. Gasden Pty., Ltd., 781 P.2d 119, 121 (Colo. App. 1989); Turpin v. Love, 1973 WL 16997, at *4 (Tenn. Ct. App. Aug. 14, 1973) ("[F]indings by the arbitrator . . . [have] the same binding effect upon the [p]laintiff as a judicial determination by a court of competent jurisdiction.").

29. Weber v. Merrill Lynch Pierce Fenner & Smith, Inc., 455 F. Supp. 2d 545, 554 (N.D. Tex. 2006) (quoting Mantle v. Upper Deck Co., 956 F. Supp. 719, 731 (N.D. Tex. 1997)).

years ago, Judge Learned Hand explored the tradeoff a party makes when it selects arbitration over litigation:

> Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery.[30]

Two arbitration agreements exist in these proceedings: the one between the parties—often called the "submission"—and the one between the arbitrator(s) and the parties.[31] The submission is the roadmap for the proceedings and defines the issues for decision.[32] The submission may take one of two forms: a stand-alone arbitration agreement or an arbitration clause in the principal contract for the goods or services.[33] Indeed, the submission has such importance that it contains a "presumption" of arbitrability, i.e., the parties have agreed to submit a particular issue to arbitration.[34] A court should not refuse to issue an order to arbitrate unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.[35]

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30. Am. Almond Prods. Co. v. Consol. Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944).

31. 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:45 (4th ed. 2001); Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 295–96 (2012).

32. 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:45 (4th ed. 2001) (discussing submissions in arbitration).

33. THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 48–49 (4th ed. 2012).

34. 1 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 15:2 (3d ed. 2013).

35. Metro Const. Co. v. Cogun Indus., Inc., No. 02A01-9608-CH-00207, 1997 WL 538914, at *3 (Tenn. Ct. App. Sept. 4, 1997) (quoting United Steelworkers v. Mead Corp., 21 F.3d 128, 131 (6th Cir. 1994)); Wachtel v. Shoney's, Inc., 830 S.W.2d 905, 908 (Tenn. Ct. App. 1991). For additional discussion of

Where a party agrees to arbitration, it relinquishes "much" of its right to receive a judicial decision on the merits.[36] Indeed, courts and commentators have characterized arbitration as a type of "forum selection clause."[37] Courts commonly observe that "[a]n agreement to arbitrate does not affect the rights and duties of the parties," but "simply shifts the forum of dispute settlement" for resolving the parties' differences.[38]

The above statement that arbitration "does not affect the rights and duties of the parties"[39] can be misleading because courts and arbitrators have different responsibilities for adhering to statutory and case law principles. While judges are strictly bound by the law, arbitrators operate on a more relaxed standard. Many courts hold that, where a party seeks vacatur on the grounds that the arbitrator—either during the proceedings or in the decision—has made an erroneous legal interpretation, this alleged misapplication of the law, by itself, is *not* grounds for overturning an arbitral award.[40] To an extent, this problem is alleviated by the doctrine that arbitration awards are not legal precedents and do not bind the courts (or future arbitrators).[41] In numerous succeeding parts, this article will discuss the ramifications of the relaxed legal standards governing arbitration proceedings.

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arbitrability, see 1 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 15 (3d ed. 2013) (discussing the analysis of determination of issues by court or arbitrator; parties' intention; arbitrable issues—in general; arbitrable issues—presumptions and burden of proof (including broad or restrictive clauses; subject matter; and waiver)).

36. Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 448 (Tenn. 1996) (quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995)).

37. *E.g.*, Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974); Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189 n.221 (2011).

38. *E.g.*, T.R. Mills Contractors, Inc. v. WRH Enters., L.L.C., 93 S.W.3d 861, 868 (Tenn. Ct. App. 2002) (citing Buraczynski v. Eyring, 919 S.W.2d 314, 319 (Tenn. 1996)).

39. *See id.*

40. *See, e.g.*, *Arnold*, 914 S.W.2d at 451 ("[E]rrors of law or fact, or an erroneous decision of matters submitted to [arbitration] are insufficient to invalidate an award fairly and honestly made." (quoting Turner v. Nicholson Props., Inc., 341 S.E.2d 42, 45 (1986))).

41. *See* Peoples Sec. Life Ins. v. Monumental Life Ins., 991 F.2d 141, 147 (4th Cir. 1993).

B. The Scope of Judicial Review

In the same vein as the strong policy favoring arbitrability, courts have a "limited role" in reviewing an arbitration decision as the courts follow a "deferential" standard of review.[42] This process is not *de novo*.[43] As a result, the trial court acts as an appellate court to the arbitrator in vacatur cases,[44] whereby the court does not reweigh the evidence presented to the arbitrator.[45] Similarly, the formal review at the Tennessee Court of Appeals or the Tennessee Supreme Court is not *de novo*, except that questions of law will be considered without deference to the lower court.[46]

Based on these constraints, the courts' review of an arbitration decision is "one of the narrowest standards of judicial review in all of American jurisprudence."[47] The policy is to avoid the undue "judicialization" of the arbitration process[48] and to ensure that arbitration does not become an additional expensive and time-

42. D & E Constr. Co. v. Robert J. Denley Co., 38 S.W.3d 513, 518 (Tenn. 2001); *Arnold*, 914 S.W.2d at 448, 450; La. Safety Sys., Inc. v. Tengasco, Inc., No. E2000-03021-COA-R3-CV, 2001 WL 1105395, at *5 (Tenn. Ct. App. Sept. 21, 2001). *But see* Parr v. Tower Mgmt. Co., No. 01A01-9811-CV-00573, 1999 WL 415169, at *4 (Tenn. Ct. App. June 23, 1999) (stating that courts are "severely limited" in their authority to retry the issues parties raise in arbitration cases).

43. AmeriCredit Fin. Servs.. Inc. v. Oxford Mgmt. Servs., 627 F. Supp. 2d 85, 92 n.6 (E.D.N.Y. 2008).

44. 4 AM. JUR. 2d *Alternative Dispute Resolution* § 206 (2014) (stating the movant must, also, rely upon a statutory or common law ground for vacatur for the trial court to have jurisdiction).

45. Vt. Built, Inc. v. Krolick, 969 A.2d 80, 86 (Vt. 2008).

46. Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp., 320 S.W.3d 252, 258 n.4 (Tenn. 2010). *But see* Sanders v. Harbor View Nursing & Rehab. Ctr., No. W2014-01407-COA-R3-CV, 2015 WL 3430082, at *3 (Tenn. Ct. App. 2015) ("We review the trial court's conclusions of law *de novo*. We review the trial court's findings of fact *de novo* with a presumption of correctness unless the evidence preponderates otherwise." (citation omitted)). By a similar logic, the trial court has no duty of deference to the arbitrator for his conclusions of law. *Id.*

47. Morgan Keegan & Co. v. Smythe, No. W2010-01339-COA-R3-CV, 2014 WL 2462853, at *2 (Tenn. Ct. App. May 29, 2014) (quoting cases); *see also* Bronstein v. Morgan Keegan & Co., No. W2011-01391-COA-R3-CV, 2014 WL 1314843, at *2 (Tenn. Ct. App. Apr. 1, 2014).

48. E.I. DuPont de Nemours & Co. v. Grasselli Emps. Indep. Ass'n of E. Chi., Inc., 790 F.2d 611, 614 (7th Cir. 1986).

consuming layer to the already complex litigation process. "Judicialization" occurs where the process inappropriately lends itself to conventional legal and evidentiary appeals that would render informal arbitration a mere prelude to the more cumbersome and time consuming judicial review process.[49]

As indicated above, the scope of judicial review is narrow. Courts may set aside an arbitration decision only in "very unusual circumstances," and the award will stand unless shown to be "clearly erroneous."[50] The standard for arbitral reversal must be based on statute or the deprivation of a party's due process. A reviewing court cannot consider the merits of an arbitration award even when the aggrieved party alleges that the award is tainted by errors of fact or law or by the arbitrator's misunderstanding or misrepresentation of the contract.[51] Finally, the submission[52] could affect the scope of judicial review. For example, if the parties' agreement states that the arbitrator is the final judge of the admissibility of evidence, and that the ordinary rules of evidence do not apply, the arbitrator's rulings on this point are not reviewable by a subsequent court.[53] In this way, TUAA serves as an "efficient and economical system of alternative dispute resolution."[54]

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49. *See* Cat Charter, L.L.C. v. Schurtenberger, 646 F.3d 836, 845 (11th Cir. 2011) (citing Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 588 (2008)).

50. *See* Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 450 (Tenn. 1996) (citing First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995)); *see also Cat Charter*, 646 F.3d at 842–43 ("[A]rbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party." (citing Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731, 990 F.2d 957, 960 (7th Cir. 1993))); Remmey v. Painewebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994) (finding that parties would cease to use arbitration if courts did not resist the temptation to re-decide arbitral decisions); *Nat'l Wrecking Co.*, 990 F.2d at 960 ("Judicial review of arbitration awards is narrow because arbitration is intended to be the final resolution of disputes."); *E.I. DuPont*, 790 F.2d at 614 ("[A]n extremely low standard of review is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution.").

51. Vt. Built, Inc. v. Krolick, 969 A.2d 80, 86 (Vt. 2008).

52. *See supra* notes 31–34 and accompanying text.

53. Davis v. Reliance Elec., 104 S.W.3d 57, 63 (Tenn. Ct. App. 2002).

54. *Arnold*, 914 S.W.2d at 450; *see also* Buraczynski v. Eyring, 919 S.W.2d 314, 318, 318 n.3 (Tenn. 1996) ("[P]ublic policy favors alternative dispute resolution because it is quicker, less expensive and relieves court conges-

Some jurisdictions go even further and state that an arbitration award will not be appealable where the parties (1) contractually agreed to resolve their dispute through binding arbitration and (2) expressly agreed to waive the right of judicial review of the arbitrator's decision.[55] These principles would likely apply in Tennessee because our courts recognize a party's right to waive an appeal.[56]

C. The Need for Finality

The above-mentioned strong pro-enforcement policy advances the core need for finality in arbitration cases, even though "harsh results" can and will occur.[57] The Tennessee Supreme Court has remarked,

> If an arbitrator makes a mistake, either as to law or fact, it is a misfortune of the party, and there is no help for it. There is no right of appeal and the Court has no power to revise the decisions of "judges who are of the parties' own choosing." An [arbitration] award is intended to settle the matter in controversy, and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens a door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact, may be suggested by the dissat-

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tion. . . . [A]dvantages to arbitration . . . [include] finality of decisions and informality of procedure and rules . . . .").

55. Hirsh v. Gursky, No. BC182550, 2002 WL 31266350, at *3 (Cal. Dist. Ct. App. Oct. 10, 2002).

56. *See* Diggs v. DNA Diagnostic Ctr., No. W2012-01617-COA-R3-CV, 2013 WL 3972191, at *4 (Tenn. Ct. App. Aug. 2, 2013) (holding that voluntary dismissal is tantamount to waiving the right of appeal); Metro. Dev. & Hous. Agency v. Hill, 518 S.W.2d 754, 760–61 (Tenn. Ct. App. 1974) (holding that a party cannot appeal from a judgment that they voluntarily recognized the validity of).

57. Motorcarrier Petroleum Grp. v. T. R. Auto Truck Plaza, No. 02A01-9509-CV-00207, 1996 WL 266652, at *2 (Tenn. Ct. App. May 21, 1996).

> isfied party. Thus . . . arbitration, instead of ending would tend to increase litigation.[58]

Obviously, the above passage, in stating there is "no right of appeal," is partially mistaken or at least misleading with regard to TUAA because there is definitely a right of appeal through the vacatur process of Tenn. Code Ann. sections 29-5-313 and 29-5-314. Therefore, the better interpretation of the above passage is that the Tennessee Supreme Court was essentially emphasizing the importance of finality in arbitration.

In another aspect of the need for finality in arbitration, the law advances party autonomy and freedom of contract. A 1997 Tennessee Court of Appeals case observed,

> These parties signed a contract with an arbitration clause. It is for the arbitrator to decide the legal obligations of the parties, based upon the legal principles applicable to the fact of this case. *Since the parties agreed to arbitration, it is not for the courts to decide their controversies*.[59]

Other courts explicitly acknowledge this freedom of contract policy in their decisions construing the local version of the Uniform Arbitration Act. Thus, according to the Connecticut Supreme Court in *L & R Realty v. Connecticut National Bank*,[60]

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58. *Arnold*, 914 S.W.2d at 449, 451 (alterations in original) (quoting Carolina Va. Fashion Exhibitors Inc. v. Gunther, 255 S.E.2d 414, 420 (N.C. Ct. App. 1979)).

59. B.L. Hodge Co. v. Roxco, Ltd., No. 03A01-9704-CH-00144, 1997 WL 644960, at *4 (Tenn. Ct. App. Oct. 16, 1997) (emphasis added); *see also* Pyburn v. Bill Heard Chevrolet, 63 S.W.3d 351, 357 (Tenn. Ct. App. 2001) ("[P]arties are free to structure an arbitration agreement as they see fit."); Jones v. Cubberley, No. 03A01-9210-CH-00370, 1993 WL 17721, at *1 (Tenn. Ct. App. Jan. 29, 1993) ("Courts are justified in exercising great caution when asked to set aside an arbitration award, which is the product of the theoretically informal, speedy and inexpensive process . . . freely chosen by the parties." (quoting Hooten Const. Co. v. Borseberry Const. Co., 769 P.2d 726, 727 (1989))).

60. 715 A.2d 748, 753 (Conn. 1998); *accord* Miller v. Miller, 707 N.W.2d 341, 345 (Mich. 2005); Peterson & Simpson v. IHC Health Servs., Inc., 217 P.3d 716, 721 (Utah 2009).

"[a]rbitration agreements illustrate the strong public policy favoring freedom of contract and the efficient resolution of disputes."[61]

It would be a mistake, however, to conclude that TUAA pursues the goal of finality in every aspect. Other objectives besides finality are important. Balanced against the strong finality policy is the need to avoid excessive emphasis on unchangeable outcomes. Some TUAA examples of provisions placing proper emphasis on objectives other than finality are Tenn. Code Ann. section 29-5-302, which requires written arbitration agreements, and Tenn. Code Ann. section 29-5-307, which precludes a party from waiving the right to representation by an attorney at an arbitration hearing or other proceeding.[62]

III. TUAA AGREEMENTS, AWARDS, AND RELATED PROCEDURES

A party challenging an arbitration award may seek the relief from a court or the remedy may arise after a court orders a submission to the arbitrators.[63] Upon application of a party, the court under Tenn. Code Ann. section 29-5-312 shall confirm an award, unless a party, acting within the time limits found in TUAA,[64] urges grounds for vacating, modifying, or correcting the award.[65]

The above statute, in allowing "confirmation," is "primarily a mechanism whereby a court adds its imprimatur to an arbitrator's decision."[66] Put another way, the confirmation of an arbitration award occurs in a summary proceeding where the court converts

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61. *L & R Realty*, 715 A.2d at 753; *see also* THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 36 (4th ed. 2012) ("[C]ontract freedom, [is] a theme that runs through the core of the U.S. law of arbitration.").

62. T.R. Mills Contractors, Inc. v. WRH Enters., L.L.C., 93 S.W.3d 861, 869 (Tenn. Ct. App. 2002).

63. TENN. CODE ANN. § 29-5-310 (2012).

64. *See* TENN. CODE ANN. §§ 29-5-313 to -314.

65. TENN. CODE ANN. § 29-5-312.

66. United Steel Workers Local Union 978 v. Packaging Corp., No. 1:09-cv-01055, 2010 WL 396353, at *4 (W.D. Tenn. Jan. 27, 2010) (stating a reviewing court under TENN. CODE ANN. § 29-5-312 is not free to add its own interpretation of the award).

the final arbitration award into the final judgment of the court.[67] Either party to the arbitration decision may invoke vacatur as a remedy[68] but the alleged excessiveness or inadequacy of the award is generally not grounds for appeal absent one of the statutory grounds for challenge, such as fraud, corruption, or other misconduct.[69]

Where the aggrieved party petitions to vacate the award by authority of Tenn. Code Ann. section 29-5-313[70] (discussed above), the prevailing party has no requirement to file a counter petition to confirm. Instead, the prevailing party, in answering the petition to vacate, may include a request for the court to confirm the award.[71] If neither party appeals the trial court's confirmation or vacatur of the award, then neither party has preserved its right to appellate review of the trial court's judgment.[72]

An arbitration decision carries the "same dignity" as a court of competent jurisdiction in matters of res judicata or collateral estoppel.[73] Because of these issues, a party might contend that a subsequent court cannot give preclusive effect (in the sense of collateral estoppel) to an arbitral award if it lacks detailed findings of fact. Concededly, no requirement exists for an arbitrator's detailed findings of fact and conclusions of law unless the parties agree to this documentation requirement in their submission.[74] Nevertheless, courts have found that the absence of detailed findings of fact

67. D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006); Farmers Crop Ins. All. v. Latux, 422 F. Supp. 2d 898, 899 (S.D. Ohio 2006); 2 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 40:5 (3d ed. 2013).

68. *See* TENN. CODE ANN. 29-5-313(a)(1) (providing that a "party" upon application may seek the remedy).

69. *Id.*; *see* 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:129 (4th ed. 2001).

70. *See supra* notes 63–65 and accompanying text.

71. Morgan Keegan & Co. v. Smythe, 401 S.W.3d 595, 608 (Tenn. 2013).

72. Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp., 320 S.W.3d 252, 257 (Tenn. 2010) (stating that it is not enough for an agreement to address an appeal from an arbitrator's award).

73. Turpin v. Love, 1973 WL 16997 (Tenn. Ct. App. Aug. 14, 1973) (deciding case based on pre-TUAA law).

74. *See infra* notes 456–75 and accompanying text.

is not "necessarily fatal" if preclusion can be "necessarily implied from the nature of the claim and award."[75]

TUAA does not address the subject of remands by the court to the arbitrator. As a suggested strategy for the practitioner, FAA case law can provide a helpful analogy. Although the cases are not unanimous, the basic rule should be that remand is proper where the arbitrator is the only ruling body sufficiently close to the facts of the case to resolve award uncertainties, but where the resolution is clear and beyond significant doubt, no remand should be needed.[76]

IV. VACATUR AND MODIFICATION OF AWARDS—OVERVIEW

A. Substantive Requirements

A court's mere disagreement with the arbitrator's decision is not a basis for vacatur.[77] TUAA governs the scope of judicial review of arbitration awards; therefore, a number of decisions pro-

75. *In re* Beckemeyer, 222 B.R. 318, 321 (Bankr. W.D. Tenn. 1998) (quoting Universal Barge Corp. v. J-Chem, Inc., 946 F.2d 1131, 1137 (5th Cir. 1991)).

76. United Steel Workers Local Union 978 v. Packaging Corp., No. 1:09-cv-01055, 2010 WL 396353 (W.D. Tenn. Jan. 27, 2010) (construing statute); *see id.* at *7 ("The Sixth Circuit 'has recognized the need for an arbitrator's "clarification of an ambiguous award when the award fails to address a contingency that later arises or when the award is susceptible to more than one interpretation."'"); *see also* TENN. CODE ANN. § 27-3-128 (2012) (basing remand on statutory grounds); Mut. Fire, Marine & Inland Ins. v. Norad Reinsurance, 868 F.2d 52, 58 (3d Cir. 1989) ("A district court itself should not clarify an ambiguous arbitration award but should remand it to the arbitration panel for clarification. . . . '[R]emand to the arbitrator is the appropriate disposition . . . when an award is patently ambiguous.'" (quoting Oil, Chem. & Atomic Workers It'l Union Locl 4-367 v. Rohm & Hass, 677 F.2d 492, 495 (5th Cir. 1982))). *But see id.* at 58 ("A remand is inappropriate, however, where it would force a decision of an issue not previously submitted to the arbitrators." (quoting *Oil, Chem. & Atomic Workers*, 677 F.2d at 495)); Fischer v. CGA Comput. Assocs., 612 F. Supp. 1038, 1041 (S.D.N.Y. 1985) (stating that the court should not order a remand where the court can resolve any ambiguities in the award by modification by way of 9 U.S.C. § 11 (2012)).

77. Bangor Gas Co. v. H.Q. Energy Servs. Inc., 695 F.3d 181, 187 (1st Cir. 2012); *see also* United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 599 (1960) ("[C]ourts have no business overruling [the arbitrator] because their interpretation of the contract is different from his.").

vide that TUAA restricts a trial court's review to the statutory circumstances that create grounds for modification or vacation of an arbitration award.[78] Stated more elaborately, the Tennessee Supreme Court has held that (1) an arbitration agreement may not provide for a judicial review of an arbitration award outside TUAA boundaries and (2) TUAA limits the process by which a court may review the arbitrator's award. The upshot is that parties may not make the arbitral decision the judgment or ruling of the trial court and permit an appeal therefrom.[79]

When the case does come up for review, courts presume that an arbitrator has properly performed his duties and "all presumptions and intendments are in favor of an award."[80] Therefore, in an essential strategy, the moving party must allege sufficient facts showing that grounds exist for overturning the arbitrator's award decision.[81]

Where a party files an objection to the award, the court, under Tenn. Code Ann. section 29-5-313(a), "shall vacate an award" where:

> (A) The award was procured by corruption, fraud or other undue means;
>
> (B) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbi-

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78. D & E Const. Co. v. Robert J. Denley Co., 38 S.W.3d 513, 518 (Tenn. 2001) (quoting Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 447–48 (Tenn. 1996)). For a possible exception to this doctrine regarding common law arbitration, see *infra* Section V.H.

79. Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp., 320 S.W.3d 252, 257 (Tenn. 2010). *See generally* Becky L. Jacobs, Case, Pugh's Lawn Landscape Company, Inc. v. Jaycon Development Corporation*: The Tennessee Court of Appeals Limits the Judicial Review of Arbitration Awards*, 11 TRANSACTIONS: TENN. J. BUS. L. 199 (2009); Tom Cullinan, Note, *Contracting For An Expanded Scope of Judicial Review in Arbitration Agreements*, 51 VAND. L. REV. 395 (1998) (noting contrariety of decisions).

80. Harmon v. Komisar, 15 Tenn. App. 405 (1932); *see also Arnold*, 914 S.W.2d at 448–49 ("[T]he finality that courts should afford the arbitration process weighs heavily in favor of the award.").

81. Smith v. Spears, No. 05-0586, 2005 WL 5467960 (Tenn. Ch. Ct. 2005).

> trators or misconduct prejudicing the rights of any party;
>
> (C) The arbitrators exceeded their powers;
>
> (D) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to Tenn. Code Ann. section 29-5-306 [the statute on hearings], as to prejudice substantially the rights of a party; or
>
> (E) There was no arbitration agreement and the issue was not adversely determined in proceedings under Tenn. Code Ann. section 29-5-303 [the statute on orders and proceedings] and the party did not participate in the arbitration hearing without raising the objection.[82]

A few of these grounds have extensive case law interpretation while others have minimal explanation. For the lesser-interpreted grounds, it is necessary and proper to refer to case law from other jurisdictions construing their analogous version of the Uniform Arbitration Act.[83] Practitioners deciding on strategy should also know that the Tennessee Court of Appeals has observed that FAA and TUAA contain "virtually identical language establishing the relevant grounds for vacating an arbitrator's decision."[84]

The grounds for vacatur are restricted to "exceptional circumstances" reflecting distinctly unacceptable business conduct.[85] These statutory grounds represent "egregious departures" from the

82. TENN. CODE ANN. § 29-5-313(a) (2012).

83. *See* TENN. CODE ANN. § 29-5-320 (stating that Tennessee courts should construe TUAA in light of other jurisdictions considering their version of the Uniform Arbitration Act).

84. Bailey v. Am. Gen. Life & Accident Ins., No. M2003-01666-COA-R3-CV, 2005 WL 3557840, at *8 n.7 (Tenn. Ct. App. Dec. 29, 2005).

85. THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 313 (4th ed. 2012).

parties' arbitration agreement.[86] The United States Court of Appeals for the Fourth Circuit in *Remmey v. PaineWebber, Inc.*,[87] explained at length the policy for limited judicial review in vacatur cases:

> A policy favoring arbitration would mean little, of course, if arbitration were merely the prologue to prolonged litigation. If such were the case, one would hardly achieve the "twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." Opening up arbitral awards to myriad legal challenges would eventually reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality. To avoid this result, courts have resisted temptations to redo arbitral decisions. As the Seventh Circuit put it, "[a]rbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party."
>
> Thus, in reviewing arbitral awards, a district or appellate court is limited to determining "whether the arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it."

A party will not allege valid grounds for vacating or objecting to the award merely because a court of law or equity could not or would not grant the requested relief.[88] In fact, while arbitrators

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86. *See* AmeriCredit Fin. Servs., Inc. v. Oxford Mgmt. Servs., 627 F. Supp. 2d 85, 92 (E.D.N.Y. 2008).

87. 32 F.3d 143, 146 (4th Cir. 1994) (citations omitted); *see also* Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1254 (7th Cir. 1994) ("[Arbitration] is a private system of justice offering benefits of reduced delay and expense. A restrictive standard of review is necessary to preserve these benefits and to prevent arbitration from becoming a 'preliminary step to judicial resolution.'").

88. TENN. CODE ANN. § 29-5-313(a)(2), *construed in* Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 451 (Tenn. 1996).

often have strict limits based on the parties' agreement on what issues they may decide, they can also have a "broad grant of authority to fashion remedies."[89] Where grounds do exist for vacatur, assuming no conflict with the parties' submission, an arbitrator with equitable powers may award declaratory and injunctive relief.[90] Practitioners for prevailing parties are strongly advised to be proactive in their strategy for suggesting creative remedies for capitalizing on a favorable decision.

B. Procedural Requirements

When seeking to vacate an award, a party under TUAA ordinarily must file the application within ninety days after receipt of the award decision.[91] In accordance with Tenn. Code Ann. section 29-5-313(a), where the objection is based upon corruption, fraud, or other undue means, the party must seek redress within ninety days after the party knows, or should have known, such grounds.[92] If the court denies the application to vacate and no motion to modify or correct the award is pending, the court must confirm the award.[93]

Where the court determines to vacate the award, the court may order an arbitral rehearing under the following criteria.[94]

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89. Cal-Circuit ABCO, Inc. v. Solbourne Comput., Inc., 848 F. Supp. 1506, 1509 (D. Colo. 1994) (citing decisions).

90. Pyburn v. Bill Heard Chevrolet, 63 S.W.3d 351, 365–66 (Tenn. Ct. App. 2001) (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)); *see also* E.R. Tan, Annotation, *Availability & Scope of Declaratory Judgment Actions in Determining Rights of Parties, or Powers and Exercise Thereof by Arbitrators, Under Arbitration Agreements*, 12 A.L.R. Fed. 3d 854 (1967); M.L. Cross, Annotation, *Power of Arbitrators to Award Injunction or Specific Performance*, 70 A.L.R. Fed. 2d 1055 (1960).

91. TENN. CODE ANN. § 29-5-313(b).

92. *Id. But see* Blount Excavating, Inc. v. Denso Mfg. Tenn., Inc., No. 03A01-9903-CV-00112, 1999 WL 1068678, at *5 (Tenn. Ct. App. Nov. 29, 1999) (stating that time limits not controlling where the proceeding lacked the essential characteristic of being an arbitration proceeding under TUAA); Funk v. Target Nat'l Bank/Target Visa, No. E2006-02010-COA-R3-CV, 2007 WL 1555843 (Tenn. Ct. App. May 30, 2007) (noting ninety day required timeframe to apply for application to vacate an arbitration under TENN. CODE ANN. § 29-5-313(b) (1983), and finding arbitration award void for lack of signature by an arbitrator).

93. TENN. CODE ANN. § 29-5-313(d).

94. *Id.* § 29-5-313(c).

First, except where the court vacates the award where there was no arbitration agreement and the party did not participate in the hearing without raising an objection, the court may order a rehearing before new arbitrators.[95] If the agreement designates the process for selecting any new arbitrators, the agreement will control on identifying the new arbitrators.[96] If the agreement fails to provide such a provision, the court will select the arbitrators.[97] Second, if the court vacates the award because the arbitrators exceeded their powers, unjustifiably refused to postpone the hearing, or prejudicially refused to hear a party's material evidence, the court may order a rehearing before either the same arbitrators who made the award or their duly appointed successors.[98] The rehearing process must again produce a timely award based on the arbitration agreement and requires a time frame that commences from the date of the order.[99]

Courts should be wary of ordering a rehearing if it would be contrary to the judicial policy of promoting efficiency. Thus, where the rehearing would impose needless delay and cost and would create another round of proceedings where the court must again decide whether to confirm the award decision, such a process "would merely serve to exalt form over substance."[100]

Two concepts, vacatur and correction/modification of awards—are theoretically distinct but often closely related in practice. In addition to, or along with, requesting vacatur, a party may seek correction or modification of an award.[101] Where the movant submits an application for modification or correction within ninety

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95. *Id.*

96. *Id.*; *see also id.* § 29-5-304 (describing judicial selection of arbitrators).

97. *Id.* § 29-5-304 (2012) (describing process).

98. *Id.* § 29-5-313(c).

99. *Id.*

100. Spector v. Torenberg, 852 F. Supp. 201, 207 (S.D.N.Y. 1994).

101. TENN. CODE ANN. § 29-5-314(c). This statute applies only to the enumerated events. United Steel Workers Local Union 978 v. Packaging Corp. of Am., No. 1:09-cv-01055, 2010 WL 396353, at *4 (W.D. Tenn. Jan. 27, 2010) (distinguishing use of TENN. CODE ANN. § 29-5-312 on confirmation of awards). *See generally* 2 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 40:4 (3d ed. 2013) (addressing modification of awards).

days after receipt of the award decision, the court shall modify or correct the award in the following circumstances:

> (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;[102]
>
> (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
>
> (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.[103]

In granting the application, the court shall duly modify and confirm the award as corrected. Otherwise, the court must confirm the original award,[104] which in either instance shall be enforceable as any other court judgment or decree.[105] Practitioners should carefully observe the distinctions between "correction/modification" and "vacatur" of the award and make the strategic choice in seeking one or both remedies as necessary.

Practitioners must also be acutely aware of how the appellate courts review other closely related questions about whether these issues pertain to questions of fact or questions of law. The identification of the ruling legal standards is a question of law that Tennessee appellate courts review *de novo*. Similarly, the application of the law to facts and to mixed questions of law and fact is reviewed *de novo*.[106] "When the review of an arbitration decision raises a question of law, the [trial] court reviews the question de

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102. *Compare* TENN. CODE ANN. § 29-5-314(a), *with* 4 AM. JUR. 2D *Alternative Dispute Resolution* § 224 (2014) (noting the mistake must be apparent on the face of the record and the arbitrator could have corrected the error had it been brought to his attention).

103. TENN. CODE ANN. § 29-5-314(a), (c).

104. *Id.* § 29-5-314(b).

105. *Id.* § 29-5-315; *see also id.* § 29-5-316 (stating rules on judgment roles and docketing); *id.* § 29-5-319 (rules on making of appeals).

106. Franklin City Bd. of Educ. v. Crabtree, 337 S.W.3d 808, 811 (Tenn. Ct. App. 2010).

novo, as does the court of appeals."[107] A prominent treatise explains the parameters of this question for review:

> Under the de novo standard of review, questions regarding the arbitrability of an issue, the validity and scope of an arbitration agreement, the waiver of arbitration, the [trial] court's grant or denial of a motion to compel arbitration, the [trial] court's grant of summary judgment in a suit to vacate the arbitration award, the district court's confirmation of an award, and the [trial] court's analysis of compliance with statutory requirements are reviewed de novo by the court of appeals.[108]

Under TUAA, appeals as a matter of right to the Tennessee Court of Appeals are taken in the "same manner and to the same extent" as occur with appeals from orders or judgments in the typical civil action.[109] Thus, under Tenn. R. App. Rule 4(a), a party making an appeal as of right must file the action within thirty days after the date of entry of the judgment in question. If the trial court dismissed the action, then Tenn. R. App. Rule 3 comes into play.[110] In a Rule 3 appeal, the parties have "broad latitude" to raise issues, consistent with the other rules of appellate procedure.[111] When the party takes an interlocutory appeal under Tenn. R. App. 9, such as an interlocutory appeal from the trial court's order to partially vacate an arbitration award, the only valid issue is the one(s) the trial court granted a party permission to address in such an interlocutory appeal.[112] Where the trial court has granted a motion to compel arbitration of an issue, the trial court should stay the matter and not

107. 2 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 39:13 (3d ed. 2013).

108. *Id.* § 39:14.

109. TENN. CODE ANN. § 29-5-319(b).

110. Thompson v. Terminix Int'l Co., No. M2005-02708-COA-R3-CV, 2006 WL 2380598 (Tenn. Ct. App. Aug. 16, 2006).

111. Smith v. Hukowicz, No. M2001-01320-COA-R9-CV, 2003 WL 132483, at *6 (Tenn. Ct. App. Jan. 16, 2003) (quoting Heatherly v. Merrimack Mut. Fire Ins. Co., 43 S.W.3d 911, 914 (Tenn. Ct. App. 2000)).

112. *Id.*

dismiss it.[113] If the issue regarding arbitration is separable from the rest of the case, the trial court may order a stay for only that issue.[114]

Because a trial court reviewing an arbitration award functions more like an appellate body subject to an extremely narrow standard of review, Tennessee appellate courts do not equate an order vacating an arbitration award and ordering a new arbitration with an order granting a new trial.[115] The Tennessee Supreme Court has succinctly explained the posture of a case where the trial court issues an order vacating an arbitral award:

> An order that vacates an arbitration award and orders a second arbitration is an order "denying confirmation of an award" for the purposes of Tenn. Code Ann. section 29-5-319(a)(3), regardless of whether the party opposing the petition to vacate the award filed a separate cross-petition for confirmation under Tenn. Code Ann. section 29-5-312 or whether the trial court has expressly denied confirmation in its written order.[116]

Most courts hold that, where a party does not invoke the right of appeal under the appropriate procedural vehicle, this omission generally will be a waiver of the moving party's rights regarding enforcement of arbitration provided the opposing party was prejudiced thereby.[117]

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113. *Terminix Int'l Co.*, 2006 WL 2380598, at *3 (stating that an order granting a motion to compel arbitration and to stay the action is not directly appealable under TENN. CODE ANN. § 29-5-319 (2012)).

114. *Id.* at *18. While very few cases address this point in Tennessee, a number of other jurisdictions do so more extensively. *See* 1 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 11:1 (3d ed. 2013).

115. Morgan Keegan & Co. v. Smythe, 401 S.W.3d 595, 611 (Tenn. 2013).

116. *Id.* at 612; Morgan Keegan & Co. v. Starnes, No. W2012-00687-COA-R3-CV, 2014 WL 2810209, at *4 (Tenn. Ct. App. June 20, 2014). *See generally* R. A. Vinluan, Annotation, *Appealability of Judgment Confirming or Setting Aside Arbitration Award*, 7 A.L.R. Fed. 3d 608 (1966) (providing an annotation of federal and state arbitration decisions).

117. Long v. Miller, No. E2006-02237-COA-R3-CV, 2007 WL 2751663, at *7 (Tenn. Ct. App. Sept. 21, 2007) (untimely appeal deemed a waiver).

V. TUAA GROUNDS FOR VACATUR

A. "Vacatur" as a Judicial Control Mechanism

In legal parlance, "vacatur" is the act of annulling or setting aside an entry of record or a judgment.[118] Tennessee appellate decisions have stated that TUAA in Tenn. Code Ann. section 29-5-313, discussed below, contains the exclusive grounds for annulling an award,[119] which means that the parties and courts may not expand (or inferentially restrict) the statutory grounds for review.[120]

A court may not vacate an award merely because it disagrees with the arbitrator[121] or concludes that the dollar value of the award was incorrect.[122] Thus, vacatur is not a vehicle for a court to render a decision based on the judge's view of the equities or of an ideal state of the law.[123] A "real party in interest" type analysis

118. Walter v. Gunter, 788 A.2d 609, 614 n.8 (Md. 2002) (citing BLACK'S LAW DICTIONARY (5th ed. 1979)). For additional commentary on vacatur, see Thomas H. Oehmke, *Appealing Adverse Arbitration Awards*, 94 AM. JUR. *Trials* § 211 (2004); Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509 (2009); Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443 (1998); Eric Lucentini, Note, *Taking A Fresh Look at Vacatur of Awards Under the Federal Arbitration Act*, 7 AM. REV. OF INT'L ARB. 359 (1996); Laird E. Lawrence & Christopher R. Ward, *The Availability and Scope of Appeal of Arbitration Awards Under the Federal, Uniform and State Acts*, AM. BAR ASS'N BRIEF, Spring 2000, at 32; Marc S. Dobin, *Appealing the Unappealable: Vacating Arbitration Awards,* AM. BAR ASS'N BRIEF, Fall 1996, at 69.

119. Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 448–49 (Tenn. 1996); Davis v. Reliance Elec. Indus., 104 S.W.3d 57, 61 (Tenn. Ct. App. 2002) (stating that courts are "limited to the statutory grounds").

120. *Arnold*, 914 S.W.2d at 448–49.

121. *Id.*; Adams TV of Memphis, Inc. v. Int'l Bhd. of Elec. Workers, Local 474, No. 48639 T.D, 1996 WL 590434, at *2 (Tenn. Ct. App. Oct. 15, 1996); *see also* Lagstein v. Certain Underwriters at Lloyd's, London, 607 F.3d 634, 642 (9th Cir. 2010) (stating that courts will not vacate an award just because the court might have interpreted the contract differently); Emp'rs Ins. of Wausau v. Nat'l Union Fire Ins. of Pittsburgh, 933 F.2d 1481, 1486 (9th Cir. 1991) (noting that no authority exists to vacate an award because of an arbitrator's alleged error in contract interpretation).

122. *Lagstein*, 607 F.3d at 641.

123. Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173, 886 F.2d 1200, 1204 (9th Cir. 1989) (en banc).

governs which claimant can bring a vacatur case; thus, a corporate relationship can be sufficient depending on the facts to permit a corporation that is not a party to the arbitration agreement to bring a claim that belongs to an affiliated entity.[124]

The theme of vacatur is that parties are entitled to a fair hearing, but not a perfect one.[125] Vacatur of an award is designed to occur in "rare instances;"[126] one case even mentions the "severe remedy of vacatur."[127] Where the record reveals as little as a "barely colorable" justification for the arbitration decision, courts typically will sustain the outcome,[128] even if the court is convinced that the arbitrator made the "wrong call" on the law.[129]

Courts view vacatur through the lens of deciding arbitration cases expeditiously and at lower cost than ordinary litigation.[130] Therefore, as one commentator observes, "Anyone attempting to vacate an arbitrator's decision has an uphill battle inasmuch as it is the stated policy of the courts to give every intendment of validity to an award."[131] No statistics were found regarding the relative merits in Tennessee of arbitration versus litigation in terms of outcomes and lower cost.

In deciding vacatur, the trial court should make findings of fact and conclusions of law. The trial court must "accord defer-

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124. *In re* Fried, Krupp, GmbH, Krupp Reederei Und Brennstoff-Handel-Seeschiffarht, 674 F. Supp. 1022, 1026 n.1 (S.D.N.Y. 1987).

125. *Emp'rs Ins. Of Wasau*, 933 F.2d at 1491.

126. *See* Wachtel v. Shoney's, Inc., 830 S.W.2d 905, 909 (Tenn. Ct. App. 1991) (citing Ierna v. Arthur Murray Int'l, Inc., 833 F.2d 1472, 1476–77 (11th Cir. 1987)).

127. *Lagstein*, 607 F.3d at 647; *see also* THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 58 (4th ed. 2012) ("Vacatur . . . is exceedingly unlikely to occur.").

128. *In re* Andros Compania Maritima, 579 F.2d 691, 704 (2d Cir. 1978); F. Hoffman-La Roche Ltd. v. Qiagen Gaithersburg, Inc., 730 F. Supp. 2d 318, 326 (S.D.N.Y. 2010).

129. *F. Hoffman-La Roche Ltd.*, 730 F. Supp. 2d at 326.

130. Cat Charter, L.L.C. v. Schurtenberger, 646 F.3d 836, 846 (11th Cir. 2011).

131. Neil A. Helfman, *Establishing Statutory Grounds to Vacate an Arbitration Award in Nonjudicial Arbitration*, 27 AM. JUR. 3D *Proof of Facts* § 103 (1994).

ence" to the arbitrator's award,[132] which means that the scope of review is "narrow" and "limited."[133] One reason for this judicial deference is that the parties have contracted to have the dispute settled by the arbitrator, and therefore, they have agreed to accept his view of the facts and the meaning of the contract.[134] Where a trial court considers the award in light of a motion to vacate, it will consider "evidence of fairness incident to the arbitration."[135] Furthermore, in conformance with general principles of appellate review, a party may not acquiesce in the arbitration proceeding without objection and then, disappointed by the result, raise a complaint before the court that the party could earlier have presented to the arbitrator.[136]

Another strong reason counsels against liberal grounds for overturning an arbitral decision: the reviewing court is *not* considering a decision of another person or board that is part of the state's governmental apparatus. The United States Supreme Court observed in *Alexander v. Gardner-Denver Co.*,

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends

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132. Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 448 (Tenn. 1996); La. Safety Sys., Inc. v. Tengasco, Inc., No. E2000-03021-COA-R3-CV, 2001 WL 1105395, at *4–5 (Tenn. Ct. App. Sept. 21, 2001).

133. *Arnold*, 914 S.W.2d at 448; *see also* Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co., 918 F.2d 1215, 1218 (5th Cir. 1990) ("[J]udicial review of an arbitration award is extraordinarily narrow and this Court should defer to the arbitrator's decision when possible." (quoting Antwine v. Prudential Bache Sec. Inc., 899 F.2d 410, 413 (5th Cir. 1990))).

134. Bull HN Info. Sys., Inc. v. Hutson, 229 F.3d 321, 330 (1st Cir. 2000) (citing United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 37–38 (1987)). For an extensive discussion of this issue in Tennessee, see *Arnold*, 914 S.W.2d at 452.

135. Jones v. Cubberley, No. 03A01-9210-CH-00370, 1993 WL 17721, at *1 (Tenn. Ct. App. Jan 29, 1993) (stating that an evidentiary hearing is not required when the movant is merely attempting to retry the merits of the arbitration).

136. Parr v. Tower Mgmt. Co., No. 01A01-9811-CV-00573, 1999 WL 415169, at *4 (Tenn. Ct. App. June 23, 1999).

> the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement.[137]

Because it is "axiomatic" that no state action occurs with the conduct and rulings of a private arbitrator, arbitration procedures are not susceptible to a constitutional due process challenge.[138]

While the courts routinely emphasize the need for speed and cost savings as the driving policy for limited vacatur review,[139] Tennessee courts infrequently mention (if at all) an important countervailing policy. Even conceding that the arbitrator is not a public officer, the party prevailing in the arbitration can invoke the coercive power of the state to enforce the judgment. To this extent, the arbitrator is an adjunct of the state and the law must account for this involvement.

Several sister jurisdictions give more weight to the public policies that flow from the arbitrator's de facto status as part of the governmental apparatus. As the District of Columbia Court of Appeals observed in *Wolf v. Sprenger & Lang, PLLC*, a necessary counterweight to arbitral speed and efficiency is "the need to establish justified confidence in arbitration among the public."[140] A New Jersey case also emphasizes that "it is our strongly held view that honest, fair and impartial arbitration is as important as the fi-

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137. 415 U.S. 36, 52 n.16 (1974) (quoting Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016 (1955)).

138. *See Davis*, 59 F.3d at 1190. ("[T]he state action element of a due process claim is absent in private arbitration cases.") (citing Fed. Deposit Ins. Corp. v. Air Fla. Sys., Inc., 822 F.2d 833, 842 n.9 (9th Cir. 1987)). The Uniform Arbitration Act procedures are constitutional. *See* 1 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 7:3 (3d ed. 2013); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 1642–43 (2005) (stating that there is no violation of Fourteenth Amendment due process or Seventh Amendment jury trial guaranty).

139. *E.g.*, Cat Charter, L.L.C. v. Schurtenberger, 646 F.3d 836, 846 n.17 (11th Cir. 2011); Schmidt v. Finberg, 942 F.2d 1571, 1573 (11th Cir. 1991).

140. 86 A.3d 1121, 1133 (D.C. 2013) (quoting Bolton v. Bernabei & Katz, P.L.L.C., 954 A.2d 953, 959 (D.C. 2008).

nality of arbitration."[141] As the Vermont Supreme Court has stated,

> To the extent that justified confidence in arbitration is established, it can only aid the courts in meeting the public's need for speedy, inexpensive and fair dispute resolution. The courts must respect an arbitrator's determinations; otherwise, those determinations will merely add another expensive and time consuming layer to the already complex litigation process. If the courts merely rubber-stamp arbitrators' decisions, however, litigants will hesitate to entrust their affairs to arbitration. *It is this delicate balance which courts reviewing arbitration decisions must strive to attain*.[142]

Because the run of Tennessee cases omit this co-equal policy governing vacatur, a strong argument exists that such decisions fail to capture the full function of vacatur in arbitration matters.

B. Record Review in Vacatur Cases

Parties may arrange for a verbatim transcript of the arbitration hearing.[143] Because TUAA does not require a transcript, parties might bypass the opportunity, creating a situation where an appellate court must review cases without this information.[144] Consistent with TUAA's narrow standard of review, a 1999 Tennessee Court of Appeals opinion said that the likely outcome with a trial record that lacks a transcript of the proceedings is that the appellate court will have "no basis" to find that the decision below was "clearly erroneous" as to warrant reversal.[145] Along the same

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141. Barcon Assocs. v. Tri-Cnty. Asphalt Corp., 430 A.2d 214, 219 (N.J. 1981).

142. R. E. Bean Constr. Co. v. Middlebury Assocs., 428 A.2d 306, 309 (Vt. 1980) (emphasis added).

143. Parr v. Tower Mgmt. Co., No. 01A01-9811-CV-00573, 1999 WL 415169, at *6–7 (Tenn. Ct. App. June 23, 1999).

144. *See id.*

145. *Id.* at *7 (quoting Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 449 (Tenn. 1996)); s*ee also* Kline v. O'Quinn, 874 S.W.2d 776, 783 (Tex. App. 1994) (noting that without a transcript of the arbitration proceedings, a court must presume that "adequate evidence" supports the award).

lines, a Wyoming arbitration decision states that absent a record, the court must presume that the evidence was sufficient and that the arbitrator was fair and impartial and acted within his legal authority.[146]

A related issue is that TUAA has no requirement for arbitrator findings of fact and rulings of law. The arbitral decision could be as minimal as a lump sum award with no accompanying rationale.[147] A leading 1996 Tennessee Supreme Court decision, *Arnold v. Morgan Keegan & Co.*, expresses concerns that a different and overly-burdensome standard to make more elaborate findings and conclusions would encourage appellate courts to review *de novo* the trial court's rulings on vacatur and undercut the goal of speedy and efficient resolution of controversies:

> The agreement in this case provided that the arbitrators were not required to make written findings of fact and law. Such is normally the case. Thus, under usual circumstances, any ground for vacating or modifying the arbitration award will usually appear on the face of the award, not within the transcript. It would be unfair and incongruous to hold that an arbitration award in hearings in which a transcript was made is more open to attack than in a case in which no transcript was made. Thus, the case under submission was no more open to review by the trial court than was any other arbitration case.
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146. *In re* Wyo. Game & Fish Comm'n, 773 P.2d 941, 994–95 (Wyo. 1989); *see also* Anzilotti v. Gene D. Liggin, Inc., 899 S.W.2d 264, 267 (Tex. App. 1995) ("Without a record, we are to presume that adequate evidence was presented to support the arbitrator's award."); Rutter v. McLaughlin, 612 P.2d 135, 136 (Idaho 1980) (missing portions of a record are presumed to support the arbitrator's decision).

147. *See in re* Koch Oil, S.A. & Transocean Gulf Oil Co., 751 F.2d 551, 554 (2d Cir. 1985); Kurt Orban Co. v. Angeles Metal Sys., 573 F.2d 739, 740 (2d Cir. 1978) ("Arbitrators are not required to disclose the basis upon which their awards are made . . . . [C]ourts will not look beyond the lump sum award in an attempt to analyze the reasoning processes of the arbitrators." (citation omitted)).

> "The very purpose of arbitration is to avoid the courts insofar as the resolution of the dispute is concerned. The object is to avoid what some feel to be the formalities, the delay, the expense and vexation of ordinary litigation. Immediate settlement of controversies by arbitration removes the necessity of waiting out a crowded court docket . . . .
>
> Arbitration's desirable qualities would be heavily diluted, if not expunged, if a trial court reviewing an arbitration award were permitted to conduct a trial *de novo*."[148]

Put another way, courts disdain "[t]hinly veiled attempts to obtain appellate review of an arbitrator's decision" on the merits in the guise of a vacatur inquiry.[149]

The *Arnold* decision is in line with the common statement that, "[g]enerally, arbitrators are no more obligated to give reasons for an award than is a jury required to explain a verdict."[150] The law also provides that "it is not the function of courts to agree or disagree with the reasoning of the arbitrator[]," but only to assess the decision, and therefore, it becomes much less important for the reviewing court to analyze the arbitrator's rationale.[151] Because an arbitrator can make an award based on broad principles of fairness and equity, courts have concluded that to require detailed factual and legal conclusions would deprive the arbitrator of this discre-

148. *Arnold*, 914 S.W.2d at 449 (quoting Boyd v. Davis, 897 P.2d 1239, 1242 (Wash. 1995)); *see also* Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 735 (1996) (noting same approach nation-wide).

149. Flexible Mfg. Sys. Pty. Ltd. v. Super Prods. Corp., 86 F.3d 96, 100 (7th Cir. 1996) (quoting Gingiss Int'l, Inc. v. Bormet, 58 F.3d 328, 333 (7th Cir. 1995)).

150. Nat'l Ave. Bldg. Co. v. Stewart, 910 S.W.2d 334, 349 (Mo. Ct. App. 1995); *see also* Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 245 n.4 (1962) (making a similar statement).

151. Guardian Builders, LLC v. Uselton, 154 So. 3d 964, 968 (Ala. 2014); *see also* 2 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 30:6 (3d ed. 2013) ("The general rule is that arbitrators need not provide any reasons for their award, and if the the [sic] award is rationally inferable from the facts it must be confirmed.").

tion and would convert the vacatur process into a misguided search for mistake of law or fact in the decision.[152] The Tennessee Supreme Court in the *Arnold* case emphatically stated this approach is not permissible:

> Courts, thus, do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined. As long as the arbitrator is, arguably, construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision.[153]

The standard is so liberal that no requirement exists for the arbitrator to provide precise mathematical calculations of the damages.[154]

Is there an out for the parties to modify the rules on arbitrator explanations for the decision? It will aid the analysis on this point by looking to similar arbitration statutes in other jurisdictions. As indicated above, while an arbitrator does not necessarily exceed his authority under the FAA, 9 U.S.C. § 10(a)(4), when he fails to provide reasons for the award, he can still exceed his authority by failing to render an award in the form required by the arbitration agreement.[155] Thus, for example, the arbitrator can exceed his authority by disregarding a requirement in the parties' submission to make findings of fact and conclusions of law.[156] If

152. *See* Payton v. Jackson, 756 S.E.2d 555, 557–58 (Ga. Ct. App. 2014).

153. *Arnold*, 914 S.W.2d at 449.

154. Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C., 430 F.3d 1269, 1278 (10th Cir. 2005). Expert witnesses might be needed on damages and a pre-hearing brief could also be advisable. *See* Meyers Assocs., LP v. Goodman, No. 3:14-cv-1174, 2014 WL 5488761, at *13–14 (M.D. Tenn. Oct. 29, 2014) (praising this practice).

155. *See* A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403 (9th Cir. 1992).

156. *See* Cat Charter, L.L.C. v. Schurtenberger, 646 F.3d 836, 843 n.14 (11th Cir. 2011) (rejecting criticism of a federal district court in a different circuit that it would not be possible for an arbitrator to exceed his powers by not

the agreement requires a "reasoned award," such an award can express varying levels of detail that constitutes more than a simple result but less than full-fledged findings of fact and conclusions of law.[157] A fair reading of the above quoted term, nothing else appearing, is that the arbitrator must document an award listing or mentioning expressions or statements that justify his decision.[158] These FAA decisions are good analogous authority in TUAA matters.

The absence of a transcript could create another adverse consequence for claimants. Assume that a transcript exists in fact, but is not part of the record on appeal; accordingly, when a moving party fails to file an available transcript of the proceedings, the appeal can be frivolous under Tenn. Code Ann. section 27-1-122. The result could be that a court may award an appropriate level of damages against the appellant, which can include interest on the judgment and the appellee's expenses.[159]

C. Award Procured by Corruption, Fraud or Other Undue Means (TENN. CODE ANN. Section 29-5-313(a)(1)(A))

No Tennessee cases were found interpreting Tenn. Code Ann. section 29-5-313(a)(1)(A), where an award was procured by corruption, fraud, or other undue means. The most that can be said is that several pre-TUAA decisions from nineteenth century Tennessee courts disapprove of fraudulent arbitral awards.[160] While Tennessee cases largely fail to consider modern-day vacatur based

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doing enough (quoting ARCH Dev. Corp. v. Biomet, Inc., No. 02-C-9013, 2013 WL 21697742, at *4 n.4 (N.D. Ill. July 30, 2003))); *see also* 2 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 34:7 (3d ed. 2013) ("Of course, the parties may, by agreement, require that arbitrators include findings of fact and conclusions of law, and the failure to provide them may subject the award to attack because the arbitrators had exceeded their powers.").

157. *Cat Charter*, 646 F.3d at 844; s*ee also* House v. Vance Ford-Lincoln-Mercury, Inc., 328 P.3d 1239, 1246 (Okla. Civ. App. 2014) (noting standards for detail when the parties' submission required a "reasoned award").

158. *Cat Charter*, 646 F.3d at 845 n.16 (citing the "sparse precedent" addressing the nature of a "reasoned award").

159. Long v. Miller, No. E2006-02237-COA-R3-CV, 2007 WL 2751663, at *10 (Tenn. Ct. App. Sept. 21, 2007).

160. *See, e.g.*, Mathews v. Mathews, 48 Tenn. (1 Heisk.) 669, 674–75 (1870) (stating one party's threat to prosecute the other party for perjury qualified as fraudulent conduct justifying the set aside of the arbitration award).

on corruption, fraud, or other undue means, other jurisdictions construing similar arbitration statutes have set down some well-settled principles.

1. Corruption

Corruption is "the state of being corrupt; a perversion of integrity; bribery," and "corrupt" means "guilty of dishonest practices, as bribery; lacking integrity; crooked: a corrupt judge."[161] The referenced language apparently means the corruption of a party, witness, arbitrator, or other person involved in the proceedings.[162] No Tennessee decisions were found on this theory, and the case law from other jurisdictions is scant as well. The most likely reason is that courts apparently treat "corruption" as a synonym for "fraud."[163]

The above referenced duplication of terminology appears in other grounds under Tenn. Code Ann. section 29-5-313(a)(1). Thus, both Tenn. Code Ann. section 29-5-313(a)(1)(A) ("award procured by corruption") and Tenn. Code Ann. section 29-5-313(a)(1)(B) ("evident partiality . . . corruption") mention "corruption" by the arbitrator. This repeat of like terminology causes confusion. The law and practice of arbitration in Tennessee would be enhanced if the General Assembly clarified Tenn. Code Ann. section 29-5-313 by making clear, non-overlapping grounds for vacatur.

2. Fraud

To the extent it can be differentiated from "corruption," "fraud" requires proof of "bad faith" during the arbitral proceed-

161. Las Palmas Med. Ctr. v. Moore, 349 S.W.3d 57, 69 (Tex. App. 2010) (quoting WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 454, 455 (2003)).

162. *See* William H. Hardie, Jr., *Judicial Review of Arbitration Awards in the Alabama Courts*, 69 ALA. LAW. 435, 436 (2008).

163. *See generally* Andrew M. Campbell, Annotation, *Construction and Application of § 10(a)(1)–(3) of Federal Arbitration Act (9 U.S.C.A. § 10(a)(1)–(3)) Providing for Vacating of Arbitration Awards Where Award Procured by Fraud, Corruption, or Undue Means, Where Arbitrators Evidence Partiality or Corruption and Where Arbitrators Engage in Particular Acts of Misbehavior*, 141 A.L.R. Fed. 1 (1997).

ings, such as bribery, undisclosed arbitrator bias, or willfully destroying or withholding evidence.[164] The movant must establish the following elements of fraud: (1) proof by clear and convincing evidence, (2) the claimant's exercise of due diligence prior to or during the arbitration would not have revealed the fraud, and (3) a material relation existed with respect to an issue in the arbitration such that the fraud prevented the complaining party from fully and fairly presenting his case (which differs from whether the outcome would have been different had the fraud not occurred).[165] The fraud must be willful and deliberate but this category would exclude constructive fraud, quasi-fraud, or any other merely fraud-like conduct.[166]

Fraud is difficult to prove in vacatur cases because the claimant will often experience serious challenges in proving the alleged conduct directly influenced the outcome.[167] Based on the strong policy favoring arbitration, and to preserve finality,[168] there needs to be "an extremely high degree of improper conduct," more so than the common law variety of fraud.[169] The party alleging fraud also must show that the fraud was not discoverable with due diligence before or during the arbitration proceeding.[170] One variety (among numerous possible circumstances) where an award will be procured by fraud would be where the arbitrator engaged in numerous ex parte contacts with one of the parties and this arbitra-

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164. MPJ v. Aero Sky, L.L.C., 673 F. Supp. 2d 475, 494 (W.D. Tex. 2009) (citations omitted).

165. MidAmerican Energy Co. v. Int'l Bhd. of Elec. Workers Local 499, 345 F.3d 616, 622 (8th Cir. 2003); *see* Hardeman v. Burge, 18 Tenn. (1 Yer.) 202, 204–05 (1836) (noting that an allegation of arbitrator corruption and misconduct must be proven by clear and conclusive evidence, especially when there has been a long lapse of time).

166. Barber v. Union Carbide Corp., 304 S.E.2d 353, 357 (W. Va. 1983).

167. *See* Delta Mine Holding Co. v. AFC Coal Props., Inc., 280 F.3d 815, 822–23 (8th Cir. 2001).

168. Dogherra v. Safeway Stores, Inc., 679 F.2d 1293, 1297 (9th Cir. 1982) (courts "must be slow" to vacate an award based on fraud).

169. Pac. & Arctic Ry. & Navigation Co. v. United Trans. Union, 952 F.2d 1144, 1148 (9th Cir. 1991); *see* United Trans. Union v. BNSF Ry. Co., 710 F.3d 915, 931 (9th Cir. 2013).

170. *MidAmerican Energy Co.*, 345 F.3d at 622 (citation omitted); Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988) (citation omitted).

tor showed "complete unwillingness to respond, and indifference, to any evidence or argument" in support of the other party's positions.[171] The word "procured" in Tenn. Code Ann. section 29-5-313(a)(1)(A) implements the legislative intent for "a nexus between the alleged fraud and the basis for the [arbitral] decision."[172]

One frequent point of contention in the decisional law is whether the amount of the award alone can evidence arbitrator fraud or corruption. A prominent treatise observes, "To justify setting aside an award based on its inadequacy, the inadequacy must be so strong, gross, and manifest that it would be impossible to state it to a person of common sense without producing an exclamation about its unfairness."[173]

Other issues exist under this type of statute. One common variety of fraud as a basis for vacatur is where a party submits false testimony or other evidence or effects a fraudulent concealment of relevant facts.[174] By contrast, improper non-disclosures of documents during pre-hearing discovery will not suffice for "fraud."[175] It bears noting that as with a number of grounds for vacatur, the same act can qualify under more than one statutory theory. Thus, for example, an ex parte conversation between the arbitrator and

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171. *See United Trans. Union*, 952 F.2d at 1148; *see also* Remmey v. PaineWebber, Inc., 32 F.3d 143, 149 (4th Cir. 1994) ("[T]he party seeking a vacation of an award on the basis of *ex parte* conduct must demonstrate that the conduct influenced the outcome of the arbitration." (quoting M & A Elec. Power Co-op v. Local Union No. 702, 977 F.2d 1235, 1237 (8th Cir. 1992))); Emp'rs Ins. of Wausau v. Nat'l Union Fire Ins. Co., 933 F.2d 1481, 1490–91 (9th Cir. 1991) (moving party must prove prejudice resulting from the ex parte conduct). *But see* Spector v. Torenberg, 852 F. Supp. 201, 210 n.9 (S.D.N.Y. 1994) ("[T]he burden may shift to the party seeking confirmation [of the award] to demonstrate the absence of prejudice if the party seeking vacatur makes a preliminary showing that the *ex parte* contacts were carried out in [a] secretive or conspiratorial manner.").

172. Forsythe Int'l, S.A. v. Gibbs Oil Co. of Tex., 915 F.2d 1017, 1022 (5th Cir. 1990).

173. 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:131 (4th ed. 2001) (citing Second Soc'y of Universalists in Town of Bos. v. Royal Ins., 109 N.E. 384 (Mass. 1915)).

174. George Chamberlin, *Cause of Action to Vacate Arbitration Award on Ground of Corruption, Fraud, or Undue Means in Procuring Award*, *in* 2 CAUSES OF ACTION 2D § 5 (2d ed. 1993).

175. *See* Pontiac Trail Med. Clinic, P.C. v. PaineWebber, Inc., No. 9201972, 1993 WL 288301, at *4 (6th Cir. 1993) (unpublished table opinion).

another person could also qualify as arbitrator misconduct under Tenn. Code Ann. section 29-5-313(a)(1)(B).[176] Tennessee law is unclear on whether a court may set aside an arbitration award where a party, and not the arbitrator, commits the fraud procuring the award.[177] The federal cases do not appear to draw this distinction to excuse a party's misconduct.[178]

3. Undue Means

The phrase "undue means" in a statute allowing vacatur of an arbitration award "signifies '[conduct] akin to fraud and corruption.'"[179] The irregularity for "undue means" must have caused "an unjust, inequitable, or unconscionable award."[180] Some authorities require conduct that involves immoral or illegal grounds.[181] An example could be where the party has obtained an award by improper intimidation or threats against the arbitrator.[182]

The Mississippi Supreme Court has ruled that the quoted term means "nefarious conduct" that "equals intentional malfeasance" which differs from "an incorrect or sloppy conclusion of law,"[183] "simple [errors] of law or fact"[184] or "sloppy or overzeal-

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176. *See* 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:133 (4th ed. 2001).

177. Bishof v. Yarbrough Constr. Co., C.A. No. 02A01-9411-CH-00256, 1996 WL 490629, at *4 n.1 (Tenn. Ct. App. Aug. 29, 1996). *But see* 4 AM. JUR. 2D *Alternative Dispute Resolution* § 227 (2015) (stating that an award may be set aside when one party had ex parte communications with an arbitrator on material issues).

178. *See, e.g.*, Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 n.7 (11th Cir. 1988) (stating "no doubt" that the perjury of a witness constitutes fraud under the FAA).

179. Spiska Eng'g, Inc. v. SPM Thermo-Shield, Inc., 678 N.W.2d 804, 806 (S.D. 2004) (citation omitted); *see* Drinane v State Farm Mut. Auto. Ins., 584 N.E.2d 410, 414 (Ill. App. Ct. 1991).

180. Trombetta v. Raymond James Fin. Servs., Inc., 907 A.2d 550, 570 (Pa. Super. Ct. 2006) (citation omitted).

181. A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403 (9th Cir. 1992) (citation omitted); AmeriPath, Inc. v. Hebert, No. 05-12-00321-CV, 2014 WL 3827834, at *15 (Tex. Ct. App. Aug. 14, 2014) (citation omitted).

182. 2 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION §§ 27:6 to 27:8 (3d ed. 2013).

183. Robinson v. Henne, 115 So. 3d 797, 802 (Miss. 2013) (citation omitted); *see also* Doctor's Assocs. v. Windham, 81 A.3d 230, 237 (Conn. App. Ct.

ous lawyering."[185] As stated more elaborately by the Wisconsin Supreme Court, "[O]ne must conclude the term 'undue means' to include a more comprehensive area of acts of fraud and corruption while simultaneously restricting such expanded area of acts to those acts which are inappropriate, unjustified or improper methods of procuring an arbitration award."[186]

By contrast, "undue means" will be absent where the unfair conduct was ancillary or collateral to the award[187] or where the arbitrator considered evidence that was "merely legally objectionable."[188] Where a party offers a defense (or claim) that the arbitrator decides lacks merit, but another party calls this party's behavior "undue means," this conduct is part of the business of litigation and has no necessary connotation of wrongfulness or immorality.[189] If the party opposite had sufficient notice of the other party's (or the arbitrator's) alleged misdeeds and through due diligence could have avoided their impact, "undue means" would be absent as well.[190]

D. Evident Partiality by an Appointed Neutral Arbitrator or Corruption in any Arbitrators or Misconduct Prejudicing the Rights of Any Party (TENN. CODE ANN. Section 29-5-313(a)(1)(B))

Tenn. Code Ann. section 29-5-313(a)(1)(B) is confusing because it lumps together three different types of misconduct, several of which are already covered under other statutes. Thus, the

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2013) ("[T]o establish 'undue means' . . . a party must prove 'nefarious intent or bad faith' . . . or conduct that is 'immoral if not illegal.'" (quoting *McCollough*, 967 F.2d at 1403)).

184. *Robinson*, 115 So. 3d at 802.

185. Barcume v. City of Flint, 132 F. Supp. 2d 549, 556 (E.D. Mich. 2001) (quoting *McCollough*, 967 F.2d at 1403).

186. City of Manitowoc v. Manitowoc Police Dept., 236 N.W.2d 231, 238 (Wis. 1975).

187. *See* Taheri Law Grp., A.P.C. v. Sorokurs, 98 Cal. Rptr. 3d 634, 639–40 (Cal. Dist. Ct. App. 2009).

188. Am. Postal Workers Union v. U.S. Postal Serv., 52 F.3d 359, 362 (D.C. Cir. 1995) (citation omitted).

189. A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1404 (9th Cir. 1992).

190. Nolan v. Kenner, 250 P.3d 236, 238 (Ariz. Ct. App. 2011); *see* Conoco, Inc. v. Oil, Chem. & Atomic Workers Int'l Union, 26 F. Supp. 2d 1310, 1320 (N.D. Okla. 1998) (citation omitted).

statute in paragraph (a)(1)(B) covers awards reflecting "corruption" or "misconduct," which is also partially the province of paragraph (a)(1)(A). Another difference is that paragraph (a)(1)(B) applies a "prejudice" requirement for arbitrator "corruption" or "misconduct," but paragraph (a)(1)(A) has no requirement for "prejudice" for awards procured through fraud, corruption, or other undue means. The General Assembly should streamline these factors to avoid this duplication and uncertainty.

The remainder of this part of the article will focus on "evident partiality" from Tenn. Code Ann. section 29-5-313(a)(1)(B), which is unmentioned in any other provision of Tenn. Code Ann. section 29-5-313(a)(1).[191]

1. "Evident Partiality" Defined

An essential attribute of arbitration is a neutral and impartial arbitrator.[192] Courts should be highly scrupulous in assessing the impartiality of arbitrators, even more so than their review of the qualifications of judges. The rationale is that the former class of persons have "free rein" to decide the law and the facts, and arbitral decisions are largely exempt from appellate review.[193] Notably, no requirement exists that the award also be unjust to establish this ground for vacatur.[194] A trial court considering a motion for vacatur on this basis has "sound discretion" to decide the issue.[195]

As just indicated, arbitral discretion is not unlimited under either TUAA or the FAA,[196] but complete impartiality or absolute

191. The references to "corruption" and "misconduct" in TENN. CODE ANN. § 29-5-313(a)(1)(B) (2012) have the same interpretation as under TENN. CODE ANN. § 29-5-313(a)(1)(A) (2012).

192. Team Design v. Gottlieb, 104 S.W.3d 512, 520 (Tenn. Ct. App. 2002) (citation omitted). *See generally* 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:132 (4th ed. 2001) ("At common law, an award could be vacated if the arbitrator engaged in simple bias . . . .").

193. Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 149 (1968).

194. 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:132 (4th ed. 2001).

195. Torres v. Piedmont Builders, Inc., 686 S.E.2d 464, 466 (Ga. Ct. App. 2009) (footnote omitted).

196. *See* TENN. CODE ANN. § 29-5-313(a)(1)(B) (2012); 9 U.S.C. § 10(a)(3) (2012).

disinterestedness is not the test.[197] Arbitrators are also not subject to the same standard for disqualification as applies to Article III judges in the federal court system.[198] Because proof of actual bias and outright chicanery "is often impossible to obtain," the majority of courts in the United States do not require this high level of proof for arbitrator bias.[199] Instead, the prevailing test, as in Tenn. Code Ann. section 29-5-313(a)(1)(B), is "evident partiality."[200] Given the nature of the non-disclosure, evident partiality will be found "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."[201]

The claimant should prevail on an "evident partiality" vacatur challenge where the arbitrator either has an actual conflict *or* he knows of, but does not disclose, facts that would lead a reasonable person to believe that a potential conflict exists.[202] The "evident partiality" comes from the nondisclosure itself, regardless of whether the underlying information of its own force establishes partiality or bias.[203]

The Tennessee Court of Appeals succinctly summarized the standard for this ground of vacatur:

> [T]he party challenging the arbitrators' decision must show that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration. The challenging party carries the burden to establish specific facts that indi-

197. Ditto v. RE/MAX Preferred Props., Inc., 861 P.2d 1000, 1003 (Okla. Civ. App. 1993) (citation omitted).

198. Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 82–83 (2d Cir. 1984).

199. Carina Int'l Shipping Corp. v. Adam Mar. Corp., 961 F. Supp. 559, 568 (S.D.N.Y. 1997).

200. *Morelite*, 748 F.2d at 84.

201. *Id.*; *see also* 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:73 (4th ed. 2001) (addressing arbitrator's required scope of disclosure); 2 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION §§ 25:9 to 25:18 (3d ed. 2013).

202. Gianelli Money Purchase Plan & Tr. v. ADM Inv'r Servs., 146 F.3d 1309, 1312 (11th Cir. 1998).

203. Burlington N. R.R. v. TUCO, Inc., 960 S.W.2d 629, 636 (Tex. 1997) (citing Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 147 (1968)).

> cate improper motives on the part of the arbitrator. The alleged partiality must be direct, definite, and capable of demonstration, and an amorphous institutional predisposition toward the other side is not sufficient because that would simply be the appearance-of-bias standard that [the Sixth Circuit] [has] previously rejected. [T]he question before this Court is whether the party challenging the arbitrators' decision has carried its heavy burden to establish specific facts that indicate improper motives on the part of the arbitrator.[204]

The arbitrator's volitional conduct is needed to prove such grounds.[205] An objective test will apply; the arbitrator's decision must reflect that a "reasonable person would have to conclude that an arbitrator was partial to the other party in the arbitration."[206] Partiality also requires more than inference or supposition.[207] An excellent way to draw the ire of the courts in this area is where counsel for a moving party makes repetitive and pejorative charges of arbitrator partiality that amount to a "drumfire of charges" barren of factual support that only satisfy the emotional needs of such counsel and their clients and defeat the whole purpose of arbitration.[208] On the other hand, when entered into evidence in a judicial proceeding, an arbitrator's self-serving declaration that he tried the

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204. Bronstein v. Morgan Keegan & Co., No. W2011-01391-COA-R3-CV, 2014 WL 1314843, at *10–11 (Tenn. Ct. App. Apr. 1, 2014) (citations and internal quotations omitted) (alteration in original); *see also* Morgan Keegan & Co., v. Starnes, No. W2012-00687-COA-R3-CV, 2014 WL 2810209, at *9–10 (Tenn. Ct. App. June 20, 2014) (adopting FAA case law assessing arbitrator evident partiality).

205. *See* Tarpley v. Searcy, No. M2000-03094-COA-R3-CV, 2002 WL 870089, at *3–4 (Tenn. Ct. App. May 7, 2002) (noting that an arbitrator was not evidently partial to a party where he was unaware at the time of the case that the party was married to his nephew's ex-wife).

206. *Bronstein*, 2014 WL 1314843, at *2 (citing Uhl v. Komatsu Forklift Co., 512 F.3d 294, 306 (6th Cir. 2008)); *see also Morelite*, 748 F.2d at 84.

207. *Bronstein,* 2014 WL 1314843, at *10.

208. *See* Hunt v. Mobil Oil Corp., 654 F. Supp. 1487, 1495 (S.D.N.Y. 1987).

case in a fair manner irrespective of the appearance of bias will not necessarily remove the taint.[209]

An award regular on its face may be overturned for statutorily-covered arbitrator misconduct and a reviewing court may consider evidence on this issue extrinsic to the arbitrator's decision.[210] A significant caveat, however, is that where the moving party raises a legitimate issue of undue arbitrator partiality, a court should permit at least limited discovery of the arbitrator.[211] In this way, the moving party will have a fair opportunity to explore the relationship at issue between the arbitrator and the other party.[212]

A panel of arbitrators presents some unique issues on this topic of arbitrator misconduct. The panel can consist of party appointed arbitrators and neutral arbitrators.[213] Notably, this basis for arbitrator disqualification does not necessarily apply to party-appointed arbitrators whom the courts expect to be partial (and perhaps even partisan) to the side recommending the arbitrator's appointment.[214] This test applies only to arbitrators that the parties accept as neutral decision makers.[215] Neutral arbitrators are not the

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209. 6 C.J.S. *Arbitration* § 207 (2014).

210. 4 AM. JUR. 2D *Alternative Dispute Resolution* § 217 (2014); *see also* Team Design v. Gottlieb, 104 S.W.3d 512, 518 n.7 (Tenn. Ct. App. 2002) (stating an award regular on its face cannot be impeached but may be challenged upon objections that go to the alleged misbehavior of the arbitrators).

211. Kauffman v. Haas, 318 N.W.2d 572, 574 (Mich. Ct. App. 1982).

212. *Id.*

213. Winfrey v. Simmons Foods, Inc., 495 F.3d 549, 551 (8th Cir. 2007).

214. *Id.* at 552; Tate v. Saratoga Sav. & Loan Ass'n, 216 Cal. App. 3d 843, 858 (1989) ("[B]ias in a party arbitrator is expected and furnishes no ground for vacating an arbitration award, unless it amounts to 'corruption.'"); *see also* ATSA of Cal., Inc. v. Cont'l Ins. Co., 702 F.2d 172, 175 (9th Cir. 1983) (permitting partisan arbitrators). Under the ABA/AAA Code of Ethics, a party-appointed neutral arbitrator is subject to the same duty of disclosure as any other neutral arbitrator. THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES CANON 2 (AM. BAR ASS'N 1983).

215. Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 759 (11th Cir. 1993) (deeming it unobjectionable where the party-appointed arbitrator consulted with the party about evidence of record after the former's appointment and before the hearing); *see also* U.S. Care, Inc. v. Pioneer Life Ins. Co., 244 F. Supp. 2d 1057, 1064 (C.D. Cal. 2002) (citing cases establishing a lower duty of disclosure for party-appointed arbitrators).

agent of either party and they sit in a quasi-judicial capacity.[216] At the same time, however, party-appointed arbitrators, consistent with the parties' submission, are still required to act in good faith and with integrity and fairness.[217] Consistent with the liberal policy favoring arbitration of disputes, a court may appoint a substitute arbitrator after upholding vacatur against the award based on arbitrator bias.[218]

2. Evidence of Partiality

The relationship raising concerns of arbitrator partiality must be so substantial personally, socially, professionally, or financially from the perspective of a reasonable member of the public aware of all the facts that the relationship casts serious doubt on the arbitrator's impartiality.[219] Consistent with the overarching policy that judicial review of arbitration awards is "narrowly limited," along with the presumption that awards shall be confirmed, the evident partiality basis for vacatur must be "strictly construed."[220]

Courts are "not quick" to set aside an award for the arbitrator's failure to disclose information linking the arbitrator in a relationship with a party,[221] even if such non-disclosure might have violated current ethical norms for arbitrators.[222] The evidence for a meritorious claim must be "direct, definitive and capable of demonstration" versus being merely "remote, uncertain and specu-

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216. *See* Carroll v. Alsup, 64 S.W. 193, 197 (Tenn. 1901); Cowan v. Murch, 37 S.W. 393, 395 (Tenn. 1896).

217. *Sunkist*, 10 F.3d at 759.

218. Third Nat. Bank in Nashville v. WEDGE Grp., Inc., 749 F. Supp. 851, 855 (M.D. Tenn. 1990).

219. Midwest Generation EME, L.L.C. v. Continuum Chem. Corp., 768 F. Supp. 2d 939, 950–51 (N.D. Ill. 2010); Mahnke v. Super. Ct., 103 Cal. Rptr. 3d 197, 206–07 (Cal. Dist. Ct. App. 2009).

220. Gianelli Money Purchase Plan & Tr. v. ADM Inv'r Servs., 146 F.3d 1309, 1312 (11th Cir. 1998).

221. *In re* Andros Compania Maritima, 579 F.2d 691, 700 (2d Cir. 1978); Sanford Home for Adults v. Local 6, IFHP, 665 F. Supp. 312, 317–18 (S.D.N.Y. 1987).

222. *Sanford Home for Adults*, 665 F. Supp. at 318 (noting that the violation under review was "at worst" a "technical violation").

lative."[223] Again, the parties' submission is important in this area, especially when the document establishes ethical rules for arbitrator conduct as a component of the ground rules for the proceeding.

A court will not vacate an award where the only evidence of partiality is that the arbitrator's decision was unfavorable to the complaining party.[224] Arbitrators are empowered to decide what is relevant, material, and cumulative and to determine the rules of procedure.[225] Similarly, the courts have concluded that alleged procedural or evidentiary errors, by themselves, have little or no probative weight that will show bias.[226] Indeed, courts are deferential in this area toward arbitrators to the point that they place their "faith in the 'deterrent value' of an arbitrator's concern for his 'professional reputation,' 'especially where the arbitrator is a lawyer.'"[227] Courts are also sensitive to the prospect that an overly lenient standard of evident partiality could encourage parties to conduct background investigations of arbitrators, which would serve to increase the cost and decrease the finality of arbitration.[228] Another inevitable consequence of such investigations is they would tend to harass arbitrators and to deter them from accepting such service in the future.[229]

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223. *Gianelli*, 146 F.3d at 1312 (quoting Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 117, 1202 (11th Cir. 1982)); Tamari v. Bache Halsey Stuart Inc., 619 F.2d 1196, 1200 (7th Cir. 1980); *see also* New Regency Prods., Inc. v. Nippon Herald Films, Inc., 501 F.3d 1101, 1110 (9th Cir. 2007) ("[C]ourts have rejected claims of evident partiality based on long past, attenuated or insubstantial connections between a party and an arbitrator.").

224. 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:132 (4th ed. 2001).

225. *See* Commercial Risk Reinsurance Co. v. Sec. Ins. Co. of Hartford, 526 F. Supp. 2d 424, 428 (S.D.N.Y. 2007).

226. *See* Areca, Inc. v. Oppenheimer & Co., 960 F. Supp. 52, 56–57 (S.D.N.Y. 1997) ("[F]ederal courts have concluded that evident partiality may not be shown by alleged procedural or evidentiary errors, by legitimate efforts to move the case along, or by failure to follow the rules of evidence." (quoting Sisti v. Merrill, Lynch, Pierce, Fenner & Smith, No. 91 00102-R, 1991 WL 575874, at *3 (E.D. Va. Apr. 22, 1991))).

227. *Sanford Home for Adults*, 665 F. Supp. at 318 (quoting Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983)).

228. *Merit Ins. Co.*, 714 F.2d at 683.

229. *See id.*

The fact patterns regarding arbitrator misconduct are highly varied.[230] The courts will examine whether there are inferences from objective facts that do not comport with arbitral impartiality.[231] A party need not necessarily show proof of "actual bias," but the evidence must go beyond the mere "appearance of bias."[232] Some criteria relevant to the determination of evident partiality are: (1) any personal interest, pecuniary, or otherwise the arbitrator has in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of the relationship to the arbitration; and (4) the proximity in time between the relationship and the arbitration proceeding.[233] Another factor can be the "peculiar commercial practices in the geographic area."[234] Most decisions indicate that a court has no general power to intervene in an ongoing arbitration case, such as a ruling during the proceedings that the judge deems the arbitrator unfairly biased.[235]

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230. *See* 4 AM. JUR. 2D *Alternative Dispute Resolution* § 220 (2014) (noting fact patterns showing or not showing partiality).

231. Pitta v. Hotel Ass'n of N.Y. City, Inc., 806 F.2d 419, 423 (2d Cir. 1986).

232. Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 137 (2d Cir. 2007); *see also* Remmey v. PaineWebber, Inc., 32 F.3d 143, 148 (4th Cir. 1994) (stating that arbitrators "are not held to the ethical standards required of Article III judges" (quoting Peoples Sec. Life Ins. v. Monumental Life Ins., 991 F.2d 141, 146 (4th Cir.1993))); Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150 (1969) (White, J., concurring) (allowing disqualification of arbitrators based on a mere appearance of bias would unnecessarily "disqualify the best informed and most capable potential arbitrators") (relied upon in Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 83 n.3 (2d Cir. 1984)); Woods v. Saturn Distrib. Corp., 78 F.3d 424, 427 (9th Cir. 1996) (requiring "reasonable impression of bias"); Sidarma Societa Italiana Di Armamento Spa, Venice v. Holt, 515 F. Supp. 1302, 1307 (S.D.N.Y. 1981) (finding that it is not enough that the arbitrator's perspective on the case is colored by his personal business experience or that the arbitrator might expect future business from the parties before him).

233. Consol. Coal Co. v. Local 1643, United Mine Workers of Am., 48 F.3d 125, 130 (4th Cir. 1995); Sanford Home for Adults v. Local 6, IFHP, 665 F. Supp. 312, 320 (S.D.N.Y. 1987).

234. Carina Int'l Shipping Corp., 961 F. Supp. 559, 568 (S.D.N.Y. 1997); *Morelite*, 748 F.2d at 84.

235. *Compare* W.J. Dunn, Annotation, *Disqualification of Arbitrator by Court or Stay of Arbitration Proceedings Prior to Award, on Ground of Interest,*

A good example of an insubstantial connection between the arbitrator and a party that does not show undue partiality occurred in *Morgan Keegan & Co., Inc. v. Starne*.[236] In this case, the arbitrator and a party had a superficial, professional acquaintanceship where they were employed by the same company in different cities more than twenty years before the arbitration.[237] Another situation that is more trivial than probative is where the arbitrator appeared disinterested, shrugged his shoulders, discouraged further statements from the claimant, or even was abrasive.[238] Further, no impropriety exists where the arbitrator merely asks questions of witnesses (which can include cross-examination) to facilitate the proceedings.[239]

3. Arbitrator's Duty of Self-Investigation and Disclosure

The arbitrator can have a legal obligation as required by an arbitral contract or the parties' submission to make a reasonable investigation of nontrivial facts pertaining to his fitness to serve and to disclose to the parties any relationship that raises a question of bias.[240] Where the arbitrator breached the duty of self-

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Bias, Prejudice, Collusion or Fraud of Arbitrators, 65 A.L.R.2d 755 (1959) (noting that in some jurisdictions, a court may intervene in the arbitration pursuant to its general equity powers), *with* Metro. Prop. & Cas. Ins. Co. v. J.C. Penney, 780 F. Supp. 885, 894–96 (D. Conn. 1991) (finding no categorical prohibition against disqualification of an arbitrator prior to the conclusion of the arbitration) (citing cases)).

236. No. W2012-00687-COA-R3-CV, 2014 WL 2810209 (Tenn. Ct. App. June 20, 2014) (stating that small talk between the arbitrator and a participant during breaks in the proceedings is not evidence of bias or evident partiality).

237. *Id*. at *10.

238. *See* Nasta v. Paramount Pictures Corp., No. 87 Civ. 1599 (WK), 1991 WL 183353, at *5 (S.D.N.Y. Sept. 11, 1991).

239. *See* Butler v. Boyles, 29 Tenn. 155, 155 (1849); Burton v. Cruise, 118 Cal. Rptr. 3d 613, 622 (Cal. Dist. Ct. App. 2010) (noting the "conversational" nature of some arbitration proceedings); *see also* Spector v. Torenberg, 852 F. Supp. 201, 209 (S.D.N.Y. 1994) ("[A]n arbitrator is not precluded from developing views regarding the merits of a dispute early in the proceedings, and an award will not be vacated because he expresses those views.").

240. *See* New Regency Prods., Inc. v. Nippon Herald Films, Inc., 501 F.3d 1101 (9th Cir. 2007) (stating that the arbitrator's lack of actual knowledge of the presence of a conflict does not excuse non-disclosure where the arbitrator has reason to believe that a non-trivial conflict of interest might exist). *But see*

investigation, vacatur will be appropriate only where the undisclosed conflict was "real and 'not trivial.'"[241] The arbitrator's failure to disclose a financial or personal relationship, apart from the actual potential for a conflict, may establish the claim of bias.[242]

Lower courts have echoed Justice White's concurring opinion in the U.S. Supreme Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*,[243] that "arbitrators would be well advised if they desired their decision not to be subject to the kind of attack here involved if they did as admonished by Mr. Justice White [to] 'err on the side of disclosure.'"[244] Tennessee courts also have stated that a party may waive this ground for relief for purposes of vacatur when the party knowingly remains silent about this problem during the proceedings, raises no objection to the arbitrator's alleged bias, but decides to complain after the arbitrator issues a decision adverse to that person.[245]

Gianelli Money Purchase Plan & Tr. v. ADM Inv'r Servs., 146 F.3d 1309, 1313 (11th Cir. 1998) (adopting per se rule that a finding of evident partiality will be absent where the arbitrator lacked "actual knowledge of the information upon which an alleged 'conflict' was founded"). For a comprehensive summary of the case law on arbitrator disclosure of the relationship this official has with the parties, see Hobet Mining, Inc. v. Int'l Union, United Mine, 877 F. Supp. 1011 (S.D. W. Va. 1994).

241. *New Regency Prods, Inc.*, 501 F.3d at 1110 (citation omitted) (quoting ANR Coal Co. v. Cogentrix of N.C., Inc., 173 F.3d 493, 499 n.4 (4th Cir. 1999)).

242. Toyota of Berkeley v. Auto. Salesman's Union, 834 F.2d 751, 756 (9th Cir. 1987) (citing Sheet Metal Workers Int'l Ass'n v. Kinney Air Conditioning, 756 F.2d 742, 746 (9th Cir. 1985); Merit Ins. v. Leatherby Ins., 714 F.2d 673, 678 (7th Cir. 1983); Ormsbee Dev. Co. v. Grace, 668 F.2d 1140, 1149 (10th Cir. 1982)).

243. 393 U.S. 145, 150 (1968) (White, J., concurring).

244. U.S. Wrestling Fed'n v. Wrestling Div. of AAU, Inc., 605 F.2d 313, 319 (7th Cir. 1979).

245. Bailey v. Am. Gen. Life & Accident Ins., No. M2003-01666-COA-R3-CV, 2005 WL 3557840, at *5 (Tenn. Ct. App. Dec. 29, 2005); *see also* Cook Indus. v. C. Itoh & Co., 449 F.2d 106, 107–08 (2d Cir. 1971) (stating that an "[a]ppellant cannot remain silent, raising no objection during the course of the arbitration proceeding, and when an award adverse to him has been handed down complain of a situation of which he had knowledge from the first").

E. The Arbitrators Exceeded Their Powers (TENN. CODE ANN. Section 29-5-313(a)(1)(C))

1. The Statutory Standards

An arbitration award must "draw its essence from the agreement of the parties."[246] Because arbitration is "a matter of consent, not coercion," parties are "generally free" to structure their contracts as they deem appropriate and to specify the ground rules governing the arbitration.[247] In keeping with this statement, the Tennessee Supreme Court has said that parties "cannot be forced to arbitrate claims that they did not agree to arbitrate."[248] From the above doctrine comes the rule that the arbitrator's scope of authority regarding the issues in the case depends on the terms of the parties' arbitration agreement.[249] It bears emphasis that this ground for challenge considers only whether the arbitrator exceeded his delegated powers, which inquiry differs from the merits of his decision.[250]

An arbitrator's authority depends upon the matters that the parties' agreement either covers expressly or that are implied by necessity.[251] A number of decisions recognize that the arbitrator's

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246. Wasco, Inc. v. R.P. Indus., Inc., No. 01-A-01-9407-CH00343, 1994 WL 706663, at *3 (Tenn. Ct. App. Dec. 21, 1994) (citing Int'l Talent Grp., Inc. v. Copyright Mgmt., Inc., 769 S.W.2d 217 (Tenn. Ct. App. 1988)).

247. Frizzell Constr. Co. v. Gatlinburg, L.L.C., 9 S.W.3d 79, 84 (Tenn. 1999) (quoting Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 479 (1989)).

248. *Id.* at 84, *cited in* T.R. Mills Contractors, Inc. v. WRH Enters., L.L.C., 93 S.W.3d 861, 870 (Tenn. Ct. App. 2002) (stating that an "indirect agreement to arbitrate is enforceable as long as it is clear"). This principle coincides with the common law (pre-TUAA) rule. *See, e.g.*, Mays v. Myatt, 62 Tenn. 309 (1874).

249. D & E Constr. Co. v. Robert J. Denley Co., 38 S.W.3d 513, 518 (Tenn. 2001); Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 450 (Tenn. 1996); Int'l Talent Grp. v. Copyright Mgmt. Co., 769 S.W.2d 217, 218 (Tenn. Ct. App. 1988); *see also* Williams Holding Co. v. Willis, 166 S.W.3d 707, 711 (Tenn. 2005); Davis v. Reliance Elec., 104 S.W.3d 57, 61 (Tenn. Ct. App. 2002) ("[S]o long as the arbitrator is acting within his scope of authority, 'the fact that a court is convinced he committed serious error does not suffice to overturn his decision.'" (quoting *Arnold*, 914 S.W.2d at 449)).

250. Gordon Sel-Way, Inc. v. Spence Bros., 475 N.W.2d 704, 710 (Mich. 1991).

251. Quinn v. Nafta Traders, Inc., 257 S.W.3d 795, 799 (Tex. App. 2008).

jurisdiction is defined by both the contract containing the arbitration clause and the submission agreement that illuminates that agreement.[252] Accordingly, an arbitrator exceeds his power "when he rules on issues not submitted to him by the parties"[253] or "grant[s] relief not authorized in the arbitration agreement."[254] Thus, for example, an arbitration clause in an employment contract does not necessarily require the employee to submit a complaint under the Tennessee Human Rights Act to arbitration.[255]

In assessing the issue of party intent in a submission or contract, courts often consider the correspondence regarding the terms in the demand for arbitration and related documents.[256] Where the clause broadly requires the arbitration of all disputes arising from the agreement—unlike a narrower clause that limits arbitration to specific disputes—the clause reaches all aspects of the parties' agreement[257] and the presumption favoring arbitrability applies even more strongly.[258] These principles stem from case law that courts are "to give as broad a construction to an arbitration agreement as the words and intentions of the parties, drawn from

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252. Executone Info. Sys., Inc. v. Davis, 26 F.3d 1314, 1323 (5th Cir. 1994) (noting that by their conduct parties can agree to submit an issue to the arbitrator that they were not compelled to submit according to their agreement); *D & E Const.*, 38 S.W.3d at 518 ("[T]he scope of an arbitrator's authority 'is determined by the terms of the agreement between the parties which includes the agreement of the parties to arbitrate the dispute.'" (quoting *Int'l Talent Grp.*, 769 S.W.2d at 218).

253. Vt. Built, Inc. v. Krolick, 969 A.2d 80, 87 (Vt. 2008) (quoting Hoeft v. MVL Grp., 343 F.3d 57, 71 (2d Cir. 2003)).

254. Morgan Stanley & Co. v. Core Fund, 884 F. Supp. 2d 1229, 1231 (M.D. Fla. 2012).

255. Brown v. KareMor Int'l, Inc., No. 01A01-9807-CH-00368, 1999 WL 221799, at *2 (Tenn. Ct. App. Apr. 19, 1999).

256. *See* Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987); Costle v. Freemont Indem. Co., 839 F. Supp. 265, 273 (D. Vt. 1993).

257. Neal v. Hardee's Food Sys., 918 F.2d 34, 37–38 (5th Cir. 1990).

258. AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 650 (1986); McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co., 858 F.2d 825, 832 (2d Cir. 1988). For a decision reconciling an agreement containing both a narrow and a broad arbitration clause, see Blue Tee Corp. v. Koehring Co., 999 F.2d 633 (2d Cir. 1993).

their expressions, will warrant, and to resolve any doubts in favor of arbitration."[259]

Where a claimant in a contract dispute alleges that the arbitrator exceeded his authority, the record must show that the arbitrator did not rely upon his personal opinion about the parties' contractual intent or on his own conceptions of sound public policy.[260] Instead, the courts will decide the scope of arbitrator authority by interpreting the arbitration terms of the agreement under "ordinary state law principles" of party intent.[261] In deciding whether the arbitrator exceeded his authority, courts resolve "any doubts in favor of arbitration."[262] In fact, arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[263] FAA decisions on this point are persuasive authority in TUAA cases.

2. Role of Contract Interpretation

The controlling issue is not whether the arbitrator construed the parties' contract correctly, "but whether he construed it at all."[264] Where an arbitration clause covers a specific type(s) of dispute(s), a court cannot require arbitration on claims outside that scope; thus, for example, where the clause covers "all factual disputes" between the parties, the clause cannot compel arbitration of

259. *See* Wachtel v. Shoney's Inc., 830 S.W.2d 905, 908 (Tenn. Ct. App. 1991).

260. *See* Wolf v. Sprenger + Lang, P.L.L.C., 86 A.3d 1121, 1133–34 (D.C. 2013).

261. T.R. Mills Contractors, Inc. v. WRH Enters., L.L.C., 93 S.W.3d 861, 870 (Tenn. Ct. App. 2002); *see also* McAllister Bros. v. A & S Transp. Co., 621 F.2d 519, 524 (2d Cir. 1980) ("[O]rdinary principles of contract and agency determine which parties are bound by an agreement to arbitrate.").

262. Hardaway v. Goodwill, 1994 WL 585767, at *2 (Tenn. Ct. App. Oct. 19, 1994) (quoting *Wachtel*, 830 S.W.2d at 908).

263. Taylor v. Butler, 142 S.W.3d 277, 281 (Tenn. 2004) (quoting United Steelworkers of Am. v. Warrior & Guilf Navigation Co., 363 U.S. 574, 582–83 (1960)); *see also* 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:22 (4th ed. 2001).

264. Oxford Health Plans, L.L.C. v. Sutter, 133 S. Ct. 2064, 2071 (2013).

all legal *and* factual matters in dispute between the parties.[265] Another example of such a limitation is an arbitrator may not award relief in excess of the dollar limit the parties accepted in their agreement.[266] Tennessee courts also recognize that when the parties employ a broad arbitration clause covering numerous items, it will be correspondingly more difficult for a party to argue that a dispute is outside the agreement.[267] The above doctrines are entrenched in Tennessee arbitration jurisprudence, predating TUAA by many years.[268]

In labor disputes, arbitrators frequently construe collective bargaining agreements; so long as the arbitrator draws his interpretation "from the essence" of the agreement (which concept is interpreted "expansively")[269] and he does not "dispense his own brand of industrial justice," the arbitrator's decision will likely stand.[270] While the Labor Management Relations Act of 1947, as amended, (and not the FAA) governs labor arbitration,[271] the same approach exists in commercial arbitration.[272] Accordingly, the collective

265. Encompass Ins. v. Hagerty Ins. Agency, No. 1:08-cv-337, 2009 WL 160776, at *11 (W.D. Mich. Jan. 22, 2009).

266. Int'l Talent Grp. v. Copyright Mgmt., 769 S.W.2d 217, 219 (Tenn. Ct. App. 1988).

267. *See* Bodor v. Green Tree Servicing, L.L.C., No. M2007-00308-COA-R10-CV, 2007 WL 2409675, at *2 (Tenn. Ct. App. Aug. 24, 2007).

268. *See* Jackson v. Chambers, 510 S.W.2d 74, 76 (Tenn. 1974) ("The arbitrators had no authority to go in their inquiries beyond the powers delegated by the terms of the submission." (citing Mays v. Myatt, 62 Tenn. 309 (1874))).

269. Executone Info. Sys., Inc. v. Davis, 26 F.3d 1314, 1324–25 (5th Cir. 1994); s*ee also* Mich. Mut. Ins. v. Unigard Sec. Ins., 44 F.3d 826, 830–31 (9th Cir. 1995) ("[A]n award does not draw its essence from the contract if the arbitrators exceeded their powers in crafting the award, if the award is contrary to public policy, or if the arbitrators acted in manifest disregard of the law" (citing Local Joint Exec. Bd. of Las Vegas v. Riverboat Casino, Inc., 817 F.2d 524, 527 (9th Cir. 1987))); Int'l Bd. of Teamsters, Local 519 v. United Parcel Serv., 275 F. Supp. 2d 944, 951–52 (E.D. Tenn. 2001), *vacated on other grounds*, 335 F.3d 497 (6th Cir. 2003) (discussing the "essence" of the agreement).

270. *Int'l Talent Grp.*, 769 S.W.2d at 220 (quoting Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125, 1129–30 (3d Cir. 1972)).

271. *See* THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 38 n.105, 86–94 (4th ed. 2012).

272. Johnson Controls, Inc. v. Edman Controls, Inc., 712 F.3d 1021, 1026 (7th Cir. 2013). Section One of the FAA does not apply to employment contracts, but this exclusion is itself narrowly construed. *See* THOMAS E.

bargaining cases may properly be cited as persuasive authority on cognate issues in commercial arbitration cases. Courts commonly cite labor arbitration cases, which are subject to the federal common law of labor relations, in arbitration cases subject to the FAA.[273]

A less-frequently cited, but equally valid, doctrine is that, even where an arbitration agreement does not cover a particular issue, the parties, by their knowing conduct during arbitration, may agree to send an issue to the arbitrator for resolution.[274] As an FAA decision pointed out,

> It is a fundamental contract principle that a contract provision may be modified by the actions or expressions of the parties. The practical construction or interpretation of a contract by the parties is an important indication of the intent of the parties and courts give great weight to such interpretations. "Few things can better evidence the meaning of a contract than the actions of the parties themselves."[275]

As indicated above, the most common question on this theory of vacatur is whether the arbitrator has stayed within the bounds of his appointed authority. Under the analogous FAA, the decisions have "consistently accorded the narrowest of readings" on whether the arbitrator has exceeded his powers.[276] Although some courts hold that the arbitrator's interpretation of the scope of his conferred authority does not bind a reviewing court, other decisions state that the parties, by consent, may confer this authority on

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CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 127–47 (4th ed. 2012).

273. *See* Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ON ARB. & MEDIATION 56 (2014) (analyzing cases).

274. Gvozdenovic v. United Air Lines, Inc., 933 F.2d 1100, 1105 (2d Cir. 1991); Carey v. Conn. Gen. Life Ins., 93 F. Supp. 2d 165, 168 (D. Conn. 1999).

275. Globe Transp. & Trading (U.K.) Ltd. v. Guthrie Latex, Inc., 722 F. Supp. 40, 44 (S.D.N.Y. 1989) (citations omitted) (quoting Ottley v. Palm Tree Nursing Home, 493 F. Supp. 910, 914 (S.D.N.Y. 1980)).

276. ReliaStar Life Ins. of N.Y. v. EMC Nat'l Life Co., 564 F.3d 81, 85 (2d Cir. 2009); DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 824 (2d Cir. 1997).

the arbitrator.[277] In any event, the arbitrator's determination of the scope of his delegated authority must be subservient to the terms of the arbitration agreement.[278] On the other hand, the better view is that courts are not bound by an arbitration agreement stating the award shall be final on all questions of law and fact. The reason is that such a term effectively deprives an aggrieved party of its statutory right to seek vacatur of an improper award.[279]

3. Ambiguity in Arbitration Agreements/Arbitrator Decisions

A number of cases address whether a vacatur action may lie because the arbitrator's award decision is ambiguous. A mere ambiguity in an opinion accompanying an arbitration award on whether the arbitrator exceeded his authority is insufficient for vacatur.[280] Another fertile area for litigation, discussed below, is whether vacatur is available where the parties' submission or the arbitration agreement was ambiguous on which issues are arbitrable.[281]

Under settled law, courts must strongly consider the policy favoring arbitration and construe any ambiguities on arbitrability in favor of arbitration.[282] Another principle of interpretation that can reconcile conflicting contractual language is that a court may order

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277. *Globe Transp.*, 772 F. Supp. at 45.

278. *See* Synergy Gas Co. v. Sasso, 853 F.2d 59, 63–64 (2d Cir. 1988) ("[T]he 'scope of authority of arbitrators generally depends on the intention of the parties to an arbitration, and is determined by the agreement or submission.'" (quoting Ottley v. Schwartzberg, 819 F.2d 373, 376 (2d Cir. 1987)).

279. *See* United States v. Farragut, 89 U.S. 406 (1874). *But see* Swenson v. Bushman Inv. Props., Ltd., 870 F. Supp. 2d 1049, 1054–56 (D. Idaho 2012) (noting that there is a split of authority in the circuits); 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:128 (4th ed. 2001) (favoring the view that parties may waive their right to an appeal).

280. United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960).

281. *See infra* Section V.E.4.

282. Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 475 (1989); Local Union No. 336 v. Detroit Gasket & Mfg. Co., 521 F. Supp. 39, 40 (E.D. Tenn. 1981) ("Consequently, although the parties are bound to arbitrate only those disputes they have agreed to arbitrate, all doubts or ambiguities must be resolved in favor of arbitration." (citing Controlled Sanitation Corp. v. Dist. 128, 524 F.2d 1324 1328 (3d Cir. 1975)).

arbitration of claims under one agreement that is part of a larger agreement containing an arbitration clause.[283] A court may even go so far as to conclude that the "nature of the award itself" may cure the ambiguity.[284]

The easiest way to avoid an ambiguity on arbitrability is, if a party believes that an agreement on a particular issue should not be subject to arbitration, it can say so in the contract.[285] In keeping with the policy to uphold arbitration awards wherever possible, if the arbitration decision goes beyond a mere ambiguity and is so ambiguous that the award cannot be interpreted, the courts may not vacate but should be able to remand the case to the arbitrator(s) below for clarification.[286]

A sound reason exists for requiring a substantive, material ambiguity for vacatur instead of a technical one. First, submissions by the parties and opinions prepared by arbitrators rarely reach the level of sophistication characteristic of judges. It would be unrealistic to expect that the parties in their agreement, or the arbitrator(s) in their opinions, can avoid all uncertainty or lack of clarity. If the rule were otherwise, parties dissatisfied with the award decision would simply go on a hunt for ambiguity in the agreement or the opinion and compel courts to overturn the award for apparently harmless errors. Second, if the broader rule were the standard, it would prompt arbitrators to "play it safe by writing

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283. Frounfelker v. Identity Grp., No. M2001-02542-COA-R3-CV, 2002 WL 1189299, at *4 (Tenn. Ct. App. June 5, 2002); *see also* Dickson Cty. v. Bomar Constr. Co., 935 S.W.2d 413, 415 (Tenn. Ct. App. 1996) (declining to interpret two clauses to find a repugnancy on whether the parties had agreed to arbitration but, instead, decided to reconcile the language that showed an agreement to arbitrate).

284. Sheet Metal Workers Int'l Ass'n Local Union No. 420 v. Kinney Air Conditioning Co., 756 F.2d 742, 745 (9th Cir. 1985).

285. *Frounfelker*, 2002 WL 1189299, at *4.

286. Emp'rs Ins. of Wausau v. Nat'l Union Fire Ins., 933 F.2d 1481, 1488 n.6 (9th Cir. 1991); Refino v. Feuer Transp., Inc., 480 F. Supp. 562, 565 (S.D.N.Y. 1979). *But see* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 40 n.10 (1987); Westvaco Corp. v. Local 579, United Paperworkers, Int'l Union, Civ. A. No. 90-30091-F, 1992 WL 121372, at *9 (D. Mass. Mar. 5, 1992) (noting that when a court vacates an arbitration award, it should not resolve the merits of the dispute but should, when possible, remand the case to the arbitrator). The legal status of remands in Tennessee arbitration is unclear. *See infra* note 475 and accompanying text.

no supporting opinions. . . . This would be undesirable for a well-reasoned opinion would engender confidence in the integrity of the process and aid in clarifying the underlying agreement."[287] Thus, courts will resolve any ambiguity in the award decision, if possible, in favor of an interpretation that supports confirmation of the award.[288] In fact, courts go so far as to say that "'[t]he showing required to avoid confirmation' of an arbitration award 'is very high.'"[289]

4. Gaps in Arbitration Agreements/Arbitrator Decisions

Another problem related to ambiguity is what course of action should an arbitrator take when the submission is silent on the precise question in controversy? Although some case law supports the view that "arbitrators cannot change or alter the terms of a contract between the parties,"[290] other decisions indicate the arbitrator may "look beyond the written contract" if the contract has such a gap.[291] When facing such a contractual gap, the arbitrator can overcome potential objections that he lacked the authority to decide such questions if he relies on established precepts of contract construction. Similar principles govern arbitration agreements and arbitrator decisions.

Although some Tennessee decisions reference the principles of contractual ambiguity to resolve the problem of missing language,[292] the more appropriate approach is that a gap in an

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287. United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960).

288. Pompano-Windy City Partners, Ltd. v. Bear Stearns & Co., 794 F. Supp. 1265, 1272 (S.D.N.Y. 1992) (citing decisions).

289. Morgan Keegan & Co. v. Starnes, No. W2012-00687-COA-R3-CV, 2014 WL 2810209, at *10 (Tenn. Ct. App. June 20, 2014) (quoting Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983)).

290. Stokely-Van Camp, Inc. v. United Steelworkers, Local Union No. 7198, 480 F. Supp. 48, 49 (E.D. Tenn. 1971).

291. Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n, 889 F.2d 599, 602 (5th Cir. 1979).

292. *See* Adams TV of Memphis, Inc. v. Int'l Bhd. of Elec. Workers, Local 274, 932 S.W.2d 932, 935 (Tenn. Ct. App. 1996) (stating that where a collective bargaining agreement provided that an employee could be discharged for just cause, but was silent on the procedures, the arbitrator properly devised the procedures).

agreement or a decision cannot be interpreted one way or another because there is no language to construe.[293] The whole point of a gap is that there is no coverage for the particular issue. The better view is the document can be saved, however, where established notions of offer and acceptance can overcome the contractual silence. Alternatively, the *Restatement (Second) of Contracts*, Section 208, can provide a solution. The *Restatement* states that when the bargain is sufficiently defined to be a contract, but they have not agreed on a point essential to the determination of their rights and duties, a court (and inferentially an arbitrator) may supply a term that is reasonable under the circumstances.[294]

Another alternative to resolve an interpretive gap is the case law doctrine that a contract term may be implied, even though not stated expressly, when the reviewing authority can "plainly determine from the agreement that the obligation or duty was necessarily or indispensably included within the contemplation of the parties so that they deemed it unnecessary or too obvious to mention, or where the term is needed to give effect to the bargain."[295] Lastly, some decisions authorize "equitable considerations in resolving a dispute on which the contract is silent."[296] This approach would find favor under the broad principle that the courts in deciding arbitration disputes may rely upon equitable and policy considerations.[297] Further, this approach comports with the judicial policy to uphold arbitration awards "whenever possible."[298]

5. Limits on Grants of Relief

An arbitrator may still act within his authority, and the award will not be vacated under Tenn. Code Ann. section 29-5-313(a)(1)(C), even if a court could not grant the same relief in sim-

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293. *See* 21 STEVEN W. FELDMAN, TENNESSEE PRACTICE SERIES: CONTRACT LAW AND PRACTICE § 8:57 (2006) (citing authorities).

294. *See id.* § 8:58.

295. *See id.* § 8:21.

296. Exec. Life Ins. of N.Y. v. Alexander Ins., 999 F.2d 318, 320 (8th Cir. 1993).

297. *Id.*

298. City of Des Plaines v. Metro. All. of Police, Chapter No. 240, 30 N.E.3d 598, 603 (Ill. App. Ct. 2015).

ilar circumstances.[299] Perhaps the best example of this scenario is that while a court may not ignore the applicable law in granting relief to a party, arbitrators making a fair and honest decision do not operate under the same constraint. "As long as the arbitrator is, arguably, construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision."[300]

Courts further advise that the issue is not whether the arbitrator got the contract's meaning right or wrong. The arbitrator's construction will be upheld, no matter "good, bad, or ugly."[301] Putting it more bluntly, no requirement exists for an arbitrator to follow the law in resolving the dispute[302] because courts simply review whether the arbitrator acted within his powers and not whether he did so correctly.[303] The parties contracted for the arbitrator's opinion, so they must live with the consequences of their agreement, however mistaken the arbitrator's decision.[304] A different approach "opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.'"[305] Where so inclined, and nothing else appearing, the

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299. TENN. CODE ANN. § 29-5-313(a)(2) (2012), *cited in* D & E Constr. Co. v. Robert J. Denley Co., No. 02A01-9812-CH-00358, 1999 WL 685883, at *3 (Tenn. Ct. App. Sept. 3, 1999); *see also* Compania Chilena de Navegacion Interoceanica v. Norton, Lilly & Co., 652 F. Supp. 1512, 1516 (S.D.N.Y. 1987) (stating that arbitrators have "broad discretion in fashioning remedies" and may grant equitable relief that a court could not).

300. Millsaps v. Robertson-Vaughn Constr. Co., 970 S.W.2d 477, 480 (Tenn. Ct. App. 1997) (quoting Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 449 (Tenn. 1996)).

301. S. Commc'ns Servs., Inc. v. Thomas, 720 F.3d 1352, 1360 (11th Cir. 2013).

302. Berglund v. Arthroscopic & Laser Surgery Ctr. Of San Diego, L.P., 187 P.3d 86, 91 (Cal. 2008).

303. Anthony v. Kaplan, 918 S.W.2d 174, 177 (Ark. 1996).

304. Oxford Health Plans L.L.C. v. Sutter, 133 S. Ct. 2064, 2070–71 (2013); United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 599 (1960).

305. Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 588 (2008) (quoting Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998 (9th Cir. 2003)) (stating the general goal for arbitration).

arbitrator may even decide the case on "broad principles of fairness and equity."[306]

The arbitrator's choice of remedy in vacatur cases merits more deference than his reading of the underlying contract.[307] Thus, if the arbitrator is so inclined, he may order specific performance of the contract.[308] The only exception is that a remedy will be off the table if the arbitration agreement or the parties' submission expressly or implicitly forbids the remedy or if the agreement states that another remedy shall be exclusive.[309] When the claimant receives an award, practitioners, in devising their strategy, should be prepared to suggest beneficial avenues of relief that the arbitrator might otherwise overlook.

F. The Arbitrators Refused to Postpone the Hearing Upon Sufficient Cause or Refused to Hear Material Evidence at the Hearing or Otherwise Conducted the Hearing as to Prejudice Substantially the Rights of a Party (TENN. CODE ANN. Section 29-5-313(a)(1)(D))

1. Party Discretion and Rules of Procedure

Before striking their deal, parties to a prospective arbitration rarely bargain about arbitration terms because few rational parties would enter into a contract they think will descend into disagreement and dispute. To minimize the potential for disputes and other difficulties, many parties in arbitrations employ standard forms and procedures, such as the standard agreements and uniform rules of the American Arbitration Association, the American Bar Association Code of Ethics for Arbitrators in Commercial Disputes, and like organizations. These standard forms alleviate to

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306. Payton v. Jackson, 756 S.E.2d 555, 557 (Ga. Ct. App. 2014) (quoting Barron Reed Constr. v. 430 L.L.C., 622 S.E.2d 83, 85 (Ga. Ct. App. 2005)).

307. Timegate Studios, Inc. v. Southpeak Interactive, L.L.C., 713 F.3d 797, 803 (5th Cir. 2013) ("The remedy lies beyond the arbitrator's jurisdiction only if there is no rational way to explain the remedy handed down by the arbitrator as a logical means of furthering the aims of the contract." (quoting Executone Info. Sys., Inc. v. Davis, 26 F.3d 1314, 1325 (5th Cir. 1994))).

308. 2 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 35:3 (3d ed. 2013).

309. Sverdrup/ARO, Inc. v. Int'l Assoc. of Machinists, 532 F. Supp. 143, 146 (E.D. Tenn. 1980).

an extent any unfairness or inconsistency potentially resulting from the arbitrator's administration of the applicable procedures. These formats also save parties from predicting what could be issues difficult to forecast at the time of award.[310] Although these rules and procedures "do not have the force of law,"[311] once the claimant and respondent adopt these rules (nothing else appearing), the parties are bound by them.[312]

In arbitration, the parties may agree upon "virtually any procedure they desire" absent illegality or violation of public policy.[313] A rebuttable presumption of fairness attaches to those mutually adopted procedures.[314] Thus, nothing wrong exists with an informal and even relaxed hearing atmosphere.[315] If they choose, parties can dispense with a hearing.[316] They even may provide for a specific arbitration process that would exclude a hearing.[317] Nevertheless, absent such a valid waiver or the failure to provide for a specific arbitration process that lacks a hearing, Tenn. Code Ann. section 29-5-306 is mandatory on the hearing procedure. This lengthy statute provides in pertinent part: "The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing."[318]

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310. Alan R. Gilbert, Annotation, *Refusal of Arbitrators to Receive Evidence, or to Permit Briefs or Arguments, or Particular Issues as Grounds for Relief from Award*, 75 A.L.R.3d 132 (1977). *But see* 1 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 8:18 (3d ed. 2013) (discussing battle of the forms under U.C.C. 2-207); 21 STEVEN W. FELDMAN, TENNESSEE PRACTICE SERIES: CONTRACT LAW AND PRACTICE §§ 4:34 to 4:36 (2006) (discussing Tennessee law on U.C.C. 2-207).

311. Merit Ins. v. Leatherby Ins., 714 F.2d 673, 680 (7th Cir. 1983).

312. *See* Reeves Bros., Inc. v. Capital Mercury Shirt Corp., 962 F. Supp. 408, 411 (S.D.N.Y. 1997); *see also* 1 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION, §§ 5:1 TO 5:21 (3d ed. 2013) (giving an overview of arbitrator ethical considerations).

313. Searcy v. Herold, No. M2003-02037-COA-R3-CV, 2005 WL 2387159, at *3 (Tenn. Ct. App. Sept. 28, 2005) (citing Team Design v. Gottlieb, 104 S.W.3d 512, 517–18 (Tenn. Ct. App. 2002)).

314. Woods v. Saturn Distrib. Corp., 78 F.3d 424, 428 (9th Cir. 1996).

315. Remmey v. PaineWebber, Inc., 32 F.3d 143, 148–49 (4th Cir. 1994).

316. *See* 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:94 (4th ed. 2001) (addressing a party's waiver of a hearing).

317. *Id.*

318. TENN. CODE ANN. § 29-5-306(2) (2012).

In essence, the statutory hearing promised by TUAA in Tenn. Code Ann. section 29-5-306 will become a contract term implied by law irrespective of its physical omission from the agreement.[319] By contrast, while a party has no pre-hearing statutory right to discovery of potentially relevant evidence,[320] where the parties' agreement provides for discovery or the arbitrator otherwise allows discovery, an arbitrator's prejudicial discovery rulings can be grounds for vacatur when they were in bad faith or so grossly incorrect as to amount to affirmative misconduct.[321]

2. Burden of Proof

Where the party alleges that the arbitrator acted improperly in failing to postpone the hearing for what the party deemed to be good cause—which is grounds for complaint under Tenn. Code Ann. section 29-5-313(a)(1)(D)—the burden of proof is high. In addition to showing that the arbitrator's decision "substantially prejudiced" the party's rights, the movant must show that the alleged arbitral misconduct stemmed from bad faith or gross error and caused the denial of "fundamental fairness" of the arbitration itself.[322]

The burden is high in part because courts give arbitrators "a degree of discretion" in deciding whether to grant a requested

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319. *See generally* Wasco, Inc. v. R.P. Indus., No. 01-A-01-9407-CH00343, 1994 WL 706663, at *3 (Tenn. Ct. App. Dec. 21, 1994) ("Laws affecting either the construction, enforcement or discharge of a contract which subsist at the time and place of the making of a contract and where it is to be performed, enter into and form part of it as fully as if they had been expressly referred to or incorporated in its terms."); *see also* 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:24 (4th ed. 2001) ("In statutory arbitration, the terms of the statute are by implication a part of the arbitration agreement.").

320. Reece v. U.S. Bancorp Piper Jaffray, Inc., 80 P.3d 1088, 1092 (Idaho 2003).

321. *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 40 (1987) (reversing the lower court's granting of a motion to vacate because, even assuming "that the arbitrator erred in refusing to consider the disputed evidence, his error was not in bad faith or so gross as to amount to affirmative misconduct").

322. Bisnoff v. King, 154 F. Supp. 2d 630, 635–37 (S.D.N.Y. 2001); Transit Cas. Co. v. Trenwick Reinsurance Co., 659 F. Supp. 1346, 1354 (S.D.N.Y. 1987).

postponement.[323] The movant also must show by clear and convincing proof that the arbitrator abused that discretion insofar as his decision precluded the party from making a full presentation of its case[324] by foreclosing "pertinent and material evidence."[325] The other reason the burden is high is that, with fewer procedural rules, arbitrators can conduct the proceedings quicker and cheaper.[326]

3. Arbitrator Discretion in Allowing Evidence

Cases construing a similar ground for vacatur under the FAA or the Uniform Arbitration Act illustrate the narrow scope of the policy of Tenn. Code Ann. section 29-5-313(a)(1)(D) in regard to the receipt of evidence. Because arbitrators are not required to follow "all the niceties" observed in conventional litigation,[327] the rules of evidence are typically relaxed in arbitration hearings.[328] Thus, for example, arbitrators are not bound by the parol evidence rule,[329] and hearsay proof can be proper.[330] Accordingly, the arbi-

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323. Naing Int'l Enters. v. Ellsworth Assocs., 961 F. Supp. 1, 3 (D.D.C. 1997).

324. Roe v. Cargille, Inc., 333 F. Supp. 2d 808, 815 (W.D. Ark. 2004).

325. *Naing*, 961 F. Supp. at 3.

326. Ebasco Constructors, Inc. v. Ahtna, Inc., 932 P.2d 1312, 1315–16 (Alaska 1997) (stating that the review of an arbitrator's procedural decisions should be extremely deferential and observing that challenges are rarely successful to arbitrator determinations to deny a continuance); *see also* Sheet Metal Workers Int'l Ass'n Local No. 162 v. Jason Mfg., Inc., 900 F.2d 1392, 1398 (9th Cir. 1990) (observing that a party must have good cause for requesting a continuance but that the "arbitrary denial" of a continuance request "may" serve as a ground for vacatur). For the Tennessee decisions on a trial court's discretion to rule on a motion for continuance, an apt analogy in arbitration cases, see Box v. Gardner, No. W2012-00631-COA-R3-CV, 2012 WL 6697579, at *3 (Tenn. Ct. App. Dec. 26, 2012).

327. Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997) (quoting Bell Aerospace Co. Div. of Textron v. Local 516, 500 F.2d 921, 923 (2d Cir. 1974)).

328. Bordonaro v. Merrill Lynch, Pierce, Fenner & Smith, 805 N.E.2d 1138, 1140 (Ohio Ct. App. 2004).

329. Dominick & Dominick, Inc. v. Inv'r Servs. & Savs. Corp., No. 86 Civ. 7265 (MGC), 1991 WL 143716, at *6 (S.D.N.Y. 1991).

330. Barker v. Gov't Emps. Ins., 339 F. Supp. 1064, 1067 (D.D.C. 1972) (quoting Petroleum Separating Co. v. Interamerican Ref. Corp., 296 F.2d 124, 124 (2d Cir. 1961)).

trator's use of the wrong evidentiary standard or his acceptance of evidence otherwise inadmissible in court will not necessarily justify vacatur.[331]

This policy for relaxed procedural rules dates back to the common law of arbitration.[332] Courts are lenient in this area because parties typically select arbitrators for their special skill or knowledge of the subject matter, not necessarily for their legal acumen.[333] Indeed, the parties may select arbitrators for the very reason that they may need little or no evidence to make a particular finding on either the fact of liability or compensation due the claimant:

> In general, arbitrators who are selected because of their special fitness or knowledge may, in the absence of other restrictions, rely wholly or partly on their knowledge or on information they may possess. Unlike a court or jury, which is to rely only on the facts presented by witnesses at a trial, arbitrators may draw on their personal knowledge in making an award. Thus, evidence need not necessarily be heard where experts are chosen as arbitrators and the parties rely on the knowledge of those experts in making the award.[334]

A related issue is that arbitrators have no requirement to allow parties the leeway to introduce every item of relevant proof; the guidance is that the arbitrators need only have "enough evidence to make an informed decision."[335] Therefore, arbitrators

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331. State Dep't of Ins. v. First Floridian Auto & Home Ins., 803 So. 2d 771, 776 (Fla. Dis. Ct. App. 2001). *Cf.* Dean Witter Reynolds, Inc. v. Deislinger, 711 S.W.2d 771, 772 (Ark. 1986) (noting that the mere exclusion of evidence otherwise admissible in court is not grounds for vacatur); City of Fairbanks Mun. Utils. Sys. v. Lees, 705 P.2d 457, 461 (Alaska 1985) (stating that the exclusion of evidence is grounds for vacatur when the result is the "complete omission of critical evidence").

332. *See* Ryan v. Reed Air Filter Co., 11 Tenn. App. 472 (1930).

333. 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:79 (4th ed. 2001).

334. *Id.*

335. A.S. Seateam v. Texaco Pan., Inc., No. 97 CIV. 0214(MBM), 1997 WL 256949, at *9 (S.D.N.Y. May 16, 1997).

have "broad discretion" to decide whether additional evidence is necessary or would merely prolong the proceedings.[336] As just indicated, courts will balance the policies of arbitrators' needing sufficient evidence to make an informed decision versus the policy against compromising the speed and efficiency of arbitration.[337]

The upshot is that arbitrators are not bound to hear all of the evidence that the party wishes them to consider; however, the arbitral panel must give each of the parties to the dispute, consistent with a party's right to a "fair hearing," an adequate opportunity to present its evidence and arguments.[338] Even when the evidence is pertinent, material, and admissible, a reviewing court considering a requested vacatur based on the arbitrator's exclusion of such evidence must find that the arbitrator's exclusion was both prejudicial to the proffering party and inconsistent with fundamental fairness.[339] "Prejudice" in this context means that the moving party must show that, but for the arbitrator's mistaken ruling on the receipt of evidence, the arbitrator should have made a different

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336. 563 Grand Med. P.C. v. N.Y. State Ins. Dep't, 787 N.Y.S.2d 613, 616 (N.Y. 2004); *see also* Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 481 F.3d 813, 817 (D.C. Cir. 2007) (stating that an arbitrator has the authority to decide whether proffered evidence is merely cumulative).

337. *See* Areca, Inc. v. Oppenheimer & Co., 960 F. Supp. 52, 54–55 (S.D.N.Y. 1997).

338. Forsythe Int'l, S.A. v. Gibbs Oil Co. of Tex., 915 F.2d 1017, 1023 (5th Cir. 1990); Hoteles Condado Beach v. Union De Tronquistas Local 901, 763 F.2d 34, 39 (1st Cir. 1985); *see also* Hall v. Cable Lock Found. Repair, Inc., 80 So. 3d 1157, 1161 (La. Ct. App. 2011) (stating that an arbitrator has discretion on whether to qualify a witness as an expert).

339. Emp'rs Ins. of Wausau v. Nat'l Fire Ins., 933 F.2d 1481, 1490 (7th Cir. 1991) ("[A] showing of prejudice is a prerequisite to relief based on an arbitration panel's evidentiary rulings."); Sherrock Bros. v. DaimlerChrysler Motor Co., 465 F. Supp. 2d 384, 394 (M.D. Pa. 2006) ("[O]nly the most egregious error which adversely affects the rights of [a] party constitutes misconduct in refusing to hear evidence pertinent and material to the controversy." (quoting Grosso v. Barney, No. 03-MC-115, 2003 WL 22657305, at *6 (E.D. Pa. Oct. 24, 2003))); AT&T Corp. v. Tyco Telecomm. (U.S.) Inc., 255 F. Supp. 2d 294, 303 (S.D.N.Y. 2003); *see also* Shearson Hayden Stone Inc. v. Liang, 653 F.2d 310, 313 (7th Cir. 1981) ("The Arbitration Act does not allow vacation of an award for new evidence."); Nationwide Mut. Ins. v. First State Ins., 213 F. Supp. 2d 10, 19 (D. Mass. 2002) (stating that there is no requirement for arbitrators to consider newly discovered evidence).

award.[340] Accordingly, courts will grant vacatur on this ground only with "the most egregious error" that prejudices the aggrieved party's right to a fair hearing.[341] Notably, such error does not include allegations based on newly discovered evidence.[342]

Some special rules govern in this area. One rule of evidence peculiar to arbitration cases is that an arbitrator's award in a prior arbitration case—even between the same parties—is not necessarily precedential and does not preclude either party from raising the same issues subsequently.[343] Another requirement is that, to preserve a ground of error in anticipation of a hearing in court, the aggrieved party, during the proceeding, must have made clear its objection and tendered an offer of proof during the arbitration process.[344] Reviewing courts will not consider challenges to an arbitrator's findings on witness credibility.[345]

Another predicate for preserving an argument for judicial review is that the record must show that the appellant requested this opportunity to submit additional evidence and the arbitrator denied the movant this right.[346] Thus, in a 2000 Tennessee Court of Appeals decision, the appellant argued that it had witnesses ready to testify and that the arbitration panel improperly refused to hear this evidence.[347] The problem for the plaintiff was that the record failed to show that the plaintiff requested this opportunity to

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340. *Emp'rs Ins. of Wausau*, 933 F.2d at 1490.

341. Hunt v. Mobil Oil Corp., 654 F. Supp. 1487, 1512 (S.D.N.Y. 1987).

342. 2 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 38:26 (3d ed. 2013).

343. *See* Westvaco Corp. v. Local 579, United Paperworkers, Int'l Union, Civ. A. No. 90-30091-F, 1992 WL 121372, at *7 (D. Mass. Mar. 5, 1992).

344. *See* Terk Techs. Corp. v. Dockery, 86 F. Supp. 2d 706, 709 (E.D. Mich. 2000); Farm Constr. Serv., Inc. v. Robinson, 487 N.E.2d 873, 873 (Mass. Ct. App. 1986); Alan R. Gilbert, Annotation, *Refusal of Arbitrators to Receive Evidence, or to Permit Briefs or Arguments, on Particular Issues as Grounds for Relief from Award*, 75 A.L.R.3d 132 (1977).

345. Fairbanks Mun. Utils. Sys. v. Lees, 705 P.2d 457, 462 (Alaska 1985) (stating that, absent a showing of corruption, fraud, or undue means in obtaining an arbitration award, an arbitrator's failure to consider credibility evidence pertaining to a party is insufficient to establish vacatur).

346. Rebound Care Corp. v. Universal Constructors, Inc., No. M1999-00868-COA-R3-CV, 2000 WL 758610, at *8 (Tenn. Ct. App. June 13, 2000).

347. *Id.*

present the witnesses or that the panel ruled to the contrary.[348] Accordingly, the court of appeals rejected the appellant's assignment of error.

This ground from Tenn. Code Ann. section 29-5-313(a)(1)(D) is sometimes closely related to the ground that the arbitrator was guilty of misconduct at the proceedings as provided in Tenn. Code Ann. section 29-5-313(a)(1)(B). Thus, in other jurisdictions, courts have upheld vacation of an award where the arbitrator improperly and prejudicially refused to grant an adjournment at the hearing, thereby preventing the party from submitting material evidence on its behalf.[349] These cases also would be sound authority in Tennessee.

G. No Arbitration Agreement Existed and the Issue was Not Adversely Determined at the Proceeding and the Party Participating in the Hearing Raised an Objection (TENN. CODE ANN. Section 29-5-313(a)(1)(E))

In *Louisiana Safety Systems, Inc. v. Tengasco*, the Tennessee Court of Appeals explained vacatur as allowed under Tenn. Code Ann. section 29-5-313(a)(1)(E):[350]

> The purpose behind the statute is straightforward. The statute prohibits a party from claiming no arbitration agreement exists without first giving the trial court or the arbitrator an opportunity to decide before arbitration whether an arbitration agreement does in fact exist. . . . Once an unfavorable award was made, [a party] cannot then claim there was no agreement to arbitrate. Litigants are not allowed to submit issues to arbitration without objecting on the basis that no arbitration agreement exists, and then object if an adverse award is handed down. Such a

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348. *Id.*

349. *See* 4 AM. JUR. 2D *Alternative Dispute Resolution* § 218 (2014) (citing Woodco Mfg. Corp. v. G.R. & R. Mfg., Inc., 378 N.Y.S.2d 504 (N.Y. App. Div. 1976)).

350. No. E2000-03021-COA-R3-CV, 2001 WL 1105395 (Tenn. Ct. App. Sept. 21, 2001).

> "lie and wait" attitude would eviscerate the arbitration process.[351]

If the arbitration agreement were voidable at the option of the party, such as where an infant lacks capacity and does not ratify the transaction, this circumstance would be an example of "no arbitration agreement" under the statute.[352] Regarding the theory of vacatur, a party waives any claimed error made during the course of arbitration by failing to voice a specific objection before the arbitrator.[353]

H. Common Law (Non-Statutory) Grounds for Vacatur

Tennessee has a long history of arbitration rules and procedures. These decisions predate the TUAA by many years with cases decided well before the turn of the 20th century. The question becomes whether the common law grounds for vacatur from that era are good law in the 21st century.

The status of common law, as opposed to statutory, arbitration is uncertain in Tennessee. The 1968 Tennessee Supreme Court case of *Meirowsky v. Phipps*[354] upheld the common law rule that a party can revoke an agreement to arbitrate future disputes at any time before the arbitrator has rendered a valid award. The Tennessee Supreme Court as late as 1976 fully endorsed *Meirowsky*.[355] Notably, the cases yet to be overruled show Tennessee courts have applied common law arbitration since the early nineteenth century (as will be seen below).[356] It also follows that if

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351. *Id.* at *6; *see also* Anderson Cty. v. Architectural Techniques Corp., No. 03A01-9303-CH-00110, 1993 WL 346473, at *5 (Tenn. Ct. App. Sept. 9, 1993) ("There [was] no proof in this record that the appellants 'did not participate in the arbitration hearing without raising the objection' [that there was no arbitration agreement].").

352. 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:136 (4th ed. 2001).

353. *Id.* at § 57:95.

354. 432 S.W.2d 885, 887 (Tenn. 1968) (stating that with existing disputes, a party could be subject to an action for damages for breach of the agreement).

355. Cavalier Ins. v. Osment, 538 S.W.2d 399, 403 (Tenn. 1976). For additional discussion of common law arbitration, see 4 AM. JUR. 2D *Alternative Dispute Resolution* § 207 (2014).

356. *See infra* notes 379–93 and accompanying text.

common law arbitration survives, then common law grounds for vacatur remain viable.

Prior to TUAA, the Tennessee Supreme Court in a 1974 decision approved the long-standing notion of common law arbitration with regard to agreements to arbitrate future disputes.[357] Accordingly, where the agreement to arbitrate was never entered of record in any court, "[t]he common law is applicable."[358] In the last case to consider the continuing vitality of *Meirowsky*, the Tennessee Supreme Court in 1982 did not address this question.[359] Notably, when the Tennessee Supreme Court issued *Meirowsk*y, as well as in earlier decisions,[360] common law arbitration coexisted with a pre-TUAA statutory program on arbitration for existing disputes.[361] This line of authority—which has not been overruled—indicates that the Tennessee Supreme Court sees no inherent conflict with a dual track system of common law and statutory arbitral remedies—including vacatur.

Recent pronouncements from Tennessee appellate decisions are that TUAA's legislative intent is to "severely limit judicial review of arbitration awards" and to limit the grounds for vacatur to the express grounds in the statutes.[362] These observations would tend to indicate that the common law version of arbitration (and common law vacatur) is extinct and supplanted by statute. In

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357. Jackson v. Chambers, 510 S.W.2d 74 (Tenn. 1974).

358. *Id.* at 76.

359. Tenn. River Pulp & Paper Co. v. Eichleay Corp., 637 S.W.2d 853, 856 (Tenn. 1982). A modern day Tennessee decision appears to leave open the possibility of common law arbitration. *See* Cannon Cty. Bd. of Educ. v. Wade, No. M2006-02001-COA-R3-CV, 2008 WL 3069466, at *5 n.6 (Tenn. Ct. App. July 31, 2008) ("[W]e need not resolve the question of [whether common law] standards . . . apply in lieu of those established in statute or opinions based on statute.").

360. *See infra* notes 379–93 and accompanying text.

361. TENN. CODE ANN. §§ 29-5-301 to -320 (2012).

362. Warbington Constr., Inc. v. Franklin Landmark, L.L.C., 66 S.W.3d 853, 858 (Tenn. Ct. App. 2001); Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 450 (Tenn. 1996). In Tuetken v. Tuetken, 320 S.W.3d 262, 270 (Tenn. 2010), the Tennessee Supreme Court reaffirmed its holding in Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp., 320 S.W.3d 252 (Tenn. 2010), stating: "We take this opportunity to reaffirm our holding in *Pugh's* that the judicial review of an arbitrator's award is confined to the grounds enumerated in the TUAA." *Tueken*, 320 S.W.3d at 270.

actuality, a number of sister court decisions have considered this precise question on the relation of common law and statutory arbitration. The cases are of two minds on this point.

Some jurisdictions hold that because arbitration statutes are in derogation of the common law and shall be strictly construed, common law (non-statutory) grounds are not available.[363] Some policy reasons for this position are that there would be increased judicial disapproval of awards and that even the prospect of greater judicial disapproval would increase costs, reduce efficiencies, and undermine the finality of arbitration awards.[364] The many definitions of common law arbitration would also increase the difficulty of deciding whether such a basis for vacatur has merit.[365]

As will be explained in greater detail below,[366] the better view is that common law arbitration (and common law vacatur) survives in Tennessee as a supplement to statutory arbitration. A more searching review based on the common law could properly serve as a basis for vacating or modifying arbitration awards. As the United States Supreme Court in its 2008 decision of *Hall Street Associates, L.L.C. v. Mattel, Inc.*[367] said, "The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory *or common law*, for example, where judicial review of different scope is arguable."[368] Because the Tennessee Supreme Court in 2010 specifically endorsed the *Hall Street* reasoning and rationale in *Pugh's Lawn Landscape Co. v. Jaycon Development Corp.*[369] as a "guide" for Tennessee arbitration jurisprudence, a good argument exists that if the common law arbitration (and vacatur) theory survives at the federal level, it continues to co-exist as a form of non-statutory vacatur under Tennessee law.

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363. 4 AM. JUR. 2D *Alternative Dispute Resolution* § 207 (2014).

364. Coors Brewing Co. v. Cabo, 114 P.3d 60, 65 (Colo. App. 2004).

365. *Id.* at 61.

366. *See infra* notes 371–78 and accompanying text.

367. 552 U.S. 576 (2008).

368. *Id.* at 590 (emphasis added).

369. 320 S.W.3d 252, 258 (Tenn. 2010); *see also id.* at 259 ("Parties 'may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.'" (quoting *Hall St. Assocs.*, 552 U.S. at 590).

Although no post-TUAA decision squarely addresses the point, this conclusion in favor of dual track statutory and common law arbitration (and vacatur) rests on settled rules of Tennessee statutory construction. As stated by a respected authority, where a state law abolishes common law arbitration, common law arbitration is no longer viable, but where no repeal or modification is evident from the legislation, "that state continues to recognize common law arbitration."[370] This is exactly what happened with TUAA, which is silent on any wholesale abolishment of the common law remedy of arbitration. Indeed, as far back as 1873, in considering whether common law arbitration survived the enactment of a statutory arbitration regime, the Tennessee Supreme Court explicitly answered the question in the affirmative—and the case has never been overruled.[371]

While as indicated above, the issue of common law arbitration is very much open in Tennessee, the most reliable guide to legislative intent is if the relevant statute does not abrogate the common law action, the remedies become cumulative.[372] Our courts have stated, "[W]here a common law right exists, and a statutory remedy is subsequently created, the statutory remedy is cumulative unless expressly stated otherwise." Further, the Legislature is presumed to know the state of the law on the subject under consideration at the time it enacts legislation.[373] Applying these precepts solves the conundrum because TUAA has no express repeal of the common law arbitral remedy.

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370. 1 THOMAS H. OEHMKE & JOAN M. BROVINS, COMMERCIAL ARBITRATION § 4:8 (2014).

371. Meirowsky v. Phipps, 432 S.W.2d 885, 886 (Tenn. 1968); Halliburton v. Flowers, 59 Tenn. 25 (1873) (holding that the provisions of the Code as to arbitration have added to, not abrogated, the common law upon the subject). *See generally* 6 C.J.S. *Arbitration* §§ 4, 7 (2014) (noting rule in some jurisdictions that statutory arbitration does not abrogate common law arbitration but that the statutory and common law methods of arbitration are distinct, concurrent, supplementary, and cumulative remedies aiming at the same result); 1 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 6:2 (3d ed. 2013); Sturges & Reckson, *Common-Law and Statutory Arbitration: Problems Arising from Their Coexistence*, 46 MINN. L. REV. 819 (1962).

372. *Halliburton*, 59 Tenn. at 25.

373. Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 899 (Tenn. 1992). The legislature frequently provides that a given statutory remedy is exclusive, but it did not make this statement for TUAA. *See id.* at 899 n.1.

For the same reasons, where statutory and common law arbitration co-exist, a party may be entitled to invoke common law arbitration (and vacatur) where statutory arbitration is unavailable.[374] Importantly, where the agreement to arbitrate does not clearly address whether the arbitration statute or the common law doctrine applies, "[t]hen common law rules control the review of an award."[375] Adding further weight to these arguments, several respected commentaries classify Tennessee as recognizing common law arbitration.[376]

Perhaps the most compelling argument why common law arbitration (and vacatur) survive in Tennessee comes from the history of the Uniform Arbitration Act, which was first promulgated in 1955 and which the General Assembly adopted in TUAA (Tennessee has not enacted the Revised Uniform Arbitration Act of 2000). As one authority observes,

> The Uniform Arbitration Act (UAA) 1955 did not explicitly either preserve or exclude common-law arbitration; it was simply silent on the subject. Significantly, however, the Committee of the Whole on the Uniform Arbitration Act stated that the Uniform Act was not intended to abrogate common-law arbitration. *Thus, the general rule remains that existing*

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374. 1 THOMAS H. OEHMKE & JOAN M. BROVINS, COMMERCIAL ARBITRATION § 4:8 (2014). For one state's experience recognizing the dual track system, see L.H. Lacy Co. v. City of Lubbock, 559 S.W.2d 348, 351 (Tex. 1977) ("[C]ommon law arbitration continues to be a viable alternative to the statutory method."); Blue Cross Blue Shield of Tex. v. Juneau, 114 S.W.3d 126, 134 n.5 (Tex. Ct. App. 2003) (discussing that common law arbitration was never abolished, however, although arbitration agreements are presumed to arise under the statute unless the parties provide otherwise); Monday v. Cox, 881 S.W.2d 381, 385 n.1 (Tex. Ct. App. 1994); *see also* Wold Architects & Eng'rs v. Strat, 713 N.W.2d 750 (Mich. 2006).

375. 1 THOMAS H. OEHMKE & JOAN M. BROVINS, COMMERCIAL ARBITRATION § 4:8 (2014).; *see* 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:7 (4th ed. 2001).

376. 1 THOMAS H. OEHMKE & JOAN M. BROVINS, COMMERCIAL ARBITRATION § 4:8 (2014) (citing Jackson v. Chambers, 510 S.W.2d 74 (Tenn. 1974)); *see also* 3 TENN. JUR. *Arbitration and Award* § 2 ("However the statutes have added to and not abrogated the common law on this subject.").

> *common-law remedies are not abrogated unless such an intention is clearly expressed.*[377]

As mentioned above, the Tennessee General Assembly has never repealed common law arbitration, which means a strong argument exists that the usual principle of preserving both the common law and statutory procedures remain alive and well in Tennessee. Practitioners should strongly consider the strategy of arguing in the alternative that common law vacatur is a basis for overturning an arbitral award—even when they participate in TUAA proceedings.

What, then, are the contours of common law arbitration and its vacatur component in Tennessee? The principles from common law arbitration closely resemble many TUAA concepts. This correspondence explains why contemporary courts in TUAA decisions continue to cite cases relying on common law arbitration rules.[378] Perhaps the most fundamental refrain that has current day resonance is this quote from an 1874 Tennessee Supreme Court decision: "[A]rbitrators have no authority to go in their inquiries beyond the powers delegated by the terms of the submission."[379] In other examples of common law arbitration doctrines that could also support or oppose vacatur (some of which are either very similar or dissimilar to TUAA grounds), earlier Tennessee court decisions stated:

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377. THOMAS H. OEHMKE & JOAN M. BROVINS, *Arbitration Award Vacatur & Confirmation at Common Law—A 21st Century Option*, 112 AM. JUR. *Trials* 365 (2009) (emphasis added) (examining common law arbitration in comparison to statutory arbitration, including grounds for overturning an arbitral award).

378. *See, e.g.*, Team Design v. Gottlieb, 104 S.W.3d 512, 518 n.7 (Tenn. Ct. App. 2002) (citing Jocelyn v. Donnel, 7 Tenn. (Peck) 274, 275 (1823)).

379. Mays v. Myatt, 62 Tenn. 309 (1874); *see also* Smith v. Kincaid, 26 Tenn. 28, 28–29 (1846) (stating that where parties to a suit submit the matter in controversy to arbitration, the arbitrators can make no award on matters not involved in the suit, except by express agreement of the parties). *But see* TENN. CODE ANN. § 29-5-313(a)(1)(C) (2012) (allowing vacatur when the arbitrator "exceeded [his] powers").

(1) A party waives an objection to a disqualified arbitrator by appearing before the board and taking part in the arbitration without objection;[380]

(2) An arbitration award is not required to itemize the findings, unless the parties agree otherwise in their submission;[381]

(3) If the arbitrators depart from the parties' agreement in a material way or fail to act as a body, an arbitration award can be void;[382]

(4) If the parties' arbitration agreement states that the arbitrators are required to comply with the applicable law, a reviewing court is authorized to determine whether the arbitrators have drawn the proper legal conclusions;[383]

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380. Graham v. Bates, 45 S.W. 465, 466 (Tenn. Ch. App. 1898); *see also* Dougherty v. McWhorter, 15 Tenn. 239 (1934) (participating party did not object in a proceeding where the arbitrator was a relative of the opposing party).

381. *Graham*, 45 S.W. at 466.

382. Palmer v. Van Wyck, 21 S.W. 761, 761–64 (Tenn. 1893); Reynolds v. Reynolds, 15 Ala. 398, 403 (1849) (following common law rule). *But see* Memphis & Charleston R.R. Co. v. Pillow, 56 Tenn. 248, 249–54 (1872) (stating that all arbitrators must concur in an award to make it binding, unless the parties' agreement says otherwise); Smith v. Kincaid, 26 Tenn. 28, 28–29 (1846) (noting that arbitrators cannot make an award on matters not involved in a lawsuit except where based on the parties' express agreement); Toomey v. Nichols, 53 Tenn. 159, 162 (1871) (stating that an award is a nullity unless it strictly conforms to the submission, and the judgment is a nullity unless it conforms to the award).

383. Galbraith v. Lunsford, 9 S.W. 365, 366 (Tenn. 1888); Powell v. Riley, 83 Tenn. 153, 156 (1885); *see also* Nance's Lessee v. Thompson, 33 Tenn. 321, 325 (1953) (noting that an award may be set aside where the arbitrators attempt to decide a mixed question of law and fact, and the award shows on its face that they have mistaken the law); State v. Ward, 56 Tenn. (9 Heisk.) 100, 116 (1871) (stating that if the parties' agreement states that arbitrators will follow the law, then if the arbitrators clearly mistake the law, the award may be set aside); Fain v. Headrick, 44 Tenn. (4 Cold.) 327 (1867) (supporting a similar statement); Conger v. James, 32 Tenn. (2 Swan) 213, 216 (1852) (supporting a similar statement). *But see* Jocelyn v. Donnel, 7 Tenn. (Peck) 274, 274–75 (1823) (stating that arbitrators are to decide the case based on their own notions of equity and conscience and are not restricted to legal precedents or positive rules of law); *id.* (holding that a court may set aside an award where evidence exists of the receipt of "illegal evidence").

(5) A reviewing court may overturn an award based on a charge of arbitrator partiality;[384]
(6) The proof must be clear and conclusive that an arbitrator has issued an award tainted by arbitrator corruption and misconduct;[385]
(7) Arbitrators have greater discretion than law courts in deciding disputes;[386] and
(8) Parties cannot agree to judicial review that contradicts the rules of arbitration.[387]

Common law arbitration could favor either party to the case. An award that a court might deem voidable under TUAA because it fails to comply with its provisions could be valid (and enforceable) under the common law.[388] A respected commentator observes:

> [W]here an arbitration agreement falls within the scope of the arbitration statute of a state, and is enforceable under the statute, it is not necessary to decide whether the agreement is enforceable under common law, but an award that may be voidable under the statute because it fails to comply with its provisions may be valid under the common law.[389]

The common-law grounds for vacating an arbitration award are fraud, misconduct, or gross mistake. The meaning of fraud and misconduct are evident enough whereas a gross mistake is a mis-

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384. Butler v. Boyles, 29 Tenn. (10 Hum.) 155, 155 (1849) (recognizing ground but rejecting plaintiff's allegation on the facts).

385. Hardeman v. Burge, 18 Tenn. (10 Yer.) 202, 205 (1836). *But see* Dougherty v. McWhorter, 15 Tenn. (7 Yer.) 239 (1834) (finding that evidence of corruption was insufficient).

386. Ezell v. Shannon, 3 Tenn. Cas. 609, 611 (1875).

387. Bone v. Rice, 38 Tenn. (1 Head.) 149, 151–52 (1858).

388. 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:24 (4th ed. 2001). For additional discussion of the common law principles of arbitration, with some slight variations between the jurisdictions, see Thomas H. Oehmke. & Joan M. Brovins, *Arbitration Award Vacatur & Confirmation at Common Law—A 21st Century Option*, 112 AM. JUR. *Trials* 365 (2009).

389. 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:24 (4th ed. 2001).

take that implies bad faith or a failure to exercise honest judgment and results in a decision that is arbitrary and capricious. No matter how erroneous, when the arbitrator's judgment is based on honest consideration of conflicting claims, this decision will not be arbitrary and capricious.[390] The sharpest conflict between common law and statutory arbitration is the principle that in common law arbitration, if the agreement says the arbitrator will adhere to the law and he does not, the decision will necessarily be improper, but the rule is the opposite in statutory arbitration.[391]

Many court decisions construing the FAA have followed what a number of modern-day courts consider to be two common law (judge-originated) grounds for reviewing an arbitration award: (1) the award occurred in "manifest disregard of the law" or (2) the award violated the public policy of the local state jurisdiction.[392] These two lines of authority merit extended discussion in the sections below.

I. "Manifest Disregard of the Law"

In numerous decisions, federal and state courts have addressed whether a party may allege grounds for vacatur above and beyond the explicit statutory reasons. The chief area of disagreement is whether a claimant may file a valid vacatur complaint because the arbitrator's decision was in "manifest disregard of the law."

One source of confusion is that several variations exist for this theory of overturning an arbitral award. Nevertheless, a working definition of "manifest disregard of the law" is that

> A successful challenge . . . depends upon the challenger's ability to show that the award is "(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or

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390. Werline v. E. Tex. Salt Water Disposal Co., 209 S.W.3d 888, 897–98 (Tex. App. 2006).

391. *See* Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 450 (Tenn. 1996).

392. *See* Warbington Constr., Inc. v. Franklin Landmark, L.L.C., 66 S.W.3d 853, 857–58 (Tenn. Ct. App. 2001).

> (3) mistakenly based on a crucial assumption that is concededly a non-fact."[393]

Another well-known principle within the "manifest disregard of the law" doctrine in vacatur cases is that "manifest disregard" is not "mere error in the law or failure on the part of the arbitrators to understand or apply the law" but "may be found if the arbitrator understood and correctly stated the law but proceeded to ignore it."[394]

In 2008, before the United States Supreme Court decided *Hall Street Associates, L.L.C. v. Mattel, Inc.*,[395] the federal circuits were split on whether the FAA grounds for judicial review are exclusive or whether the common law "manifest disregard of the law" theory is viable (addressed below).[396] Much controversy continues to surround the availability of this common law rule—there are even indications the rule is statutory and not common law.[397]

The United States Supreme Court in *Hall Street* decided the FAA provides the exclusive criteria for review of arbitration awards and disallows parties from expanding or heightening the scope of review by agreement to permit, among other matters, the manifest disregard theory.[398] At the same time, the Court left the door ajar for such expanded agreements outside the FAA when it said that federal law does not preclude states from using "more searching review based on authority outside the [federal] statute,"

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393. Advest, Inc. v. McCarthy, 914 F.2d 6, 8–9 (1st Cir. 1990) (quoting Local 1445, United Food and Commercial Workers v. Stop & Shop Cos., 776 F.2d 19, 21 (1st Cir. 1985)). The same *Advest* decision states a different standard for the same concept: "[T]here must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it." *Id.* at 9 (quoting O.R. Secs., Inc. v. Prof'l Planning Assocs., 857 F.2d 742, 747 (11th Cir. 1988)).

394. Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997) (citations omitted).

395. 552 U.S. 576 (2008).

396. *See infra* notes 530–38 and accompanying text.

397. In at least one circuit, the court defined the quoted phrase "so narrowly that it fits comfortably under the first clause of the fourth statutory ground—'where the arbitrators exceeded their powers' . . . [because] we have confined it to cases in which arbitrators 'direct the parties to violate the law.'" Wise v. Wachovia Sec., L.L.C., 450 F.3d 265, 268–69 (7th Cir. 2006) (citing decisions).

398. *Hall St. Assocs.*, 552 U.S. at 583–87.

including "state statutory or *common law*."[399] The California Supreme Court has used this qualification to hold that under state law, a court may review the merits of an arbitration award where the contracting parties expressly agree that the arbitrators have no authority to commit errors of law and a reviewing court may vacate the award or correct it on appeal for legal error.[400]

In a comprehensive opinion, the Mississippi Supreme Court, in *Robinson v. Henne*,[401] has construed the viability of the manifest disregard of the law exception after *Hall Street*. The *Robinson* court summarized the United States Supreme Court's holding as making clear that if the manifest disregard doctrine is still viable, it is not a common law authority, but must come within the terms of the FAA.[402] Because the Supreme Court in *Hall Street* stated that "maybe the term 'manifest disregard' . . . merely referred to the statutory grounds collectively, rather than adding to them,"[403] the *Robinson* decision observed that this lack of clarity in *Hall Street* has resulted in the federal circuits having reached differing conclusions on whether such grounds are allowed in vacatur cases.[404] The *Robinson* court further noted that state courts also have gone both ways on the issue.[405]

The next source of confusion is that the United States Supreme Court, in its decisions post-*Hall Street*, has said it has yet to decide whether the manifest disregard doctrine is viable. In the most recent pronouncement, *Stolt-Nielsen S.A. v. AnimalFeds International Corp*., the United States Supreme Court observed, "We do not decide whether 'manifest disregard' survives our decision in [*Hall Street*] as an independent grounds for review or as a judicial

399. *Id.* at 590 (emphasis added).

400. *See* Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 604 (Cal. 2008).

401. 115 So. 3d 797 (Miss. 2013).

402. *Id.* at 801 (citing cases).

403. *Hall St. Assocs.*, 552 U.S. at 585.

404. *Robinson*, 115 So. 3d at 801 (analyzing decisions).

405. *Id.* at 800–02 ("State courts have split on the question with some jurisdictions applying the reasoning to their own state arbitration statutes. Texas, Alabama, and New York no longer recognize the doctrine, but California, Wisconsin, and Georgia still believe it to be valid.") (analyzing *Hall St. Assocs.*, 552 U.S. at 584).

gloss on the enumerated grounds for vacatur set forth in 9 U.S.C. § 10."[406]

Tennessee courts have addressed the viability of this defense. In its *Arnold* decision, the Tennessee Supreme Court strongly indicated that a party under TUAA may *not* rely upon the arbitrator's "manifest disregard of the law" as grounds for relief.[407] In the words of a subsequent Tennessee Court of Appeals decision considering this issue under the FAA, "We find that *Arnold* evidences an intent to severely limit judicial review of arbitration awards in Tennessee. As a result, we decline to adopt the non-statutory grounds of 'manifest disregard' and public policy for reviewing arbitration awards."[408] Because other Tennessee cases construing TUAA necessarily indicate that only the statutory grounds for vacatur are available in Tennessee, it would appear that the "manifest disregard" principle is unacceptable as a statutory basis for relief.[409]

While expressing some uncertainty, the most recent Sixth Circuit case law indicates that manifest disregard in FAA cases is still a valid common law vacatur standard.[410] This differing state and federal treatment creates a dilemma. Tennessee federal and state courts construing the FAA and state courts applying the TUAA must follow opposite positions on this heavily litigated issue, which only creates challenges for Tennessee counsel and their clients depending on the happenstance of whether the case falls within the FAA or TUAA.[411]

406. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 672 n.3 (2010).

407. Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 449 (Tenn. 1996).

408. Warbington Constr., Inc. v. Franklin Landmark, L.L.C., 66 S.W.3d 853, 859 (Tenn. Ct. App. 2001).

409. *See* Chattanooga Area Reg'l Transp. Auth. v. Local 1212 Amalgamated Transit Union, 206 S.W.3d 448, 451 (Tenn. Ct. App. 2006) ("An arbitration award cannot be vacated because the arbitrator made a mistake of fact or law, and it also cannot be vacated because it is irrational." (citing *Arnold*, 914 S.W.2d at 450)).

410. *See* Shafer v. Multiband Corp., 551 F. App'x 814, 819 n.1 (6th Cir. 2014); *see also* Meyers Assocs., v. Goodman, No. 3:14-cv-1174, 2014 WL 5488761, at *5 n.11 (M.D. Tenn. Oct. 29, 2014) (providing a comprehensive discussion of manifest disregard doctrine).

411. Note that if the state court is applying FAA and not TUAA, then the Sixth Circuit view would likely govern. *But see supra* notes 10–11 and accom-

J. Violation of Public Policy

In a theory with "obvious parallels" to the "manifest disregard" doctrine,[412] the United States Supreme Court accepted the "public policy" ground for reviewing arbitration awards in *W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber Workers*.[413] The usual rationale for vacating an award on this theory stems from a court's common law power to refuse enforcement of an arbitration contract—just as with any other contract—that violates public policy or law.[414] This inquiry is separate from whether the award decision was incorrect.[415]

The party alleging this ground must show (1) a well-defined and dominant public policy and (2) a sufficient link—also called a "nexus"—between enforcement of the award and violation of the particular policy to support the court's refusal to confirm the award.[416] Public policy grounds would exclude vague concerns that enforcement of arbitration awards would create "intolerable incentives to disobey court orders."[417]

A leading treatise makes an important point regarding the nature of the public policy that can qualify as grounds for overturning an award:

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panying text (stating that Tennessee state courts must apply the FAA in cases under the FAA for a contract arising from interstate commerce).

412. Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 783 (1996).

413. 461 U.S. 757, 766 (1983); *see also* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 (1987).

414. W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum, and Plastic Workers, 461 U.S. 757, 766 (1983). The Uniform Arbitration Act does not recognize the public policy theory as grounds for vacatur. Ariz. Elec. Power Coop., Inc. v. Berkeley, 59 F.3d 988, 991 (9th Cir. 1995). Most jurisdictions view this exception as a judicially-created or common law basis for vacatur. 2 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 38:24 (3d ed. 2013).

415. 4 AM. JUR. 2D *Alternative Dispute Resolution* § 216 (2014).

416. Dean Foods Co. v. United Steelworkers, 911 F. Supp. 1116, 1125 (N.D. Ind. 1995); *c.f.* U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers, 330 F.3d 747, 751 (6th Cir. 2003) ("Public policy must be determined from laws and legal precedents, not general considerations of public interest.").

417. Emp'rs Ins. of Wausau v. Nat'l Union Fire Ins. of Pittsburg, 933 F.2d 1481, 1488 n.5 (9th Cir. 1991).

> In attacking the award on the basis of its violation of public policy, distinctions should be made between violations of arbitration policy and violations of policy regarding the substance of the controversy. Public policy on the arbitration process is generally set forth in its entirety in the arbitration statute; normally courts need go no further. On the other hand, in determining whether an arbitrator's award contravenes public policy on a substantive issue, the court looks to constitutional, judicial and statutory authority.[418]

The U.S. Supreme Court has narrowly construed the public policy ground for challenging arbitral contract awards, observing that "general considerations of supposed public interests" are insufficient.[419]

Several federal circuit and state courts also have recognized public policy as a common law ground for vacatur,[420] but other states, such as Tennessee, oppose this view.[421] The opposing theory would be that this ground undermines the finality of arbitration decisions and opens the doors to routine sustained appeals.[422] This point becomes clearer when one considers that many—if not most—losing parties could argue that all statutory errors committed by the arbitrator offend public policy.

In line with the opposing view, the Tennessee Court of Appeals in the *Arbington* decision relied on the Tennessee Supreme Court's 1996 decision in *Arnold* rejecting the public policy ground. According to these Tennessee decisions, the strong doctrine favor-

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418. 2 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 38:24 (3d ed. 2013).

419. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 43 (1987) (quoting *W.R. Grace & Co.*, 461 U.S. at 765; 4 AM. JUR. 2D *Alternative Dispute Resolution* § 215 (2014).

420. Warbington Constr., Inc. v. Franklin Landmark, L.L.C., 66 S.W.3d 853, 857–58 (Tenn. Ct. App. 2001) (citing decisions).

421. *See Warbington*, 66 S.W.3d at 857–58; 4 AM. JUR. 2D *Alternative Dispute Resolution* § 214 (2014).

422. Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 451 (Tenn. 1996) (citing Carolina Va. Fashion Exhibitors, Inc. v. Gunter, 255 S.E.2d 414, 420 (N.C. Ct. App. 1979)).

ing arbitration requires the rejection of the public policy rationale for vacating an arbitration award.[423] The likely driving concern is that courts wish to avoid *sub silentio* review of the arbitrator's view of the case on the merits.[424]

Other Tennessee cases, however, support the interpretation that an arbitrator's violation of public policy is a ground for complaint, either as an independent common law ground or as a subset of the ground in Tenn. Code Ann. section 29-5-313 forbidding arbitrators from exceeding their powers. Thus, in *Lawrence County Education Ass'n v. Lawrence County Board of Education*,[425] the same Tennessee Supreme Court in 2007 that in 1996 had earlier authored *Arnold* broadly stated that "public policy considerations" forbid arbitrators from acting "in contravention of statutes."[426] The *Lawrence* court also said in unqualified language that an arbitrator's decision "may be vacated where the arbitrator exceeds [his] powers."[427] These statements also advance settled law that courts should refuse to enforce a contract that violates public policy.[428] To date, this conflict remains unresolved in the Tennessee decisions.

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423. *Warbington*, 66 S.W.3d at 858–59 (citing *Arnold,* 914 S.W.2d at 452).

424. *See* C&D Techs., Inc. v. Int'l Ass'n of Heat and Frost Insulators & Asbestos Workers, 303 F. Supp. 2d 468, 470–71 (S.D.N.Y. 2004); BBF, Inc. v. Alstom Power, Inc., 645 S.E.2d 467, 469–70 (Va. 2007) (stating that courts may not consider whether the arbitrator's decision was "legally correct" but only whether the arbitrator "had the power" to decide the case).

425. 244 S.W.3d 302 (Tenn. 2007).

426. *Id.* at 318 (applying rule to collective bargaining arbitration).

427. *Id.* at 318–19 (quoting TENN. CODE ANN. § 29-5-313(a)(3) (2012)).

428. Whitley v. White, 140 S.W.2d 157, 161 (Tenn. 1940) ("The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." (citation omitted)). Modern day cases construing the FAA have used the same reasoning in uphold vacatur based on a public policy violation. *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 (1987) (citing the "basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act").

VI. CRITIQUE OF VACATUR UNDER TENNESSEE ARBITRATION LAW

A. *The Superiority of Arbitration Over Litigation: Fact or Fiction?*

The Tennessee Supreme Court has endorsed the unqualified proposition that arbitration is a superior method of dispute resolution over litigation. In turn, this perceived aspect of arbitration drives the numerous pro-arbitration case law legal doctrines underlying TUAA, including the deliberately high bar for plaintiffs to overcome in seeking vacatur. Thus, in *Arnold v. Morgan, Keegan & Co.*,[429] the leading case on vacatur in arbitration, the court said that TUAA was designed to promote settlement in bypassing the courts.[430] The court also accepted without question the superiority of arbitration over litigation:

> [A]rbitration is attractive because it is a more expeditious and final alternative to litigation.
>
> The very purpose of arbitration is to avoid the courts insofar as the resolution of the dispute is concerned. The object is to avoid what some feel to be the formalities, the delay, the expense and vexation of ordinary litigation. Immediate settlement of controversies by arbitration removes the necessity of waiting out a crowded court docket . . . .[431]

The problem with the *Arnold* analysis is that our courts have built an extensive body of law without any empirical support for the critical finding that arbitration is superior to litigation in terms of formalities, delay, expense, and vexation to the parties.

A number of commentators have challenged the notion that arbitration is necessarily a more cost effective and efficient means of case disposition superior to conventional litigation. After making a careful empirical analysis, Professor Thomas J. Stipanowich has observed, "[T]he arbitration experience has become increasing-

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429. 914 S.W.2d 445.

430. *Id.* at 448–49.

431. *Id.* at 445 (quoting Boyd v. Davis, 897 P.2d 1239, 1242 (Wash. 1995).

ly similar to civil litigation, and arbitration procedures have become increasingly like the civil procedures they were designed to supplant, including prehearing discovery and motion practice," and observes that "arbitration generally is as expensive [as litigation] . . . less predictable, and not appealable."[432] Professor Christopher Drahozal similarly observes that the upfront costs of arbitration will in many cases be higher than, and at best the same as, the upfront costs in litigation.[433] Regarding the supposed superiority of arbitration over litigation, Professor W. Mark C. Weidemaier concludes that the evidence regarding outcomes in arbitration versus litigation "is mixed."[434] Next, as stated in *Williston on Contracts*,

> It should be noted, however, that arbitration is not invariably "a simple, expeditious or inexpensive method of adjudicating commercial controversies." Arbitration fees may be prohibitively high and substantially deter a worker from enforcing his or her statutory employment rights; therefore, an employer may be required to bear these costs as the *quid pro quo* for an agreement to arbitrate employment disputes. Thus, it is necessary to compare the direct costs of arbitration—which may be high, since the parties may be required to pay filing and administrative fees, the arbitrators' compensation and travel expenses, and expenses for the rental of facilities—to the indirect costs of litigation, including billable hours of attorney time incurred in discovery, pretrial hearings, motions related to the evidence, and the trial itself.[435]

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432. Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. ILL. L. REV. 1, 9 (citing Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. EMPIRICAL LEGAL STUD. 843, 895 (2004)).

433. Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U MICH. J.L. REFORM 813, 815 (2008).

434. W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1108–09 n.69 (2012).

435. 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:11 (4th ed. 2001) (citations omitted); 2 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL

Some judges are also starting to doubt the supposed truism of arbitral superiority over litigation. A South Carolina federal district judge has written,

> In this court's view, the longstanding federal policy favoring arbitration perhaps should be revisited. The policy arose during a time when a reasonable percentage of federal cases went to trial and a burgeoning federal case load made arbitration an attractive, less expensive, and quicker form of dispute resolution. *Today, it appears that the arbitration dockets may be more congested than the dockets of most federal district courts*. On several occasions in recent years, when this court has granted a motion to compel arbitration, retaining the case on its docket so that the award can be formalized in a judgment, the arbitration process has required two to three years to run its course. This court would have been able to provide a much quicker forum for the resolution of those disputes.[436]

These preliminary observations warrant deeper study, but they should at least raise serious questions about the supposed superiority of arbitration over litigation in terms of efficiency and the advantages to the parties. Tennessee courts seem to give short shrift to the absence of well-conducted empirical studies in Tennessee (and elsewhere) in this regard.

Where a legal policy giving great weight to arbitration as a superior conflict resolution device lacks verifiable support, the legal doctrine becomes suspect. As courts have stated in other contexts, "A doctrine that is explained as if it were an empirical proposition but for which there is only limited empirical support is both

ARBITRATION § 48:2 (3d ed. 2013). For other commentary strongly questioning the received wisdom that arbitration is superior to litigation in dispute resolution, see Theodore Eisenberg & Geoffrey P. Miller, *The Flight From Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335 (2007).

436. Cox v. Time Warner Cable, Inc., C/A No. 4:12-cv-03407-JFA, 2013 WL 5469992, at *1 n.1 (D.S.C. Sept. 30, 2013) (emphasis added) (citations omitted).

inherently unstable and an easy mark for critics."[437] Accordingly, the time has come for Tennessee courts to reexamine the many pro-arbitration case law policies that support (and are supposedly derived from) TUAA, including the difficult standard for vacatur. If a principle no longer has (and maybe never had) empirical backing, then the highly pro-arbitration TUAA cases making casual empirical assumptions about the plusses of these non-judicial proceedings need in-depth reconsideration.

B. TUAA's Judicial Gloss

Besides lacking empirical support in key respects, the Tennessee vacatur decisions have gone well beyond the literal terms of the statutory scheme and have added a substantial gloss to TUAA. Nothing in TUAA states that courts in vacatur cases must employ an extremely narrow and deferential standard of review—the words "severely" limited are a common judicial fixture[438]—or that awards will stand except in "very unusual circumstances."[439] Nothing in TUAA states that courts in vacatur cases cannot consider the merits of the arbitral award or assess whether the arbitrator has committed a significant error of law or fact. Lastly, nothing in TUAA specifically supports the case law doctrine establishing a "heavy presumption of arbitrability"[440] or that a court must enforce an order to arbitrate "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute."[441] Nonetheless, Tennessee courts routinely advance these principles merely by citing other cases that

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437. State v. Novembrino, 519 A.2d 820, 848 (N.J. 1987).

438. *E.g.*, Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 448 (Tenn. 1996); Millsaps v. Robertson-Vaughn Const. Co., 970 S.W.2d 477, 480 (Tenn. Ct. App. 1997).

439. *E.g.*, *Arnold*, 914 S.W.2d at 448 (citing First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995)); Davis v. Reliance Elec., 104 S.W.3d 57, 61 (Tenn. Ct. App. 2002).

440. *E.g.*, Pyburn v. Bill Heard Chevrolet, 63 S.W.3d 351, 357 (Tenn. Ct. App. 2001); Dale Supply Co. v. York Int'l Corp., No. M2002-01408-COA-R3-CV, 2003 WL 22309461, at *4 (Tenn. Ct. App. Apr. 9, 2003).

441. *E.g.*, Taylor v. Butler, 142 S.W.3d 277, 281 (Tenn. 2004) (quoting United Steelworks v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582–83 (1960)); Metro Const. Co. v. Cogun Indus., Inc., No. 02A01-9608-CH-00207, 1997 WL 538914, at *3 (Tenn. Ct. App. Sept. 4, 1997).

make these statements. Significantly, no cases were found where a court identified the *statutory* source for these precepts.

The counterargument might be that "[a]rbitration's desirable qualities would be heavily diluted, if not expunged, if a trial court reviewing an arbitration award were permitted to conduct a trial de novo."[442] This argument proves too much; this article advocates that the courts in TUAA cases obey the legislative intent and apply the rule in Tenn. Code Ann. section 29-5-319(b) that appeals in TUAA cases "shall be taken in the same manner and to the same extent as from orders or judgments in a civil action." The quoted language comes from TUAA, which says specifically that all arbitration appeals from Tennessee trial courts to the appellate courts are governed by such a standard.[443] Thus, any common law doctrine mentioned above without a statutory anchor lacks the traditional forms of legal support and persuasiveness. Nothing else appearing, the courts are relying on pure policy preferences for doctrines having the effect of narrowing—and practically eliminating—a party's ability to overturn an arbitral award.

Stripped of the courts' circular reliance on their own opinions, our courts as adjudicators have encroached upon the legislature's function. Courts are not properly arbitration policy makers, but serve only to resolve disputes about the application of statutory rules of arbitration to live cases and controversies. The question must then be asked, what legal basis do courts have to support the conclusion that "courts have long noted that judicial review of an arbitration decision is 'one of the narrowest standards of judicial review in all of American jurisprudence[?]'"[444] My answer is that mere policy cannot drive statutory interpretation. Because of the separation of powers provision in the state constitution, Tennessee appellate courts must remain adjudicators and not venture forth as policy makers.[445]

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442. *Davis*, 104 S.W.3d at 61 (quoting *Arnold*, 914 S.W.2d at 449).

443. *See* TENN. CODE ANN. § 29-5-319(b) (2012) ("The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.").

444. Bronstein v. Morgan Keegan & Co., No. W2011-01391-COA-R3-CV, 2014 WL 1314843, at *2 (Tenn. Ct. App. Apr. 1, 2014) (quoting Uhl v. Komatsu Forklift Co., 512 F.3d 294, 305 (6th Cir. 2008)).

445. *See* Nashville Ry. & Light Co. v. Lawson, 229 S.W. 741, 744 (Tenn. 1921) ("This court can know nothing of public policy except from the Constitu-

The Tennessee Supreme Court bypassed an excellent opportunity to address this critical issue of the scope of review in *Arnold v. Morgan Keegan and Co.*,[446] but the court ingrained the confusion more deeply. In this frequently cited case, the Tennessee Supreme Court said, "The limiting language of the statutes governing vacation and modification of arbitration awards evidences an intent to limit *severely* the trial court's authority to retry the issues decided by arbitration."[447] Importantly, the *Arnold* court cited no statutes or in-state common law doctrine for these propositions of "severe" statutory construction but merely drew a policy conclusion.[448]

Oddly enough, the *Arnold* court most strongly relied on a New Mexico Supreme Court decision applying New Mexico, and not Tennessee, law for this outcome.[449] Thus, Tennessee courts also have yet to explain why the arbitrators have not "exceeded their powers" as forbidden by Tenn. Code Ann. section 29-5-313(a)(1)(C) where arbitrators merely "arguably" construe or ap-

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tion and the laws, and the course of administration and decision." (quoting United States v. Vassar, 72 U.S. 462, 469 (1866))); City of Memphis v. Hargett, No. M2012-02141-COA-R3-CV, 2012 WL 5265006, at *5 (Tenn. Ct. App. Oct. 25, 2012) (citing TENN. CONST. art. II, §§ 1–2); *see also* Hodge v. Craig, 382 S.W.3d 325, 337 (Tenn. 2012) ("The determination of this state's public policy is primarily the prerogative of the General Assembly." (citations omitted)); Cavender v. Hewitt, 239 S.W. 767, 768 (Tenn. 1921) ("All questions of policy are for the determination of the Legislature, and not for the courts . . . . Where courts intrude into their decrees their opinion on questions of public policy, they in effect constitute the judicial tribunals as lawmaking bodies in usurpation of the powers of the Legislature." (citation omitted)); *cf.* Taylor v. Beard, 104 S.W.3d 507, 511 (Tenn. 2003) ("[T]he judiciary may determine 'public policy in the absence of any constitutional or statutory declaration'" (quoting Alcazar v. Hayes, 982 S.W.2d 845, 851 (Tenn. 1998))).

446. 914 S.W.2d 445, 445 (Tenn. 1996).

447. *Id.* at 448.

448. Adams TV of Memphis, Inc. v. Int'l Bhd. of Elec. Workers, Local 474, 932 S.W.2d 932, 934 (Tenn. Ct. App. 1996) (construing *Arnold* forthrightly). *Adams TV* commented that the Tennessee Supreme Court based its principle of limited judicial review in arbitration cases "upon the *policy* of providing finality of arbitration awards." *Id.* (emphasis added). Thus, the *Adams* court implicitly acknowledged the reality that *Arnold* is a non-statutory policy based decision versus a rule-based decision. *Id.*

449. *Arnold*, 914 S.W.2d at 449 (citing Hooten Constr. Co. v. Borsberry Constr. Co., 769 P.2d 726, 727 (N.M. 1989)).

ply the contract, but still commit "serious error" in contract interpretation.[450] When Tennessee courts construe a statute, their task is to:

> [C]arry out legislative intent without broadening or restricting the statute beyond its intended scope. [Courts] start by looking to the language of the statute, and if it is unambiguous, [they] apply the plain meaning and look no further. In doing so, [they] must avoid any forced or subtle construction that would limit or extend the meaning of the language.[451]

By adding policies and doctrines that TUAA does not expressly reflect, our courts have inappropriately applied a layer of commands and policies to unambiguous legislative enactments. Put another way, "[i]f the Legislature has clearly expressed its intent in the language of a statute, that statute must be enforced as written, free of any 'contrary judicial gloss.'"[452]

Of course, the courts' answer to this argument would be that even if courts have misapplied TUAA, the maxim that "the fact that the legislature has not expressed disapproval of a judicial construction of a statute is persuasive evidence of legislative adoption of the judicial construction."[453] The argument would be "[t]he legislature is presumed to know the interpretation which courts make of its enactments."[454] In this circumstance, it must be acknowledged that the General Assembly has not intervened and modified the statutes to overrule the post-1983 decisions so construing TUAA. Nevertheless, the Tennessee case law gloss rests on a shaky foundation based on the courts taking on legislative

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450. *Id.* at 448–51.

451. West v. Schofield, No. M2014-00320-COA-R9-CV, 2014 WL 4815957, at *6 (Tenn. Ct. App. Sept. 29, 2014) (citations omitted) (internal quotations omitted).

452. *See* Dep't of Agric. v. Appletree Mktg., L.L.C., 779 N.W.2d 237, 241 (Mich. 2010) (quoting Morales v. Auto-Owners Ins., 672 N.W.2d 849 (Mich. 2003) (stating principle)).

453. Hamby v. McDaniel, 559 S.W.2d 774, 776 (Tenn. 1977).

454. Sw. Tenn. Elec. Membership Corp. v. City of Jackson, 359 S.W.3d 590, 603 (Tenn. Ct. App. 2012) (quoting *Hamby*, 559 S.W.2d at 776).

prerogatives through a partial adverse possession of the Tennessee Code.

C. Judicial Review, Transcripts, and Arbitrator Findings of Fact/Conclusions of Law

For vacatur to be an effective remedy, and not an impossible dream for claimants, there must be a sufficient record of the arbitral proceedings that a trial or appellate court can examine with confidence. As stated above, unless the agreement or a statute provides otherwise, Tennessee courts see nothing wrong or unfair that the record for an arbitration decision is missing a transcript on appeal or that the award might lack findings of fact or of law.[455] The Tennessee Supreme Court said in *Arnold,*

> The agreement in this case provided that the arbitrators were not required to make written findings of fact and law. Such is normally the case. Thus, under usual circumstances, any ground for vacating or modifying the arbitration award will usually appear on the face of the award, not within the transcript. It would be unfair and incongruous to hold that an arbitration award in hearings in which a transcript was made is more open to attack than in a case in which no transcript was made. Thus, the case under submission was no more open to review by the trial court than was any other arbitration case.[456]

The practical (and adverse) effects of this doctrine is that it "greatly restricts" a court's ability to review the arbitral decision, it invites "speculation" on the arbitrator's rationale, and it "emasculates effective judicial review."[457]

The problem is more serious where the award lacks any sort of valid contemporaneous explanation. Here, the reviewing

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455. *See supra* Section V.B.

456. Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 449 (Tenn. 1996).

457. Chasser v. Prudential-Bache Secs., 703 F. Supp. 78, 79 (S.D. Fla. 1988). A prominent treatise takes a different perspective on use of transcripts in arbitration but does concede that the issue has long been a matter of debate and that they are advisable in technical or complex cases. 2 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 29:18 (3d ed. 2013).

court frequently confirms the award because the precedents allow it to conclude that the arbitrator's "true intent is apparent" or that the grounds for the award "can be inferred from the facts."[458] If it is proper for an arbitrator's award to be as brief as stating a dollar award for damages, an aggrieved claimant (contrary to *Arnold*) has little or no possible basis to determine the grounds for challenge merely from a number on a piece of paper.

Given the minimal information that can accompany an arbitration award decision, a real danger exists that the reviewing court's opinion will cure a deficient arbitral decision by supplying a post-hoc justification. The cases reveal the problems with how the courts have used this last-mentioned questionable judicial savings mechanism. A 2013 District of Columbia district court decision stated that a court under the FAA "is not at liberty to make assumptions as to the arbitral Tribunal's logic."[459] Yet, in the same opinion the court approved a post-hoc rationale when it stated that "an award must be confirmed even where the reasoning is 'deficient or non-existent,' provided that 'any justification [for the decision] can be gleaned from the record.'"[460] The problem with this federal district court decision is that no substantive distinction exists between an award based on impermissible "assumptions"—which the court condemned—and an award based on permissible "gleanings"—which the court approved.[461] Succinctly put, the line cannot be drawn that finely.

In defending the sufficiency of the arbitrator's reasoning, another court unapologetically said that an arbitrator's "improvident, even silly factfinding does not provide a basis for a reviewing court's to refuse to enforce an award."[462] As a federal appeals court judge observed in a concurring opinion in another appellate case, the truth is that when an arbitrator makes an award without a

458. First Interregional Equity Corp. v. Haughton, 842 F. Supp. 105, 110 (S.D.N.Y. 1994) (citations omitted).

459. ARMA, S.R.O. v. BAE Sys. Overseas, Inc., 961 F. Supp. 2d 245, 261 (D.D.C. 2013) (construing 9 U.S.C. § 10(a)(1) (2012)).

460. *Id.* at 261 (quoting Kurke v. Oscar Gruss & Son, Inc., 454 F.3d 350, 354 (D.D.C. 2006)).

461. *See id.* (making this distinction).

462. Questar Capital Corp. v. Gorter, 909 F. Supp. 2d 789, 799 (W.D. Ky. 2012) (quoting Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001)).

satisfactory explanation, courts become participants in a "judicial snipe hunt" as they become a "rubber stamp" for unexplained or unsupported arbitrator decisions.[463]

Recognizing these potential flaws, not all jurisdictions let the arbitrators off the hook so easily. For example, Connecticut courts in adjudicating state arbitral awards reason that, because reviewing courts frequently lack access to a transcript of the proceedings, "it is particularly important and incumbent upon arbitrators to make express reference to the specific evidence on which they rely in support of their findings of fact, as opposed to simply making conclusory statements."[464] Further, as an FAA case has observed, "[W]hen the arbitrators do not give their reasons [for arbitral decisions], it is nearly impossible for the court to determine whether they acted in disregard of the law."[465]

Courts defending the current approach on findings of fact/law argue that imposing a requirement upon the arbitrator to explain his decision (absent the parties' agreement otherwise) "[w]ould serve only to perpetuate the delay and expense which arbitration is meant to combat."[466] This rationale is unconvincing because a concise but complete arbitral decision is hardly wasteful of resources. An adequate decision explaining the arbitrator's rationale brings credibility and transparency to the process and instills confidence in the participants that each has received fair

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463. Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc., 894 F.2d 862, 871 (6th Cir. 1990) (Martin, J., concurring); *see also* Matteson v. Ryder Sys., Inc., 99 F.3d 108, 113 (3d Cir. 1996) ("[C]ourts are neither entitled nor encouraged simply to 'rubber stamp' the interpretations and decisions of arbitrators.").

464. State v. AFSCME, Local 391, 69 A.3d 927, 939 (Conn. 2013).

465. Prudential-Bache Secs., Inc. v. Tanner, 72 F.3d 234, 240 (1st Cir. 1995); O.R. Secs., Inc. v. Prof'l Planning Assocs., 857 F.2d 742, 747 (11th Cir. 1988); *see also* Dominick & Dominick Inc. v. Inv'r Servs. & Savs. Corp., No. 86 Civ. 7265 (MGC), 1991 WL 143716, at *5 (S.D.N.Y. July 22, 1991) ("The absence of a statement of reasons does not support [an] argument that the arbitrators based their decision on a particular finding or theory."). *But see* Alexander v. Gardner-Denver Co., 415 U.S. 36, 57–58 (1974) (observing that no requirement exists under the FAA for arbitrator findings of fact or conclusions of law). *See generally* R. D. Hursh, Annotation, *Necessity that Arbitrators, in Making Award, Make Specific or Detailed Findings of Fact or Conclusions of Law*, 82 A.L.R.2d 969 (1962).

466. Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1254 (7th Cir. 1994).

treatment.[467] In fact, an explanation requirement would actually *improve* the efficiency of arbitration by giving the parties and reviewing courts the insights on what guided the arbitrator's thought processes. It also proves too little for courts to reason that if parties to arbitration wish a more detailed arbitral opinion, they should clearly state in the agreement the degree of specificity required.[468]

The current regime on arbitral transcripts and findings of fact/law harms the utility of the process because it encourages arbitrators to render careless and incorrect decisions secure in the belief that reviewing courts will likely supply judicial first aid as needed by providing legally defensible rationales by citing the "gleanings" from the record.[469] Such judicial repair work also invites courts to provide rationales and justifications that the arbitrator might never have considered, thus turning courts into super-arbitrators.[470]

In their vigor to defend what should otherwise be dubious award decisions, some courts display a puzzling reticence to remand the case to an arbitrator for additional findings. The better view is that "[i]t is entirely appropriate for a [trial] court to direct arbitrators to explain their awards."[471] This technique advances the fairness of the arbitral system because it "avoids any judicial guessing" about the rationale for the award and gives the parties "what they bargained for—a clear decision from the arbitrator."[472] Nevertheless, a 1989 decision of the United States Court of Ap-

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467. *See* R. E. Bean Constr. Co. v. Middlebury Assocs., 428 A.2d 306, 309 (Vt. 1980) ("To the extent that justified confidence in arbitration is established, it can only aid the courts in meeting the public's need for speedy, inexpensive and fair dispute resolution.").

468. Questar Capital Corp. v. Gorter, 909 F. Supp. 2d 789, 822 (W.D. Ky. 2012).

469. *See* ARMA, S.R.O. v. BAE Sys. Overseas, Inc., 961 F. Supp. 2d 245, 261 (D.D.C. 2013) (using this mode of analysis to uphold an arbitral award).

470. *See* State Sys. of Higher Educ. v. State College Univ. Prof'l Ass'n, 743 A.2d 405, 413 (Pa. 1999).

471. Sargent v. Paine Webber, Jackson & Curtis, Inc., 674 F. Supp. 920, 923 (D.D.C. 1987), *rev'd*, 882 F.2d 529 (D.C. Cir. 1989); *accord* Falcon Steel Co. v. HCB Contractors, Inc., Civ. A. No. 11557, 1991 WL 50139, at *2 (Del. Ch. Apr. 4, 1991) (citations omitted).

472. *Sargent*, 674 F. Supp. at 923; *see also* Hilib, Rogal & Hobbs Co. v. Golub, No. 3:05cv574, 2006 WL 2403390, at *6–7 (E.D. Va. Aug. 18, 2006) (citing an extensive collection of approving remands).

peals for the District of Columbia Circuit ("D.C. Circuit") rejected that procedure for a damages award lacking backup calculations, reasoning that remand for an explanation of an award "would unjustifiably undermine the speed and thrift sought to be obtained by the 'federal policy favoring arbitration.'"[473] What the D.C. Circuit missed in this case is that an appellate court will have little insight in what it is being asked to enforce if serious doubt exists on the rationale that the arbitrator or trial court used to reach its decision.

No Tennessee cases were found addressing the trial court's authority to order a remand to the arbitrator. Because the case law in Tennessee on remands is unclear, practitioners should rely on general case law principles in advocating this remedy. The United States Court of Appeals for the Sixth Circuit has ruled that "[a] remand is proper . . . at common law . . . to clarify an ambiguous award or to require the arbitrator to address an issue submitted to him but not resolved by the award."[474]

D. Misreading "Exceeding" Arbitrator "Powers" (TENN. CODE ANN. Section 29-5-313(a)(1)(C))

An established ground for vacatur, both under the FAA[475] and TUAA,[476] is that the arbitrator "exceeded" his "powers." While courts commonly state that arbitrators "exceed their powers" in deciding issues when they go outside the scope of the arbitration agreement,[477] some extra-lenient doctrines apply in this area.

In one common statement, "As long as the arbitrator is, arguably, construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision."[478] In-

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473. Sargent v. Paine Webber, Jackson & Curtis, Inc., 882 F.2d 529, 532 (D.C. Cir. 1989).

474. M & C Corp. v. Erwin Behr GmbH & Co., 326 F.3d 772, 782 (6th Cir. 2003) (quoting Green v. Ameritech Corp., 200 F.3d 967, 977 (6th Cir. 2000)).

475. 9 U.S.C. § 10(a)(4) (2012).

476. TENN. CODE ANN. § 29-5-313(a)(1)(C) (2014).

477. *E.g.*, Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 450 (Tenn. 1996) (citing Int'l Talent Grp., Inc. v. Copyright Mgmt., Inc., 769 S.W.2d 217, 218 (Tenn. Ct. App. 1988)).

478. *Id.* at 449; Millsaps v. Robertson-Vaughn Constr. Co., 970 S.W.2d 477, 480 (Tenn. Ct. App. 1997) (quoting *Arnold*, 914 S.W.2d at 480).

deed, "improvident, even silly" interpretations usually pass judicial muster,[479] and some courts profess that the reasoning of the arbitrator is legally irrelevant because the only point at issue is "the result reached."[480] This dilution—and misreading—of the statutory standard that the arbitrator may not "exceed" his powers cannot withstand logical scrutiny.

In the words of Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit, the question of whether the arbitrator exceeded his powers is not if he "erred" in the interpretation of the contract, "clearly erred" in the interpretation, or "grossly erred" in the interpretation.[481] The standard for the proper exercise of arbitral powers is whether the arbitrator interpreted the contract as opposed to ignoring it and substituted his own notion of what is reasonable or fair.[482] Judge Posner's observation should not be over-construed, however, because "the grosser the apparent misinterpretation, the likelier it is that the arbitrators weren't interpreting the contract at all."[483] Perhaps in recognition of this questionable classification of reasonable and unreasonable readings of

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479. *See* United Paperworkers Int'l Union v. Misco, 484 U.S. 29, 39 (1987); *see also* Bull HN Info. Sys., Inc. v. Hutson, 229 F.3d 321, 330 (1st Cir. 2000) ("[E]ven where such error is painfully clear, courts are not authorized to reconsider the merits of arbitration awards." (quoting Advest, Inc. v. McCarthy, 914 F.2d 6, 8 (1st Cir. 1990)) (noting that arbitrator inconsistently ruled that the parties had no contract but also said the parties had an adhesion contract); Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731, 990 F.2d 957, 961 (7th Cir. 1993); Ethyl Corp. v. United Steelworkers, 768 F.2d 180, 183 (7th Cir. 1985) (stating that errors of fact or law do not supply valid grounds for vacating an arbitration award). For a discussion of arbitration and adhesion contracts, see 1 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION §§ 8:26 to 8:27 (3d ed. 2013).

480. Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co., 918 F.2d 1215, 1219 n.3 (5th Cir. 1990). Some courts do not review the arbitrator's interpretation of the contract but whether the arbitrator's conduct displayed "an infidelity" to his obligation as an arbitrator. Ancor Holdings, L.L.C. v. Peterson, Goldman & Villani, Inc., 294 S.W.3d 818, 831 (Tex. Ct. App. 2009) (citation omitted).

481. Hill v. Norfolk & W. Ry. Co., 814 F.2d 1192, 1195 (7th Cir. 1987).

482. *Id.*

483. *Id.*

the contract, some courts indicate that the arbitrator's interpretation of the contract to be upheld must be "plausible."[484]

Notwithstanding, if the standard per Tenn. Code Ann. section 29-5-313(a)(1)(C) that the court "shall vacate an award" when arbitrators "exceeded their powers"[485] is to have any meaning, it should be insufficient depending on the arbitration agreement that the arbitrator was "arguably" construing the contract but was still dead wrong. Where an arbitration agreement expressly, or even impliedly, requires the arbitrator to follow the law, but his contract interpretation is irrational or illogical, he cannot be said to have stayed within his powers as defined by the parties' underlying contract. Case law from other jurisdictions specifically relies on this last perspective.[486]

Using a penetrating analysis, the Michigan Supreme Court convincingly has rebutted the widespread doctrine that arbitration decisions based on an error of law do not exceed the powers of arbitrators. In *Detroit Automobile Inter-Insurance Exchange v. Gavin*,[487] the Michigan high court concluded that "just as a judge exceeds his power when he decides a case contrary to controlling principles of law, so does an arbitrator."[488] It bears noting that the

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484. Emp'rs Ins. of Wausau v. Nat'l Union Fire Ins. of Pittsburgh, 933 F.2d 1481, 1486 (9th Cir. 1991).

485. Note that vacatur is mandatory under TENN. CODE ANN. § 29-5-313(a)(1)(C) (2012) if the grounds exist, which differs from the Federal standard under 9 U.S.C. § 10(a)(4) (2012), which states that a court "may" vacate the award when the statutory circumstances are present, which further emphasizes the "deferential nature" of federal judicial review. Cat Charter, L.L.C. v. Schurtenberger, 646 F.3d 836, 843 n.11 (11th Cir. 2011).

486. *See* Prince George's Cty. Educators Ass'n v. Bd. of Educ. of Prince George's Cty., 486 A.2d 228, 232 (Md. App. 1995) ("If the language of the contract permits but one meaning, an arbitrator who does not follow such a clear contractual mandate exceeds his authority as surely as if had gone beyond the scope of his express arbitration authority."); Nat'l Ave. Bldg. Co. v. Stewart, 910 S.W.2d 334, 349 (Mo. Ct. App. 1995) (indicating that an arbitrator will exceed his authority when his erroneous decision is not "rationally grounded in the agreement"); Davis v. Chevy Chase Fin. Ltd., 667 F.2d 160, 165–67 (D.C. Cir. 1981) (stating that an arbitral award considering a matter outside the scope of the agreement is both one made in excess of the arbitrator's authority and the basis for a decision that the arbitrator had no jurisdiction to decide the matter).

487. 331 N.W.2d 418 (Mich. 1982).

488. *Id.* at 435.

Michigan court did not hold that an error of law is automatic grounds for vacatur. More precisely, the court said that to vacate an award there "must be error so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise."[489]

Thus, the *Detroit Automobile* court considered the parties' reasonable expectations of arbitrator conduct:

> If the sole or even primary goal of private arbitration were the expeditious, inexpensive, and unreviewable resolution of private disputes, we might be persuaded of the justice of the no-review rule . . . . But those are not the goals or purposes of statutory arbitration.
>
> . . . We are not ready to assume that the parties in these cases agreed to forego observance of a plainly applicable provision of their written contract, one which is dispositive of the only matter genuinely in dispute between them, in exchange for a speedy, thrifty, and final resolution of their differences in a way which disregards the law substantially determinative of their rights and duties. The process of dispute resolution and the procedural advantages of arbitration are the servants of the law governing the issues in dispute, not the reverse.[490]

Picking up on the majority opinion's approach in *Detroit Automobile*, I ask what is the difference to a party between an arbitrator making a gross interpretive error of law or fact and deciding a question that was not clearly submitted to him under the arbitration agreement? Why is the first scenario not grounds for error in Tennessee, but the second fact pattern is grounds for complaint? Both missteps fall squarely within the text of Tenn. Code Ann. section 29-5-313(a)(1)(C), but to the average claimant, such a distinction seems hyper-technical and unjust. In *both* instances, the arbitrator is substituting his own notion of what is fair and reason-

489. *Id.* at 434.
490. *Id.* at 427.

able versus construing the law or the contract before him.[491] In *both* situations, the arbitrator is deciding questions not clearly submitted to him under the arbitration agreement and has exceeded the scope of his power in the submission.[492] By solid case law authority, a court (and by logical extension, an arbitrator) "'abuses its discretion' when it makes an error of law."[493]

Therefore, the Michigan Supreme Court correctly held that

> [W]here it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, the award and decision will be set aside.[494]

Nothing in TUAA (as opposed to current case law) would stand as an obstacle to our courts' adopting the Michigan approach.

E. Good Faith and Fair Dealing—A Little-Used Vacatur Theory

Another possible vacatur theory largely unmentioned in Tennessee is that the arbitrator will exceed his powers under the contract when he violates the implied covenant of good faith and fair dealing in conducting the proceedings or in rendering a decision. Only one unreported Tennessee decision was found mentioning this doctrine in an arbitration case, and that was in passing.[495]

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491. *See* Shearson Lehman Bros. v. Hedrich, 639 N.E.2d 228, 232 (Ill. Ct. App. 1994) ("The ultimate award must be 'grounded on the parties' contract' and arbitrators do not have the authority to ignore plain language and alter the agreement." (quoting Inter-City Gas Corp. v. Boise Cascade Corp., 845 F.2d 184, 187–88 (8th Cir. 1988)).

492. *See* T & M Props. v. ZVFK Architects & Planners, 661 P.2d 1040, 1044 (Wyo. 1983); Himco Sys., Inc. v. Marquette Elecs., Inc., 407 N.E.2d 1013, 1016 (Ill. Ct. App. 1980) ("An arbitrator exceeds his powers when he decides matters which were not submitted to him." (citing cases)).

493. *See* Boyd v. Comdata Network Inc., 88 S.W.3d 203, 212 (Tenn. Ct. App. 2002) (quoting Koon v. United States, 518 U.S. 81, 100 (1996)).

494. *Detroit Auto.*, 331 N.W.2d at 442–43.

495. *See* Hardaway v. Goodwill, No. 03-A-01-9403CV000113, 1994 WL 585767, at *4 (Tenn. Ct. App. Oct. 19, 1994).

A Minnesota case lends direct support to this notion that arbitrators are contractually bound to act in good faith and fair dealing. The court indicated that when arbitrators are "unfaithful to their obligations," a court reviewing the case can assume that the arbitrators did "exceed their authority."[496] Thus, claimants should have grounds for vacatur under Tenn. Code Ann. section 29-5-313(a)(1)(C) when the arbitrator exceeds his powers in this manner.

This theory of vacatur authority also finds substantial support from the common law of contracts. As stated in the *Restatement (Second) of Contracts* section 205, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." No party to a contract has unbridled discretion to perform as he pleases.[497] The arbitrator will act in "good faith" only when he demonstrates "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party."[498] By agreeing to serve in the role of arbitrator, this individual impliedly (and often expressly) agrees to decide the dispute impartially, conscientiously, and competently. Furthermore, the better view is that parties do not submit a case to arbitration with the expectation that the arbitrator will flout applicable law and that they are to sit by with no ability to make a complaint.[499]

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496. QBE Ins. v. Twin Homes of French Ridge Homeowners Ass'n, 778 N.W.2d 393, 398 (Minn. Ct. App. 2010); *see also* Hooters, Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999) ("Hooters materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith.").

497. Va. Vermiculite, Ltd. v. W.R. Grace & Co., 156 F.3d 535, 542 (4th Cir. 1998) ("The courts could leave all discretion in performance unbridled. . . . No U.S. court now takes this approach." (quoting STEVEN J. BURTON & ERIC G. ANDERSON, CONTRACTUAL GOOD FAITH 46–47 (1995))).

498. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981). *See generally Hooters*, 173 F.3d at 940 (summarizing implied duty of good faith and fair dealing). Tennessee courts are in accord on these principles of good faith and fair dealing. *See* 21 STEVEN W. FELDMAN, TENNESSEE PRACTICE SERIES: CONTRACT LAW AND PRACTICE §§ 8:32 to 8:34 (2006) (citing Tennessee decisions).

499. Stolt-Nielsen SA v. Animal Feeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008), *rev'd on other grounds*, 559 U.S. 662 (2010). A qualifying word read

Tennessee common law supports this statement; the Tennessee Supreme Court said in 1871 that "[t]he agreement to submit to an arbitration necessarily implies that the award made is to be legal, and if it is not, that either party shall have the right to show its illegality by regular judicial proceedings."[500] No reason supports holding arbitrators to a lower standard of conduct in 2015 as compared with the generally more primitive legal landscape of 1871.

In another sense, the arbitrator's serious error of fact or law is a breach of contract—and exceeds his powers under the arbitration contract—because it frustrates the disputing parties' reasonable expectation that the arbitrator will discharge his duties in a competent fashion. The Tennessee Court of Appeals has said about this ubiquitous implied covenant:

> Tennessee common law . . . imposes an implied covenant of good faith and fair dealing in the performance of contracts. This Court has stated that the purposes of this implied duty are two-fold: to honor the reasonable expectations of the contracting parties, and to protect the rights of the parties to receive the benefits of their agreement.[501]

Further, Tennessee courts agree that "a claim based on the implied covenant of good faith and fair dealing is not a stand alone claim; rather, it is part of an overall breach of contract claim."[502]

Given these reasonable ground rules for arbitral service, arbitrators under a contract that reflects the implied covenant have no authority to ignore plain contract language in their pact with the

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into every contract is the word "reasonable" or its equivalent "reasonably;" thus, when a party undertakes a contractual duty, *it promises a reasonable effort to achieve it through ordinary, recognized means*. *See* 21 STEVEN W. FELDMAN, TENNESSEE PRACTICE SERIES: CONTRACT LAW AND PRACTICE § 8:20 (2006) (citations omitted) (emphasis added).

500. State v. Ward, 56 Tenn. (9 Heisk.) 100, 112 (1871).

501. SecurAmerica Bus. Credit v. Schledwitz, No. W2009-02571-COA-R3-CV2011, 2011 WL 3808232 (Tenn. Ct. App. Aug. 26, 2011) (citations omitted).

502. Jones v. LeMoyne–Owen Coll., 308 S.W.3d 894, 907 (Tenn. Ct. App. 2009) (citing Lyons v. Farmers Ins. Exch., 26 S.W.3d 888, 894 (Tenn. Ct. App. 2000)).

parties that expressly or impliedly requires the arbitrator to make supportable interpretations of clear contract language.[503] If the arbitrator fails to meet this standard, and falls short of meeting a party's "reasonable expectation," he has breached the arbitral contract and exceeded his authority contrary to Tenn. Code Ann. section 29-5-313(a)(1)(C). Accordingly, this contract deviation properly affords the counsel for the aggrieved party a valid strategy for vacatur under TUAA.

F. Judicial Interpretation of Arbitration Contracts: Question of Law or Fact?

No quarrel can exist with settled law that "[t]he standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing."[504] Absent an express agreement to the contrary, the arbitrator's interpretation of his procedural powers are entitled to the same level of deference as with his merits determinations.[505] What is not so clear, however, in a judicial contest over vacatur based on the "exceeded his powers" strand of Tenn. Code Ann. section 29-5-313 (a)(1)(C) is whether interpretation of the parties' submission or the arbitrator's contract is a matter of law or fact. The distinction is important because it will control on whether the trial and appellate courts will exercise *de novo* review over that interpretation.

Unfortunately, Tennessee decisions have abandoned "well-settled" principles of appellate review in matters of contract interpretation in arbitration cases. Tennessee courts repeatedly recognize these general rules,

> [When] [t]he . . . issue on appeal involves contract interpretation, [this] is a matter of law that we review *de novo* on the record with no presumption of correctness for the determination of the trial court.

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503. Shearson Lehman Bros. v. Hedrich, 639 N.E.2d 228, 232 (Ill. App. Ct. 1994).

504. Morgan Keegan & Co. v. Starnes, No. W2012-00687-COA-R3-CV, 2014 WL 2810209, at *3 (Tenn. Ct. App. June 20, 2014) (quoting Nationwide Mutual Ins. Co. v. Home Ins. Co., 278 F.3d 621, 625 (6th Cir. 2002)).

505. Lagstein v. Certain Underwriters at Lloyd's, London, 607 F.3d 634, 643-44 (9th Cir. 2010).

> The "cardinal rule" of contract construction is to ascertain the intent of the parties and to effectuate that intent consistent with applicable legal principles. When the language of the contract is plain and unambiguous, courts determine the intentions of the parties from the four corners of the contract, interpreting and enforcing it as written.[506]

As just stated, because contract interpretation involves issue of law, the reviewing courts—*both* the trial court and the appellate courts—should consider the arbitrator's contract interpretation issues *de novo*, with no presumption of correctness on appeal.[507] The reviewing court must analyze the arbitrator's award decision based on the contract document and other permissible evidence and make its own determination of the contract's meaning and legal effect.[508] Nothing in Tenn. Code Ann. section 29-5-319 (the TUAA statute on judicial appeal and review) exempts arbitration cases from these prevailing rules of appellate contract interpretation.

The U.S. Supreme Court in a major arbitration case said, "We believe . . . that the majority of the Circuits is right in saying that courts of appeals should apply ordinary, not special, standards when reviewing district court decisions upholding arbitration awards."[509] The Tennessee Supreme Court has specifically approved the U.S. Supreme Court's stance on this point,[510] but as will be seen below, the appellate courts in our state have yet to follow this established doctrine in reviewing arbitration cases.

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506. Colonial Pipeline Co. v. Nashville & E. R.R., 253 S.W.3d 616, 621 (Tenn. Ct. App. 2007) (citations omitted).

507. O'Neil v. Clinically Home, L.L.C., No. M2013-01789-COA-R3-CV, 2014 WL 3540840, at *6 (Tenn. Ct. App. July 16, 2014).

508. *See id.* at *6–7 (citations omitted).

509. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 948 (1995). The *Arnold* court similarly observed that in reviewing a trial court's decision in an arbitration case, that the court of appeals should apply "ordinary standards." Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 449 (Tenn. 1996). Unaccountably, the *Arnold* court did not cite the standard rule of appellate review of contract interpretation that these issues are questions of law and reviewed *de novo*. *See id.*

510. Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp., 320 S.W.3d 257 (Tenn. 2010).

Until recently, Tennessee appellate courts confused a number of issues in explaining judicial review of arbitration awards. Up to 2010, the Tennessee Supreme Court and the Tennessee Court of Appeals followed the dubious view that absent legislative direction, courts should consider matters of law in arbitration cases "with the utmost caution."[511] In *Pugh's Lawn Landscape Co., Inc. v. Jaycon Development Corp.*,[512] the Tennessee Supreme Court disavowed this statement from earlier decisions. In restating (and clarifying) the standards for appellate review, the *Pugh's* case first noted that, based on a 2008 U.S. Supreme Court decision,[513] the Tennessee Court of Appeals should accept a trial court's findings of fact regarding agreements to submit the issue to arbitration if they were supported by "substantial evidence."[514] Also, the *Pugh's* court said that the Tennessee Court of Appeals should decide questions of law *de novo*.[515] Thus, the *Pugh's* decision commented that "'ordinary, not special, standards' of appellate review should apply in arbitration cases and that appellate courts need not 'give *extra* leeway to district courts that uphold arbitrators.'"[516]

While the *Pugh's* court did correct this error from earlier decisions, the Tennessee Supreme Court did not go far enough. The problem is that the Tennessee Supreme Court has yet to take the next step and rule explicitly that trial and appellate courts in TUAA cases should consider issues of contract interpretation as matters of law reviewed *de novo*. The prevailing view in American jurisdictions is that "[t]he existence and scope of an arbitration agreement are questions of law that the [appellate courts] review de novo, applying state law principles governing contract interpretation."[517]

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511. *See Arnold*, 914 S.W.2d at 450 (cited in Adams TV of Memphis, Inc. v. Int'l Bhd. of Elec. Workers, Local 274, 932 S.W.2d 932, 934–35 (Tenn. Ct. App. 1996)).

512. 320 S.W.3d at 252.

513. *First Options of Chi.*, 514 U.S. at 947.

514. *Pugh's Lawn,* 320 S.W.3d at 258.

515. *Id.* at 257.

516. *Id.* at 258 n.4 (quoting *First Options of Chi.*, 514 U.S. at 948).

517. Radil v. Nat'l Union Fire Ins. Co. of Pittsburg, 233 P.3d 688, 692 (Colo. 2010). *Accord* PaineWebber Inc. v. Elahi, 87 F.3d 589, 592 (1st Cir. 1996); Sidney v. Allstate Ins., 187 P.3d 443, 447–48 (Alaska 2008); J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 227 (Tex. 2003).

Indeed, the United States Court of Appeals for the Sixth Circuit in interpreting the closely-related FAA follows the general rule that it will review *de novo* a district court's holding that the arbitration agreement is invalid and unenforceable (or by necessary inference that the agreement is valid and enforceable).[518] To the same end, the Tennessee Court of Appeals in a FAA case has said that "[a] trial court's order on a motion to compel arbitration addresses itself primarily to the application of contract law. We review such an order with no presumption of correctness on appeal."[519] Indeed, the Tennessee Supreme Court has repeatedly stated that "the scope of review advanced by the United States Supreme Court has *equal application* in a case under the [TUAA] to the extent that such review furthers the common goal of [the] acts."[520] No Tennessee cases were found considering this TUAA/FAA discrepancy in reviewing contract interpretation questions.

G. Mutual, Final, and Definite Awards

The next issue pertains to the not-uncommon situation where the arbitration agreement bound the arbitrator to consider "all claims" that the parties presented at the hearing, but where the arbitrator failed to address all the claims. When a court adjudicates whether an arbitrator has accomplished this task, the court is not reviewing the decision on the merits. Instead, the court is merely validating whether the arbitrator has performed the duties under the agreement.[521]

Unlike TUAA, the FAA explicitly covers this point as a ground for vacatur in the most frequent ground for vacating an award: "where the arbitrators exceeded their powers, *or so imperfectly executed them that a mutual, final, and definite award upon*

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518. Cooper v. MRM Inv. Co., 367 F.3d 493, 497 (6th Cir. 2004) (stating that the trial court's fact findings will be upheld except where "clearly erroneous"); *see also* Rosenberg v. BlueCross BlueShield of Tenn., Inc., 219 S.W.3d 892, 903 (Tenn. Ct. App. 2006) ("As a general rule, a court's enforcement of an arbitration provision is reviewed *de novo*.").

519. *Rosenberg*, 219 S.W.3d at 903.

520. *Pugh's Lawn,* 320 S.W.3d at 257–58 (quoting Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 448 n.2 (Tenn. 1996)) (emphasis added).

521. Simmons v. Lucas & Stubbs Assocs., 322 S.E.2d 467, 469 (S.C. Ct. App. 1984) (construing the FAA).

the subject matter submitted was not made."[522] The TUAA is missing the language about the arbitrator "imperfectly execut[ing]" his powers such that a "mutual, final, and definite award" decision has occurred.[523]

A commentator makes the following important points in this area,

> An award must, on its face, dispose of all issues raised by either party by demand or counterclaim. To avoid controversy as to whether all issues have been finally determined, arbitrators often say in the award that "the award is in full settlement of all claims submitted to arbitration by either party against the other." There is no requirement for a particular formula or wording, but this language has been accepted by courts as evidence that everything was considered by the arbitrator.[524]

While Tennessee does recognize that an incomplete arbitration award can be objectionable, the latest on point authority found was pre-TUAA cases.[525] When faced with this issue, counsel should argue that an incomplete or non-final award violates Tenn. Code Ann. section 29-5-313(a)(1)(C) on the basis that the arbitrator has exceeded his powers, but the counter argument would be what really has occurred is the arbitrator has not fully performed his duties, which is an entirely different theory.

Because the Tennessee Supreme Court has construed TUAA to mean the grounds for overturning an arbitral award are "limited" and "narrowly construed" to effectuate the legislative

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522. 9 U.S.C. § 10(a)(4) (2012) (emphasis added).

523. *Arnold*, 914 S.W.2d at 451 (noting this difference between state and federal arbitration law). *But see* Bell Aerospace Co. Div. of Textron v. Local 516, 500 F.2d 921, 923 (2d Cir. 1974) ("Courts will not enforce an [arbitration] award that is incomplete, ambiguous, or contradictory.").

524. 2 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 33:4 (3d ed. 2013) (citations omitted).

525. *See generally* Jackson v. Chambers, 510 S.W.2d 74, 76 (Tenn. 1974) (holding that common law arbitral award was not final where the arbitrators rendered two different decisions, *i.e.*, the award was ambiguous); Powell v. Ford, 72 Tenn. 278, 286 (1880) (discussing that arbitrators disagreed on the decision).

intent,[526] a serious question exists in Tennessee on whether an incomplete or non-final award is subject to challenge under the statutory test for vacatur or if the pre-TUAA cases might suffice. It also appears that the alternative theory of modification or correction of awards under Tenn. Code Ann. section 39-5-314 cannot be stretched so far as to cover this substantive oversight.[527]

Perhaps Tennessee should follow the FAA rule that as a matter of common law, judicial review of non-final arbitration awards should occur, if at all, "only in the most extreme cases."[528] Another alternative is that "[i]f an arbitrator's decision is 'clear enough to indicate unequivocally what each party is required to do,' it will be considered a final award even if arithmetical or accounting calculations or similar technical acts remain to be completed."[529] In any event, it is apparent that a legislative fix would best address this issue.

H. Manifest Disregard of the Law—Is it a Viable Theory?

A number of jurisdictions, state and federal, recognize the arbitrator's manifest disregard of the law as a basis for vacatur[530] (analyzed above in Part VIII). The policy underlying the manifest disregard theory is that it encourages arbitrators to obey the law and assures that a claimant can vindicate its statutory rights in an effective way. "Thus, the manifest disregard standard seemingly balances the public's interest in having arbitrators stay within applicable law with the public policy favoring a speedy and economical arbitration process."[531]

Unfortunately, this theory of review has an uncertain judicial legitimacy. In *Hall Street Associates, L.L.C. v. Mattel, Inc.*,[532]

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526. *See Arnold*, 914 S.W.2d at 449.

527. *See supra* Section IV.B.

528. Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019, 1022–23 (9th Cir. 1991) (quoting Aerojet-Gen. Corp. v. Am. Arbitration Ass'n, 478 F.2d 248, 251 (9th Cir. 1973)).

529. 2 MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 33:6 (3d ed. 2013).

530. *See supra* notes 394–412 and accompanying text.

531. Marcus Mungioli, *The Manifest Disregard of the Law Standard: A Vehicle for Modernization of the Federal Arbitration Act*, 31 ST. MARY'S L.J. 1079, 1114 (2000).

532. 552 U.S. 576, 584 (2008).

the U.S. Supreme Court made some confusing comments about whether the arbitrator's manifest disregard of the law was still a viable basis for vacatur.[533] Accordingly, the federal appeals courts have divided on whether the arbitrator's manifest disregard of the law constitutes grounds for vacatur in arbitration cases.[534]

Some substantial arguments support the rejection of an arbitrator's "manifest disregard of the law" as a basis for vacatur. A number of states have concluded this theory lies outside the scope of the Uniform Arbitration Act.[535] These dissenting jurisdictions believe that the exception weakens the effectiveness and utility of arbitration because this expansion of judicial review increases costs, reduces efficiencies, and undermines the finality of arbitral awards.[536] This camp also maintains that the confusing variety of definitions of "manifest disregard" compounds the difficulties of applying vacatur theory in a consistent manner and also encourages the adoption of other non-statutory theories.[537]

The better resolution is that the manifest disregard of the law cause of action should be a proper *statutory* basis for vacatur in Tennessee. The theory would be proper when it follows the statutory grounds, i.e., where the arbitrator has exceeded his powers, and is a sufficiently comfortable fit on the facts. For instance, the Second and Ninth Circuits in the federal system accept the manifest disregard theory of vacatur on a statutory (not common

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533. *See id.* at 585 ("Maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them.").

534. *Compare* Comedy Club, Inc. v. Improv W. Assocs., 553 F.3d 1277, 1290 (9th Cir. 2009) (holding that manifest disregard theory is still valid), *with* Citigroup Glob. Mkts., Inc. v. Bacon, 562 F.3d 349, 355 (5th Cir. 2009) (holding that the manifest disregard theory is no longer valid). The U.S. Court of Appeals for the Sixth Circuit has indicated that the manifest disregard standard remains viable. Coffee Beanery, Ltd. v. WW, L.L.C., 300 Fed. Appx. 415, 418–19 (6th Cir. 2008), *cert. denied*, 558 U.S. 819 (2009).

535. *See* Coors Brewing Co. v. Cabo, 114 P.3d 60, 62 (Colo. App. 2004) (discussing a number of judicial approaches). For a collection of state court cases approving or disapproving the manifest disregard doctrine, see Robinson v. Henne, 115 So. 3d 797, 800–03 (Miss. 2013); Sooner Builders & Invs., Inc. v. Nolan Hatcheries, 164 P.3d 1063, 1072 (Okla. 2007).

536. *Coors Brewing*, 114 P.3d at 65–66 (citing Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 452 (Tenn. 1996)).

537. *Id.* at 62.

law) basis.[538] In denying vacatur where the arbitrator plainly circumvents the law, those courts rejecting the manifest disregard doctrine can be properly criticized for assisting the arbitrator in poisoning the fount of justice. Thus, even though the arbitrator acts in his private capacity, courts rejecting the manifest disregard doctrine overlook that this official is an adjunct to the machinery of the state where the courts approve and enforce an otherwise legally insupportable arbitral outcome. Undoubtedly, the average claimant losing the case places little stock in the above legalisms justifying the result.

The manifest disregard doctrine, properly cabined, does not confer a roving commission upon courts to right perceived wrongs. Additionally, to say that courts should reject manifest disregard of the law because of the difficulty in drawing a line between serious and less serious statutory errors is no excuse for courts to throw up their hands and avoid line drawing altogether. As Justice Oliver Wendell Holmes wrote almost a century ago in a different context: "Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law."[539]

I. The Status of the Public Policy Defense

As stated above, based on the discrepancy between *Arnold* and *Lawrence,* where both decisions remain good law,[540] Tennessee case law is conflicted on the availability of the public policy defense in arbitration cases.

The better view allows use of the public policy defense in limited instances. In effect, when courts in arbitration cases fail to disapprove a contract that transgresses deeply-held notions of public policy, the courts are lending their imprimatur to the enforcement of a void contract.[541] It is "well settled that [a court] will not enforce obligations arising out of a contract or a transaction that is

538. Visiting Nurse Ass'n of Fla., Inc. v. Jupiter Med. Ctr., Inc., No. SC11-2468, 2014 WL 6463506, at *14 (Fla. Nov. 6, 2014).

539. Irwin v. Gavit, 268 U.S. 161, 168 (1925) (citation omitted); *see also* Dominion Hotel v. Ariz., 249 U.S. 265, 269 (1919) (Holmes, J.) ("[T]he constant business of the law is to draw such lines.").

540. *See supra* notes 425–30 and accompanying text.

541. *In re* Standard Coffee Serv. Co., 499 So. 2d 1314, 1316 (La. Ct. App. 1986).

illegal."[542] When courts review arbitral decisions, there should be nothing controversial about accepting the proposition that "[t]he public policy exception is rooted in the common law doctrine of a court's power to refuse to enforce a contract that violates public policy or law."[543]

Putting these statements together, it is a natural step to conclude that Tennessee may, and indeed must, recognize the public policy restraints on arbitrators regarding impermissible awards. Practitioners, in devising their strategy, should consider that it is not controversial to conclude, "[A] claim forbidden by the law cannot be enforced through the process of arbitration."[544]

J. An Appeal Alternative

Given the strict and narrow grounds for judicial review of a statutory arbitration award, parties should consider the option of including in their arbitration agreement a procedure for a private contractual review panel of appellate arbitrators. The supporting theory would be that Tennessee courts allow parties wide discretion in devising their arbitral procedures.[545] As one commentator points out:

> Arbitral appellate review lacks many of the drawbacks of the appellate structure of the court system. Under such arbitral appellate review, the parties could contract to allow for another arbitration panel to review the first panel's findings, and the parties could tailor this review to their own particular values and resources. For example, parties could pro-

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542. *See* Ledbetter v. Townsend, 15 S.W.3d 462, 464–65 (Tenn. Ct. App. 1999).

543. Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941, 951 (Utah 1996) (quoting Seymour v. Blue Cross/Blue Shield, 988 F.2d 1020, 1023 (10th Cir. 1993)).

544. 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:138 (4th ed. 2001).

545. Searcy v. Herold, No. M2003-02037-COA-R3-CV, 2005 WL 2387159, at *3 (Tenn. Ct. App. Sept. 28, 2005) (citing Team Design v. Gottlieb, 104 S.W.3d 512, 517–18 (Tenn. Ct. App. 2002)); *see also* Chi. Typographical Union v. Chi. Sun-Times, 935 F.2d 1501, 1505 (7th Cir. 1991) (Posner, J.) ("If the parties want, they can contract for an appellate arbitration panel to review the arbitrator's award.").

> vide that appellate arbitrators can review only the original arbitrators' application of substantive law, or potential conflicts of the award with existing public policy, or the award's substantive basis in the facts. Moreover, since parties need not wait for their appeal to be taken up in the court system, an appeal could be conducted quickly, thus allowing an aggrieved party the opportunity to challenge the award, but not through a long and costly delay. Of course, both the scope of the arbitral review and the timing of that procedure should be set out in the arbitration agreement before later disputes arise. If given a choice, the losing party to an arbitration proceeding may hope to expand the scope of arbitral review, or to simply prolong that review, in the hopes of securing a more favorable settlement.[546]

K. A Vacatur Alternative

One could easily get the impression from examining the Tennessee decisions that an aggrieved party could be left without a remedy if it fails to make a valid case for vacatur. Such an impression would be mistaken. A theory available for any action litigated in court derives from Rule 60.02 of the Tennessee Rules of Civil Procedure, which provides:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated as intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective ap-

546. Stephen Wills Murphy, Note, *Judicial Review of Arbitration Awards Under State Law*, 96 VA. L. REV. 887, 934 (2010).

> plication; or (5) any other reason justifying relief from the operation of the judgment.[547]

Tennessee appellate courts have applied Rule 60.02 to controversies arising from an arbitration matter before a trial court,[548] and federal courts have done the same in construing the FAA under the parallel Fed. R. Civ. P. 60.[549] Therefore, practitioners are advised to investigate this avenue in addition to vacatur.

L. The Gap Between the Award and its Confirmation

Tenn. Code Ann. section 29-5-314(a), (c) provides that the court cannot confirm the award until the statutory period (ninety days) has expired for the losing party to seek vacatur or modification of the arbitrator's award. This time lag creates a danger for the prevailing party, because the losing party has three months to dispose of his assets during the interim that could otherwise be used to satisfy the award. Therefore, to prevent possible unfairness to the winning party, Tennessee should adopt the procedure in the Revised Uniform Arbitration Act, Section 22,[550] and the FAA[551] that the court's jurisdiction vests immediately after the award's entry, which helps ensure that the losing party is not tempted to circumvent the arbitral process.

VII. CONCLUSION

Arbitration as a technique for alternative dispute resolution can frequently be a desirable process for one or both parties. Counsel and their clients will decide this matter in light of the factual, legal, and strategic considerations favoring or disfavoring

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547. TENN. R. CIV. P. 60.02; *see also* Harris v. Hall, No. M2000-00784-COA-R3-CV, 2001 WL 1504893, at *2–3 (Tenn. Ct. App. Nov. 28, 2001) (explaining Rule 60.02).

548. Vest v. Duncan-Williams, Inc., No. M2005-00466-COA-R3-CV, 2006 WL 2252750, at *4 (Tenn. Ct. App. Aug. 3, 2006).

549. Merit Ins. v. Leatherby Ins., 714 F.2d 673, 682 (7th Cir. 1983).

550. REVISED UNIF. ARBITRATION ACT § 22 ("After a party to an arbitration proceeding receives notice of an award, the party may make a [motion] to the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to Section 20 or 24 or is vacated pursuant to Section 23.").

551. 9 U.S.C. § 9 (2012).

their position in the dispute. This article will have met its purpose where counsel for claimants and respondents, along with arbitrators, trial courts, and appellate courts, can use the information I have presented in such a way that it enhances the quality of civil justice in Tennessee.

Stand Your Ground Laws: Mischaracterized, Misconstrued, and Misunderstood

PAMELA COLE BELL*

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I. INTRODUCTION

It is universally accepted that the first law of nature is self-preservation. Man, animals, and all organisms seek to survive. When confronted with danger, the fight or flight instinct compels man and animals to do what is necessary to preserve his or its life. It is why our adrenalin flows when we are confronted with danger; it is why we put out our hands to break our fall; and it is even why undomesticated animals run when we come upon them. This law of nature is so basic that every state recognizes the right to use force,[1] including deadly force[2] and self-defense. The scope of the right to use deadly force to defend oneself has come under particular scrutiny in the past decade due to highly publicized and debated cases, such as *State of Florida v. Zimmerman*,[3] combined with the fact that many states changed and expanded their self-defense laws to provide greater protections for law-abiding citizens unlawfully confronted with deadly force.

This Article addresses the parameters of the use of deadly force in self-defense. States establish these parameters by statute or in their common law and fall into one of two general categories:

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1. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 223 (5th ed. 2009).

2. "Deadly force" is commonly defined as force likely to cause death or great or serious bodily injury. ALA. CODE § 13A-3-20(2) (LexisNexis 2005 & Supp. 2012); ALASKA STAT. § 11.81.900(b)(16) (2012); ARIZ. REV. STAT. ANN. § 13-105(14) (2010 & Supp. 2012); ARK. CODE ANN. § 5-2-601(2) (2013); CONN. GEN. STAT. ANN. § 53a-3(5) (West 2012); DEL. CODE ANN. tit. 11, § 471(a) (2007); FLA. STAT. ANN. § 776.012 (West Supp. 2015); HAW. REV. STAT. ANN. § 703-300 (LexisNexis 2007); KAN. STAT. ANN. § 21-5221(a)(2) (West, Westlaw through 2015 Reg. Sess.); KY. REV. STAT. ANN. § 503.010(1) (LexisNexis 2008); MO. ANN. STAT. § 563.011(1) (West 2012); NEB. REV. STAT. § 28-109(6) (2008); N.H. REV. STAT. ANN. § 627:9(II) (LexisNexis 2007 & Supp. 2012); N.J. STAT. ANN. § 2C:3-11(b) (West 2005 & Supp. 2013); N.Y. PENAL LAW § 10(11) (McKinney 2009); N.D. CENT. CODE § 12.1-05-12(1) (2012); 18 PA. STAT. AND CONS. STAT. ANN. § 501 (West 1998 & Supp. 2013); TENN. CODE ANN. § 39-11-611(a)(4) (2014); TEX. PENAL CODE ANN. § 9.01(3) (West 2011).

3. 114 So. 3d 446, 447 (Fla. Dist. Ct. App. 2013). In the *Zimmerman* case, the defendant was charged with the second-degree murder of Trayvon Martin. Zimmerman raised the defense of self-defense under Florida's statute and was acquitted. The case drew national attention and criticism, much of which was aimed at the Florida statute.

(1) retreat states and (2) no retreat states. In retreat states, if a person is confronted with what he reasonably believes is unlawful deadly force, he must first evaluate whether there is a place to which he can safely retreat and must do so if he can prior to using deadly force in self-defense. In no retreat states, a person may defend against the unlawful threat of deadly force without first retreating, as long as the defender has a reasonable belief that the use of deadly force is necessary to prevent the imminent use of deadly force against himself or another person.[4] The majority of states in the United States do not impose a duty to retreat before one can lawfully use deadly force to defend against deadly force, as long as the requirements of the state's self-defense or justifiable homicide laws are met.[5]

The public debate regarding self-defense ignited in 2005, when Florida joined the majority of states and abolished the duty

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4. *See infra* Section III.A.

5. ALA. Code § 13A-3-23 (West, Westlaw through Act 2015-559 of the 2015 Reg., First Spec. and Second Spec. Sess..); ALASKA STAT. § 11.81.335 (2012); ARIZ. REV. STAT. ANN. § 13-405 (2010 & Supp. 2012); FLA. STAT. ANN. §§ 776.012 to –.013 (West 2010 & Supp. 2015); GA. CODE ANN. § 16-3-23 (2011); IND. CODE § 35-41-3-2 (West, Westlaw through P.L. 1-2016 and P.L. 2-2016); KAN. STAT. ANN. § 21-5222 (West, Westlaw through 2015 Reg. Sess.); KY. REV. STAT. ANN. § 503.050 (LexisNexis 2008); LA. STAT. ANN. § 14:20 (West, Westlaw through 2015 Reg. Sess.); MICH. COMP. LAWS ANN. § 780.972 (West 2007); MISS. CODE ANN. § 97-3-15 (2006); MONT. CODE ANN. § 45-3-110 (2011); NEV. REV. STAT. ANN. § 200.120 (West, Westlaw through 2015 Reg. & Spec. Sess.); N.H. REV. STAT. ANN. § 627:4 (LexisNexis 2007 & Supp. 2012); N.C. GEN. STAT. § 14-51.3 (2011); OKLA. STAT. ANN. tit. 21, § 1289.25 (West Supp. 2013); S.C. CODE ANN. § 16-11-440 (Supp. 2012); S.D. CODIFIED LAWS § 22-18-4 (2006); TENN. CODE ANN. § 39-11-611 (2014); TEX. PENAL CODE ANN. § 9.32 (West 2011); UTAH CODE ANN. § 76-2-402 (LexisNexis 2012); Cassels v. People, 92 P.3d 951, 956 (Colo. 2004) (en banc); State v. McGreevey, 105 P. 1047, 1051 (Idaho 1909); People v. Manley, 584 N.E.2d 477, 491 (Ill. App. Ct. 1991); State v. Bartlett, 71 S.W. 148, 151 (Mo. 1902); Territory v. Gonzales, 68 P. 925, 932 (N.M. 1902); State v. Sandoval, 156 P.3d 60, 64 (Or. 2007); Foote v. Commonwealth, 396 S.E.2d 851, 855 (Va. Ct. App. 1990); State v. Cushing, 45 P. 145, 145–46 (Wash. 1896); State v. Dinger, 624 S.E.2d 572, 576–77 (W. Va. 2005); State v. Wenger, 593 N.W.2d 467, 471 (Wis. Ct. App. 1999); N.M. UNIF. JURY INSTRUCTIONS CRIMINAL § 14-5190 (2015); JUDICIAL COUNCIL OF CAL. CRIMINAL JURY INSTRUCTIONS § 505 (2012); IDAHO CRIMINAL JURY INSTRUCTIONS § 1519 (2010).

to retreat.[6] After Florida enacted the new law, critics and commentators were quick to christen the law a "stand your ground" law, even though the new statute was not named a "stand your ground" law. In fact, the law incorporated statutory provisions already recognized in other states for decades and required the same basic traditional components for the use of self-defense.[7] As other states joined Florida in updating and strengthening their self-defense laws to protect law-abiding citizens, the criticisms, mischaracterizations, and misunderstanding of no retreat self-defense laws grew.[8]

This Article seeks to clarify the purpose of and protections afforded by these and other self-defense laws and to dispel the doomsday predictions made by many commentators and critics after Florida joined the majority. Part II of this Article examines the history of the law of self-defense using deadly force. To understand why the laws called "stand your ground" laws created nothing new in the law of self-defense, Part III provides an overview of the law of self-defense, including a discussion of the traditional and still recognized basic components of self-defense, who can use deadly force in self-defense, and protections afforded by so-called "stand your ground" laws. Part IV discusses the current status of and policy behind the justifiable use of deadly force in the various states. In order to debunk the negative treatment of "stand your ground" laws, Part V addresses common criticisms, misrepresentations, and misconceptions of these state laws. Finally, Part VI provides a conclusion and urges no retreat states to maintain or strengthen their protections for law-abiding citizens; challenges retreat states to reconsider their self-defense laws; and rebukes the media, commentators, and politicians for misrepresenting the requirements, application, and effect of "stand your ground" laws.

6. FLA. STAT. ANN. §§ 776.012 to –776.031 (West 2010 & Supp. 2015).

7. *Id.*; *see infra* Section III.A.

8. Ironically, the same criticisms and misrepresentations did not extend to the pre-2005 laws that provided the same protections and represented the majority view.

II. History of the Law of Self-Defense Using Deadly Force

The right to defend oneself by using deadly force is not unique to American jurisprudence. In biblical times, certain types of killings were not deemed murder in violation of the sixth commandment.[9] For instance, the killing of a thief who broke into another's house at night was not considered murder and was not punished.[10] The lawful use of deadly force in self-defense was also recognized in English common law.[11] English common law, however, required a person suddenly assaulted or attacked by another to retreat before using deadly force, even if confronted with deadly force.[12] As Sir William Blackstone put it, a person assaulted "must . . . flee as far as he conveniently can, either by reason of some wall, ditch or some other impediment."[13] In other words, "it must appear that the slayer had no other possible means of escaping from his assailant" before the "slayer" could use deadly force to defend himself against deadly force.[14] But even Blackstone recognized English law did not require a person to retreat if the "fierceness of the assault" was so fierce that retreating would increase a defender's danger of death or great bodily harm.[15] This meant a person attacked was only required to retreat "as far as he conveniently or safely" could "to avoid the violence of the assault."[16] Furthermore, Blackstone was aware that not all English philosophers and legal and political theorists agreed with him regarding a duty to retreat "to the wall" before using deadly force to defend oneself.[17]

John Locke, an influential 17th century political theorist, believed if a man used any amount of force on another without any

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9. *Exodus* 20:13, 22:2.

10. *Exodus* 22:2; 4 William Blackstone, Commentaries, *182–88 (The Univ. of Chi. Press 1979) (1769).

11. *See* Blackstone, *supra* note 10, at *182.

12. *Id*. at *184–85.

13. *Id*. at *185.

14. *Id.* at *184.

15. *Id.* at *185.

16. *Id.*

17. *Id.* at *187–88.

right he became an aggressor and was thus in a "state of war" with the person upon whom he used force.[18] Locke said,

> This makes it lawful for a man to kill a thief, who has not in the least hurt him, nor declared any design upon his life, any farther than, by the use of force, so to get him in his power, as to take away his money, or what he pleases, from him . . . ."[19]

Locke justified using deadly force against even a thief by going on to say, "[B]ecause using force, where he has no right, to get me into his power, let his pretense be what it will, I have no reason to suppose, that he, who would take away my liberty, would not, when he had me in his power, take away everything else."[20] According to Locke, that put the would-be thief at war with his intended victim and exposed him to deadly force.[21] It is clear Locke did not agree with the English common law's requirement of retreating before using deadly force to defend against deadly force.

Just as the United States of America established a government different from that of England, the new country did not embrace the "retreat to the wall" mentality of England, as expounded by Blackstone.[22] Locke's political views and philosophies influenced the Declaration of Independence and many of our founders.[23] It is, therefore, not surprising that the majority of the new states did not adopt the English duty to retreat before using deadly force to defend against deadly force and instead allowed those confronted with deadly force to stand their ground and not retreat.[24] In 1921, Justice Holmes, writing for the Court in *Brown v. United States*, summed up the American attitude toward retreat when he said, "Detached reflection cannot be demanded in the presence of an uplifted knife."[25]

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18. JOHN LOCKE, TWO TREATISES ON GOVERNMENT 107 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).
19. *Id.* at 107–08.
20. *Id.* at 108.
21. *Id.*
22. Beard v. United States, 158 U.S. 550, 561–63 (1895).
23. *See* JOHN DUNN, THE POLITICAL THOUGHT OF JOHN LOCKE 6 (1969).
24. *Beard*, 158 U.S. at 561–63.
25. 256 U.S. 335, 343 (1921).

Some states, however, did follow the English tradition of imposing a duty to retreat before using deadly force in self-defense. But even those states recognized an exception, the castle doctrine, which abolished the duty to retreat in one's home or dwelling before using deadly force in self-defense and allowed a person to "stand his ground."[26] Justice Cardozo emphasized the historical recognition of the castle doctrine when he said, "It is not now, and never has been the law that a man assailed in his own dwelling, is bound to retreat. If assailed there, he may stand his ground, and resist the attack."[27]

As our country grew, the majority of states continued to recognize a person's right to use deadly force to defend against deadly force without retreating.[28] Prior to Florida amending its self-defense statute to abolish its common law duty to retreat, the majority of states recognized a person's right to use deadly force to defend against deadly force without first retreating.[29] Today, an

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26. The castle doctrine is based on the concept that a man's home is his castle, and he should not be required to retreat in his own home. Additionally, a person's home is his sanctuary and should be his safe place. Weiand v. State, 732 So. 2d 1044, 1049–50 (Fla. 1999) (quoting People v. Tomlins, 107 N.E. 496, 497 (N.Y. 1914)).

27. *Tomlins*, 107 N.E. at 497.

28. *Weiand*, 732 So. 2d at 1051.

29. MO. ANN. STAT. § 563.031 (West 2012); TENN. CODE ANN. § 39-11-611(b)(1) (2014); UTAH CODE ANN. § 76-2-402(3) (LexisNexis 2012); State v. Jackson, 382 P.2d 229, 232 (Ariz. 1963); People v. Hughes, 237 P.2d 64, 67–68 (Cal. Dist. Ct. App. 1951); Cassels v. People, 92 P.3d 951, 956 (Colo. 2004); Johnson v. State, 315 S.E.2d 871, 872 (Ga. 1984); State v. McGreevey, 105 P. 1047, 1051 (Idaho 1909); People v. Robinson, 302 N.E.2d 228, 231 (Ill. App. Ct. 1973); Runyan v. State, 57 Ind. 80, 82–83 (Ind. 1877); State v. Scobee, 748 P.2d 862, 867 (Kan. 1988); Oliver v. Commonwealth, 33 S.W.2d 684, 685 (Ky. Ct. App. 1930); People v. Riddle, 649 N.W.2d 30, 35 (Mich. 2002); Cook v. State, 467 So. 2d 203, 210 (Miss. 1985); State v. Bartlett, 71 S.W. 148, 151 (Mo. 1902); State v. Merk, 164 P. 655, 658 (Mont. 1917); Culverson v. State, 797 P.2d 238, 240–41 (Nev. 1990); State v. Horton, 258 P.2d 371, 373 (N.M. 1953); State v. Allen, 541 S.E.2d 490, 497 (N.C. Ct. App. 2000); Kirk v. Territory, 60 P. 797, 806 (Okla. 1900); State v. Rader, 186 P. 79, 85 (Or. 1919); State v. Burtzlaff, 493 N.W.2d 1, 7–8 (S.D. 1992); State v. Renner, 912 S.W.2d 701, 704 (Tenn. 1995); State v. Hatcher, 706 A.2d 429, 435 (Vt. 1997); Gilbert v. Commonwealth, 506 S.E.2d 543, 546 (Va. Ct. App. 1998); State v. Redmond, 78 P.3d 1001, 1003 (Wash. 2003); State v. Evans, 10 S.E. 792, 793 (W. Va. 1890); State v. Wenger, 593 N.W.2d 467, 471 (Wis. Ct. App. 1999).

even larger majority of states recognize a person's right to use deadly force in self-defense without first retreating.[30]

Because of the American tradition of not retreating before appropriately defending one's life from an attacker's use of deadly force, it is puzzling that so much attention was directed at Florida when the state legislature decided to finally join the majority and abolish the duty to retreat. While Florida did strengthen its protections for law-abiding citizens, residents, and visitors who find themselves defending their lives against deadly force, it did not drastically change the parameters, requirements, or components of deadly force as many try to argue. The next part of this Article discusses the generally accepted components of justifiable use of deadly force, Florida's and other state's reaffirmation of the traditional requirements for using deadly force, and the additional protections many states now recognize.

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30. ALA. CODE § 13A-3-23 (West, Westlaw through Act 2015-559 of the 2015 Reg., First Spec. and Second Spec. Sess.); ALASKA STAT. § 11.81.335 (2012); ARIZ. REV. STAT. ANN. § 13-405 (2010 & Supp. 2012); FLA. STAT. ANN. §§ 776.012 to –776.013 (West 2010 & Supp. 2015); GA. CODE ANN. § 16-3-23.1 (2011); IND. CODE § 35-41-3-2 (West, Westlaw through P.L. 1-2016 and P.L. 2-2016); KAN. STAT. ANN. § 21-5222 (West, Westlaw through 2015 Reg. Sess.); KY. REV. STAT. ANN. § 503.050 (LexisNexis 2008); LA. STAT. ANN. § 14:20 (West, Westlaw through 2015 Reg. Sess.); MICH. COMP. LAWS ANN. § 780.972 (West 2007); MISS. CODE ANN. § 97-3-15 (2006); MONT. CODE ANN. § 45-3-110 (2011); NEV. REV. STAT. ANN. § 200.120 (West, Westlaw through 2015 Reg. & Spec. Sess.); N.H. REV. STAT. ANN. § 627:4 (LexisNexis 2007 & Supp. 2012); N.C. GEN. STAT. § 14-51.3 (2011); OKLA. STAT. ANN. tit. 21, § 1289.25 (West Supp. 2013); S.C. CODE ANN. § 16-11-440 (Supp. 2012); S.D. CODIFIED LAWS § 22-18-4 (2006); TENN. CODE ANN. § 39-11-611 (2014); TEX. PENAL CODE ANN. § 9.32 (West 2011); UTAH CODE ANN. § 76-2-402 (LexisNexis 2012); *Cassels*, 92 P.3d at 956; People v. Manley, 584 N.E.2d 477, 491 (Ill. App. Ct. 1991); *Bartlett*, 71 S.W. at 151; Territory v. Gonzales, 68 P. 925, 932 (N.M. 1902); State v. Sandoval, 156 P.3d 60, 64 (Or. 2007); Foote v. Commonwealth, 396 S.E.2d 851, 855 (Va. Ct. App. 1990); State v. Cushing, 45 P. 145, 145–46 (Wash. 1896); State v. Dinger, 624 S.E.2d 572, 576–77 (W. Va. 2005); *Wenger*, 539 N.W.2d at 471; N.M. UNIF. JURY INSTRUCTIONS CRIMINAL § 14-5190 (2015); JUDICIAL COUNCIL OF CAL. CRIMINAL JURY INSTRUCTIONS § 505 (2012); IDAHO CRIMINAL JURY INSTRUCTIONS § 1519 (2010).

III. ANALYSIS OF THE LAW OF SELF-DEFENSE

A. An Overview of the Law of Self-Defense Using Deadly Force

The legal justification for self-defense of any kind rests upon the premise that the defender has "no opportunity to resort to the law for his defense."[31] Blackstone and Locke espoused this same justification for use of deadly force in self-defense.[32] This premise could not be any truer than when one is confronted by an assailant about to use deadly force against a law-abiding person. Just as the basic justification for the use of force in self-defense is recognized in every state in the United States,[33] the basic components of the justified use of deadly force are found in all states with slight variations in wording or emphasis. Those components are proportionality, necessity, and reasonable belief.[34]

The most fundamental component required for using deadly force in self-defense is proportionality. A person must be confronted with deadly force before using deadly force.[35] All fifty states require proportionality before defending with deadly force.[36]

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31. WAYNE R. LAFAVE, CRIMINAL LAW 539 (4th ed. 2003).

32. *See* BLACKSTONE, *supra* note 10, at *182; LOCKE, *supra* note 18, at 107.

33. *See* DRESSLER, *supra* note 1, at 223.

34. *See id.* at 224.

35. *See* sources cited *supra* note 2.

36. ALA. CODE § 13A-3-23 (West, Westlaw through Act 2015-559 of the 2015 Reg., First Spec. and Second Spec. Sess.); ALASKA STAT. § 11.81.335; ARIZ. REV. STAT. ANN. § 13-405 (2010 & Supp. 2012); ARK. CODE ANN. § 5-2-607 (West, Westlaw through 2015 Reg. & 1st Ex. Sess.); CAL. PENAL CODE § 197 (West 2008); COLO. REV. STAT. § 18-1-704 (2012); CONN. GEN. STAT. ANN. § 53a-19 (West 2012); DEL. CODE ANN. tit. 11, § 464 (2007); FLA. STAT. ANN. §§ 776.012 to –776.013 (West 2010 & Supp. 2015); GA. CODE ANN. § 16-3-21 (2011); HAW. REV. STAT. ANN. § 703-304 (LexisNexis 2007); IDAHO CODE § 18-4009 (2004); 720 ILL. COMP. STAT. ANN. 5/7-1 (West 2002 & Supp. 2013); IND. CODE 35-41-3-2 (West, Westlaw through P.L. 1-2016 and P.L. 2-2016); IOWA CODE ANN. § 704.1 (West 2003); KAN. STAT. ANN. § 21-5222 (West, Westlaw through 2015 Reg. Sess.); KY. REV. STAT. ANN. § 503.050 (LexisNexis 2008); LA. STAT. ANN. § 14:20 (West, Westlaw through 2015 Reg. Sess.); ME. REV. STAT. ANN. tit. 17A, § 108 (2006 & Supp. 2012); MICH. COMP. LAWS ANN. § 780.972 (West 2007); MINN. STAT. ANN. § 609.065 (West 2009); MISS. CODE ANN. § 97-3-15 (West, Westlaw through 2015 1st Reg. Sess.); MO. ANN. STAT. § 563.031 (West 2012); MONT. CODE ANN. § 45-3-102 (2011); NEB. REV.

This includes the states that do not require a person to retreat before resorting to deadly force—the so-called "stand-your-ground" states.[37] It is important to remember that deadly force does not *only* mean force involving a firearm, knife, or other traditional weapon. Depending on the size, age, sex, and health of the aggressor and the defender, the number of assailants, and the violent nature of an attack, deadly force, including use of a weapon, can be justified when confronting an unarmed assailant or attacker.[38]

STAT. § 28-1409 (2008); NEV. REV. STAT. ANN. § 200.160 (LexisNexis 2012); N.H. REV. STAT. ANN. § 627:4 (LexisNexis 2007 & Supp. 2012); N.J. STAT. ANN. § 2C:3-4 (West 2005); N.M. STAT. ANN. § 30-2-7 (West, Westlaw through 2015 First Spec. Sess.); N.Y. PENAL LAW § 35.15 (McKinney 2009); N.C. GEN. STAT. § 14-51.3 (2011); N.D. CENT. CODE § 12.1-05-07 (2012); OKLA. STAT. ANN. tit. 21, § 733 (West, Westlaw through 2015 First Sess.); OR. REV. STAT. § 161.219 (2011); 18 PA. STAT. AND CONS. STAT. ANN. § 505 (West 1998 & Supp. 2013); S.C. CODE ANN. § 16-11-440 (Supp. 2012); S.D. CODIFIED LAWS §§ 22-16-34, 22-16-35 (2006); TENN. CODE ANN. § 39-11-611 (2014); TEX. PENAL CODE ANN. § 9.32 (West 2011); UTAH CODE ANN. § 76-2-402 (LexisNexis 2012); VT. STAT. ANN. tit. 13, § 2305 (2009); WASH. REV. CODE ANN. § 9A.16.050 (West Supp. 2013); W. VA. CODE § 55-7-22 (LexisNexis 2008); WIS. STAT. ANN. § 939.48 (West Supp. 2012); Christian v. State, 951 A.2d 832 (Md. 2008); Commonwealth v. Haith, 894 N.E.2d 1122, 1128 (Mass. 2008); State v. Hanes, 783 A.2d 920, 925–26 (R.I. 2001); Gilbert v. Commonwealth, 506 S.E.2d 543, 547 (Va. Ct. App. 1998); VA. PRACTICE JURY INSTRUCTIONS §§ 63.1, 63.6 (2015); WYO. PATTERN JURY INSTRUCTION § 8.02 (2014); MD. STATE BAR ASS'N CRIMINAL PATTERN JURY INSTRUCTIONS § 5:07 (2013); 2 CR OHIO JURY INSTRUCTIONS § 417.27 (2008); VT. BAR ASS'N CRIMINAL JURY INSTRUCTION § 111 (2005).

37. ALA. CODE § 13A-3-23; ALASKA STAT. § 11.81.335; ARIZ. REV. STAT. ANN. § 13-405; CAL. PENAL CODE § 197; COLO. REV. STAT. § 18-1-704; FLA. STAT. ANN. §§ 776.012 to –776.013; GA. CODE ANN. § 16-3-21; IDAHO CODE § 18-4009; 720 ILL. COMP. STAT. ANN. 5/7-1; IND. CODE 35-41-3-2; KAN. STAT. ANN. § 21-5222; KY. REV. STAT. ANN. § 503.050; LA. REV. STAT. ANN. § 14:20; MICH. COMP. LAWS ANN. § 780.972; MISS. CODE ANN. § 97-3-15; MO. ANN. STAT. § 563.031; MONT. CODE ANN. § 45-3-102; NEB. REV. STAT. § 28-1409; NEV. REV. STAT. ANN. § 200.160; N.H. REV. STAT. ANN. § 627:4; N.M. STAT. ANN. § 30-2-7; N.C. GEN. STAT. § 14-51.3; OKLA. STAT. ANN. tit. 21, § 733; OR. REV. STAT. § 161.219; S.D. CODIFIED LAWS §§ 22-16-34, 22-16-35; TENN. CODE ANN. § 39-11-611; TEX. PENAL CODE ANN. § 9.32; UTAH CODE ANN. § 76-2-402; VT. STAT. ANN. tit. 13, §2305; WASH. REV. CODE ANN. § 16.050; W. VA. CODE § 55-7-22; WIS. STAT. § 939.48; *Gilbert*, 506 S.E.2d at 547; VA. PRACTICE JURY INSTRUCTIONS §§ 63.1, 63.6 (2015).

38. *See* LAFAVE, *supra* note 31, at 542 (citing cases).

Proportionality does not mean equal weapon or instrument of defense but instead refers to the amount of force and the *likely* effect it can have.[39] Thus, an armed person can be justified in killing an unarmed person who uses or attempts to use deadly force against the armed person.[40]

The next component of the justified use of deadly force in self-defense is necessity.[41] The requirement of necessity includes confronting deadly force that is imminent or immediate.[42] To use deadly force to defend against deadly force, the use of force must be necessary to prevent death or great bodily injury.[43] Such force is necessary if the danger of death or great bodily harm is imminent or immediate. All states require the necessity component either in their self-defense statutes or in their common law as expressed in the state jury instructions.[44] Some states specifically use

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39. *See* People v. Tomlins, 107 N.E. 496, 497 (N.Y. 1914).

40. *See* Weiand v. State, 732 So. 2d 1044, 1049 (Fla. 1999); MISS. MODEL JURY INSTRUCTIONS: CRIMINAL § 2:14 (2011).

41. *See* DRESSLER, *supra* note 1, at 224.

42. *Id.*

43. *Id.*

44. ALA. CODE § 13A-3-23(a) (West, Westlaw through Act 2015-559 of the 2015 Reg., First Spec. and Second Spec. Sess.); ALASKA STAT. § 11.81.335(a) (2012); ARIZ. REV. STAT. ANN. § 13-405(a)(2) (2010 & Supp. 2012); ARK. CODE ANN. § 5-2-607(b) (West, Westlaw through 2015 Reg. & 1st Ex. Sess.); CAL. PENAL CODE § 197 (West 2008); COLO. REV. STAT. § 18-1-704(1) (2012); CONN. GEN. STAT. ANN. § 53a-19(a) (West 2012); DEL. CODE ANN. tit. 11, § 464(a) (2007); FLA. STAT. ANN. §§ 776.012 to –776.013(1) (West 2010 & Supp. 2015); GA. CODE ANN. § 16-3-21(a) (2011); HAW. REV. STAT. ANN. § 703-304(1) (LexisNexis 2007); IDAHO CODE § 18-4009 (2004); 720 ILL. COMP. STAT. ANN. 5/7-1 (West 2002 & Supp. 2013); IND. CODE ANN. 35-41-3-2 (West, Westlaw through P.L. 1-2016 and P.L. 2-2016); IOWA CODE ANN. § 704.1 (West 2003); KAN. STAT. ANN. 21-5222(a) (West, Westlaw through 2015 Reg. Sess.); KY. REV. STAT. ANN. § 503.050(1) (LexisNexis 2008); LA. STAT. ANN. § 14:20 (West, Westlaw through 2015 Reg. Sess.); ME. REV. STAT. ANN. tit. 17A, § 108 (2006 & Supp. 2012); MICH. COMP. LAWS ANN. § 780.972(1)(a) (West 2007); MINN. STAT. ANN. § 609.065 (West 2009); MISS. CODE ANN. § 97-3-15 (2006); MO. ANN. STAT. § 563.031(1) (West 2012); MONT. CODE ANN. § 45-3-102 (2011); NEB. REV. STAT. § 28-1409(1) (2008); NEV. REV. STAT. ANN. § 200.160 (LexisNexis 2012); N.H. REV. STAT. ANN. § 627:4(I) (LexisNexis 2007 & Supp. 2012); N.J. STAT. ANN. § 2C:3-4(a) (West 2005); N.M. STAT. ANN. § 30-2-7(a) (West, Westlaw through 2015 First Spec. Sess.); N.Y. PENAL LAW § 35.15(1) (McKinney 2009); N.C. GEN. STAT. ANN. § 14-51.3(a)

the word "necessity" or "necessary," while others use "imminent" or "immediate."[45] Several states, some of which impose a duty to retreat and some which do not, include both "necessary/necessity" and "imminent/immediate" to emphasize this basic and historic requirement for self-defense.[46] In jurisdictions that require retreat before defending against deadly force with deadly force, necessity is required even if not specifically legislated because if there is a place to which a person can safely retreat to escape from the threat of deadly force, using deadly force is not necessary.

The final component of justified use of deadly force is reasonable belief. The defender must reasonably believe deadly force is necessary to prevent the use of deadly force on the defender. This component includes both a subjective and objective requirement: the defender must *have* a reasonable belief that the force is necessary to defend against deadly force (subjective), and a reasonable person in the defender's circumstances would also believe

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(2011); N.D. CENT. CODE § 12.1-05-07(1) (2012); OKLA. STAT. ANN. tit. 21, § 733(A)(2) (West, Westlaw through 2015 First Sess.); OR. REV. STAT. § 161.219 (2011); 18 PA. STAT. AND CONS. STAT. ANN. § 505(a) (West 1998 & Supp. 2013); S.C. CODE ANN. § 16-11-440(C) (Supp. 2012); S.D. CODIFIED LAWS §§ 22-16-34, 22-16-35 (2006); TENN. CODE ANN. § 39-11-611(b)(1) (2014); TEX. PENAL CODE ANN. § 9.32 (West 2011); UTAH CODE ANN. § 76-2-402(1)(a), (b) (LexisNexis 2012); VT. STAT. ANN. tit. 13, § 2305(1) (2009); WASH. REV. CODE ANN. § 9A.16.050 (West Supp. 2013); W. VA. CODE § 55-7-22(a) (LexisNexis 2008); WIS. STAT. ANN. § 939.48 (West Supp. 2012); Christian v. State, 951 A.2d 832 (Md. 2008); Commonwealth v. Haith, 894 N.E.2d 1122, 1128 (Mass. 2008); State v. Hanes, 783 A.2d 920, 925–26 (R.I. 2001); Gilbert v. Commonwealth, 506 S.E.2d 543, 547 (Va. Ct. App. 1998); VA. PRACTICE JURY INSTRUCTIONS §§ 63.1, 63.6 (2015); WYO. PATTERN JURY INSTRUCTION § 8.02 (2014); MD. STATE BAR ASS'N CRIMINAL PATTERN JURY INSTRUCTIONS § 5:07 (2013); 2 CR OHIO JURY INSTRUCTIONS § 417.27 (2008); VT. BAR ASS'N CRIMINAL JURY INSTRUCTION § 111 (2005).

45. *See* sources cited *supra* note 44 (citing law in Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin).

46. *See* sources cited *supra* note 44 (citing law in Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Illinois, Iowa, Kansas, Louisiana, Michigan, Montana, Nevada, New Mexico, New York, North Carolina, Tennessee, Texas, Utah, and Wisconsin).

such force is necessary (objective).[47] For example, the Florida statute provides: "A person is justified in using or threatening to use deadly force if he or she reasonably believes that . . . such harm is necessary to prevent imminent death or great bodily harm."[48] By using the term "reasonably believes," the Florida statute requires the person actually believe the force is necessary, the subjective component, and the belief must be reasonable for a person in the defender's situation, the objective component. The Florida standard criminal jury instructions clearly set out these two requirements:

> In deciding whether defendant was justified in the use of deadly force, you must judge [him] [her] by the circumstances by which [he] [she] was surrounded at the time the force was used. The danger facing the defendant need not have been actual; however, to justify the use of deadly force, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. Based upon appearances, the defendant must have actually believed that the danger was real.[49]

The majority of states uses the same "reasonably believes" statutory language, thus requiring both a subjective and objective mental element for the justified use of deadly force.[50] Maryland and Wy-

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47. *See* DRESSLER, *supra* note 1, at 225.

48. FLA. STAT. ANN. § 776.012(2) (West 2010 & Supp. 2015);

49. FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES (2010).

50. ALA. CODE § 13A-3-23(a) (West, Westlaw through Act 2015-559 of the 2015 Reg., First Spec. and Second Spec. Sess.); ALASKA STAT. § 11.81.335(a) (2012); ARK. CODE ANN. § 5-2-607(b) (West, Westlaw through 2015 Reg. & 1st Ex. Sess.); COLO. REV. STAT. § 18-1-704(1) (2012); CONN. GEN. STAT. ANN. § 53a-19(a) (West 2012); FLA. STAT. ANN. §§ 776.012 to – 776.013(1) (West 2010 & Supp. 2015); GA. CODE ANN. § 16-3-21(a) (2011); 720 ILL. COMP. STAT. ANN. 5/7-1 (West 2002 & Supp. 2013); IND. CODE 35-41-3-2 (West, Westlaw through P.L. 1-2016 and P.L. 2-2016); IOWA CODE ANN. § 704.1 (West 2003); KAN. STAT. ANN. 21-5222(a) (West, Westlaw through 2015 Reg. Sess.); LA. STAT. ANN. § 14:20 (West, Westlaw through 2015 Reg. Sess.);

oming do not include the "reasonably believes" language in their statutes, but the state jury instructions provide that the defendant must have the reasonable belief required by the majority.[51] Massachusetts statutes do not impose the reasonable belief requirement, but the state common law does require a defendant reasonably believe deadly force is necessary before using such force.[52]

A small minority of states seems to reject the subjective element of the reasonable belief component of self-defense and instead has adopted a strictly reasonable person objective standard.[53] The North Dakota and Vermont statutes do not include language indicating an objective or subjective standard requirement for the justified use of deadly force.[54] The North Dakota statute provides, "Deadly force is justified . . . [w]hen used in lawful self-defense if such force is *necessary* to protect the actor . . . against death, serious bodily injury, or the commission of a felony involving violence."[55] Similarly, the Vermont statute provides, "If a person kills or wounds another . . . he or she shall be guiltless: (1) In the *just and necessary* defense of his or her own life."[56] However, the jury

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ME. REV. STAT. ANN. tit. 17A, § 108 (2006 & Supp. 2012); MICH. COMP. LAWS ANN. § 780.972(1)(a) (West 2007); MINN. STAT. ANN. § 609.065 (West 2009); MO. ANN. STAT. § 563.031(1) (West 2012); MONT. CODE ANN. § 45-3-102 (2011); N.H. REV. STAT. ANN. § 627:4(I) (LexisNexis 2007 & Supp. 2012); N.J. STAT. ANN. § 2C:3-4(a) (West 2005); N.Y. PENAL LAW § 35.15(1) (McKinney 2009); N.C. GEN. STAT. § 14-51.3(a) (2011); OKLA. STAT. ANN. tit. 21, § 733(A)(2) (West, Westlaw through 2015 First Sess.); OR. REV. STAT. § 161.219 (2011); S.C. CODE ANN. § 16-11-440(C) (Supp. 2012); TENN. CODE ANN. § 39-11-611(b)(1) (2014); TEX. PENAL CODE ANN. § 9.32 (West 2011); UTAH CODE ANN. § 76-2-402(1)(a), (b) (LexisNexis 2012); W. VA. CODE § 55-7-22(a) (LexisNexis 2008); WIS. STAT. ANN. § 939.48 (West Supp. 2012).

51. MD. STATE BAR ASS'N CRIMINAL PATTERN JURY INSTRUCTIONS § 5:07 (2013); WYO. PATTERN JURY INSTRUCTION § 8.08 (2004).

52. Commonwealth v. Haith, 894 N.E.2d 1122, 1128 (Mass. 2008).

53. ARIZ. REV. STAT. ANN. § 13-405(A)(2) (2010 & Supp. 2012); CAL. PENAL CODE § 198 (West 2008); I.C. § 18-4009(3) (2013); MISS. CODE ANN. § 97-3-15(1)(f) (2006); N.M. STAT. ANN. § 30-2-7(B) (West, Westlaw through 2015 First Spec. Sess.); S.D. CODIFIED LAWS § 22-16-35 (2006); WASH. REV. CODE ANN. § 9A.16.050(1) (West Supp. 2013).

54. N.D. CENT. CODE § 12.1-05-07 (2012); VT. STAT. ANN. tit. 13, § 2305 (2009).

55. N.D. CENT. CODE § 12.1-05-07(2)(b) (emphasis added).

56. VT. STAT ANN. tit. 13, § 2305 (emphasis added).

instructions of both states make it clear that the basic component of a reasonable belief is required.[57]

In addition to justifying the use of deadly force when confronted with deadly force, the majority of state statutes provide deadly force may be used when the person against whom force is being used is committing a felony,[58] a felony involving force or violence,[59] a forcible felony as defined by statute,[60] or certain enumerated felonies.[61] These statutes recognize the mere commission of certain felonies creates a risk of death or great bodily injury to victims, witnesses, or bystanders of such crimes. The purpose of all self-defense statutes is to protect law-abiding citizens from

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57. VT. BAR ASS'N CRIMINAL JURY INSTRUCTION § 111 (2005); *see also* State v. Gagnon, 567 N.W.2d 807, 810 (N.D. 1997).

58. *See, e.g.*, MINN. STAT. ANN. § 609.065 (West 2009); MISS. CODE ANN. § 97-3-15 (2006); NEV. REV. STAT. ANN. § 200.120 (West, Westlaw through 2015 Reg. & Spec. Sess.); N.M. STAT. ANN. § 30-2-7 (West, Westlaw through 2015 First Spec. Sess.); S.D. CODIFIED LAWS §§ 22-16-34 to -35 (2006).

59. ARK. CODE ANN. § 5-2-607(a) (West, Westlaw through 2015 Reg. & 1st Ex. Sess.); CAL. PENAL CODE § 197 (West 2008); IDAHO CODE § 18-4009 (2004); KY. REV. STAT. ANN. § 503.055(3) (LexisNexis 2008); LA. STAT. ANN. § 14:20 (West, Westlaw through 2015 Reg. Sess.); N.D. CENT. CODE § 12.1-05-07; OR. REV. STAT. § 161.219(1) (2011); S.C. CODE ANN. § 16-11-420 (Supp. 2012); WASH. REV. CODE ANN. § 9A.16.050 (West Supp. 2013); *see also* JUDICIAL COUNCIL OF CAL. CRIMINAL JURY INSTRUCTIONS § 506 (2006) (interpreting CAL. PENAL CODE § 197 to mean a "forcible and atrocious" felony).

60. FLA. STAT. ANN. § 776.031 (West 2010 & Supp. 2015); GA. CODE ANN. § 16-3-21(a) (2011); 720 ILL. COMP. STAT. ANN. 5/7-1 (West 2002 & Supp. 2013); IND. CODE § 35-41-3-2 (West, Westlaw through P.L. 1-2016 and P.L. 2-2016); MO. ANN. STAT. § 563.031 (West 2012); MONT. CODE ANN. § 45-3-102 (2011); OKLA. STAT. ANN. tit. 21, § 733 (West, Westlaw through 2015 First Sess.); UTAH CODE ANN. § 76-2-402 (LexisNexis 2012).

61. ALA. CODE § 13A-3-23 (West, Westlaw through Act 2015-559 of the 2015 Reg., First Spec. and Second Spec. Sess.); ALASKA STAT. § 11.81.335 (2012); ARIZ. REV. STAT. ANN. § 13-411 (2010 & Supp. 2012); COLO. REV. STAT. § 18-1-704 (2012); CONN. GEN. STAT. § 53a-20 to -21 (West 2012); DEL. CODE ANN. title 11, § 464 (2007); HAW. REV. STAT. ANN. § 703-3-4 (LexisNexis 2007); ME. REV. STAT. ANN. tit. 17A, § 108 (2006 & Supp. 2012); NEB. REV. STAT. § 28-1409 (2008); N.H. REV. STAT. ANN. § 627:4 (LexisNexis 2007 & Supp. 2012); N.Y. PENAL LAW § 35.15 (McKinney 2009); 18 PA. STAT. AND CONS. STAT. ANN. § 505 (West 1998 & Supp. 2013); 3 R.I. GEN. LAWS § 11-8-8 (2002); TEX. PENAL CODE ANN. § 9.32 (2011); VT. STAT. ANN. tit. 13, § 2305 (2009).

falling prey to the unlawful acts of assailants, attackers, or other criminals, and the additional justification for using deadly force when serious crimes are being committed is a necessary component of that protection.

The three basic components discussed above, along with the protections afforded those who are victims, witnesses, or bystanders of crime, serve as the foundational requirements for the justified use of deadly force. Unless the requirements are met, the use of deadly force in self-defense is not justified but is, instead, likely to be criminal. The law of all fifty states makes it clear that one cannot use deadly force against non-deadly force, a threat, or a verbal confrontation.[62] A would-be assailant must be using or at-

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62. ALA. CODE § 13A-3-23(a); ALASKA STAT. § 11.81.335(a); ARIZ. REV. STAT. ANN. § 13-405(a)(2) (2010 & Supp. 2012); ARK. CODE ANN. § 5-2-607(b); CAL. PENAL CODE § 197; COLO. REV. STAT. § 18-1-704(1); CONN. GEN. STAT. ANN. § 53a-19(a) (West 2012); DEL. CODE ANN. tit. 11, § 464(a); FLA. STAT. ANN. §§ 776.012 to –776.013(1) (West 2010 & Supp. 2015); GA. CODE ANN. § 16-3-21(a); HAW. REV. STAT. ANN. § 703-304(1); IDAHO CODE § 18-4009; 720 ILL. COMP. STAT. ANN. 5/7-1; IND. CODE 35-41-3-2; IOWA CODE ANN. § 704.1 (West 2003); KAN. STAT. ANN. § 21-5222(a) (West, Westlaw through 2015 Reg. Sess.); KY. REV. STAT. ANN. § 503.050(1) (LexisNexis 2008); LA. STAT. ANN. § 14:20 (West, Westlaw through 2015 Reg. Sess.); ME. REV. STAT. ANN. tit. 17, § 108; MICH. COMP. LAWS ANN. § 780.972(1)(a) (West 2007); MINN. STAT. ANN. § 609.065; MISS. CODE ANN. § 97-3-15 (2006); MO. REV. STAT. § 563.031(1); MONT. CODE ANN. § 45-3-102; NEB. REV. STAT. § 28-1409(1); NEV. REV. STAT. ANN. § 200.160 (LexisNexis 2012); N.H. REV. STAT. ANN. § 627:4(I); N.J. STAT. ANN. § 2C:3-4(a) (West 2005); N.M. STAT. ANN. § 30-2-7(a); N.Y. PENAL LAW § 35.15(1); N.C. GEN. STAT. § 14-51.3(a) (2011); N.D. CENT. CODE § 12.1-05-07(1); OKLA. STAT. ANN. tit. 21, § 733(A)(2) (West, Westlaw through 2015 First Sess.); OR. REV. STAT. § 161.219 (2011); 18 PA. STAT. AND CONS. STAT. ANN. § 505(a) (West 1998 & Supp. 2013); S.C. CODE ANN. § 16-11-440(C) (Supp. 2012); S.D. CODIFIED LAWS §§ 22-16-34, 22-16-35 (2006); TENN. CODE ANN. § 39-11-611(b)(1) (2014); TEX. PENAL CODE ANN. § 9.32 (West 2011); UTAH CODE ANN. § 76-2-402(1)(a), (b); VT. STAT. ANN. tit. 13, § 2305(1); WASH. REV. CODE ANN. § 16.050; W. VA. CODE § 55-7-22(a) (LexisNexis 2008); WIS. STAT. ANN. § 939.48 (West Supp. 2012); Christian v. State, 951 A.2d 832 (Md. 2008); Commonwealth v. Haith, 894 N.E.2d 1122, 1128 (Mass. 2008); State v. Hanes, 783 A.2d 920, 925–26 (R.I. 2001); Gilbert v. Commonwealth, 506 S.E.2d 543, 547 (Va. Ct. App. 1998); VA. PRACTICE JURY INSTRUCTIONS §§ 63.1, 63.6 (2015); WYO. PATTERN JURY INSTRUCTION § 8.02 (2014); MD. STATE BAR ASS'N CRIMINAL PATTERN JURY INSTRUCTIONS § 5:07 (2013); 2 CR OHIO JURY INSTRUCTIONS § 417.27 (2008); VT. BAR ASS'N CRIMINAL JURY INSTRUCTION § 111 (2005).

tempting to use deadly force, and deadly force must be necessary to prevent or repel that deadly force. Finally, the necessity to use deadly force must be based on the defender's reasonable belief, which will be determined by the circumstances in which the defender finds himself knowing what he knows. Whether in a retreat state or a non-retreat state, a killing in self-defense will be justified and, therefore, not criminal only when all the requirements of the law are met. Thus, if an unprovoked man yells to a potential victim standing by his car 100 feet away, "Your money or your life," the potential victim cannot pull a gun, shoot the would-be robber, and successfully claim self-defense in any state. In these limited facts, the force used is not necessary or proportional, and there are no facts to support a reasonable belief that the thief was about to use deadly force.

B. Who Can and Who Cannot Defend Themselves Using Deadly Force

Every state, whether by statute or by common law, limits when an individual will be justified in using deadly force in a self-defense situation. Some statutory restrictions are based on the defender's actions or activities at the time he uses deadly force. All fifty states, including "stand your ground" states, prohibit aggressors and/or provokers from benefiting from self-defense laws, except in vary narrow circumstances that indicate the person claiming justification has clearly ceased being the aggressor.[63] Several

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63. ALA. CODE § 13A-3-23; ALASKA STAT. § 11.81.335; ARIZ. REV. STAT. ANN. § 13-405 (2010 & Supp. 2012); ARK. CODE ANN. § 5-2-606 (2013); CAL. PENAL CODE § 197; COLO. REV. STAT. § 18-1-704; CONN. GEN. STAT. ANN. § 53a-19; DEL. CODE ANN. tit. 11, § 464; FLA. STAT. ANN. §§ 776.013 to –776.041 (West 2010 & Supp. 2015); GA. CODE ANN. § 16-3-21; HAW. REV. STAT. ANN. § 703-304; IDAHO CODE ANN. § 18-4009; 720 ILL. COMP. STAT. ANN. 5/7-4 (West 2002); IND. CODE 35-41-3-2; IOWA CODE ANN. § 704.6 (West 2003); KAN. STAT. ANN. § 21-5226 (West, Westlaw through 2015 Reg. Sess.); KY. REV. STAT. ANN. §§ 502.055, 502.060 (LexisNexis 2008); LA. STAT. ANN. §§ 14:19, 14.21 (West, Westlaw through 2015 Reg. Sess.); ME. REV. STAT. ANN. tit. 17A, § 108; MICH. COMP. LAWS ANN. § 780.972; MINN. STAT. ANN. § 609.065; MISS. CODE ANN. § 97-3-15 (2006); MO. ANN. STAT. § 563.031; MONT. CODE ANN. § 45-3-105 (2011); NEB. REV. STAT. § 28-1409; NEV. REV. STAT. ANN. § 200.120 (West, Westlaw through 2015 Reg. & Spec. Sess.); N.H. REV. STAT. ANN. § 627:4; N.J. STAT. ANN. § 2C:3-4; N.Y. PENAL LAW § 35.15; N.C. GEN. STAT. § 14-51.4; N.D. CENT. CODE § 12.1-05-03 (2012); OKLA.

states further restrict the justifiable use of deadly force to those who do not consent to force or violence and those who are not involved in combat by agreement or mutual combat.[64] Finally, many state statutes specifically deny the justification for use of deadly force if the user of such force is involved in criminal activity.[65] Thus, the use of deadly force is only justified if a person is not engaging in provocative, violent, or criminal behavior that created the necessity to use such force in self-defense.

C. Florida Joins the Majority and Others Follow

In 2005, Florida joined the majority of states by amending its self-defense laws to abolish its common law duty to retreat before using deadly force in self-defense. When it did, it became the first state whose no retreat law became characterized as a "stand

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STAT. ANN. tit. 21, § 1289.25 (West Supp. 2013); OR. REV. STAT. § 161.215 (2011); 18 PA. STAT. AND CONS. STAT. ANN. § 505 (West 1998 & Supp. 2013); S.C. CODE ANN. § 16-11-420 (Supp. 2012); TENN. CODE ANN. § 39-11-611 (2014); TEX. PENAL CODE ANN. §§ 9.31, 9.32 (West 2011); UTAH CODE ANN. § 76-2-402; WIS. STAT. ANN. § 939.48; State v. Turner, 886 N.E.2d 280, 284–85 (Ohio Ct. App. 2008); State v. Woods, 374 N.W.2d 92, 97 (S.D. 1985); State v. McGee, 655 A.2d 729, 733 (Vt. 1995); Foster v. Commonwealth, 412 S.E.2d 198, 201–02 (Va. Ct. App. 1991); State v. Riley, 976 P.2d 624, 627–28 (Wash. 1999); N.M. UNIF. JURY INSTRUCTIONS CRIMINAL § 14-5190 (2015).

64. ALA. CODE § 13A-3-23; ALASKA STAT. § 11.81.335; ARIZ. REV. STAT. ANN. § 13-405; CAL. PENAL CODE § 197; COLO. REV. STAT. § 18-1-704; CONN. GEN. STAT. ANN. § 53a-19; GA. CODE ANN. § 16-3-21; IDAHO CODE ANN. § 18-4009; IND. CODE 35-41-3-2; NMRA, Crim. UJI 14-5191; N.Y. PENAL LAW § 35.15; N.D. CENT. CODE § 12.1-05-03; OR. REV. STAT. § 161.215; TENN. CODE ANN. § 39-11-611; UTAH CODE ANN. § 76-2-402.

65. ALA. CODE § 13A-3-23; ALASKA STAT. §§ 11.81.330, 11.81.335 (2012); ARIZ. REV. STAT. ANN. § 13-405; FLA. STAT. ANN. §§ 776.012, 77.031, 776.041 (West 2010 & Supp. 2015); GA. CODE ANN. § 16-3-21; 720 ILL. COMP. STAT. ANN. 5/7-4 (West 2002); IND. CODE § 35-41-3-2; IOWA CODE ANN. § 704.6; KAN. STAT. ANN. §§ 21-5226, 21-5230 (West, Westlaw through 2015 Reg. Sess.); KY. REV. STAT. ANN. §§ 502.055; LA. STAT. ANN. §§ 14:19, 14:20 (West, Westlaw through 2015 Reg. Sess.); MICH. COMP. LAWS ANN. § 780.961 (West 2007); MISS. CODE ANN. § 97-3-15 (2006); MO. ANN. STAT. § 563.031; MONT. CODE ANN. § 45-3-105; NEV. REV. STAT. ANN. § 200.120; N.C. GEN. STAT. § 14-51.4; OKLA STAT. ANN. title 21, § 1289.25; 18 PA. STAT. AND CONS. STAT. ANN. § 505; TENN. CODE ANN. § 39-11-611; TEX. PENAL CODE ANN. §§ 9.31, 9.32; UTAH CODE ANN. § 76-2-402; W. VA. CODE ANN. § 55-7-22 (LexisNexis 2008); WIS. STAT. ANN. § 939.48.

your ground" statute.[66] Many commentators were quick to criticize the new law; however, other states soon followed Florida by adopting stronger self-defense laws.[67] Over the next few years, additional states joined Florida and passed similar statutes or milder versions.[68] States continue to review their laws regarding a person's right to use deadly force in self-defense, and as recently as February 2015, the Iowa legislature proposed an amendment to its self-defense statute to eliminate a person's duty to retreat; the amendment has been referred to the Judiciary Subcommittee.[69] Even states that impose a duty to retreat on a person defending himself began re-evaluating their self-defense laws. Ohio, a retreat state, expanded its castle doctrine in 2008 to include a person's residence and vehicle.[70] Wyoming, another retreat state, revisited its self-defense laws that same year and created legal presumptions to protect those confronted with an intruder in their home or habitation.[71]

Prior to amending its statute in 2011, Wisconsin did not impose a statutory or common law duty to retreat; however, judges in effect created such a duty when they would instruct the jury as follows:

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66. Elizabeth Chuck, *Florida Had First Stand Your Ground Law, Other States Followed in 'Rapid Succession,'* NBC NEWS (July 18, 2013, 10:03 AM), http://www.nbcnews.com/news/other/florida-had-first-stand-your-ground-law-other-states-followed-f6C10672364.

67. ALA. CODE § 13A-3-23 (effective June 1, 2006); GA. CODE ANN. § 16-3-23.1 (2011) (effective July 1, 2006); IND. CODE § 35-41-3-2 (effective July 1, 2006); KY. REV. STAT. ANN. §§ 505.050, 503-055 (effective July 12, 2006); LA. STAT. ANN. §§ 14:19 to –14:20 (effective Aug. 15, 2006); MICH. COMP. LAWS ANN. §§ 768.21c, 780.951, 780.961, 780.972 (West 2007) (effective Oct. 1, 2006); MISS. CODE ANN. § 97-3-15 (effective July 1, 2006); S.C. CODE ANN. §§ 16-11-420 and 16-11-440 (Supp. 2012) (effective June 9, 2006).

68. TENN. CODE ANN. § 39-11-611 (effective May 22, 2007); TEX. PENAL CODE ANN. §§ 9.31, 9.32 (effective Sept. 1, 2007); W. VA. CODE ANN. § 55-7-22; NEV. REV. STAT. ANN. § 200.120 (effective Oct. 1, 2011; amended June 2, 2015); N.H. REV. STAT. ANN. § 627.4 (effective Nov. 13, 2011); N.C. GEN. STAT. §§ 14-51.2 to -51.4 (2011) (effective Dec. 1, 2011); WIS. STAT. ANN. § 939.48 (effective Dec. 21, 2011).

69. S.B. 137, 86th Gen. Assemb., Reg. Sess. (Iowa 2015).

70. OHIO REV. CODE ANN. § 2901.09 (LexisNexis 2010) (effective Sept. 9, 2008).

71. WYO. STAT. ANN. § 6-2-602 (2013) (effective July 1, 2008).

> There is no duty to retreat. However, in determining whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the interference, you may consider whether the defendant had the opportunity to retreat with safety, whether such retreat was feasible, and whether the defendant knew of the opportunity to retreat.[72]

As a result, in 2011, the Wisconsin legislature amended its self-defense statute to make it clear that a person does not have any duty to retreat and, therefore, the possibility of retreat is irrelevant by adding the following language: "the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force."[73] Additionally, the legislature created a conclusive presumption of reasonableness for those in their dwelling, motor vehicle, or place of business when an intruder unlawfully and forcibly enters.[74]

In 2011, the Pennsylvania legislature also revisited its self-defense laws and, like Florida and states both before and after Florida, created legal presumptions that benefit those confronted with intruders unlawfully and forcibly entering their dwelling, residence, or occupied vehicle.[75] Pennsylvania stopped short of totally abolishing the duty to retreat but enacted what could be called a partial "stand your ground" statute by abolishing the duty to retreat and granting a law-abiding resident "the right to stand his ground and use force, including deadly force" if he has the right to be where he is, otherwise meets the requirements for use of deadly force, *and* the other person displays or uses a "firearm or replica of a firearm" or "any other weapon readily or apparently capable of lethal use."[76]

Florida's statute has drawn particular attention and criticism perhaps because it was the first state to incorporate more of

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72. State v. Wenger, 593 N.W.2d 467, 471 (Wis. Ct. App. 1999).

73. WIS. STAT. ANN. § 939.48 (West Supp. 2012) (effective Dec. 21, 2011).

74. *Id.*

75. 18 PA. STAT. AND CONS. STAT. ANN. § 505(b)(2.3) (West 1998 & Supp. 2013) (effective August 29, 2011).

76. *Id.*

the protections already enacted in other states or because of media coverage of high-profile cases, such as *State of Florida v. George Zimmerman*.[77] As a result, critics have repeatedly mischaracterized such statutes, calling them "shoot first" or "shoot first, ask questions later" laws.[78] Some have even said the statutes allow for retaliation.[79] Such characterizations are patently false and indicate a lack of understanding of the purpose of these statutes. As stated earlier, prior to Florida passing its new self-defense statute, the majority of states did not require a person to retreat before using deadly force to defend against deadly force.[80] Florida did not create or introduce a new concept into the long-established legal doctrine of self-defense.

D. Protections Afforded by "Stand Your Ground" Laws

In order to analyze so called "stand your ground" laws, it is necessary to identify which state statutes qualify as "stand your ground" statutes and which states would be considered "stand your ground" states because of the state's common law regarding justified use of deadly force. It is difficult to categorize which statutes constitute "stand your ground" statutes because those so categorized by the media, critics, and commentators are not identical in their provisions or language. Critics of the 2005 Florida statutes,

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77. *See* Brandon T. Wrobleski, Note, *Calling the Court of Public Opinion to Order: A Critical Analysis of* State of Florida v. George Zimmerman, 27 REGENT U. L. REV. 103 (2015). In the *Zimmerman* case, the defendant was charged with the first-degree murder of Trayvon Martin. *Id.* at 111. Zimmerman raised the defense of self-defense under Florida's statute and was acquitted. *Id.* at 106. The case drew national attention and criticism, much of which was aimed at the Florida statute. *See, e.g.*, Pete Williams & Tracy Connor, *Holder Speaks Out Against 'Stand Your Ground' Laws After Zimmerman Verdict*, NBSNEWS.COM (July 17, 2013, 11:13 AM), http://www.nbcnews.com/news/other/holder-speaks-out-against-stand-your-ground-laws-after-zimmerman-f6C10654061.

78. Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL'Y 504 (2007); Kavan Peterson, *More States Sanction Deadly Force*, STATELINE: THE PEW CENTER ON THE STATES (April 26, 2006), http://web.archive.org/web/20110101085316/http:/www.stateline.org/live/ViewPage.action?siteNodeId=136&languageID=1&contentId=107276.

79. Peterson, *supra* note 78.

80. *See supra* note 29.

and others like them, began referring to such statutes as "stand your ground" laws in an attempt to cast such laws in a negative light;[81] however, the Florida legislature did not enact any of the new statutes as a "stand your ground" law and did not include the words "stand your ground" in the titles of any of the new statutes enacted in 2005.[82] The title of the statute that includes the "stand your ground" language is "Home protection; use of deadly force; presumption of fear of death or great bodily harm."[83] At the time the statute was passed, the legislative history likewise does not refer to the statute as a "stand your ground" statute.[84] The Florida legislature did use the language "stand his or her ground" in the part of the statute that abolished the state common law duty to retreat.[85]

Long before the Florida statute was enacted, various courts recognized and emphasized the long-standing majority view of no duty to retreat by using the term "stand your ground."[86] In 1895, in *United States v. Beard*, the United States Supreme Court held the trial court committed reversible error when it instructed the jury that the defendant had a duty to retreat and posed the question, "Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself on the sole ground that he failed to fly from his assailant when he might safely have done so?"[87] The Court answered the question in the negative and held:

> [I]f the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life, or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to *stand his ground*, and meet any attack . . . with such force as .

81. Catalfamo, *supra* note 78, at 523–24.
82. FLA. STAT. §§ 776.012, 776.013, 776.031 (2005) (amended 2014).
83. *Id.* § 776.013.
84. *Id.* §§ 776.012, 776.013, 776.031.
85. *Id.* § 776.013(3).
86. *See, e.g.*, Beard v. United States, 158 U.S. 550 (1895).
87. *Id.* at 561.

> . . were necessary to save his own life, or to protect him from great bodily injury.[88]

Additionally, as reflected in its jury instructions regarding self-defense, New Mexico common law recognized a person's right to stand his ground and use deadly force in self-defense at least as early as 1902, long before Florida incorporated the language in its justified use of deadly force statute.[89] Likewise, California Jury Instruction 505 Justifiable Homicide: Self-Defense or Defense of Another uses the same language when emphasizing no duty to retreat and provides:

> A defendant is not required to retreat. He or she is entitled to *stand his or her ground* and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of (death/great bodily injury/_______<*insert forcible and atrocious crime*>) has passed. This is so even if safety could have been achieved by retreating.[90]

Similarly, Virginia common law has long recognized that a person who is without fault in bringing on the necessity for self-defense "need not retreat, but is permitted to *stand his ground* (emphasis added) and repel the attack by force, including deadly force, if it is necessary."[91] The courts used the language "stand his ground" to emphasize that the law did not require a person who was not at fault to retreat before using deadly force in self-defense. Even Florida courts before 2005 used the "stand his ground" language

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88. *Id.* at 564 (emphasis added).

89. *See* N.M. Unif. Jury Instructions Criminal § 14-5190 (2015). "A person who is threatened with an attack need not retreat. In the exercise of his right of self defense, he may stand his ground and defend himself." *Id.*; *see also* State v. Horton, 258 P.2d 371, 372–73 (N.M. 1953); Territory v. Gonzales, 68 P. 925, 932 (N.M. 1902).

90. Judicial Council of Cal. Criminal Jury Instructions § 505 (2012) (emphasis added).

91. Foote v. Commonwealth, 396 S.E.2d 851, 855 (Va. Ct. App. 1990) (emphasis added) (citing McCoy v. Commonwealth, 99 S.E. 644 (Va. 1919)); *see also* Gilbert v. Commonwealth, 506 S.E.2d 543, 547 (Va. Ct. App. 1998).

when applying the castle doctrine exception to the duty to retreat.[92] By using the language "stand his or her ground,"[93] the Florida legislature similarly highlighted its intent to join the majority and to abolish the state common law duty to retreat.

Even though the term "stand his or her ground" was used years before the Florida legislature passed the 2005 statute, commentators and critics seized upon the language in the Florida statute and began using the phrase "stand your ground" in a way that mischaracterized such statutes. At the same time, they seemed to ignore the history of the phrase and other states' use of the phrase to emphasize no duty to retreat in their castle doctrines.

Fortunately for the citizens and residents of several states, the mischaracterizations and criticisms had no effect on their state legislatures. After Florida passed its justifiable use of deadly force statute in 2005, other state legislatures reviewed and revised their laws regarding justifiable use of deadly force.[94] Some states followed Florida and abolished the duty to retreat, while others modified their retreat provisions to expand their version of the castle doctrine or to provide protections for those justifiably using deadly force.[95] Some of the states that followed Florida's lead and enact-

92. Hedges v. State, 172 So. 2d 824, 827 (Fla. 1965); Pell v. State, 122 So. 110, 116 (Fla. 1929).

93. FLA. STAT. ANN. §§ 776.012, 776.013, 776.031 (2010 & Supp. 2015).

94. MO. ANN. STAT. § 563.031 (West 2012); NEV. REV. STAT. ANN. § 200.120 (West, Westlaw through 2015 Reg. & Spec. Sess.); N.H. REV. STAT. ANN. § 627.4 (LexisNexis 2007 & Supp. 2012); N.C. GEN. STAT. §§ 14-51.2 to -51.4 (2011); N.D. CENT. CODE §§ 12.1-05-07, 12.1-05-07.1 (2012); OHIO REV. CODE ANN. § 2901.09 (LexisNexis 2010); 18 PA. STAT. AND CONS. STAT. ANN. § 505 (West 1998 & Supp. 2013); TENN. CODE ANN. § 39-11-611 (2014); TEX. PENAL CODE ANN. §§ 9.31, 9.32 (West 2011); WA. REV. CODE § 9A.16.050 (2009); W. VA. CODE ANN. § 55-7-22 (LexisNexis 2008); WIS. STAT. ANN. § 939.48 (West Supp. 2012); WYO. STAT. ANN. § 6-2-602 (2013); S.B. 137, 86th Gen. Assemb., Reg. Sess. (Iowa 2015).

95. MO. ANN. STAT. S.C. CODE ANN. § 16-11-440 (Supp. 2012) § 563.031; NEV. REV. STAT. § 200.120; N.H. REV. STAT. ANN. § 627.4; N.C. GEN. STAT. §§ 14-51.2 to -51.4; N.D. CENT. CODE §§ 12.1-05-07, 12.1-05-07.1; OHIO REV. CODE ANN. § 2901.09; 18 PA. STAT. AND CONST. STAT. § 505; TENN. CODE ANN. § 39-11-611; TEX. PENAL CODE ANN. §§ 9.31, 9.32; WA. REV. CODE § 9A.16.050; W. VA. CODE ANN. § 55-7-22; WIS. STAT. § 939.48; WYO. STAT. ANN. § 6-2-602; S.B. 137, 86th Gen. Assemb., Reg. Sess. (Iowa 2015).

ed what some call "stand your ground" statutes[96] did not even include the language "stand your ground."[97]

If "stand your ground" laws do not necessarily contain those words, are all states that do not impose a duty to retreat considered "stand your ground" states? As has already been discussed, the United States Supreme Court and other no-retreat states used the phrase "stand your ground" long before Florida passed its statute in 2005.[98] If all no-duty-to-retreat states are considered "stand your ground" states, there are thirty-three states that are "stand your ground" states.[99] Prior to 2007, one of those states,

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96. ALA. CODE § 13A-3-23 (West, Westlaw through Act 2015-559 of the 2015 Reg., First Spec. and Second Spec. Sess.) (effective June 1, 2006); GA. CODE ANN. § 16-3-23.1 (effective July 1, 2006); IND. CODE § 35-41-3-2 (West, Westlaw through P.L. 1-2016 and P.L. 2-2016) (effective July 1, 2006); KY. REV. STAT. ANN. §§ 505.050, 503-055 (LexisNexis 2008) (effective July 12, 2006); LA. STAT. ANN. §§ 14:19–14:20 (West, Westlaw through 2015 Reg. Sess.) (effective Aug. 15, 2006); MICH. COMP. LAWS ANN. §§ 768.21c, 780.951, 780.961, 780.972 (West 2007) (effective Oct. 1, 2006); MISS. CODE ANN. § 97-3-15 (2006) (effective July 1, 2006); NEV. REV. STAT. § 200.120 (effective Oct. 1, 2011; amended June 2, 2015); N.H. REV. STAT. ANN. § 627.4 (effective Nov. 13, 2011); N.C. GEN. STAT. §§ 14-51.2 to –14-51.4 (effective Dec. 1, 2011); S.C. CODE ANN. §§ 16-11-420 and 16-11-440 (effective June 9, 2006); TENN. CODE ANN. § 39-11-611 (effective May 22, 2007); TEX. PENAL CODE ANN. §§ 9.31, 9.32 (effective Sept. 1, 2007); W. VA. CODE ANN. § 55-7-22 (effective Feb. 28, 2008); WIS. STAT. § 939.48 (effective Dec. 21, 2011).

97. ALASKA STAT. § 11.81.335 (2012); ARIZ. REV. STAT. ANN. § 13-405 (2010 & Supp. 2012); IND. CODE § 35-41-3-2; MISS. CODE ANN. § 97-3-15; S.D. CODIFIED LAWS § 22-18-4 (2006); TENN. CODE ANN. § 39-11-611; TEX. PENAL CODE ANN. § 9.32; W. VA. CODE ANN. § 55-7-22.

98. TENN. CODE ANN. § 39-11-611; UTAH CODE ANN. § 76-2-402 (LexisNexis 2012); Gilbert v. Commonwealth, 506 S.E.2d 543 (Va. Ct. App. 1998); Beard v. United States, 158 U.S. 550, 561–63 (1895); State v. Jackson, 382 P.2d 229, 232 (Ariz. 1963); People v. Hughes, 237 P.2d 64, 66 (Cal. Ct. App. 1951); State v. McGreevey, 105 P. 1047, 1051 (Idaho 1909); State v. Scobee, 748 P.2d 862, 867 (Kan. 1988); People v. Riddle, 649 N.W.2d 30, 35 (Mich. 2002); State v. Sunday, 609 P.2d 1188, 1195 (Mont. 1980); Culverson v. State, 797 P.2d 238, 240 (Nev. 1990); State v. Horton, 258 P.2d 371, 373 (N.M. 1953); Kirk v. Territory, 60 P. 797, 804 (Okla. 1900); Bechtel v. State, 840 P.2d 1, 12–13 (Okla. Crim. App. 1992); State v. Rader, 186 P. 79, 88 (Or. 1919); State v. Burtzlaff, 493 N.W.2d 1, 7 (S.D. 1992).

99. ALA. CODE § 13A-3-23; ALASKA STAT. § 11.81.335; ARIZ. REV. STAT. ANN. § 13-405; FLA. STAT. ANN. §§ 776.012, 776.013 (2010 & Supp. 2015); GA. CODE ANN. § 16-3-23.1 (2011); IND. CODE § 35-41-3-2; KAN. STAT.

Missouri, did not specifically state in its statute whether or not a person had a duty to retreat before using deadly force;[100] however, the common law of the state clearly recognized the state imposed no duty to retreat.[101] Additionally, the Comment to the 1973 Proposed Code says, "Missouri . . . imposes no duty to retreat on the actor before he can resort to deadly force in self-defense."[102] In 2007, the Missouri legislature amended its self-defense statute to include an expanded castle doctrine and to specifically provide a person does not have a duty to retreat "from a dwelling, residence, or vehicle" or "from private property that is owned or leased" by the person.[103] While the statute again is silent as to whether there is a duty to retreat in other places, such as anywhere a person has a right to be, there is no reason to believe the Missouri common law rule of no duty to retreat has changed.[104]

As stated earlier, in addition to the thirty-three no retreat states, the Pennsylvania legislature amended its self-defense statute in 2011 to provide a person is not required to retreat and recogniz-

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ANN. § 21-5222 (West, Westlaw through 2015 Reg. Sess.); KY. REV. STAT. ANN. § 503.050 (LexisNexis 2008); LA. STAT. ANN. § 14:20 (West, Westlaw through 2015 Reg. Sess.); MICH. COMP. LAWS ANN. § 780.972 (West 2007); MISS. CODE ANN. § 97-3-15; MONT. CODE ANN. § 45-3-110 (2011); NEV. REV. STAT. ANN. § 200.120 (West, Westlaw through 2015 Reg. & Spec. Sess.); N.H. REV. STAT. ANN. § 627:4; N.C. GEN. STAT. § 14-51.3 (2011); OKLA. STAT. ANN. tit. 21, § 1289.25 (West Supp. 2013); S.C. CODE ANN. § 16-11-440 (Supp. 2012); S.D. CODIFIED LAWS § 22-18-4 (2006); TENN. CODE ANN. § 39-11-611; TEX. PENAL CODE ANN. § 9.32 (West 2011); UTAH CODE ANN. § 76-2-402 (LexisNexis 2012); Cassels v. People, 92 P.3d 951, 956 (Colo. 2004); *McGreevey*, 105 P. at 1051 (Idaho 1909); People v. Manley, 584 N.E.2d 477, 491 (Ill. App. Ct. 1991); State v. Bartlett, 71 S.W. 148, 151 (Mo. 1902); Territory v. Gonzales, 68 P. 925, 932 (N.M. 1902); State v. Sandoval, 156 P.3d 60, 64 (Or. 2007); Foote v. Commonwealth, 396 S.E.2d 851, 855 (Va. Ct. App. 1990); State v. Cushing, 45 P. 145, 145–46 (Wa. 1896); State v. Dinger, 624 S.E.2d 572, 576–77 (W. Va. 2005); State v. Wenger, 539 N.W.2d 467, 471 (Wis. Ct. App. 1999); N.M. UNIF. JURY INSTRUCTIONS CRIMINAL § 14-5190 (2015); JUDICIAL COUNCIL OF CAL. CRIMINAL JURY INSTRUCTIONS § 505 (2012); IDAHO CRIMINAL JURY INSTRUCTIONS § 1519 (2010).

100. MO. ANN. STAT. § 563.031 (West 2012).

101. *Bartlett*, 71 S.W. at 151.

102. MO. ANN. STAT. § 563.031.

103. *Id.*

104. *See Bartlett*, 71 S.W. at 148; *In re* J.M., 812 S.W.2d 925, 932 (Mo. 1991).

es his right to "stand his ground" when defending against deadly force if the other person displays or uses a firearm, replica of a firearm, or "any other weapon readily or apparently capable of lethal use."[105] The defender's right to stand his ground exists wherever he "has a right to be."[106] Clearly, even with its partial "stand your ground" statute, Pennsylvania does not adopt the view of the shrinking minority that law-abiding citizens should always retreat outside their home before defending themselves against deadly force.

Since it is difficult to tell which state self-defense laws commentators and critics consider "stand your ground" laws, and since commentators and critics have focused on the 2005 Florida statutory amendments when discussing "stand your ground" laws, the next section of this Article analyzes the Florida statute to discuss the protections afforded by Florida and other states that provide similar protections.

1. Recognition of the Long-Standing Right to Use Deadly Force to Protect Oneself Without First Retreating

Prior to 2005, the Florida statute regarding the use of deadly force in self-defense contained no language as to whether or not a person had a duty to retreat before using such force.[107] The Florida common law, however, did require a person to retreat before using deadly force in defense against deadly force.[108] Thus, when Florida enacted new statutes that abolished the common law duty to retreat, the new legislation represented a major change to the Florida self-defense laws. When the Florida legislature amended the state statutes regarding the justified use of deadly force in self-defense, Florida joined the majority of states that do not require law-abiding citizens, residents, and visitors to retreat before defending themselves against deadly force. This Article emphasizes this basic fact because eliminating the duty to retreat is the statutory change that drew the most criticism, mischaracterizations, and media attention when the new statute was proposed, being dis-

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105. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 505(b)(2.3) (West 1998 & Supp. 2013).

106. *Id.*

107. FLA. STAT. § 776.012 (2003) (amended 2005).

108. Weiand v. State, 732 So. 2d 1044, 1051 (Fla. 1999).

cussed, and finally enacted. Those criticisms and mischaracterizations are discussed below in Part V.

2. Presumptions under Florida's Home Protection Statute

In addition to abolishing the duty to retreat, the Florida legislature created protections for law-abiding citizens who find it necessary to use deadly force in self-defense.[109] The legislature created certain legal presumptions to protect people in their homes and vehicles when a would-be invader, burglar, robber, or assailant is entering or has entered "unlawfully and forcefully."[110] Additionally, the legislature created two presumptions and granted immunity to those who meet the requirements of the statutes and justifiable use deadly force.[111] These provisions provide important protections to the citizens and residents of and visitors to Florida.

With regard to the legislated presumptions, Florida Statute section 776.013(1) addresses two of the basic components of self-defense using deadly force discussed earlier: proportionality and reasonable belief. That section provides a person's "reasonable fear of imminent peril of death or great bodily harm" is presumed under certain circumstances.[112] Specifically, the presumption arises if an intruder unlawfully and forcefully entered or is in the process of entering the defender's "dwelling, residence, or occupied vehicle."[113] The presumption also arises if the person against whom deadly force is used "had removed or is attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle."[114] The statute sets out a second requirement before the presumption is recognized. The person who uses deadly force in the above circumstances must know or have "reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred."[115] If both of those

109. FLA. STAT. ANN. §§ 776.012, 776.013, 776.031 (West 2010 & Supp. 2015).

110. *Id.* § 776.013(1)(b).

111. *Id.* § 776.013; *see also id.* § 776.032 (providing immunity from criminal prosecution and civil action for justifiable use of force).

112. *Id.* § 776.013(1).

113. *Id.* § 776.013(1)(a).

114. *Id.*

115. *Id.* § 776.013(1)(b).

requirements are met, the person who used the deadly force is presumed to have a reasonable fear of imminent deadly force and justifiably defends himself. The statute clearly recognizes the sanctity of one's home and the vulnerability faced when in one's vehicle. It also protects people who find themselves victims in their homes and vehicles without having others who were not present to face the danger, i.e. police, prosecutors, judges, or jurors, later judge and determine the reasonableness of their fear.

It is important to note the presumption only arises if used in a "dwelling, residence, or occupied vehicle."[116] These are the same places now often covered by the castle doctrine exception in retreat states.[117] Additionally, the presumptions protect temporary residents and guests,[118] an important protection in light of Florida's tourism industry. When considered in light of the circumstances under which the presumption arises, it provides important protections to people who could be victims of violent crimes committed by others unlawfully entering their home or vehicle. A person should not have to make a legal analysis regarding an intruder's intent when that intruder has or is attempting to unlawfully and forcibly enter his home. Even a brief delay to try to determine if the intruder is about to use deadly force could result in the death or unnecessary injury of the home's occupants. Without the presumption, as required by the proportionality component discussed earlier in Section III.A, a person could only use deadly force when

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116. *Id.* § 776.013(1)(a).

117. ARK. CODE ANN. § 5-2-607(b) (West, Westlaw through 2015 Reg. & 1st Ex. Sess.) (dwelling or curtilage surrounding); CONN. GEN. STAT. ANN. § 53a-19(b) (West 2012) (dwelling or place of work); DEL. CODE ANN. tit. 11, § 464(e)(2) (2007) (dwelling or place of work); HAW. REV. STAT. ANN. § 703-304(5)(b) (LexisNexis 2007) (dwelling or work place); IOWA CODE ANN. § 704.1 (West 2003) (dwelling or place of business or employment); ME. REV. STAT. ANN. tit. 17A, § 108(2)(C)(3) (2006 & Supp. 2012) (dwelling); MASS. GEN. LAWS ANN. ch. 278, § 8A (West 2014) (dwelling); NEB. REV. STAT. § 28-1409(4)(b) (2008) (dwelling or place of work); N.J. STAT. ANN. § 2C:3-4 b(2)(b)(i) (West 2005) (dwelling); N.Y. PENAL LAW § 35-15 (McKinney 2009) (dwelling); N.D. CENT. CODE § 12.1-05-07 (2012) (dwelling, place of work, or occupied motor home or travel trailer); OHIO REV. CODE ANN. § 2901.09 (LexisNexis 2010) (residence or vehicle); 3 R.I. GEN. LAWS § 11-8-8 (2002); State v. Carothers, 594 N.W.2d 897 (Minn. 1999) (dwelling); Miller v. State, 67 P.3d 1191 (Wyo. 2003) (residence).

118. FLA. STAT. ANN. § 776.013(5)(a), (b) (West 2010 & Supp. 2015).

confronted with a deadly threat.[119] This requirement is separate from the duty to retreat; therefore, even in states that recognize the castle doctrine exception to the retreat rule, the defending homeowner can only use deadly force when he is sure he is facing deadly force, even in his dwelling, residence, or occupied vehicle. Consequently, in castle doctrine states with no presumption as to a person's reasonable fear of imminent death or great bodily injury, a law-abiding person faced with an intruder in his home must determine whether or not the use of deadly force is necessary to prevent imminent death or great bodily harm before he can use deadly force in defense of himself and his family.[120] The castle doctrine, therefore, does not provide sufficient protections for people faced with a violent home invasion or any other criminal intrusion into their homes or "castles."

As discussed earlier, some states also allow a person to use deadly force if he reasonably believes the person is committing a felony, felony involving force or violence, forcible felony, or certain enumerated felonies.[121] In the situation of a home intruder, the resident of the home still must analyze the situation to determine the intruder's purpose in invading his home. Most jurisdictions will more than likely not require a detailed analysis, but even a split second delay to assess the situation can result in disaster for a person confronted with an unknown intruder in his home. To protect potential victims in such situations, the Florida statute creates a second presumption which complements the first and deals with the intent of an intruder: "A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence."[122] With the intent of a forceful intruder established by the presumption, a person suddenly confronted by such an intruder may use deadly force to defend himself and those with him. Again, this presumption benefits a law-abiding person confronted with an unlawful intruder. A potential victim does not have to try to determine the intruder's inten-

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119. *See supra* note 108 and accompanying text.
120. *Id.*
121. *See supra* Part III.A.
122. FLA. STAT. ANN. § 776.013(4) (West 2010 & Supp. 2015).

tions before acting to protect himself and others in the home or vehicle.

Residents of states without presumptions like these in the Florida statute must choose between assessing the intruder's intent and purpose before defending himself and his family or risk possible prosecution if there are insufficient facts to determine if the requirements for the use of deadly force in self-defense are met. A judge or jury looking back at the circumstances with detached reflection will likely be unable to see the situation in the same way the potential victim would see it. Such Monday morning quarterbacking can lead to criminal prosecution, prison, and disaster for a person trying to protect himself or his family. The presumptions granted by the Florida statute, therefore, serve as valuable protections for Florida citizens, residents, and visitors when in their homes and vehicles.

To provide real protections for the law-abiding citizens, residents, and visitors in Florida, the legislature clearly intended for the presumptions in Florida Statute section 776.013 (2005) to be conclusive. The first rule of determining legislative intent is to look at the plain language of the statute itself.[123] Section 1 of the statute provides: "A person *is presumed* to have held a reasonable fear of imminent peril of death or great bodily harm."[124] The legislature did not say may be presumed, can be presumed, or if not rebutted, is presumed. Additionally, the staff analysis in the legislative history of the senate bill precursor to the enacted statute states: "Legal presumptions are typically rebuttable. The presumptions created by the committee substitute, however, appear to be conclusive."[125] There is no doubt the Florida legislature intended to create conclusive presumptions regarding a defender's reasonable belief and an intruder's intent under the circumstances required by the statute. In creating these conclusive presumptions, it is equally clear that the legislature intended to provide substantive protections for those within their homes and vehicles from would be assailants and criminals. If a person's home is truly his castle,

123. *See* Bautista v. State, 863 So. 2d 1180, 1185 (Fla. 2003).

124. FLA. STAT. ANN. § 776.013(1) (West 2010 & Supp. 2015) (emphasis added).

125. FLA. JUD. COMM., STAFF ANALYSIS, S. 2005-CS/CS/SB 436, 107th Sess., at 4 (Fla. 2005).

the protections afforded by the Florida statute more definitively establish a person's right to the uninterrupted peaceful enjoyment and sanctuary of that castle.

In addition to Florida, twenty-two states have created presumptions regarding a person's right to use deadly force in self-defense.[126] Six of those states require a person to retreat before using deadly force.[127] The majority of these states' presumptions are rebuttable.[128] However, like Florida, the Tennessee statute provides for a conclusive presumption: "Any person using force intended or likely to cause death or serious bodily injury within a residence, business, dwelling or vehicle *is presumed* to have held a reasonable belief of imminent death or serious bodily injury."[129] Wisconsin's statute also creates a conclusive presumption by providing "[T]he court . . . *shall presume* that the actor reasonably

126. ALA. CODE § 13A-3-23 (West, Westlaw through Act 2015-559 of the 2015 Reg., First Spec. and Second Spec. Sess.); ARIZ. REV. STAT. ANN. § 13-411 (Westlaw through 2015 1st Reg. Sess.); ARK. CODE ANN. § 5-2-620 (West, Westlaw through 2015 Reg. & 1st Ex. Sess.); CAL. PENAL CODE § 198.5 (West 2008); KAN. STAT. ANN. § 21-5224 (West, Westlaw through 2015 Reg. Sess.); KY. REV. STAT. ANN. § 503.055 (LexisNexis 2008); LA. STAT. ANN. § 14:20 (West, Westlaw through 2015 Reg. Sess.); MICH. COMP. LAWS ANN. § 780.951 (West 2007); MISS. CODE ANN. § 97-3-15 (2006); NEV. REV. STAT. ANN. § 41.095 (West, Westlaw through 2015 Reg. & Spec. Sess.); N.J. STAT. ANN. § 2C:3-4 (West 2005); N.C. GEN. STAT. § 14-51.2 (2011); OHIO REV. CODE ANN. § 2901.05 (LexisNexis 2010); OKLA. STAT ANN. tit. 21, § 1289.25 (West Supp. 2013); 18 PA. STAT. AND CONS. STAT. ANN. § 505 (West 1998 & Supp. 2013); R.I. GEN. LAWS § 11-8-8 (2002); S.C. CODE ANN. § 16-11-440 (Supp. 2012); TENN. CODE ANN. § 39-11-611 (2014); TEX. PENAL CODE ANN. § 9.32 (West 2011); UTAH CODE ANN. § 76-2-405 (LexisNexis 2012); WIS. STAT. ANN. § 939.48 (West Supp. 2012); WYO. STAT. ANN. § 6-2-602 (2013).

127. ARK. CODE ANN. § 5-2-620 (West, Westlaw through 2015 Reg. & 1st Ex. Sess.); N.J. STAT. ANN. § 2C:3-4; OHIO REV. CODE ANN. § 2901.05; 18 PA. STAT. AND CONS. STAT. ANN. § 505; R.I. GEN. LAWS § 11-8-8; WYO. STAT. ANN. § 6-2-602.

128. ARIZ, REV. STAT. ANN. § 13-411 (Westlaw through 2015 1st Reg. Sess.); ARK. CODE ANN. § 5-2-620; CAL. PENAL CODE § 198.5; KAN. STAT. ANN. § 21-5224; MICH. COMP. LAWS ANN. § 780.951 (West 2007); NEV. REV. STAT. ANN. § 41.095; N.C. GEN. STAT. § 14-51.2; OHIO REV. CODE ANN. § 2901.05; R.I. GEN. LAWS § 11-8-8; TEX. PENAL CODE ANN. § 9.32; UTAH CODE ANN. § 76-2-405 (LexisNexis 2012).

129. TENN. CODE ANN. § 39-11-611(c) (2014) (emphasis added).

believed that the force was necessary to prevent imminent death or great bodily harm . . ." if the statutory conditions are met.[130]

As seen above, the protective presumptions' application to the justified use of deadly force in self-defense appear in retreat and non-retreat states. Seven states created such protective presumptions long before Florida became a no retreat state in 2005 and included its presumptions in its justified use of deadly force statute.[131] So why did the Florida statute draw so much attention and criticism? Florida joined the *majority* when it became a no-retreat state, and the presumptions in its justified use of deadly force statute did nothing that other states had not done before. As with the other states noted above, the presumptions provided by the Florida statute provide important protections for law-abiding residents of and visitors to the state and are not worthy of criticism.

3. Criminal and Civil Immunity for the Justified Use of Deadly Force

In addition to the legal presumptions designed to protect those justifiably using deadly force in self-defense, Florida, and other states, provide criminal and/or civil immunity for those justified in using deadly force. Before immunity is granted in these jurisdictions, the statutory requirements for justification must be met. Florida's statute provides for immunity from both criminal prosecution and civil liability.[132] Thirteen other states also grant criminal and/or civil immunity,[133] two of which are retreat states—

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130. WIS. STAT. § 939.48 (emphasis added).

131. ARIZ. REV. STAT. ANN. § 13-411 (Westlaw through 2015 1st Reg. Sess.); ARK. CODE ANN. § 5-2-620; CAL. PENAL CODE § 198.5; NEV. REV. STAT. ANN. § 41.095; R.I. GEN. LAWS § 11-8-8 (2002); TENN. CODE ANN. § 39-11-611 (2014); UTAH CODE ANN. § 76-2-405 (LexisNexis 2012).

132. FLA. STAT. ANN. § 776.032 (Westlaw through Ch. 232 1st Reg. Sess.).

133. ALA. CODE § 13A-3-23(d) (West, Westlaw through Act 2015-559 of the 2015 Reg., First Spec. and Second Spec. Sess.); ARK. CODE ANN. § 5-2-621 (West, Westlaw through 2015 Reg. & 1st Ex. Sess.); DEL. CODE ANN. tit. 11, § 466(d) (2007); IDAHO CODE § 19-202A (2004); 720 ILL. COMP. STAT. ANN. 5/7-1(b) (West 2002 & Supp. 2013); IND. CODE § 35-41-3-2(c) (West, Westlaw through P.L. 1-2016 and P.L. 2-2016); MISS. CODE ANN. § 97-3-15(5)(b) (2006); N.C. GEN. STAT. § 14-51.2(e) (2011); OKLA. STAT. ANN. tit. 21, § 1289.25(F) (West Supp. 2013); S.C. CODE ANN. § 16-11-450 (Supp. 2012);

Arkansas and Delaware.[134] The statutes in Idaho, Indiana, and Washington provide that a person justified in using deadly force will not face "legal jeopardy of any kind" and have provided this broad immunity before Florida granted immunity in its statute in 2005.[135] Other states granting statutory immunity prior to Florida include Arkansas, Delaware, and Illinois.[136]

Since Florida is not the first state to grant immunity to those justified in using deadly force, the motivation for criticism and mischaracterization cannot logically arise from these protections. Likewise, such protections do not render the Florida statute a "stand your ground" statute. As with the presumptions legislated in many states, the immunity granted by Florida and other states provide important protections for law-abiding citizens and residents.

IV. CURRENT STATUS OF AND POLICY BEHIND THE LAW OF SELF-DEFENSE USING DEADLY FORCE

Since its founding, this country has recognized a person's fundamental right to life and liberty.[137] This right includes the right to personal autonomy, security, and safety and is recognized in numerous ways in the laws of all fifty states. Criminal and civil laws prohibiting battery recognize the sanctity of a person's body and the right to be free from unwanted and illegal interference. Laws regarding the use of self-defense also recognize these same rights and the value of human life. As stated earlier, all fifty states recognize a person's right to defend himself by using force, including deadly force, under certain circumstances and to be secure in his own home. To emphasize the importance of these rights, some

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TENN. CODE ANN. § 39-11-622 (2014); TEX. CIVIL PRACTICE AND REMEDIES CODE ANN. § 83.001 (Westlaw through 2015 Reg. Sess.); WASH. REV. CODE ANN. § 9A.16.110 (West 2009).

134. ARK. CODE ANN. § 5-2-621; DEL. CODE ANN. Title 11, § 466(d).

135. IDAHO CODE § 19-202A; IND. CODE § 35-41-3-2; WASH. REV. CODE ANN. § 9A.16.110.

136. ARK CODE ANN.§ 5-2-621 (West, Westlaw through 2015 Reg. Sess. & 2015 1st Ex. Sess.); DEL. CODE ANN. title 11, § 464 (2007); 720 ILL. COMP. STAT. ANN. 5/7-1 (West 2002 & Supp. 2013).

137. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

state legislatures have reiterated the state's commitment to protecting its citizens' right to self-defense and the sanctity of their home.

In 1981, the Arkansas legislature recognized the fundamental nature of a person's right to defend himself, especially in his own home, when it included the following language as part of one of its self-defense statutes:

> The right of an individual to defend himself or herself and the life of a person or property in the individual's home against harm, injury, or loss by a person unlawfully entering or attempting to enter or intrude into the home is reaffirmed as a fundamental right to be preserved and promoted as a public policy in this state.[138]

The legislature also created a presumption that any force used to accomplish the purpose in the section quoted above would be lawful and necessary force.[139] To further make sure the policy stated would be followed, the legislature mandated that the "section shall be strictly complied with by the court and an appropriate instruction of this public policy shall be given to a jury sitting in trial of criminal charges brought in connection with this public policy."[140]

In 1985, the Colorado legislature similarly recognized a person's right to safety in his own home: "The general assembly hereby recognizes that the citizens of Colorado have a right to expect absolute safety within their own homes."[141] In the same statute, the legislature created criminal and civil immunity for those justifiably using deadly force in their home.[142]

In 2012, the Indiana legislature emphasized the right of its citizens to feel secure in their homes but went further and recognized the importance of its citizens' right to defend themselves anywhere:

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138. ARK. CODE ANN. § 5-2-620(a) (West, Westlaw through 2015 Reg. & 1st Ex. Sess.).

139. *Id.* at (b).

140. *Id.* at (c).

141. COLO. REV. STAT. § 18-1-704.5(1) (2012).

142. *Id.* at §§ (3), (4).

> In enacting this section, the general assembly finds and declares that it is the policy of this state to recognize the unique character of a citizen's home and to ensure that a citizen feels secure in his or her own home against unlawful intrusion by another individual or a public servant. By reaffirming the long standing right of a citizen to protect his or her home against unlawful intrusion, however, the general assembly does not intend to diminish in any way the other robust self-defense rights that citizens of this state have always enjoyed. Accordingly, the general assembly also finds and declares that it is the policy of this state that people have a right to defend themselves and third parties from physical harm and crime. The purpose of this section is to provide the citizens of this state with a lawful means of carrying out this policy.[143]

This declaration came after the legislature enacted its no duty to retreat or "stand your ground" law in 2006 and after critics and commentators had excoriated Florida for strengthening its citizens' right to defend themselves from physical harm and crime. As if to answer critics of the Florida statute, Indiana chose to declare its public policy ensuring their citizens the right to self-defense in the statute itself, not just in its legislative history.

Oklahoma passed its version of a "stand your ground" statute in 2006, which included the creation of Florida-type legal presumptions to provide additional protections in one's home.[144] The legislature expanded those protections in 2011, when it granted the same presumptions in one's "place of business."[145] Additionally, the legislature included the following in the first section of the statute: "The Legislature hereby recognizes that the citizens of the State of Oklahoma have a right to expect absolute safety within their own homes or places of business."[146]

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143. IND. CODE § 35-41-3-2(a) (West, Westlaw through P.L. 1-2016 and P.L. 2-2016).

144. OKLA. STAT. ANN. tit. 21, § 1289.25 (West 2002) (amended 2011).

145. OKLA. STAT. ANN. tit. 21, § 1289.25 (West Supp. 2013).

146. *Id.*

In 2006, the South Carolina General Assembly amended the state's self-defense statute and devoted a full section of the new law to reiterate its intent and findings behind what some may call a "stand your ground" statute.[147] In section A, the legislature indicated its intent to "codify the common law Castle Doctrine,"[148] but in fact went much further in recognizing the rights of law-abiding citizens. The remainder of the statute provides:

> (B) The General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.
>
> (C) The General Assembly finds that Section 20, Article I of the South Carolina Constitution guarantees the right of the people to bear arms, and this right shall not be infringed.
>
> (D) The General Assembly finds that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles.
>
> (E) The General Assembly finds that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.[149]

In conjunction with the above statute, the General Assembly created protective presumptions similar to those adopted by Florida and other states[150] and granted both criminal and civil immunity to those who justifiably use deadly force in self-defense.[151]

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147. S.C. CODE ANN. § 16-11-420 (Supp. 2012).
148. *Id.*
149. *Id.*
150. *Id.* § 16-11-440 (Supp. 2012).
151. *Id.* § 16-11-450 (Supp. 2012).

These specific legislative pronouncements clearly reflect the recognition of the rights of law-abiding citizens, residents, and visitors to be secure in their persons, homes, businesses, and vehicles. They recognize this country's long-standing commitment to the rights of the people to be free from interference by criminals and others seeking to do them or their property harm. While other states have not spelled out this policy in their self-defense statutes, the same policy is reflected in the majority of states that have adopted a no-duty-to-retreat, or "stand your ground," justifiable use of deadly force statutory scheme.

If "stand your ground" states do not require a person to retreat before using deadly force to defend against deadly force, a large majority of states are "stand your ground" states. As stated earlier, thirty-three states do not impose a duty to retreat before defending against deadly force.[152] Of the seventeen retreat states, over half limit the places or circumstances under which a person still has a duty to retreat before using deadly force.[153] Additionally, none of the retreat states requires a person to retreat if he cannot do so with complete safety or if retreating risks death or serious bodily injury.[154] While the requirement that one retreat only if he

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152. *See supra* note 99.

153. ARK. CODE ANN. § 5-2-607(b) (West, Westlaw through 2015 Reg. & 1st Ex. Sess.) (dwelling and surrounding curtilage); CONN. GEN. STAT. ANN. § 53a-19(b) (West 2012) (dwelling or place of work); DEL. CODE ANN. tit. 11, § 464(e)(2) (2007) (dwelling or place of work); HAW. REV. STAT. ANN. § 703-304(5)(b) (LexisNexis 2007) (dwelling or work place); IOWA CODE ANN. § 704.1 (West 2003) (dwelling or place of business or employment); NEB. REV. STAT. § 28-1409(4)(b) (2008) (dwelling or place of work); OHIO REV. CODE ANN. § 2901.09 (LexisNexis 2010) (residence or vehicle); 18 PA. STAT. AND CONS. STAT. ANN. § 505 (West 1998 & Supp. 2013) (no duty to retreat in dwelling, place of work, or if other person uses a firearm or replica of a firearm or any other weapon readily or capable of lethal use).

154. ARK. CODE ANN. § 5-2-607; CONN. GEN. STAT. ANN. § 53a-19 (2015); DEL. CODE ANN. tit. 11, § 464; HAW. REV. STAT. ANN. § 703-304 (LexisNexis 2007); IOWA CODE ANN. § 704.1; ME. REV. STAT. ANN. tit. 17A, § 108 (2006 & Supp. 2012); NEB. REV. STAT. § 28-1409 (2008); N.J. STAT. ANN. § 2C:3-4 (West 2005); N.Y. PENAL LAW § 35.15 (McKinney 2009); N.D. CENT. CODE § 12.1-05-07 (2012); 18 PA. STAT. AND CONS. STAT. ANN. § 505 (West 1998 & Supp. 2013); Burch v. State, 696 A.2d 443, 458 (Md. 1997); Commonwealth v. Pike, 701 N.E.2d 951, 957 (Mass. 1998); State v. Johnson, 152 N.W.2d 529, 532 (Minn. 1967); State v. Quarles, 504 A.2d 473, 475 (R.I. 1986); Garcia v. State, 667 P.2d 1148, 1153 (Wyo. 1983).

can do so safely sounds reasonable, how does a person confronted, attacked, or assailed make such a determination in the few, at most, seconds he may have to protect his life? John Locke was correct when he said a person using force on another for any reason becomes an aggressor capable of injuring or even killing his victim.[155] To require such a victim to determine if he can safely retreat would be astonishingly difficult in the most dangerous situations and clearly ignores the victim's fundamental right to be personally secure and safe as expressed in the above-stated policies.

One of the most strict retreat states is Rhode Island. Although it is a retreat state that recognizes the castle doctrine, it only eliminates the duty to retreat pursuant to the doctrine if the person against whom deadly force is used is committing certain enumerated breaking and/or entering crimes.[156] Again, placing law-abiding citizens and residents in the position of determining if the proper felony is being committed before they defend themselves with deadly force in their own home creates an even more dangerous situation.

Currently, the vast majority of states recognizes a person's right to defend himself or herself appropriately against deadly force. The trend since Florida passed its comprehensive statutes in 2005 has been for state legislatures to re-examine their self-defense laws and to even the playing field for innocent law-abiding citizens, residents, and visitors in their states. While critics and commentators use the term "stand your ground" to disparage laws protecting innocent people confronted with criminals, the term has been used in this country long before 2005 to acknowledge a person's right to personal autonomy and safety and to be and remain where they have a right to be. Retreating very often increases the danger to a person attacked. Of course, retreating or trying to retreat may be all a person can do, especially in those states that limit a person's right to carry a firearm or other weapon.

Since the overwhelming majority of states and citizens of the United States believe a person has a right to fully defend himself without retreating and since that right is embedded in this country's founding and history, why has this right come under such an onslaught of attacks since Florida joined the majority?

155. *See supra* note 18.
156. R.I. GEN. LAWS § 11-8-8 (2002).

Why do critics, commentators, and others continue to misrepresent what self-defense laws provide? Why does the minority seek to have their will overcome the long-standing rights of the majority? The next part will address and discuss some of the criticisms and commentaries regarding our right to self-defense.

V. COMMON CRITICISMS AND MISCHARACTERIZATIONS

Those who purposely misrepresent and mischaracterize what they call "stand your ground" laws attempt to cast these laws in a negative light in an attempt to discredit them and eventually abolish them. The motive behind the attack is a mystery. The majority of citizens, as reflected by the laws enacted by their chosen representatives, believes law-abiding citizens should be able to effectively and lawfully defend themselves, including against the use of deadly force. Citizens believe that, when faced with the immediate fear of death, they should not have to try to evaluate and discover a place where they can safely run and hide to avoid defending themselves. A criminal assailant will not wait idly by while a victim tries to evaluate his chances of finding and retreating to a hiding place.

Critics and commentators wasted no time in declaring the Florida statute and other similar statutes "Shoot First Laws"[157] and predicted that the Florida law would result in a "'Wild West' atmosphere in Florida."[158] Six months before the Florida legislature passed the new law in October 2005, a media critic and opponent of the proposed new law also said the law brought the "Wild West to Florida" and declared it "encourages vigilante 'justice' and em-

157. Chuck, *supra* note 66. The author also says, "Stand Your Ground laws . . . change the legal definition of self-defense." *Id.* As discussed in this Article, that is not true.

158. *See Florida Legislation—The Controversy Over Florida's New "Stand Your Ground" Law*, 33 FLA. ST. U. L. REV. 351, 351–56 (2005). The author cites a St. Petersburg Times article entitled *Legislature Says Let the Force Be with You* and quotes Florida State Senator Steven Geller as saying the law "will encourage a 'Wild West' atmosphere in Florida, where people are emboldened to use deadly force without fear of prosecution." *Id.* (quoting Steve Bosquet, *Legislature Says Let the Force be With You*, ST. PETERSBURG TIMES (April 6, 2005) http://www.sptimes.com/2005/04/06/State/Legislature_says_let_.shtml).

powers street gangs."[159] It is difficult to understand how such an unequivocal prediction about the effect of the new law could be made by anyone who actually read the statute. Street gangs were not and still are not empowered by the law, and vigilante justice did not emerge. Criminals did not seem to take note of the new law, and life continued as before passage of the statute. The only change was law-abiding citizens felt safer. Florida did not become the "Wild West," and vigilantism did not rule the day, nor does it today, ten years after the passage of the statute.

As discussed earlier, once Florida amended its statute, other states reviewed their self-defense laws and amended their statutes to provide their citizens with similar protections. Some states merely codified their common law recognition of no duty to retreat.[160] Others joined the majority and abolished a duty to retreat as Florida did.[161] But in spite of the declared and obvious purpose of these legislative changes, commentators immediately began to misrepresent the changes, their effect, and the legitimate reason for the amendments. One commentator declared in the title to an article published anonymously that these statutes were "sanction[ing]

159. Martin Dyckman, *Bringing the Wild West to Florida*, TAMPA BAY TIMES, (Mar. 27, 2005) http://www.sptimes.com/2005/03/27/Columns/Bringing_the_Wild_Wes.shtml.

160. ARIZ. REV. STAT. ANN. § 13-405 (2010 & Supp. 2012), GA. CODE ANN. §16-3-23.1 (2011); IND. CODE § 35-41-3-2 (West, Westlaw through P.L. 1-2016 and P.L. 2-2016); MISS. CODE ANN. § 97-3-15 (2006); MONT. CODE ANN. 45-3-110 (2011); NEV. REV. STAT. ANN. § 200.120 (West, Westlaw through 2015 Reg. & Spec. Sess.); N.C. GEN. STAT. § 14-51.3 (2011); OKLA. STAT. ANN. tit. 21, § 1289.25 (West Supp. 2013); S.D. CODIFIED LAWS § 22-18-4 (2006); State v. Jackson, 382 P.2d 229, 232 (Ariz. 1963); Johnson v. State, 315 S.E.2d 871, 872 (Ga. 1984); Runyan v. State, 57 Ind. 80, 82–83 (Ind. 1877); Cook v. State, 467 So.2d 203, 210 (Miss. 1985); State v. Sunday, 609 P.2d 1188, 1195 (Mont. 1980); Culverson v. State, 797 P.2d 238, 240–41 (Nev. 1990); State v. Allen, 541 S.E.2d 490, 497 (N.C. Ct. App. 2000); Bechtel v. State, 840 P.2d 1, 12–13 (Okla. Crim. App. 1992); State v. Burtzlaff, 493 N.W.2d 1, 7 (S.D. 1992).

161. ALA. CODE § 13A-3-23 (West, Westlaw through Act 2015-559 of the 2015 Reg., First Spec. and Second Spec. Sess.); ALASKA STAT. § 11.81.335 (2012); LA. STAT. ANN. § 14:19 (West, Westlaw through 2015 Reg. Sess.); N.H. REV. STAT. ANN. § 627:4 (LexisNexis 2007 & Supp. 2012); S.C. CODE ANN. § 16-11-440 (Supp. 2012); TEX. PENAL CODE ANN. §§ 9.31, 9.32 (West 2011).

deadly force."[162] Contrary to such an irresponsible, baseless characterization, the states, through these statutes, sanction self-defense and a person's right to life.[163] The author went on to say, "[w]hile it already is legal in most cases to use deadly force against an attacker in your home, the new self-defense laws allow victims to retaliate against an attacker in public."[164] The reason many states have amended their self-defense laws and expanded the protections afforded to law-abiding citizens in their home is because, as the author says, deadly force can be used only "in most cases" when a person is *attacked* in his home.[165] "In *most* cases" is not good enough, as the majority of states recognize. Law abiding citizens should be able to protect themselves always, not just in their home "in most cases."

The same author cited above and others also allege the self-defense laws allow victims to retaliate.[166] The Merriam-Webster online dictionary defines *retaliate* as follows: "to do something bad to someone who has hurt you or treated you badly: to get revenge against someone; to repay (as in an injury) in kind."[167] This definition, along with the ordinary understanding of what retaliate means, connotes an act that comes sometime after a prior bad act for the purpose of revenge. There is nothing in the Florida statute or any other so-called "stand your ground" statute that allows a person to retaliate after being attacked, assaulted, or "treated . . . badly"[168] by someone else.[169] No self-defense statute allows retaliation.[170] Additionally, if a potential victim is confronted with deadly force and does not defend himself, he would likely be phys-

162. Kavan Peterson, *More States Sanction Deadly Force*, THE PEW CENTER ON THE STATES (April 26, 2006) https://web.archive.org/web/20110101085316/http:/www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=107276.

163. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

164. *See* Peterson *supra* note 162.

165. *Id.*

166. *Id.*; *see also* Wyatt Holiday, *"The Answer to Criminal Aggression is Retaliation": Stand-Your-Ground Laws and the Liberalization of Self-Defense*, 43 U. TOL. L. REV. 407 (2012).

167. Definition of "*Retaliate*," *Merriam-Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/retaliate (last visited Feb. 15, 2016).

168. *Id.*

169. *See supra* Section III.A.

170. *See supra* Section III.A.

ically unable or have no opportunity to retaliate at some later time. As discussed earlier, all states restrict the use of deadly force in self-defense to situations where the danger of deadly force is imminent or immediate and/or the use of defensive force is necessary.[171] Clearly, retaliation does not meet these requirements.

In the same article, the author quotes a state senator commenting after the Kentucky legislature amended its self-defense law, "It's perfectly clear in Kentucky that you have a right to self-defense. The purpose of this bill was to sanction the use of firearms in all kinds of disputes, and that does not further public safety."[172] Of course, neither the author nor the senator cite any legislative history or other source that indicates in any way the purpose of the bill "was to sanction the use of firearms in all kinds of disputes."[173] Even a cursory reading of the Kentucky statute makes it clear the purpose of the statute is to allow the law-abiding people of Kentucky to protect themselves against violent attacks, including those involving guns, and from violent felons.[174] To equate the justification of the use of force to protect oneself against a deadly attack with a mere "dispute" creates a false narrative regarding the purpose and effect of all self-defense laws. Furthermore, the statute does not just apply to defensive force involving guns. It applies to any deadly force, which can include the use of a knife, a baseball bat, or any other object or force, including bare hands, capable of inflicting great bodily harm or death. But for some reason, the senator and others who oppose the protections afforded by these statutes tend to always try to connect them to guns and unlawful violence.

The same author also states that "[c]ritics, such as the Brady Campaign to Prevent Gun Violence, have dubbed the new measures 'shoot-first' laws and argue the statutes would make it

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171. *See supra* Section III.A.

172. *See* Peterson *supra* note 162, at 2.

173. *Id.*

174. KY. REV. STAT. ANN. § 503.055(3) (LexisNexis 2008) ("A person who is *not engaged in an unlawful activity* and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if he or she *reasonably believes it is necessary to do so to prevent death or great bodily harm* to himself or herself or another or to *prevent the commission of a felony involving the use of force*." (emphasis added)).

more likely that confrontations turn deadly and will make it harder to prosecute people who commit acts of violence."[175] No basis is given for such a prediction, and no facts or statistics support it. The defense afforded by these statutes does not make it easier for those who commit unjustified/unlawful acts of violence to avoid prosecution. The author goes on to quote a spokesperson of the Brady Campaign as saying, "Unfortunately, the law has had precisely the effect we thought it would. A handful of overly aggressive individuals are using it as a defense for actions that appear to go beyond the pale of self-defense."[176] No facts or verifiable statistics are offered to substantiate that claim. As discussed earlier, no self-defense statute allows an aggressor to claim self-defense.[177] The article indicates the same spokesperson said the Florida statute adopted in 2005 "ha[d] been cited as a defense in at least three cases" by the date of the article, which is April 26, 2006.[178] Only a brief statement of the facts in these three cases is mentioned, and the specific statute is not identified. No citations are given to location, court, or any other information, and no information is given regarding the outcome of these cases. Furthermore, even if we assume the three defendants were engaged in the unlawful use of force, three cases in one year does not justify taking away law-abiding citizens' rights to defend themselves. People try to manipulate a variety of laws for their own benefit and purposes. That doesn't mean there is anything wrong with the laws. Just because a few individuals *may* attempt to use self-defense to avoid answer-

175. Peterson, *supra* note 162; *see* ARIZ. REV. STAT. ANN. § 13-405 (2010 & Supp. 2012), GA. CODE ANN. §16-3-23.1 (2011); IND. CODE § 35-41-3-2 (West, Westlaw through P.L. 1-2016 and P.L. 2-2016); MISS. CODE ANN. § 97-3-15 (2006); MONT. CODE ANN. § 45-3-110 (2011); NEV. REV. STAT. ANN. § 200.120 (West, Westlaw through 2015 Reg. & Spec. Sess.); N.C. GEN. STAT. § 14-51.3 (2011); OKLA. STAT. ANN. tit. 21, § 1289.25 (West Supp. 2013); S.D. CODIFIED LAWS § 22-18-4 (2006); State v. Jackson, 382 P.2d 229, 232 (Ariz. 1963); Johnson v. State, 315 S.E.2d 871, 872 (Ga. 1984); Runyan v. State, 57 Ind. 80, 82–83 (Ind. 1877); Cook v. State, 467 So.2d 203, 210 (Miss. 1985); State v. Sunday, 609 P.2d 1188, 1195 (Mont. 1980); Culverson v. State, 797 P.2d 238, 240–41 (Nev. 1990); State v. Allen, 541 S.E.2d 490, 497 (N.C. Ct. App. 2000); Bechtel v. State, 840 P.2d 1, 12–13 (Okla. Crim. App. 1992); State v. Burtzlaff, 493 N.W.2d 1, 7 (S.D. 1992).

176. Peterson, *supra* note 162.

177. *See supra* Section III.B.

178. Peterson, *supra* note 162.

ing for their violent crimes that does not justify taking away everyone's right to defend themselves. If states refused to enact laws that someone may try to use in an inappropriate or unintended manner, there would be very few statutes on the books. Based on this false logic, defenses such as insanity and entrapment should also be repealed.

The Brady Campaign to Prevent Gun Violence has opposed these stronger self-defense laws since before Florida passed its revised statute in 2005.[179] One commentator says, "[t]he Brady Campaign believes that the new laws effectually grant people a 'license to kill.'"[180] No reasonable interpretation of any self-defense statute, including Florida's, would even suggest they grant people a license to kill. The spokesperson of the Brady Campaign has also been quoted as saying, "you don't just broadly paint a new statewide law saying, if you're in doubt, go ahead and shoot and kill the other person."[181] Again, this critic misquotes the statute, the legislative intent, and the standard imposed by the statute.[182] No self-defense statute or law, stand your ground or otherwise, comes anywhere near saying, suggesting, or hinting that doubt alone justifies killing an attacker.[183] As discussed above, a basic component of self-defense is a reasonable belief that deadly force is necessary to defend against deadly force.[184] Critics who continue to make these deliberate misrepresentations run the risk of creating the very effect they decry. The doomsday scenario painted by these critics did not materialize when the majority of states

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179. The Brady Campaign went so far as to attack the Florida tourism industry by "passing out leaflets in Florida airports, issuing press releases, and posting ads warning that tourists now 'face a greater risk of bodily harm in Florida' because of the 'Shoot First Law.'" Renee L. Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL'Y 331, 343 (2006).

180. Jason W. Bobo, *Following the Trend: Alabama Abandons the Duty to Retreat and Encourages Citizens to Stand Their Ground*, 38 CUMB. L. REV. 339, 363 (2008).

181. *Id.* at 363–64 (citation omitted).

182. *See supra* note 84.

183. *See supra* pp. 12-14 (noting the requirement of reasonable belief).

184. *Id.*

passed no retreat statutes years before Florida or when Florida and other states joined that majority.[185]

Critics and commentators also allege these self-defense laws eliminate proportionality, a basic component of self-defense discussed earlier.[186] Every state, whether by statute or common law, requires that a person be confronted with force likely to cause death or serious/great bodily injury before using deadly force in self-defense.[187] There is, therefore, no question that these laws

185. *See* Angie D. Holan, *Crime Rates in Florida Have Dropped Since 'Stand Your Ground,' Says Dennis Baxley*, POLITIFACT (Mar. 23, 2012, 5:58 PM), http://www.politifact.com/florida/statements/2012/mar/23/dennis-baxley/crime-rates-florida-have-dropped-stand-your-ground/.

186. *See, e.g.*, Catalfamo, *supra* note 78, at 504.

187. ALA. CODE § 13A-3-23 (West, Westlaw through Act 2015-559 of the 2015 Reg., First Spec. and Second Spec. Sess.); ALASKA STAT. § 11.81.335 (2012); ARIZ. REV. STAT. ANN. § 13-405 (2010 & Supp. 2012); ARK. CODE ANN. § 5-2-607 (West, Westlaw through 2015 Reg. & 1st Ex. Sess.); CAL. PENAL CODE § 197 (West 2008); COLO. REV. STAT. § 18-1-704 (2012); CONN. GEN. STAT. ANN. § 53a-19 (West 2012); DEL. CODE ANN. tit. 11, § 464 (2007); FLA. STAT. ANN. §§ 776.012, 776.013 (West 2011); GA. CODE ANN. § 16-3-21 (2011); HAW. REV. STAT. § 703-304 (LexisNexis 2007); IDAHO CODE ANN. § 18-4009 (2004); 720 ILL. COMP. STAT. ANN. 5/7-1 (West 2002 & Supp. 2013); IND. CODE 35-41-3-2 (West, Westlaw through P.L. 1-2016 and P.L. 2-2016); IOWA CODE ANN. § 704.1 (West 2003); KAN. STAT. ANN. § 21-5222 (West, Westlaw through 2015 Reg. Sess.); KY. REV. STAT. ANN. § 503.050 (LexisNexis 2008); LA. STAT. ANN. § 14:20 (West, Westlaw through 2015 Reg. Sess.); ME. REV. STAT. ANN. tit. 17A, § 108 (2006 & Supp. 2012); MICH. COMP. LAWS ANN. 780.972 (West 2007); MINN. STAT. ANN. § 609.065 (West 2009); MISS. CODE ANN. § 97-3-15 (2006); MO. ANN. STAT. § 563.031 (West 2012); MONT. CODE ANN. § 45-3-102 (2011); NEB. REV. STAT. § 28-1409 (2008); NEV. REV. STAT. ANN. § 200.160 (LexisNexis 2012); N.H. REV. STAT. ANN. § 627:4 (LexisNexis 2007 & Supp. 2012); N.J. STAT. ANN. § 2C:3-4 (West 2005); N.M. STAT. ANN. § 30-2-7 (West, Westlaw through 2015 First Spec. Sess.); N.Y. PENAL LAW § 35.15 (McKinney 2009); N.C. GEN. STAT. § 14-51.3 (2011); N.D. CENT. CODE § 12.1-05-07 (2012); OKLA. STAT. ANN. tit. 21, § 733 (West, Westlaw through 2015 First Sess.); OR. REV. STAT. § 161.219 (2011); 18 PA. STAT. AND CONS. STAT. ANN. § 505 (West 1998 & Supp. 2013); S.C. CODE ANN. § 16-11-440 (Supp. 2012); S.D. CODIFIED LAWS §§ 22-16-34, 22-16-35 (2006); TENN. CODE ANN. § 39-11-611 (2014); TEX. PENAL CODE ANN. § 9.32 (West 2011); UTAH CODE ANN. § 76-2-402 (LexisNexis 2012); VT. STAT. ANN. tit. 13, § 2305 (2009); WASH. REV. CODE ANN. § 16.050 (West Supp. 2013); W. VA. CODE § 55-7-22 (LexisNexis 2008); WIS. STAT. ANN. § 939.48 (West Supp. 2012); Christian v. State, 951 A.2d 832 (Md. 2008); Commonwealth v. Haith,

retain the traditional requirement of proportionality: deadly force can only be used against deadly force. So why do some commentators say the Florida statute and other similar statutes eliminate the proportionality requirement?

The 2005 Florida statute made two major changes to the state's self-defense law. First, it eliminated a duty to retreat before defending against deadly force.[188] As seen in the statute and discussed above, the statute did not change the proportionality requirement at all.[189] The second major change in the statute involved the creation of certain presumptions connected to the state's home protection statute.[190] The presumptions apply if an intruder "was in the process of *unlawfully and forcefully* entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle."[191] Twenty-three other states have created similar presumptions, some before Florida and others after.[192] Some of these states did not impose a duty to retreat before 2005, but critics did

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894 N.E.2d 1122, 1128 (Mass. 2008); State v. Hanes, 783 A.2d 920, 925–26 (R.I. 2001); Gilbert v. Commonwealth, 506 S.E.2d 543, 547 (Va. Ct. App. 1998); VA. PRACTICE JURY INSTRUCTIONS §§ 63.1, 63.6 (2015); WYO. PATTERN JURY INSTRUCTION § 8.02 (2014); MD. STATE BAR ASS'N CRIMINAL PATTERN JURY INSTRUCTIONS § 5:07 (2013); 2 CR OHIO JURY INSTRUCTIONS § 417.27 (2008); VT. BAR ASS'N CRIMINAL JURY INSTRUCTION § 111 (2005).

188. FLA. STAT. ANN. §§ 776.012, 776.031 (West 2010).

189. FLA. STAT. ANN. § 776.012 (Supp. 2015).

190. FLA. STAT. ANN. § 776.013 (Supp. 2015).

191. *Id.* (emphasis added).

192. ALA. CODE § 13A-3-23; ARIZ. REV. STAT. ANN. § 13-411 (2010 & Supp. 2012); ARK. CODE ANN. § 5-2-620 (West, Westlaw through 2015 Reg. & 1st Ex. Sess.); CAL. PENAL CODE § 198.5 (West 2008); KAN. STAT. ANN. § 21-5224 (West, Westlaw through 2015 Reg. Sess.); KY. REV. STAT. ANN. § 503.055 (LexisNexis 2008); LA. STAT. ANN. § 14:19 (West, Westlaw through 2015 Reg. Sess.); MICH. COMP. LAWS ANN. § 780.951 (West 2007); MISS. CODE ANN. § 97-3-15 (2006); NEV. REV. STAT. ANN. § 41.095 (West, Westlaw through 2015 Reg. & Spec. Sess.); N.J. STAT. ANN. § 2C:3-4; N.C. GEN. STAT. § 14-51.2; N.D. CENT. CODE § 12.1-05-07.1; OHIO REV. CODE ANN. § 2901.05 (LexisNexis 2010); OKLA. STAT. ANN. tit. 21, § 1289.25 (West Supp. 2013); 18 PA. STAT. AND CONS. STAT. ANN. § 505; R.I. GEN. LAWS § 11-8-8 (2002); S.C. CODE ANN. § 16-11-440; TENN. CODE ANN. § 39-11-611; TEX. PENAL CODE ANN. §§ 9.31, 9.32 (West 2011); UTAH CODE ANN. § 76-2-405 (LexisNexis 2012); WIS. STAT. ANN. § 939.48 (West Supp. 2012); WYO. STAT. ANN. § 6-2-602 (2013).

not categorize them as "stand your ground" states.[193] On the other hand, some state legislatures that created these same presumptions require retreat before using deadly force in self-defense.[194] These retreat states with presumptions certainly were never characterized as "stand your ground" states.

Detractors from and critics of stronger self-defense laws, even in one's own home, vehicle, or place of business, see these presumptions as a "revolt against proportionality" in self-defense.[195] The plain language of the statutes and the clear legislative intent debunk that characterization. Proportionality is clearly required in all the statutes. Additionally, the plain language and the legislative intent reveal the states seek another purpose: they attempt to level the playing field for law-abiding residents and visitors. If someone has "unlawfully and forcibly" entered another's home, dwelling, occupied vehicle, or even business, that criminal has exhibited force in a way that shows a willingness to use violence against anyone he encounters. Why should a homeowner in the middle of the night awakened by someone unlawfully and for-

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193. It is hard to determine which states would be considered "stand your ground" states because that designation seems to apply only to Florida and other states that joined the majority of no-retreat states beginning in 2005. The pre-2005 no-retreat states that created the presumptions are: Arizona, California, Kansas, Kentucky, Michigan, Mississippi, Nevada, North Carolina, North Dakota, Oklahoma, Tennessee, Utah, and Wisconsin. *See* ARK. CODE ANN. § 5-2-607(b) (West, Westlaw through 2015 Reg. & 1st Ex. Sess.) (dwelling and surrounding curtilage); CONN. GEN. STAT. ANN. § 53a-19(b) (dwelling or place of work); DEL. CODE ANN. tit. 11, § 464(e)(2) (dwelling or place of work); HAW. REV. STAT. ANN. § 703-304(5)(b) (LexisNexis 2007) (dwelling or work place); IOWA CODE ANN. § 704.1 (West 2003) (dwelling or place of business or employment); NEB. REV. STAT. § 28-1409(4)(b) (2008) (dwelling or place of work); OHIO REV. CODE ANN. § 2901.09 (LexisNexis 2010) (residence or vehicle); 18 PA. STAT AND CONS. STAT. ANN. § 505 (no duty to retreat in dwelling, place of work, or if other person uses a firearm or replica of a firearm or any other weapon readily or capable of lethal use).

194. The retreat states with statutory presumptions that benefit citizens through the castle doctrine are: Arkansas, New Jersey, North Dakota, Ohio, Pennsylvania, Rhode Island, and Wyoming. ARK. CODE ANN. § 5-2-620; N.J. STAT. ANN. § 2C:3-4; N.D. CENT. CODE § 12.1-05-07.1; OHIO REV. CODE ANN. § 2901.05; 18 PA. STAT. AND CONS. STAT. ANN. § 505; R.I. GEN. LAWS § 11-8-8; WYO. STAT. ANN. § 6-2-602.

195. *See* Renee L. Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J. L. ECON. & POL'Y 331, 334 (2006).

cibly entering his house be required to determine if the intent of the felon is to use deadly or non-deadly force against him? The intruder himself may not even know until he decides to use it.

If anything, the presumptions created in statutes like Florida's return some proportionality to a dangerous and intolerable situation. Without the presumptions, the homeowner faces the possibility that a prosecutor, judge, or jury in the cool calm of the aftermath of such a horrible incident will decide that the intruder did not intend to use deadly force because he was not armed or for any other reason. First, one does not have to be armed to have the ability to use deadly force. Critics seem to believe only guns constitute deadly force. Second, someone not faced with the frightening reality of a criminal in his or her home intending to do who knows what cannot understand the danger and stress such a scenario creates. The police, prosecutor, judge, or jury will be able to review all facts, most of which would have been unknown to the person confronted with the criminal, feeling no fear, urgency, or stress. That is why states are evening the odds for the law-abiding citizen by creating these presumptions of reasonable fear. They add proportionality to a disproportionate situation while maintaining the traditional proportionality component required for all self-defense.

Some critics are willing to say anything to try to discredit self-defense laws. In discussing Florida's new law, one commentator began by saying that Florida was "a notorious violent state" with no statistics or support for such a bold statement.[196] Even if it were true, such a characterization would support the added protections the Florida legislature enacted in 2005. States with higher crime rates and more violence have a duty to allow their law-abiding residents and visitors to protect themselves without increasing the danger to themselves by imposing a duty to retreat or second guessing them when they are accosted in their residences, business, or vehicles.

Other critics try to connect self-defense laws with concealed carry gun laws in an attempt to discredit both. Concealed carry laws have their genesis in a citizen's Second Amendment

196. Catalfamo*, supra* note 78, at 504.

right to bear arms.[197] Self-defense laws, on the other hand, deal with a person's fundamental right to life as enumerated and recognized in the Declaration of Independence.[198] But because there are those segments in our society who are opposed to law-abiding citizens exercising their Second Amendment right to "bear arms," they seem to be attempting to cast both laws in a particularly bad light by trying to connect them in some nefarious plot to do something horrible to and in America. In a report on gun violence in America, a member of the U.S. Congress indicates the top priority in dealing with gun violence is to get the states to "impose a duty to retreat on individuals before they are deemed justified in using deadly force."[199] If gun violence in America is as she reports, law-abiding citizens need strong self-defense laws to defend themselves against the violence.

Laws that impose impossible choices in life-and-death situations require citizens to hesitate before defending themselves and their family. Hesitation puts innocent victims at the mercy of criminals, who do not hesitate to use whatever force is necessary to bring about their criminal intentions. The majority of states refuse to create an even more dangerous situation by requiring a person to retreat before defending himself or another from deadly force. The people of each state have spoken through their elected state representatives, and federal legislators should not interfere in any way. Federal politicians are not paid by taxpayers to attempt to subvert state laws.

VI. CONCLUSION

In order to deal with the criminal use of deadly force, each state recognizes a person's right to use deadly force in self-defense. Most states recognize the long-standing tradition in this country to allow the justifiable use of deadly force in self-defense without first retreating. A minority of states follows the English

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197. U.S. CONST. amend. II; *see also* D.C. v. Heller, 554 U.S. 570, 595 (2008) (holding that the Second Amendment confers an individual right to bear arms).

198. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

199. U. S. CONGRESSWOMAN ROBIN L. KELLY, 2014 KELLY REPORT: GUN VIOLENCE IN AMERICA 63 (2014), https://robinkelly.house.gov/sites/robinkelly.house.gov/files/wysiwyg_uploaded/KellyReport_1.pdf.

tradition and requires a law-abiding citizen, resident, or visitor to retreat—to turn from and leave the place where a criminal is threatening the use of deadly force—if he can do so safely. All states retain the three traditional components required for self-defense, including for the use of deadly force. Those components are proportionality, necessity, and reasonable belief. All "stand your ground" statutes specifically include all of these components.

As discussed throughout this article, in 2005, the parameters for the justifiable use of deadly force adopted by the majority came under attack when Florida decided to join that majority and follow the American tradition of recognizing a person's right to protect himself from deadly force without first retreating. The attacks used to discredit these parameters resorted, and still resort, to mischaracterizations that lead to misunderstanding. Critics and opponents ignore the plain language of what they call "stand your ground" statutes, resulting in the statutes being misconstrued and misunderstood. Commentators make wild accusations regarding the intent of the statutes and baseless doomsday predictions. None of the predictions have materialized.

When the statutes characterized as "stand your ground" statutes are actually read, the purpose of these statutes, like all self-defense statutes, becomes clear. It is to protect law-abiding citizens from the unlawful use of deadly force by allowing them to protect themselves. Police cannot protect every single person every day. Absent their presence or some special undertaking, police do not have a duty to protect individuals who are threatened with harm.[200] Criminals do not usually attack or assail people in front of the police, so even if police had such a duty, nothing would change. As a result, states seek to protect people from criminals by allowing them to protect themselves when it becomes necessary. States that do not impose the impossible task of determining a place of safety to which to retreat do not require law-abiding citizens to make impossible decisions when endangered by deadly force. These states have been accused of sanctioning violence and retaliation, allowing people to shoot without reason, and creating a dangerous wild-west scenario. No logical justification for these unsubstantiated claims exists, and no reasonable explanation can be found for making them, nor has any been given.

200. *See* Riss v. City of New York, 240 N.E.2d 860, 861 (N.Y. 1968).

In addition to protecting people by allowing them to defend themselves without retreating, Florida and other no retreat states and some retreat states provide greater protections for those in their home, dwelling, vehicle, or place of business. These additional protections are founded on the long-accepted castle doctrine and include conclusive or rebuttable presumptions and criminal and/or civil immunity. The presumptions created require or allow a person's reasonable fear of imminent danger of death or great/serious bodily injury to be presumed when someone unlawfully and forcefully is entering or has entered any of the places designated by the statute. The statutes also create a presumption that the person who unlawfully and forcefully enters or has entered has the intent to commit an unlawful act involving force or violence. Criminal and/or civil immunity is also granted in some statutes if the person defending himself or another is justified in using deadly force in the places so designated.

Critics and commentators attempt to discredit self-defense laws that do not impose a duty to retreat and cite increasing violence, crime, and illegal use of guns as reasons for imposing a duty to retreat. These reasons actually support strong self-defense laws that allow law-abiding citizens to defend themselves without first making an impossible analysis of their surroundings, a potential place of safety, and a criminal's intent. The more crime, violence, and illegal guns there are the more law-abiding people need to defend themselves. To advocate the repeal of strong self-defense laws because of an increase in crime and gun violence is a non sequitur. Reason and logic dictate that if crime and violence increase the law-abiding potential victims should be afforded greater protections through strong self-defense laws.

The Declaration of Independence acknowledges our fundamental right to life and liberty. The United States Constitution guarantees our right to defend ourselves and to bear arms. This country is founded upon a rich history of individualism and independence. That is why the majority has never embraced the English duty to retreat before defending against deadly force. The majority has allowed and still allows a person to stand his ground to defend against deadly force by using deadly force without first being backed into a corner by retreating "to the wall." In addition to crime and violence, this country faces an unprecedented threat of terrorism. Strong self-defense laws protect law-abiding citizens by allowing them to protect themselves when necessary and pre-

serve individual freedom by ensuring the fundamental right to life and liberty. The so-called "stand your ground" laws provide this protection and preserve freedom.

The thirty-three no retreat states should ignore the unfounded, unsubstantiated, and untrue criticisms of their statutes and common law and continue to refuse to impose a duty to retreat upon their citizens, residents, and visitors. The so-called "stand your ground" states provide vital protections for potential victims of crime and violence. Retreat states should set aside all politicizing of their citizens' safety and right to defend themselves and take action to strengthen that right. Retreat states should become no retreat states and provide as many common sense protections for the law-abiding citizens, residents, and visitors in their state as required for their safety and security. All state legislators should consider *facts* regarding crime, victims, and self-defense. States that still impose a duty to retreat should actually read "stand your ground" statutes and not rely on others' interpretations. Critics, commentators, and politicians who predicted doom and destruction when Florida passed its 2005 self-defense statutes were wrong. Strong self-defense laws provide exactly the opposite—safety and security for law-abiding citizens, which should be the top priority for all lawmakers. All states should resist the influence and unfair characterizations of others, especially those with political agendas that include bullying states into retreating from legitimate and much needed self-defense protections. The actual language of stand your ground laws already protect against the evils decried by critics and politicians and prescribe the conditions for true self-defense by victims and potential victims of violent crime. Stand your ground laws focus on innocent victims instead of the criminals, which should be the focus of all self-defense laws.

No Looking Back: The Effect of Transfer on the Choice of Law Rules Applicable to Directly Filed Multidistrict Litigation Cases

ELISABETH COURSON*

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I. INTRODUCTION

Marye Wahl, a Tennessee resident, suffers from a rare, but potentially serious, disease known as nephrogenic systemic fibrosis ("NSF") for which there is no cure.[1] The only known cause of NSF is the use of gadolinium-based contrast agents ("GBCAs") during MRI procedures.[2] General Electric, a company with its principal place of business in New Jersey, sells and markets a GBCA called Omniscan.[3] In May and November 2006, Wahl's physicians administered MRIs on Wahl in Tennessee using Omniscan as a contrast agent.[4] In May 2007, Wahl began experiencing symptoms associated with NSF, and doctors diagnosed her with the disease in October 2010.[5]

Many individuals, like Wahl, developed NSF after treatment with GBCAs.[6] As a result, related lawsuits were consolidated for pre-trial proceedings in a Multidistrict Litigation court ("MDL court") in the Northern District of Ohio.[7] The MDL court issued a Case Management Order permitting direct filing into the court, regardless of whether jurisdiction and venue were otherwise proper.[8] In May 2011, Wahl filed her suit directly into the MDL court.[9] Although most of the suits in the MDL court settle, Wahl's case was not settled.[10]

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1. Wahl v. Gen. Elec. Co., 786 F.3d 491, 493–94 (6th Cir. 2015); Brief of Plaintiff-Appellant Marye Wahl at 6, Wahl v. Gen. Elec. Co., 786 F.3d 491 (6th Cir. 2015) (No. 13-6622), 2014 WL 897565.
2. *Wahl*, 786 F.3d at 492–93.
3. *Id.* at 492, 500.
4. *Id.* at 493.
5. Brief of Plaintiff-Appellant, *supra* note 1, at 6–7.
6. *See Wahl*, 786 F.3d at 493.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

The parties, pursuant to 28 U.S.C. § 1404(a), agreed to transfer the case to the Middle District of Tennessee.[11] Following the transfer, General Electric moved for summary judgment, arguing that the Tennessee products liability statute of repose barred Wahl's suit.[12] Wahl responded, arguing that application of Ohio's choice-of-law rules was appropriate and would require application of New Jersey's statute of limitations, which would not bar her suit.[13] Although Wahl lives in Tennessee and the injury giving rise to the cause of action occurred in Tennessee, she argued that, as the transferor court, the choice-of-law rules of Ohio, not Tennessee, should apply.[14]

MDL courts and the ability to file directly into them provide a great deal of judicial efficiency to a flooded federal court system, but they also create a loophole for forum-shopping plaintiffs. The federal Multidistrict Litigation statute allows for the consolidation of tort cases for pretrial proceedings in a single district court chosen by the Judicial Panel on Multidistrict Litigation.[15] Most of the cases are settled or are disposed of during pretrial proceedings, and any cases that survive are usually remanded back to the district courts from which they were transferred.[16] To promote judicial efficiency, however, plaintiffs may file their case directly into the MDL court, even if it does not have personal jurisdiction over the parties.[17] If one of these directly filed cases

11. *Id.*; *see* 28 U.S.C. § 1404(a) (2013) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.").

12. *Wahl*, 786 F.3d at 493.

13. *Id.* at 494.

14. *Id.*

15. 28 U.S.C. § 1407 (2013).

16. *See* U.S. PANEL ON MULTIDISTRICT LITIGATION, STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2014 (2014), http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical%20Analysis%20of%20Multidistrict%20Litigation_2014.pdf (indicating that over seventy percent of Multidistrict Litigation actions were terminated by the MDL courts between 1968 and 2014).

17. Direct filing is permissible when the judge presiding over the MDL court issues a Case Management Order allowing cases to be directly filed into the MDL court rather than filed in another district and transferred to the MDL court. *See, e.g.*, Case Management Order No. 2, *In re* DePuy Orthopaedics, Inc.

survives the MDL court, it is transferred to a district court with proper jurisdiction. Plaintiffs may argue that the more preferable choice-of-law rules of the state in which the MDL court sits apply, citing a line of cases that, if followed, would support the notion that the choice-of-law rules of the transferor court always apply.[18] However, there is no choice of law theory that supports the conclusion that the transferee district court should apply the choice-of-law rules from the state in which the transferor district court sits if that state does not have a significant contact or a significant aggregation of contacts.[19] Furthermore, mechanical application of the analysis presented in *Van Dusen* and *Ferens* would generate inconsistent results. Namely, federal courts would apply different choice-of-law rules for plaintiffs who directly file into an MDL court and plaintiffs who initially file in one venue and their case is transferred to the MDL court, even though those actions would actually be litigated in the same state. This inconsistency of result is also at odds with the *Erie* doctrine.[20] Finally, the Supreme Court's recent decision in *Atlantic Marine*[21] would reject such a mechanical application in so far as it departs from *Van Dusen* and *Ferens*.[22]

ASR Hip Implant Products, No. 1:10-md-2197 (N.D. Ohio Jan. 7, 2011) ("In order to eliminate delays associated with transfer of cases in or removed to other federal district courts to this Court, and to promote judicial efficiency, any plaintiff whose case would be subject to transfer to [this Court] may file his or her case directly . . . .").

18. *See* Ferens v. John Deere Co., 494 U.S. 516, 520 (1990); Van Dusen v. Barrack, 376 U.S. 612, 646 (1964).

19. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (AM. LAW INST. 1971) (requiring the law of the state with the "most significant relationship" to be applied); RESTATEMENT OF CONFLICT OF LAWS § 377 (AM. LAW INST. 1934) (requiring the law of the place of the harm to be applied); BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 69 (1963) (requiring forum law to be applied as long as the forum has a legitimate interest in its law being applied).

20. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.").

21. Atlantic Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex., 134 S. Ct. 568 (2013).

22. *See Ferens*, 494 U.S. at 531; *Van Dusen*, 376 U.S. at 616.

Closure of the forum-shopping loophole created by direct filing requires a two-step response. First, every Case Management Order issued by an MDL court that allows direct filing should contain a mandatory provision requiring the plaintiff to declare a "home forum" upon filing.[23] Second, Congress should amend 28 U.S.C. § 1407 to add a provision requiring that if a directly filed case is transferred following pretrial proceedings, the choice-of-law rules of the state in which the transferee court sits are applicable, unless the plaintiff declared the MDL court as the home forum and the case could have originally been filed in the MDL court absent the Multidistrict Litigation.

Part II of the Note examines the development of choice of law theories in the United States and the application of these theories in federal courts. Part III focuses on the history of Multidistrict Litigation and the newly adopted direct filing process. Part IV seeks to prove that the direct filing process leaves open a loophole for plaintiffs to challenge the choice-of-law rules of a transferee court. Part V analyzes and comments upon the need for a provision in Multidistrict Litigation Case Management Orders requiring that direct filing plaintiffs declare a home forum as well as a Congressional amendment to 28 U.S.C. § 1407. Part VI, the Conclusion, offers brief closing remarks.

II. CHOICE OF LAW DEVELOPMENT

A choice of law analysis is employed by courts when it is unclear which jurisdiction's law should be applied to a case because the law of more than one jurisdiction could potentially be applied.[24] Although the analysis of which laws should be applied in a case seems like a simple procedural system that would be uni-

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23. *See* Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 759–60 (2012) (suggesting that the solution to which choice-of-law rules for pretrial proceedings of directly filed cases in the MDL court are applicable is resolved by "requiring plaintiffs to declare a proper home district whose choice-of-law rules would apply to their claims" in the MDL court).

24. *See* KERMIT ROOSEVELT, III, CONFLICT OF LAWS 1–2 (2010) (describing a two-step process through which courts first analyze whether the case is within the scope of each jurisdiction's law and then which jurisdiction has priority in the claims asserted).

form throughout U.S. jurisdictions to ensure predictable results, the methods of analysis vary from state to state.[25] The application of one state's laws over another can be the difference between a victory for the plaintiff and their case being dismissed.[26] The substantial impact on a case that can result from the implementation of one choice of law analysis over another has incited some plaintiffs to forum-shop.[27] To discourage such practices and provide a greater uniformity of results, the Supreme Court has rendered decisions that assist in closing forum-shopping loopholes.[28]

A. Development of Choice of Law Theories

The Full Faith and Credit Clause of the Constitution requires that each state give full faith and credit to the "public [a]cts" of its sister states.[29] Additionally, the Due Process Clause of the Fourteenth Amendment guarantees due process of law.[30] The Supreme Court thus ruled that a forum's application of its own law is unconstitutional if the forum's connection to the case is insignifi-

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25. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 331 (2011) (providing a table evidencing the various methods of choice of law analysis used by each state).

26. This problem often arises when the competing jurisdictions have different length statute of limitations and the case is brought after one has expired. *See* Wahl v. Gen. Elec. Co., 983 F. Supp. 2d 937, 952 (M.D. Tenn. 2013) (dismissing the case after applying Tennessee's statute of repose). Choice of law can also affect damages awarded to the plaintiff if one jurisdiction has statutory limitation on damages or does not allow insurance policies to be stacked. *See* Allstate Ins. v. Hague, 449 U.S. 302, 306 (1981) (holding that insurance policies issued in Wisconsin could be stacked following an accident in Minnesota).

27. *See* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 530–31 (1928) (evidencing plaintiffs who filed in federal court rather than state court to exploit the federal court's advantageous choice of law analysis).

28. *See* Klaxon Co. v. Stentor Elec. Mfg., 313 U.S. 487, 496 (1941) (holding that a federal court sitting in diversity must apply the choice-of-law rules of the state in which it sits).

29. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

30. U.S. CONST. amend. XIV § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

cant.[31] Accordingly, a choice of law analysis is necessary whenever more than one state's laws could be applied. A forum may apply its own law, however, when it has a "legitimate" interest in its law being applied.[32] Therefore, if the choice of law analysis leads to the forum law being applied, the court may implement any choice of law analysis it wishes as long as the court can show that the forum had a legitimate interest in its law being applied.[33] The choice of law theory utilized by a court may change depending upon the type of claim being asserted.[34] This Note focuses on the choice of law theories utilized in tort claims.

1. First Restatement

The (First) Restatement of Conflict of Laws ("First Restatement") implemented the vested rights theory,[35] which relies upon territoriality.[36] According to this theory, the law of the forum

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31. *Allstate*, 449 U.S. at 310–11 ("[I]f a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional.").

32. *Id.* at 323 (Stevens, J., concurring) ("[T]he [Full Faith and Credit] Clause should not invalidate a state court's choice of forum law unless that choice threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State.").

33. *Id.* at 336 (Powell, J., dissenting) ("A contact, or a pattern of contacts, satisfies the Constitution when it protects the litigants from being unfairly surprised if the forum State applies its own law, and when the application of the forum's law reasonably can be understood to further a legitimate public policy of the forum State.").

34. For example, Tennessee courts employ the Second Restatement in the choice of law analysis for tort claims but rely upon the First Restatement for contract claims. *See* Symeonides, *supra* note 25, at 331.

35. RESTATEMENT OF CONFLICT OF LAWS (AM. LAW INST. 1934).

36. *See* Kermit Roosevelt, III, *Brainerd Currie's Contribution to Choice of Law: Looking Back, Looking Forward*, 65 MERCER L. REV. 501, 503 (2014); Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 778 (1983) ("Most of these rules are, in the language of the new learning, 'jurisdiction selecting.' They identify the state whose law governs solely on the basis of these couplings of substantive category and determinative contact, looking to the substantive tenor and policies of the conflicting local laws only insofar as is necessary to determine in which substantive category the rules belong."); James Y. Stern, Note, *Choice of Law, the Constitution, and Lochner*, 94 VA. L.

in which a wrong occurred is the applicable law in deciding any claim that arose from such wrong.[37] The moment a wrong occurs, it creates a right in the injured individual. This right then vests, and once vested, is enforceable in all states.[38] The Supreme Court utilized this theory in numerous cases during the first quarter of the Twentieth Century.[39] Courts cited the Full Faith and Credit Clause and the Due Process Clause as reasons to force a forum to apply the law of a foreign jurisdiction.[40]

Although this approach simplifies the choice of law process, it can provide unfair results.[41] For example, in the case of *Alabama Great Southern Railroad Co. v. Carroll*, an Alabama employee was injured in Mississippi by the negligence of his Alabama employer and, through the use of the First Restatement, the

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REV. 1509, 1521 (2008); *see also* RESTATEMENT OF CONFLICT OF LAWS § 379 (AM. LAW INST. 1934).

37. *See* William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196, 1197 (1997) ("When an event (a tort, for example) occurred in the foreign territory, a right was created; the content of that right, of course, could be determined only by reference to the foreign law. The role of the forum court in the choice-of-law process was merely to enforce the right that had vested in the foreign territory according to the foreign law."); Korn, *supra* note 36, at 803 ("Since under the vested rights theory the exclusive power of such a state embraced the creation and definition of the entire right of action, that state's law was held to govern all substantive issues in tort actions and, in contract actions, at least all those going to the 'validity and effect' of the agreement.").

38. *See* ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW: CASES AND MATERIALS 18 (5th ed. 2010).

39. *See* W. Union Tel. Co. v. Brown, 234 U.S. 542, 547 (1914) (holding that the law of the place where a tort is committed follows the defendant); Old Dominion S.S. Co. v. Gilmore, 207 U.S. 398, 406 (1907) (holding that the law of the place of the wrong vests with the right to sue); *see also* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process,* 105 HARV. L. REV. 1217, 1225–26 (1992).

40. *See* Brilmayer & Norchi, *supra* note 39, at 1227; Stern, *supra* note 36, at 1526.

41. *See* Korn, *supra* note 36, at 806 ("[A] forum asked to enforce a right 'vested' elsewhere was stripped of any discretion with respect to the legal rules governing its response—it had an obligation to apply the law of the one state having territorially-based 'legislative jurisdiction' from which the only escapes were through manipulatory techniques or an ill-defined 'public policy' exception.").

law of Mississippi was held to be applicable.[42] The Alabama employer and Alabama employee made their contract in Alabama and the injury arose from a negligent act that occurred in Alabama.[43] The only relationship the state of Mississippi had to the lawsuit was that the injury happened to occur within the state's borders.[44] The plaintiff was able to recover under Mississippi law but was unable to do so under Alabama law.[45] The Alabama Supreme Court created a bright line rule, stating "there can be no recovery in one state for injuries to the person sustained in another, unless the infliction of the injuries is actionable under the law of the state in which they were received."[46] Although such a rule allows for a greater predictability of results, it also allows the law of a state with no interest in the case to be applied.

Many legal theorists criticized the First Restatement. Walter Wheeler Cook, for one, did not believe that a state's sovereignty stopped immediately at its borders.[47] David Cavers criticized the First Restatement for being an instrument for jurisdiction selection, not choice of law selection.[48] Rejecting the per se rule espoused by the First Restatement, legal theorists sought a system rooted less in territoriality.[49] In the 1950s and early 1960s, Brainerd Currie developed the Governmental Interest Analysis approach to choice of law issues.[50]

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42. 11 So. 803, 803–09 (Ala. 1892).

43. *Id.* at 803–04.

44. *Id.* at 804.

45. *Id.* at 805.

46. *Id.*

47. WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 41 (1942) ("'[L]aw' is not a material phenomenon which spreads out like a light wave until it reaches the territorial boundary and then stops.").

48. David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 178 (1933) ("Both the territorial and the 'vested rights' theories sanctioned its disregard. So long as deduction from territorial postulates could indicate only one jurisdiction as a source of law in a given case, the content of that law would be logically irrelevant.").

49. *See* Korn, *supra* note 36, at 807–09 (describing attempts by legal scholars to move away from the use of territoriality in choice of law analysis).

50. *See generally* CURRIE, *supra* note 19, at 188–89.

2. Governmental Interest Analysis

Through Currie's governmental interest analysis, the forum applies its own law whenever it has a legitimate interest in doing so.[51] Currie's theory rejects the First Restatement's choice of law analysis that favors the law of the state where the harm occurred above all else.[52] Courts welcomed interest analysis insofar as it gave credence to the application of the law of the jurisdiction with the strongest interest in the claim.[53] Despite its improvements over the approach of the First Restatement, this analysis has been criticized for favoring forum law and being easily manipulated.[54] Notwithstanding any criticism it may receive, this analysis raises the important distinction between a true conflict and a false conflict, while shedding light on the "unprovided-for" cases.[55]

First, a court must determine whether the case presents a true conflict.[56] If application of another state's choice-of-law rules would create the same result as the application of the forum's own choice-of-law rules, there is a false conflict and the court applies forum law.[57] Courts have also held that a false conflict exists if the

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51. *See id.* at 152–57; Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1590 (1985) ("The laws of a state should be deemed to regulate only the affairs of residents of the state, absent reason for concluding otherwise.").

52. *See* Maurice Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946, 951 (1981).

53. Babcock v. Jackson, 191 N.E.2d 279, 285 (N.Y. 1963) ("Where the issue involves standards of conduct, it is more than likely that it is the law of the place of the tort which will be controlling but the disposition of other issues must turn, as does the issue of the standard of conduct itself, on the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented.").

54. *See* Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1048 (1987); Korn, *supra* note 36, at 815–16.

55. A true conflict arises when application of the forum's law would have a different result from the application of an eligible foreign jurisdiction's law. *See* Smith, *supra* note 54, at 1047–48.

56. *See* Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 311 (1990) ("A multistate conflict of laws exists only when contacts are distributed such that more than one state wants to regulate the case.").

57. *See* CURRIE, *supra* note 19, at 107 (explaining that a false conflict arises when only one forum has a legitimate interest in its law being applied).

foreign jurisdiction has no interest in its law being applied.[58] In *O'Connor v. O'Connor*, both plaintiff and defendant were domiciled in Connecticut, but the injury that gave rise to the suit occurred in Quebec.[59] Although Quebec would not have allowed recovery and Connecticut would have, creating different results, the Connecticut court deemed this case to be a false conflict because Quebec had no interest in applying its law; therefore, the court applied Connecticut law.[60]

A true conflict arises when the application of forum law would cause a different result than application of the law of another interested jurisdiction. Interest analysis requires that when a true conflict arises, the law of the forum will be applied.[61] For example, in *Lilienthal v. Kaufman*, the parties, one domiciled in Oregon, the other in California, made, entered into, and performed a contract in California.[62] Despite the deep-rooted connection of the claim to California, the court applied the law of Oregon, reasoning that in a case where "[t]he interests of neither jurisdiction are clearly more important than those of the other[,]" the law of the forum must be applied.[63]

In addition to false conflicts and true conflicts, there is a third category into which cases may fall—"unprovided-for" cases.[64] This occurs when no state, including the forum, has an interest in its law being advanced.[65] Accordingly, the court must next

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58. *See, e.g.*, O'Connor v. O'Connor, 519 A.2d 13, 25 (Conn. 1986).

59. *Id.* at 14.

60. *Id.* at 24–25.

61. *See* Damon C. Andrews & John M. Newman, *Personal Jurisdiction and Choice of Law in the Cloud*, 73 MD. L. REV. 313, 345 (2013) (explaining that in the event of a true conflict, interest analysis required the forum to apply its own law); *see also* Gene R. Shreve, *Currie's Governmental Interest Analysis—Has It Become A Paper Tiger?*, 46 OHIO ST. L.J. 541, 542 (1985).

62. Lilienthal v. Kaufman, 395 P.2d 543, 544 (Or. 1964) (en banc).

63. *Id.* at 549.

64. *See* Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 BUFF. L. REV. 329, 347 (1997); *see also* John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 200–01 (1981) (describing "unprovided-for cases" as a "criss-cross" configuration where the law of the state in which each party is domiciled is in opposition to that party's interests).

65. Larry Kramer, *The Myth of the "Unprovided-for" Case*, 75 VA. L. REV. 1045, 1045–46 (1989) ("[S]uppose that a plaintiff from state A has an

determine whether the forum has a legitimate interest in its law being applied.[66] In the event that an "unprovided-for" case arises, under interest analysis, the forum would apply the forum's law.[67]

Currie's governmental interest analysis has been praised for incorporating the purpose of the law of competing states in determining the proper choice of law.[68] However, the approach has also been criticized for forum favoritism and being easily manipulated by courts.[69] Accordingly, Currie's approach has been widely abandoned in favor of choice of law approaches that consider the totality of circumstances.[70]

3. Second Restatement

In 1971, the American Law Institute published the Restatement (Second) of Conflicts ("Second Restatement"), an attempt to reach a middle ground between conflicting choice of law approaches.[71] The Second Restatement provides the "most significant relationship" test to determine which jurisdiction's law should be applied when a conflict arises in torts claims.[72] Section 6 of the Second Restatement enumerates the factors the court should consider in determining which jurisdiction has the most significant

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accident with a defendant from state B. If the policy underlying state A's law protects defendants and the policy underlying state B's law protects plaintiffs, neither state would have an interest in applying its law.").

66. *See* Kramer, *supra* note 56, at 326–27 (explaining scholarly preference for a forum's law to be applied if there is a legitimate interest).

67. *See* CURRIE, *supra* note 19, at 152–56.

68. *See* Shreve, *supra* note 61, at 542 ("By whatever name, all modern choice of law approaches include in their design some mechanism for probing the interests of the forum and other jurisdictions by investigating the extent to which policies accounting for substantive rules will be advanced through their application in the particular case.").

69. *See* Symeonides, *supra* note 25, at 328; *see also* Shreve, *supra* note 61, at 542.

70. *See* Shaman, *supra* note 64, at 354 (explaining that only four states still use interest analysis and some scholars dispute that there are even four).

71. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AM. LAW INST. 1971); *see* Shaman, *supra* note 64, at 330 (citing Herma H. Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 552–53 (1983)).

72. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (AM. LAW INST. 1971).

relationship with the parties and the issues before the court.[73] To determine which state has the most significant relationship, courts consider the following contacts: (1) the place of the injury; (2) the place where the conduct causing the injury occurred; (3) the domicile and place of business of the parties; and (4) the place where the parties' relationship was centered, if any.[74]

In *Townsend v. Sears, Roebuck and Co.*, a Michigan boy was injured at his home when he was run over by a lawn mower purchased from the defendant, a New York corporation with its principal place of business in Illinois.[75] Plaintiffs, mother and son, filed suit against the defendant in Illinois and requested that forum law apply.[76] The Supreme Court of Illinois denied this request, explaining that the application of the Second Restatement requires that the law of the state where the injury occurred must be applied, unless there is a state with a more significant relationship.[77] In *Townsend*, Michigan was the state in which the injury occurred, the home of the plaintiffs, and, therefore, the state with the most significant relationship to the cause of action.[78]

The Second Restatement is the most widely used choice of law approach, primarily due to its flexibility.[79] This approach is

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73. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW INST. 1971) ("(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.").

74. Montgomery v. Wyeth, 580 F.3d 455, 459–60 (6th Cir. 2009) (citing Hataway v. McKinley, 830 S.W.2d 53, 59 (Tenn. 1992) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (AM. LAW INST. 1971))).

75. 879 N.E.2d 893, 896 (Ill. 2007).

76. *Id.*

77. *Id.* at 902–05.

78. *Id.* at 905–06.

79. *See* Phillips v. Gen. Motors Corp., 995 P.2d 1002, 1007 (Mont. 2000) (citing *In re* Air Crash Disaster at Boston, Mass. on July 31, 1973, 399 F. Supp. 1106, 1110 (D. Mass. 1975)) (explaining the advantages of adopting the Second Restatement approach to choice of law analysis); Smith, *supra* note 54, at 1046

criticized, however, for its lack of predictability due to the significant amount of judicial discretion allowed under the approach.[80] Scholars have complained that by not defining "significant" and giving discretion to judges to assign weight to the various factors employed in determining the significant relationship, the Second Restatement almost encourages dissimilarity in results across courts.[81]

B. Federal Courts and Choice of Law

The ability of courts to choose their own choice of law analysis creates a disparity in results from jurisdiction to jurisdiction.[82] This lack of uniformity was further frustrated when a case's result turned not only on within which state a plaintiff brought their claims, but whether they brought their claims to state or federal court.[83] Following the Supreme Court's decision in *Swift v. Tyson*, confusion reigned supreme.[84]

1. *Erie* and *Klaxon*

The Supreme Court, through its decisions in *Erie* and *Klaxon*, narrowed the ability of federal courts to create law. The Supreme Court held in *Swift v. Tyson* that a federal court sitting in

(describing the Second Restatement as a flexible mixture of choice of law theories); *see also* Symeonides, *supra* note 25, at 331.

80. *See* Korn, *supra* note 36, at 818; Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1246 (1997) ("The eclectic mix of territorial and personal connecting factors allows a court to claim that almost any result is consistent with the Second Restatement."); s*ee also* Hill, *supra* note 51, at 1636 (explaining that although the Second Restatement provides guidance, a judge still has a substantial amount of judicial discretion).

81. *See* Korn, *supra* note 36, at 818–19 (listing numerous defects of the Second Restatement).

82. *See* Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 962 (1994) (noting that scholars track closely jurisdictions' adoptions of different choice of law approaches).

83. *See, e.g.*, Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 529–31 (1928).

84. *See* Adam N. Steinman, *What Is the Erie Doctrine? (and What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 256–57 (2008) (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 75 (1938)).

diversity must only apply the statutory law of the state in which it sits and may disregard the common law of such state.[85] The *Swift* decision created an inconsistency in the courts that enabled plaintiffs to forum-shop between state and federal courts.[86] Accordingly, an individual's substantive rights varied depending on whether their case was heard in federal or state court.[87] A notable example of the inconsistency created by *Swift v. Tyson* is of the taxicab company that reincorporated in a different state to create diversity jurisdiction so their case could be heard in federal court, avoiding the common law of Kentucky.[88]

Swift v. Tyson stood untouched for almost a century until the Supreme Court held in *Erie* that a federal court sitting in diversity must apply the law of the state in which it sits.[89] The cause of action in *Erie* arose from a train accident, when a train in Pennsylvania hit a Pennsylvania resident and the Pennsylvania resident filed suit in New York.[90] The plaintiff argued that federal common law should determine the applicable standard of care, while the defendant railroad argued that Pennsylvania law should be applied.[91] The Supreme Court held that a federal court sitting in diversity must apply the substantive law of the state in which it sits.[92] *Erie* firmly established that "[t]here is no federal general common law."[93] The goal of this opinion was to create a greater uniformity amongst courts that had become disconnected following *Swift*.[94]

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85. 41 U.S. 1, 19 (1842).

86. *See* Donald Earl Childress, III, *When Erie Goes International*, 105 NW. U. L. REV. 1531, 1540 (2011).

87. *Erie*, 304 U.S. at 74–75.

88. *Black & White Taxicab & Transfer Co.*, 276 U.S. at 522–23.

89. *Erie*, 304 U.S. at 78.

90. *Id.* at 69.

91. *Id.* at 70–71.

92. *Id.* at 79–80.

93. *Id.* at 78.

94. *See id.* at 74 ("Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties."); *see also* Allan Ides, *The Supreme Court and the Law to Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the* Erie *Doctrine and Related Problems,* 163 FED. RULES DECISIONS 19, 20 (1995) (providing a detailed analysis of *Erie* and how it will impact decisions in the future).

Following *Erie*, the Supreme Court held in *Klaxon* that a federal court sitting in diversity must apply the choice-of-law rules of the state in which it sits.[95] The cause of action that gave rise to *Klaxon* was the breach of a contract.[96] The defendant, a Delaware corporation, and the plaintiff, a New York corporation, executed the contract in New York.[97] Although the plaintiff filed suit in Delaware, the federal district court applied New York law.[98] The Court held that a federal court sitting in diversity may not fashion its own choice of law methodology, effectively making a state's choice-of-law rules substantive law.[99] Combined, *Erie* and *Klaxon* require that the choice-of-law rules governing a case filed in federal court must be the same as though the case were filed in a state court.[100]

When *Klaxon* was decided, courts routinely followed the First Restatement of Conflicts of Laws.[101] As noted above, the First Restatement simply requires the law of the place of the harm or contract formation be applied.[102] Accordingly, no matter within which state the federal court was seated, the applicable law would be the place of the harm or contract formation.[103] Such predictable and uniform outcomes are not possible, however, when each state has its own choice-of-law rules.[104] Today, the choice-of-law rules

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95. Klaxon Co. v. Stentor Elec. Mfg., 313 U.S. 487, 496 (1941).
96. *Id.* at 494.
97. *Id.*
98. *Id.* at 495.
99. *See id.* at 498.
100. *See* Ides, *supra* note 94, at 34 ("In a diversity case, a federal district court sitting in New York will not necessarily apply New York substantive law to the controversy; rather, the court will apply the substantive law a New York state court would apply.").
101. *See* Earl M. Maltz, *Choice of Forum and Choice of Law in the Federal Courts: A Reconsideration of Erie Principles*, 79 KY. L.J. 231, 253 (1991) ("At the time the Klaxon rule was established, it fit both the limited impact theory and the principle of equality well. American courts uniformly followed the approach of the Restatement (First) of Conflict of Laws in deciding choice of law questions.").
102. *See supra* Part II.A.1.
103. *See* W. Union Tel. Co. v. Brown, 234 U.S. 542, 547 (1914).
104. *See* Symeonides, *supra* note 25, at 331 (providing a survey of the theories employed by each state in torts and contracts cases).

implemented by states give courts great discretion to apply forum law.[105]

2. Post-Transfer Choice of Law

In 1948, Congress passed the federal transfer statute.[106] The statute, while providing convenience to parties, left open the question of which state's laws applied after a case was transferred. The Supreme Court held in *Van Dusen* and *Ferens* that the policies underlying the holdings of *Erie* and *Klaxon* mandated that the law, including the choice-of-law rules, of the transferor court, rather than those of the transferee court, must be applied to a case that has been transferred pursuant to 28 U.S.C. § 1404(a).[107]

The claims asserted in *Van Dusen* arose from a plane crash when a plane traveling from Boston to Philadelphia crashed into the Boston Harbor.[108] Plaintiffs filed personal injury and wrongful death suits in Pennsylvania, but the district court then granted the request of the defendants to transfer the case to Massachusetts.[109] The request was granted because the case could have been brought in the District of Massachusetts at the onset.[110] However, the Court held that the law of Pennsylvania, not Massachusetts applied.[111] The Court explained that 28 U.S.C. § 1404(a) is available to prevent a waste of time and money, not to change the applicable law in the case.[112]

The Supreme Court strengthened the precedent set by *Van Dusen* in *Ferens*. In *Ferens*, a John Deere combine injured a Pennsylvania farmer in Pennsylvania.[113] The farmer filed suit against John Deere in a Mississippi state court, then requested the case be transferred to a Mississippi federal court.[114] Finally, after

105. *See* Childress, III, *supra* note 86, at 1544 (citing PETER HAY ET AL., CONFLICT OF LAWS § 1.10 tbl. 3 (5th ed. 2010)).

106. 28 U.S.C. § 1404 (2012).

107. Ferens v. John Deere Co., 494 U.S. 516, 532 (1990); Van Dusen v. Barrack, 376 U.S. 612, 639 (1964).

108. *Van Dusen*, 376 U.S. at 613.

109. *Id.* at 613–14.

110. *Id.* at 614.

111. *Id.* at 639.

112. *Id.* at 616.

113. Ferens v. John Deere Co., 494 U.S. 516, 519 (1990).

114. *Id.* at 520.

realizing that the statute of limitations in Pennsylvania was more advantageous, the farmer sought for his case to be transferred to the Western District of Pennsylvania.[115] The Supreme Court held that the transferee court must apply the law of the transferor court, regardless of which party initiated the transfer.[116] When read with *Klaxon*, these cases require that courts employ the choice-of-law rules of the transferor court.[117]

In *Atlantic Marine*, the Supreme Court departed from this general rule in deciding that the laws of the state in which the transferee court sits should apply when the transfer is based on the parties' valid, contractual choice of law provision.[118] The cause of action arose from an alleged breach of contract.[119] The contract included a forum selection clause, which required that any action arising from the contract must be filed in the Eastern District of Virginia.[120] However, when the plaintiff believed the defendant had breached the contract, the plaintiff brought suit in the Western District of Texas.[121] The defendant filed a mandamus action to force the district court to transfer the case to the Eastern District of Virginia.[122] The Supreme Court held that not only should the case be transferred to the Eastern District of Virginia, but the law of the transferee court should also apply.[123] In departing from the bright line rule created by *Van Dusen* and *Ferens*, the Supreme Court

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115. *Id.*

116. *Id.* at 531.

117. *See* Klaxon Co. v. Stentor Elec. Mfg., 313 U.S. 487, 497–98 (1941); *see also* Bradt, *supra* note 23, at 780 ("[T]he invocation of a state's choice-of-law rules is linked to a plaintiffs' selection of a proper venue. Transfer within the federal system—even in the case of a mass tort, where transfer would create increased efficiency—does not deprive a plaintiff of the benefits of that choice.").

118. Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Texas, 134 S. Ct. 568, 582–83 (2013).

119. *Id.* at 575.

120. *Id.*

121. *Id.* at 576.

122. *Id.*

123. *Id.* at 582 ("[W]hen a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules—a factor that in some circumstances may affect public-interest considerations.").

relied upon the policy behind the holdings of these cases.[124] Justice Alito reasoned, "[b]ecause '§ 1404(a) should not create or multiply opportunities for forum shopping,' . . . we will not apply the *Van Dusen* rule when a transfer stems from enforcement of a forum-selection clause. . . ."[125] It should be inferred then that the choice-of-law rules of the transferor court should not be applied if doing so would encourage the "gamesmanship" described by Justice Alito.[126]

Over the past century, the loopholes that allow forum-shopping have narrowed significantly.[127] Rather than focusing on an isolated incident, courts have begun to look at the totality of the circumstances in determining which jurisdiction's laws apply to any given case.[128] Rather than awarding a better outcome to a plaintiff who brings his case in federal court, federal courts apply the same choice of law rules to federal diversity cases as though the case were brought in state court.[129] Rather than allowing parties to transfer their case for a different result, the Supreme Court has required that the original forum's law apply post-transfer.[130] Taken as a whole, courts and scholars have made it clear that forum-shopping should be stopped.[131]

III. MULTIDISTRICT LITIGATION

Multidistrict Litigation is a statutory tool used to promote efficiency and judicial economy.[132] It allows for cases with similar causes of action to be consolidated into one district court for pretrial proceedings.[133] In 2008, one-third of all federal civil litigation

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124. *Id.* at 583 (citing Ferens v. John Deere Co., 494 U.S. 516, 523 (1990)).
125. *Id.*
126. *Id.* at 583.
127. *See supra* Part II.
128. *See* Smith, *supra* note 54, at 1046–47; Symeonides, *supra* note 25, at 331.
129. *See* Ides, *supra* note 94, at 34.
130. *See* Ferens v. John Deere Co., 494 U.S. 516, 531 (1990).
131. *See infra* Section V.A.1.
132. 28 U.S.C. § 1407 (2012).
133. *Id.*

cases are Multidistrict Litigation cases.[134] An added efficiency of Multidistrict Litigation that is not statutorily defined is direct filing, which allows plaintiffs to file their claims directly into the district court where similar cases have been consolidated.[135]

A. History

The prologue to Multidistrict Litigation formed out of necessity in the early 1960s when, following a batch of highly publicized antitrust litigation, hundreds of cases were filed alleging conspiracies among electrical equipment managers.[136] Chief Justice Warren established the Coordinating Committee for Multiple Litigation of the United States District Courts and charged the Committee with consolidating the pretrial proceedings of the conspiracy cases.[137] Following the success of the Committee and upon the Committee's recommendation, in 1968, Congress enacted 28 U.S.C. § 1407, creating Multidistrict Litigation, in an effort to consolidate the pretrial proceedings of cases with similar claims and defendants, which would otherwise span courts across the country and waste valuable time and resources.[138]

The purpose of enacting the statute was to promote efficiency and encourage uniformity by avoiding inconsistent pretrial proceedings in different district courts.[139] The Multidistrict Litigation statute contemplates that cases with similar claims and defendants are transferred to a designated district court for pretrial proceedings.[140] Then, following the pretrial proceedings, the cases

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134. *See* Bradt, *supra* note 23, at 784 (citing Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1667 (2011)).

135. Although direct filing is not contained within § 1407, it has been widely used by MDL courts over the past decade to promote judicial economy. *See* Bradt, *supra* note 23, at 764–65.

136. *See* Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 48–49 (2007).

137. *See* Mark A. Hill, *Opening the Door for Bias: The Problem of Applying Transferee Forum Law in Multidistrict Litigation*, 85 NOTRE DAME L. REV. 341, 342–43 (2009).

138. 28 U.S.C. § 1407 (2012); *see* Hill, *supra* note 137, at 343.

139. *See* Hill, *supra* note 137, at 343.

140. 28 U.S.C. § 1407; *see* Hill, *supra* note 137, at 346–47.

that have not been disposed of are remanded to their originating court.[141]

The Multidistrict Litigation statute also created the Judiciary Panel on Multidistrict Litigation ("JPML"). The JPML consists of seven circuit and district court judges who are appointed, without oversight, by the Chief Justice of the Supreme Court.[142] The JPML identifies causes of action to be consolidated by Multidistrict Litigation and selects a singular district court to conduct the pretrial proceedings.[143] The JPML may initiate proceedings for the consolidation of pretrial proceedings or may act upon a motion filed by a party involved in an action.[144] The only three requirements necessary for pretrial proceeding consolidation to occur are: (1) the cases for consolidation involve "one or more common questions of fact"; (2) the consolidation must be for the "convenience of parties and witnesses"; and (3) the consolidation of the pretrial proceedings must promote justice and efficiency.[145]

Once the JPML has decided to consolidate pretrial proceedings for a particular cause of action, the JPML, again without oversight, will designate a district court wherein the Multidistrict Litigation pretrial proceedings for the particular cause of action will be heard.[146] Following notice from the JPML, filed cases arising from the particular cause of action are then transferred to the designated district court.[147] Once the cases have been transferred, the Multidistrict Litigation judge treats the cases as though they originated in the MDL court, but only for pretrial proceedings.[148] The cases are then settled, dismissed, or transferred back to the court of origin for trial.[149]

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141. *See* Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 MICH. L. REV. 703, 705 (1995).

142. 28 U.S.C. § 1407(d).

143. *Id.* § 1407(a)*; see* Daniel A. Richards, Note, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 FORDHAM L. REV. 311, 312 (2009).

144. 28 U.S.C. § 1407(c).

145. *Id.* § 1407(a); Ostolaza & Hartmann, *supra* note 136, at 62.

146. 28 U.S.C. § 1407(b).

147. *Id.* § 1407(c).

148. *See* Bradt, *supra* note 23, at 788.

149. UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2014, *su-*

B. Direct Filing

Within the past decade, the JPML has created a device to further increase the efficiency of Multidistrict Litigation—direct filing.[150] Between October 1, 2013 and September 30, 2014, more than eighty five percent of cases presided over by the MDL courts were filed directly into the MDL court.[151] Following the JPML's designation of an MDL court and transfer of already filed cases to that court, the MDL court will issue a Case Management Order, permitting plaintiffs whose cases share the same cause of action as the already transferred cases to file directly into the MDL court,[152] regardless of whether the MDL court has personal jurisdiction over the case.[153] Direct filing effectively allows plaintiffs to circumvent filing into a district court only to have their case transferred to the MDL court. If the case is not settled or dismissed, the case is then transferred to a court with proper jurisdiction.[154]

IV. FORUM-SHOPPING LOOPHOLE

Although the efficiency of Multidistrict Litigation and direct filing seems without fault, a closer look reveals a much larger problem—forum-shopping.[155] Plaintiffs can potentially engage in

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pra note 16 (indicating that over seventy percent of Multidistrict Litigation actions were terminated by the MDL court between 1968 and 2014).

150. *See* Bradt, *supra* note 23, at 794.

151. UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2014, *supra* note 16 (revealing that in the one year period 46,983 cases were directly filed into the MDL courts and 6,120 were transferred to the MDL courts).

152. *See supra* note 17 and accompanying text.

153. *See* Bradt, *supra* note 23, at 795–96 ("[P]laintiffs in tag-along cases filed after the establishment of the MDL can bypass transfer and file their cases directly into the MDL court, regardless of whether personal jurisdiction and venue would be appropriate in the MDL district.").

154. 28 U.S.C. § 1407(a) (2012).

155. *See* Korn, *supra* note 36, at 782–83 ("The problem of forum-shopping arises when four conditions exist. First, the combination of federal and state law governing judicial jurisdiction allows the courts of more than one state to act in a single case. Second, the federal law governing legislative jurisdiction allows application of the law of any of two or more states having conflicting local rules to a potentially determinative issue in that case. Third, under the choice-of-law doctrine of the states having judicial jurisdiction, the courts of two

forum-shopping by choosing to directly file into MDL courts instead of first filing in a more natural jurisdiction. If the state in which the MDL court sits has laws more favorable to a party than any jurisdiction with actual jurisdiction over the case, that party could argue that the laws of the state in which the MDL court sits should be applied to their case.[156] The reasoning to support such an argument is that the per se rule espoused in *Van Dusen* and *Ferens* requires that the law of the transferor court prevail over the law of the transferee court.[157]

For example, the court in *In re Express Scripts* mechanically applied *Van Dusen* and held that the law of the state in which the MDL court sits should be applied to directly filed cases during pretrial proceedings.[158] Similarly, the court in *In re Welding Fume* followed a related analysis and arrived at the same result.[159] Both courts relied upon the same district court opinion, which, in dicta, acknowledged that it might be permissible to apply the law of the MDL court but declined to do so.[160] In neither case was there any evidence that, but for the Multidistrict Litigation, the plaintiff would have filed their case in that particular district court. Accordingly, where there is no evidence that, but for the Multidistrict Lit-

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or more of them could reach different conclusions as to which of the conflicting local rules should be applied. Fourth, the probable conclusion of one or more of the permissible forums regarding the law to be applied is predictable at the time that the plaintiff commences suit.").

156. *See* Brief of Plaintiff-Appellant at 8, Wahl v. Gen. Elec. Co., 786 F.3d 491 (6th Cir. 2015) (No. 13-6622) (citing Ferens v. John Deere Co., 494 U.S. 516, 530 (1990)) (arguing that there is a per se rule that requires that the choice-of-law rules of the state in which the transferor court sits must be applied by the transferee court).

157. *Id.*

158. *In re* Express Scripts, Inc., PBM Litig., No. 4:05-CV-00862 SNL, 2007 WL 4333380, at *2 (E.D. Mo. Dec. 7, 2007).

159. *In re* Welding Fume Prods. Liab. Litig., 245 F.R.D. 279, 295 (N.D. Ohio 2007) ("To make this determination, the Court would have to apply the choice-of-law rules of California, because that is where the *Steele* complaint was originally filed.").

160. *In re* Vioxx Prods. Liab. Litig., 239 F.R.D. 450, 454 (E.D. La. 2006) ("In the present case, the proposed class representatives originally filed their class action complaint in the United States District Court for the District of New Jersey; however, the PSC also subsequently filed a Master Complaint in this Court. Therefore, the Court could conceivably apply the choice-of-law rules of either New Jersey or Louisiana.").

igation, the plaintiff would have filed in the district in which the MDL court sits, application of the choice-of-law rules of the MDL court after a directly filed case has been transferred frustrates the intent of *Ferens*.[161]

V. CLOSING THE LOOPHOLE

It is imperative that the potential loophole, created by direct filing that allows plaintiffs to claim that the choice-of-law rules of the state in which the MDL court sits should apply when that state has no significant contact or significant aggregation of contacts after their case has been transferred, be closed. Allowing the loophole to remain open encourages gamesmanship and could lead to constitutionally impermissible results.[162]

Courts that apply the choice-of-law rules of the state in which the transferee court sits rely upon the argument that direct filing is not meant to change the applicable choice-of-law rules in a case, but a procedural device to save time and money.[163] In *Wahl v. G.E.*, the Sixth Circuit held that when a directly filed Multidistrict Litigation case is transferred to a court of proper jurisdiction, the law of the transferee court should apply.[164] Many courts have followed this line of analysis, reasoning that but for the MDL court permitting direct filing, the case would have originally been filed with the now transferee court.[165] Utilization of the most significant

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161. *Ferens*, 494 U.S. at 527 ("The *Van Dusen* policy against forum shopping simply requires us to interpret § 1404(a) in a way that does not create an opportunity for obtaining a more favorable law by selecting a forum through a transfer of venue.") (citing Van Dusen v. Barrack, 376 U.S. 612, 636 (1964)).

162. *See supra* Part IV.

163. Wahl v. Gen. Elec. Co., 786 F.3d 491, 498 (6th Cir. 2015) (holding that the transferee court's choice-of-law rules are applicable).

164. *Id.*

165. Wahl v. Gen. Elec. Co., 983 F. Supp. 2d 937, 943 n.11 (M.D. Tenn. 2013).

> [T]he better approach is to treat foreign direct filed cases as if they were transferred from a judicial district sitting in the state where the case originated," which is "the state where the plaintiff purchased and was prescribed the subject drug. Thus, for a foreign direct filed member action involving a plaintiff that purchases and was prescribed the subject drug in Tennessee, the Court will treat that plaintiff's claims as if they were

relationship test of the Second Restatement results in the application of the transferee court's law over the law of the MDL court. The Second Restatement directs courts to apply the place of the injury, unless another state has a more significant relationship.[166] The court considers the following contacts: (1) the place of the injury, (2) the place where the conduct causing the injury occurred,

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> transferred to this Multidistrict Litigation from a district court in Tennessee.

Id. (quoting *In re* Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig., No. 3:09–md–2100–DRH–PMF, 2011 WL 1375011 (S.D. Ill. Apr. 12, 2011)).

> The Court has concluded, as have other MDL courts, that such cases should be governed by the law of the states where Plaintiffs received treatment and prescriptions for Avandia. This ruling will promote uniform treatment between those Plaintiffs whose cases were transferred into the Multidistrict Litigation from their home states and those Plaintiffs who filed directly in the Multidistrict Litigation.

Id. (quoting *In re* Avandia Mktg, Sales Practices & Prods. Liab. Litig., No. 07–MD–01871, 2012 WL 3205620, at *2 (E.D. Pa. Aug. 7, 2010)).

> [U]nlike the usual case filed in this district, the present case has no connection with Illinois other than the fortuity that the JPML authorized an Multidistrict Litigation proceeding to take place here, supervised by the undersigned judge. Illinois is essentially an artificial forum created for purposes of convenience and efficiency. That is doubly true for the present case, which was filed here only by virtue of a court-approved direct-filing procedure whose sole purpose was to maximize convenience and save the parties' and judicial resources. Given the circumstances, it would not make a great deal of a sense to apply Illinois law in this case, or even Illinois' choice-of-law rules. Indeed, the prevailing rule in this situation is that in a case that was directly filed in the Multidistrict Litigation transferee court but that originated elsewhere, the law (including the choice-of-law rules) that applies is the law of the state where the case originated.

Id. (quoting *In re* Watson Fentanyl Patch Prods. Liab. Litig, 977 F.Supp.2d 885, 888, 2013 WL 4564927, at *2 (N.D. Ill. Aug. 27, 2013)). "[I]t would be an odd result to subject plaintiffs to [the law of the Multidistrict Litigation forum] simply because they took advantage of the direct filing procedure-a procedure that provides benefits to all parties and preserves judicial resources." *Id.* (quoting *In re* Bausch & Lomb Inc. Contacts Lens Solution Prods. Liab. Litig., Multidistrict Litigation No. 1785, 2007 WL 3046682, at *3 (D.S.C. Oct. 11, 2007)).

166. Montgomery v. Wyeth, 580 F.3d 455, 459 (6th Cir. 2009) (quoting Hataway v. McKinley, 830 S.W.3d 53, 59 (Tenn. 1992)).

(3) the domicile and place of business of the parties, and (4) the place where the parties' relationship was centered if any.[167] This is a default rule "whereby trial courts can apply the law of the place where the injury occurred when each state has an almost equal relationship to the litigation."[168] Accordingly, unless these contacts occurred in the state in which the MDL court sits, it is unlikely that the law of the state in which the MDL court sits will be applied.

A. *Necessity for Loophole Closure*

1. Forum-Shopping

Forum-shopping is "[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard."[169] Although forum-shopping operates on a continuum ranging from a plaintiff simply choosing whether to file in state or federal court to "manufactured diversity" to gain the ability to file in federal court,[170] the practice holds a negative connotation due to its association with gamesmanship.[171] Furthermore, the Supreme Court declared the discouragement of forum-shopping to be one of the twin aims of the *Erie* doctrine.[172] There are numerous reasons that forum-shopping should be discouraged,[173] but the most notable ar-

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167. *Id.* at 459–60.

168. *Id.* at 459.

169. *Forum-shopping*, BLACK'S LAW DICTIONARY (10th ed. 2014).

170. *See* Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1679–80 (1990) ("'[M]anufactured diversity' [is] the improper or collusive creation of diversity of citizenship for the sole purpose of obtaining federal court jurisdiction.").

171. *See* Patrick J. Borchers, *The Real Risk of Forum Shopping: A Dissent from Shady Grove*, 44 CREIGHTON L. REV. 29, 30 (2010) ("Gamesmanship, not justice, is the prevalent consideration if litigants can control the results of cases by choosing between courthouses as little as a block apart.").

172. *See* Hanna v. Plumer, 380 U.S. 460, 468 (1965).

173. *See Forum Shopping Reconsidered*, *supra* note 170, at 1684 ("Three reasons are generally given for policies against forum shopping: first, that forum shopping undermines the authority of substantive state law; second, that forum shopping overburdens certain courts and creates unnecessary expenses as litigants pursue the most favorable, rather than the simplest or closest, forum; and, third, that forum shopping may create a negative popular perception about the equity of the legal system.").

gument against forum-shopping is the inconsistent and unpredictable results that stem from attempts at gamesmanship.[174]

2. Intent of *Van Dusen* and *Ferens*

The Supreme Court, in *Van Dusen*, held that the law of the transferor court was applicable in a case where venue and jurisdiction was proper in both the transferor court and the transferee court.[175] Direct filing, on the other hand, at its core is an artifice. But for the Multidistrict Litigation proceedings, the MDL court would not have jurisdiction over the directly filed cases. In *Ferens*, the Supreme Court made clear that policy required 28 U.S.C. § 1404(a) to be interpreted in a way that would not give parties an advantage from transferring a case, standing staunchly against forum-shopping.[176] Therefore, *Van Dusen* and *Ferens* are inapplicable in cases when a directly filed case has been transferred to a court of proper jurisdiction where the transferor court, the MDL court, is not a court with proper venue and jurisdiction.[177] Accordingly, it would go against the policy rationale of *Van Dusen* and *Ferens* to apply the cases in a way that would promote forum-shopping.

3. Effect of *Atlantic Marine*

The Supreme Court's decision in *Atlantic Marine* substantially undermines the attempt by courts to mechanically apply *Van Dusen* and *Ferens*. Mechanical application of these cases would cause the law of the state of the transferor court to apply in every transferred case. However, *Atlantic Marine* asserts that there is no

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174. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74–75 (1938) (explaining that forum-shopping may make equal protection of the law impossible).

175. Van Dusen v. Barrack, 376 U.S. 612, 621 (1964) ("It must be noted that the instant case . . . involves a motion to transfer to a district in which both venue and jurisdiction are proper.").

176. *See supra* text accompanying note 161.

177. *See* Brief of Appellees at 13, Wahl v. Gen. Elec. Co., 786 F.3d 491 (6th Cir. 2015) (No. 13-6622) (citing Ferens v. John Deere Co,, 494 U.S. 516, 530 (1990)) (arguing that application of the choice-of-law rules of the state in which the MDL court sits would defeat the policy of *Ferens*).

such steadfast requirement.[178] The Supreme Court reiterates in *Atlantic Marine* that a § 1404(a) transfer may not be used for forum-shopping or to create inequities.[179] Furthermore, directly filed cases resemble the special circumstances at play in *Atlantic Marine* because the Multidistrict Litigation direct filing case management order is essentially the inverse of a contractual choice of law provision.[180]

4. Choice of Law Theories

There is no choice of law theory that would support the conclusion that the law of a state with no interest in the case and where no events that gave rise to the cause of action occurred should be applied simply because the case was originally filed in that state. The First Restatement maintains that the law of the forum in which a wrong occurred is the applicable law in a case that arises from the harm.[181] Unless the cause of action of the Multidistrict Litigation occurred in the same state as the MDL court, a transferee court employing the First Restatement to determine the applicable choice of law would not apply the law of the MDL court. Currie's Governmental Interest Analysis requires that a forum apply its own choice-of-law rules as long as it has a legitimate interest in doing so.[182] Even if the state in which the MDL court sits has a legitimate interest in its laws being applied to the case,

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178. Atlantic Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex., 134 S. Ct. 568, 582 (2013) (holding that 28 U.S.C. § 1404(a) does not carry with it the choice-of-law rules of the transferor court when the parties are contractually obligated to a forum-selection clause).

179. 28 U.S.C. § 1404(a) (2012); *see Atlantic Marine*, 134 S. Ct. at 583 ("Not only would it be inequitable to allow the plaintiff to fasten its choice of substantive law to the venue transfer, but it would also encourage gamesmanship. Because '§ 1404(a) should not create or multiply opportunities for forum shopping.'") (quoting *Ferens*, 494 U.S. at 523).

180. A plaintiff should not enjoy the "privilege" of preserving the MDL court's choice-of-law rules because, but for direct filing, filing into the MDL court would be improper. *See Atlantic Marine*, 134 S. Ct. at 582–83 (citing *Van Dusen*, 376 U.S. at 635) (explaining that the "privilege" of preserving the transferor court's choice-of-law rules should not be enjoyed by a plaintiff who filed their case in the transferor court in violation of a forum-selection clause).

181. *See* RESTATEMENT OF CONFLICT OF LAWS (AM. LAW INST. 1934).

182. *See* CURRIE, *supra* note 19, at 152–57.

the law of the transferee court would prevail.[183] Application of the Second Restatement's choice of law approach also would not result in application of the law of the state in which the MDL court sits. The Second Restatement requires several factors to be weighed to determine which state has the most significant relationship to parties and issues before the court.[184] Again, because the MDL court's relationship to the case is a mere legal fiction, unless the cause of action or the parties were substantially linked to the state in which the MDL court sits, it is unlikely that state would have the most significant relationship to the case. If there is no choice of law theory that supports the application of the law in which the MDL court sits, it is clear that the only purpose in applying that law would be forum-shopping. Accordingly, courts should reject such application.

5. Due Process and Full Faith and Credit Clauses

A mechanical application of the choice-of-law rules of the state in which the MDL court sits after a directly filed case has been transferred to a court with proper venue and personal jurisdiction would violate both the Due Process and the Full Faith and Credit clauses if the state in which the MDL court sits does not have a "significant contact or aggregation of contacts" to the claim.[185] In cases where more than one jurisdiction may have an interest in a claim, the Due Process clause and Full Faith and Credit clause balance one another. The Due Process clause ensures that one jurisdiction's laws are not applied arbitrarily while the Full Faith and Credit clause allows a forum to apply its own law as long as it has a legitimate interest in doing so.[186]

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183. *See* Shreve, *supra* note 61, at 542.

184. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW INST. 1971).

185. Allstate Ins. v. Hague, 449 U.S. 302, 312–13 (1981) ("[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."); *see* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

186. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 819 (1985).

The exception to this rule appears in *Sun Oil v. Wortman*.[187] The Supreme Court held that application of the forum's procedural rules does not violate the Full Faith and Credit clause even if the forum does not have a significant contact to the claim.[188] Therefore, a forum with no connection to the case other than the case being filed within its jurisdiction could apply its own statute of limitations.[189] However, this does not extend to the issue before us now. Choice-of-law rules are substantive law.[190] Accordingly, it is necessary that a jurisdiction must have a significant contact or aggregation of contacts for the choice-of-law rules of that jurisdiction to be applied.

Multidistrict litigation is a statutory device that allows a court that would not normally have jurisdiction over a case to oversee the case for the sake of judicial efficiency.[191] If the state in which the MDL court sits does not have significant contacts or an aggregation of significant contacts to the claim, then, when pretrial proceedings cease and the case is transferred to a court with proper forum and jurisdiction, application of the choice-of-law rules of the state in which the MDL court sits would violate both the Due Process clause and the Full Faith and Credit Clause.

B. Method of Closure

Closure of the forum-shopping loophole created by direct filing requires a two-step response. First, every Case Management Order issued by an MDL court that allows direct filing would contain a mandatory provision requiring the plaintiff to declare a "home forum" upon filing. Second, Congress must amend 28 U.S.C. § 1407, adding a provision that, if a directly filed case is transferred following pretrial proceedings, the choice-of-law rules of the state in which the transferee court sits are applicable, unless the plaintiff declared the MDL court as the home forum and the case could have originally been filed in the MDL court absent the Multidistrict Litigation.

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187. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 730–34 (1988).

188. *Id.* at 722–23.

189. *Id.*

190. Kermit Roosevelt, III, *Choice of Law in Federal Courts: From Erie and Klaxon to Cafa and Shady Grove,* 106 NW. U. L. REV. 1, 17 (2012) (citing Klaxon Co. v. Stentor Elec. Mfg., 313 U.S. 487, 496 (1941)).

191. *See supra* Part III.

1. Required Case Management Order Provision

Direct filing into an MDL court is a legal fiction created to promote judicial efficiency. Such a fiction does not give the state in which the MDL court sits a governmental interest in the directly filed case.[192] Thus, when the case is thereafter transferred to a court with proper jurisdiction, any argument that the law of the state in which the MDL court sits should apply is a false conflict. As evidenced above, some courts are willing to mechanically apply *Van Dusen* and *Ferens*, creating an anomalous result.[193] It is therefore necessary to close the loophole created by Multidistrict Litigation direct filing to prevent forum-shopping abuse. All Case Management Orders filed by a designated MDL court that allow cases to be directly filed into the MDL court should include: (1) a requirement that plaintiffs who file directly into the MDL court must declare a "home forum," a district court with personal jurisdiction over the parties, where the case would be transferred should it not be disposed of in the MDL court; and (2) a provision explaining the fact that the case was directly filed in the MDL court will have no impact on the choice of law to be applied should the case be transferred to the "home forum."

It is possible that the choice-of-law rules of the state in which the MDL court sits would apply when a directly filed case has been transferred following pretrial proceedings.[194] However, for these choice-of-law rules to apply, it would be necessary that: (1) filing the case in that district would be otherwise proper, notwithstanding the Multidistrict Litigation and (2) upon directly filing, the plaintiff declared the district in which the MDL court sits to be the home forum.[195] The home forum is, according to the plaintiff's complaint, where the plaintiff would have filed the case but for the Multidistrict Litigation. These two requirements deter gamesmanship after a case has been directly filed. The first requirement follows the Supreme Court's requirement in *Van Dusen*

192. *See supra* Section V.A.4.

193. *See supra* Part IV.

194. *See In re* Fresenius Granuflo/NaturaLyte Dialysate Prods. Liab. Litig., 76 F. Supp. 3d 294, 303 (D. Mass. 2015).

195. *See id.* at 304 ("The home forum designation of the direct filing plaintiffs is the best evidence I have of what these plaintiffs would have done absent direct filing.").

that, for law of the transferor court to be applied, jurisdiction and forum must be proper in both the transferor and transferee courts.[196] The second requirement follows the Supreme Court's decision in *Ferens*, holding that the purpose of transfer should not be to confer an advantage upon the transferring party.[197]

For example, in the Multidistrict Litigation case of *In re Fresenius Granuflo*, the Case Management Order permitting direct filing required that all plaintiffs filing directly into the MDL court submit a short complaint in which they were to indicate their home forum for purposes of pretrial proceedings.[198] The court conceded that the applicable choice of law analysis to be applied to a case in the MDL court is not necessarily the choice-of-law rules of the state in which the MDL court sits.[199] The court held that the choice-of-law rules of the home forum stipulated on the short complaint of the plaintiff were applicable to each case for purposes of pretrial litigation.[200] Accordingly, if the case were thereafter transferred to a different district court following pretrial proceedings, the application of choice-of-law rules applied by the MDL court would be consistent with *Van Dusen* and *Ferens*.[201]

2. Amendment to 28 U.S.C. § 1407

The most obvious solution would be to amend the MDL statute to close the forum-shopping loophole at its source. Congress should amend 28 U.S.C. § 1407 to include a clause requiring that, if a case is directly filed into a Multidistrict Litigation court and the case is thereafter transferred to a district court with subject matter jurisdiction, the "transferee" court will apply the choice-of-law rules of the state in which it sits.[202] Such an amendment would

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196. *See* Van Dusen v. Barrack, 376 U.S. 612, 621 (1964).

197. *See* Ferens v. John Deere Co., 494 U.S. 516, 527 (1990).

198. *In re Fresenius Granuflo/NaturaLyte Dialysate Prods. Liab. Litig.*, 76 F. Supp. 3d at 298–99.

199. *Id.* at 300; *see* Bradt, *supra* note 23, at 800–01 (describing the inconsistency that arises when courts mechanically apply the choice-of-law rules of the state in which the MDL court sits).

200. *In re Fresenius Granuflo/NaturaLyte Dialysate Prods. Liab. Litig.*, 76 F. Supp. 3d at 302.

201. *Ferens*, 494 U.S. at 527; *Van Dusen*, 376 U.S. at 621.

202. 28 U.S.C. § 1407 (2012).

prevent the application of the laws of a state with no relationship to the cause of action and close the loophole for forum-shopping.

VI. CONCLUSION

Forum-shopping allows plaintiffs to choose a forum that will render a favorable decision to the plaintiffs. Although the practice of forum-shopping should be discouraged, direct filing allows plaintiffs to choose not only between forums of proper jurisdiction in which to file, but to also consider the law of the MDL court, the transferor court, as well.[203] The Supreme Court held in *Van Dusen* and *Ferens* that the policies underlying the *Erie* doctrine mandate applying the transferor court's choice-of-law rules, rather than those of the transferee court, after a transfer of venue pursuant to 28 U.S.C. § 1404(a).[204] However, as illustrated in *Atlantic Marine*, this general rule is not without exceptions.[205] The ability to consolidate pretrial proceedings into one MDL court was created to promote federal court efficiency, and the direct filing process was added to increase such efficiency. Direct filing should not be so unrestrained that it is easy for plaintiffs to gain a more favorable judgment.

It was not the intention of Congress to allow the laws of a forum with no relationship to the cause of action to be the deciding factor in a case.[206] Furthermore, no choice of law theory would support such an outcome.[207] Therefore, attempts by plaintiffs who directly file Multidistrict Litigation cases and later transfer those cases to forums with proper jurisdiction to use the law of the forum

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203. Wahl v. Gen. Elec. Co., 786 F.3d 491, 498 (6th Cir. 2015).

204. *Ferens*, 494 U.S. at 821; *Van Dusen*, 376 U.S. 612.

205. Atlantic Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Tex., 134 S. Ct. 568, 577 (2013).

206. 114 CONG. REC. 4, 4925 (1968) (explaining that the purpose of the Multidistrict Litigation legislation was to ensure "just and efficient conduct" of consolidated actions).

207. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (AM. LAW INST. 1971) (requiring the law of the state with the most significant relationship to be applied); RESTATEMENT OF CONFLICT OF LAWS § 377 (AM. LAW INST. 1934) (requiring the law of the place of the harm to be applied); CURRIE, *supra* note 19, at 69 (requiring forum law to be applied as long as the forum has a legitimate interest in its law being applied).

of the MDL court to gain a more favorable outcome should be thwarted.

Private Payer Parity in Telemedicine Reimbursement: How State-Mandated Coverage Can Be the Catalyst for Telemedicine Expansion

CARL BENJAMIN LEWIS*

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I. INTRODUCTION

Telemedicine, or the use of telecommunications for the delivery of health care services when the health care practitioner and patient are not in the same physical location, is growing in popularity across the nation and around the world. It is safe to say that telemedicine is the future of health care in a culture consumed with technological advancement and interconnectivity. Telemedicine has numerous benefits, but barriers exist that stymie its proliferation. Foremost among these barriers is reimbursement and, more specifically, private insurance reimbursement.

Some states have been proactive in their approach by enacting laws that mandate private insurance coverage of telemedicine. These laws are often referred to as "private payer parity" statutes.[1] Private payer parity is classified as "comparable coverage and reimbursement [by private insurers] for telemedicine-provided services to that of in-person services."[2] Twenty-nine states and the District of Columbia have enacted some form of private payer parity laws.[3] While most of these states have full private payer parity laws, two states have partial parity laws, which seriously limit payment for telemedicine services.[4]

Telemedicine is a fully realized mechanism for providing effective and efficient care, yet advocates for telemedicine have been unable to facilitate its spread throughout the United States. Reimbursement is one of the most often—if not *the* most often—

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1. *See* LATOYA THOMAS & GARY CAPISTRANT, AM. TELEMED. ASS'N, STATE TELEMEDICINE GAPS ANALYSIS: COVERAGE & REIMBURSEMENT 6–7 (2015), http://www.americantelemed.org/docs/default-source/policy/50-state-telemedicine-gaps-analysis---coverage-and-reimbursement.pdf.

2. *Id.* at 6.

3. ATA STATE TELEMEDICINE TOOLKIT: IMPROVING ACCESS TO COVERED SERVICES FOR TELEMEDICINE, AM. TELEMED. ASS'N 3 (2015), http://www.americantelemed.org/docs/default-source/policy/ata-state-telemedicine-toolkit---coverage-and-reimbursement.pdf?sfvrsn=4 [hereinafter STATE POLICY TOOLKIT]. Arizona, Arkansas (effective January 1, 2016), California, Colorado, Connecticut (effective January 1, 2016), Delaware (effective January 1, 2016), Georgia, Hawaii, Indiana (effective July 1, 2015), Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota (effective January 1, 2017), Mississippi, Missouri, Montana, Nevada (effective July 1, 2015), New Hampshire, New Mexico, New York, Oklahoma, Oregon, Tennessee, Texas, Vermont, Virginia, Washington (effective January 1, 2017), and the District of Columbia have enacted laws mandating the coverage of telemedicine services under private health insurance plans. *Id.*

4. *See id.*; ARIZ. REV. STAT. § 20-841.09 (LexisNexis 2013); COLO. REV. STAT. § 10-16-123(1)–(3) (West 2015).

cited barrier to effective proliferation of telemedicine services.[5] For this reason, private insurance parity legislation is more important than ever if telemedicine is going to enjoy an expansive adoption.

Most importantly, telemedicine is a highly effective means of health care delivery and it should be an integral part of the future of America's health care system. Empirical data shows that mandating private insurance coverage for telemedicine services is the most effective way to facilitate widespread adoption.[6] The current state of telemedicine legislation does not achieve this goal.

There should be nationwide enactment of private payer parity legislation in order to facilitate telemedicine expansion because telemedicine can help to remedy our costly, private-insurance centered healthcare system. Not only should every state enact a private payer parity law, but also the laws should be enacted uniformly to avoid a statutory maze for practitioners in order to overcome the current issues confronting telemedicine statutes. Private payer parity laws will not serve their purpose without a nationwide, standardized adoption. For this reason, this Note proposes model legislation to serve as a guide for states to either revise their private payer parity laws or enact one if they have not already. Part II of this Note provides a history and background on telemedicine, clarifies the difference between telemedicine and telehealth, and explains the benefits of telemedicine use. Part III discusses the current state of private payer parity legislation and highlights why these laws are currently ineffective. Part IV proposes model legislation for states to use when creating their statutes and explains

5. *See* Julia Adler-Milstein et al., *Telehealth Among US Hospitals: Several Factors, Including State Reimbursement and Licensure Policies, Influence Adoption*, 33 HEALTH AFF. 207, 210 (2014) (examining factors associated with telehealth adoption among U.S. hospitals using data from the American Hospital Association's 2012 annual survey of acute care hospitals); Stacey Butterfield, Telemedicine Connects Remote Areas with Care, ACP INTERNIST (Apr. 2008), http://www.acpinternist.org/archives/2008/04/one.htm ("All of the interviewed experts listed reimbursement as the biggest hurdle to [telemedicine] implementation.").

6. Adler-Milstein et al., *supra* note 5, at 213 ("[P]olicies—in particular, those that require private payers to reimburse telehealth services to the same extent as face-to-face services—may give hospitals more latitude to choose the type of telehealth to pursue and make it more likely that any type of investment in telehealth will pay off for them.").

how the model law solves the issues in current legislation. Finally, Part V provides concluding remarks on private payer parity legislation as a whole.

II. BACKGROUND, HISTORY, & BENEFITS OF TELEMEDICINE

Telemedicine is a recent and technologically advanced area of health care. Unfortunately, many people, health care providers included, do not understand telemedicine or its benefits.[7] This section explains what telemedicine is and clarifies the difference between telemedicine and telehealth. A brief history of telemedicine is provided to show that the concept is not necessarily a new one. Lastly, this section highlights a few of the innumerable benefits that telemedicine can provide to our health care system.

A. *What is Telemedicine/Telehealth?*

Most simply put, telemedicine is "the use of technology [or] telecommunications for the delivery of health care services when the health care practitioner and the patient are not in the same physical location."[8] There is little consensus on the definition of telemedicine in the academic and medical community, and the term is often used interchangeably with telehealth.[9] The World Health Organization, which provides a commonly cited definition, defines telemedicine as:

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7. AM. TELEMED. ASS'N, ATA STATE TELEMEDICINE TOOLKIT: WORKING WITH MEDICAL BOARDS: ENSURING COMPARABLE STANDARDS FOR THE PRACTICE OF MEDICINE VIA TELEMEDICINE, 3−5 (2015), http://www.americantelemed.org/docs/default-source/policy/ata-state-telemedicine-toolkit-medical-boards.pdf.

8. Vanessa Reynolds, *Opportunities and Challenges of Telemedicine*, LAW360 (Oct. 30, 2012, 1:00 PM), http://www.law360.com/articles/390083/opportunities-and-challenges-of-telemedicine.

9. *See, e.g.*, Bradley J. Kaspar, Note, *Legislating for a New Age in Medicine: Defining the Telemedicine Standard of Care to Improve Healthcare in Iowa*, 99 IOWA L. REV. 839, 844 (2014) (noting that telemedicine is often referred to as either telehealth or e-health); *Telemedicine Frequently Asked Questions (FAQs)*, AM. TELEMED. ASS'N, http://www.americantelemed.org/about-telemedicine/faqs#.VGKMrpV0xMs (last visited Dec. 14, 2015) (stating that the American Telehealth Association treats "telemedicine" and "telehealth" as synonyms and uses them interchangeably).

> The delivery of health care services, where distance is a critical factor, by all health care professionals using information and communication technologies for the exchange of valid information for diagnosis, treatment and prevention of disease and injuries, [and] research and evaluation, . . . all in the interests of advancing the health of individuals and their communities.[10]

The broader term "telehealth" normally encompasses telemedicine, but also includes a variety of other services, such as community and professional health-related education, public health, and health administration.[11]

Telemedicine is not a new form of health care, but simply a more modern mode of delivering the same services.[12] The technological aspect of telemedicine consultation is the only variant from

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10. WORLD HEALTH ORG., TELEMEDICINE: OPPORTUNITIES AND DEVELOPMENTS IN MEMBER STATES 9 (2010), http://www.who.int/goe/publications/goe_telemedicine_2010.pdf (quoting WORLD HEALTH ORG., A HEALTH TELEMATICS POLICY IN SUPPORT OF WHO'S HEALTH-FOR-ALL STRATEGY FOR GLOBAL HEALTH DEVELOPMENT: REPORT OF THE WHO GROUP CONSULTATION ON HEALTH TELEMATICS 10 (1998), http://apps.who.int/iris/bitstream/10665/63857/1/WHO_DGO_98.1.pdf). For other definitions of telemedicine, see Amy E. Zillis, Note, *The Doctor Will Skype You Now: How Changing Physician Licensure Requirements Would Clear the Way for Telemedicine to Achieve the Goals of the Affordable Care Act*, 2012 U. ILL. J.L. TECH & POL'Y 193, 196 (2012) (stating that telemedicine is "the use of electronic communication and information technologies to provide or support clinical care at a distance," and can be "divided into three subsets: interactive, store-and-forward, and remote monitoring"); *For The Media*, AM. TELEMED. ASS'N, http://www.americantelemed.org/about-ata/for-the-media (last visited Dec. 14, 2015) (defining telemedicine as "the delivery of any healthcare service or transmission of wellness information using telecommunications technology.").

11. U.S. DEP'T OF HEALTH & HUMAN SERVS. & DEP'T OF COMMERCE, TELEMEDICINE REPORT TO CONGRESS (Jan. 31, 1997), http://www.ntia.doc.gov/legacy/reports/telemed/execsum.htm [hereinafter 1997 REPORT TO CONGRESS]; *see also* U.S. DEP'T OF HEALTH & HUMAN SERVS., THE ROLE OF TELEHEALTH IN AN EVOLVING HEALTH CARE ENVIRONMENT: INSTITUTE OF MEDICINE REPORT (Nov. 20, 2012), http://www.nap.edu/read/13466/chapter/1.

12. *See* Kristen R. Jakobsen, Note, *Space-Age Medicine, Stone-Age Government: How Medicare Reimbursement of Telemedicine Services is Depriving the Elderly of Quality Medical Treatment*, 8 ELDER L.J. 151, 156 (2000).

traditional health care.[13] State statutes concerning telemedicine most often use the term telemedicine interchangeably with telehealth.[14] Therefore, this Note will refer to telemedicine, but the term is also interchangeable with telehealth.

Telemedicine is generally divided into three subsets: interactive, store-and-forward, and remote monitoring.[15] Interactive telemedicine allows for real-time interaction through office visits, home visits, consultations, and various examinations and procedures when a health care provider and patient are separated geographically and want to communicate in real-time.[16] Interactive telemedicine, while not the most common form, is the most similar to an in-person visit with a health care provider. Another technology, store-and-forward, is one of the most widespread uses of telemedicine.[17] It allows a health care provider at one location to capture, store, and send images, information, and video of the patient; which is then forwarded to another health care provider for them to evaluate at their convenience.[18] Remote patient monitoring is another popular use of telemedicine. It allows health care professionals to regularly monitor patient health while the patient remains at home, leading to fewer office visits for those with chronic or acute illnesses.[19]

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13. *Id.*

14. *Compare* TENN. CODE ANN. § 56-7-1002 (2014) (referring to coverage for "Telehealth" services, but using the definition of Telemedicine), *with* GA. CODE ANN. § 33-24-56.4 (2014) (referring to payment for Telemedicine services, but defining it similarly to the Tennessee statute).

15. Zillis, *supra* note 10, at 196.

16. *See* AGENCY FOR HEALTHCARE RESEARCH & QUALITY, U.S. DEP'T HEALTH & HUMAN SERVS., TELEMEDICINE FOR THE MEDICARE POPULATION: UPDATE 1 (Feb. 2006), http://archive.ahrq.gov/downloads/pub/evidence/pdf/telemedup/telemedup.pdf [hereinafter MEDICARE UPDATE].

17. *See* Symposium, *Roundtable on Legal Impediments to Telemedicine: Legal Impediments to the Diffusion of Telemedicine*, 14 J. HEALTH CARE L. & POL'Y 1, 2–3 (2011) (discussing store-and-forward technology and its numerous uses); *see also* Paul Spradley, Comment, *Telemedicine: The Law is the Limit*, 14 TUL. J. TECH. & INTELL. PROP. 307, 314 (2011) ("Store-and-forward . . . . [has] been exhaustively tested, and successfully implemented.").

18. *See* MEDICARE UPDATE, *supra* note 16, at 1.

19. *See Home Telehealth & Remote Monitoring SIG*, AM. TELEMED. ASS'N, http://www.americantelemed.org/members/ata-members/ata-member-gro

B. A Brief History of Telemedicine

The first recorded use of telemedicine coincided with the invention of the telephone by Alexander Graham Bell.[20] In 1897, a physician diagnosed a child with croup during a telephone conversation.[21] The case was reported in the medical journal, *Lancet*, and marked the arrival of telemedicine as it is now conceived.[22] Despite some hesitancy about using the telephone for such personal matters, patients swiftly accepted the new technology in order to receive better medical care.[23] Almost a century later, the interest in further developing telemedicine was so great that a national conference was held in Ann Arbor, Michigan, during which attendees discussed the technical specifications of telemedicine, the economic and psychological effects of telemedicine, and the scientific evaluation of telemedicine programs.[24] Unfortunately, the attendees found that the high costs and poor quality of the technology at the time outweighed the benefits of health care efficiency, resulting in many organizations withdrawing their support for telemedicine development.[25] Although the conference was unsuccessful, telemedicine continued to be utilized in various forms and by various entities. The National Aeronautics and Space Agency ("NASA"), remote survey stations, offshore oil rigs, and the United States military all continued to develop technology for their employees who, because of location and conditions, had limited access to quality health care.[26] Since the turn of the millennium, interest in telemedicine reignited in the United States due to the rapidly increasing costs of health care and massive strides in technology that significantly reduced the costs of healthcare delivery.[27]

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ups/special-interest-groups/home-telehealth-remote-monitoring#.VNvUBJV0z4g (last visited Dec. 14, 2015) [hereinafter *Remote Monitoring SIG*].

20. ADAM WILLIAM DARKINS & MARGARET ANN CARY, TELEMEDICINE AND TELEHEALTH: PRINCIPLES, POLICIES, PERFORMANCE, AND PITFALLS 6 (2000).

21. *Id.*

22. *Id.*

23. *Id.* at 7.

24. *Id.* at 6–7.

25. *Id.* at 7.

26. *Id.* at 8−9.

27. *Id.* at 11–12.

So why are we only now beginning to push for the expansion of telemedicine? Rapid technological advancements and decreases in the cost of telemedicine technology have led to calls for telemedicine expansion. At its inception, telemedicine was facilitated through multi-million-dollar NASA equipment, which literally required a rocket scientist to operate.[28] Today, due mostly to extraordinary technological leaps, the population demands its information be delivered immediately. Whether it be social media or the twenty-four hour news cycle, today's culture is obsessed with rapid delivery of information. Coincidentally, the same technology that provides us with instantaneous updates on social networks can also improve our health care system.[29]

Numerous industries utilize telemedicine to provide medical care for hard-to-reach and traditionally underserved populations. The United States Department of Justice has used telemedicine as a means of reducing health care costs for inmates.[30] Deepwater drilling platforms use telemedicine applications to treat employees located hundreds of miles offshore.[31] Rural communities in the United States have begun to use telemedicine to reduce expenses and travel, provide care in remote regions, and provide access to otherwise inaccessible or unavailable specialists.[32] These are only a few examples of the growing role that telemedicine plays in our health care system.

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28. *See* Spradley, *supra* note 17, at 314−15.

29. *See* Sam Servello, *Is Telemedicine the Next Big Thing . . . Again?*, 10 ABA SCITECH LAW 4, 5–6 (2014) ("[B]oth patients and physicians are becoming more adept and familiar with technologies such as smart phones, iPads, and various forms of video chat . . . . For the younger population, there is every possibility that they will grow to expect telemedicine services from their physicians . . . ."); Spradley, *supra* note 17, at 315.

30. U.S. DEP'T OF JUSTICE, TELEMEDICINE CAN REDUCE CORRECTIONAL HEALTH CARE COSTS: AN EVALUATION OF A PRISON TELEMEDICINE NETWORK 2 (1999), https://www.ncjrs.gov/pdffiles1/175040.pdf.

31. *See, e.g.*, Oscar W. Boultinghouse, *Telemedicine Technologies Enhance Offshore Healthcare, Reduce Illness-Related Drilling Contractor*, DRILLINGCONTRACTOR.ORG (Nov. 2, 2009), http://www.drillingcontractor.org/telemedicine-technologies-enhance-offshore-healthcare-reduce-illness-related-departures-1853. This article is based upon a presentation given by the author at the 2009 IADC Drilling HSE Europe Conference & Exhibition, September 23−24, 2009, in Amsterdam. *Id.*

32. Spradley, *supra* note 17, at 308.

C. Benefits of Telemedicine

Telemedicine has the unique capability of increasing the quality of care and improving patient access while also reducing costs.[33] Certain medical issues and emergencies are most effectively handled through face-to-face consultation; however, the availability of telemedicine will make healthcare professionals more accessible for patients who do not require in-person medical attention.[34] For example, rural areas have long suffered as an underserved medical population.[35] In situations when the nearest health care provider may be hundreds of miles away, a remote interactive consultation can provide access to distant specialists and is the alternative to receiving subpar care or no care at all.[36]

Telemedicine also increases the quality of care by providing continuous monitoring for chronic illnesses or following hospital discharge. Nearly one in every two adults has at least one chronic illness, which equates to more than seventy-five percent of all healthcare costs and eighty-one percent of all hospital visits.[37] Home monitoring of chronically ill patients allows physicians to rapidly receive information, detect problems earlier, and employ preventative medicine.[38] Medical staff is able to contact the patient if an abnormality is discovered and subsequently provide instruction on how to improve the condition.[39] The patient is able to

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33. *See id.*

34. Gabrielle Lee, Note, *A Telehealth Technicality: Pennsylvania's Outdated Insurance Reimbursement Policies Deter Investment in Modern Telehealth Technology*, 15 PITT. J. TECH. L. & POL'Y 115, 119 (2014).

35. *See* Lindsey T. Goehring, *H.R. 2068: Expansion of Quality or Quantity in Telemedicine in the Rural Trenches of America?*, 11 N.C. J.L. & TECH. ON. 99, 103 (2009); Daniel McCarthy, *The Virtual Health Economy: Telemedicine and the Supply of Primary Care Physicians in Rural America*, 21 AM. J.L. & MED. 111, 116 (1995).

36. *See* Kaspar, *supra* note 9, at 844.

37. P'SHIP TO FIGHT CHRONIC DISEASE, THE GROWING CRISIS OF CHRONIC DISEASE IN THE UNITED STATES 1, http://www.fightchronicdisease.org/sites/fightchronicdisease.org/files/docs/GrowingCrisisofChronicDiseaseintheUSfactsheet_81009.pdf (last visited Feb. 18, 2016).

38. Kim A. Schwartz & Bonnie Britton, *Use of Telehealth to Improve Chronic Disease Management*, 72 N.C. MED. J. 216, 216–18 (2011), http://www.researchgate.net/publication/51627770_Use_of_telehealth_to_improve_chronic_disease_management.

39. Lee, *supra* note 34, at 121.

stay home where she is more comfortable, while her quality of care is similar to that of an inpatient stay and she avoids the higher cost of a hospital setting.[40] Likewise, patients are able to avoid physical trips to the doctor, which often result in the spread of viruses and infections, as many patients become sick through exposure to illness within the hospital or clinic.[41]

In addition to improved access and quality of care, telemedicine is a cost-effective mode of healthcare delivery. Providers and patients will be interested in utilization of telemedicine where the services can help a patient avoid more expensive hospitalization, emergency room care, or lengthy hospital stays.[42] Empirical studies show that "costs frequently are reduced in avoiding unnecessary services . . . . [T]he costly complications of chronic illnesses may be reduced, yielding improved health outcomes among more informed patients . . . ."[43] Data also shows that telemedicine can decrease treatment costs below traditional methods of health care delivery.[44] When using telemedicine technology, the average savings per consultation range from $62 for a primary care physician consultation to $712 for an emergency room visit.[45] While some commentators suggest a potential misuse or overbilling from telemedicine, many state statutes have addressed this by mandating reimbursement only for services that are deemed medically necessary.[46]

40. *Id.*; *see also* Zillis, *supra* note 10, at 197 ("Remote monitoring reduces the use of hospital and emergency services, enabling patients to continue to live in their homes instead of in higher cost hospital settings.").

41. Kaspar, *supra* note 9, at 857–58.

42. *See* Servello, *supra* note 29, at 8.

43. Rashid Bashshur et al., *Telemedicine for Chronic Disease Management*, 20 TELEMED. & E-HEALTH 769, 793 (2014).

44. Kirsten R. Smolensky, *Telemedicine Reimbursement: Raising the Iron Triangle to a New Plateau*, 13 HEALTH MATRIX 371, 385 (2003).

45. TELADOC, HEALTH CARE AND BUSINESS: USING NEW TECHNOLOGIES TO REDUCE COSTS, IMPROVE ACCESS, AND INCREASE EMPLOYEE SATISFACTION, 7 (2010), http://communications.teladoc.com/www/Telehealth-Special-Report.pdf.

46. *See* Lee, *supra* note 34, at 123.

III. LEGAL BARRIERS TO TELEMEDICINE EXPANSION

Traditionally, private insurers have not reimbursed providers for telemedicine services. Recently, states enacted laws that mandate coverage of telemedicine services by private insurers. This section discusses why private reimbursement is a barrier to telemedicine proliferation and highlights the major problems in current private payer parity statutes.

A. Private Reimbursement

"The successful development and expansion of telemedicine depends on the extent to which [health care providers] are reimbursed by payors."[47] A seventy-two institution survey determined which obstacles hindered the success of their telemedicine programs.[48] The number one hindrance that healthcare providers cited was reimbursement.[49]

Private insurers have not traditionally reimbursed for telemedicine services, and when they have it has generally been limited reimbursement.[50] A mixture of "doubt regarding telemedicine's efficacy and concerns with costs of and compliance with states' regulatory insurance requirements are likely responsible for" the historical lack of coverage.[51] In recent years private insurers have begun to voluntarily reimburse for telemedicine services. Additionally, states have begun to pass legislation that requires private insurers in that state to provide reimbursement.

According to the United States Census Bureau's 2013 report on Health Insurance Coverage, sixty-four percent of the population was covered by private insurance, with fifty-four percent covered by employment-based health insurance policies.[52] Private

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47. Servello, *supra* note 29, at 8.

48. DARKINS & CARY, *supra* note 20, at 14–15.

49. *Id.* This Note is concerned with private payer parity statutes among the states, and since Medicare and Medicaid are federal programs, they will not be the focus, although they will be touched upon for a few reasons.

50. 1997 Report to Congress, *supra* note 11.

51. Amar Gupta & Deth Sao, *The Constitutionality of Current Legal Barriers to Telemedicine in the United States: Analysis and Future Directions of its Relationship to National and International Health Care Reform*, 21 HEALTH MATRIX 385, 405 (2011).

52. JESSICA C. SMITH & CARLA MEDALIA, U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2013, 2 (2014). The

health insurance is generally made available to employees and their families through employers, COBRA,[53] or a commercially advertised plan, although it can also be purchased individually from a private company.[54] Since such a large majority of the United States population is covered by private insurance,[55] it is imperative that private insurance reimburse for telemedicine.

Federal programs have been unsuccessful in promoting telemedicine expansion,[56] but if private insurers are required to reimburse for telemedicine services it will promote telemedicine as an efficient means of health care delivery.[57] In states where private insurance providers are forced to recognize that telemedicine practices constitute legitimate medical procedures, patients are "encouraged to explore and utilize these services without the concern that their health-care provider will deny reimbursement."[58]

States have the ability, under the Tenth Amendment of the United States Constitution,[59] to force private insurers within that

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64.2 percent covered by private insurance is a vast majority compared with Medicare and Medicaid, which cover 15.6 and 17.3 percent respectively. *Id.* The remaining percentage is uninsured at 13.4 percent of the population and military health insurance at 4.5 percent. *Id.* at 3.

53. COBRA stands for the Consolidated Omnibus Budget Reconciliation Act of 1985. COBRA is a federal law requiring all employer-sponsored health plans to allow certain employees and their families the opportunity to continue health insurance at their own expense under the group plan after their insurance coverage would normally have ceased due to the death of the qualifying employee, divorce, or another qualifying event. Smolensky, *supra* note 44, at 380 n.40. *See generally* Mary Ross & Carol Hayes, *Consolidated Omnibus Budget Reconciliation Act of 1985*, 49 Soc. Sec. Bulletin 8 (1986).

54. *See* SMITH & MEDALIA, *supra* note 52 at 1.

55. *See id.* at 2.

56. *See* Smolensky, *supra* note 44, at 378–80 (discussing Medicare and Medicaid reimbursement schemes and why they are barriers to telemedicine expansion and adoption).

57. *See* Servello, *supra* note 29, at 8.

58. Spradley, *supra* note 17, at 315–16.

59. U.S. CONST. amend. X. Under the United States Constitution, the states have the unenumerated power to regulate activities that affect the health of its citizens; the history of legal challenges to health care regulation has resulted in overwhelming support for state authority. Gupta & Sao, *supra* note 51, at 413*; see also* Smolensky, *supra* note 44, at 383 ("[S]tates have the ability to force private insurers to cover telemedicine services within their states.").

state to reimburse for telemedicine services.[60] Many statutes, however, have exceptions that render them ineffective, and the differences between each state law make it difficult to provide effective guidance to multi-state providers.[61] Often, doctors are unaware of telemedicine reimbursement statutes or unable to confidently comprehend the legal jargon.[62] Currently twenty-three states and the District of Columbia have enacted telemedicine private insurance parity statutes, but they are rife with issues and limitations.[63]

B. Problems in Private Payer Parity Statutes

Private payer parity statutes have many problems that render them ineffective and difficult to implement. While all of the statutes mandate coverage by private insurers for telemedicine services in some way, not all of them do so fully or clearly. The most serious limitations on private payer parity statutes include non-medical restrictions on reimbursement, lack of clarity in what services are covered, absence of definitions, and a general lack of uniformity among the states. This Section will parse through the laws, highlighting four major limitations in state statutes, and then explain how these limitations keep the statutes from being effective.

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60. *See* Gupta & Sao, *supra* note 51, at 405 ("One of the main reasons for this change in [reimbursement] policy is because some states have begun to require private insurers to provide reimbursement.").

61. *See, e.g.*, ARIZ. REV. STAT. § 20-841.09 (LexisNexis 2013); COLO. REV. STAT. § 10-16-123(1)–(3) (West 2015). Both Arizona and Colorado have enacted partial parity laws that require coverage and reimbursement but limit coverage to a certain geographic area or a predefined list of health care services. *See* THOMAS & CAPISTRANT, *supra* note 1, at 6.

62. Jennifer Bresnick, *State Laws Vary Widely on Telehealth Insurance Coverage*, EHR INTELLIGENCE (June 4, 2013), https://ehrintelligence.com/2013/06/04/state-laws-vary-widely-on-telehealth-insurance-coverage/ ("[P]hysicians who wish to offer telehealth consults will need to pay close attention to their state's current guidelines as they navigate an ever-changing maze of legislation.").

63. THOMAS & CAPISTRANT, *supra* note 1, at 6–7.

1. Full Parity & Non-Medical Restrictions

Full parity is classified as comparable to in-person services with regards to coverage and reimbursement for telemedicine services.[64] States, like most payors, often impose a variety of restrictions on telemedicine that prevent full parity.[65] "These restrictions are often arbitrary and provide no consideration for professional medical discretion, provider shortages or patient limitations."[66] In state private payer parity statutes, the most common restrictions are geographical limitations, limits on applicable technology, requirements for an established patient-provider relationship, and provider-type constraints.[67]

Two states have serious geographical limitations on telemedicine reimbursement. Arizona mandates that telemedicine services be "provided to a subscriber receiving the service in a *rural region* of this state."[68] Similarly, Colorado's statute provides that the intent is "to recognize the practice of telemedicine as a legitimate means by which an individual in a rural area may receive medical services from a provider without person-to-person contact with the provider."[69] Colorado's statute goes on to state that "no health benefit plan . . . for a person residing in a county with one hundred fifty thousand or fewer residents may require face-to-face contact between a provider and a covered person for services appropriately provided through telemedicine."[70] The geographical limitations in private payer parity statutes mean that a person in a non-rural area cannot be reimbursed for telemedicine services even though the need and efficacy of those services match that of a patient within the geographically covered area; this is not full parity.[71]

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64. *Id.* at 6.
65. STATE POLICY TOOLKIT, *supra* note 3, at 1.
66. *Id.*
67. *Id.*
68. ARIZ. REV. STAT. § 20-841.09(A) (LexisNexis 2013) (emphasis added).
69. COLO. REV. STAT. § 10-16-123(1) (West 2015). Colorado enacted a new telemedicine statute in 2015 to improve the existing parity law and remove the rural restrictions, but it will not go into effect until January 1, 2017. *Id.*
70. *Id.* at § 10-16-123(2).
71. *See* Smolensky, *supra* note 44, at 378.

These geographical limitations mirror the limitations present in the telemedicine policy of Medicare. State laws regarding medical subjects often follow the federal government's lead in requiring telemedicine reimbursement.[72] Coverage under Medicare is limited to originating sites located within either a Rural Professional Shortage Area, non-Metropolitan Statistical Area, or a site that is a part of a federal telemedicine demonstration project.[73] The geographical limitations of state private payer parity have limited expansion of telemedicine's use similarly to how Medicare's limit on telemedicine has failed to expand telemedicine's use.[74]

Another common restriction present in private payer parity statutes is a limit on the applicable technology. Michigan,[75] Oregon,[76] and Vermont[77] all have restrictions on the types of technology that qualify for reimbursement. The Michigan statute requires that "[t]o be considered telemedicine under this [statute], the health care professional must be able to examine the patient via a real-time, interactive audio or video, or both, telecommunications system."[78] Likewise, the other two states provide that covered services are only considered telemedicine if delivered through real-time or live interactive audio and video.[79]

The only way private insurers are required to reimburse telemedicine services in these states is if the patient and provider are

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72. Eleanor D. Kinney, Symposium, *Behind the Veil Where the Action Is: Private Policy Making and American Health Care*, 51 ADMIN. L. REV. 145, 176 (1999) (opining that private insurers often follow the lead of Medicare in making reimbursement decisions, possibly due to the massive amount of federal funding allocated to health services research); Smolensky, *supra* note 44, at 383; *see also* George Lauer, *Medicare Telemedicine Bill Could Change Landscape*, iHEALTHBEAT (May 8, 2009), http://www.ihealthbeat.org/features/2009/medicare-telemedicine-bill-could-change-landscape.aspx ("A generally accepted maxim in health care: Where Medicare goes, the rest of the country follows.").

73. 42 C.F.R. § 410.78(b)(4) (2014).

74. *See* Smolensky, *supra* note 44, at 383.

75. MICH. COMP. LAWS ANN. § 500.3476(2) (2014).

76. OR. REV. STAT. § 743A.058(2) (2013).

77. VT. STAT. ANN. tit. 8, § 4100k(g)(4) (2012).

78. MICH. COMP. LAWS ANN. § 500.3476(2).

79. *See* VT. STAT. ANN. tit. 8, § 4100k(g)(4) ("'Telemedicine' means the delivery of health care services such as diagnosis, consultation, or treatment through the use of live interactive audio and video . . . ."); OR. REV. STAT. § 743A.058(2).

able to interact in real-time.[80] The decision to restrict coverage to interactive audio-video telemedicine is another that mirrors the choices of Medicare.[81] One commentator, Kirsten Rabe Smolensky, a former professor of law and healthcare attorney,[82] opines that Medicare does not reimburse for store-and-forward technology because the government either feared overuse or possibly had difficulty establishing appropriate procedures, but she also notes that Medicare has the power to reimburse for technology other than interactive audio-visual telemedicine.[83]

The restrictions on applicable technology eliminate the common forms of telemedicine delivery, store-and-forward and remote monitoring, and limit coverage to the least common method.[84] Interactive audio-visual telemedicine is the most similar to an in-person visit, but it is not as popular among providers as the other two forms because it requires expensive technology that the health care provider may not already possess.[85] The "cost/benefit ratio is likely to be far higher for store-and-forward services than for two-way video telemedicine, and the quality of care in certain areas of medicine would be just as high without interactive consultations."[86] By limiting reimbursement to the least common and least popular form of telemedicine delivery, this restriction practically defeats the goal of private payer parity statutes.

Along with geographical and technological restrictions, some states have other limitations on private insurance reimbursement. For example, Hawaii requires that "a health care provider-

80. *See, e.g.*, MICH. COMP. LAWS § 500.3476(2).

81. *See* 42 C.F.R. § 410.78(a)(3) (2014); *see also* Smolensky, *supra* note 44, at 378 (noting that Medicare does not generally reimburse for store and forward technology, which has been shown to be cost effective, and questions why Medicare would favor complex interactive video-consults).

82. Kirsten Rabe Smolensky is a graduate of the University Of Chicago School Of Law and a former healthcare attorney, Bigelow Fellow at the University of Chicago School of Law, and Associate Professor at the University Of Arizona James E. Rogers College Of Law. She is currently a generalist appraiser in Antiques & Residential Contents, Fine Art and instructor for the International Society of Appraisers in the Nashville, Tennessee area.

83. Smolensky, *supra* note 44, at 412–13.

84. *See supra* Section II.A.

85. *See, e.g.*, MEDICARE UPDATE, *supra* note 16, at 1; *Remote Monitoring SIG*, *supra* note 19.

86. Jakobsen, *supra* note 12, at 175.

patient relationship exists between the patient and one of the health care providers" before reimbursement for a telemedicine consultation.[87] Similarly, Louisiana requires that a licensed physician be present at one end of the telemedicine consultation for there to be any reimbursement at all.[88] Kentucky only requires private insurance coverage if "the consultation is provided through the [telemedicine] network established under [Kentucky law]."[89] Private payer parity statutes are meant to mandate comparable coverage for telemedicine services as for in-person services, but the above restrictions "seem to make the rule requiring telemedicine reimbursement by private insurers a fallacy."[90]

In 2015, Arkansas enacted its first telemedicine reimbursement statute,[91] and it is a prime example of a restriction-riddled private payer parity statute. Arkansas's statute includes telemedicine reimbursement under private insurance for physician-provided services only, and it also includes technology restrictions and requires an in-person visit before a telemedicine encounter.[92] The statute provides that "[a] health benefit plan shall cover the services of a physician who is licensed by the Arkansas State Medical Board for healthcare services through telemedicine on the same basis as the health benefit plan provides coverage . . . by the physician in person."[93] This is almost identical to the restriction in Louisiana's statute which means that telemedicine services are not covered when provided by a registered nurse, physician's assistant, etc.[94] Further, the Arkansas definition of telemedicine limits coverage to services delivered through "real-time two-way electronic audio-visual communications . . . to provide or support healthcare

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87. HAW. REV. STAT. § 431:10A-116.3(c) (LexisNexis 2014).

88. LA. STAT. ANN. § 22:1821(F)(1) (2013) ("[For] health care service . . . performed via . . . telemedicine, such a payment, benefit, or reimbursement under such policy or contract shall not be denied to a *licensed physician* conducting or participating in the transmission . . . ." (emphasis added)).

89. KY. REV. STAT. ANN. § 304.17A-138(1)(a) (2011).

90. Smolensky, *supra* note 44, at 382.

91. ARK. CODE. ANN. § 23-79-1602 (West 2015). The Arkansas telemedicine statute applies to all health benefit plans delivered, issued, reissued, or extended in Arkansas on or after January 1, 2016. *Id.*

92. *Id.*; *see* THOMAS & CAPISTRANT, *supra* note 1, at 28.

93. ARK. CODE. ANN. § 23-79-1602(c)(1).

94. *Compare id.*, *with* LA. REV. STAT. ANN. § 22:1821(F)(1) (2013).

delivery that facilitates the assessment, diagnosis, consultation, or treatment of a patient's health care . . . ."[95] This provision provides a technology limitation on the use of telemedicine services and only allows for telemedicine services that are provided using real-time audio-visual communications, which eliminates the use of two very popular methods of delivery: store-and-forward technology and in-home monitoring.[96]

Lastly, the Arkansas private payer parity statute requires an in-person visit before a telemedicine encounter.[97] The statute states that telemedicine services will be covered when the patient is at an originating site and the healthcare professional is at a distant site, but the originating site is defined as "[t]he offices of a healthcare professional or a licensed healthcare entity where the patient is located at the time services are provided by a healthcare professional through telemedicine."[98] There is a limited exception for patients with end-stage renal disease, much like the exception to Medicare coverage, but this is a serious limitation because it requires a patient to be present at the office of a qualified healthcare professional to receive covered telemedicine services and effectively requires an in-patient visit.[99] It is evident from the Arkansas statute that newer private payer parity laws are not necessarily better. Arkansas's telemedicine statute is filled with limitations on reimbursable telemedicine services which practically defeat its purpose. Overall, Arkansas's private payer parity statute for telemedicine is a prime example of all the limitations and restrictions that states should seek to avoid when drafting their own telemedicine laws.

3. Lack of Clarity or Intent

An important aspect of any law is that it be clear enough for a layperson to understand the scope and intent. Opacity and lack of clear intent are limitations on current private payer parity statutes that render many ineffective. Professors Victoria Nourse and Jane Schacter, Professors of Law at Georgetown and Stanford

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95. ARK. CODE ANN. § 23-79-1601(5).
96. *Id.*
97. *Id.* § 23-79-1602.
98. *Id.* § 23-79-1601(4)(A).
99. *Id.* § 23-79-1601(4)(B).

respectively, argue that clarity is the "single most significant judicial drafting virtue."[100] Legislative language should be written to be as unambiguous as possible so that reader knows what telemedicine is, which services are covered or excluded, how much providers are reimbursed for, etc., but many state statutes fail this mark.

Lack of clarity does not mean that a private payer parity statute does not accomplish the goal of parity in telemedicine. Texas[101] and Oklahoma[102] were among the first states to enact private payer parity statutes, both in 1997.[103] Due to the passage of time, now the statutes are minimal and state only that telemedicine services cannot be excluded from coverage simply because there is not person-to-person contact.[104] Compare these statutes with the Washington, D.C. statute, which states that "[a] health insurer . . . may not deny coverage for a healthcare service on the basis that the service is provided through [telemedicine] if the same service would be covered when delivered in person."[105] Neither Texas, Oklahoma, nor Washington, D.C. explicitly state that telemedicine services should be reimbursed the same as in-person services; however, they all do require full parity, and Washington, D.C. at least insinuates that telemedicine and in-person services are comparable.[106]

Many other statutes fail to explicitly state that there should be full parity in coverage of telemedicine services.[107] For example, the Virginia statute states that "a health care plan . . . shall provide

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100. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 594 (2002).

101. TEX. INS. CODE ANN. § 1455.004 (2009).

102. OKLA. STAT. tit. 36, § 6803 (2009).

103. THOMAS & CAPISTRANT, *supra* note 1, at 61, 68.

104. *See* OKLA. STAT. tit. 36, § 6803(A) ("For services that a health care practitioner determines to be appropriately provided by means of telemedicine, health care service plans . . . shall not require person-to-person contact between a health care practitioner and a patient."); TEX. INS. CODE ANN. § 1455.004(a) ("A health benefit plan may not exclude a telemedicine medical service or a telehealth service from coverage under the plan solely because the service is not provided through a face-to-face consultation.").

105. D.C. CODE § 31-3862(a) (West 2013).

106. *See id.;* OKLA. STAT. tit. 36, § 6803; TEX. INS. CODE ANN. § 1455.004.

107. *See, e.g.*, CAL. INS. CODE § 10123.85(c) (2013); VA. CODE ANN. § 38.2-3418.16(C) (West 2014).

coverage for the cost of such health care services provided through telemedicine services, as provided in this section" and "[a]n insurer . . . shall not exclude a service for coverage solely because the service is provided through telemedicine services and is not provided through face-to-face consultation."[108] The Virginia statute makes clear that the provider cannot exclude a service from coverage solely because it was provided through telemedicine, but it does not explicitly state that coverage must be comparable to that of a face-to-face consultation. Compare the language with the New Mexico statute that reads: "[c]overage for health care services provided through telemedicine shall be determined in a manner consistent with coverage for health care services provided through in-person consultation."[109] This statute clearly mandates that private insurers reimburse for telemedicine services in a comparable manner to reimbursement for face-to-face services.

Many state private payer parity laws lack clarity due to the lack of or confusing nature of the statutory intent. The intent or purpose of the statute guides anyone reading it to what the legislature intended when it drafted the law.[110] An issue arises when there is no enacted intent, or the enacted intent is at odds with the remainder of the statute. Consider the stated intent of three state private parity laws. A California statute reads: "[i]t is the intent of the Legislature to recognize the practice of [telemedicine] as a legitimate means by which an individual may receive health care services . . . ."[111] A Georgia statute reads: "[i]t is the intent of the General Assembly to *mitigate geographic discrimination* in the delivery of health care by recognizing the application of and payment for covered medical care provided by means of telemedicine."[112] Lastly, consider that Maine's statute contains no statement of intent within its scant two paragraphs of text.[113]

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108. VA. CODE ANN. § 38.2-3418.16(A), (C).

109. N.M. STAT. ANN. § 59A-22-49.3(A) (West 2013).

110. *See* Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C.L. Rev. 585, 604 (1996) ("[S]tatutory text is the surest device for correctly estimating the whole legislature's intent.").

111. CAL. INS. CODE § 10123.85(b).

112. GA. CODE ANN. § 33-24-56.4(c) (2013) (emphasis added).

113. *See* ME. REV. STAT. tit. 24-A, § 4316 (2012).

114. *See* Gonzalez, *supra* note 110, at 598 ("While individuals can have intents . . . collectives such as legislatures cannot. Thus, Judge Easterbrook

These two different statements of intent, and the lack thereof in Maine's statute, exemplify the vast differences among state statutes mandating private insurance coverage for telemedicine. It seems as though Georgia mandates full private payer parity, but the enacted intent appears to suggest that an argument can be made limiting reimbursement to only rural or geographically discriminated against areas. What is a provider in Georgia to do when the statute contends to offer full parity, but the stated intent of the statute might restrict coverage? Some argue that legislatures cannot have intents, but instead only outcomes in the form of enacted law.[114] If one resigns to this theory, then the intent should not control the true purpose of the statute; but then why have stated intent? As one can see, the statutory intent of a statute is difficult to grasp or use, and it adds to the opacity of private payer parity statutes.

3. Lack of Definitions

Hand in hand with lack of clarity are the varying definitions, or the lack thereof, in private payer parity statutes. Professor Jeanne Price,[115] in a lengthy article on statutory definitions, opines that "[statutory definitions] are important thresholds to our understanding of and the success of legislation . . . . [T]hey confer the authority and establish a structure that allows the statute's normative provisions to have effect . . . ."[116] She goes on to write that "[i]f definitions control future interpretations of the statute, they may also clarify current application of the statute and promote predictability."[117] Predictability and clarity are lacking in most state private payer parity statutes, and this is where definition sections

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writes, '[b]ecause legislatures compromise many members, they do not have "intents" or "designs," hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes. . . .'" (quoting Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983)).

115. Professor Price is the Director of the Wiener-Rogers Law Library at the University of Nevada, Las Vegas William S. Boyd School of Law.

116. Jeanne F. Price, *Wagging, Not Barking: Statutory Definitions*, 60 CLEV. ST. L. REV. 999, 1002–03 (2013).

117. *Id.* at 1022.

become vital, especially in an area as complex as insurance reimbursement for telemedicine.

State private payer parity statutes vary wildly on the presence of definitions. For example, New Hampshire's law does not contain a definition for telemedicine, health care provider, or anything else.[118] In contrast, Tennessee's statute contains definitions for "health insurance entity," "healthcare services," "healthcare services provider," "qualified site," "store-and-forward telemedicine," "telehealth," and "telehealth provider."[119] Georgia's statute exemplifies the middle ground by including definitions for "health benefit policy," "insurer," and "telemedicine."[120] Yet, in other states, such as Vermont, the statute simply refers the reader to another statutory section to find the definitions.[121] One of the basic rules of legislative drafting is to place a definition where it is most easily found by the reader.[122] Therefore, in an area of the law as complex as telemedicine, it benefits the reader most to have the definitions in the statute, not referenced to another statute or area of the code.

In those statutes that have definitions sections, the definitions often vary from statute to statute. In Mississippi's statute, telemedicine is defined as: "[T]he delivery of health care services such as diagnosis, consultation, or treatment through the use of interactive audio, video, or other electronic media. Telemedicine must be 'real-time' consultation, and it does not include the use of audio-only telephone, e-mail, or facsimile."[123] Compare that definition to Tennessee's definition of telemedicine:

> [T]he use of real-time, interactive audio, video telecommunications or electronic technology, or store-and-forward telemedicine services by a healthcare

118. N.H. REV. STAT. ANN. § 415-J:3 (2014).

119. TENN. CODE ANN. § 56-7-1002(a)(1)–(7) (2014).

120. GA. CODE ANN. § 33-24-56.4(b)(1)–(3) (2014).

121. *See, e.g.*, VT. STAT. ANN. tit. 8, § 4100k(g)(1)–(2) (2014) ("'Health insurance plan' means any health insurance policy or health benefit plan offered by a health insurer, as defined in 18 V.S.A. § 9402 . . . .").

122. NAT'L ARCHIVES FED. REGISTER, *Drafting Legal Documents*, http://www.archives.gov/federal-register/write/legal-docs/definitions.html (last visited Dec. 30, 2015).

123. MISS. CODE ANN. § 83-9-351(1)(d) (2014).

> services provider to deliver healthcare services to a patient within the scope of practice of the healthcare services provider when: (i) such provider is at a qualified site other than the site where the patient is located; and (ii) the patient is at a qualified site or a school clinic staffed by a healthcare services provider and equipped to engage in the telecommunications described in this section . . . .[124]

Tennessee and Mississippi, two adjacent states, should not have such varied statutory language and definitions for telemedicine. The definition in Mississippi's statute appears to limit telemedicine to "real-time consultation," which means that store-and-forward technology is not covered.[125] Conversely, Tennessee's statute explicitly includes store-and-forward technology along with all other forms of telemedicine services.[126] Doctors who hold licenses in both states would likely find it very difficult to know what they would be reimbursed for when practicing across multiple jurisdictions.

4. General Lack of Uniformity

The existing state-by-state regulatory framework of telemedicine reimbursement is ill equipped to resolve the challenges of the health care industry on a national scale.[127] Patients and providers normally encounter a patchwork of arbitrary insurance requirements that do not allow them to take advantage of telemedicine.[128] As evidenced by the discussion above of other problems within private payer parity statutes, it is evident that these statutes lack broad uniformity.[129]

Some state statutes offer coverage for interactive audio-visual, store-and-forward, and remote monitoring, while others merely cover real-time, interactive audio-visual telemedicine tech-

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124. TENN. CODE ANN. § 56-7-1002(a)(6) (2014).
125. MISS. CODE ANN. § 83-9-351(1)(d).
126. TENN. CODE ANN. § 56-7-1002(a)(6).
127. Gupta & Sao, *supra* note 51, at 405.
128. THOMAS & CAPISTRANT, *supra* note 1, at 1.
129. *See* discussion *supra* Sections III.A.–C.

nology.[130] One state may intend to reimburse private insurers for telemedicine services throughout the state, while another may only cover patients living in rural areas.[131] Likewise, one state statute consists of two paragraphs, and another statute is nearly two pages long.[132]

A study conducted by Michigan State University's Department of Telecommunications found that "the lack of a uniform telemedicine reimbursement system may cause society, and those in the health care industry, to view traditional delivery methods as superior to telemedicine."[133] States do not have to enact precisely the same law, but a more uniform approach to private insurance reimbursement is necessary if telemedicine is to achieve its goals of improving access and quality of care. Ultimately, provider participation suffers because non-uniformity of telemedicine reimbursement leads to lack of enforcement and general awareness.[134]

IV. MODEL LEGISLATION & SOLUTIONS

Only twenty-nine United States jurisdictions currently have private payer parity statutes in some form.[135] It is much more difficult for telemedicine to gain nationwide expansion if insurers are not required to reimburse providers for services offered through telemedicine. While it is certainly possible for the insurance industry to expand telemedicine on its own, it is unlikely without a catalyst such as legislative intervention. Even if every state adopts a private payer parity statute, considering the current state of these

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130. *Compare* TENN. CODE ANN. § 56-7-1002, *with* OR. REV. STAT. § 743A.058 (2013).

131. *Compare* MISS. CODE ANN. § 83-9-351 (2014), *with* ARIZ. REV. STAT. ANN. § 20-841.09 (LexisNexis 2014).

132. *Compare* TEX. INS. CODE ANN. § 1455.004 (West 2013), *with* MD. CODE ANN., Ins. § 15-139 (West 2014).

133. Jaime Bennett, *Improving Quality of Care Through Telemedicine: The Need to Remove Reimbursement and Licensure Barriers*, 19 ANNALS HEALTH L. ADVANCE DIRECTIVE 203, 210 (2010) (citing Pamela Whitten & Laurie Buis, *Private Payer Reimbursement for Telemedicine Services in the United States*, 13 TELEMEDICINE AND E-HEALTH 1, 22 (2007), http://www.researchgate.net/publication/6496994_Private_Payer_Reimbursement_for_Telemedicine_Services_in_The_United_States).

134. *See* THOMAS & CAPISTRANT, *supra* note 1, at 4.

135. STATE POLICY TOOLKIT, *supra* note 3, at 3.

laws, they will remain as ineffective as if they were never enacted.[136] Model legislation can solve many of the problems inherent in current private payer parity laws because the model serves to identify and solves the issues.

The following proposed model legislation was created using language from and portions of the most effective private payer parity statutes currently enacted.[137] The statutes used were all enacted within the past three years and have all been shown, through empirical analysis, to be among the strongest private payer parity laws.[138] The model legislation is valuable because it is created using successful telemedicine statutes, meaning that it will be an effective guide for states attempting to create the best, most operative law.

This part presents proposed model legislation for uniform national adoption of telemedicine laws mandating private insurance coverage comparable to that of in-person services. States that have ineffective or limited private payer parity statutes can use this model to revise their laws. States that have yet to enact laws mandating private insurance coverage of telemedicine services may use this model in drafting one. Following the proposed model legislation, the next section will explain how this model can solve the problems facing private payer parity statutes.

A. Model Legislation

Title: Private Insurance Reimbursement Parity in Telemedicine Services

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136. *See* Smolensky, *supra* note 44, at 383 ("[E]vidence [shows] that the statutes' exceptions make them ineffective tools for increasing telemedicine reimbursements . . . . If more states enact mandatory telemedicine reimbursement statutes, then any company wishing to be in the medical insurance business in that state will be required to reimburse for telemedicine . . . .").

137. *See* Thomas & Capistrant, *supra* note 1, at 50–51, 56, 67 (2014). This study, conducted by the American Telemedicine Association, provides an analysis of telemedicine policy in all fifty states. *Id.* at 1. Of the states used to create the model legislation, the major states enacted their laws from 2012–14 and each state has an "A" rating for private insurance parity. *Id.* at 45, 50–51, 56, 67. The analysis by the American Telemedicine Association identified Maryland, Mississippi, Missouri, New Mexico, and Tennessee as the strongest in terms of their private payer parity laws. *Id.* at 49–50, 56, 67.

138. *See id.*

Declaration of Intent: It is the intent of the legislature to recognize the practice of telemedicine as a legitimate means by which individuals may receive medical services from a provider without in-person contact;[139] and to recognize the application of telemedicine as a reimbursable service by which an individual shall receive quality medical services.[140]

Definitions:

a. "Telemedicine": as it relates to the delivery of health care services, telemedicine means the use of real-time, interactive audio, video telecommunications or electronic technology, or store-and-forward telemedicine services by a health care provider to deliver health care services to a patient within the scope of practice of the healthcare services provider at a site other than the site at which the patient is located.[141] Telemedicine does not include audio-only conversations, electronic mail messaging, or facsimile transmissions.[142]
b. "Store-and-forward telemedicine services": the use of asynchronous computer-based communications between a patient and a health care provider at a distant site for the purpose of diagnostic assistance in the care of a patient;[143] or electronic information, imaging and communication, that is transferred or recorded or otherwise stored for asynchronous use.[144]
c. "Health care provider": a duly licensed hospital or other licensed facility, physician, or other health care professional authorized to furnish health care services in the State within the scope of the professional's license.[145]

Applicability: This statute applies to insurers and nonprofit health service plans that provide hospital, medical, or surgical benefits to individuals or groups on an expense-incurred basis under health

139. *See, e.g.*, CAL. INS. CODE § 10123.85(b) (West 2014).

140. *See* HAW. REV. STAT. § 431:10A-116.3(a) (2014).

141. *See* TENN. CODE ANN. § 56-7-1002(6) (2014).

142. *See id.*

143. *See, e.g.*, MONT. CODE ANN. § 33-22-138(6)(c) (2014); TENN. CODE ANN. § 56-7-1002(5) (2014).

144. *See* N.M. STAT. ANN. § 59A-22-49.3(H)(5) (2014).

145. *See id.*

insurance policies or contracts that are issued or delivered in the State, including HMOs.[146]

Reimbursement & Deductible: Any entity subject to this statute:

a. Is required to not exclude from coverage a health care service solely because it was provided through telemedicine and is not provided through an in-person consultation between a healthcare provider and an insured patient.[147]

b. Is required to reimburse a health care provider—to the same extent that it reimburses the same service if provided through in-person consultation—for the diagnosis, consultation, and treatment of an insured patient for a health care service covered under a health insurance policy or contract that can be appropriately, effectively, and safely provided through telemedicine.[148]

c. May impose a deductible, copayment, or coinsurance amount on benefits for health care services provided through telemedicine so long as it does not exceed the deductible, copayment, or coinsurance applicable to an in-person consultation.[149]

d. Is required to reimburse providers who are out-of-network for telemedicine services under the same reimbursement policies applicable to other out-of-network health care services providers.[150]

e. May limit reimbursement to only those services that are medically necessary, subject to the terms and conditions of the covered person's policy.[151]

f. May not require a health care provider be physically present with a patient where the patient is located unless the health care provider who is providing health care services by means of telemedicine determines that the presence of a health care provider is necessary.[152]

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146. *See* MD. CODE ANN., INS. § 15-139(b) (LexisNexis 2014).

147. *See id.* at (c)(2); MO. REV. STAT. § 376.1900(4) (2014); TENN. CODE ANN. § 56-7-1002(d)(3).

148. *See* MD. CODE ANN., INS. § 15-139(d) (LexisNexis 2014).

149. *See* MISS. CODE ANN. § 83-9-351(3) (2014).

150. *See* TENN. CODE ANN. § 56-7-1002(d)(4) (2014).

151. *See* MISS. CODE ANN. § 83-9-351(5) (2014).

152. *See* MO. REV. STAT. § 376.1900(9) (2014).

Utilization Review: Any entity subject to this statute may undertake utilization review to determine the appropriateness of any health care service whether the service is provided through an in-person consultation or through telemedicine if the appropriateness of the health care service is determined the same.[153]
Geographic Discrimination Prohibition: A health insurance policy or contract may not distinguish between patients in rural and urban locations in providing coverage under the policy or contract for health services delivered through telemedicine.[154]
Provisions Not Stipulated: Any provisions not stipulated by this statute is required to be governed by the terms and conditions of the health insurance policy and contract.[155]

B. Solutions for Private Reimbursement Statutes

It is important that states enact statutes that mandate private insurance parity in telemedicine reimbursement because it has been proven to be very effective in promoting the adoption of telemedicine.[156] A 2014 study using the Information Technology Supplement to the American Hospital Association's 2012 annual survey of acute hospitals supports the enactment of private payer parity laws.[157] Those conducting the study found that "state policies that required private payers to reimburse for [telemedicine] services to the same extent as face-to-face services made hospitals more likely to adopt [telemedicine]."[158] The researchers suggest that "states may want to consider implementing policies to promote private payer reimbursement of [telemedicine]."[159] The study concluded that state policies mandating private payer reimbursement are the most effective manner in which to promote telemedicine expansion.[160] The proposed model legislation serves at a starting point for states to begin drafting a private payer parity statute, and it can solve many of the problems inherent in current laws.

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153. *See* MD. CODE ANN., INS. §15-139(e) (LexisNexis 2014); MO. REV. STAT. § 376.1900(7) (2014); N.M. STAT. ANN. § 59A-22-49.3(C) (2014).
154. *See* MD. CODE ANN., INS. § 15-139(f).
155. *See* TENN. CODE ANN. § 56-7-1002(g) (2014).
156. *See* Adler-Milstein, *supra* note 5, at 207.
157. *See id.*
158. *Id.* at 211.
159. *Id.* at 214.
160. *Id.* at 213.

Current laws mandating private insurance reimbursement for telemedicine suffer from artificial restrictions, lack of clarity, and non-uniformity.[161] This Note highlighted the major barriers to utilization of these statutes and the model legislation strives to fix these problems. For example, the model removes all restrictions for geographic area, providers, technology, or relationships, all of which are present in some state statutes.[162] The model legislation prevents clarity issues by stating a strong intent and providing clear definitions. Likewise, if widely adopted, the model will solve the issue of uniformity.

Uniformity is likely the biggest issue in the area of telemedicine.[163] Each state maintains the power to regulate activities affecting health under the Tenth Amendment to the United States Constitution.[164] Since each state has its own laws relating to health care, it is very difficult for doctors to practice in multiple jurisdictions, absent obtaining multiple licenses.[165] Consequently, uniformity in licensure is an important topic in the area of telemedicine because it is a barrier to expansion, much like reimbursement policies.[166] Current licensing practices force health care providers to fulfill requirements and protocols that differ for each state

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161. *See* discussion *supra* Sections III.B.i.–iv.

162. *See, e.g.*, COLO. REV. STAT. § 10-16-123(1) (2014) (rural area restriction); LA. REV. STAT. ANN. § 22:1821(F)(1) (2013) (provider restriction); OR. REV. STAT. § 743A.058(1)(c) (2013) (technology restriction).

163. *See* Symposium, *supra* note 17, at 17.

164. *See* U.S. CONST. amend. X; *see also* Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) (opining that states have a compelling interest in regulating the practice of medicine and other activities related to health, safety, and welfare of its citizens); Fish, Shiri A. Hickman & Humayun J. Chaudry, *State Licensure Regulations Evolve to Meet the Demands of Modern Medical Practice*, 10 ABA SCITECH LAW 18 (2014) (noting that the U.S. Supreme Court recognizes the states have a right to regulate health care); Zillis, *supra* note 10, at 201 (citing to the Tenth Amendment in support or state regulation of health care). *But see* Gupta & Sao, *supra* note 51, at 413–14 (arguing that states do not have a constitutional right to exclusive domain over health care regulation and that current state regulation is likely unconstitutional per the Dormant Commerce Clause).

165. *See* CNTR. FOR TELEMEDICINE LAW, OFFICE FOR THE ADVANCEMENT OF TELEHEALTH: TELEMEDICINE LICENSURE REPORT 1 (2003).

166. *See id.* at 2 ("[L]icensure is a major barrier to the development of telemedicine."); Fish, Hickman, & Chaudry, *supra* note 164, 18–19; Spradley, *supra* note 17, at 317.

board, and there are sixty-nine licensing jurisdictions in the United States.[167] There are myriad proposals to remedy the current state of medical licensure, but the consensus is that there must be a uniform approach among the states without relinquishing state control to the federal government.[168]

What does licensure have to do with the adoption of the proposed model legislation? Telemedicine, by nature, is a cross-jurisdictional practice; several scholars and medical professionals conclude that the establishment of a uniform set of standards and regulations is necessary to realize telemedicine's potential.[169] The ability to deliver health care across distances using telemedicine achieves the goals of greater quality and access to health care.[170] As medical licensure enjoys a movement towards uniformity, so should reimbursement policy, and the model legislation can help accomplish this goal.

States have the opportunity to blaze the path toward widespread telemedicine adoption through the implementation of private payer parity statutes. As mentioned previously, mandating private insurance coverage for telemedicine has proven to be the most effective means of expansion.[171] If laws differ greatly from state-to-state, however, physicians will be discouraged from fully effectuating their potential. Telemedicine can extend health care to traditionally underserved populations, provide access to specialists, allow for fewer site visits for chronic patients, decrease health care expenditures, and much more.[172]

With uniform state reimbursement laws, health care providers and insurers are able to know which telemedicine services

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167. *See* Spradley, *supra* note 17, at 317.

168. *See id.* at 317–20 (providing examples of solutions to medical licensure as a telemedicine barrier); LICENSURE PORTABILITY, AM. TELEMED. ASS'N (Mar. 2007), https://web.archive.org/web/20100616143720/http:/www.americantelemed.org/files/public/policy/Licensure_Portability.pdf (providing position statement and recommendations proposed by the American Telemedicine Association).

169. *See* Gupta & Sao, *supra* note 51, at 387; *see also* Susan E. Volkert, *Telemedicine: Rx for the Future of Health Care*, 6 MICH. TELECOMM. & TECH. L. REV. 147, 158–59 (2000).

170. Gupta & Sao, *supra* note 51, at 442.

171. *See* Adler-Milstein, *supra* note 5, at 214.

172. Gupta & Sao, *supra* note 51, at 389–91.

they are able to provide and still receive reimbursement. For example, under the current state statutes, a patient in Tennessee wishing to consult via telemedicine with an orthopedist in Alabama would run the serious risk of not receiving coverage. Alabama lacks any kind of law that mandates coverage for telemedicine.[173] Financially the patient is better off driving to Alabama than consulting with a specialist through telemedicine if he is unlikely to receive reimbursement. Therein lies the problem with lack of uniformity and lack of widespread private payer parity statutes. While telemedicine may be the more efficient and cost-effective means of health care delivery, doubt about reimbursement will likely cause providers and patients to stick to traditional health care delivery.[174] Nationwide adoption of this model private payer parity legislation can spur telemedicine to the forefront of the health care scene, and ultimately, telemedicine will prove to be the savior for a failing health care system faced with constantly rising costs.[175]

V. CONCLUSION

Telemedicine has evolved from a futuristic fantasy into a promising, rapidly growing industry. The technological and monetary obstacles that once prevented the industry from expanding are no longer impediments. With access to modernized networks, providers have the ability to administer specialized and high-quality treatment to those who would not otherwise have access. Additionally, telemedicine falls clearly in line with today's culture of interconnectivity and autonomy. Before we can realize the full potential of telemedicine, several changes must take place within our legal system.

For telemedicine to flourish, a reimbursement solution must be established whereby providers and insurers know what services are covered. State legislatures and private insurers can lead the

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173. THOMAS & CAPISTRANT, *supra* note 1, at 26 ("AL is bordered by LA, MS, and TN which enacted private insurance parity laws.").

174. *See* Bennett, *supra* note 133, at 210 ("Ultimately, the lack of a uniform telemedicine reimbursement system may cause society, and those in the healthcare industry, to view traditional delivery methods as superior to telemedicine as a delivery method.").

175. *See* Gupta & Sao, *supra* note 51, at 389.

way towards nationwide telemedicine adoption through state enactment of private payer parity statutes. Standardized adoption of mandated private insurance laws will eliminate artificial barriers between jurisdictions by providing knowledge and security in telemedicine reimbursement.

There are serious restrictions on the few enacted state private payer parity statutes for telemedicine. Only twenty-nine of fifty-one jurisdictions have adopted these laws, and many of those that have would benefit from thorough revision. The proposed model legislation seeks to remedy these limitations and provides a statute that can be uniformly and nationally adopted so as to facilitate the expansion of telemedicine. Until the state legislatures of our nation move to enact and revise statutes mandating private coverage for telemedicine services, it is unlikely that the federal government, or any other entity, will take the lead. There is ample data proving that telemedicine and private payer parity statutes are effective at lowering costs, expanding access, and promoting efficacy. Nationwide utilization of telemedicine is a reality and it may be the answer to our country's health care problem. Widespread state mandated private reimbursement can be the catalyst toward a more efficient and cost-effective system of telemedicine utilization.

Enough with the White Lie-ability: Decreasing Frivolous Health Care Liability Actions in Tennessee with Time and Transparency

MARY KATHERINE SMITH*

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I. INTRODUCTION

John Smith, a sixty-year-old male, was admitted to a local hospital in Memphis, Tennessee, for treatment of a recurring bacterial infection, which if not managed, would have ultimately resulted in pneumonia. Smith's daughter, Nancy, accompanied him to the hospital where they provided the treating nurse with all of

Smith's past and present medical conditions, medical allergies, and insurance information. Smith disclosed that he was highly allergic to all types of sulfonamide ("sulfa") drugs. The nurse gave Smith a red band to wear around his wrist to put other treating physicians and nurses on notice that he had a well-documented, life-threatening sulfa drug allergy. Despite the prevalent warning, the treating physician mistakenly ordered that Smith be administered a sulfa drug for his symptoms. The medical staff did not tell Smith which drug they were ordering him, so he persistently questioned the physician about this particular drug's risks and side effects. Still, the physician failed to disclose this information.

Later that evening, Smith's daughter learned that the treating physician ordered the nurse to monitor Smith for an anaphylactic drug reaction following his first dose of the sulfa drug. Neither Smith nor Nancy was informed of this monitoring plan. Smith did not exhibit any symptoms of an allergic reaction after the first several doses of the drug. However, several hours following his fourth dose, a drug reaction began to cause Smith to experience hypotension, which eventually led to several complications. When Smith and Nancy asked about these complications, the treating physician avoided the questions and denied the possibility that Smith's experiences were a result of the medication the physician administered to him. While still in the hospital, the complications worsened, and Smith soon passed away.

Following her father's passing, Nancy discovered that despite the disclosure of Smith's specific drug allergy, he had been administered a sulfa drug during his stay at the hospital. After this realization, and because Nancy was not provided with any true explanation of her father's death, she confronted the treating physician and asked if her father had been administered a sulfa drug, and if so, was a drug reaction the definitive cause of her father's death. The only responses she received from the physician and hospital representatives were evasive explanations and a denial of any wrongdoing. The treating physician told Nancy that her father's underlying medical condition was the reason for his passing. Further, the physician downplayed the risks of the drug that he administered to Smith. He also refused to admit any fault throughout the entire process. Nancy was unsatisfied with how the physician and hospital representatives handled the medical error that ultimately caused her father's passing. Frustrated and angry about the dishonesty and lack of accountability she witnessed, Nancy

filed a health care liability action against both the individual physician and the hospital for their error in administering Smith a drug in which the doctor knew or had reason to know would cause a devastating allergic reaction.[1]

Medical errors are prevalent, and situations such as John Smith's arise in hospital settings daily. Such medical errors cause patients not only to suffer "unnecessary physical and mental pain" for prolonged periods of time, but sometimes cost patients their lives.[2] Many of these unnecessary outcomes mentioned above are preventable.[3] But, the medical and legal communities together must take action to reform their approaches to combat these medical errors and frivolous malpractice actions. First, it is important to determine what constitutes a medical error within the context of a health care setting. The Institute of Medicine ("IOM") defines a medical error generally as "the failure of a planned action to be completed as intended or the use of a wrong plan to achieve an aim."[4] Although the IOM definition provides a broad framework

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1. Although the location, names, and ages of the individuals involved in this fact pattern have been altered for purposes of this Note, this hypothetical is inspired by the facts of an actual event. *Stories About Medical Errors: Father Given Wrong Dosage of Life Threatening Medication*, SAFE PATIENT PROJECT, http://safepatientproject.org/sys-medical_errors.html (last visited Jan. 26, 2016).

2. Rebecca Rubel-Seider, *Full Disclosure: An Alternative to Litigation*, 48 SANTA CLARA L. REV. 473, 473 (2008); *see* Evelyn M. Tenenbaum, *Using Informed Consent to Reduce Preventable Medical Errors*, 21 ANNALS HEALTH L. 11, 11 (2012), http://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1012 &context=annals (acknowledging the long-standing effects of preventable medical errors).

3. *See* Randall R. Bovbjerg, *Paths to Reducing Medical Injury: Professional Liability and Discipline vs. Patient Safety—and the Need for a Third Way*, 29 J.L. MED. & ETHICS 369, 369 (2001) ("Many, perhaps even most, injuries are preventable, probably numbering in the hundreds of thousands a year forhospital care alone."); *see also* Rubel-Seider, *supra* note 2.

4. INSTITUTE OF MEDICINE, TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 1, (Linda T. Kohn et al. eds., 1999) [hereinafter TO ERR IS HUMAN].

for the description of a medical error, each state differs as to how it statutorily defines medical errors.

Because medical errors have the potential to result in life-threatening outcomes, they also have the effect of fueling costly and time-consuming medical malpractice litigation. In the state of Tennessee, litigation that stems from medical negligence was previously referred to as a medical-malpractice claim, but is more recently recognized as a health care liability action.[5] A health care liability action is defined as

> any civil action, including claims against the state or a political subdivision thereof, alleging that a health care provider or providers have caused an injury related to the provision of, or failure to provide, health care services to a person, regardless of the theory of liability on which the action is based.[6]

Preventable medical errors play a large role in frivolous medical malpractice litigation. This litigation may be avoided by encouraging transparency and communication within the health care setting via hospital-implemented disclosure policies and programs. However, encouraging the co-existence of transparent disclosure programs with the threat of potential medical malpractice litigation looming in the background is no easy task. Both medical malpractice litigation and patient safety disclosure programs aim to reduce medical errors in the health care arena.[7] Although the end goals are corresponding, the policies behind these two movements

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5. In 2011, the Tennessee General Assembly passed the Tennessee Civil Justice Act, which replaced the term "medical malpractice action" throughout the Tennessee Code with the term "health care liability action." *See* 2011 Tenn. Pub. Acts 510, § 9. For purposes of consistency throughout this Note, I will refer to Tennessee's "health care liability action" as a "medical malpractice action."

6. TENN. CODE ANN. § 29-26-101(a)(1) (2012 & Supp. 2015).

7. *See* Stanton N. Smullens et al., *Regulating for Patient Safety: The Law's Response to Medical Errors: Article: Pennsylvania's Approach to Reducing Medical Error: The Story of the Patient Safety Authority*, 12 WIDENER L. REV. 39, 40 (2005); *see also* Bovbjerg, *supra* note 3 (discussing the two competing views that society uses to both define and respond to medical errors).

are in conflict.[8] Unlike patient safety disclosure programs, the medical malpractice approach is considered reactive and punitive in nature, blaming the individual physician for his or her lapse in professional judgment and care.[9] This approach is justified on the grounds that if a physician is penalized for his or her mistakes, the incurred punishment will prevent similar mistakes from happening again in the future.[10]

On the other hand, patient safety disclosure programs are part of a relatively new movement.[11] Disclosure programs use a proactive approach in attempting to reduce both medical errors and litigation by focusing on the individual patient, identifying any potential medical errors, and "fostering an atmosphere that is open to discussing [those] errors."[12] Physicians and medical providers are encouraged to communicate transparently and honestly with their patients and patient's families, especially following a medical error.[13] In effect, this approach seems to alleviate the "name and blame" policy driving medical malpractice, and supports the idea that medical errors are a result of a possible system failure rather than the result of incompetent physicians.[14]

When handling medical errors, the conflict between these two approaches makes it difficult to not only achieve quality

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8. *See generally* Smullens et al., *supra* note 7 (explaining the divergent interests between medical malpractice litigation and the patient safety movement).

9. *See id.*; *see also* David M. Studdert et al., *Medical Malpractice*, 350 NEW ENG. J. MED. 283, 287 (2004) (stating that medical malpractice litigation seeks to single out individual physicians in order to allocate fault and compensation based on evidence of negligence).

10. *See* Smullens et al., *supra* note 7; *see also* Studdert, *supra* note 9, at 283 ("Theoretically, lawsuits deter physicians by reminding those who wish to avoid the emotional and financial costs of ligation that they must take care.").

11. *See* Smullens et al., *supra* note 7.

12. *Id.*

13. For a general discussion regarding the role of transparent communications within the health care setting following a medical error, see generally Joanna C. Schwartz, *A Dose of Reality for Medical Malpractice Reform*, 88 N.Y.U. L. REV. 1224 (2013).

14. *Id.* The patient safety movement recognizes that physicians and other health care providers make mistakes because it is inherent in human nature and not because they lack adequate training or competency. *See also* Bovbjerg, *supra* note 3, at 370.

care,[15] but also inhibits the possibility of reducing frivolous malpractice claims. As part of the patient safety movement, physicians and health care providers are urged to be open and transparent about their medical errors, reporting them to patients, fellow practitioners, and regulators, to openly address future methods of prevention.[16] In order to foster openness and honesty from medical providers, experts emphasize that most medical errors are a result of system failures and not unskilled or incompetent physicians.[17] Conversely, the medical malpractice approach is strikingly contrary because it targets individual physicians by assigning blame and encouraging providers to keep hidden information surrounding a medical error.[18] The fear of being exposed to litigation may override physicians' interests in patient safety disclosure methods. Further, reluctant physicians feel that there is little to no legal protection when they are transparent about medical errors, which could ultimately lead to litigation or difficulty in obtaining medical malpractice insurance.[19] Due to the conflict between these two approaches, not only are physicians less willing to disclose medical errors to their patients, but they are also deterred from communicating openly with their patients about potential mistakes.[20]

In support of the goal of reducing frivolous health care liability actions in Tennessee, this Note proposes that the Tennessee

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15. *See* Smullens et al., *supra* note 7, at 40.

16. *Id.* at 40–41. Initiated in response to a report issued by the IOM in 1999, which disclosed the severity of recurring medical errors, the patient safety movement focuses on identifying errors pro-actively by encouraging an open discussion of those errors. *Id.* at 40.

17. *See* Studdert, *supra* note 9, at 287.

18. *Id.*

19. *Id.*

20. *See* Lisa I. Iezzoni et al., *Survey Shows That at Least Some Physicians Are Not Always Open or Honest with Patients*, 31 HEALTH AFF. 383, 388 exhibit 2 (2012), http://content.healthaffairs.org/content/31/2/383.full.pdf. In a 2009 research survey that addressed physicians' attitudes and behavior regarding the disclosure of medical errors to patients, researchers found that a significant number of physicians deviated from a policy of complete honesty. *Id.* Nearly 65.9 percent of survey respondents agreed that physicians should "disclose all significant medical errors to affected patients." *Id.* However, 19.9 percent of survey respondents failed to fully disclose actual errors to their patients due to the fear of a potential malpractice suit. *Id.*

legislature amend two current statutes that would, in effect, provide greater protection for physicians' apologies following a medical error, and expand the pre-suit notice period before filing a health care liability action. These proposed amendments will encourage health care providers and hospital systems within the state to adopt patient-centered disclosure programs that mandate transparency and communication when handling medical errors.

Part II of this Note discusses why medical malpractice litigation remains the default response to medical errors, and how this response inhibits the implementation of full disclosure programs throughout Tennessee. Part III recognizes the benefits of full disclosure programs and how they aid in reducing frivolous medical malpractice litigation. Part IV then offers an overview of successful disclosure programs that have been implemented in other states, and analyzes the benefits of these programs. Part V suggests amending Tennessee Rules Evidence section 409.1(a) by adding a provision that protects apologetic expressions, including fault-admitting statements, made specifically by heath care providers following a medical error. Part VI proposes to amend Tennessee Code Annotated section 29-26-121(a)(1) by expanding the pre-suit notice period prior to filing a health care liability action. Part VII concludes the analysis and offers brief closing remarks.

II. WHY MEDICAL MALPRACTICE LITIGATION IS THE TREND

Traditionally, endeavors to reduce medical errors have been addressed predominantly through medical malpractice litigation.[21] A period of an abundant increase in medical errors within the health care arena revealed, however, that persistent medical malpractice actions are not the end-all, be-all solution. In November 1999, the IOM released an alarming report that ignited controversy within the medical community.[22] The IOM's report, *To Err is Human*, announced that preventable medical errors had become a leading cause of mortality in the United States, estimating these

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21. *See* Smullens et al., *supra* note 7, at 39; *see also* Alan G. Williams, *The Cure for What Ails: A Realistic Remedy for the Medical Malpractice "Crisis,"* 23 STAN. L. & POL'Y REV. 477, 481–83 (2012). Between the 1950s and 1980s, America considered itself to be facing a medical malpractice crisis. *Id.* at 480.

22. *See* TO ERR IS HUMAN, *supra* note 4.

errors were responsible for as many as 98,000 deaths per year.[23] Another study found that a projected three to five percent of hospital patients have suffered an injury as a result of their health care.[24] Comparing the past medical error crises to an epidemic, the IOM further estimated that preventable medical errors potentially cost between $17 billion and $29 billion per year.[25] The report also acknowledged that the prevalence of medical errors not only results in the unnecessary loss of human life and costly expenses, but also depletes patients' trust in the healthcare system, resulting in dissatisfaction for both patients and medical professionals alike.[26] The IOM concluded that a majority of the medical errors that occur in hospital settings are largely due to system failures and faulty conditions rather than individual negligence or incompetence.[27] After addressing the serious consequences of medical errors, the report then offered solutions to aid in the prevention of future medical errors in order to increase patient safety, acutely focusing on transparent disclosure.[28]

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23. *Id.* at 1; Charles M. Key, *Toward a Safer Health System: Medical Injury Compensation and Medical Quality*, 37 U. MEM. L. REV. 459, 461 (2007); Rubel-Seider, *supra* note 2, at 473.

24. *See* Bovbjerg, *supra* note 3, at 369 (discussing the role of negligent medical care in causing patient injuries).

25. TO ERR IS HUMAN, *supra* note 4, at 1–2*; see also* Lee Taft, *Apology and Medical Mistake: Opportunity or Foil?*, 14 ANNALS HEALTH L. 55, 56 (2005)
http://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1203&context=annals (attributing these preventable costs to a variety of factors).

26. *See* TO ERR IS HUMAN, *supra* note 4, at 2.

27. *See id.* at 49. The majority of medical errors do not result from individual recklessness or the actions of a particular group—this is not a "bad apple" problem. Medical errors are more commonly, the result of systems, processes, and conditions that lead physicians or nurses to make mistakes. *Id.* *But see* Bovbjerg, *supra* note 3, at 369 (stating that nearly one-third to one-half of patient injuries that transpire during hospital visits are due to negligence or an otherwise preventable error).

28. *See* TO ERR IS HUMAN, *supra* note 4, at 23. *But see* H. T. Stelfox et al., *The "*To Err Is Human*" Report and the Patient Safety Literature*, 15 QUALITY SAFETY HEALTH CARE 174, 174 (2006), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2464859/pdf/174.pdf/. Although the IOM gained mostly positive attention from both the public and health care providers, critics of the IOM report suggested that the release of the report did more harm than good. *Id.* For example, critics argue that, "by focusing undue attention on accidental deaths

In order to combat the pervasiveness of medical errors, the IOM recommended a framework of specific approaches to help reduce the occurrence of these avertable mistakes.[29] In 2001, the IOM report quickly proved to be a facilitator of change in the health care industry when the Joint Commission for the Accreditation of Hospitals ("JCAHO") published new patient safety standards, which included regulations requiring the disclosure of unanticipated outcomes following medical care.[30] However, concerns with medical errors and malpractice litigation were well known even before the publication of the IOM report.

Studies conducted in the early 1990s confirmed that the recent concerns about preventable medical errors were material and in desperate need of a solution.[31] A 1991 study indicated that 3.7 percent of hospitalizations in New York resulted in adverse events, and 13.6 percent of those adverse events resulted in death.[32] Further, a 1992 study conducted in Utah and Colorado concluded that 2.9 percent of the states' hospitalizations resulted in adverse events, while 6.6 percent of those instances led to mortality.[33] These two late studies collectively provided the foundation and ultimate motivation for the IOM's 1999 report's push for change.[34]

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which are difficult to study and prevent, limited resources are being drawn away from other important quality improvement initiatives." *Id.*

29. *See* TO ERR IS HUMAN, *supra* note 4, at 6. This framework included methods such as, establishing a national focus to create leadership and enhancing knowledge on patient safety; developing a nationwide public mandatory reporting system while also encouraging the implementation of separate voluntary reporting systems; creating and raising performance standards and expectations; and implementing safety systems to ensure safe practices. *Id.*

30. *See* Taft, *supra* note 25, at 56.

31. *See* Smullens et al., *supra* note 7, at 41.

32. *Id.*; *see also* Troyen A. Brennan et al., *Incidence of Adverse Events and Negligence in Hospitalized Patients: Results of the Harvard Medical Practice Study I*, 324 NEW. ENG. J. MED. 370, 370 (1991) (defining an adverse event as an injury that is caused by the medical management rather than the underlying disease and results in either a prolonged hospital stay or a disability).

33. Smullens et al., *supra* note 7, at 41; *see* Eric J. Thomas et al., *Incidence and Types of Adverse Events and Negligent Care in Utah and Colorado*, 38 MED. CARE 261, 261 (2000).

34. Smullens et al., *supra* note 7, at 41.

A. Justifications for Following Medical Malpractice Trend

Although the early IOM report encouraged change in several facets of the health care industry, including how to efficiently deal with medical errors, deference to malpractice litigation continued to be the norm. This is because the "'deny and defend' culture of malpractice litigation is fundamentally opposed to the culture of openness and transparency advocated by the [IOM]."[35] Over the last several decades, efforts toward transparency, disclosure, and improving patient safety have successfully made a debut into the health care arena. However, the "deny and defend" approach continues to be the prevailing response of many health care providers when faced with a medical error and patient injury.[36] There are numerous fears plaguing both physicians and hospital representatives that dissuade these individuals from speaking openly and honestly with their patients about medical mistakes or sometimes even non-negligent complications.[37] Some of these fears include "a natural aversion to confronting angry" patients or families, "concerns that disclosure might invite a [malpractice] claim that otherwise would not be asserted," "anxiety that the discussion will compromise [] defenses" that may be viable in the future, and "fear[s] that the conversation may lead to loss of malpractice insurance or higher premiums."[38]

Generally, medical professionals assert that their fear of being transparent with patients derives from the adversarial nature of the legal profession.[39] A study conducted in 2008 surveyed physi-

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35. Schwartz, *supra* note 13, at 1227.

36. Richard C. Boothman et al., *A Better Approach to Medical Malpractice Claims? The University of Michigan Experience*, 2 J. HEALTH & LIFE SCI. L. 125, 127, 131 (2009), http://www.med.umich.edu/news/newsroom/Boothman%20et%20al.pdf ("Transparency seems to be gaining currency as a concept, but individual physicians, hospitals, insurers, and defense lawyers still cling to 'deny and defend' as a comfortable, safe response to claims, despite its drawbacks.").

37. *Id.* at 128.

38. *Id.*

39. William M. Sage, *Medical Malpractice Insurance and the Emperor's Clothes,* 54 DEPAUL L. REV. 463, 464 (2005) ("For over a century, American physicians have regarded malpractice suits as unjustified affronts to medical professionalism, and have directed their ire at plaintiffs' lawyers—whose wealth

cians about their attitudes regarding methods of communication that take place following a medical error and found that "[p]hysicians were 'concerned about the confidentiality and legal discoverability of the error information they report.'"[40] Hospitals and healthcare providers seem to tailor their programs and policies in response to a perceived exposure to legal liability, regardless of whether that perception actually materializes.[41] This perception serves as a barrier that tends to discourage physicians from disclosing medical errors to their patients since disclosure would seem contrary to implemented policies.[42] Additionally, apologies made by physicians to injured patients also play an important role in the disclosure process. However, a significant reason why physicians abstain from making such apologies, or even initiating the disclosure process in the first place, is due to the realistic fear of impending lawsuits and their potentially devastating consequences.[43] When physicians realize that apologies or expressions of sympathy may be used against them to prove liability, or that such actions may jeopardize their ability to obtain insurance coverage in the

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and reputation seem inversely proportional to their own—and the legal system in which they operate.").

40. *See* Boothman et al., *supra* note 36, at 129; *see also* Jane Garbutt et al*., Lost Opportunities: How Physicians Communicate About Medical Errors*, 27 HEALTH AFF. 246 (2008), http://content.healthaffairs.org/content/27/1/246.full.pdf. Physicians' concerns regarding disclosure are understandable due to the malpractice system's tendency to focus only on provider fault and the limited obtainability of malpractice insurance. *Id.*

41. *See* Carol Brass, *A Proposed Evidentiary Privilege For Medical Checklists*, 2010 COLUM. BUS. L. REV. 835, 842–43 (2010).

42. *See id.* at 846; *see also* Emily R. Carrier et al., *Physicians' Fears of Malpractice Lawsuits Are Not Assuaged by Tort Reforms*, 29 HEALTH AFF. 1585, 1591 (2010), http://content.healthaffairs.org/content/29/9/1585.full.pdf ("It is likely that physicians' assessment[s] of their risk is driven less by the true risk of malpractice claims or the cost of malpractice insurance, and more by the perceived arbitrary, unfair, and adversarial aspects of the malpractice tort process . . . .").

43. Robin E. Ebert, *Attorneys, Tell Your Clients to Say They're Sorry: Apologies in the Health Care Industry*, 5 IND. HEALTH L. REV. 337, 342 (2008). However, it is suggested that that many physicians may not have access to correct information regarding "their absolute risk of being sued." Carrier et al., *supra* note 42, at 1591.

future, they are less likely to be forthcoming and apologetic with their patients.[44]

The constant anticipation of a lawsuit following some type of medical error generates an atmosphere of secrecy and mistrust among health care providers.[45] As a result, a physician or hospital representative's failure to disclose mistakes causes unsatisfied and fearful patients to sense that their only option is to file suit.[46] These reasonable concerns of litigation instill fear in the minds of medical providers about the no-defect medical culture, which is impossible to obtain and ultimately results in the practice of defensive medicine and increased health care costs for the remainder of society.[47]

B. Why Medical Malpractice is Not the Answer

The "deny and defend" method is an ineffective and costly way to respond to a patient who has been affected by a medical error.[48] When physicians and hospitals resort to this method, patients are left with unanswered questions and plausibly feel that their only way to hold the providers accountable is to seek recourse through the adversarial system. Although litigation has long been the answer for patients who suffer as a result of a medical error, physician liability alone has failed to solve these problems and prevent these mistakes from recurring.[49] When patients choose to resort to litigation following a medical error, the process often proves to be inefficient and time consuming, leaving the patient uncompensated and experiencing unwanted outcomes, such as un-

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44. *See* Ebert, *supra* note 43, at 342.

45. Barbara Phillips-Bute, *Transparency and Disclosure of Medical Errors: It's the Right Thing to Do, so Why the Reluctance?*, 35 CAMPBELL L. REV. 333, 336 (2013).

46. *Id.*

47. *Id.* The idea of defensive medicine stems from physicians' looming fear of potential lawsuits, which leads them to "prescribe medicines and order tests" that they know are not reasonably necessary under the circumstances, but do so anyway for the sole purpose of shielding themselves from liability. Frederick H. Davis, *Medical Liability and the Disclosure-Offer Approach: Transforming How Arkansans Should Think About Medical Malpractice Reform*, 64 ARK. L. REV. 1057, 1069 (2011).

48. *See* Boothman et al., *supra* note 36, at 129. The "deny and defend" approach is financially and emotionally costly. *Id.*

49. *See* Bovbjerg, *supra* note 3, at 377.

foreseen injuries associated with the medical error.[50] Accordingly, in the rare case that a patient is granted compensation following a medical malpractice action, the patient typically does not receive a monetary award until a much later date.[51] It is estimated that patients do not receive payment until roughly five years following the relevant incident that caused the harm.[52] Further, if the patient actually receives compensation, it is generally only half of the patient's true award due to the reduction of attorney fees and litigation expenses.[53]

The costs incurred from malpractice litigation are tremendous.[54] According to one study, overhead costs stemming from malpractice litigation are "exorbitant," and "for every dollar spent on compensation, 54 cents went to administrative expenses," such as attorney fees, experts' compensation, and court costs.[55] Comparably to the lack of adequate compensation experienced by affected patients involved in malpractice suits, litigation also does not always allow patients' questions or injuries to be fully addressed because the physicians are focused on relieving themselves of potential liability.[56] Because physicians' malpractice suits remain defensive, they are less incentivized to openly explain the circum-

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50. *Id.* at 335; *see also* David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2025 (2006) (asserting that costly, frivolous medical malpractice claims are a substantial waste of time and resources in both the legal and medical systems).

51. *See* Phillips-Bute, *supra* note 45, at 335.

52. *See id.*; Studdert et al., *supra* note 50, at 2031 (disclosing the findings of a study that indicated an average time of five years between when the injury stemming from a medical error occurred and when the resolution process was complete).

53. *See* Phillips-Bute, *supra* note 45, at 335.

54. *See* Charles Kolodikin & Paul Greve, *Medical Malpractice: The High Cost of Meritless Claims*, IRMI (Jan. 2007), http://www.irmi.com/expert/articles/2007/kolodkin01.aspx.

55. Studdert et al., *supra* note 50, at 2026. For a discussion of how the liability process is slow in resolution, disregards a majority of claimed injuries, and fails to pay out consistent amounts, even among similar cases, see Randall R. Bovbjerg, *Beyond Tort Reform: Fixing Real Problems*, 3 IND. HEALTH L. REV. 1, 13 (2006).

56. *See* Phillips-Bute, *supra* note 45, at 337.

stances surrounding a medical error.[57] Due to this defensive practice, physicians may make judgment calls or take action based on their perceived personal legal benefit as opposed to a patient's clinical benefit.[58] Additionally, although the effects of medical errors can be potentially detrimental to both patients and their families, the subsequent effects of litigation can take a devastating toll on the physician as well.[59] This leads many physicians to sometimes experience depression, alienation, and financial instability after being sued.[60] Even though these barriers are tremendous, many patients feel that litigation is their only means of recourse.

C. Why Patients Continue to Turn to Medical Malpractice Litigation

It is suggested that patients who resort to malpractice litigation following an injury caused by a medical error do so as a result of the physician's reluctance to disclose or explain to the patient what actually happened.[61] Accordingly, following a medical error,

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57. *See* Richard C. Boothman et al., *Nurturing a Culture of Patient Safety and Achieving Lower Malpractice Risk Through Disclosure: Lessons Learned and Future Directions*, FRONTIERS HEALTH SERV. MGMT., Spring 2012, at 13, 15, http://www.med.umich.edu/news/newsroom/Boothman-ACHE-Frontiers.pdf ("The medical community more often views a complaint as a threat, not an opportunity to reach an understanding based on honesty and openness."). The defensive process of malpractice litigation persuades physicians to distance themselves from "acknowledg[ing] mistakes and to avoid talking to an injured patient at all." Phillips-Bute, *supra* note 45, at 336.

58. Bovbjerg, *supra* note 55, at 11. "Some of [these actions are] characterized as negative defensive medicine, that is, not doing ethically or clinically indicated things for legal reasons—like seeing charity patients or providing obstetrical care to high risk patients." *Id.* However, there are many more instances of positive defensive medicine in practice. Examples of positive defensive medicine include "ordering extra tests, doing unneeded procedures, or adding layers of documentation, because those things are perceived to lower risk of lawsuit or facilitate defense if claims are brought." *Id.* at 11–12.

59. Phillips-Bute, *supra* note 45, at 336–37 ("Symptomatic reactions are common among physicians who have been sued for malpractice . . . .").

60. *See* Alicia Gallegos, *Life After Lawsuit: How Doctors Pick Up the Pieces*, AMERICAN MEDICAL NEWS (May 16, 2011), http://www.amednews.com/article/20110516/profession/305169939/4/.

61. Boothman et al., *supra* note 36, at 133; *e.g.*, Ebert, *supra* note 43, at 343 ("[A] patient who does not receive the response he or she was expecting may leave feeling resentful and more likely to desire taking legal action against

patients are motivated to turn to the courts because they feel as if they have not been fully advised about their outcomes, the physician or hospital has failed to take responsibility for the accident, or the patient reasonably believes a same or similar mistake will occur in the future during another patient's care.[62] One study surveyed patients who had been affected by a medical error and found that 24 percent of those patients filed suit because "the physician had failed to be completely honest with them about what happened, allowed them to believe things that were not true, or intentionally misled them."[63]

Generally, patients have reasonable expectations of trust when visiting a hospital or health care provider. Patients expect that when they go in for treatment, surgery, or a simple diagnosis, the providing physician will possess the knowledge and ability to assist them. These same patients also expect that if something were to go wrong while they were under the physician's care, the physician would honestly and willingly explain the situation, regardless of the outcome. A considerable gap exists, however, between current disclosure practices and a patient's expectation that he or she will be notified of a medical error.[64] Therefore, if an in-

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the physician."); Rubel-Seider, *supra* note 2, at 476 ("Patients who experience medical errors seek litigation as a way to hold the hospital responsible for its mistake . . . .").

62. Boothman et al., *supra* note 36, at 133 (citing Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1609–13 (1994)).

63. *Id.* (citing Gerald B. Hickson et al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359, 1361 (1992)). Out of the 127 families who responded to the survey, another 24 percent filed suit because they needed compensation, 33 percent filed because they were advised by an individual outside of the patient's family to take action, another 23 percent of the families filed suit because they were informed by medical personnel that they suffered from poor medical care, 20 percent filed because they realized that as a result of the medical error their child had no future, and 19 percent filed suit out of revenge. FRANK A. SLOAN ET AL., SUING FOR MEDICAL MALPRACTICE 64–65 (1993).

64. *See* Anna C. Mastroianni et al., *The Flaws in State "Apology" and "Disclosure" Laws Dilute Their Intended Impact on Malpractice Suits*, 29 HEALTH AFF. 1611, 1616 (2010), http://content.healthaffairs.org/content/29/9/1611.full.pdf (noting that disclosure requirements are more commonly being codified into state laws). The circumstances surrounding a medical error may be vague, allowing physicians to be uncertain as to what information necessitates

jured patient does not receive a reasonably anticipated forthcoming response from his or her treating physician, the patient is left feeling angry, resentful, and more likely to turn to the adversarial system to compensate for the harm he or she suffered.[65]

III. How Disclosure Programs Aid in Reducing Frivolous Medical Malpractice Litigation

Although historically many health care systems discouraged the disclosure of medical errors for fear of liability, there has recently been a continuous push by the health care industry toward the implementation of full disclosure programs that emphasize transparency.[66] Accordingly, there continue to be prevalent concerns that increased transparency, coupled with apologetic statements made by physicians following a medical error, will result in

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disclosure, essentially adding to the gap between patients' expectations and a provider's actual disclosure. *See also* Thomas H. Gallagher et al., *Choosing Your Words Carefully: How Physicians Would Disclose Harmful Medical Errors to Patients*, 166 ARCHIVES INTERNAL MED. 1585, 1585 (2006), http://archinte.jamanetwork.com/article.aspx?articleid=410785.

65. Ebert, *supra* note 43, at 343. Patients who have been affected or injured by a medical error desire a detailed explanation about what happened, an apology acknowledging that the medical error had an impact on the patient, and a compensation to cover expenses that would not have incurred but for the error. Virginia L. Morrison, *Heyoka: The Shifting Shape of Dispute Resolution in Health Care*, 21 GA. ST. U. L. REV. 931, 947 (2005). "Studies document that the failure to meet these expectations, or poor communications in meeting them, can be perceived as measures of disrespect and may inflict as much or more pain than the injury, serving as the catalyst for taking legal action." *Id.*

66. Phillips-Bute, *supra* note 45, at 337 ("While the health care system has traditionally discouraged disclosures, there is, nonetheless, a steady momentum toward programs that promote transparency and full disclosure of medical errors in the United States and in other western countries."); *see generally* Kelly Bogue, Note, *Innovative Cost Control: An Analysis of Medical Malpractice Reform in Massachusetts*, 9 J. HEALTH & BIOMEDICAL L. 87, 100–03 (2013) (discussing the successes of the disclosure programs that are in effect within New Hampshire and Michigan); Doug Wojcieszak et al., *The Sorry Works! Coalition: Making the Case for Full Disclosure*, 32 JOINT COMMISSION J.. ON QUALITY & PATIENT SAFETY 344 (2006), http://www.jointcommission.org/assets/1/18/Sorry_Works.pdf (promoting the implementation of full disclosure programs and physician apologies in the event of a medical error).

amplified litigation and greater malpractice premiums.[67] These concerns, however, have shown to be unfounded. Research suggests that a provider's reluctance to provide transparent disclosure to a patient injured by a medical error actually increases the frequency of litigation, especially if the patient believes his or her questions have not been answered or that the provider is avoiding accountability for his or her mistake.[68] One study indicated that 37 percent of the patients interviewed who resorted to legal action would have refrained from doing so if they had been provided with an explanation and apology from the physician following the medical error, while another 25 percent of injured patients would have refrained from pursuing a malpractice claim if the physician corrected his or her mistake.[69] Not only does transparent disclosure serve the goal of decreasing frivolous medical malpractice claims, but "[a] system that encourages medical disclosure and transparency through a safe, supportive, and highly effective process that addresses both the needs of the patients and the needs of the physician can also serve the broader goals of increased patient safety."[70]

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67. *See* Troyen A. Brennan, *The Institute of Medicine Report on Medical Errors—Could it do Harm?*, 342 NEW ENG. J. MED. 1123, 1125 (2000); *see also* Phillips-Bute, *supra* note 45, at 338.

68. Phillips-Bute, *supra* note 45, at 337–38 (citing Vincent et al., *supra* note 62, at 1609); *see* Rubel-Seider, *supra* note 2, at 485 (highlighting that a patient is less likely to file a malpractice suit if the patient feels decreased anger towards a physician); *see also* Wojcieszak et al., *supra* note 66, at 344 (explaining that when patients' emotions and concerns are properly addressed, compensation becomes an ancillary issue). The Sorry Works! Coalition is "an organization of doctors, lawyers, insurers, and patient advocates that is dedicated to promoting full disclosure and apologies for medical errors as a 'middle-ground solution' to the medical malpractice crisis." *Id.*

69. Vincent, *supra* note 62, at 1612 tbl.5. The same study also indicated that 17 percent of the patients affected by medical errors would have refrained from resorting to litigation if physician or hospital would have paid the patient compensation for the inflicted injury. *Id.* A similar study found that 24 percent of patients who have encountered a medical error filed suit because the treating physician was dishonest about their mistake, or the patient felt that the physician had intentionally misled them about their injury. *See* Jennifer K. Robbennolt, *Apologies and Medical Error*, 467 CLINICAL ORTHOPAEDICS & RELATED RES. 376, 377 (2009), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628492/pdf/11999_2008_Article_580.pdf (citing Hickson, *supra* note 63, at 1359–63).

70. Phillips-Bute, *supra* note 45, at 337.

Along with full disclosure, an apology can play an important role in fulfilling the patient's expectations and avoiding outrageous medical and insurance costs.[71] It is suggested that there are three essential responses that patients desire following a medical error: (1) information about what happened; (2) a sincere apology; and (3) the assurance that measures to prevent the error from happening to another patient have been taken.[72]

There are several benefits derived from implementing a full disclosure program within a health care system. For example, the medical community is likely to observe improved communications between health care providers and their patients, which aids in mending the physician-patient relationship after a medical error has occurred due to the reinstatement of trust between the parties.[73] Full disclosure programs also have the potential to provide patients with a remedy more quickly than if patients chose to participate in extensive litigation.[74] But, these programs also allow patients to retain the right to sue should negotiations not satisfy their de-

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71. Rubel-Seider, *supra* note 2, at 480; *see also* Thomas H. Gallagher et al., *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 [J]AMA 1001, 1003 (2003), http://www.mitsstools.org/uploads/3/7/7/6/3776466/gallagher_patientphysicianattitudestowardsdisclosureofmedicalerrors.pdf (discussing the conflicting views between patients and physicians regarding the necessity of an apology following a medical error). Apologies have also been used as an important and effective dispute resolution tool in other legal settings such as mediation. *See* Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1208 (1997) (recognizing that a sincere, remorseful apology may aid in satisfying conflict, but cautioning against overestimating the power of a simple "I'm sorry").

72. Phillips-Bute, *supra* note 45, at 338; *see also* Taft, *supra* note 25, at 63–64. ("In the face of medical error, the physician must first take time to identify what went wrong and why, a process that must take place before communicating with the patient or the patient's family. This is a time not only for internal reflection but also a time for communications with the medical team, mentors, and colleagues."). These steps are imperative because not only do they "equip[] the physician to communicate with clarity," they also prepare the physician to communicate the information through an authentic apology. *Id.* at 64.

73. Rubel-Seider, *supra* note 2, at 486. Healing for the patient begins once the injury is disclosed and an apology is made by the physician, but the nondisclosure of an error "interrupts the essential ingredient of trust" in a doctor patient relationship. Taft, *supra* note 25, at 66.

74. Rubel-Seider, *supra* note 2, at 486.

mands.[75] By departing from the "deny and defend" approach and heeding the benefits of a full disclosure program, physicians and hospitals are able to focus on moving forward with their patients' anticipated care.[76]

Due to the importance of transparent disclosure and genuine apologies following a medical error, medical schools are beginning to "incorporate training about error disclosure and apologies into the curriculum."[77] Perhaps the most important reasons to encourage the teaching of patient safety and error disclosure policies to medical students are to prevent future error and improve a patient's quality of care.[78] However, despite the fact that some medical schools have implemented a curriculum that teaches students to both disclose medical errors and apologize to patients, medical students still find it difficult to disclose their mistakes because they are "less sure of their skills" and are especially concerned about tarnishing their reputations as physicians.[79] Because errors are an inevitable part of medicine, it is essential that medical professionals are trained and mentored early on in their medical career so that they will learn how to properly disclose errors to

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75. *Id.* For example, New Hampshire recently implemented a statutory early offer and disclosure program in which, following an adverse event, allows patients to either pursue litigation or "enter into an early offer process," which entails the patient sending a "written notice of injury" to the provider, and requires the patient to waive certain legal rights, such as, the right to receive payment for non-economic damages. Bogue, *supra* note 66, at 103; *see also* N.H. REV. STAT. ANN. § 519-C:2 (Supp. 2012). The provider has ninety days to respond to the written notice with a financial offer, and the patient subsequently has sixty days to either accept the provider's offer by signing a waiver or request a hearing. Bogue, *supra* note 66, at 103.

76. Bogue, *supra* note 66, at 101. Physicians should be able to focus on providing the best care to their patients based on their past training and education rather than deciphering ways to avoid liability in the case of a medical error. *Id.* at 93.

77. Robbennolt, *supra* note 69, at 380.

78. Joseph L. Halbach & Laurie L. Sullivan, *Teaching Medical Students About Medical Errors and Patient Safety: Evaluation of a Required Curriculum*, 80 ACAD. MED. 600, 600 (2005).

79. Dhruv Khullar, *When Medical Students Make Errors*, N.Y. TIMES (May 15, 2014, 10:35 AM), http://well.blogs.nytimes.com/2014/05/15/when-medical-students-make-errors/?_r=0.

their patients.[80] This early training will prove beneficial because transparent disclosures and sincere apologies are characteristics embedded in current hospital disclosure programs today.[81]

IV. SUCCESSFUL DISCLOSURE PROGRAMS IMPLEMENTED IN OTHER STATES

A. Veterans Affairs Medical Center in Lexington, Kentucky

The Veterans Affairs Medical Center ("VA") in Lexington, Kentucky, has implemented a landmark disclosure program[82] that consists of high standards for transparency and disclosure—a different approach to medical errors than most hospitals have chosen to adopt.[83] Its program is inherently proactive as it emphasizes extreme honesty when handling medical errors.[84] The driving force behind the implementation of the VA's policy "was to maintain a care-giving relationship toward the patient following medical error rather than adopting an adversarial one."[85] The VA's disclosure program is comprised of several practical steps.

First, once a patient experiences a harmful medical error, the hospital encourages providers to report those errors to its risk management committee ("the Committee").[86] After the error is reported, the Committee immediately investigates the mistake and attempts to determine its root cause.[87] The Committee considers

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80. *See id.*; *see also* Darrell G. Kirch & Philip G. Boysen, *Changing the Culture in Medical Education to Teach Patient Safety*, 29 HEALTH AFF. 1600, 1601 (2010), http://content.healthaffairs.org/content/29/9/1600.abstract ("To achieve the culture change necessary to improve patient safety, medical schools and clinical practices must work together more effectively.").

81. *But see* Kirch & Boysen, *supra* note 80, at 1600 ("Medical education alone cannot accomplish this shift [in advancing patient safety].").

82. In 1987, after losing two colossal malpractice claims costing upward of $1.5 million, the VA decided that it was time for a change in the way the institution dealt with medical errors, thus implementing a full disclosure program. *See* Phillips-Bute, *supra* note 45, at 339–40.

83. Rubel-Seider, *supra* note 2, at 487.

84. *Id.* The VA is so proactive in their disclosure that they are known to "call families after discharge to explain that an error occurred." *Id.*

85. Jonathan R. Cohen, *Apology and Organizations: Exploring an Example From Medical Practice*, 27 FORDHAM URB. L. J. 1447, 1451 (2000).

86. *See id.* at 1452.

87. *Id.*

the possibility of both a "systemic" error and individual negligence on behalf of the providing physician.[88] Once it is determined that the patient has suffered harm, the physician fully informs the patient of the medical error.[89] After the disclosure is made, the Committee discusses avenues available to the hospital that will assist the affected patient through further medical treatment, including necessary compensation.[90] Once a the Committee develops a plan of action, the providing clinicians and Committee members set up a face-to-face meeting with the patient, his or her family, and the patient's legal counsel.[91] If the Committee's investigation indicates that the hospital or its physicians are at fault, the patient is afforded an apology.[92] If the Committee finds that the hospital or its employees are to blame for the patient's injuries, the Committee offers the patient both a fair settlement offer and an apology.[93]

Because the approach taken by the VA implicates the necessary elements of a full disclosure program,[94] the hospital has had the ability to minimize its exposure to litigation because patients and their families are not as angry when learning of a medical error.[95] The VA experienced financial improvement after the new disclosure program took effect.[96] These improvements were con-

88. *Id.* If the hospital's risk management committee finds that a systemic error caused the harm, efforts to prevent similar, future systemic mistakes are taken. *Id.*

89. *Id.* The physician must disclose the error to patient regardless whether the patient has knowledge of the harm. *Id.*

90. *See id.* at 1453.

91. *Id.*

92. *Id.* During the meeting, the physicians alongside the committee members discuss with the patient different approaches that could be taken to further aid the patient medically, and also consider any benefits to which the patient may be entitled. *Id.*

93. *Id.*

94. *Id.*

95. *See id.* at 1449 ("By going out of its way to be open and honest with patients and their families, the [VA] hospital has found that it is minimizing its legal exposure because families are not as angry when they learn of a medical error.").

96. *Id.* at 1453 ("From 1990 through 1996, the hospital paid an average of only $190,113 per year in malpractice claims, with an average (mean) payment of $15,622 per claim.").

sidered substantial when compared to the previous $1.5 million malpractice verdicts rendered against the VA from 1985 through 1986.[97] The VA's financial improvements placed it in the lowest quartile of comparable VA hospitals for malpractice payments during a seven-year period.[98]

However, the VA system possesses a distinctive feature that has contributed to its success. Contrary to many private hospitals that carry third-party liability insurance, the VA is a self-insured organization that directly bears its liability costs.[99] When an employer hospital becomes self-insured, the hospital pays for "individual employee health claims out of cash flow rather than as a monthly fixed premium to a health insurance carrier."[100] Being self-insured potentially promotes the affording of apologies to patients while third-party insurers may possibly "give little weight to some . . . benefits of [an] apology that an organization may value."[101] Further, being self-insured allows the VA more control in how a hospital decides to handle medical errors.[102] This is because most third-party insurance contracts impose a duty on the insured hospital to comply with the third-party insurance policy once involved with the defense of a claim.[103]

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97. *Id.*

98. *Id.* "The Lexington VA's average payout was $16,000 per settlement, versus the national VA average of $98,000 per settlement, and only two lawsuits went to trial during a 10-year period." Wojcieszak et al., *supra* note 66, at 346.

99. Wojcieszak, *supra* note 66, at 346; *see also* Greg Bordonaro, *Hospitals Battle Medical Malpractice Costs*, HARTFORDBUSINESSS.COM (Apr. 28, 2014), http://www.hartfordbusiness.com/article/20140428/PRINTEDITION/304249935/hospitals-battle-medical-malpractice-costs ("Being self-insured . . . also gives hospitals greater control over malpractice premiums, which could also impact total expenses.").

100. Joseph Berardo, Jr., *Understanding Benefits of Self-Insurance and Role of Hospitals in Helping Employers Lower Claims Costs*, BECKER'S HOSPITAL REVIEW (Dec. 31, 2013), http://www.beckershospitalreview.com/strategic-planning/understanding-benefits-of-self-insurance-and-role-of-hospitals-in-helping-employers-lower-claims-costs.html. Additionally, when a hospital becomes self-insured, it is afforded greater flexibility in setting strategic goals, increased financial control, maximized internal resources, and improved decision-making. *Id.*

101. Cohen, *supra* note 85, at 1471.

102. *Id.*

103. *Id.*

B. University of Michigan Health System Approach

The University of Michigan Health System ("UMHS") has implemented perhaps one of the most compelling disclosure program models in the country.[104] UMHS's disclosure policies, fashioned closely after those of the VA system, involve several stages. Following the occurrence of a medical error or near miss,[105] the physician communicates openly and directly with the patient or his or her medical representative.[106] The risk management team reviews the complaint made by the patient in order to determine what happened.[107] If the affected patient has retained legal counsel, the risk management team offers to meet with both parties to review the patient's care and to answer any questions.[108] If through an investigation the risk management team determines that the patient's care was unreasonable, the institution admits its mis-

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104. When the program was implemented in 2001, three principal goals molded the institution's response to patient injuries following medical errors: (1) compensate quickly and fairly when unreasonable care causes injury; (2) defend medically reasonable care vigorously; and (3) reduce patient injures (and therefore claims) by learning form patients' experiences. Boothman et al., *supra* note 36, at 139; *see also* Richard Boothman & Margo M. Hoyler, *The University of Michigan's Early Disclosure and Offer Program*, BULL. AM. C. SURGEONS (Mar. 2, 2013), http://bulletin.facs.org/2013/03/michigans-early-disclosure/# ("The UMHS model has been generally well-received in Michigan and elsewhere. . . . Nationally, the model has been covered by major newspapers and newsmagazines.").

105. The term "near miss" is "used to describe any process variation that did not affect an outcome but for which a recurrence carries a significant change of a serious adverse outcome." COMPREHENSIVE ACCREDITATION MANUAL FOR LABORATORY AND POINT-OF-CARE TESTING, JOINT COMMISSION ON ACCREDITATION OF HEALTHCARE ORGANIZATIONS at SE-4 (2011), http://www.jointcommission.org/assets/1/6/2011_CAMLAB_SE.pdf.

106. *The Michigan Model: Medical Malpractice and Patient Safety at UMHS*, U. MICH., http://www.uofmhealth.org/michigan-model-medical-malpractice-and-patient-safety-umhs (last visited Feb. 5, 2016).

107. *Id.* This step includes a peer review process, which involves professionals in similar practices. *Id.* The risk management team also acknowledges any opportunities for improvement that would prevent a similar event in the future. *Id.*

108. *Id.* This step is taken regardless of whether the parties provided the institution with a notice of intent to file suit. *Id.*

take and apologizes to the patient.[109] If the team's investigation concludes that the patient's care was medically reasonable, the team still extends an offer to meet with the patient and his or her counsel to explain the situation.[110] If a patient responds by filing suit, the risk management team vigorously defends its position throughout the litigation process.[111]

Similar to the VA, UMHS has several advantages over other health care systems, which ultimately aid in its program's efficiency. UMHS is a self-insured health system, "which allow[s] for consistency and alignment of ethical and financial motivation between the hospitals, care providers, and insurer."[112] Further, Michigan law encourages hospitals and health care institutions to respond proactively to patient injuries by communicating with the affected patients and managing the consequences of a medical error as quickly and efficiently as possible.[113] Accordingly, UMHS benefits from Michigan's statutory six-month pre-suit notice period, which allows the facility time to investigate the alleged claims and engage the patient and the patient's family in possible settlement negotiations, if appropriate.[114] Despite speculation that transparency increases malpractice claims, UMHS data suggests

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109. *Id.* If the patient was injured as a result of an error, the team works with the patient and his or her legal counsel to reach a mutual agreement about a resolution. *Id.* This does not imply a settlement is going to occur, but if it were to occur, the institution compensates quickly and fairly. *Id.* UMHS views care as reasonable when it meets professional and institutional expectations, and such a determination is fundamentally clinical rather than legal. Boothman et al, *supra* note 57, at 21.

110. *See The Michigan Model*, *supra* note 106. It is not required, but many times the providing physician will participate in the mutual discussion. *Id.* The physician can aid in explaining to the patient the care they received. *Id.*

111. *See id.* ("No matter what happens: We will seek to learn from the experience, educate our staff, and make changes to the systems and processes that were involved in the care that prompted the complaint.").

112. *See* Boothman et al., *supra* note 36, at 137 (highlighting the benefits of maintaining a self-insured facility).

113. *See id.* ("Michigan laws encourage proactive responses to patient injuries and claims.").

114. *See id.* Under Michigan law, before filing a medical malpractice suit, a plaintiff must serve the potential defendants with written specifics of the claim he or she intends to file at least 182 days before the action is commenced. MICH. COMP. LAWS § 600.2912b (2015).

that its disclosure policies have led to a substantial decrease in litigation.[115] After the implementation of the program, the number of new claims against the hospital system fell from 136 in 1999 to 61 in 2006.[116] Additionally, claims were resolved more quickly with processing times shifting from an average of 20.3 months to 8 months overall, while litigation expenses were also cut in half.[117] Patients' satisfaction with UHMS's policy of explanatory disclosure and an apology following a medical error is perhaps an explanation as to why the number of lawsuits against the health system continues to decrease.[118] These policies coupled with Michigan's favorable malpractice laws may be the key to fixing the broken medical malpractice system.

V. PROPOSED AMENDMENT TO TENNESSEE'S SYMPATHY LAW TO PROTECT APOLOGETIC EXPRESSIONS AND FAULT ADMITTING STATEMENTS MADE BY HEALTH CARE PROVIDERS

Designing and implementing an entirely new statutory scheme in order to mandate the implementation of full disclosure programs for hospitals and health care providers within Tennessee is a daunting task. Instead, Tennessee can aid in encouraging and incentivizing its health care providers and hospital systems to implement full disclosure programs by amending its existing law to create an environment that is conducive to the existence of such programs. The proposed amendment would give health care providers and hospital systems in Tennessee a greater incentive to engage in full disclosure programs by protecting apologetic expressions and statements of fault made specifically by health care

115. *See* Boothman et al., *supra* note 36, at 145 ("Although singular factors giving rise to decreased claims cannot be identified precisely, clearly, transparency at UMHS has not been the catastrophe predicted—and it has yielded unquestionable benefits that enable UMHS and its staff to deliver safer and better care.").

116. *Id.* at 143.

117. Phillips-Bute, *supra* note 45, at 341. *But see* Boothman et al., *supra* note 36, at 144 (discussing that transparency alone is not responsible for the downwards trend of medical malpractice claims).

118. Tina Reed, *University of Michigan's Policy Admitting Medical Errors Reduced Costs, Study Finds*, THE ANN ARBOR NEWS (Aug. 16, 2010, 6:22 PM), http://www.annarbor.com/news/university-of-michigans-medical-error-policy-effectively-cut-costs-study-finds/.

providers following a medical error. This statutory amendment would provide physicians and hospitals greater protections and work to decrease frivolous medical malpractice lawsuits.

In 2002, the Tennessee legislature originally enacted statutory disclosure requirements applicable to all physicians and medical facilities following the occurrence of an "unusual event," which was Tennessee's term for medical error.[119] The statute defined "unusual event" as "an unexpected occurrence or accident resulting in death or life-threatening or serious injury to a patient that is not related to a natural course of the patient's illness or underlying condition."[120] The statute required that "[t]he affected patient and the patient's family, as may be appropriate, shall also be notified of the [unusual] event or incident by the facility."[121] Thus, if during a

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119. TENN. CODE ANN. § 68-11-211(d)(1) (2007) (amended 2009).

120. *Id.* § 68-11-211(c)(7). "An unusual event also includes an incident resulting in the abuse of a patient." *Id.*

121. *Id.* § 68-11-211(d)(1). In order to provide guidance to medical providers, the statute listed examples of situations that could result in unusual events:

> The following represent circumstances that could result in an unusual event that is an unexpected occurrence or accident resulting in death or life-threatening or serious injury to a patient, not related to a natural course of the patient's illness or underlying condition. The circumstances that could result in an unusual event include, but are not limited to:
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> (A) Medication errors;
> (B) Aspiration in a non-intubated patient related to conscious or moderate sedation;
> (C) Intravascular catheter related events, including necrosis or infection requiring repair, or intravascular catheter related pneumothorax;
> (D) Volume overload leading to pulmonary edema;
> (E) Blood transfusion reactions, use of wrong type of blood or delivery of blood to the wrong patient;
> (F) Perioperative or periprocedural related complications that occur within forty-eight (48) hours of the operation or the procedure
> . . .
> (G) Burns of a second or third degree;
> (H) Falls resulting in radiologically proven fractures, subdural or epidural hematoma, cerebral contusion, traumatic subarachnoid hemorrhage, or internal trauma, but does not include fractures resulting from pathological conditions; and

patient's treatment, the physician or member of the treating team made a mistake that ultimately resulted in a medical error, the patient was entitled to be informed of such event. In 2009, the Tennessee legislature amended the statute, and disclosures of "unusual events" are no longer mandatory.[122] Currently, the statute only requires a medical facility to notify a patient and a patient's family about incidents of "abuse, neglect, and misappropriation."[123]

Although the Tennessee legislature removed the statutory requirement that medical providers disclose medical errors to their patients, transparency will still be encouraged if the legislature amends Tennessee's apology law to include statements of fault made by health care providers following a medical error. This strategy would encourage disclosure of medical errors to affected patients and their families without having to recreate a coercive mandatory disclosure statute. Such amendment would also cultivate broader protection for health care providers and ultimately create an environment that incentivizes a more transparent and honest disclosure following a medical error.

A sincere apology offers several advantages in the health care arena.[124] An apology has positive emotional and psychological effects on both the wrongdoer and the victim.[125] Although an

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> (I) Procedure related incidents, regardless of setting and within thirty (30) days of the procedure and includes readmissions

Id. § 68-11-211(d)(1)(2).

122. TENN. CODE ANN. § 68-11-211 (2012).

123. *Id.* § 68-11-211(c).

124. The value of an apology is not a recent revelation in the health care industry. Many medical organizations have emphasized the importance of honest communications and apologies between patients and physicians. *See* Nicole Saitta & Samuel D. Hodge, Jr., *Efficacy of a Physician's Words of Empathy: An Overview of State Apology Laws*, 112 J. AM. OSTEOPATH ASS'N 302, 302 (2012), http://jaoa.org/article.aspx?articleid=2094499. For example, section 2 of the American Osteopathic Association's Code of Ethics states, "The physician shall give a candid account of the patient's condition to the patient or to those responsible for the patient's care." *AOA Code of Ethics*, AM. OSTEOPATH ASS'N, http://www.osteopathic.org/inside-aoa/about/leadership/Pages/aoa-code-of-ethics.aspx (last visited Dec. 22, 2014).

125. *See* Nicole Marie Saitta & Samuel D. Hodge, Jr., *Is it Unrealistic to Expect a Doctor to Apologize for an Unforeseen Medical Complication?—A Primer on Apologies Laws*, 82 PA BAR. ASS'N. Q. 93, 94 (2011); *see also* Beverly Engel, *The Power of Apology*, PSYCHOL. TODAY, July 1, 2002,

apology alone cannot undo the wrongful act itself, an apology has the effect of placating an individual's anger toward the wrongdoer by lessening the negative effects of that action.[126] Frequently, apologies work as efficient dispute resolution tools because forgiveness often depends on an apology.[127] If a physician or hospital representative offers a sincere apology to the patient for harm they caused, the patient has an opportunity to forgive. Additionally, ethical and professional duties urge physicians and hospital representatives to take responsibility for their actions, regardless of the impending consequences.[128] A physician's fault-admitting statement may help prevent future, similar medical mistakes.[129] In order to understand the root cause of a medical error and prevent a future occurrence, an open and honest discussion of the error must first take place.[130] Further, a fault admitting statement made by a physician to a patient aids in decreasing the patient's anger towards the physician for his or her mistake.[131]

It stands to reason that if a patient has the opportunity to forgive the physician for injuries they experienced, the likelihood of the patient filing a frivolous malpractice suit decreases.[132]

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http://www.psychologytoday.com/articles/200208/the-power-apology ("[An apology] is an important ritual, a way of showing respect and empathy for the wronged person.").

126. *See* Saitta & Hodge, Jr., *supra* note 125, at 94.

127. *See* Rubel-Seider, *supra* note 2, at 481.

128. *See* Aviva A. Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221, 264 http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1554&context=facpub ("By disclosing and apologizing, a doctor is able to fulfill the physician's ethical responsibility of being truthful and loyal.").

129. If an honest, fault-admitting statement is made to a patient, the hospital may use that information following a medical error to prevent it from occurring down the road, ultimately increasing patient safety. Ebert, *supra* note 43, at 358.

130. Lucinda E. Jesson & Peter B. Knapp, *My Lawyer Told Me to Say I'm Sorry: Lawyers, Doctors, and Medical Apologies*, 35 WM. MITCHELL L. REV. 1410, 1417 (2009).

131. *See* Ebert, *supra* note 43, at 358.

132. *See* Saitta & Hodge, Jr., *supra* note 124, at 303 ("Monetarily, an apology decreases the financial consequences that result from litigating a medical malpractice claim."); *see also* Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 485–86 (2003). Following a survey study conducted in order to examine the effects of sincere

However, the manner and tone of a health care provider's apologetic statement to a patient is critical; an apology that truly accepts responsibility for past actions is considered more effective than a statement simply acknowledging empathy.[133] Generally, there are three essential elements to an effective apology: an expression of sympathy for the challenges or sufferings that the patient is experiencing, an admission of fault, and an expression of remorse or regret.[134]

Still, laws among the states vary widely regarding the evidentiary protections afforded to physicians and hospital representatives for apologetic statements made to patients following a medical error.[135] One of the primary variations among state laws is

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apologies on a patient's willingness to accept a settlement offer following a medical error, the results suggested that when provided a full apology, 73 percent of surveyed patients were inclined to accept the offer, while only 52 percent would accept in the absence of an apology. *Id.*

133. *See* Saitta & Hodge, Jr., *supra* note 125, at 94.

134. *See* Rubel-Seider, *supra* note 2, at 481; *see also* Robbennolt, *supra* note 132, at 486 (acknowledging that apologies can be defined in various ways and consist of various elements).

> In its fullest form, the apology has several elements: expression of embarrassment and chagrin; classification that one known what conduct had been expected and sympathizes with the application of negative sanction; verbal rejection, repudiation, and disavowal of the wrong way of behaving along with vilification of the self that so behaved; espousal of the right way and an avowal henceforth forth to pursue that course; performance of penance and the volunteering of restitution.

Id. However, other definitions of an effective apology require fewer, simpler elements. For instance, Nicholas Tavuchis proposes that an apology must at least consist of an "acknowledgement of the legitimacy of the violated rule, admission of fault and responsibility for its violation, and the expression of genuine regret and remorse for the harm done." NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION 3 (Stanford Univ. Press ed., 1991). Despite its effectiveness, it is clear that not every definition of an effective apology requires an admission of fault on behalf of the wrongdoer.

135. Although many state apology laws are catalogued under a particular state's rules of evidence relating to medical errors, some states protect apologies irrespective of whether such statements pertain to a medical malpractice claim. Sattia, *supra* note 124, at 306. Tennessee's apology law applies broadly across all industries and is not just limited to statements made by medical providers. *See* TENN. R. EVID. 409.1(a). Along with Tennessee, ten other states have adopted an apology law with general applicability, including: California, Flori-

whether a state's statutory protections for apologetic gestures also include safeguards for a physician's statements of fault.[136] A fault-admitting statement includes language such as, "I am sorry about what happened, this was my fault." A majority of states have enacted statutory protections for *apologies* made by physicians and hospital representatives, but most of these states do not protect a medical provider's *admissions of fault*.[137] This is the case even if an admission of fault is integrated into a physician's sincere expression of sympathy.[138] Thus, it is important that physicians know what types of empathetic statements are protected under the laws of their state so that they may avoid misspeaking and inadvertently increasing the likelihood of liability following a medical error. Currently, only a few states have enacted apology laws protecting medical providers' statements of fault from being used in malpractice actions. These states include: Arizona,[139] South Caro-

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da, Hawaii, Indiana, Iowa, Massachusetts, Missouri, Nebraska, Texas, and Washington. *See* Mastroianni, *supra*, note 64, at 1619 n.37.

136. *See* Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819, 820 (2002) (discussing the ability of fault admitting apologies to alter the outcome of malpractice litigation if not afforded protection); s*ee also* Saitta & Hodge, Jr., *supra* note 124, at 303 (explaining that patients have greater respect for physicians when their apologies contain admissions of fault, thereby increasing patients' willingness to settle).

137. *See* Davis v. Wooster Orthopedics & Sports Med., Inc., 952 N.E.2d 1216 (Ohio Ct. App. 2011) (holding that the term "apology" as used in the Ohio statute barring admissions of a health care provider's apologies for an unanticipated outcomes of medical care does not include admissions of fault); *see also* Lawrence v. MountainStar Healthcare, 320 P.3d 1037, 1051 (Utah Ct. App. 2014) (holding that Utah's apology law does not bar statements of fault made by a medical provider following an unanticipated outcome of medical care); *see also* Ebert, *supra* note 43, at 357.

138. *See* Ebert, *supra* note 43, at 357.

139. In full, Arizona's full apology law protects,

> [A]ny statement, affirmation, gesture or conduct expressing apology, *responsibility*, liability, sympathy, commiseration, condolence, compassion or a general sense of benevolence that was made by a health care provider or an employee of a health care provider to the patient, a relative of the patient, the patient's survivors or a health care decision maker for the patient and that relates to the discomfort, pain, suffering, injury or death of the patient as the result of the unanticipated outcome of medical care is inadmissible as evidence of an admission of liability or as evidence of an admission against interest.

lina,[140] Connecticut,[141] Georgia,[142] Washington,[143] and Colorado.[144] These particular states reward those medical professionals

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Ariz. Rev. Stat. § 12-2605 (West Supp. 2012) (emphasis added). Arizona's statute is one relating specifically to unanticipated outcomes of a patient's medical care. *Id.*

140. South Carolina's apology statute is construed as a full apology law, protecting,

> [A]ny and all statements, affirmations, gestures, activities, or conduct expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence which are made by a health care provider, an employee or agent of a health care provider, or by a health care institution to the patient, a relative of the patient, or a representative of the patient and which are made during a designated meeting to discuss the unanticipated outcome shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest.

S.C. CODE ANN. § 19-1-190(D) (West Supp. 2012). Thus, both apologies and statements of fault made my medical providers following unanticipated medical outcomes are not admissible to prove that the physician is liable.

141. Connecticut has adopted a full apology law, covering both apologies and statements of fault. The relevant statutes reads,

> [A]ny and all statements, affirmations, gestures or conduct expressing apology, *fault*, sympathy, commiseration, condolence, compassion or a general sense of benevolence that are made by a health care provider or an employee of a health care provider to the alleged victim, a relative of the alleged victim or a representative of the alleged victim and that relate to the discomfort, pain, suffering, injury or death of the alleged victim as a result of the unanticipated outcome of medical care shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest.

CONN. GEN. STAT ANN. § 52-184d(b) (West 2013) (emphasis added).

142. Georgia is also considered to have implemented a full apology law, protecting,

> [A]ny and all statements, affirmations, gestures, activities, or conduct expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence which are made by a health care provider or an employee or agent of a health care provider to the patient, a relative of the patient, or a representative of the patient and which relate to the unanticipated outcome shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest.

who hold themselves accountable for their actions by shielding them from liability based solely on their fault admitting statements.[145] For example, according to the clear language found in Colorado's apology law, which strictly applies to expressions made by medical providers, statements of fault are inadmissible as later evidence of liability.[146] Colorado's statute reads:

> [A]ny and all statements, affirmations, gestures, or conduct expressing apology *fault*, sympathy, commiseration, condolences, compassion, or a general sense of benevolence which are made by a health care provider or an employee of a health care provider to the alleged victim, a relative of an alleged victim, or a representative of the alleged victim and

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GA. CODE ANN. § 24-3-37.1(c) (2014). Although Georgia's statute does not explicitly address statements of fault, a Georgia state appeals court previously held that a physician's statement, "this was my fault," clearly fell within the language and scope of the statute's protections. *See* Airasian v. Shakk, 657 S.E.2d 600, 602 (Ga. Ct. App. 2008).

143. The state of Washington has also adopted a full apology law, protecting both apologetic expressions and statements of fault made by health care providers following a medical error. The statute protects, "(i) Any statement, affirmation, gesture, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence." WASH. REV. CODE § 5.64.010(2)(b)(i) (2014).

144. COLO. REV. STAT. ANN. § 13-25-135(1) (2014). *See* David Doyle, *Apologizing for Medical Missteps: Whether it's a Mistake for Physicians,* PHYSICIANS PRACTICE (Feb. 22, 2014), http://www.physicianspractice.com/blog/apologizing-for-medical-missteps-whether-its-a-mistake-for-physicians.
Many states have enacted partial apology laws, protecting only statements of "compassion, commiseration, condolence, or sympathy." *Id.* However, states that have implemented full apology laws protect against all types of statements, such as, "statements of fault, errors, liability, or mistake." *Id.*

145. There are four overlapping reasons supporting the contention that fault-admitting statements should be statutorily protected. First, it encourages parties to settle, avoiding the costly expenses of litigation. Second, apologies admitting fault promote open, honest, and direct communication with the patient after the injury. Third, fault-admitting statements allow the physician or hospital to express sympathy and acknowledge their willingness to admit that a mistake was made. Finally, protecting fault admitting encourages individuals to engage in morally correct behavior by apologizing after they have injured a patient. *See* Cohen, *supra* note 136, at 841.

146. COLO. REV. STAT. ANN. § 13-25-135(1) (2014).

> which relate to the discomfort, pain, suffering, injury or death of the alleged victim as the result of the unanticipated outcome of a medical care shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest.[147]

Colorado's statutory language is precise, leaving physicians unable to speculate as to what types of apologetic statements and conduct are protected. This certainty of protection is likely to make physicians more willing to provide a patient affected by a medical error with a sincere apology, owning responsibility and mending the physician-patient relationship.

Statutory clarity in apology laws is important because if the language is ambiguous, the physician could, for example, mistakenly convey an admission of fault to the affected patient and that statement could potentially be used against them as evidence of liability if not protected by the state's applicable apology statute. Further, if physicians have to concern themselves with "the exact phrasing necessary to avoid a lawsuit," many physicians will decide to suspend or omit an apology completely.[148]

Tennessee adopted a partial apology law with general applicability, protecting only expressions of sympathy and benevolence in all civil settings and not specifically statements made by medical providers.[149] Tennessee's current statute has the potential

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147. *Id.* (emphasis added). Connecticut has a similar full apology law that also expressly protects statements of fault, making it a clear and concise model that could be referenced by the Tennessee legislature when broadening Tennessee's apology law. *See* CONN. GEN. STAT. ANN §52-184(d) (2014).

148. *See* Maria Pearlmutter, *Physician Apologies and General Admissions of Fault: Amending the Federal Rules of Evidence,* 72 OHIO ST. L.J. 687, 702 (2011); *see also* William M. McDonnell & Elizabeth Guenther, *Narrative Review: Do State Laws Make it Easier to Say "I'm Sorry?"*, 149 ANNALS INTERNAL MED. 811, 812 (2008) ("Unless the scope, availably, and potential benefits of existing apology laws are presented to physicians in a clear, succinct manner, such laws are unlikely to affect physicians disclosure an apology.").

149. TENN. R. EVID. 409.1(a) (2014); *see* Stephen E. Raper, *No Role for Apology: Remedial Work and the Problem of Medical Injury*, 11 YALE J. HEALTH POL'Y L. & ETHICS 269, 318 (2011). Contrary to a full apology, "[a] 'partial apology' is one in which the offending party expresses sympathy and hope for rapid recovery, but does not accept responsibility for the accident causing the injury." Michael B. Runnels, *Apologies All Around: Advocating Federal*

to cause physicians and medical providers to be skeptical about delivering apologies to affected patients for fear of inadvertently saying something that may be used against them in a later lawsuit. Since the absence of an apology can lead to angered patients and the increased likelihood of frivolous malpractice actions being filed against the physician or hospital, the Tennessee legislature should amend Tennessee's existing partial apology law by adding a separate, full apology provision, similar to Colorado's apology law. This provision should specifically provide protections to health care providers' apologetic and fault-admitting statements. By broadening Tennessee's apology law, hospitals and medical providers within the state would likely be more willing to implement full disclosure programs within their facilities due to the enhanced protections of statements made during communication with affected patients. As written, the current Tennessee apology law reads as follows:

> That portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action. *A statement of fault that is part of, or in addition to, any of the above shall not be inadmissible because of this Rule*.[150]

Because Tennessee's current apology law is one of general applicability to all individuals in various types of civil actions, the Tennessee legislature should amend the statute by adding a separate provision specifically addressing statements made by medical providers. The language within this provision should protect not only benevolent gestures, but also apologetic expressions and statements of fault in order to eliminate the gray area and encourage a fuller, more honest disclosure process. Patients and physicians in Tennessee would gain significant benefits from the addi-

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Protection for the Full Apology in Civil Cases, 46 SAN DIEGO L. REV. 137, 149 (2009).

150. TENN. R. EVID. 409.1(a) (2014) (emphasis added).

tion of a full apology provision as compared to the current partial apology law. In effect, this provision would help create an environment that encourages the implementation of disclosure programs within Tennessee's medical facilities.[151] The following section to the Tennessee apology statute should be added:

> (b) That portion of statements, writings, or benevolent gestures expressing apology, fault, sympathy, commiseration, condolences, or compassion, which are made by a health care provider or an employee of a health care provider to a patient or to a patient's family and which relate to the pain, suffering, injury, or death of that person shall be inadmissible as evidence of an admission of liability in a civil action.

Adding this additional, separate provision addressing only statements made by health care providers creates differentiation between protections afforded in the general civil setting and those made by a health care provider in a medical setting. With the additional amendment, the Tennessee statute still provides protection for sympathetic statements and benevolent gestures in general civil actions, but also provides greater protection for health care providers' statements following a medical error, allowing physicians more leeway when providing a genuine, full apology, thus decreasing the likelihood of litigation.[152] This broader apology law will support the initiative that hospitals and health care facilities within Tennessee adopt full disclosure programs.

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151. *See* Pearlmutter, *supra* note 148, at 697 ("A full apology was seen as more moral and regretful, and the giver of such an apology was perceived to be less likely to offend in the future."); s*ee also* Jennifer K. Robbennolt*, Apologies and Legal Settlement: An Empirical Examination,* 102 MICH. L. REV. 460, 487 (2003) (explaining the findings of a study that showed full apologies were more sufficient than a partial apology which only expressed sympathy).

152. *But see* Mastroianni et al., *supra* note 64, at 1616 (explaining that even after a sincere apology, some patients will still choose to file suit, especially if the "injury entails large economic losses and there is no offer of compensation").

VI. PROPOSED AMENDMENT TO EXPAND TENNESSEE'S PRE-SUIT NOTICE PERIOD FOR A HEALTH CARE LIABILITY ACTION

In 2008, the Tennessee legislature amended the late Tennessee Medical Malpractice Act[153] by enacting a new pre-suit notice statute. This statute requires a plaintiff patient in a health care liability action to give the defendant health care provider pre-suit notice of his or her claim at least 60 days prior to filing the initial complaint with the court.[154] If a plaintiff complies with the requirements of this statute, the plaintiff's statute of limitations for his or her claim is extended by 120 days.[155] The pre-suit notice period is occasionally referred to as a "cooling off period" because it allows both the plaintiff and the defendant time to analyze and investigate the issue at hand while also encouraging a possible settlement.[156] During this "cooling off period" the plaintiff may become less angered and have the opportunity to process the situation rationally. A longer statutory pre-suit notice period before filing suit allows physicians and health care providers to more thoroughly review reported claims and hold disclosure meetings without the

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153. During a tort reform in 2011, the Tennessee Medical Malpractice Act was replaced with the Tennessee Civil Justice Act of 2011. The Tennessee Civil Justice Act currently governs all health care liability actions within the state of Tennessee that accrued on or after June 16, 2011. The initial 60 day pre-suit notice requirement established in the Medical Malpractice Act is still currently in effect. *See* Myers v. AMISUB (SFH), Inc., 382 S.W.3d 300, 308–09 (Tenn. 2012).

154. TENN. CODE ANN. § 29-26-121(a)(1) (2014). The statute further sets forth what information the pre-suit notice must include:

> (A) The full name and date of birth of the patient whose treatment is at issue; (B) The name and address of the claimant authorizing the notice and the relationship to the patient, if the notice is not sent by the patient; (C) The name and address of the attorney sending the notice, if applicable; (D) A list of the name and address of all providers being sent a notice; and (E) A HIPPA complaint medical authorization permitting the provider receiving the notice to obtain a complete medical records from each other provider being sent a notice.

Id. § 29-26-121(a)(2).

155. TENN. CODE ANN. § 29-26-121(c) (2014). The statute also delineates how the notice may be delivered to the defendant via personal delivery or mail in order to qualify for the extended statute of limitations. *Id.* at § 29-26-121(3).

156. *See* Bogue, *supra* note 66, at 104.

pressure of a pending lawsuit and deadlines. Accordingly, an amendment to expand Tennessee's pre-suit notice period would decrease frivolous medical malpractice litigation because it would encourage hospitals and health care providers to implement full disclosure programs based on transparency and honest communication with their patients.

A majority of states have enacted legislation requiring plaintiffs to provide defendants with statutory pre-suit notice of their intent to file a medical malpractice claim.[157] The length of mandatory pre-suit notice periods among states varies largely, ranging from a short 30 days to lengthier 182 days.[158] Tennessee falls in the middle of the spectrum with a 60 day pre-suit notice period, meaning that a plaintiff must provide a defendant with his or her intent to file suit at least 60 days before actually filing a health care liability complaint with the court.[159] The Tennessee statute reads, in full:

> (a)(1) Any person, or that person's authorized agent, asserting a potential claim for medical malpractice shall give written notice of the potential claim to each health care provider that will be a named defendant at least sixty (60) days before the filing of a complaint based upon medical malpractice in any court of this state.[160]

Although Tennessee's pre-suit notice period is not considered short when compared to some other states' notice periods,[161] 60 days does not provide considerable time to investigate claims

157. *See* Haavi Morreim, *Malpractice, Mediation, and Moral Hazard: The Virtues of Dodging the Data Bank*, 27 OHIO ST. J. DISP. RESOL. 109, 142 (2012) (highlighting the length of various states' pre-suit notice periods).

158. *Id.*

159. TENN. CODE ANN. § 29-26-121(a)(1) (2014). To receive an explanation regarding the purpose behind Tennessee's statutory 60 day notice period, see Myers v. AMISUB (SFH), Inc., 382 S.W.3d 300, 309 (2012) ("The essence of Tennessee Code Annotated section 29-26-121 is that a defendant be given notice of a medical malpractice claim before suit is filed.").

160. TENN. CODE ANN. § 29-26-121(a)(1) (2014).

161. In order to file a medical malpractice action in West Virginia, the Plaintiff must provide the medical provider with thirty-days notice. W. VA. CODE § 55-7B-6(b) (2014).

and communicate with patients as would a longer statutory period. As discussed above, in order for successful disclosure programs to run efficiently, hospitals and medical providers need more time to properly evaluate each step that leads to patient injuries.[162] For example, both Michigan's[163] and Massachusetts's[164] pre-suit notice

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162. *See supra* Part IV.

163. MICH. COMP. LAWS ANN. § 600.2912b(1) (West 2014). The legislative purpose behind the 182 day notice requirement "was to provide a mechanism for 'promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice claims that would otherwise be precluded form recovery because of litigation costs. . . .'" Bush v. Shabahang, 772 N.W.2d 272, 283 (Mich. 2009) (quoting Senate Legislative Analysis, SB 270, August 11, 1993). Additionally, the Michigan statute allows the 182-day notice period to be lessened to 91 days if the following conditions are satisfied:

> (3) The 182-day notice period required in subsection (1) is shortened to 91 days if all of the following conditions exist:
>
> (a) The claimant has previously filed the 182-day notice required in subsection (1) against other health professionals or health facilities involved in the claim.
>
> (b) The 182-day notice period has expired as to the health professionals or health facilities described in subdivision (a).
>
> (c) The claimant has filed a complaint and commenced an action alleging medical malpractice against 1 or more of the health professionals or health facilities described in subdivision (a).
>
> (d) The claimant did not identify, and could not reasonably have identified a health professional or health facility to which notice must be sent under subsection (1) as a potential party to the action before filing the complaint.

MICH. COMP. LAWS ANN. § 600.2912b(3) (West 2010).

164. MASS. GEN. LAWS ANN. ch. 231, § 60L(a) (Westlaw through Ch. 95 of 2015 1st Ann. Session). Similar to Michigan, the Massachusetts statute also allows its 182-day notice period to shorten to 90 days if one of two requirements is met. The statute reads, in pertinent part:

> (c) The 182-day notice period in subsection (a) shall be shortened to 90 days if:
>
> (1) the claimant has previously filed the 182-day notice required against another health care provider involved in the claim; or
>
> (2) the claimant has filed a complaint and commenced an action alleging medical malpractice against any health care provider involved in the claim.

Id. ch. 231, § 60L(c) (Westlaw through Ch. 95 of 2015 1st Ann. Session).

statutes state that a plaintiff who intends to file suit against a defendant is required to provide a notice of intent not less than 6 months (182 days) before actually filing the malpractice complaint. Longer pre-suit notice periods allow plaintiff patients significant time to analyze the strength of their potential claims and decide whether they plan to continue to pursue litigation.[165] Further, an expansive pre-suit notice period allows defendant health care providers to investigate the alleged claims and offer the plaintiff alternative remedies or settlement figures.[166] With a longer notice period, the parties can take the time to review and exchange information pre-litigation, which saves time, money, and unnecessary expenses.[167] Disclosing important information up front that will eventually be revealed during discovery promotes efficiency and provides the opportunity to minimize or eliminate litigation.[168] An extended pre-suit notice period encourages increased transparency and communication between the parties without patients sacrificing their right to bring suit at a later date.[169]

Tennessee would benefit from an extended pre-suit notice period because it would create an environment that encourages the adoption of full disclosure programs by health care facilities across the state. Institutions within the state of Michigan have shown success in using its prolonged notice period to both analyze the potential claims and engage the patient or family during the process.[170] If Tennessee were to amend its current 60 day notice period to 182 days, it would encourage the implementation of full disclosure policies and programs within hospitals and other facilities throughout the state. In effect, this amendment would allow time

165. *See* Bogue, *supra* note 66, at 104.

166. *See id.*; Boothman et al., *supra* note 36, at 137–38.

167. *See* Bogue, *supra* note 66, at 104.

168. *See id.*; Dwight Golann, *Dropped Medical Malpractice Claims: Their Surprising Frequency, Apparent Causes, and Potential Remedies*, 30 HEALTH AFF. 1343, 1346 (2011), http://content.healthaffairs.org/content/30/7/1343.full.pdf (stating that the information gained while investigating claims in the course of litigation is a primary reason that plaintiff's decide to abandon their claims).

169. *See* Bogue, *supra* note 66, at 104.

170. *See id.* ("Because Michigan already requires a 182-day notice period, UMHS took advantage of this built-in six-month period to have their committee thoroughly review claims and hold the disclosure meetings, without the added pressure on both parties of an already-pending lawsuit.").

for health care providers to investigate alleged claims, allow greater opportunity for providers to communicate with the affected patients, and ultimately engage the parties to participate in settlement discussions, effectively decreasing frivolous health care liability actions. To extend the pre-suit notice period, the relevant Tennessee statute should read:

> (a)(1) Any person, or that person's authorized agent, asserting a potential claim for medical malpractice shall give written notice of the potential claim to each health care provider that will be a named defendant at least 182 days before the filing of a complaint based upon medical malpractice in any court of this state.

Ultimately, in conjunction with a broader apology law discussed in Part V, an amendment to expand Tennessee's pre-suit notice period would decrease frivolous litigation because hospitals and health care providers would have a greater incentive to implement full disclosure programs that emphasize honesty and communication within their facilities.[171]

VII. CONCLUSION

Preventable medical errors play a large role in frivolous medical malpractice litigation. These malpractice actions may be avoided by simply encouraging transparency and communication within the health care setting. If health care providers engaged in more transparent disclosure and provided affected patients with a sincere apology that acknowledged responsibility, patients would feel less of a need to turn to the courts for redress. Additionally, longer pre-suit notice periods allow both physicians and patients to participate in a more effective communication process due to the requirement that patients provide health care providers with their intent to file a potential malpractice claim during a certain extended time period before his or her claim is actually filed with the court. Many states have statutes that provide the necessary protections for physicians to have the opportunity to engage in these

171. *See supra* Part V.

types of discussions.[172] Many hospitals within these states that have implemented successful disclosure programs are self-insured institutions.[173] These self-insured hospitals retain many benefits that third-party insured hospitals do not enjoy, such as greater control over malpractice premiums and vast discretion in deciding how to handle medical errors.[174]

Furthermore, effective communication between physicians and patients allows for questions to be answered and anger to be diffused, potentially decreasing frivolous malpractice litigation and increasing patient safety. Several effective disclosure programs implemented in other states emphasize the idea of transparent communication, apologies, and cooling off periods.[175] Currently, Tennessee has a statute of general applicability that protects expressions of benevolence made in civil suits from being used to prove liability.[176] In order for health care providers to express a sincere apology and acknowledge responsibility for their mistake, a separate provision that specifically protects apologies and statement of fault made by health care providers must be added to Tennessee's statute. Additionally, Tennessee would benefit from a longer pre-suit notice period for the same reasons. Currently, Tennessee has a pre-suit notice period of 60 days. A longer notice period would allow for more effective communication and investigations in order for patients and health care providers to determine the strength of the potential claim. Thus, Tennessee's pre-suit notice statute should be amended to require patients to afford health care providers with their intent to file a claim at least 182 days before the actual complaint is filed with the court. The ultimate goal of amending these two Tennessee statutes is to increase patient safety and encourage health care providers and hospital systems in Tennessee to implement full disclosure programs so as to decrease the number of frivolous health care liability actions that arise from preventable medical errors.

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172. *See supra* Parts V and VI.

173. *See supra* Part IV. Both UMHS and the VA are self-insured institutions that have implemented successful full disclosure programs.

174. *See* Bordonaro, *supra* note 99; Cohen, *supra* note 85, at 1471.

175. *See supra* Parts IV and VI.

176. TENN. R. EVID. 409.1(a) (2014).

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The Narrowing Government Interest in Campaign Finance Regulations: Republic Lost?

DEBORAH A. ROY*

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I. INTRODUCTION

A government interest in preserving a representative democracy should be asserted when campaign finance regulations are challenged. In a representative democracy, the promise of democratic self-government is fulfilled when the views of the people are transferred into the policy choices of their representatives. Representation is at the core of the United States Constitution and elections are the means by which the people choose their representa-

tives. Since its decision in *Buckley v. Valeo,*[1] the Supreme Court has held that any government interest in campaign finance regulation must be balanced against a donor's First Amendment right to engage in political speech by giving money to a candidate for public office. The First Amendment interest in political speech is one that the Roberts Court protects vigilantly by applying a heightened standard of review to any government regulation that burdens it.[2] The First Amendment, however, has never acted as an absolute prohibition on the regulation of speech.

In the Roberts Court's recent decisions holding campaign finance regulations unconstitutional, including *Citizens United* and *McCutcheon v. FEC*,[3] Justices in the majority have taken a nearly

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1. 424 U.S. 1 (1976) (per curiam). In *Buckley*, the Court reviewed challenges to The Federal Election Campaign Act of 1971, as amended in 1974, holding that the Act's: (1) contribution provisions were constitutional as appropriate legislative measures to deal with the reality and appearance of improper influence stemming from the dependence of candidates on large campaign contributions and that the contribution limits did not directly impinge upon the rights of individual citizens and candidates to engage in political debate and discussion; (2) expenditure provisions violated the First Amendment because they placed substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in political expression protected by the First Amendment; (3) aggregate limits on contributions were upheld because they were a modest restraint that prevented evasion of the base contribution limits; (4) disclosure and recordkeeping provisions were a constitutional exercise of legislative power because it was reasonable for the legislature to conclude that the disclosure of contributions informs the public about the political process; and (5) provisions for the public financing of elections were constitutional. *Id.* at 1–5.

2. Citizens United v. FEC, 558 U.S. 310, 340 (2010) ("Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007))). Earlier decisions applied a less rigorous standard of review to campaign contribution limits. McConnell v. FEC, 540 U.S. 93, 137 (2003), *overruled in part by Citizens United*, 558 U.S. 310.

3. *Citizens United*, 558 U.S. 310. *Citizens United* considered the constitutionality of a campaign finance law that limited a non-profit corporation's expenditures on political speech within thirty days of an election. *Id.* at 310. In a broad holding, the Court found that political speech could not be regulated

absolutist view of the First Amendment protection of money as political speech. Moreover, they adopted an uncompromising position that preventing corruption or the appearance of corruption is the only compelling government interest that can support a campaign finance restriction. And they defined corruption narrowly. In *McCutcheon*, Chief Justice Roberts wrote that Congress can only target a specific type of corruption—"quid pro quo" corruption.[4] By quid pro quo corruption, Chief Justice Roberts means the direct exchange of an official act for money or dollars for political favors.[5]

The Roberts Court, however, fails to consider the fundamental, compelling government interest in preserving a representative democracy. In the summer of 1787, the delegates to the Philadelphia Constitutional Convention labored to establish the contours of a representative democracy embodied in the United States Constitution. Thereafter, the first United States Congress enacted the First Amendment to the Constitution, which included free speech clauses protecting the right of the people to express political views that would inform the policy choices of their representatives. A jurisprudence that uses the First Amendment to debase representative democracy turns the United States Constitution's first principles on their head. In balancing representative democracy against a First Amendment interest in the contribution of money to candidates for elected office, the Supreme Court should give a higher level of deference to the contemporary Congress's view regarding whether campaign finance regulations preserve representative democracy.

"When Benjamin Franklin walked out of Independence Hall, the work of the Constitutional Convention completed, he was

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based on the speaker's corporate identity and held that the federal statute at issue barring independent corporate expenditures violated the First Amendment. *Id.* at 315. Further, the Court found that no sufficiently important government interest was served by limiting corporate political advertising, recognizing solely a government interest in quid pro quo corruption. *Id.* at 315–16; *see* McCutcheon v. FEC, 134 S. Ct. 1434 (2014) (plurality opinion). *McCutcheon* held that federal statutory aggregate limits on how much money a donor may contribute in total to all political candidates or committees violated the First Amendment's protection of political speech. *Id.* at 1436.

4. *McCutcheon*, 134 S. Ct. at 1441.

5. *Id.*

stopped by a woman and asked, 'Mr. Franklin, what have you wrought?' 'A Republic, madam,' Franklin replied, '*if you can keep it.*'"[6] The Court's recent decisions striking down campaign finance regulations illustrate the challenges that Franklin knew the Republic would face.

The Article proceeds as follows. Part II provides support for the recognition of a compelling government interest in preserving a representative democracy. Section IIA establishes that representative democracy is a core constitutional principle established by the Constitution's Framers. Section IIB shows that the only compelling interest accepted by the Roberts Court majority in recent campaign finance decisions—the prevention of corruption or the appearance of corruption—is itself an interest in representative democracy. Section IIC discusses government interests that have been expressed by some of the Justices during their review of campaign finance regulations that reflect an interest in representative democracy.

Part III asserts that First Amendment speech rights must be balanced against a compelling interest in representative democracy. Section IIIA shows that the First Amendment's purpose is to preserve a representative democracy. Section IIIB asserts that many campaign finance regulations, including aggregate limits on campaign contributions, are modest restraints on political speech that may not outweigh a government interest in preserving representative democracy.

Part IV focuses on *McCutcheon v. FEC,* where an interest in protecting representative democracy is strikingly relevant. Sec-

6. LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS – AND A PLAN TO STOP IT 317 (2011). Lessig discusses the many ways in which the influence of campaign cash has drawn the nation's democracy away from the will of the people. Lessig also filed an amicus brief in *McCutcheon* that surveys the Constitution's Framers' conception of corruption. He concludes that they were concerned primarily with the corruption of democratic institutions of government, which would occur if the government's dependency on the people alone was impaired. Lessig notes that the historical record leaves no doubt that the Founders understood corruption as more than just individual quid pro quo payments for legislation. To them corruption encompassed any use of public power for private purposes-not merely theft, but any use of government power and assets to benefit special interests rather than the broader public. Brief of Professor Lawrence Lessig as Amicus Curiae Supporting Appellee, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536), 2013 WL 3874388.

tion IVA argues that representatives should be elected by and reflect the views of their voting constituents rather than the policy preferences of money donors who reside outside of their districts. Section IVB presents the concern that an increase in the number of money donors may dilute the influence of voters. Section IVC argues that representatives should not be controlled by a favored class.

Part V recommends that the Supreme Court give more deference to the role of legislators in undertaking the challenge of balancing representative democracy against First Amendment interests in political speech. In Part VI, the Article concludes by advising the Court to recognize an interest in representative democracy, balancing that fundamental constitutional interest against the often modest restraints on political speech that Congress places on a donor's ability to provide money to candidates for elected office.

II. REPRESENTATIVE DEMOCRACY IS A COMPELLING INTEREST

A. *The Framers Established a Representative Democracy*

The Framers of the United States Constitution established a specific type of democracy—a representative democracy.[7] In a representative democracy, a citizen exercises his basic right to participate in the democracy by electing representatives who will advocate for his views regarding public policy. Thomas Jefferson, describing the republic that he helped to found, wrote:

> [A] government is republican in proportion as every member composing it has his equal voice in the direction of its concerns (not indeed in person, which

7. For a further discussion of the importance of representation to the Constitution's Framers, see ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 12–16 (2014). Post's volume of Tanner Lectures makes an important contribution to this article and to the current discussion of campaign finance jurisprudence. He argues, "that a primary purpose of First Amendment rights is to make possible the value of self-government, and that this purpose requires public trust that elections select officials who are responsive to public opinion. Government regulations that maintain this trust advance the constitutional purpose of the First Amendment." *Id.* at 4. In his *McCutcheon* dissent, Justice Stephen Breyer cites Post for his discussion of electoral integrity as a necessary condition for American democracy to thrive. *McCutcheon*, 134 S. Ct. at 1468 (Breyer, J. dissenting).

> would be impracticable beyond the limits of a city, or small township, but) by representatives chosen by himself, and responsible to him at short periods . . . .[8]

The delegates to the Philadelphia Constitutional Convention of 1787 affirmed that the first principle of the Constitution's representative democracy is that the people express their will through the actions of their representatives. James Wilson of Pennsylvania[9] advised that in order to adhere to the principle that all authority in the new government would derive from the people, their representatives must "express the Sentiments of the represented."[10] Wilson expressed the foundational principle that the people control the government through their elected representatives.[11] For the people to maintain that control, representatives must express the views of their constituents when enacting public policy.

Justice Stephen Breyer expressed Wilson's view of the link between constituent and representative writing, "it should be possible to trace without much difficulty a line of authority for the making of governmental decisions back to the people themselves—either directly, or indirectly through those whom the people have chosen, perhaps instructed, to make certain kinds of decisions in certain ways."[12] In *McCutcheon v. FEC*, Justice Breyer cited Wilson for the proposition that there is a "chain of communication between the people, and those, to whom they have commit-

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8. Letter from Thomas Jefferson to Samuel Kercheval (June 12, 1816), http://teachingamericanhistory.org/library/document/letter-to-samuel-kercheval/.

9. Although James Wilson is not as well known as other Framers, his influence in the drafting of the Constitution is considered to be second only to that of James Madison. MARK DAVID HALL, THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON 1742–1798 1 (1997); *see also* Nicholas Pedersen, Note, *The Lost Founder: James Wilson in American Memory*, 22 YALE J.L. & HUMAN. 257 (2010).

10. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 191 (Max Farrand, ed., 1911) [hereinafter FEDERAL CONVENTION RECORDS—VOLUME I] (notes of William Paterson).

11. *Id.*

12. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 15 (2005).

ted the exercise of the powers of government."[13] During the Pennsylvania Convention, Wilson stated in regard to the principle of representation:

> I believe it does not extend farther, if so far in any other government in Europe. For the American States, were reserved the glory and the happiness of diffusing this vital principle throughout the constituent parts of government. Representation is the chain of communication between the people, and those, to whom they have committed the exercise of the powers of government. This chain may consist of one or more links; but in all cases it should be sufficiently strong and discernible.[14]

The importance to the Framers of creating a strong chain of communication between the people and their representatives is illustrated by an event occurring at the end of the Philadelphia Convention when the delegates re-considered the proper number of representatives in the new House of Representatives.[15] Article I of

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13. *McCutcheon*, 134 S. Ct. at 1467, (Breyer, J., dissenting) (quoting J. WILSON & THOMAS M'KEAN, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES OF AMERICA 30–31 (Philadelphia, T. Lloyd 1792)). The Framers emphasized the connection between political speech and government action by requiring frequent elections to federal office, and by enacting a First Amendment that would facilitate a "chain of communication between the people, and those, to whom they have committed the exercise of the powers of government."

14. COMMENTARIES ON THE CONSTITUTION, *supra* note 13, at 30–31.

15. The House of Representatives was intended to provide the important link between the people and their government. *See* THE FEDERALIST NO. 52 (James Madison). James Madison wrote that the House of Representatives should have "an immediate dependence on, and an intimate sympathy with, the people." *Id.*; *see also* FEDERAL CONVENTION RECORDS—VOLUME I, *supra* note 10, at 133–34 (quoting George Mason) (notes of James Madison). Delegate George Mason stated that representatives "should sympathize with their constituents; shd. think as they think, & feel as they feel; and that for these purposes shd. even be residents among them." *Id.* at 134. During the debates over whether elections for the House of Representatives should be conducted annually or biennially, Roger Sherman advocated that representatives should have the opportunity "to return home and mix with the people." *Id.* at 351. By mixing with the people, the representative will become better acquainted with the views

the U.S. Constitution, which establishes the Congress of the United States consisting of a Senate and a House of Representatives, includes a clause providing that "[t]he number of Representatives shall not exceed one for every thirty thousand."[16] The Framers initially set the number of Representatives referenced in this clause at one for every forty thousand. On September 17, 1787, at the end of three months during which the delegates to the Philadelphia Constitutional Convention had drafted the republic's founding document, Nathaniel Gorham of Massachusetts[17] rose to propose one last amendment to the Constitution. Gorman proposed that the "forty thousand" be struck out and replaced with "thirty thousand."[18] Gorham stated that this would not be an absolute rule, but would "give Congress a greater latitude which could not be thought unreasonable."[19]

George Washington, the Constitutional Convention's presiding officer, rose to put Gorham's question to the delegates. In his convention notes, James Madison wrote that although Washington had previously refrained from offering his thoughts on matters relating to the House of Representatives, he "could not forbear expressing his wish that the alteration proposed might take place."[20] Washington stated that "[t]he smallness of the proportion of Representatives has been considered by many members of the Convention, an insufficient security for the rights & interests of the

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and sentiments that he is trusted to represent in the national legislature. In a truly prescient moment, Sherman observed that "by remaining at the seat of Govt. [representatives] would acquire the habits of the place which might differ from those of their Constituents." *Id.*

16. U.S. CONST. art I, § 2, cl. 3.

17. Gorham (1738–1796), who had little formal education, established a successful mercantile career. He served in the Massachusetts Provincial Congress in the years prior to independence and was a member of the Massachusetts Board of War throughout much of the American Revolutionary War. As a delegate from Massachusetts to the Constitutional Convention in Philadelphia, he spoke often and served as chairman of the Committee of the Whole and the Committee of Detail. *See* CAROL BERKIN, A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION 214 (2003).

18. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 643–44 (Max Farrand, ed. 1911) (notes of James Madison) [hereinafter FEDERAL CONVENTION RECORDS—VOLUME II].

19. *Id.* at 644.

20. *Id.*

people."[21] Although noting that the present moment was late for admitting amendments, Washington told the delegates that he thought Gorham's proposal was "of so much consequence that it would give him satisfaction to see it adopted."[22] Following Washington's statement, Madison records that no opposition was made to Mr. Gorham's proposal to decrease the number of constituents represented by each legislator and the delegates agreed to it unanimously.[23]

The attention paid to enhancing representation in the Constitution shows that the Framers viewed the link between the people and their representatives to be a crucial component of the representative democracy that they had labored exhaustively to found.[24] George Washington viewed representation as the means to secure the rights and interests of the people.[25] The fewer number of constituents represented by each member of the national legislature would enhance the ability of each representative to maintain a chain of communication with his constituents, better assuring that their interests would be represented.[26] And Nathaniel Gorham had the wisdom to state that the Congress should be given the "latitude" to determine whether that number would adequately ensure that the people would be represented by their legislators.[27] He recognized that the responsibility to ensure proper representation lay with the Congress.[28]

The Constitution's Framers established that all authority in the new government was retained by the people of the United States. The people exercise their sovereignty when they participate in their democracy by electing representatives. Once elected, the people have a right to representation by an elected official who makes decisions that reflect the sentiments of those constituents who exercised their fundamental right to vote.[29] Through election

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21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. FEDERAL CONVENTION RECORDS—VOLUME I, *supra* note 10, at 191.

and representation, the Framers' first principle of democratic self-government is preserved in a representative democracy.[30]

B. Buckley v. Valeo*: Representation is at the Base of Corruption*

Since it was decided in 1976, *Buckley* has been cited as having upheld contribution limits solely based on a compelling government interest in preventing corruption or the appearance of corruption.[31] *Buckley*, however, did not hold that preventing corruption was the only compelling interest that can be considered by the Court when it reviews campaign finance regulations.[32] And significantly, in relation to this Article's argument that there is a government interest in preserving representative democracy, *Buck-*

30. CITIZENS DIVIDED, *supra* note 7, at 12–16.

31. McCutcheon v. FEC, 134 S. Ct. 1434, 1444–45 (2014) (plurality opinion) (finding that *Buckley* held that the government's interest in quid pro quo corruption is sufficiently important to satisfy strict scrutiny); Citizens United v. FEC, 558 U.S. 310, 357 (noting that the *Buckley* Court sustained limits on direct contributions in order to prevent the reality or appearance of corruption); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 478 (2007) ("The Court has long recognized 'the governmental interest in preventing corruption or the appearance of corruption' in election campaigns . . . .") (quoting Buckley v. Valeo, 424 U.S. 1, 45 (1976)).

32. Davis v. FEC, 554 U.S. 724, 754–55 (2008) (Stevens, J., concurring in part and dissenting in part). The Court in *Davis* noted that although the *Buckley* Court held that preventing both actual corruption and the appearance of corruption were government interests with sufficient weight to support any infringement on First Amendment freedoms that resulted from FECA's contribution limits, "it does not follow that the *Buckley* Court concluded that *only* the interest in combating corruption and the appearance of corruption can justify congressional regulation of campaign financing." *Id.* In *Davis*, the Court invalidated the "Millionaire's Amendment" to the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which provided that if a candidate for the U.S. House of Representatives spent more than $350,000 of his personal funds, the candidate's opponents could collect individual contributions up to $6,900 per contributor—three times the normal contribution limit of $2,300. *Id.* at 729 (majority opinion). The Court viewed the additional money that the opponent could collect as a substantial burden on the individual who had the ability to spend substantially more on his election from his personal funds. *Id.* at 739–40, 745.

ley's concern with corruption arose out of a more fundamental concern with the integrity of the electoral process.[33]

The integrity of the system of representative democracy can only be maintained if the important link between constituents and representative is preserved. The *Buckley* Court explained that large contributions that secured a political quid pro quo from elected officials undermined "the integrity of our system of representative democracy."[34] Corruption undermines representative democracy in the sense that a corrupt legislator does not *represent* the interests of his voting constituents. The important link between constituent and representative, which consists of both the communication of constituent interests to the representative and the actualization of the communication into public policy, is disrupted when the representative acts on behalf of a large contributor rather than on behalf of the constituents.[35]

Additionally, the *Buckley* Court's holding regarding contribution limits did not use the word "corruption," but rather referred to "*improper influence*" and referenced the government interest in "*safeguarding the integrity of the electoral process*."[36] The Court held:

> In sum, the provisions of the Act that impose a $1,000 limitation on contributions to a single candidate, § 608(b)(1) . . . and a $25,000 limitation on total contributions by an individual during any calendar year, § 608(b)(3), are constitutionally valid. These limitations, along with the disclosure provisions, constitute the Act's primary weapons against

33. CITIZENS DIVIDED, *supra* note 7, at 55–56 ("[T]he [*Buckley*] Court has conceptualized the state's interest in preventing corruption as the state's interest in preserving the integrity of representative government."). *Buckley* noted that the Court of Appeals had upheld, for the most part, the campaign finance restrictions, finding a clear and compelling interest in preserving the integrity of the electoral process. *Buckley*, 424 U.S. at 10.

34. *Buckley*, 424 U.S. at 26–27 ("Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.").

35. *Id.* at 45.

36. *Id.* at 58 (emphasis added).

> *the reality or appearance of improper influence* stemming from the dependence of candidates on large campaign contributions. The contribution ceilings thus serve *the basic governmental interest in safeguarding the integrity of the electoral process* without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion.[37]

The *Buckley* Court identified the concern being addressed by campaign finance regulations as "*improper influence*," where representatives act on behalf of donors who make large money contributions to their campaigns for elected office.[38] The Court then recognized that undue influence undermines *the fundamental government interest in safeguarding the integrity of the electoral process*, and thereby, threatens representative democracy.[39] In fact, the Court stated that it was concerned with money influencing public officials beyond the most blatant form of quid pro quo corruption, such as the bribery of a public official, which the Court pointed out could be addressed by criminal laws.[40] The *Buckley* Court was concerned with more subtle influences beyond quid pro quo corruption.[41]

In *McConnell v. FEC*, one of the last Supreme Court decisions to uphold campaign finance regulations,[42] the majority also distinguished *undue influence* from quid pro quo corruption:

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37. *Id.* (emphasis added).
38. *Id.* at 27.
39. *Id.* at 27–28.
40. *Id.*
41. *Buckley* referenced the scope of abuses identified in the opinion of the D.C. Court of Appeals. *Id.* at 27 n.28. The Court of Appeals wrote that "[l]arge contributions are intended to, and do, gain access to the elected official after the campaign for consideration of the contributor's particular concerns." Buckley v. Valeo, 519 F.2d 821, 838 (D.C. Cir. 1975). It further supported its finding by noting that Congress and the District Court confirmed such contributions were often made for the purpose of furthering business or private interests by facilitating access to government officials or influencing government decisions, and elected officials have tended to afford special treatment to large contributors. *Id.* (citations omitted).
42. *McConnell* was decided in 2003 with Justice Sandra Day O'Connor upholding most of the campaign finance regulations before she left the court in

> Just as troubling to a functioning democracy as quid pro quo corruption is the danger that officeholders will decide issues not on the merits of the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for undue influence is manifest.[43]

The *McConnell* majority noted that the many "deeply disturbing examples" of corruption cited by the Court in *Buckley* were not singular episodes of vote buying, but instead were broader examples of special interests using their substantial money donations to secure actual or perceived influence over representatives.[44] The *McConnell* Court recognized that *Buckley's* holding was not solely based on a concern with quid pro quo corruption. Instead, the *Buckley* Court was concerned that when representatives become dependent on their large money donors rather than on the broad base of their constituents, the ability of the representative democracy to fulfill its purpose of securing citizen self-government through representatives is threatened.

Subsequent court decisions have viewed *Buckley's* holding on contribution limits too narrowly as a concern with the corruption of individual representatives, rather than a broader one of preventing the undue influence of elected officials that undermines

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2006. McConnell v. FEC, 540 U.S. 93 (2003), *overruled in part by* Citizens United v. FEC, 558 U.S. 310 (2010). Justice Samuel Alito, who would join the Roberts Court's majority to overturn campaign finance regulations in future decisions, replaced her. *See generally* Citizens United v. FEC, 558 U.S. 310 (2010); McCutcheon v. FEC, 134 S. Ct. 1434 (2014) (plurality opinion).

43. *McConnell*, 540 U.S. at 153. In *McConnell*, the Court stated that the government interest in corruption or its appearance is not limited to quid pro quo exchanges of votes for cash, but extends to "the broader threat from politicians too compliant with the wishes of large contributors." *Id.* at 143 (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000)). In his *McCutcheon* dissent, Justice Breyer pointed out that the plurality's adoption of a narrow definition of corruption excludes the influence and access a donor may obtain over elected officials, which is "virtually impossible to reconcile" with the Court's holding in *McConnell. McCutcheon*, 134 S. Ct. at 1466 (Breyer, J., dissenting).

44. *McConnell*, 540 U.S. at 150.

representative democracy.[45] The latter is a more compelling government interest that should be raised, briefed, and argued by parties seeking to uphold campaign finance regulations. The Court's recognition of an interest in preserving a representative democracy when reviewing campaign finance regulations would be more faithful to the Constitution and is a more substantial concern than single acts of quid pro quo corruption.[46]

C. The Supreme Court's Consideration of Representative Democracy

Government interests that are broader than quid pro quo corruption have been identified by dissenting Justices in cases in which the majority struck down campaign finance regulations. The dissenters, however, have failed to articulate these government interests in a clear, focused, and consistent voice. Their concerns arise from an interest in the protection of representative democracy and a recognition of the important government interest in having legislators represent the interests of their constituents rather than large, non-constituent donors.

In 2007, Justice David Souter, dissenting in *FEC v. Wisconsin Right to Life*,[47] expressed an interest in "political" or "representative" or "democratic" integrity, using the terms interchangeably. He wrote:

> Devoting concentrations of money in self-interested hands to the support of political campaigning there-

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45. *See generally Citizens United*, 558 U.S. at 359; Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2826–27 (2011) (citing *Citizens United*, 558 U.S. 310, 313, 360).

46. *See Citizens United*, 558 U.S. at 449 (Stevens, J., dissenting) ("There are threats of corruption that are far more destructive to a democratic society than the odd bribe.") Justice Stevens referred to cases of undue influence and advocated for a broader understanding of corruption than the majority's "myopic focus" on quid pro quo corruption. *Id.* at 449–51.

47. FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007). The Court struck down BCRA's prohibition on the use of corporate funds to finance electioneering communications during pre-federal-election periods as applied to issue-advocacy advertisements. *Id.* at 457. The Court drew a distinction between campaign advocacy and issue advocacy, concluding that the interests supporting restrictions of corporate campaign speech did not justify restricting issue advocacy advertisements that were under review in the case. *Id.*

> fore threatens the capacity of this democracy to represent its constituents and the confidence of its citizens in their capacity to govern themselves. These are the elements summed up in the notion of political integrity, giving it a value *second to none in a free society*.[48]

Justice Souter recognized that the core principle of this country's democracy is that constituents are only able to exercise their right to self-government if their interests are represented. He finds that this interest is compelling—"second to none in a free society."[49] He expressed a concern that the value of political integrity is threatened by concentrations of money in politics.[50] In his dissent, Justice Souter stated that "the purchase of influence and the cynicism of voters threaten the integrity and stability of democratic government, each derived from the responsiveness of its law to the interests of citizens and their confidence in that focus."[51] In Justice Souter's view, this threat can be ameliorated by "reasonable limits" on the influence of money in campaign activities.[52]

After providing a history of government limitations on the use of general treasury funds by corporations and unions for electioneering activities during the 20th Century, Justice Souter observed:

> Neither Congress's decisions nor our own have understood the corrupting influence of money in politics as being limited to outright bribery or discrete *quid pro quo*; campaign finance reform has instead consistently focused on the more pervasive distortion of electoral institutions by concentrated wealth, on the special access and guaranteed favor that sap

48. *Id.* at 507 (Souter, J., dissenting) (emphasis added). Justice Souter's dissent was joined by Justices Stevens, Ginsburg, and Breyer. *Id.* at 504.
49. *Id.* at 507.
50. *Id.*
51. *Id.* at 507–08.
52. *Id*.

> *the representative integrity of American government* and defy public confidence in its institutions.[53]

Unrestrained corporate and union spending has always seriously jeopardized the integrity of democratic government.[54] Justice Souter noted, however, that although the facts relating to campaign finance had not changed, the legal analysis had, leading to the majority's departure from precedent in *FEC v. Wisconsin Right to Life*.[55] He further observed that the facts are too powerful to ignore and voters and the Congress will continue to seek campaign finance reforms.[56] In 2007, when he wrote the *FEC v. Wisconsin Right to Life* dissent, Justice Souter did not know how far the direction of the Court would depart from the principles that he articulated. He appears, however, to have had some sense of it because he closed his dissent by writing, "I cannot tell what the future will force upon us."[57]

The future brought the Supreme Court's 2010 decision in *Citizens United*, which over-turned limits on the ability of corporations and unions to finance campaign speech within a period of time prior to an election.[58] Justice Stevens authored a lengthy dissent in *Citizens United*, writing that the majority's decision threatened a cluster of interrelated interests that had been well-captured under the rubric of "democratic integrity" by Justice Souter's dis-

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53. *Id.* at 522 (emphasis added).
54. *Id.*
55. *Id.* at 521–26.
56. *Id.* at 536.
57. *Id.* Justice Stevens stated that Justice Souter told him that he would have joined Stevens' dissent in *Citizens United* had he still been a member of the Court when it was reargued. JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 59 (2014).
58. *See* Citizens United v. FEC, 558 U.S. 310 (2010). The decision also sanctioned unlimited campaign spending by corporations as long as those expenditures were not coordinated with a candidate. *Id.* at 357. In *SpeechNow.org*, the D.C. Circuit, relying on *Citizens United*, held that there was no government interest in limiting the independent expenditures of non-profit organizations. SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010). The holding resulted in the proliferation of "Super PACs," entities that can spend unlimited amounts of money to overtly advocate for or against political candidates.

sent in *Wisconsin Right to Life*.[59] Justice Stevens would uphold limitations on corporate campaign expenditures reasoning that

> [a]lthough they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters.[60]

Justice Stevens made the important distinction that a corporation may not be resident in the legislative district in which it is trying to gain influence and it is never a voter.[61] At the same time its interests may be in direct conflict with the interests of resident, eligible voters. For this reason, he was concerned that the *Citizens United* ruling "threatens to undermine the integrity of elected institutions across the Nation."[62]

Citizens United overruled *Austin v. Michigan Chamber of Commerce*,[63] a case that is noted for what has been labeled as an "anti-distortion rationale."[64] *Austin* upheld a state statute that prohibited corporations from using their general treasury funds for independent expenditures on express election advocacy.[65] The *Austin* majority identified a concern with "the corrosive and dis-

59. *Citizens United*, 558 U.S. at 451 (Stevens, J. dissenting); *see also Wis. Right to Life*, 551 U.S. at 522 (Souter, J. dissenting).

60. *Citizens United*, 558 U.S. at 394.

61. *Id.* at 470.

62. *Id.* at 396.

63. 494 U.S. 652 (1990*), overruled by Citizens United*, 558 U.S. 310. *Citizens United* overruled the holding in *Austin* that campaign finance regulations could restrict expenditures based on the donor's corporate identity. *Citizens United*, 558 U.S. at 379–80.

64. *See Citizens United*, 558 U.S. at 348 (stating that *Austin* identified a new governmental interest in limiting political speech: an anti-distortion interest).

65. *Austin*, 494 U.S. at 654–55. Justice Thurgood Marshall's majority opinion upheld a Michigan statute that prohibited corporations from contributing corporate treasury funds to candidates for state office. *Id.* The corporate treasury funds were acquired from individuals who contributed their money to the corporation for economic reasons and not to support the corporation's political ideas. *Id.* at 659–60.

torting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[66] The Court was concerned that corporations, who may not represent the views of the public—and perhaps not even of their shareholders—would distort the political debate and affect the outcome of elections. Thereafter, elected officials would reflect the views of their corporate donors rather than represent the interests of the public generally and, more specifically, of their voting constituents.[67] The *Austin* Court, however, approved of the corporation's use of funds from a Political Action Committee ("PAC") that relied on voluntary contributions because they "reflect actual public support for the political ideals espoused by corporations."[68]

The *Citizens United* majority, and specifically Chief Justice Roberts's concurrence, misinterpreted *Austin's* anti-distortion rationale as an interest in "equalizing" the relative ability of speakers to influence the outcome of elections.[69] The interest, in fact, was in assuring that elected representatives reflect the policy choices of constituent voters rather than the views of non-voting corporations. *Austin* stated this explicitly, explaining that the Michigan campaign finance regulation "does not attempt 'to equalize the relative influence of speakers on elections'; rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations."[70] Perhaps *Citizens United* would not have over-

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66. *Id.* at 660.

67. *See* STEVENS, *supra* note 57, at 75–77 (stating that the interest in *Austin* was to preserve the power of voters to control the outcome of elections by limiting the right of non-voters-corporations to influence the outcome of elections); *see also Citizens United*, 558 U.S. at 470 (Stevens, J., dissenting) ("In a state election such as the one at issue in *Austin*, the interests of nonresident corporations may be fundamentally adverse to the interests of local voters.") This outcome results in the possibility that a flood of money on an election eve would marginalize the opinions of residents. *See id.*

68. *Austin*, 494 U.S at 660.

69. *Citizens United*, 558 U.S. at 350 (equating *Austin*'s anti-distortion rationale with equalizing the relative ability of speakers to influence the outcome of elections); *id.* at 381 (Roberts, C.J., concurring) ("*Austin's* logic would authorize government prohibition of political speech by a category of speakers in the name of equality . . . .").

70. *Austin*, 494 U.S. at 659–60 (internal citations omitted); *see also* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257–58 (1986) (explaining that

ruled *Austin* if the government interest at issue was recognized as representative democracy rather than equalizing the relative ability of speakers to influence elections.

Justice Stephen Breyer, writing for the dissent in *McCutcheon v. FEC*, identified "political integrity" as underlying the government interest in corruption.[71] *McCutcheon*, which is discussed in Section IVA of this article, overturned regulations limiting aggregate campaign finance contributions. Justice Breyer explained that the plurality found that the aggregate limits did not give rise to corruption only because it defined corruption too narrowly,[72] and he asserted that the plurality misunderstood the constitutional importance of the issue at stake.[73] The issue at stake was whether political communication in the marketplace of ideas—reflecting public opinion—secures government action.[74] Corruption is a concern only because "[i]t derails the essential speech-to-government-action tie" when representatives respond to money donors rather than the public.[75] Justice Breyer wrote that "the anti-corruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges. It is an interest in protecting the integrity of our public governmental institutions."[76] He relates maintaining the integrity of government to an interest in assuring that elected representatives express the interests of the people, rather than having a system where money "calls the tune."[77] He also finds that the cor-

although the interest in the free trade of political ideas does not require all participants to have equal resources, money donated from a corporate treasury reflects economic power and not public support for the corporation's ideas).

71. McCutcheon v. FEC, 134 S. Ct. 1434, 1465–68 (2014) (Breyer, J., dissenting).

72. *Id.* at 1466.

73. *Id.*

74. *Id.* at 1467.

75. *Id.*

76. *Id.* at 1466–67. During *McCutcheon's* oral argument, Justice Breyer stated that he did not like to use the word "corrupting." Transcript of Oral Argument, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536), 2013 WL 5845702, at *55. Instead, he liked to use the phrase "integrity of the process" which he defined as "that notion of getting people to think that their First Amendment speech makes a difference." *Id.*

77. *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting); *see also* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000) ("[T]he cynical

ruption interest that the Court has expressed in campaign finance cases is "rooted in the constitutional effort to create a democracy responsive to the people—a government where laws reflect the very thoughts, views, ideas, and sentiments" expressed by the people.[78] In sum, Justice Breyer expressed at least an interest in preserving representative democracy.

Justice Elena Kagan also expressed an interest in representative democracy in her dissent in *Arizona Free Enterprise v. Bennett*, where the majority overturned an Arizona statute passed by voter referendum that provided matching funds to publicly financed candidates.[79] Justice Kagan recognized the concern underlying the government interest in preventing corruption is that an officeholder will act for the benefit of wealthy contributors, rather than on behalf of all of the people.[80] She noted that this country's core values include a "devotion to democratic self-governance" as well as a fidelity to robust political debate.[81] Justice Kagan pointed out that underlying *Buckley's* concern that large campaign contributions lead to a political quid pro quo is the interest in protecting, not undermining, "the integrity of our democracy."[82] She concluded her dissent by writing that citizens' efforts to preserve their absolute sovereignty in their democratic government by passing campaign finance laws in order to ensure that government is "responsive to the will of the people" should be respected.[83] Those laws, whether passed by initiative or the people's representatives, should be upheld. "Truly, democracy is not a game."[84]

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assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.").

78. *McCutcheon*, 134 S. Ct. at 1468.

79. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011) (Kagan, J., dissenting). Justice Kagan's dissent was joined by Justices Breyer, Ginsburg, and Sotomayor. *Id.*

80. *Id.* at 2830.

81. *Id.* at 2829.

82. *Id.* at 2830.

83. *Id.* at 2846.

84. *Id.* Justice Kagan sparred with Justice Roberts, who wrote in the majority opinion that although "'leveling the playing field' through campaign finance reform can sound like a good thing, in a democracy campaigning for office is not a game, it is a critically important form of speech." *Id.* at 2826 (majority opinion). In the exchange, Justice Kagan emphasizes representative

Where the Constitution's Framers made it explicit at the Philadelphia Constitutional Convention that the new government was founded on representation,[85] and elections were the means for choosing the people's representatives, it is confounding that neither the government seeking to uphold campaign finance regulations nor the Justices have clearly articulated an independent compelling government interest in the preservation of representative democracy. Instead, the interest in representative democracy lies silent, masked by the Roberts Court's myopic focus on a government interest in preventing quid pro quo corruption. In fact, the corruption or harm is to the representative democracy.

An interest in protecting representative democracy is a more fundamental, compelling interest than corruption, which has a value that has effectively been discounted to zero by the Roberts majority.[86] Dissenting Justices have approached an interest in preserving representative democracy when they state interests in "political integrity" and "democratic integrity" and "electoral integrity."[87] All of these interests can fall under the concept of representative democracy, a term that reflects the interest in maintaining a republic in which the people govern through their representatives. There is sufficient basis in the Court's discussion of these interests, and in the original views of the Constitution's Framers as to the foundational principle of representation, for the Court to consider a compelling government interest in representative democracy.

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democracy, while Justice Roberts emphasizes freedom of speech. *Id.* at 2826, 2846 (Kagan, J. dissenting).

85. *See supra* Section IIA.

86. Citizens United v. FEC, 558 U.S. 310, 463 (2010).

87. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788–89 (1978) ("Preserving the integrity of the electoral process [and] preventing corruption . . . are interests of the highest importance."); *see also* United States. v. UAW, 352 U.S. 567, 570 (1957) (stating that labor organizations' use of union dues to influence elections involves the "integrity of our electoral process"). *But see Citizens United*, 558 U.S. at 334 (referring to speech as the important factor in preserving "the integrity of the election process," which is undermined by rules regulating political speech).

III. The First Amendment Supports Representative Democracy

A. A Right of Instruction

The First Amendment's Free Speech Clauses were intended by the Framers to support the representative democracy established by the U.S. Constitution.[88] In 1787, the Delegates to the Philadelphia Constitutional Convention established a representative democracy before the First Amendment was considered and passed by the First Congress in 1789. The importance of establishing a communicative link between the people and their representatives is evidenced by the First Congress's consideration of adding a clause to the First Amendment providing for a "right of instruction."[89] A South Carolina congressman introduced the clause which would have added a right of the people "to instruct their representatives" to the rights to speech, peaceably assemble, and petition the government. During the debate on inclusion of the right of instruction, one of the representatives observed, "Representation is the principle of our Government."[90] Additionally, he stated that "[a]ccording to the principles laid down in the Constitution, it is presumable that the persons elected know the interests and the circumstances of their constituents."[91] Another representative explained that representation was necessary because it was not feasible for each person to be present in a national legislature:

> If it were consistent with the peace and tranquility of the inhabitants, every freeman would have a right to come and give his vote upon the law; but, inasmuch as this cannot be done, by reason of the extent of territory, and some other causes, the people have

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88. *See* CITIZENS DIVIDED, *supra* note 7, at 4 ("[A] primary purpose of First Amendment rights is to make possible the value of self-government, and that this purpose requires public trust that elections select officials who are responsive to public opinion.").

89. *Id.* at 12–13 (discussing the debates in the First Congress on whether to adopt the clause).

90. THOMAS HART BENTON, ABRIDGMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856: MARCH 4, 1789–JUNE 1, 1796 138 (D. Appleton, ed. 1857) (statement of Mr. Hartley).

91. *Id.*

> agreed that their representatives shall exercise a part of their authority.[92]

As it debated the First Amendment, the First Congress affirmed the Constitutional principle that the government is a representative democracy in which the people govern by communicating their views to their representatives.

The First Congress's consideration of including a right of instruction in the First Amendment demonstrates that it viewed the amendment's free speech rights as facilitating the people's fundamental right to participate in the representative democracy by communicating their views to their representatives. During the debate on the right of instruction, Elbridge Gerry of Massachusetts stated:

> The friends and patrons of this constitution have always declared that the sovereignty resides in the people, and that they do not part with it on any occasion; to say the sovereignty vests in the people and that they have not a right to instruct and control their representatives is absurd to the last degree.[93]

Following the debate, a right of instruction was not included in the First Amendment primarily because the First Congress concluded that the Amendment's free speech provisions secured the ability of the people to express their views to their representatives. James Madison explained that Congress had asserted the right of instruction sufficiently by assuring that the First Amendment protects the right of the people to express and communicate their sentiments and wishes to their representatives.[94] Madison further stated:

> The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government; the people may therefore publicly address their representatives, may privately advise them, or declare their sentiments by

92. *Id.* at 143 (statement of Mr. Page).
93. *Id.* at 140 (statement of Mr. Gerry).
94. *Id.* at 141 (statement of Mr. Madison).

> petition to the whole body; in all these ways they may communicate their will.[95]

Although representatives are not required to take direct instructions from their constituents, the First Amendment was enacted to allow the people to freely communicate their views on issues to their representatives who are expected to be responsive to the sentiments and wishes of their constituents.[96] The right to influence representatives, however, belongs to the people and it is not intended to be exercised only by certain special interests.

Justice Breyer recognized "the importance of reading the First Amendment not in isolation but as seeking to maintain a system of free expression designed to further a basic purpose: creating and maintaining democratic decision-making institutions."[97] He wrote, "Speech does not exist in a vacuum. Rather, political communication seeks to secure government action. A politically oriented 'marketplace of ideas' seeks to form a public opinion that can and will influence elected representatives."[98] Justice Breyer understood that the First Amendment's purpose is to create a chain of communication between the people and their representatives so that the public's policy preferences could be "channeled into effective government action."[99]

One of the Court's most significant First Amendment decisions, *New York Times v. Sullivan*, is often cited for the proposition that "debate on public issues should be uninhibited, robust, and wide-open."[100] The *Sullivan* Court, however, linked the im-

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95. *Id.*

96. Citizens United v. FEC, 558 U.S. 310, 339 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.").

97. BREYER, *supra* note 12, at 39.

98. McCutcheon v. FEC, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting).

99. *Id.*; *see also* McConnell v. FEC, 540 U.S. 93, 136–37 (2003) ("[T]he electoral process is the very 'means through which a free society democratically translates political speech into concrete governmental action.'" (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 401 (2000) (Breyer, J., concurring))), *overruled in part by Citizens United*, 558 U.S. 310.

100. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); *see* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2829 (2011);

portance of free political discussion to "the end that government may be responsive to the will of the people," which the Court recognized as a principle fundamental to the Republic.[101] In *Buckley,* the Court also linked robust debate to the preservation of a representative democracy, stating that "the central purpose of the [First Amendment's] Speech and Press Clauses was to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish."[102] To fulfill the promise of the First Amendment, citizens' robust political speech must matter to the representative democracy.

For the First Amendment to have meaning, constituents must believe that their representatives respond to their political speech. Robert C. Post observes, "If the people do not believe that elected officials listen to public opinion, participation in public discourse, no matter how free, cannot create the experience of self-government."[103] Similarly, Justice Breyer remarked, "If the average person thinks that what he says, exercising his First Amend-

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FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 467 (2007); Buckley v. Valeo, 424 U.S. 1, 14 (1976).

101. *N.Y. Times*, 376 U.S. at 269 (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

102. *Buckley*, 424 U.S. at 93, n.127 (citing *N.Y. Times*, 376 U.S. at 270). The author of this statement in *Buckley,* linking robust political speech to representative democracy, is Justice William J. Brennan, Jr., who wrote the opinion in *New York Times Co. v. Sullivan*. *Buckley* is a *per curiam* opinion with several justices contributing to the drafting of the majority decision. Potter Stewart authored the contribution and expenditures section; Lewis F. Powell, Jr., the disclosure section; William Rehnquist wrote regarding the FEC; and William J. Brennan, Jr. wrote regarding the public financing provisions. Warren E. Burger, Memorandum to the Conference, Buckley v. Valeo (Nov. 18, 1975) (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part I, Box 395); Thurgood Marshall, Memorandum to the Conference, Buckley v. Valeo (Jan. 19, 1976) (on file with the Library of Congress, Manuscript Division, Papers of Thurgood Marshall, Part I, Box 173); *see also Ariz. Free Enter.*, 131 S. Ct. at 2836 (Kagan, J., dissenting) ("*Buckley* recognized that public financing of elections *fosters* First Amendment Principles." (citing *Buckley*, 424 U.S. at 93, n.127)).

103. CITIZENS DIVIDED, *supra* note 7, at 60.

ment rights, just can't have an impact on his representative, he says, what is the point of the First Amendment?"[104]

The First Amendment's protection of public discourse and the interest in preserving representative democracy are inextricably linked. In *FEC v. Wisconsin Right to Life*, Chief Justice Roberts wrote, "Where the First Amendment is implicated, the tie goes to the speaker, not the censor."[105] Roberts, however, fails to credit the interest in representative democracy that has been implicit in the First Amendment since it was enacted by the first Congress. Where the First Amendment right is speech in the form of money contributed to candidates for elected office, the tie goes to the preservation of representative democracy. Should the representative democracy fail, the First Amendment's protection of political speech becomes meaningless.

B. A Marginal Impact on Speech

The government interest in protecting representative democracy outweighs the burden imposed by many campaign finance regulations, which often have only a marginal and indirect impact on the ability of citizens to engage in political speech. The Roberts Court, however, has taken nearly an absolutist position on the First Amendment's protection of money as political speech, even though the Supreme Court's jurisprudence has often found that government regulations may survive First Amendment scrutiny.[106] In *Buckley*, the Court found that a limit on the amount or the aggregate amount that a person or group may contribute to a candidate or political committee had only a marginal or modest impact on speech.[107] In contrast, the Roberts Court's hyper-vigilance is

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104. Transcript of Oral Argument, *supra* note 76, at *33. Justice Breyer raised the question of "whether being able to write a $3.6 million check to a lot of people does leave the average person to think, my First Amendment speech, in terms of influencing my representative, means nothing." *Id.* at *42.

105. *Wis. Right to Life*, 551 U.S. at 474.

106. Citizens United v. FEC, 558 U.S. 310, 420 (2010) (stating that speech can be regulated based on the speaker's identity, e.g. students and government employees).

107. *Buckley*, 424 U.S. at 20, 38.

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution

not warranted by the burden that campaign finance regulations impose. At the same time that the Roberts Court has narrowed the government interest in campaign finance regulation, it has expanded free speech to include all money that is spent in a political campaign.

Justice William J. Brennan, Jr. wrote the opinion in *New York Times v. Sullivan* upholding the principle that "debate on public issues should be uninhibited, robust, and wide-open."[108] Although Justice Brennan's opinion is noted for strongly upholding freedom of political speech, he did not have an absolutist view of the First Amendment.[109] Justice Brennan thought that regulations on speech should be reviewed by considering the impact on the speaker's ability to speak. In a letter to Justice Antonin Scalia during the Court's consideration of *FEC v. Massachusetts Citizens for Life, Inc.,* Brennan wrote:

> Any regulation of speech can, of course, be cast as an absolute prohibition, since it forbids speech except in accordance with the regulation. However, since absolute prohibition is the ultimate restriction of speech, characterizing regulation in this way

> but does not in any way infringe the contributor's freedom to discuss candidates and issues.

Id. at 21. The compelling interest in representative democracy might also outweigh the burden imposed by expenditure limits where so much money is spent by one candidate that the citizens are unable to make an informed choice about which candidate will best represent their interests. Justice Byron White would have upheld the campaign expenditure limits in *Buckley*, writing in dissent, "[t]he ceiling on candidate expenditures represents the considered judgment of Congress that elections are to be decided among candidates none of whom has overpowering advantage by reason of a huge campaign war chest." *Id.* at 265 (White, J., dissenting).

108. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

109. Chief Justice Roberts appears to acknowledge that the First Amendment's protection of political speech is not an absolute prohibition of all government regulation of speech. He wrote that "[t]he right to participate in democracy through political contributions is protected by the First Amendment, but the right is not absolute." *McCutcheon*, 134 S. Ct. at 1441; *see also Wis. Right to Life*, 551 U.S. at 482. "Our jurisprudence over the past 216 years has rejected an absolutist interpretation" of the First Amendment's words stating that "Congress shall make no law . . . abridging the freedom of speech." *Id.* at 482 (quoting U.S. CONST. amend. I).

> would require that every provision be justified by something akin to a "clear and present danger." Most regulations, including many we currently consider both useful and minimally intrusive, would fail this test. It seems a fairer assessment of the impact of a regulation simply to examine how difficult it is to engage in speech as a result of that regulation.[110]

The First Amendment has never acted as an absolute bar to the regulation of speech and should not do so when the regulation is of money and not of pure speech. As Justice Brennan advises, the Court should take a fair look at how difficult it is to engage in political speech as a result of limits on the amount of money that can be contributed to political candidates during an election cycle. The *Buckley* Court found a variation in the burden that regulations could impose on money as election speech, finding that regulations on campaign expenditures resulted in a higher burden on speech than regulations on contributions.[111] In applying the First Amendment to political speech, there must be an analysis of the level of burden that a campaign finance regulation imposes on an individual's ability to express his views.

There are many reasons why campaign finance regulations may have only a marginal impact on political speech. As a foundational point, campaign finance regulations do not impact pure

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110. William J. Brennan, Jr., Letter to Justice Antonin Scalia, re: *FEC v. Mass. Citizens for Life, Inc.,* No. 85-701 (Nov. 17, 1986) (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part I, Box 729).

111. In *McCutcheon*, Roberts explained the distinction that the *Buckley* Court drew between expenditures and contributions: Expenditure limits address "core First Amendment rights of political expression" and must be analyzed under exacting scrutiny: the government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest. *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley*, 424 U.S. 44–45). In contrast, contribution limits impose a lesser restraint on political speech and affected political association, which requires a lesser standard of review. The government must demonstrate a sufficiently important interest and employ means closely drawn to avoid unnecessary abridgement of associational freedoms. *Id.*

speech.[112] Contributing money to be used for expenditures in a campaign for political office is not in itself engaging in speech.[113] Money does not have any speech characteristics; it is neither loud nor soft, kind nor harsh, coherent nor garbled. It doesn't communicate anything in itself. The Court, however, has accepted the proposition that money, although not speech, enables speech. Justice Breyer wrote, "Money is not speech, it is money. But the expenditure of money enables speech, and that expenditure is often necessary to communicate a message, particularly in a political context."[114] The *Buckley* Court did not unequivocally hold that political expenditures are speech. Instead, it considered that "every means of communicating ideas in today's mass society requires the expenditure of money."[115] The Court found that "[t]he electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech."[116] It is notable, however, that *Buckley* was decided in 1976. Today the electorate is increasingly using lower cost modes of communication including e-mails, Facebook, and Twitter Accounts, which unlike handbills and leaflets do not entail printing,

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112. *See* Davis v. FEC, 554 U.S. 724, 752 n.3 (2008) (Stevens, J., concurring in part and dissenting in part) ("[C]ampaign expenditures are not *themselves* 'core political speech'; they merely may *enable* such speech (as well as its repetition *ad nauseum*) . . . it is simply not the case that the First Amendment 'provides the same measure of protection' to the use of money to enable speech as it does to speech itself." (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring))).

113. *See* FEC v. Nat'l Conservative PAC, 470 U.S. 480, 508 (1985) (White, J., dissenting) ("The First Amendment protects the right to speak, not the right to spend, and limitations on the amount of money that can be spent are not the same as restrictions on speaking. I agree with the majority that the expenditures in this case 'produce' core First Amendment speech. But that is precisely the point: they produce such speech; they are not speech itself. At least in these circumstances, I cannot accept the identification of speech with its antecedents. Such a house-that-Jack-built approach could equally be used to find a First Amendment right to a job or to a minimum wage to 'produce' the money to 'produce' the speech.").

114. BREYER, *supra* note 12, at 46.

115. Buckley v. Valeo, 424 U.S. 1, 19 (1976).

116. *Id.*

paper, and circulation costs.[117] The *Buckley* Court, considering the issue today, might not find that "*every* means of communicating" requires the expenditure of money.[118]

Even accepting that political campaign contributions, although not speech, enable speech, not all the money contributed to a campaign funds speech. Retired Justice John Paul Stevens observed during testimony before a Senate committee that: "Speech is only one of the activities that are financed by campaign contributions and expenditures. Those financial activities should not receive the same constitutional protection as speech itself. After all, campaign funds were used to finance the Watergate burglaries—actions that clearly were not protected by the First Amendment."[119] In addition to funding burglaries, campaign funds can be used to pay for campaign staff's salaries, pizza, and gasoline, which are not themselves intrinsically expressive or pure speech protected by the First Amendment.[120]

In *McCutcheon*, even Chief Justice Roberts recognized that contributing money to a candidate's campaign is only one option a citizen has for expressing his political views in the context of an election.[121] He identifies as additional options, urging others to vote for a particular candidate and volunteering to work on a campaign.[122] Justice Byron White, who had first-hand knowledge of political campaigns having participated in the presidential campaign of John F. Kennedy, wrote, "The burden on actual speech imposed by limitations on the spending of money is minimal and indirect. All rights of direct political expression and advocacy are

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117. *Id.* ("The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs.").

118. *Id.* (emphasis added). *But see* Citizens United v. FEC, 558 U.S. 310, 353 (2010) (finding that television networks and major newspapers owned by media corporations are the most important means of mass communication).

119. *Dollars and Sense: How Undisclosed Money and Post-*McCutcheon *Campaign Finance Will Affect 2014 and Beyond: Hearing Before the Senate Committee on Rules and Administration*, 113th Cong. 5 (2014) [hereinafter *Dollars and Sense*] (statement of Justice John Paul Stevens (Ret.)).

120. Akhil Reed Amar, *The First Amendment's Firstness*, 47 U.C. DAVIS L. REV. 1015, 1034 (2014).

121. McCutcheon v. FEC, 134 S. Ct. 1434, 1441 (2014) (plurality opinion).

122. *Id.*

retained."[123] It is key to a consideration of the burden that campaign finance regulations impose on political speech that the restrictions are on the money that enables speech and not on speech itself. No matter how close the Court believes the relationship between money and speech to be, money enables speech, it is not speech.

Also of significance, campaign finance regulations do not restrict what the speaker says. The effect of the regulations is on the quantity of permissible speech, not the content of the speech. Therefore, the Supreme Court's cases protecting the right of individuals to express their viewpoint by burning the American flag, holding offensive posters at funerals, and participating in Nazi parades are not relevant to campaign finance regulations.[124] Justice Brennan's admonition in *Texas v. Johnson*, upholding a protester's right to burn a flag, that "a bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" is not relevant to whether a donor can contribute money to an election campaign.[125] Campaign finance regulations are invariably viewpoint neutral. *Buckley* noted, "[C]ontribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties."[126] It is only in the unusual circumstance where a campaign finance regulation discriminates based on viewpoint that a heightened level of scrutiny is warranted.

Finally, speech in the context of campaigns for elected office is distinct from speech in other contexts.

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123. FEC v. Nat'l Conservative PAC, 470 U.S. 480, 508–09 (1985) (White, J., dissenting). Justice White was the only justice to dissent in *Buckley* by upholding expenditure restrictions, as well as contribution limits. *Id.*

124. *McCutcheon*, 134 S. Ct. at 1441 ("If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition."). The plurality in *McCutcheon*, however, failed to distinguish these cases in which the government regulation was motivated by the content of the speech. *Id.*

125. 491 U.S. 397, 414 (1989).

126. Buckley v. Valeo, 424 U.S. 1, 29 (1976).

> Elections are distinct from the more general arena of democratic debate, both because elections serve a specific set of purposes and because those purposes can, arguably, be undermined or corrupted by actions such as the willingness of candidates or officeholders to trade their votes on issues for campaign contributions or spending.[127]

In *First National Bank v. Bellotti*, the Court drew a distinction between the right to speak on issues of general public interest and the "quite different context of participation in a political campaign for election to public office."[128] Campaigns for public office elect the people's representatives, and thus, are at the core of the compelling government interest in representative democracy.

One of the most passionate assertions that there is a government interest in protecting the integrity of elections—an interest that should not be overwhelmed by the First Amendment—was made by Justice James C. Nelson, sitting on the Supreme Court of Montana, who wrote a dissent in *Western Tradition Partnership, Inc. v. Attorney General of Montana*.[129] Both the majority who

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127. Richard H. Pildes, *Elections as a Distinct Sphere Under the First Amendment*, *in* MONEY, POLITICS, AND THE CONSTITUTION: BEYOND CITIZENS UNITED 19, 19 (Monica Youn ed., 2011) (advocating for "electoral exceptionalism," which would permit the regulation of speech in the context of campaigns as distinct from other contexts); *see also* Geoffrey R. Stone, *"Electoral Exceptionalism" and the First Amendment*, *in* MONEY, POLITICS AND THE CONSTITUTION, *supra*, at 37.

128. 435 U.S. 765, 787 n.26 (1978) (noting that Congress might be able to demonstrate a danger of real or apparent corruption where the independent expenditures of corporations are used to influence candidate elections rather than to influence a referendum on an issue of public interest).

129. 271 P.3d 1, 16 (Mont. 2011) (Nelson, J. dissenting), *rev'd sub nom.*, Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490 (2012) (granting certiorari and summarily reversing without argument based on the holding in *Citizens United*). Justice Stephen Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan dissented, stating that the decision in *Citizens United*:

> [S]hould not bar the Montana Supreme Court's finding, made on the record before it, that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana. Given the history and political landscape in Montana, that court concluded that the State had a compelling interest in limiting independent expenditures by

strove to uphold a state statute regulating corporate expenditures by distinguishing *Citizens United* and Justice Nelson who reluctantly wrote that *Citizens United* controlled, expressed frustration with a campaign finance jurisprudence that impaired Montana's citizens from voting for an initiative that would protect their political institutions from the corrupt practices and heavy-handed influences of special interests.[130] Justice Nelson, acknowledging that he thoroughly disagreed with the *Citizens United* decision, wrote:

> I cannot agree with [*Citizens United's*] holding that the prevention of corruption in the form of independent expenditures is not a compelling state interest. There is no plausible reason why a state would *not* want to protect the integrity of its election process against corruption and undue influence; to do otherwise would render the fundamental right to vote a meaningless exercise. To my knowledge, the First Amendment has never been interpreted to be absolute and gloriously isolated from other fundamental rights and values protected by the Constitution. Yet, *Citizens United* distorts the right to speech beyond recognition. Indeed, I am shocked that the Supreme Court did not balance the right to speech with the government's compelling interest in preserving the fundamental right to vote in elections.[131]

It is unfortunate that the Roberts Court chose to dismiss the interest of voters in protecting the integrity of Montana's election process, in favor of a hyper-vigilant protection of First Amendment speech rights. Instead, the Court should shift its focus from the right of speakers with the financial resources to spend above the thresholds

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> corporations. Thus, Montana's experience, like considerable experience elsewhere since the Court's decision in *Citizens United*, casts grave doubt on the Court's supposition that independent expenditures do not corrupt or appear to do so.

Am. Tradition P'ship, 132 S. Ct. 2491–92 (Breyer, J. dissenting) (citation omitted).

130. *W. Tradition P'ship*, 271 P.3d at 11; *id.* at 19 (Nelson, J. dissenting).

131. *Id.* at 35.

set by voters and legislators, to the rights of the vast majority of citizens to have confidence in the integrity of their elected representatives. There is a danger that if the Court does not "temper its doctrinaire logic" regarding the First Amendment "with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact" destroying representative democracy.[132]

This section argues that monetary contributions for expenditures by candidates for elected office are not at the core of political speech. The regulation of money contributions and expenditures does not unreasonably impair the ability of the individual to persuade through the power of her ideas. Today, there are more increasingly available avenues, such as a vibrant internet, for an individual to distribute her ideas. Moreover, these avenues are not dependent on significant monetary investments. Where the effect of campaign regulations on political speech is only marginal or modest, First Amendment interests should not outweigh the compelling government interest in protecting representative democracy that is at the foundation of the Constitution.[133]

IV. *McCutcheon v. FEC*: Representation Lost

A. McCutcheon v. FEC

The government interest in preserving representative democracy is particularly relevant to *McCutcheon v. FEC*, in which the United States Supreme Court struck down a federal campaign finance law that restricted the number of candidates for elected office that an individual donor could contribute money to during an election cycle.[134] The Court's decision in *McCutcheon* enables

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132. Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (opining that upholding the right of anarchists to speak and create public disorder could jeopardize the security of democratic government). A debasement of representative democracy today is a weightier concern than the public disorder disdained by Justice Jackson. A "suicide pact," however, is an apt reference.

133. *See* Buckley v. Valeo, 424 U.S. 1, 29 (1976) ("[T]he weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling.").

134. 134 S. Ct. 1434, 1442 (2014). The Court also overturned the regulations that limited aggregate contributions to political parties and non-party committees. *Id.*

donors to contribute money to an unlimited number of candidates for federal office, including every candidate for the U.S. Congress. The base limit on the amount of money that can be contributed to each of the candidates was not challenged and remains in effect.[135] In *McCutcheon*, the interest in representative democracy is relevant because the decision removes all limits on the ability of a donor to contribute money to candidates in congressional districts across the country. Wealthy donors can contribute to the election of any number of congressional candidates or gain influence by donating to all of a political party's candidates.

A likely result of *McCutcheon* is that the views of constituents will be disregarded due to an increase in campaign contributions to their representatives from non-constituents. Non-resident money donors contribute to a candidate who will advocate for their policy preferences, which may not reflect the views of the elected representative's constituents. The Court's decision may not only impair the important link between a representative and her constituents, but create a national legislature that is not representative of the people of the United States as a whole.

The aggregate limit at issue in *McCutcheon* placed some restriction on the ability to fund candidates outside of a donor's legislative district, but it did not prohibit all such contributions. Shaun McCutcheon, a resident of the State of Alabama,[136] sought to contribute money to candidates for elected office who shared his views on public policy so that those officials would enact legislation consistent with McCutcheon's policy preferences.[137] He did not want to be limited in the number of candidates that he could support by the Federal Elections Campaign Act of 1971 ("FECA"), as amended by the Bipartisan Campaign Reform Act of 2002, FECA's aggregate contribution limits.[138] McCutcheon, together

135. The limit on the amount that an individual can contribute to a candidate during an election cycle remains at $2,600. *Id.* at 1442.

136. McCutcheon v. FEC, 893 F. Supp. 2d 133, 136 (D.D.C. 2012), *rev'd* 134 S. Ct. 1434.

137. Brief for Appellant Shaun McCutcheon at 11, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536).

138. The Federal Elections Campaign Act ("FECA") of 1971 was enacted on February 7, 1972, and the FECA Amendments on October 15, 1974. Pub. L. No. 92-225, 86 Stat. 3 (1972); Pub. L. No. 93-443, 88 Stat. 1263 (1974). A quarter-century later, Congress amended FECA via the Bipartisan Campaign

with co-plaintiff the Republican National Committee ("RNC"), challenged FECA's aggregate contribution limits that restricted the total amount of money that an individual could contribute to federal candidates, as well as FECA's limits on donations to other political party and non-party committees.

In the 2011–2012 election cycle, McCutcheon contributed a total of $33,088 to sixteen different candidates in "congressional races across the nation."[139] McCutcheon wished to contribute to twelve additional candidates for Congress.[140] FECA's aggregate limits prohibited McCutcheon from contributing to all of the additional candidates because it limited his contributions to federal candidates to a total of $48,600. FECA's base limit allowed McCutcheon to contribute up to $5,200 to each of nine candidates, but the aggregate limit prevented further contributions to any other candidate (beyond the additional $1,800 that may be spent before reaching the $48,600 aggregate limit).[141] McCutcheon also wanted to contribute to various political committees, but was prevented from doing so by the aggregate limit on contributions to such committees.[142] The RNC wanted to receive the donations that McCutcheon and similarly situated individuals would give to it but for the aggregate contribution limits.[143]

The U.S. District Court for the District of Columbia upheld FECA's aggregate limits on campaign contributions as a permissible means of preventing corruption or the appearance of corruption, reasoning that the aggregate limits prevented evasion of the

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Reform Act of 2002 ("BCRA"). Pub. L. No 107-115, 116 Stat. 81 (2002). FECA's base contribution limits permitted an individual to contribute up to $2,600 per election to any candidate ($5,200 total for the primary and general elections). The aggregate limits allowed an individual to contribute $48,600 to federal candidates and a total of $74,600 to other political committees. Together an individual could contribute up to $123,200 to candidates and non-candidate committees during each two-year election cycle. *See McCutcheon*, 134 S. Ct. at 1442–43.

139. Brief for Appellant, *supra* note 137, at 12.

140. *McCutcheon*, 134 S. Ct. at 1436; Brief for Appellant, *supra* note 137, at 12.

141. Brief for Appellant, *supra* note 137.

142. *McCutcheon*, 134 S. Ct. at 1443.

143. *Id.*

base limits.[144] *Buckley* had originally upheld FECA's aggregate contribution limits under this anti-circumvention rationale.[145] The district court noted that *Buckley* applied a lower level of scrutiny to regulations affecting campaign contributions than to regulations affecting expenditures.[146] The district court reviewed the aggregate limits as a restriction on contributions and applied the lower level of scrutiny.[147] McCutcheon and the RNC appealed the district court's decision directly to the Supreme Court.[148]

In its argument before the Supreme Court, the Government argued the anti-circumvention interest that had been articulated by the district court.[149] This led the litigants and the Court to engage in debating a myriad of different scenarios under which a contributor could or could not circumvent the base contribution limits if the

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144. McCutcheon v. FEC, 893 F. Supp. 2d 133, 138–40 (D.D.C. 2012), ("The government may justify the aggregate limits as a means of preventing corruption or the appearance of corruption, or as a means of preventing circumvention of contribution limits imposed to further its anticorruption interest." (citing Buckley v. Valeo, 424 U.S. 1, 26–27 (1976))), *rev'd* 134 S. Ct. 1434.

145. *Buckley*, 424 U.S. at 38.

146. *McCutcheon*, 893 F. Supp. 2d at 137. Expenditure limits are subject to strict scrutiny, while contribution limits need only satisfy the lesser demand of being closely drawn to match a sufficiently important interest. *Id. Buckley* had distinguished between government regulations that restricted campaign finance contributions and those that restricted campaign finance expenditures. *Buckley*, 424 U.S. at 58–59. The Court applied a lesser standard of review to the regulation of contributions to candidates for elected office, upholding both the base and aggregate contribution limits. *McCutcheon*, 893 F. Supp. 2d at 138 (citing *Buckley*, 424 U.S. at 19).

147. *McCutcheon*, 893 F. Supp. 2d at 137–38.

148. A party may appeal directly to the Supreme Court an order granting or denying an injunction in a civil action in which an act of Congress requires a hearing by a three-judge panel in a district court. 28 U.S.C. § 1253 (Westlaw through Pub. L. No. 114-61). A constitutional challenge to any BCRA provision shall be filed in the District of Columbia and heard by a three-judge panel. Bipartisan Campaign Reform Act of 2002, sec. 403(a), Pub. L. No. 107-155, 116 Stat. 81 (2002). A three-judge panel of the United States District Court for the District of Columbia denied McCutcheon's motion for a preliminary injunction. *McCutcheon*, 134 S. Ct. at 1443. He appealed the District Court's decision directly to the Supreme Court. *Id.* at 1444.

149. *McCutcheon*, 134 S. Ct. at 1442 (noting the Government argued that the aggregate limits serve the permissible objective of combatting corruption by preventing circumvention of FECA's base contribution limits).

aggregate limits were removed.[150] In assessing a proposed circumvention scenario, Justice Roberts speculated, "it is hard to believe that a rational actor would engage in such machinations."[151] Finding that the aggregate limits did little, if anything, to prevent circumvention of the base contribution limits, the Court struck down the aggregate limits in a plurality opinion.[152] The Court found a "substantial mismatch" between the government's objective of preventing circumvention of the base limits and the means selected to achieve it, noting that the aggregate limits were not "closely drawn" to the government interest.[153]

Four years earlier in *Citizens United*,[154] the Court overruled existing precedent to strike down corporate expenditure limits on electioneering communications under the heightened standard of review applicable to expenditures. In *McCutcheon*, the Court struck down a government regulation limiting aggregate contributions to candidates and political committees under the lower standard of review applicable to contributions.[155] FECA's aggregate contribution limits had been upheld in *Buckley* as a "modest restraint" on protected political activity that served to prevent evasion of the base contribution limits.[156] In *McCutcheon*, the Roberts

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150. *Id.* at 1453–56.

151. *Id.* at 1454.

152. *Id.* at 1442–43, 1446. Chief Justice John Roberts wrote an opinion joined by Justices Antonin Scalia, Anthony Kennedy, and Samuel Alito. *Id.* at 1440–41. Justice Thomas concurred in the judgment, writing separately to state his view that the decision in *Buckley* should be overruled, including its holding that contribution limits could be subjected to a lesser standard of constitutional scrutiny than expenditure limits. *Id.* at 1462–65 (Thomas, J., concurring). Justice Stephen Breyer wrote a dissent that was joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. *Id.* at 1465 (Breyer, J., dissenting).

153. *Id.* at 1446 (plurality opinion). The Court stated that even where it was not applying strict scrutiny—requiring a means narrowly tailored to the desired objective—it requires a fit that although not necessarily perfect, is at least reasonable. *Id.* at 1456. The Court found that the aggregate contribution limit was "poorly tailored to the Government's interest in preventing circumvention of the base limits . . . impermissibly restrict[ing] participation in the political process." *Id.* at 1457.

154. 558 U.S. 310, 365 (2010) (Kennedy, J.).

155. *McCutcheon*, 134 S. Ct. at 1456–57.

156. Buckley v. Valeo, 424 U.S. 1, 38 (1976).

Court continued to chip away at the support structure underpinning campaign finance regulations that was established in *Buckley*.

The Government likely restricted itself to arguing the ineffective anti-circumvention rationale because of the Supreme Court's cramped view that only an interest in preventing *quid pro quo* corruption, the exchange of dollars for political favors, is compelling enough to support campaign finance regulation.[157] The anti-circumvention rationale is a weak one, dependent on consideration of the feasibility of hypothetical schemes involving the complex facts of campaign finance. The *McCutcheon* dissent also was constrained to consider the government interest in preventing corruption, although it defined corruption more broadly than the plurality.[158] The Government would fare better in defending campaign finance regulations if it began to build the foundation for a more compelling interest that is firmly embedded in the U.S. Constitution. And no interest is more firmly entrenched than the interest in preserving the representative democracy.

B. Representatives Should Respond to Voters, not Donors

In *McCutcheon*, Chief Justice Roberts describes the representative nature of the American democracy. He writes that "a central feature of democracy" is "that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns."[159] He states that responsiveness to constituents "is key to the very concept of self-governance through elected officials."[160] The holding in *McCutcheon*, however, undermines representative democracy because it increases the probability that representatives will be responsive to non-resident money donors and not to their voting constituents.[161]

157. *See McCutcheon*, 134 S. Ct. at 1441 (stating that to survive scrutiny any government regulation must target "quid pro quo" corruption or its appearance, the hallmark of which is exchanging dollars for political favors).

158. *Id.* at 1465–67 (Breyer, J., dissenting) (finding that the plurality defined corruption too narrowly; it is a broader interest in maintaining the integrity of our public governmental institutions).

159. *Id.* at 1441 (plurality opinion).

160. *Id.* at 1462.

161. *See* FEC v. Nat'l Conservative PAC, 470 U.S. 480, 517 (1985) (White, J., dissenting) ("[T]he infusion of massive PAC expenditures into the

The *McCutcheon* plurality, echoing the view of the Court in *Citizens United*, does not recognize a viable concern where a campaign contributor spends large sums of money and garners "influence over or access to" elected officials.[162] The Court accepts an election system in which any money donor may establish a direct link between his donations and influence on any representative. Wealthy donors can now contribute the maximum base limit to all candidates of a political party, which will likely gain them special access to that party's representatives. By striking down FECA's aggregate contribution limits, the *McCutcheon* plurality appears to be at rest with money donors directly influencing the policy choices of any number of federal legislators even though the donor does not live in the representatives' legislative districts and is not entitled to vote for them.

Chief Justice Roberts describes contributions to candidates who do not represent the legislative district in which an individual resides as "broader participation in the democratic process."[163] It is actually not broader in the sense that more people can participate since most people do not have the financial resources to contribute to numerous candidates. The broader participation that Chief Justice Roberts envisions is that wealthy individuals will be able to participate more broadly, influencing election results in more legislative districts, while gaining the special access to representatives that the plurality acknowledges money donors receive.

The *McCutcheon* plurality notes that volunteering to work on the campaign of a candidate for elected office is not an alternative for the individual who wants to support numerous candidates

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political process . . . may [force candidates] to please the spenders rather than the voters, and the two groups are not identical.").

162. McCutcheon v. FEC, 134 S. Ct. 1434, 1450–51 (2014) (plurality opinion) (quoting Citizens United v. FEC, 558 U.S. 310, 360 (2010)). *Citizens United* states—implausibly—that even though there is little evidence that independent expenditures ingratiate donors to elected officials, "[i]ngratiation and access, in any event, are not corruption." *Citizens United*, 558 U.S. at 360. In 2003, the *McConnell* Court articulated a concern with the pernicious effects of "undue influence." McConnell v. FEC, 540 U.S. 93, 153 (2003), *overruled in part by Citizens United*, 558 U.S. 310. That concern—inexplicably—has disappeared from the current Court's review of campaign finance regulations.

163. *McCutcheon*, 134 S. Ct. at 1449.

who are located outside of his legislative district.[164] The Court's holding, however, enables wealthy individuals to donate money to candidates in all 435 federal congressional districts. Although the donor would be unable to volunteer to work for candidates who are located outside of the donor's own district, the plurality endorses his ability to provide money to those candidates. Money, traversing the nation and passing from a non-resident contributor directly to a potential representative, disrupts the link between representatives and their constituents. Residency is an important factor in a representative democracy. For example, the Constitution provides that a representative must be an inhabitant of the State in which she will be elected.[165] Lawrence Lessig asserts that "[t]his residency requirement was a response to the fear that wealthy non-residents would purchase elected office."[166] The *McCutcheon* plurality appears not to be concerned that wealthy non-residents might purchase elected office for representatives that support their viewpoints, rather than the policy preferences of the representative's voting constituents.

Retired Justice John Paul Stevens, testifying before a Senate committee hearing on a constitutional amendment to address the Roberts Court's campaign finance decisions, stated that "rules limiting campaign contributions and expenditures should recognize the distinction between money provided by their constituents and money provided by non-voters, such as corporations and people living in other jurisdictions."[167] Justice Stevens warned that "[u]nlimited campaign expenditures impair the process of democratic self-government. They create a risk that successful candidates will pay more attention to the interests of non-voters who

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164. *Id.*

165. U.S. CONST. art. I, § 2, cl. 2.

166. Brief of Professor Lawrence Lessig, *supra* note 6, at 14.

167. *Dollars and Sense*, *supra* note 119, at 3. In his dissent in *Citizens United v. FEC*, Justice Stevens wrote regarding corporations, "[t]hey cannot vote or run for office. Because they may be managed and controlled by non-residents, their interests may conflict in fundamental respects with the interests of eligible voters." Citizens United v. FEC, 558 U.S. 310, 394 (2010) (Stevens, J., dissenting); *see also* STEVENS, *supra* note 57, at 57–79 (explaining why it is unwise to allow persons who are not qualified to vote—whether they be corporations or nonresident individuals—to have a potentially greater power to affect the outcome of elections than eligible voters).

provided them with money that to the interests of the voters who elected them. That risk is unacceptable."[168] Legislators should be dependent on voters, not money contributors. As aptly noted by Lawrence Lessig, "The framers did not intend to make representatives dependent upon contributors."[169]

C. Diluting the Votes of Constituents

Striking down FECA'S aggregate campaign contribution limits means that candidates for elected office will receive money contributions from an increased number of donors who reside outside of their legislative districts. Shaun McCutcheon had donated money to sixteen different candidates in elections across the country without triggering FECA's modest aggregate limit. He wanted to contribute to twelve additional candidates. Following the Supreme Court's decision, Mr. McCutcheon can now contribute to an unlimited number of candidates in every legislative district. The effect of *McCutcheon* will be that representatives will become increasingly responsive to the policy preferences of non-constituent donors.

A representative's disproportionate attention to non-constituent money donors is much like disproportionate voting power. In *Baker v. Carr*, the Court found that existing state legislative districts giving voters residing in rural areas of a state greater representation in the state's legislature than voters residing in urban areas affected a basic right of representation that was justiciable by the courts.[170] The concept of proportional representation can be traced back to the Philadelphia Constitutional Convention. James Madison's journal from the Convention notes:

> [Mr. Wilson] entered elaborately into the defence of a proportional representation, stating for his first position that as all authority was derived from the people, equal numbers of people ought to have an equal n[umber] of representatives, and different

168. *Dollars and Sense*, *supra* note 119, at 7.
169. LESSIG, *supra* note 6, at 242.
170. 369 U.S. 186, 255 (1962).

> numbers of people different numbers of representatives.[171]

Proportional representation embraces the principle that each American citizen has a right to representation in the government and not to have the weight of his views on public policy lessened by reason of rural or urban residence or by reason of financial resources that govern his ability to donate money to elected representatives.

In *Reynolds v. Sims*, which upheld the principle of "one citizen, one vote," Chief Justice Earl Warren wrote,

> [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them.[172]

Warren found that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[173] He further observed:

> Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.[174]

171. JAMES MADISON, REMARKS OF JAMES WILSON IN THE FEDERAL CONVENTION, 1787, *reprinted in* 1 COLLECTED WORKS OF JAMES WILSON 80, 93 (Kermit L. Hall & Mark David Hall eds., 2007).

172. 377 U.S. 533, 565 (1964).

173. *Id.* at 555.

174. *Id.* at 562.

Warren makes the important point that voters elect representatives. Economic interests, especially those that are not resident in the legislative district, should not elect representatives or have undue influence on them.

The rationale for campaign finance regulations is similar to the principle of "one citizen, one vote"; large contributions by wealthy non-resident donors makes their voices more effective than the voice of those unable to make comparable donations. Where the elector's influence on his representative is diluted because individuals who are not constituents have provided money donations to his representative, then the elector's right of suffrage is impaired. On a broader scale, if the legislature as a whole is disproportionately influenced by the donations of a group of wealthy individuals who can afford to donate to an unlimited number of candidates for elected office, then the Constitution's principle of democratic self-government by the broad base of the people will be substantially undermined and the republic envisioned by the Framers will be lost. *Reynolds v. Sims* restored the balance of one-citizen, one-vote for residents of cities and rural counties. Today, courts should allow legislatures to enact campaign finance regulations to restore the balance of one-citizen, one vote for wealthy citizens and citizens with limited financial resources.

D. Enhancing the Power of the Donor Class

Lawrence Lessig observed, in reference to *McCutcheon*, "once you remove aggregate contribution limits, you shrink even further the likely number of funders of elections and exacerbate even more the gap between 'the funders' and 'the People.'"[175] Nonetheless, the *McCutcheon* plurality focused on enhancing the influence of those persons who are able to donate $5,200 to more than nine candidates in an election cycle. In the representative democracy envisioned by the Constitution's Framers, representatives weigh the views of all of their constituents in making policy choices. And the national legislature reflects the broad base of all of the people. If instead, representatives focus on a small number

175. Lawrence Lessig, *Out-Posting Post*, *in* CITIZENS DIVIDED, *supra* note 7, at 97, 104.

of money donors, those donors will "call the tune" and dilute the influence of the larger body of constituents.[176]

At the foundation of the republic established by the U.S. Constitution is the principle that the government should be responsive to the people of the United States and not to a favored class. James Madison defined the republic to recognize this principle:

> [W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour. It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or favoured class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honourable title of republic.[177]

The delegates to the Philadelphia Constitutional Convention were concerned about the consolidation and abuse of power. They established a government that dispersed power in three branches of government and incorporated checks and balances to guard against the concentration of power in any group of persons. The Framers wanted the republican democracy that they had founded to rest on the broadest base of the people. James Wilson sought to raise "the federal pyramid to a considerable altitude, and for that reason wished to give it as broad a basis as possible. No government could long subsist without the confidence of the people. In a republican government this confidence was peculiarly

176. *See* McCutcheon v. FEC, 134 S. Ct. 1434, 1468 (2014) (Breyer, J., dissenting) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000)).

177. FEDERALIST NO. 39 (James Madison); *see also* FEDERALIST NO. 57 (James Madison) ("Who are to be the electors of the Federal Representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs . . . . The electors are to be the great body of the people of the United States.").

essential."[178] Wilson stated, "The legislature ought to be the most exact transcript of the whole society."[179]

Since enactment of the Constitution in 1787, the history of the United States has been to expand the right of persons to participate in the democracy. The Fifteenth Amendment gave persons of all races the right to vote and the Nineteenth Amendment expanded suffrage to women. "Past restrictions on political participation based upon wealth, property ownership, race, gender, and other factors have given way to a nearly universal belief that representative democracy requires all citizens to have a substantially equal voice in making the decisions that affect their lives."[180] This forward progress in expanding democratic participation may be substantially slowed if a small number of money donors to candidates become a favored class outweighing the influence of the people as a whole.

In *Arizona Free Enterprise v. Bennett*, the Court assessed the constitutionality of an Arizona campaign finance regulation enacted to assure that Arizona's state government worked on behalf of all of the people of the State and not for a class of wealthy contributors to their elections.[181] The law allowed candidates for state office who accepted public financing for their campaign to receive additional money from the state if their privately financed opponent's campaign expenditures exceeded a certain limit.[182] Chief Justice Roberts, writing for the majority, held that Arizona's matching funds law imposed a substantial burden on the speech of privately financed candidates which could not be justified by a compelling state interest.[183] In the plurality's view in *McCutcheon*, "Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation

178. FEDERAL CONVENTION RECORDS—VOLUME I, *supra* note 10, at 49 (notes of James Madison).

179. *Id.* at 132.

180. Adam Lioz, *Breaking the Vicious Cycle: How the Supreme Court Helped Create the Inequality Era and Why a New Jurisprudence Must Lead Us Out*, 43 SETON HALL L. REV. 1227, 1258 (2013).

181. 131 S. Ct. 2806, 2813–14 (2011).

182. *Id.* at 2813.

183. *Id.* at 2824.

of some in order to enhance the relative influence of others."[184] The effect of striking down the Arizona statute was to maintain the existing advantage that wealthy donors had to influence state representatives through their campaign contributions.

Dissenting in *Arizona Free Enterprise*, Justice Kagan wrote that campaign finance regulations were enacted over the last century to prevent representatives from acting for the benefit of wealthy contributors rather than on behalf of all of the people.[185] The Arizona campaign finance regulation containing the matching funds provision was passed, not by the state's legislature, but by the citizens of Arizona themselves through an initiative.[186] The initiative followed "a political scandal involving the near-routine purchase of legislators' votes."[187] Justice Kagan wrote that Arizonians supported the campaign finance regulation in order to "ensure that their representatives serve the public, and not just the wealthy donors who helped put them in office."[188] Justice Kagan expressed a first principle of representative democracy—representatives should be linked first and foremost to a broad base of their constituents, and not to a segment of wealthy donors.[189]

During *McCutcheon's* Oral Argument, Justice Ginsburg suggested that aggregate limits could force a candidate for elected office to affirmatively seek support from a wider number of her constituents, rather than concentrating on a smaller number of wealthy donors.[190] Justice Ginsburg stated:

> It has been argued that these limits promote expression, promote democratic participation because

184. McCutcheon v. FEC, 134 S. Ct. 1434, 1441 (2014) (plurality opinion).

185. *Ariz. Free Enter.*,, 131 S. Ct at 2830 (Kagan, J., dissenting).

186. *Id.* at 2813 (majority opinion).

187. *Id.* at 2845 (Kagan, J., dissenting). In a scandal, known as "AzScam," nearly ten percent of Arizona's state legislators were caught accepting campaign contributions or bribes in exchange for their support of a piece of legislation. *Id.* at 2832.

188. *Id.* at 2845. Justice Kagan opined that the people of Arizona should be respected for passing an initiative that promoted "[r]obust campaigns leading to the election of representatives not beholden to the few, but accountable to the many." *Id.* at 2845.

189. *See id.*

190. Transcript of Oral Argument, *supra* note 76, at *19.

> what they require the candidate to do is, instead of concentrating fundraising on the super-affluent, the candidate would then have to try to raise money more broadly in the electorate. So that, by having these limits, you are promoting democratic participation . . . .[191]

Solicitor General Donald B. Verrilli, Jr. informed the Court during the argument that the cost of the 2010 congressional campaigns was about $1.5 billion and with aggregate contribution caps lifted to $3.6 million, less than 500 people are required to fund the entire campaign.[192] He noted that this results in the risk that "the government will be run of, by, and for those 500 people and that the public will perceive that the government is being run of, by, and for those 500 people."[193]

In fact, Solicitor General Verrilli may have overestimated the number of people who would effectively run the government based on the influence gained through their campaign contributions. In 2014, the 100 biggest campaign donors gave $323 million—almost as much as the $356 million given by the estimated 4.75 million people who gave $200 or less.[194] These numbers almost certainly result in part from the Roberts Court's dismantling of campaign finance regulations crafted by legislators knowledgeable about the pernicious effects of endless campaign fund raising from individuals seeking influence and by voters who passed initiatives to protect the integrity of their government. A critic of big money in politics, who formed a group entitled "Take Back our Republic" with the goal of reducing the influence of wealthy interests on politics stated, "If your real constituency is anyone with a

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191. *Id.*; *see also* Buckley v. Valeo, 424 U.S. 1, 21–22 (1976) ("The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons . . . .").

192. Transcript of Oral Argument, *supra* note 76, at *46–47.

193. *Id.* at *47.

194. Kenneth P. Vogel, *Big Money Breaks Out*, POLITICO (Dec. 29, 2014, 5:32 AM), http://www.politico.com/story/2014/12/top-political-donors-113833.html.

bigger check, it just seems to break down representative democracy."[195]

If the representative nature of the democracy is lost, not only will individual constituents be untethered from their representative, but overall the government will not represent the consensus of the people, but only the views of a favored class.[196] Constitutional Scholar Akhil Reed Amar remarks that reasonable limits on the total amount a person may give to all candidates guards against the corruption of the legislature as a whole, otherwise if "every single legislator feels financially beholden to the same one person or the same tiny group of oligarchs, then the soul of democracy itself is at risk."[197] The danger to representative democracy in a holding such as *McCutcheon* is that representatives will not represent the policy preferences of their constituents and, more broadly, that the Congress of the United States will not represent the interests of the American people, but rather the interests of a wealthy faction of the American people.

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195. Matea Gold, *A Critic of Big Money Emerges on the Right*, WASH. POST, Jan. 14, 2015, at A2 (quoting John Pudner).

196. Mark C. Alexander expresses this section's concern that decisions such as *McCutcheon* may increase the likelihood that representatives will act on behalf of wealthy donors rather than for the broad base of their constituents. Mark C. Alexander, Citizens United *and Equality Forgotten*, *in* MONEY, POLITICS, AND THE CONSTITUTION, *supra* note 127, at 153. Alexander writes that:

> The unchecked presence of money in politics presents a threat to the republican form of government. Currently, wealthy individuals maintain a disproportionate influence at the expense of the many, resulting in the potential for elected officials to betray their responsibility of representation. As the few maintain a disproportionate sway over elected representatives, the representative is more likely to exercise judgment on behalf of the few than on behalf of the many.
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> . . . .
>
> In order for the republic to be truly representative, the people must have control of their choices—not simply being able to vote, but having their representatives reflect their interests, not those whose financial support enabled their election. Properly understood against this backdrop, regulating money in politics is essential to ensuring a republican government that is responsive to the people.

Id. at 167–68.

197. Amar, *supra* note 120, at 1034.

V. Deference to the Legislature

In *Buckley*, the Supreme Court created a judicially-imposed regulatory structure for campaign finance rather than deferring to Congress's constitutional authority to regulate federal elections.[198] In subsequent decisions, the Court modified the regulatory structure that it had established in *Buckley*. Having taken the dominant role in forging the nation's campaign finance system away from the legislature, the Court has failed to articulate a clear and consistent doctrine that can hold nine Justices. The history since *Buckley* has been one of a fragmented Court whose members frequently file separate concurrences and dissents.[199] As a result, the Court's campaign finance jurisprudence sustains a significant degree of criticism even from the Justices themselves.[200]

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198. Article 1, § 4 of the Constitution grants Congress the power to regulate elections of members of the Senate and House of Representatives. U.S. Const. art. 1, § 4. *Buckley* noted that "The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case." Buckley v. Valeo, 424 U.S. 1, 13 (1976).

199. See Citizens United v. FEC, 558 U.S. 310 (2010), in which Justice Kennedy wrote the opinion for the Court; Justice Thomas joined Justice Kennedy's opinion except for Part IV; Justices Stevens, Ginsburg, Breyer, and Sotomayor joined only Part IV of Justice Kennedy's opinion; Chief Justice Roberts filed a concurring opinion, in which Justice Alito joined; Justice Scalia filed a concurring opinion in which Justice Alito joined and Justice Thomas joined in part; Justice Stevens filed an opinion concurring in part and dissenting in part, in which Justices Ginsburg, Breyer, and Sotomayor joined; and Justice Thomas filed an opinion concurring in part and dissenting in part. *Id.* See also McConnell v. FEC, 540 U.S. 93 (2003), *overruled in part by Citizens United*, 588 U.S. 310, in which Justices Stevens and O'Connor delivered the Court's opinion with respect to BCRA Titles I and II in which Justices Souter, Ginsburg, and Breyer joined; Chief Justice Rehnquist delivered the opinion of the Court with respect to BCRA Titles III and IV, in which Justices O'Connor, Scalia, Kennedy, and Souter joined; Justice Breyer delivered the Court's opinion with respect to BCRA Title V, in which Stevens, O'Connor, Souter, and Ginsburg joined; Justice Scalia filed a concurrence in part and a dissent in part; Justice Thomas filed a concurrence in part and a dissent in part; Justice Kennedy filed a concurrence in part and a dissent in part; Chief Justice Rehnquist filed an opinion dissenting in part; and Justice Stevens filed an opinion dissenting in part. *Id.*

200. In *Randall v. Sorrell*, Justice Thomas joined by Justice Scalia referred to "the continuing inability of the Court (and the plurality here) to apply *Buckley* in a coherent and principled fashion." 548 U.S. 230, 266 (2006) (Thomas, J., concurring). Justice Stevens observed that the Justices "have not always spoken

In effect, the Court has given itself the authority to demarcate permissible and impermissible campaign finance practices. Chief Justice Roberts acknowledged that the Court engages in constitutional line drawing in its campaign finance jurisprudence. "In a series of cases over the past 40 years, we have spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire to simply limit political speech."[201] The Chief Justice preceding Roberts, William Rehnquist, questioned whether the Court should be involved in such line drawing. Dissenting in *Massachusetts Citizens for Life*, Chief Justice Rehnquist wrote that the lines drawn by the majority's decision distinguishing among corporations would more properly be drawn by a legislature rather than the

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about corruption in a clear or consistent voice." *Citizens United*, 558 U.S. at 360 (Stevens, J., dissenting). In *McCutcheon*, Chief Justice Roberts acknowledged that Justice Stevens had made a fair point regarding the Court's lack of clarity or consistency. McCutcheon v. FEC, 134 S. Ct. 1434, 1451 (2014) (plurality opinion). In his *FEC v. Nat'l Conservative PAC* dissent, Justice White wrote that, "By striking down one portion of an integrated and comprehensive statute, the Court has once again transformed a coherent regulatory scheme into a nonsensical, loophole-ridden patchwork." 470 U.S. 480, 518 (1985) (White, J., dissenting). Robert C. Post wrote that "the Court has been nothing but confused" on the issue of campaign finance and that by "[l]acking a coherent intellectual foundation," the Court has been "bitterly divided, sometimes leaning in favor of reform, sometimes against." CITIZENS DIVIDED, *supra* note 7, at 3.

201. *McCutcheon*, 134 S. Ct. at 1441. Chief Justice Roberts would have the Court draw a line between quid pro quo corruption and general influence, while acknowledging that the line may seem vague. *Id.* at 1451. In *Citizens United*, Roberts referred to the "careful line that *Buckley* drew to distinguish limits on contributions to candidates from limits on independent expenditures on speech." 558 U.S. at 379; *see also* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 457 (2007) (drawing a line between campaign advocacy and issue advocacy) ("Our development of the law in this area requires us, however, to draw such a line, because we have recognized that the interests held to justify the regulation of campaign speech and its 'functional equivalent' 'might not apply' to the regulation of issue advocacy (citing *McConnell*, 540 U.S. at 105, 206 n.88)); *Randall*, 548 U.S. at 273 (Thomas, J., concurring in the judgment) ("[T]he plurality's determination that this statute clearly lies on the *impermissible* side of the constitutional line gives no assistance in drawing this line, and it is clear no such line can be drawn rationally."). Justice Thomas was referring to drawing a line to demarcate the amount of money contributed to a candidate for public office that would result in corruption. *Id.*

judiciary.[202] He observed that the majority's decision was basically legislative in character and recommended leaving the drawing of such lines to Congress if those lines are within Constitutional bounds.[203]

In *McCutcheon*, Chief Justice Roberts opined that Congress should not be the branch of government to determine the structure of elections, writing: "And those who govern should be the *last* people to help decide who *should* govern."[204] It is curious that Chief Justice Roberts would make such a statement because there are significant reasons why the legislature and not the Courts should have the primary role in structuring the election laws. Members of Congress have more knowledge of the intricacies of elections and, more importantly, understand how money is used in elections to gain influence.[205] Judge Richard A. Posner also questioned whether the Court should be so involved in reviewing legislative restrictions on contributions to political campaigns, observing that "the Supreme Court and the lower federal courts have

202. FEC v. Mass. Citizens for Life, 479 U.S. 238, 268 (1986) (Rehnquist, C.J., concurring in part and dissenting in part).

203. *Id.* at 271.

204. *McCutcheon*, 134 S. Ct. at 1441–42.

205. *See Citizens United*, 558 U.S. at 461 (Stevens, J., dissenting). Justice Stevens wrote instead of running "roughshod over Congress' handwork" by undermining campaign finance laws, the Court should acknowledge that "Congress surely has both wisdom and experience in these matters that is far superior to ours." *Id.* (quoting Colo. Republican Fed. Campaign Comm'n. v. FEC, 518 U.S. 604, 650 (1996) (Stevens, J., dissenting)). It is incontrovertible that legislators have a better understanding of how their institution works than the judiciary. In *McConnell*, the Court cited testimony introduced during the district court proceedings in which a former Senator stated, *based on his experience*, that:

> Special interests who give large amounts of soft money to political parties do in fact achieve their objectives. They do get special access. Sitting Senators and House Members have limited amounts of time, but they make time available in their schedules to meet with representatives of business and unions and wealthy individuals who gave large sums to their parties. These are not idle chit-chats about the philosophy of democracy . . . Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way.

540 U.S. at 150–51 (quoting *McConnell*, 251 F. Supp. 2d 176, 496 (2003), *rev'd in part*, 540 U.S. 93).

managed to enmesh themselves deeply in the electoral process without understanding it sufficiently well to be able to gauge the consequences of their decisions."[206] Two justices who had actual experience in elections, Byron White,[207] who had a significant role in the campaign of President John F. Kennedy, and Justice Sandra Day O'Connor,[208] who had been elected to state office in Arizona, were inclined to give more deference to Congress's attempts to regulate campaign finance.[209]

The legislature is also better able than the Court to develop a record on the issues involved in campaign finance regulation. It can hold hearings, solicit the verbal and written testimony of ex-

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206. RICHARD A. POSNER, REFLECTIONS ON JUDGING 84 (2013) ("The *Citizens United* decision, which removed restrictions on campaign financing by allies and opponents of candidates (provided they are not caught covertly coordinating with their favored candidates), increasingly seems naïve in its denial that massive campaign contributions corrupt the political process, and in it simplistic equation of money to speech."); Richard Briffault, *On Dejudicializing American Campaign Finance Law*, *in* MONEY, POLITICS, AND THE CONSTITUTION, *supra* note 127, at 173, 187 ("Moreover, the Court certainly lacks the deep understanding of how campaign finance operates in practice—how money affects elections and how the raising and spending of campaign money affect the behavior of government and its ability to represent and respond to the interest of the entire electorate—that is hard-wired into the consciousness of elected officials. Today, we have a Court in which not a single justice ever ran for or held elected office.").

207. In *Buckley*, Justice Byron White was the only justice who would have upheld both FECA's contribution and expenditure limitations. He advocated for the Court to give greater deference to the legislature when reviewing campaign finance regulations. *See* FEC v. Nat'l Conservative PAC, 470 U.S. 480, 509 (1985) (White, J., dissenting) ("If the elected Members of the Legislature, who are surely in the best position to know, conclude that large-scale expenditures are a significant threat to the integrity and fairness of the electoral process, we should not second-guess that judgment." (citing FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 210 (1982))).

208. Justice O'Connor was a co-author with Justice Stevens of certain sections in *McConnell*, which upheld most of BCRA in 2003 and adopted a deferential view of Congressional authority to regulate campaign finance. *McConnell*, 540 U.S. 93. Her departure from the Court and replacement by Justice Samuel Alito tilted the Court's subsequent jurisprudence toward striking down campaign finance laws. In fact, part of Justice O'Connor's opinion in *McConnell* was overruled by *Citizens United* where Justice Alito joined the majority opinion.

209. *Id.* at 189.

perts, and obtain information from across the fifty states. In his *McCutcheon* dissent, Justice Breyer complained that a record had not been developed in the District Court because the case had been appealed from the grant of a motion to dismiss, preventing the District Court from developing an evidentiary record.[210] Justice Breyer wrote that the development of a record would help the Court determine "the extent to which we should defer to Congress' own judgments, particularly those reflecting a balance of the countervailing First Amendment interests."[211] He observed that the empirical issues regarding the effect of campaign spending on the democratic system "are questions that Congress is far better suited to resolve than are judges."[212] In concluding his dissent, Justice Breyer stated that the *McCutcheon* plurality "substitutes judges' understandings of how the political process works for the understanding of Congress."[213]

In *McCutcheon*, the Court devoted substantial time to positing and debating various hypotheticals relating to how a campaign donor might circumvent FECA's base contribution limits. During the oral argument, several justices raised factual hypotheticals. Justice Breyer posed one regarding whether donors can use Super PACs to circumvent the base contribution limits:

> Candidate Smith, we only give him $2,600, but he has a lot of supporters. And each of them—[forty] of them gets a brainstorm. And each of the [forty] puts on the internet a little sign that says, "Sam Smith PAC. This money goes to people like Sam Smith. Great people." Now, we can give each of those [forty] $5,000. They aren't coordinated. They're not established by a single person. Each is independently run. And we know pretty well that that total of $5,000 times [forty] will go to Sam Smith. Okay? What does that violate.[214]

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210. McCutcheon v. FEC, 134 S. Ct. 1434, 1479 (2014) (Breyer, J., dissenting).

211. *Id.* at 1480.

212. *Id.*

213. *Id.* at 1481.

214. Transcript of Oral Argument, *supra* note 76, at *4.

This was followed by a back and forth between Justice Breyer and McCutcheon's attorney on whether this set of facts would actually occur. Justice Elena Kagan interjected with another hypothetical that altered the facts.[215] Justice Samuel Alito later described the scenarios as "wild hypotheticals" that are not plausible and lack empirical support.[216] Justice Breyer pointed out that the plurality and the dissent had "differences of opinion on fact-related matters."[217] They disagreed "on the possibilities for circumvention of the base limits in the absence of aggregate limits" and "about how effectively the plurality's 'alternatives' could prevent evasion."[218]

When the Court finds itself enmeshed in debating various hypotheticals, it should consider whether the issue is one better left to the legislature,[219] the branch of government that is best suited to engage in robust debates. Legislators can create a factual record and vote on a resolution of an issue that reflects a consensus judgment among their colleagues who hold diverse views.[220] In contrast, the Court's majority opinions generally do not incorporate the views of the dissenters or find middle ground between strongly held views that exist among the Justices, as well as among the people of a very diverse nation. The legislature's resolution of difficult questions relating to how the political process works will better reflect the views of the people on the foundational issue of representative democracy. In fact, reflecting judicial overreach on the review of campaign finance regulations, the Court has struck-down a referendum enacted by the people themselves.[221]

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215. *Id.* at *6–7.

216. *Id.* at *36.

217. *McCutcheon*, 134 S. Ct. at 1480 (Breyer, J., dissenting).

218. *Id.*

219. In his concurrence in *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000), Justice Breyer stated that the principal dissent oversimplifies a complex problem in the context of campaign finance turning a difficult constitutional problem into a lopsided dispute between political expression and government censorship. *Id.* at 399 (Breyer, J., concurring). He advises that it is a question better left to the political branches. *Id.*

220. In his dissent in *Citizens United v. FEC*, 558 U.S. 310 (2010), Justice Stevens aptly observed, "In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules." *Id.* at 479 (Stevens, J., dissenting).

221. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011).

The Guaranty Clause of the Constitution requires that the government of the United States preserve a republican form of government in the states,[222] and certainly the clause assumes that the federal government has a republican form as well. "The United States shall guarantee to every state in this Union a Republican Form of Government . . . ."[223] The Supreme Court has interpreted the Guaranty Clause as assigning the responsibility of the United States to guarantee a republican form of government to the U.S. Congress.[224] Under this provision of the Constitution, the Court has found that it is Congress's responsibility to determine the contours of the Republic's representative democracy.[225]

In 1884, the Supreme Court recognized the interest that a republican government has in protecting elections from the influence of "insidious corruption."[226] In a unanimous opinion, Justice Samuel Freeman Miller wrote:

> That a government whose essential character is republican, whose executive head and legislative body are both elective, whose numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to attest attention and demand gravest consideration. If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it must have the power to pro-

222. U.S. CONST. art. IV, §4. A republic is defined as "a political order in which the supreme power is held by a body of citizens who are entitled to vote for officers and representatives responsible to them." WEBSTER'S II DICTIONARY 998 (1984).

223. U.S. CONST. art. IV, §4.

224. Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (holding that Congress, not the Court, should decide whether an Oregon law enacted by referendum violated the Republican Guarantee Clause); *see* Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1403–04 (2013) (citing *Pac. States Tel.*, 223 U.S. 118).

225. Hellman, *supra* note 224, at 1403.

226. *Ex parte* Yarbrough, 110 U.S. 651, 658 (1884).

> tect elections on which its very existence depends, from violence and corruption. If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and *insidious corruption*.[227]

At this early date in the nation's history, the Court had the wisdom to further observe that "the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety."[228]

Congress has the authority and responsibility to regulate federal elections and to preserve the Republic. Instead of engaging in constitutional line-drawing that the Justices themselves cannot agree on, the Court should give an increased level of deference to Congress's judgment on campaign finance regulations that are intended to preserve a representative democracy. Moreover, while the Court has an important role in guaranteeing First Amendment freedoms, the issue of money donated to candidates for elected office does not require the high level of constitutional vigilance that the Court has applied to legislative experience and judgment regarding the value of reasonable campaign finance regulations.[229] The Court's emphasis on First Amendment interests has dwarfed the fundamental concern with the preservation of a Republican form of government.

227. *Id.* at 657–58 (emphasis added). The case itself upheld laws that prohibited two or more persons from conspiring to threaten or intimidate any person from exercising a constitutional right. *Id.* at 657; *see also* Buckley v. Valeo, 424 U.S. 1, 257 (1967) (White, J., concurring in part and dissenting in part) (quoting *Yarbrough*, 110 U.S. at 657–58). Justice Byron White began his dissent from the *Buckley* Court's holding striking down expenditure limits by referencing this passage from *Yarbrough*. *Id.*

228. *Yarbrough*, 110 U.S. at 667.

229. In *Randall v. Sorrell*, 548 U.S. 230 (2006), Justice Stevens writes that "a legislative judgment that 'enough is enough' should command the greatest possible deference from judges interpreting a constitutional provision that, at best, has an indirect relationship to activity that affects quantity—rather than the quality or the content—of repetitive speech in the marketplace of ideas." *Id.* at 279–80.

VI. CONCLUSION

Preserving the representative democracy that was carefully and thoughtfully established by this country's founders should be recognized as a compelling government interest. Campaign finance regulations address the concern that money—and not constituent views—may influence the election of and the decisions made by the people's representatives. The Constitution was founded on the principle that the people delegate authority to their representatives. Thereafter, the First Amendment was enacted to enable the people to speak freely on public issues so that their views would be transferred into the policies enacted by their representatives. If the representatives are not reflecting the views expressed by their constituents, then the First Amendment's speech clauses have lost their fundamental purpose.

Moreover, while the First Amendment protects political speech, the burden on speech imposed by campaign finance regulations is measured. The regulations impose limits; they do not suppress all political speech by any speaker, nor do they place any restriction on the content of his speech. In many instances the money donated to a candidate does not fund any speech, but is used solely for non-speech campaign expenses. The Roberts majority in recent campaign finance decisions has taken a nearly absolutist position upholding First Amendment speech in disregard of the actual effect that the regulation has on a money donor's ability to express his political views. The Court fails to balance the speech limitation against the compelling government interest in preserving a representative democracy.

This Article does not assert that all campaign finance regulations should survive First Amendment scrutiny. It does, however, raise a concern that the important government interest in preserving representative democracy is missing from the Court's consideration of campaign finance regulations. And there is no reason for the Court to limit the compelling government interests that can support campaign finance regulations to *quid pro quo* corruption. The interest in preserving representative democracy may be a sufficiently compelling reason that outweighs the burden on a money donor's First Amendment right to contribute money to candidates for elected office. Further, legislatures should be given some degree of latitude to determine whether campaign finance regulations reasonably protect representative democracy. The result may be

that candidates for elected office can focus on engaging voters rather than donors, and the link between constituents and their representatives can be strengthened.

Treating Members of the Military at Least as Well as Inmates and Students: Determining When Military Necessity Requires Infringing Upon Constitutional Rights in Cases Before the Court of Appeals for the Armed Forces

RODRIGO M. CARUÇO*

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I. INTRODUCTION

For substantially similar reasons, three communities in American society are not entitled to the full panoply of rights protected by the Constitution of the United States: inmates, students, and members of the United States military. The individuals within these communities do not give up their rights due to membership. The compelling need for order, discipline, and safety, however, requires that the Constitution be applied to each community differently than how it is applied to the remaining members of American society. For student and inmate communities, the Supreme Court of the United States ("the Court") has remained actively involved in this process. Not only has the Court determined that the needs of these two communities require a different application of the Constitution, it has also articulated the framework that specifically delineates how the Constitution is to be applied.

That has not been the case with regard to the Court's involvement in the military community. Instead, the Court has largely deferred supervision of service member rights to the United States Court of Appeals for the Armed Forces ("CAAF"), the highest court in the military criminal justice system. This Article proposes that the existence of CAAF makes it unnecessary for the Court to supervise the military community as actively as it has in both the inmate and student communities. Unlike the Court in

these communities, however, CAAF has yet to adequately develop its framework for how the Constitution interacts with the military community in regards to criminal law.

Cases and controversies within the inmate and student communities arise under existing state and federal judicial systems, and the Court has declared that the unique need for order, discipline, and safety requires that the Constitution be applied to these communities differently than how it is applied to broader American society. Concerning the inmate community, the Court's decision in *Turner v. Safley*[1] encapsulates its understanding of that community and includes the applicable framework to virtually all circumstances that arise in the inmate community.[2] In slight contrast, the Court's understanding of the student community, as well as the appropriate framework to be applied in an individual case, is best understood through a series of decisions arising in various contexts.

Regardless of which community is the subject of description, it is remarkable how similarly the needs of each community are described. Good order and discipline is paramount. It is, in actuality, the judiciary's response to this compelling interest that is worthy of study.

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1. 482 U.S. 78 (1987).

2. *Turner* remains the landmark expression of the Court's understanding of the inmate community and its principal articulation of how the Constitution is to be applied to that community, though some recent decisions have applied the traditional constitutional rule rather than the *Turner* framework. *See* Michael Keegan, *The Supreme Court's "Prisoner Dilemma:" How* Johnson*, RLUIPA, and* Cutter *Re-Defined Inmate Constitutional Claims*, 86 NEB. L. REV. 279 (2007) (examining how recent decisions applying strict scrutiny to certain categories of cases impact the traditional *Turner* framework).

A. The Inmate Community

Though the Court has admitted that prison officials are better positioned to manage and respond to the needs of the inmate community, it has not hesitated to specify the source of inmate rights and the standards to be applied when those rights are infringed. Inmates are not stripped of their constitutional rights solely due to incarceration. The nature of the community, however, requires a different application of those rights. The need for discipline and the imperative of ensuring safety serve as the basis for deferring to the decisions of prison officials. Though those officials are afforded great deference to those ends, their actions are governed by a reasonableness standard. The Court has articulated a multi-factor test for reviewing courts to apply to regulations and actions by prison officials in the inmate community.

Turner remains the leading decision that explores the interplay between the Constitution and the inmate community. In that case, the Missouri Division of Corrections adopted two problematic regulations.[3] The first concerned correspondence between inmates at different institutions.[4] The Division of Corrections allowed inmates to correspond with family members incarcerated in other institutions.[5] It also allowed correspondence concerning legal matters.[6] All other correspondence, however, depended upon how good a particular inmate was, rather than the content of an individual message.[7] The second regulation allowed inmates to marry only upon receiving permission from the superintendent of the prison, which was only given if there was a "compelling reason."[8]

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3. *Turner*, 482 U.S. at 81–82.
4. *Id.* at 81.
5. *Id.*
6. *Id.*
7. *Id.* at 82 ("Trial testimony indicated that as a matter of practice, the determination whether to permit inmates to correspond was based on team members' familiarity with the progress reports, conduct violations, and psychological reports in the inmates' files rather than on individual review of each piece of mail.").
8. *Id.* The District Court applied the strict scrutiny standard of review and found both regulations to be unconstitutional. *Id.* at 83. The Eighth Circuit affirmed and "held that the District Court properly used strict scrutiny in evalu-

The Court began by reaffirming a series of principles that frame the analysis of constitutional claims asserted by inmates. First, federal courts are charged with recognizing the valid constitutional claims of inmates.[9] Second, they must protect these fundamental guarantees when unconstitutionally abridged by a prison regulation or practice.[10] Third, it declared that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform."[11]

The Court went on to outline why courts must ultimately defer to those charged with administering the prison system. The issues in prison administration were "complex and intractable," and "not readily susceptible of resolution by decree."[12] Consequently, courts must adopt judicial restraint.[13] The Court's role, thus, was to "formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'"[14] It did so in *Turner v. Safely* by synthesizing four prior decisions that separately addressed inmate rights.[15]

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ating the constitutionality of the Missouri correspondence and marriage regulations." *Id.*

9. *Id.* at 84 ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.").

10. *Id.* ("Because prisoners retain these rights, '[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.'" (quoting Procunier v. Martinez, 416 U.S. 396, 405–06 (1974))).

11. *Id.* (quoting *Martinez*, 416 U.S. at 405).

12. *Id.* ("As the *Martinez* Court acknowledged, 'the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree.'" (quoting *Martinez*, 416 U.S. at 404–05)). The Court went on to state that "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Id.* at 84–85.

13. *Id.* at 85. Even further deference is required to state officials. *Id.* ("Where a state penal system is involved, federal courts have, as we indicated in *Martinez*, additional reason to accord deference to the appropriate prison authorities." (citing *Martinez*, 416 U.S. at 405)).

14. *Id.* (alteration in original) (quoting *Martinez*, 416 U.S. at 406).

15. *Id.* at 85–87. The Court recognized that its decision in *Martinez* established "the proper standard of review" without addressing the "broad questions of 'prisoners' rights.'" *Id.* at 85 (quoting *Martinez*, 416 U.S. at 408).

Prison regulations abridging inmates' constitutional rights were to be subject to rational basis review. So long as a regulation remained "rationally related" to the "objectives of prison administration," it would be upheld.[16] This was because decisions regarding prison security are "peculiarly within the province and professional expertise of corrections officials."[17] Thus, they are entitled to substantial deference.[18] Consequently, courts must defer to those officials unless "substantial evidence" indicates that the Government has "exaggerated [its] response" to prison conditions.[19]

The Court went on to articulate a multi-factor test for courts to utilize to determine when a regulation is rationally related to prison administration objectives.[20] There must first "be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."[21] Thus, regulations that are "arbitrary or irrational" will not survive.[22] The objective "must be a legitimate and neutral one."[23]

Second, a prison regulation is more likely to survive scrutiny if "'other avenues' remain available for the exercise of the asserted right."[24] Third, courts must look to the effect equal application of the Constitution will have on other inmates and the general allocation of prison resources.[25] Courts should be "particularly deferential" if acknowledging a particular constitutional right "will have a significant 'ripple effect' on fellow inmates or on prison staff."[26]

16. *Id.* at 86 (quoting Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 129 (1977)).

17. *Id.* (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)).

18. *Id.* at 87 ("[T]he considered judgment of these experts must control . . . ." (quoting Bell v. Wolfish, 441 U.S. 520, 551 (1979))).

19. *Id.* at 86 (quoting *Pell*, 417 U.S. at 827).

20. *Id.* at 89–91.

21. *Id.* at 89 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

22. *Id.* at 89–90.

23. *Id.* at 90.

24. *Id.* (citing *Jones*, 433 U.S. at 131). This is clearly more applicable to regulations infringing upon an inmate's First Amendment rights.

25. *Id.*

26. *Id.* (citing *Jones*, 433 U.S. at 132–33).

Finally, a regulation's validity is bolstered if there is no ready alternative.[27] The Court was careful not to employ a "least restrictive means" analysis; it explained that "prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint."[28] Accommodations that result in a "*de minimis* cost to valid penological interests," however, should always be considered.[29]

This framework, the Court further explained, was necessary in light of the unique needs of the inmate community. Consequently, "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."[30] It would subject every decision by prison administration to Monday morning quarterbacking by a court far removed from the facts on the ground.[31] Thus, courts would become prison administers—meddling, incompetent administrators.[32]

The Court explained that prison officials are charged with the difficult task of maintaining discipline in the inmate community while ensuring the safety of prison officials and the inmates themselves. To this end, prison officials must enjoy a large degree of deference to accomplish that compelling societal interest. The Court, however, has not hesitated to step in to establish the standard to be applied to decisions by those officials, and to articulate its steps. The student community has received similar treatment.

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27. *Id.* In contrast, obvious alternatives make it more likely that the challenged regulation is an "exaggerated response." *Id.*

28. *Id.* at 90–91.

29. *Id.* at 91.

30. *Id.* at 89.

31. *Id.* ("The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand.").

32. *Id.* ("Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby 'unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration.'" (alteration in original) (quoting Procunier v. Martinez, 416 U.S. 396, 407 (1974))).

B. The Student Community

In a fashion similar to the inmate community, the Court has developed and articulated the framework to be applied to constitutional cases in the student community. Students receive the full panoply of constitutional rights; however, the unique needs of the community warrant a different application of the Constitution than that enjoyed by broader American society. Consequently, the need for flexibility in application and deference to leaders of the community requires this different application. In addition, school officials have an obligation to the greater society. They must educate students and inculcate the greater society's values in students in order to prepare them to be productive members of the American democracy. In doing so, school officials must maintain discipline and order in the school. This is imperative to the community's mission of ensuring the health and safety of those it leads. As in the inmate community, the Court has gone further than simply describing why a different application is necessary; it has articulated the specific test, as well as its breadth and depth. Unlike the inmate community, however, the Court's view of the student community is expressed over multiple decisions.

An early example of the Court's view of the student community, and the test it articulated, involved political speech. In December 1965, parents and students in a Des Moines, Iowa school district decided to protest the Vietnam War by wearing black armbands during the holiday season.[33] Upon discovering this plan, school officials met and adopted a policy that required a student wearing such an armband to remove it, or be suspended.[34] Undeterred, three students wore black armbands to school and were subsequently suspended.[35]

The Court acknowledged that the First Amendment applied to students,[36] however, it applied "in light of the special character-

33. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

34. *Id.*

35. *Id.*

36. *Id.* at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."). Full recognition was the default. *Id.* at 511 ("In the absence of a

istics of the school environment."[37] The Court did not elaborate on these special characteristics in its decision, but made it clear that discipline was essential to the community. Consequently, it articulated the test courts should apply to regulations that infringe upon a student's First Amendment rights.[38] Attempts to prohibit conduct that are nothing more than "a mere desire to avoid the discomfort and unpleasantness that . . . accompany an unpopular viewpoint" will not survive scrutiny.[39] However, rules or regulations that prohibit conduct that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" will be upheld.[40]

The Court fleshed out these special characteristics in a series of subsequent decisions. One such decision involved a challenge to an Ohio statute that empowered a school principal to suspend or expel a student without any sort of due process.[41] Under this statute, the principal need only notify the student's parents within twenty-four hours and state his reasons for the discipline.[42]

Writing for the majority, Justice White acknowledged that "schools are vast and complex."[43] Thus, "[s]ome modicum of discipline and order is essential if the educational function is to be performed."[44] The need for discipline, he continued, arose frequently and at times needed "immediate, effective action."[45] Due process procedures common in criminal proceedings just were not compatible in these situations.[46] Incidents requiring low-level dis-

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specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.").

37. *Id.*

38. *Id.* at 509.

39. *Id.*

40. *Id.* (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

41. Goss v. Lopez, 419 U.S. 565, 567 (1975).

42. *See* OHIO REV. CODE ANN. § 3313.66 (West 1972).

43. *Goss*, 419 U.S. at 580.

44. *Id.* In fact, the Court used language in a later decision that, as will be seen later in this Article, appears often in the military setting. *See* Bd. of Educ. v. Earls, 536 U.S. 822, 830 (2002) ("A student's privacy interest is limited in a public school environment where the State is responsible for maintaining *discipline, health, and safety*." (emphasis added)).

45. *Goss*, 419 U.S. at 580.

46. *Id.* at 583 ("We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must

cipline such as suspension occurred too frequently.[47] To require "even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness."[48] Turning the suspension process into a formal, adversarial process threatened to "make it too costly as a regular disciplinary tool" and may "destroy its effectiveness as part of the teaching process."[49] However, though school officials' authority in the schoolhouse community remained very broad, Justice White concluded, it must comply with constitutional requirements.[50] The Constitution must bend, it seemed, but it shall not break.[51]

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afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.").

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 574 ("The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards.").

51. Four justices dissented on the grounds that the majority did not go far enough in its deference to school officials. *Id.* at 585 (Powell, J. dissenting) ("The Court holds for the first time that the federal courts, rather than educational officials and state legislatures, have the authority to determine the rules applicable to routine classroom discipline . . . ."). School officials, the dissent argued, needed "wide latitude with respect to *maintaining discipline and good order*." *Id.* at 590 (emphasis added). The dissenting justices, who at other times would be in the majority in cases involving the student and military community, expressed a parochial view that sounds eerily familiar to the ears of a member of the military. *Id.* at 593.

> One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life. . . . When an immature student merits censure for his conduct, he is rendered a disservice if appropriate sanctions are not applied or if procedures for their application are so formalized as to invite a challenge to the teacher's authority . . . .

Id. Students must obey. *Id.* ("Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto."). To the civilian reader, these words carry little to no precedent. To the military lawyer, however, these principles are asserted time and again in the abridgment of certain constitutional rights for the sake of military discipline.

The Court further explained the special needs of the student community in a subsequent decision that determined "the proper standard for assessing the legality of searches conducted by public school officials."[52] A high school teacher in New Jersey discovered two students smoking in the bathroom, a violation of school policy.[53] One admitted violating the policy, but the second, T.L.O., maintained her innocence.[54] The assistant vice principal subsequently escorted T.L.O. to a private office and demanded to see her purse.[55] A visual inspection inside the purse revealed a pack of cigarettes.[56] As he reached into the purse for the cigarettes, the assistant vice principal "noticed a package of cigarette rolling papers."[57] The assistant vice principal thus proceeded to thoroughly search the purse for "further evidence of drug use."[58] He subsequently discovered a small amount of marijuana, a pipe, empty plastic bags, a substantial number of one-dollar bills, an index card listing people that owed T.L.O. money, and letters implicating T.L.O. in drug dealing.[59]

The Court recognized that the Fourth Amendment applied to students[60] and the touchstone of that amendment is reasonableness.[61] However, "what is reasonable depends on the context within which a search takes place."[62] Thus, to determine the appropriate standard of reasonableness for a given class of searches, a court must balance "the need to search against the invasion which the

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52. New Jersey v. T.L.O., 469 U.S. 325, 328 (1985).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 334 ("It is now beyond dispute that 'the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers.' Equally indisputable is the proposition that the Fourteenth Amendment protects the rights of students against encroachment by public school officials . . . ." (quoting Elkins v. United States, 364 U.S. 206, 213 (1960))).

61. *Id.* at 337 ("[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable . . . .").

62. *Id.*

search entails."[63] What is noteworthy is the Court did not diminish student rights *solely because* of a citizen's status as a student. Instead, the compelling need for good order and discipline required some sort of abridgment of rights to the extent necessary to succeed in the educational mission.

Though the need for order and discipline existed in both the schoolhouse and correctional communities, students retained a legitimate expectation of privacy in their personal items, unlike inmates in their prison cells.[64] But this expectation of privacy, the Court held, must be weighed against the "substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds."[65] A proper educational environment requires enforcing rules curtailing conduct that "would be perfectly permissible if undertaken by an adult."[66] "[M]aintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and [the Court has] respected the

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63. *Id.* (quoting Camara v. Mun. Court, 387 U.S. 523, 536–37 (1967)). "On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order." *Id.*

64. *Id.* at 338. Here, the Court appears to acknowledge that the Government retains the same interest in both communities, though there should be a distinction between the two:

> Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. We have recently recognized that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells, but it goes almost without saying that "[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.

Id. at 338–39 (quoting Ingraham v. Wright, 430 U.S. 651, 669 (1977)).

65. *Id.* at 339.

66. *Id.* ("Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.").

value of preserving the informality of the student-teacher relationship."[67]

The interest in maintaining order and discipline in the schoolhouse community "is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause."[68] To assist lower courts in applying this standard, the majority specifically articulated the framework.[69] First, a court must determine if the search was "justified at its inception."[70] This threshold is met if "there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[71] Second, a court must determine if the actual search was reasonably related "to the cir-

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67. *Id.* at 340. Justices Powell and O'Connor concurred but argued that school officials stood in a patriarchal (or matriarchal) role vis-à-vis students:

> The primary duty of school officials and teachers, as the Court states, is the education and training of young people. A State has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern. For me, it would be unreasonable and at odds with history to argue that the full panoply of constitutional rules applies with the same force and effect in the schoolhouse as it does in the enforcement of criminal laws.

Id. at 350 (Powell, J., joined by O'Connor, J., concurring). Even the dissent agreed that officials had a legitimate need to swiftly enforce order and discipline:

> When viewed from the institutional perspective, "the substantial need of teachers and administrators for freedom to maintain order in the schools" is no less acute. Violent, unlawful, or seriously disruptive conduct is fundamentally inconsistent with the principal function of teaching institutions which is to educate young people and prepare them for citizenship.

Id. at 376 (Stevens, J., joined by Marshall, J., joined by Brennan, J. as to Part I, concurring in part and dissenting in part) (citation omitted). These views appear again in the Court's decisions on the military community and are applied daily in the application of military discipline. *See infra* note 74.

68. *T.L.O.*, 469 U.S. at 341–42 (majority opinion).

69. *Id.*

70. *Id.* at 341 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

71. *Id.* at 342.

cumstances which justified the interference in the first place."[72] Thus, "a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[73]

The preceding paragraphs demonstrate that the Court looks at the inmate and student communities in substantially similar fashion. Though the membership of the two communities stand in substantially different positions, the leaders of the student community are charged with a compelling governmental interest—educating and inculcating students. They consequently need the ability to maintain order and discipline while ensuring the health and safety of those in their charge.

As in the inmate community, the Court has not only declared the framework lower courts are to apply, it has also expanded on its explanation in substantial detail in subsequent decisions. At great length, and over multiple decisions, the Court has explained why order, discipline, and safety are of upmost importance in these communities. It has not approached the military community with the same level of engagement.

C. The Military Community

In contrast to both the inmate and student communities, the Court has never expressly declared that the Constitution applies to members of the military.[74] Instead, it has largely relied upon a

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72. *Id.* at 341 (quoting *Terry*, 392 U.S. at 20).

73. *Id.* at 342.

74. The Court has charged military courts with protecting the constitutional rights of service members. Burns v. Wilson, 346 U.S. 137, 142 (1953) ("The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights."). However, just four years later, the Court was unsure to what extent the Bill of Rights applied to the members of the military. Reid v. Covert, 354 U.S. 1, 37 (1957) ("As yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials."). A few years later, the military's highest court declared that the Bill of Rights did apply. United States v. Jacoby, 11 U.S.C.M.A. 428, 429 (1960). Since then, the Court appears to assume, without deciding, that the Constitution applies. *See, e.g.*, Parker v. Levy, 417 U.S. 733, 758 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the

unique lower court's decisions in that area. Congress created The Court of Appeals for the Armed Forces ("CAAF") in 1950 when it enacted the Uniform Code of Military Justice ("UCMJ").[75] This Article I court, composed of five civilians, supervises a three-tiered military justice system with jurisdiction over three million individuals.[76] In 1960, CAAF declared that the Constitution did apply to service members.[77] Since that declaration, the Court's approach to the military community has been to assume, without deciding, that the Constitution applies.[78]

The existence of CAAF explains the Court's approach to the military community. Unlike in the inmate and student communities, which have no separate judicial system, the Court has not articulated a framework for military courts to apply in constitutional cases. Instead, applying what has been described as the military deference doctrine, the Court has left the development of military law to CAAF.[79] Essentially, the Court has treated the mil-

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different character of the military community and of the military mission requires a different application of those protections.").

75. Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) ("An Act to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice.").

76. 10 U.S.C. §§ 866–67 (2013); DEP'T OF DEF., 2013 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 3 (2013), http://www.militaryonesource.mil/12038/MOS/Reports/2013-Demographics-Report.pdf.

77. *Jacoby*, 11 U.S.C.M.A. at 429.

78. *Compare Reid*, 354 U.S. at 37 ("As yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials."), *with Parker*, 417 U.S. at 758 ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections."). *Parker* is just one example. There, the Court explained this statement by citing to CAAF's case law, not to any authority in the Constitution itself. *Id.* at 758 ("The United States Court of Military Appeals has sensibly expounded the reason for this different application of First Amendment doctrines in its opinion in *United States v. Priest*." (citation omitted)).

79. Further explained in Part II, the military deference doctrine describes the Court's deference to military courts regarding the rights of service members vis-à-vis the Constitution. John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000). It has evolved from complete non-interference, to patent skepticism of the military justice sys-

itary community as if it were a state, with CAAF as its highest court, rather than as a part of the federal judicial system.

This makes CAAF a worthy subject of study. Unlike the Court in student and inmate cases, CAAF has not articulated a clear test to determine when military necessity exists and, when it is found, how to determine the boundaries of a rule created due to such necessity. This article seeks to advance the literature toward establishing a clearer framework.[80] As stated earlier, it proposes that the existence of CAAF makes it unnecessary for the Court to inject itself into the military community to the same degree as it has in both the inmate and student communities. Like a state court of last resort, CAAF is entrusted by the Court with supervising the military community, albeit limited to military justice. This is apparent in the Court's more recent decisions, which rely on CAAF's description of the military community, rather than the Court's own understanding of it. Consequently, CAAF is the necessary legal institution to study in order to understand how the Constitution interacts with the military community. Part II turns to CAAF, the Constitution, and the military. It begins with the Court's view of its relationship with the military community, best described as the

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tem, to the modern day professional deference akin to that given to a state court of last resort. *Id.* at 164.

80. To some degree, this study builds upon John T. Willis's brilliant three article study of CAAF in the 1970s, particularly his second article on the court that studied its development of a constitutional philosophy and the emerging issue of military necessity. *See* John T. Willis, *The United States Court of Military Appeals: Its Origin, Operations and Future*, 55 MIL. L. REV. 39 (1972); John T. Willis, *The Constitution, The Court of Military Appeals and the Future*, 57 MIL. L. REV. 27 (1972); John T. Willis, *The United States Court of Military Appeals—"Born Again,"* 52 IND. L.J. 151 (1976). Around this same time period, Professors Imwinkelried and Zillman compared certain aspects of military and civilian society in response to the Court's decision in *Parker*, 417 U.S. at 744, in which the Court reiterated that the military is a "society apart" from civilian society. Donald N. Zillman & Edward J. Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 396 (1976). The authors identified seven areas in which an argument could be made that require different rules in each society. *Id.* at 396. Though the authors cited some of CAAF's opinions, their focus was not on how it addressed military necessity. It was, instead, a topical approach drawn from a larger universe. The author has been unable to uncover articles specifically analyzing how CAAF itself has addressed military necessity.

military deference doctrine. Next it describes how the Court has described the community in light of that doctrine. Then, after an introduction to CAAF, it turns to the evolution of CAAF's constitutional interpretation that began with grounding service member rights in the prerogative of Congress and ultimately resulted in grounding service member rights in the Constitution. The analysis then turns to the development of the military necessity doctrine. Two subsequent Parts review CAAF's decisions and group them into three broad categories and six more specific examples of military necessity. Part III begins this process by summarizing some existing attempts by CAAF to define military necessity, the research methods employed by the author in this study, and some initial results that are obstacles to understanding and applying the military necessity doctrine. This section attempts to move the literature forward toward a clear definition of military necessity, particularly in the absence a comprehensive definition developed by CAAF.[81] Part IV separates out three overarching themes and six broad examples of military necessity. It organizes the results of this study into three themes and six examples of military necessity that exist in CAAF's jurisprudence. Practitioners may utilize these examples immediately. In addition, military courts, particularly CAAF itself, may build on these themes and examples to further develop the military necessity doctrine. These results may serve to continue the scholarly discussion toward not only where the doctrine should be today, but also where it is likely to lead tomorrow. Finally, Part V recommends an analytic framework similar to strict scrutiny that can be used to determine when and how to apply a different constitutional standard to the military community.

II. THE CONSTITUTION AND THE MILITARY

The Court has described the needs of the military community in similar terms as used to describe both the inmate and student communities. The needs and characteristics of the student and military communities and the deference that must be given to their leaders are described in particularly similar ways. The Court,

81. Advocates may also advance this literature through appellate advocacy before CAAF by advancing well-researched and reasoned extensions of the definition.

however, has intervened in the military community differently than in the inmate and student communities, arguably, because of the existence of CAAF. As mentioned earlier, the Court has assumed, without deciding, that the Constitution applies to the military community. Like the previously discussed communities, the military requires obedience and discipline. Its leaders must also ensure the safety of its members, as well as the safety of the broader society. However, the Court does not go much further than declaring the principle that the needs of the military community, like the inmate and student communities, require a different application of the Constitution. It has not articulated a framework and defined its boundaries as it has for the inmate and student community.

CAAF applies the Constitution to the military in light of the need for order and discipline through what can be termed the military necessity doctrine. This doctrine, however, is not as developed as the Court's doctrine regarding the inmate and student communities. The remainder of this article seeks to advance the development of the military necessity doctrine. At the conclusion of this Part, the reader should understand how the Court views the military community, CAAF's role as the leading legal institution in this community, and CAAF's development of a constitutional framework relative to the Court's actions in the previously discussed inmate and student communities.

A. The Military Deference Doctrine

This selective overview of the military deference doctrine primarily relies on John O'Connor's 2000 study, *The Origins and Application of the Military Deference Doctrine*.[82] He argues that the doctrine can be classified into three chronological periods: non-interference, patent skepticism, and professional deference.[83] For purposes here, the transition between each period resulted in a shift in the Court's level of engagement with the military community.[84]

82. O'Connor, supra note 79, at 161.

83. *See id.* at 164.

84. The transitions may also characterize a general shift in society's views toward the military, but that question is beyond the scope of this Article.

Until the 1950s, the Court maintained a nearly complete hands-off approach to military justice cases.[85] So long as the court-martial was convened according to proper procedure, civilian courts were precluded from any sort of substantive review.[86] O'Connor referred to this as the "doctrine of non-interference."[87] O'Connor's analysis of this period is encyclopedic, covering a line of decisions from 1828 to 1953.[88] In sum, the Court held during this period that the Constitution placed complete control over the military in the political branches.[89] Congress raised and supported the army and navy; the President served as Commander-in-Chief.[90] The Constitution, however, said nothing of the judiciary's role in military affairs.[91] Therefore, according to the Court, the Constitution had no legitimate role to play. The need for discipline required this non-interference. Thus, "the military's extraordinary need for obedience and discipline within the ranks was inconsistent with the availability of judicial review for soldiers aggrieved by military practices."[92] As a result, if a court-martial convened in accordance with proper procedure, proceeded according to that procedure, and did not issue a punishment forbidden by law, civilian courts would not interfere.[93]

The pendulum swung to the complete opposite end of the spectrum by the mid-1950s as the Court transitioned from non-interference to patent skepticism. Over the subsequent two decades, the Court appeared to have lost faith in the military justice system as a whole.[94] Thus, in a series of decisions, it sought to

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85. *See* O'Connor, *supra* note 79, at 164.

86. *See id.*

87. *See id.*

88. *See id.* at 165–97.

89. *Id.* at 166.

90. *Id.*

91. *Id.*

92. *Id.* at 167.

93. *Id.* at 175 (quoting Dynes v. Hoover, 61 U.S. (20 How.) 65, 82 (1857). It is important to note that at this point in military legal history, no judicial appellate system existed. Courts-martial were reviewed administratively within the particular service. *See Dynes*, 61 U.S. (20 How.) at 74 ("No reviewing tribunal has been established, although the Secretary of the Navy and the President, in effect, act as revising officers, where their concurrence is required before the adjudication of the court can be carried into effect.").

94. *See* O'Connor, *supra* note 79, at 164.

limit the reach of military courts to the maximum extent possible.[95] This period culminated in Justice Douglas's majority decision in *O'Callahan v. Parker*, which required the military to prove a service connection between the offense and military service in order for the military to have jurisdiction over the offense.[96] Consequently, crimes committed by service members off base and out of uniform, without any connection to the member's military service, were now beyond the reach of military courts. Nearly two decades after Congress enacted monumental and sweeping reforms to military justice through the Uniform Code of Military Justice (UCMJ), the Court doubted "the legitimacy of the entire process of military justice."[97] It was a system necessary for maintaining discipline, and thus inept at ensuring justice.[98]

By the 1970s, the Court's membership changed yet again, and so did its view of the military justice system.[99] Over the next two decades, and primarily through the pen of then-Justice Rehnquist, the Court firmly established the modern day military deference doctrine.[100] It is not quite complete non-interference. Today, the Court will entertain substantive constitutional challeng-

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95. *See id.*

96. 395 U.S. 258, 273–74 (1969), *overruled by* Solorio v. United States, 483 U.S. 435, 450–51 (1987).

97. O'Connor, *supra* note 79, at 198. For one scholar's argument on Justice Douglas's anti-military ideology and its impact on the *O'Callahan* decision, see Joshua E. Kastenberg, *Cause and Effect: The Origins and Impact of Justice William O. Douglas's Anti-Military Ideology from World War II to* O'Callahan v. Parker, 26 T.M. COOLEY L. REV. 163 (2009).

98. *O'Callahan*, 395 U.S. at 265–66.

99. *See* O'Connor, *supra* note 79, at 164.

100. *See id.* at 216–17 ("It was Justice Rehnquist who deftly wove together precedents from the Court's era of noninterference and from the Warren Court's era of skepticism to create the Court's modern military deference doctrine."). Justice Rehnquist's majority opinion in *Solorio* expressly overruled *O'Callahan*, eliminating the service connection requirement and granting jurisdiction to military courts solely on the military status of the service member. *Solorio*, 483 U.S. at 450–51. Justice Rehnquist's approach to military justice was buoyed by legislative enactments, such as the creation of a military judge in the Military Justice Act of 1968. O'Connor, *supra* note 79, at 217. "Thus, by the 1970s, courts-martial resembled civilian court proceedings much more than they had prior to the creation of the office of the military judge." *Id.*

es; however, it grants tremendous deference to military courts.[101] This professional deference, as will be seen in subsequent paragraphs, is due to the extraordinary need for discipline and order in the military community.

Whether the military's existence is necessary to fight and win wars or is a danger to the Bill of Rights, the Court has articulated a consistent vision of the community and its needs. Its quibbles have been with the military as an institution and its justice system, not with the community it controls. With that in mind, it is now possible to compare the Court's engagement with the military community to its engagement with the inmate and student communities.

B. The Military Community

A sampling of decisions in the middle to later twentieth century encapsulates the Court's modern vision of the military community, and its unwillingness to engage at the same breadth and depth as the inmate and student communities. An initial example involved an Army doctor that filed a petition for a writ of habeas corpus in a U.S. district court, requesting that the court order the Army to discharge the doctor because he had not been "assigned to the specialized duties nor given the commissioned rank to which he claim[ed] to be entitled."[102] Perhaps as part of working through the transition from non-interference to patent skepticism, the Court wasted little time disposing of the case.[103] However, the following description of the military community would find itself often repeated in later military courts as the justification for a different application of the Constitution to service members: "The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."[104] Later in the same term, the Court de-

101. *See* O'Connor, *supra* note 79, at 215–16 ("There would be a substantive review to constitutional challenges of military legislation, but that review would be particularly solicitous of Congress's estimation of the needs of a well-functioning military.").

102. Orloff v. Willoughby, 345 U.S. 83, 84 (1953).

103. *See id.* at 93 ("[J]udges are not given the task of running the Army.").

104. *Id.* at 94.

clared that civilian habeas corpus review will only reach whether the military system gave fair consideration to an accused's claims.[105] In doing so, it reinforced why the military community needed different rules, but unlike in inmate and student cases, the Court also declared that it would not be the one to determine the parameters of this framework:

> Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.[106]

In later decisions, the Court began describing the military community in more detail, though never to the extent it did in inmate and student cases.

One such decision involved the military's attempt to court-martial a civilian for crimes committed prior to his honorable discharge from the United States Air Force ("USAF"). The USAF convicted Robert W. Toth for a murder he committed in Korea while on active duty.[107] At the time of his arrest and subsequent court-martial, Toth was a civilian, honorably discharged from service five months prior to his arrest.[108] At that time, Article 3 of the UCMJ allowed the military to prosecute former service members

105. Burns v. Wilson, 346 U.S. 137, 144 (1953) ("[W]hen a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." (citing Whelchel v. McDonald, 340 U.S. 122 (1950))).

106. *Id.* at 140.

107. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 13 (1955).

108. *Id.*

for offenses committed while on active duty, if that offense carried a maximum punishment of five years or more in confinement.[109]

The *Toth* decision occurred during the Court's period of patent skepticism of military justice. The Court determined that the military could not exercise court-martial jurisdiction over a civilian no longer connected to military service.[110] In describing why military courts were insufficient in judicial matters, the Court described the military as a monolithic community with a single, overriding purpose for existence. It began by stating that "[i]t is the primary, indeed the sole business of [Article III] courts to try cases and controversies between individuals and between individuals and the Government."[111] In contrast, "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."[112] Criminal prosecution as a means to maintain discipline is but an incidental part of the military community's existence.[113] At the time, the Court stated, military justice amounted to an additional duty, one that diverts those involved from their primary function.[114] The *Toth* decision then turned briefly to the needs of the military community:

> Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service. Even as late as the Seventeenth Century standing armies and courts-martial were not established institutions in England. Court-martial jurisdiction sprang from the belief that within the military ranks there is need for

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109. *Id.* at 13 n.2.

110. *Id.* at 23.

111. *Id.* at 15.

112. *Id.* at 17.

113. *Id.* ("But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function.").

114. *Id.* ("To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.").

> a prompt, ready-at-hand means of compelling obedience and order.[115]

In a sense, this view makes sense. *Toth* was decided in 1955, with World War II and the Korean War fresh in the minds of American society, as well as the Court. The military of that era looked far different than the military of today.[116] The mobilization required to fight those wars was unheard of in American society. It thus makes sense to understand the military community of that time as existing solely for the purpose of fighting wars. As those wars gave way to the guerilla warfare of Vietnam, however, the Court had additional opportunities to examine the military community.

The standard bearer of the Court's patent skepticism decisions, *O'Callahan v. Parker*, provides some of that additional insight into its theory of the military community. Off base and in civilian clothes, James O'Callahan, a member of the United States Army, broke into a hotel room and tried to rape a young girl.[117] Honolulu police turned him over to military police after determining that he was a member of the military.[118] The Army subsequently convicted O'Callahan of a number of offenses, including Article 134 of the UCMJ.[119] Article 134 prohibits conduct that

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115. *Id.* at 22. The dissent might have disagreed with the majority's legal analysis, but it did not disagree with the needs of the military community:

> War is a grim business, requiring sacrifice of ease, opportunity, freedom from restraint, and liberty of action. Experience has demonstrated that the law of the military must be capable of prompt punishment to maintain discipline. The power to regulate the armed forces must have been granted to Congress so that it would have the authority over its armed forces that other nations have long exercised, subject only to limitations of the Constitution.

Id. at 29.

116. A social history of military life in earlier eras relative to modern military life would be particularly relevant to understanding the role of military legal institutions. However, that is beyond the scope of this Article.

117. O'Callahan v. Parker, 395 U.S. 258, 259–60 (1969), *overruled by* Solorio v. United States, 483 U.S. 435 (1987).

118. *Id.* at 260.

119. *Id.*

results in prejudice to good order and discipline or tends to bring discredit to the armed forces.[120]

After a scathing rebuke of the military justice system, Justice Douglas's majority opinion held that in order for the military to have jurisdiction to prosecute a military member, there must be a connection between the offense and military service; finding no such connection, the Court overturned O'Callahan's conviction.[121]

The Court began by reinforcing the principle that military society required a different application of the Constitution.[122] The opinion subsequently explained why the majority was prepared to accept this principle, though only to the extent necessary to maintain order:

> That a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts and in general less favorable to defendants, is necessary to an effective national defense establishment, few would deny. But the justification for such a system rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty. This Court, mindful of the genuine need for special military courts, has recognized their propriety in their appropriate sphere . . . .[123]

After all, the majority noted, "military law has always been and continues to be primarily an instrument of discipline, not justice."[124] It was, essentially, a necessary evil.[125]

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120. *Id.* at 260 n.1.

121. *Id.* at 273–74.

122. *Id.* at 261 ("[The Constitution] recognizes that the exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply.").

123. *Id.* at 265.

124. *Id.* at 266 (quoting Glasser, Justice and Captain Levy, 12 COLUM. F. 46, 49 (1969)).

125. Though the dissent strenuously objected to the majority's creation of the service connection requirement, it appeared to agree with the majority's characterization of the military community. *Id.* at 274 (Harlan, J., joined by

With the addition of Justice Rehnquist to the Court in 1971, its view of the military transitioned to one of professional deference. Though the lens changed, the description of the military community remained relatively the same. This is best demonstrated in a landmark military justice opinion that reviewed the court-martial of an Army doctor who refused to execute his duties and attempted to dissuade Special Forces personnel from participating in the Vietnam War.[126]

Captain (CPT) Howard Levy served as the Chief of the Dermatological Service of the United States Army Hospital at Fort Jackson, South Carolina.[127] Disagreeable to the Vietnam War, he refused a direct order to train members of the Army Special Forces.[128] He also made a series of public statements thought to be

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Stewart, J., and White, J., dissenting). Justice Harlan argued that "[t]he United States has a vital interest in creating and maintaining an armed force of honest, upright, and well-disciplined persons, and in preserving the reputation, morale, and integrity of the military services." *Id.* at 281. This requires controlling what service members can do both on and off base:

> [B]ecause its personnel must, perforce, live and work in close proximity to one another, the military has an obligation to protect each of its members from the misconduct of fellow servicemen. The commission of offenses against the civil order manifests qualities of attitude and character equally destructive of military order and safety. The soldier who acts the part of Mr. Hyde while on leave is, at best, a precarious Dr. Jekyll when back on duty.

Id. (footnote omitted). The military's mission, the dissent continued, required different rules. Thus, the military had "a proper concern in keeping its own house in order, by deterring members of the armed forces from engaging in criminal misconduct on or off the base, and by rehabilitating offenders to return them to useful military service." *Id.* at 282. The soldier, the dissent argued, must remain with his unit:

> A soldier detained by the civil authorities pending trial, or subsequently imprisoned, is to that extent rendered useless to the service. Even if he is released on bail or recognizance, or ultimately placed on probation, the civil authorities may require him to remain within the jurisdiction, thus making him unavailable for transfer with the rest of his unit or as the service otherwise requires.

Id. at 282–83.

126. Parker v. Levy, 417 U.S. 733, 735–37 (1974).

127. *Id.* at 735–36.

128. *Id.* at 736.

disloyal to the United States.[129] Consequently, the Army charged and convicted him of disobeying a lawful order and promoting disloyalty and disaffection among the troops, in violation of Articles 133 and 134 of the UCMJ.[130] In upholding Congress's enactment of these two Articles, the Court synthesized all its prior military community decisions and arguably also synthesized its description of the military community.

Writing for the majority, Justice Rehnquist began by blending prior non-intervention and patent skepticism decisions into his theme of a separate community with a nearly unquestionable need for discipline and obedience.[131] What is notable for purposes here is Justice Rehnquist's selected quotes from two prior non-intervention decisions. The first sheds light on the majority's perception of the military community: "[a]n army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier."[132] It is noteworthy that the majority opinion neglected to address what, if any, differences existed between the Army of 1890 (the army in *In re Grimley*) and the Army of 1974. The inclusion of this quote, however, may indicate that the majority did not really care to address any differences in the community. The second selected quote from the opinion reinforced the concept that maintaining discipline is "essen-

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129. *Id.* at 736–37. The Court provided a sampling of those comments:

> The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam: they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children.

Id.

130. *Id.* at 737–39. Article 133 is a rather broad statute that prohibits conduct determined to be unbecoming of an officer. *See* 10 U.S.C. § 933 (2013).

131. *Levy*, 417 U.S. at 734–44 (citations omitted).

132. *Id.* at 743 (quoting *In re* Grimley, 137 U.S. 147, 153 (1890)).

tial."[133] This passage served to support the Court's conclusion that it "has long recognized that the military is, by necessity, a specialized society separate from civilian society."[134]

In addition to repurposing passages from arguably outdated or at least questionable precedent, the majority further explored some of the differences that exist between the civilian and military community. One such difference was that the relationship of the Government to service member was different than that of Government to civilian: "It is not only that of lawgiver to citizen, but also that of employer to employee. Indeed, unlike the civilian situation, the Government is often employer, landlord, provisioner, and lawgiver rolled into one. That relationship also reflects the different purposes of the two communities."[135] It is safe to assume that the purpose of the military community referred to in *Levy* was to fight and win wars, which was quite different than any purpose for a civilian community. Because of that fighting purpose, the military community simply could not have the same autonomy as that found in civilian life:

> While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community. The military establishment is subject to the control of the civilian Commander in Chief and the civilian departmental heads under him, and its function is to carry out the policies made by those civilian superiors.[136]

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133. *Id.* at 744 ("And to maintain the discipline essential to perform its mission effectively, the military has developed what 'may not unfitly be called the customary military law' or 'general usage of the military service.'" (quoting Martin v. Mott, 12 Wheat. 19, 35 (1827))).

134. *Id.* at 743.

135. *Id.* at 751.

136. *Id.*

The job of the military community, the majority re-asserted, was to obey.[137] As a consequence of these differences, the Court held that Congress was entitled to more flexibility when Articles of the UCMJ enacted by that body were challenged as unconstitutionally vague.[138]

Two additional principles emerged from the majority opinion in *Parker v. Levy*. First, the Court's description of the military community remains one of its only efforts to explain why the community is different:

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[139]

The second principle that emerged is the Court's reliance on CAAF to provide the necessary substance. In *Levy*, the Court quoted CAAF's decision in *United States v. Priest* to explain the reasons for the differences alluded to in the Court's earlier declaration that the military community was different, in this case regarding free speech rights:

> In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech,

137. *Id.* ("As we observed in *In re Grimley*, the military 'is the executive arm' whose 'law is that of obedience.'" (quoting *Grimley*, 137 U.S. at 153))).

138. *Id.* at 756–57 ("Because of the factors differentiating military society from civilian society, we hold that the proper standard of review for a vagueness challenge to the articles of the Code is the standard which applies to criminal statutes regulating economic affairs."). This standard would uphold a statute if, in light of the conduct with which an individual was charged, he could have reasonably understood that his conduct was prohibited. *Id.* at 757 (citations omitted).

139. *Id.* at 758.

> even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce such action. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself.[140]

This reliance on CAAF to essentially do the "heavy lifting" of explaining the need for a different application of the Constitution to the military community supports this Article's hypothesis that the reason for the Court's hands off approach to articulating and refining a framework for lower courts is due to the existence of a supreme court that operates more akin to a state supreme court than a federal circuit court of appeals.[141]

Though its view of the military community remained consistent and abridged, the Court rejected the service connection requirement established by *O'Callahan* in 1987 through its decision in *Solorio v. United States*.[142] As discussed earlier, this occurred

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140. *Id.* at 758–59 (citations omitted) (quoting United States v. Priest, 21 U.S.C.M.A. 564, 570 (1972)).

141. The concurring opinion saw the community in the same light. Justice Blackmun wrote that the prospect of war required a different standard: "however unfortunate it may be, it is still necessary to maintain a disciplined and obedient fighting force." *Id.* at 763 (Blackmun, J., concurring). Even the dissent agreed with the view of the community. Justice Douglas noted that the military community required discipline and obedience. *Id.* at 768 (Douglas, J., dissenting) ("The military by tradition and by necessity demands discipline; and those necessities require obedience in training and in action."). Orders thus had to be obeyed. *Id.* ("A command is speech brigaded with action, and permissible commands may not be disobeyed."). Dissent was simply not a part of the military community. *Id.* at 770 ("The military, of course, tends to produce homogenized individuals who think—as well as march—in unison."). This was a direct consequence of a draft army. *Id.* at 772 ("The power to draft an army includes, of course, the power to curtail considerably the liberty of the people who make it up.").

142. Solorio v. United States, 483 U.S. 435, 450–51 (1987).

during the Court's formulation of the modern day military deference doctrine. In doing so, the Court proclaimed why it must grant substantial deference to the decisions of military courts. It concluded that, "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military."[143]

Though the Court has viewed the military in different lights over the years, it has been hesitant to engage this community at the same breadth and depth as the inmate and student communities. Even during periods of patent skepticism, the Court sought to limit its deference to the extent necessary to maximize the liberty of service members, but it never stepped into a complete supervisory role of the military justice system.

The advent and evolution of CAAF legitimized this shallow level of engagement. The Court could continue to make general statements that the military community required a different application of the Constitution due to the overriding need for discipline and order, because a court now existed that had the jurisdiction and experience to interpret the relationship between the Constitution and service members similar to the Court's role in interpreting the relationship between the Constitution and students and inmates, and to articulate the framework lower courts should apply when determining whether to sanction the infringement of a student's or inmate's rights.

C. The Court of Appeals for the Armed Forces

CAAF, the highest court in the military community, has jurisdiction and must review all court-martial convictions resulting in a sentence of death and decisions by military intermediate appellate courts ordered reviewed by the Judge Advocate General of either service.[144] In addition, CAAF has jurisdiction to review decisions by these intermediate appellate courts if the accused demonstrates good cause in his petition.[145] Decisions by CAAF are reviewable by the Court.[146] In contrast, the denial of a petition

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143. *Id.* at 447.
144. 10 U.S.C. § 867(a)(1)-(2) (2013).
145. *Id.* at § 867(a)(3).
146. *Id.* at § 867a(a).

for review is final; no further relief is available within the military justice system.[147]

CAAF has come a long way in the approximately sixty years since its creation.[148] In fact, its name symbolizes CAAF's journey from arguably simply an administrative agency to a federal court of appeals in nearly every substantive way. The original draft of the UCMJ called CAAF the "Judicial Council."[149] After much debate concerning how naming CAAF a "council" may affect its stature (as well as whether to include life tenure for its judges), Congress officially named the new court the Court of Military Appeals ("CMA").[150] This was a compromise of sorts between advocates of a strong independent court made up of civilians, and those who wanted something much less ambitious.[151] Attempts to make CAAF a "court of the United States," thus constituted under Article III, were opposed by senators such as Senator Estes Kefauver, who expressed concern that the initial membership would be made up of "lame ducks" and who argued that experience may eventually demonstrate the necessity of changing CAAF's membership.[152] But in 1968, Congress answered the question of CAAF's status as a court. It renamed the Court of Military Appeals the United States Court of Military Appeals, a court established under Article I of the Constitution and located within the Department of Defense only for administrative purposes.[153] The House made it clear:

> One of the purposes of this bill is to make it abundantly clear in the law that the Court of Military Appeals is a court . . . that the Court of Military

147. *Id.*

148. Professor Jonathan Lurie's two-volume work on CAAF remains one of the few comprehensive published studies of that legal institution. *See* JONATHAN LURIE, ARMING MILITARY JUSTICE (Princeton Univ. Press 1992); JONATHAN LURIE, PURSUING MILITARY JUSTICE (Princeton Univ. Press 1998).

149. John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39, 61–62 (1972).

150. *See id.* at 63–71.

151. *See id.*

152. *Uniform Code of Military Justice: Hearing on S. 857 and H.R. 4080 Before the Subcomm. of the S. Comm. on Armed Servs.*, 81st Cong. 313 (1949); 95 CONG. REC. 1293, 1442–43 (1950).

153. Act of June 15, 1968, Pub. L. No. 90-340, 82 Stat. 178.

> Appeals is a court and does have the power to question any provision of the manual or any executive regulation or action as freely as though it were a court constituted under [A]rticle III of the Constitution.[154]

However, proposals to solidify CAAF's status continued. In one example, then-Chief Judge Everett, a leading military law scholar, argued that CAAF should be renamed once again and its jurisdiction expanded.[155] His proposal included renaming CAAF the United States Court of Appeals for the Military Circuit, with jurisdiction over all legal issues that fit within military related categories established by Congress.[156] To an extent, Congress listened. In 1994, CAAF was renamed again, this time to the United States Court of Appeals for the Armed Forces.[157] Today CAAF, with a few glaring exceptions, such as 15 year terms rather than life tenure and a requirement that no more than three seats come from the same political party, looks and acts just like an Article III court.[158] As such, it has taken the lead in interpreting how the Constitution interacts with the military community in the area of military justice.

D. Evolution from Congressional Prerogative to Constitutional Roots

It has long been settled in military courts that the Constitution applies to service members.[159] But it was not always this way. For a time, service members did not have the same constitutional

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154. H.R. Rep. No. 90-1480, at 2054 (1968).

155. Robinson O. Everett, *Some Observations on Appellate Review of Court-Martial Convictions—Past, Present and Future*, 31 FED. B. NEWS & J. 420, 421 (1984).

156. *Id.* at 421–22.

157. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(a)(1), 108 Stat. 2663.

158. *See* Weiss v. United States, 510 U.S. 163, 179 (1994) ("Congress has taken affirmative steps to make the system of military justice more like the American system of civilian justice . . . .").

159. United States v. Jacoby, 11 U.S.C.M.A. 428, 430 (1960).

rights guaranteed to their fellow citizens; Congress could grant, or exclude, any right it wanted through the UCMJ.[160]

CAAF addressed the origin of service members' rights in its first term. A special court-martial convicted Hospitalman ("HN") Raymond Clay of improperly wearing the uniform and disorderly conduct for getting into a fight with locals in Korea.[161] However, the president of the court[162] did not instruct it "on the elements of the offense, the presumption of innocence, and the burden of proof, as required" by the UCMJ and the Manual for Courts-Martial ("MCM").[163] While deciding whether the president

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160. United States v. Clay, 1 U.S.C.M.A. 74, 77 (1951). To be sure, the Constitution has always applied to the military. It grants Congress the authority to "make rules for the government and regulation of the land and naval forces." U.S. CONST. art. 1, § 8, cl. 14. In addition, the president, as commander-in-chief, retains authority to command the military. U.S. CONST. art. 2, § 2, cl. 1. Until CAAF first addressed the issue in 1951, it only mattered that the court-martial had jurisdiction over the person and the offense. Johnson v. Sayre, 158 U.S. 109, 118 (1895). If so, such court's decision would be unreviewable by civil courts. *Id.*

161. *Clay*, 1 U.S.C.M.A. at 76–77.

162. Prior to the Military Justice Act of 1983, which created the military judge, the president of the court-martial was the closest to the role of judge in a special court-martial. This individual, the highest ranking member of the panel (the military jury), instructed the rest of the panel as required (i.e. elements, presumptions of innocence, reasonable doubt, burden of proof, etc.) and ruled on interlocutory questions. MANUAL FOR COURTS-MARTIAL, UNITED STATES 57–58 (1951) [hereinafter 1951 MCM]. Today, the president of a panel will preside over a special court-martial only in the rare case that a military judge is not appointed to it. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 502(b)(2)(C) (2012) [hereinafter MCM]. In fact, at least one service expressly requires all special courts-martial to include a detailed military judge. *See* U.S. DEP'T OF ARMY, REG. AR 27-10, MILITARY JUSTICE 37 (2011) [hereinafter AR 27-10], http://www.apd.army.mil/pdffiles/r27_10.pdf ("In each special court-martial (SPCM), a military judge shall be detailed except when a military judge cannot be detailed because of physical conditions or military exigencies . . . .").

163. *Clay*, 1 U.S.C.M.A. at 76. Clay pleaded guilty to improper wear of the uniform and not guilty to the disorder offense, so the court-martial proceeded to trial only on the disorder offense. *Id.* The intermediate appellate court affirmed the conviction and held that Clay was not substantially prejudiced; The Judge Advocate General ("TJAG") of the Navy certified to CMA. *Id.* Article 67, UCMJ, authorizes TJAG of each service to "certify" cases to CAAF. 10 U.S.C. § 867(a)(2) (2013). Certification means that CAAF must hear all cases

of the court violated the provision within the MCM and the UCMJ, CAAF addressed service members' rights.

In a unanimous opinion, CAAF held that service members are only entitled to the rights granted them by Congress, not the Constitution.[164] Through the UCMJ, Congress established a series of rights CAAF described as "military due process,"[165] but nothing more. A congressional right that is also a constitutional right might be interpreted in the same way, but a constitutional right not found in the UCMJ simply did not exist in the military.[166]

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decided by an intermediate appellate court (today known as a Court of Criminal Appeals) that any TJAG orders reviewed.

164. "[W]e do not bottom those rights and privileges on the Constitution. We base them on the laws enacted by Congress." *Clay*, 1 U.S.C.M.A. at 77.

165. *Id.* Military due process included the following rights:

> To be informed of the charges against him; to be confronted by witnesses testifying against him; to cross-examine witnesses for the government; to challenge members of [CAAF] for cause or peremptorily; to have a specified number of members compose general and special courts-martial; to be represented by counsel; not to be compelled to incriminate himself; to have involuntary confessions excluded from consideration; to have [CAAF] instructed on the elements of the offense, the presumption of innocence, and the burden of proof; to be found guilty of an offense only when a designated number of members concur in a finding to that effect; to be sentenced only when a certain number of members vote in the affirmative; and to have an appellate review.

Id. at 77–78. However, CAAF seemed to carve out an escape valve if it decided to one day change its mind:

> [W]e have not intended to make the list all-inclusive, nor to imply others might not be substantial. We have merely enumerated those which are of such importance as to readily catalogued in that category. . . . [W]e need go no further than to hold that the failure to afford to an accused any of the enumerated rights denied him military due process and furnishes grounds for us to set aside the conviction.

Id. at 78.

166. *See, e.g.*, United States v. Rosato, 3 U.S.C.M.A. 143, 145 (1953) ("Dispelling any doubt of its application to the military services, Congress included the substance of the Fifth Amendment in the Uniform Code of Military Justice, as Article 31 . . . .").

CAAF again rejected the notion that the Constitution applied to service members two years later in 1953.[167] It agreed that military due process included the right to confront witnesses, but since Congress limited that right in the UCMJ rather than apply the full constitutional standard, CAAF remained "powerless."[168] Therefore, so long as a deposition transcript complied with the requirements of the UCMJ, it would be admitted as evidence against the accused as a substitute for the live testimony of the deponent,[169] regardless of his availability. Thus, in a conflict between the UCMJ provision and a constitutional provision, the UCMJ controlled.

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167. United States v. Sutton, 3 U.S.C.M.A. 220, 222–23 (1953) ("In [*United States v. Clay*], we specifically stated we were building 'military due process' on the laws enacted by Congress and not on the guarantees found in the Constitution. Particularly, we were speaking of the Uniform Code of Military Justice as the source and strength of military due process."). The intermediate appellate court set aside the offense of malingering after it held that admitting a deposition transcript as done in the trial below violated the accused's right to be confronted by witnesses. *Id.* at 221. TJAG certified the case for review. *Id.*

168. CAAF reiterated that it was unwilling to challenge Congress's plenary power in this area:

> Therefore, when we enumerated confrontation of witnesses as one of the privileges accorded an accused by Congress, we had to be considering it in the light of any limitations set out in the Code. Surely we are seeking to place military justice on the same plane as civilian justice but we are powerless to do that in those instances where Congress has set out legally, clearly, and specifically a different level.

Id. at 223.

169. After all, it had always been done this way:

> With an historical background of that length and consistency [referring to the use of depositions as testimony since the Articles of War of 1806 forward], it would take a positive expression by Congress to the contrary before we would feel justified in inferring that a change in the law was intended. But Congress did not express a desire for change. On the contrary, it re-enacted, in substance, the time honored rule [referring to Article 49, which continued to allow the use of deposition testimony].

Id. at 224.

This time, Chief Judge Quinn disagreed.[170] His view was clear: "I have absolutely no doubt in my mind that accused persons in the military service of the Nation are entitled to the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by necessary implication, by the provisions of the Constitution itself."[171] These exclusions were the express exception within the Fifth Amendment that excluded service members from the grand jury requirement and the implied limitation on the right to trial by jury because only an indictment or presentment required a jury.[172] All other constitutional provisions applied to the military community.[173]

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170. *Id.* at 228–31 (Quinn, C.J., dissenting). Chief Judge Quinn had previously joined the unanimous *Clay* decision that limited service members' rights to those granted them by Congress. *See Clay*, 1 U.S.C.M.A. at 82. However, his reasons for doing so in light of this later position have yet to be studied.

171. *Sutton*, 3 U.S.C.M.A. at 228 (Quinn, C.J., dissenting) (citing Burns v. Lovett, 202 F.2d 335, 341 (D.C. Cir. 1952), *aff'd sub nom.* Burns v. Wilson, 346 U.S. 137 (1953)).

172. Chief Judge Quinn's articulation was apparently based on a plain reading of the text of the Constitution:

> With only a single express exception, there is no withholding of the protection of these rights and privileges from an accused because he is, at the time, serving with the armed forces of his country. Under the express exception, set out in the Fifth Amendment, an accused in the armed forces may be held to answer for a capital, or otherwise infamous crime, without presentment or indictment of a grand jury. To this express exception may be added the implied limitation of the right of trial by jury, as protected by the Sixth Amendment, to the extent that a jury trial is required only where presentment or indictment is necessary.

Id. (citations omitted).

173. *Id.* ("No other recognized exceptions have been cited and I know of none. The opinions of the appellate courts in the Burns case support the conclusion that there are no other exceptions."). Chief Judge Quinn continued that the D.C. Circuit in *Burns* found "no intimation in the Constitution itself that [the clause empowering Congress to make rules for the armed forces] and proceedings pursuant thereto are exempt from the requirements and prohibitions of the Fifth and Sixth Amendments." *Id.* (quoting *Burns*, 202 F.2d at 341). He noted that the Court seemed to agree. *Id.* at 229 ("The military courts . . . have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." (quoting *Burns*, 346 U.S. at 142)). The Chief Judge further noted that Justice Douglas made the point more explicit in his dissent.

Chief Judge Quinn's dissent became law seven years later[174] through the pen of Judge Homer Ferguson.[175] Early in his tenure, Judge Ferguson had initially joined an opinion upholding the *Sutton* rule that withheld constitutional protections from service members.[176] As he had since 1953, Chief Judge Quinn maintained his full throated dissent that the Constitution fully applied.[177] By 1960, Judge Ferguson became convinced that Chief Judge Quinn was right.

Like Private ("PVT") Sutton before her, a special court-martial convicted Airman Third Class ("A3C") Loretta Jacoby without providing her the opportunity to confront the witnesses

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Id. (citing *Burns*, 346 U.S. at 152 (Douglas, J., dissenting)) ("But never have we held that all the rights covered by the Fifth and the Sixth Amendments were abrogated by Art. I, § 8, cl. 14 of the Constitution, empowering Congress to make rules for the armed forces.").

174. The Chief Judge's view did, on one occasion, make it into a majority opinion. United States v. Adams, 5 U.S.C.M.A. 563, 570 (1955) ("No reason in law, logic or military necessity justifies depriving the men and women in the armed forces of a fundamental right to which they would be entitled as civilians."). Though this decision has been cited thirty-six times since 1955, this claim seems to have been lost to history. *See, e.g.*, United States v. Shepherd, 33 M.J. 66, 69 (C.M.A. 1991); United States v. Richey, 20 M.J. 251, 252 (C.M.A. 1985); United States v. Clark, 22 U.S.C.M.A. 576, 579–80 (1973); United States v. Lincoln, 17 U.S.C.M.A. 330, 334 (1967); United States v. Bullock, 12 U.S.C.M.A. 142, 143 (1961). Court watchers at the time did not address what impact, if any, this assertion may have had in the relationship between the Constitution and the military community. An argument can be made that because Chief Judge Quinn did not attempt to specifically overrule *Clay*, the remaining court membership felt it unnecessary to write separately. Instead, this phrase can be interpreted as asserting that, regardless of whether in the military or civilian community, an individual is "entitled to stand his ground against a trespasser to the same extent that a civilian is entitled to stand fast in his civilian home." *Adams*, 5 U.S.C.M.A. at 570. In any event, *Clay* was not specifically overruled until 1960. United States v. Jacoby, 11 U.S.C.M.A. 428, 429 (1960).

175. Judge Ferguson joined CAAF in 1956 after serving as a United States Senator and, most recently, Ambassador to the Philippines. David A. Melson, *Military Jurisdiction Over Civilian Contractors: A Historical Overview*, 52 NAVAL L. REV. 277, 312 (2005).

176. United States v. Parrish, 7 U.S.C.M.A. 337, 342 (1956) ("Judge Ferguson has chosen to follow the principle announced by the majority [in *Sutton*] and no good purpose would be served by repeating what was there said.").

177. *Id.* at 348–49 (Quinn, C.J., dissenting).

against her.[178] Writing for the two judge majority,[179] Judge Ferguson adopted the rationale from Chief Judge Quinn's *Sutton* dissent: "It is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."[180] From that day forth, the Bill of Rights applied to members of the United States armed forces.[181]

Since *Jacoby*, it has been beyond question that the Bill of Rights applies to service members unless expressly or by necessary implication excluded.[182] As noted earlier, the text of the Constitu-

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178. *Jacoby*, 11 U.S.C.M.A. at 429. In this case, the Government sought to introduce interrogatories as a substitute for live testimony. *Id.*

179. Originally a three judge court, Congress expanded CAAF's membership to five in 1989. *See* National Defense Authorization Act for Fiscal Years 1990-1991, Pub. L. No. 101-189, § 1301, 103 Stat. 1352, 1570 (1989).

180. *Jacoby*, 11 U.S.C.M.A. at 430–31. Prior to adopting the *Sutton* dissent as the new majority rule, Judge Ferguson addressed why his position changed from *Parrish* to *Jacoby*. *Id.* at 430. *Parrish* was written out of respect for stare decisis, but the court noted, "[I]t should never be applied in order to perpetuate a mistaken view. Indeed, it is our duty to overrule and modify decisions which are erroneous, although there has been no legislative change in the law as originally construed." *Id.* (citations omitted). However, it is noteworthy that Judge Ferguson did not cite the *Sutton* dissent for the rule he just established. *See id.* at 430–31. Instead, he relied on the Supreme Court's holding in *Burns*, which is what Chief Judge Quinn had relied on as well. *Id.*

181. Considering that *Jacoby* adopted the specific language out of Chief Judge Quinn's *Sutton* dissent, it seems to follow that the Chief Judge's explanation of the only exceptions to the rule are, at least, highly persuasive. Therefore, it may appear that, save for the two exceptions listed in Chief Judge Quinn's *Sutton* dissent, the rest of the Constitution would apply completely. *See* United States v. Sutton, 3 U.S.C.M.A. 220, 228–29. The *Jacoby* decision has held fast in military justice. *See, e.g.*, United States v. Marcum, 60 M.J. 198, 200, 206 (C.A.A.F. 2004) ("Constitutional rights generally apply to members of the armed forces unless by their express terms, or the express language of the Constitution, they are inapplicable. . . . Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable."); United States v. Tulloch, 47 M.J. 283, 285 (C.A.A.F. 1997) ("[T]he protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." (quoting *Jacoby*, 11 U.S.C.M.A. at 430–31)).

182. *See, e.g.*, United States v. Easton, 71 M.J. 168, 177 (C.A.A.F. 2012) (Erdmann, J., dissenting in part and concurring in part) ("[T]his court has long held that the Bill of Rights applies to servicemembers except for those that are

tion itself excludes members of the armed forces from the right to indictment by grand jury.[183] Furthermore, the right to trial by a jury composed of a cross-section of society is by necessary implication excluded.[184] Finally, the Court has determined a summary court-martial to be a disciplinary proceeding, not a trial; therefore, the Sixth Amendment right to counsel does not apply in that forum any more then it would to an administrative proceeding in the civilian world.[185]

A straightforward reading of *Jacoby* indicates that constitutional issues in the military and civilian communities, with the exception of the inmate and student communities, should be analyzed similarly. For example, laws infringing the First Amendment rights to speech, association, and religious liberty are subject to strict scrutiny.[186] In order for the Government to infringe one of these rights, it must assert a compelling interest and the enacted law must be the least restrictive means to accomplish that compel-

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'expressly or by necessary implication inapplicable.'" (citing Courtney v. Williams, 1 M.J. 267, 270 (C.M.A. 1976))); United States v. Cendejas, 62 M.J. 334, 344 (C.A.A.F. 2006) ("[O]ur Court has long maintained vigilance in preserving the rights of servicemembers in [CAAF-martial] process." (citing *Jacoby*, 11 U.S.C.M.A. at 430–31)); United States v. Graf, 35 M.J. 450, 460 (C.M.A. 1992) ("This Court's position is clear and well established: '[T]he protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members or our armed forces.'" (alteration in original) (citations omitted) (citing *Jacoby*, 11 U.S.C.M.A. at 430–31); Courtney v. Williams, 1 M.J. 267, 270 (C.M.A. 1976) (quoting *Jacoby*, 11 U.S.C.M.A. at 430–31).

183. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . . .").

184. United States v. Loving, 41 M.J. 213, 285 (C.A.A.F. 1994) ("The Sixth Amendment right to trial by a jury which is a fair cross-section of the community has long been recognized as inapplicable to trials by court-martial." (first citing *Ex parte* Quirin, 317 U.S. 1, 39–41 (1942); and then citing *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 137–38 (1866))).

185. Middendorf v. Henry, 425 U.S. 25, 42 (1976) ("[W]e conclude that a summary court-martial is not a 'criminal prosecution' for the purposes of the Sixth Amendment.").

186. Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 229 (2006).

ling interest.[187] Fourth Amendment issues are reviewed for reasonableness.[188] Sixth, Seventh, and Eighth Amendment issues are subject to categorical rules.[189] This means that, if the individual sufficiently demonstrates that the right is violated, the denial of that right is unconstitutional.[190] The analysis for each Amendment is certainly more complex than just described, however, for the purposes of this study it is enough to say that *Jacoby* reasonably asserted that a similar analysis should occur in the military community.[191] CAAF, however, has not applied *Jacoby* this strictly in constitutional cases. Instead, it has applied the military necessity doctrine.[192]

E. The Military Necessity Doctrine

The military necessity doctrine evolved from CAAF's *Jacoby* decision.[193] As noted above, the language used in *Jacoby* mirrors the language used by Chief Judge Quinn in his *Sutton* dis-

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187. *See, e.g.*, Hoffman v. United States, 767 F.2d 1431, 1435 (9th Cir. 1985).

188. Winkler, *supra* note 186, at 229–30.

189. *Id.* at 230–31.

190. *See id.*

191. It is unclear whether intermediate, strict, or some other standard of review should be applied to Second Amendment cases. *See* Patrick J. Charles, *The Second Amendment Standard of Review After* McDonald*: "Historical Guideposts" and the Missing Arguments in* McDonald v. City of Chicago, 2 AKRON J. CONST. L. & POL'Y 7 (2010).

192. It is noteworthy to recognize that CAAF has applied a different approach in specific circumstances. CAAF has applied the Court's "extraordinarily weighty factors" balancing test to general due process challenges under the Fifth Amendment in cases that challenge the general fairness of a court-martial. *See generally* United States v. Vazquez, 72 M.J. 13, 18–19 (C.A.A.F. 2013); United States v. Gray, 51 M.J. 1, 50 (C.A.A.F. 1999); United States v. Witham, 47 M.J. 297, 300–01 (C.A.A.F. 1996); United States v. Mitchell, 39 M.J. 131, 133, 135–45 (C.M.A. 1994). It has also created a three factor test to apply the Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 563 (2003), to the military community in cases involving private sexual acts between members of the same sex. United States v. Marcum, 60 M.J. 198, 206–07 (C.A.A.F. 2004).

193. *See* United States v. Jacoby, 11 U.S.C.M.A. 428, 430–31 (1960) ("[T]he protections of the Bill of Rights, except those which are expressly or by necessary implication, are available to members of our armed forces.").

sent.[194] It is thus arguable that the only exceptions to the full application of the Constitution to the military community are the express exclusion of the right to indictment by a grand jury and the necessarily implied exclusion of the right to trial by jury.[195] This position appears consistent with Congress's intent in enacting the UCMJ. One of the primary purposes of the UCMJ was to civilianize the military justice system to the extent practical.[196] However, CAAF has since declined, though not expressly, to apply *Jacoby* this way. Instead, it appears to have walked back from *Jacoby*'s bright-line rules by referencing military necessity as the basis for a different rule in the military community.[197] Though a statutory interpretation case rather than a constitutional one, the case of Lieutenant Thomas Dowty is such an example of CAAF moving away from *Jacoby*'s language and toward military necessity.[198]

On active duty service in the Naval Medical Service Corps, Dowty operated a private business called Health Care Associ-

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194. *See* United States v. Sutton, 3 U.S.C.M.A. 220, 228 (1953) (Quinn, C.J., dissenting) ("I have absolutely no doubt in my mind that accused persons in the military service . . . are entitled to the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by necessary implication, by the provisions of the Constitution itself.").

195. *Id.* (Quinn, C.J., dissenting). Since Chief Judge Quinn penned the test in an earlier dissent, his explanation of this phrase is most informative. In addition, the Court has held that a service member is not entitled to his Sixth Amendment right to counsel in summary courts-martial. Middendorf v. Henry, 425 U.S. 25, 34 (1976).

196. Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 7 (1970) ("Substantial civilianization resulted from the passage of the Uniform Code of Military Justice (UCMJ) in 1950 . . . .").

197. It is unclear what legal basis CAAF relied on to transition from *Jacoby*'s "expressly or by necessary implication excluded" standard to the modern standard of "military necessity." CAAF began incorporating the military necessity language into its opinions over time while still citing *Jacoby* as the basis for that assertion. Arguably, this could have been the result of the Court's decision in *Parker v. Levy*. *See* Stanley Levine, *The Doctrine of Military Necessity in the Federal Courts*, 89 MIL. L. REV. 3, 12–21 (1980). However, CAAF has not explicitly articulated the reason for this shift. Thus, the lack of scholarly scrutiny during CAAF's transition was a missed opportunity. As noted in this Article, CAAF has welcomed and eagerly sought scholarly attention toward its jurisprudence.

198. *See* United States v. Dowty, 48 M.J. 102 (C.A.A.F. 1998).

ates.[199] His ex-wife anonymously called the Defense Fraud, Waste, and Abuse Hotline and alleged that Dowty's company had submitted fraudulent claims to the Government for the past three years.[200] As part of the Naval Criminal Investigative Service's ("NCIS") investigation, agents requested the Department of Defense Inspector General ("DoD IG") to issue an administrative subpoena under the Right of Financial Privacy Act ("RFPA") to obtain the bank records of Health Care Associates, which it issued on July 27, 1994.[201] Dowty challenged the Government's access to the records by filing a motion in the United States District Court for the District of Columbia on September 9, 1994.[202] The district court dismissed Dowty's motion eight months later on May 17, 1995, and the Navy preferred charges against Dowty on January 17, 1996.[203]

At his general court-martial, Dowty moved to dismiss twelve of the sixteen charged specifications because the charged offenses occurred beyond the five year statute of limitations.[204] Under the UCMJ, the military generally could only prosecute offenses that occurred within the previous five years.[205] However, the statute of limitations tolled upon the commander exercising summary court-martial convening authority receiving the charges.[206] The Government argued that the RFPA tolled the statute of limitations during the eight month and two day period in which Dowty's motion was litigated in federal court.[207] Consequently, all offenses properly occurred within the five year statute of limitations.[208]

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199. *Id.* at 104.

200. *Id.* Dowty's ex-wife claimed that he defrauded the Government out of $15,000 and deposited each check into his personal checking account. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 104–05.

204. *Id.* at 105.

205. *Id.* (citing 10 U.S.C. § 843 (2013)).

206. *Id.*

207. *Id.*

208. *Id.* The relevant provision tolled any applicable statute of limitations if the litigation caused a delay in the Government's access to the requested financial records. *Id.*

The military judge disagreed.[209] He ruled that Article 43 controlled the issue.[210] That article established the military's five year statute of limitations, and nothing in the text of that article "permits consideration of the RFPA to toll the running of the statute."[211] Even if the RFPA's provision did apply, the military judge ruled, the approximate eight month period did not toll the running of the statute.[212] Since the Government could have obtained Dowty's financial records through his ex-wife, a joint owner of the accounts, the litigation did not delay the Government's access.[213] The Government appealed this ruling, and the intermediate appellate court rejected the military judge's reasoning.[214] In deciding the questions presented, CAAF disclosed an example of its philosophy behind its military necessity doctrine.[215]

CAAF began with the principle that Congress has broad discretion over the military community.[216] Its plenary powers are buttressed by the individual protections found in the Constitution, but "the different character of the military community and of the military mission requires a different application of those protections."[217] CAAF went on to explain how this balancing works:

> While members of the armed forces do not enjoy the full panoply of constitutional and statutory rights available to others, they are no less citizens of the United States. In the absence of a *valid military*

209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* at 105–06.
215. *Id.* at 106–07. CAAF ultimately decided that the accused properly invoked the provisions of the RFPA and such action tolled the running of the statute. *Id.* at 111–12 ("When appellant affirmatively invoked the protections of the RFPA in an effort to block government access to his financial records, he submitted himself to the integrated provisions of that statute, including the provision under which the applicable statute of limitations was tolled.").
216. *Id.* at 106 ("Under the Constitution, 'Congress has "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline."'" (quoting Weiss v. United States, 510 U.S. 163, 177 (1994))).
217. *Id.* (quoting Parker v. Levy, 417 U.S. 733, 758 (1974)).

> *purpose* requiring a different result, generally applicable statutes normally are available to protect servicemembers in their personal affairs.[218]

Though *Dowty* did not deal with a constitutional protection under the Bill of Rights, CAAF's analysis sheds light into its philosophy underlying its military necessity doctrine. Though CAAF still often cites *Jacoby*,[219] it often has not taken the opportunity to go further than it did in *Dowty* to develop this doctrine.

III. SHAPING AN UNDERSTANDING OF MILITARY NECESSITY

With a foundational understanding of CAAF and its role in constitutional cases, it is now possible to turn to its development and application of the military necessity doctrine. This Part begins by summarizing CAAF's difficulties in defining military necessity. To advance the development of this doctrine, a summary of the research method employed in this study to categorize themes and examples of military necessity in CAAF's jurisprudence follows. The remainder of this Part, as well as the subsequent Part, discusses the results of this study.

A. Defining Military Necessity

While *Dowty* demonstrates CAAF's modern application of *Jacoby*, it has yet to flesh out a definition of military necessity. On one occasion, one of its judges noted that the phrase "military necessity" was often used by CAAF, as well as civilian courts, but rarely explained.[220] On a separate occasion, CAAF recognized that

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218. *Id.* at 107 (emphasis added).

219. *See, e.g.*, United States v. Marcum, 60 M.J. 198, 205 (C.A.A.F. 2004); United States v. Rendon, 58 M.J. 221, 225 (C.A.A.F. 2003); *Dowty*, 48 M.J. at 107 (C.A.A.F. 1998); United States v. Tulloch, 47 M.J. 283, 285 (C.A.A.F. 1997); United States v. Rexroat, 38 M.J. 292, 294–95 (C.M.A. 1993); United States v. Lopez, 35 M.J. 35, 41 n.2 (C.M.A. 1992); Courtney v. Williams, 1 M.J. 267, 270 (C.M.A. 1976).

220. Judge Matthew Perry said so in some detail in the majority opinion in *Harris*:

> While the term "military necessity" has appeared in many cases in this Court as well as in civilian appellate courts, discussion of its meaning has been rare. See United States v. Russell, 13 Wall. 623, 627–28 (1871); Korematsu v. United

"military necessity" is an "amorphous term," but it knew it when it saw it.[221] Members of CAAF have also criticized the majority at times for citing military necessity as a basis to ignore a constitutional rule without proper justification.[222]

> States, 323 U.S. 214, 233, 234 (Murphy J., dissenting) (1944). In context some cases may provide insight into its meaning: United States v. Grow, 3 U.S.C.M.A. 77 (1953); United States v. Hooper, 5 U.S.C.M.A. 391, 396-8 (1955); United States v. Robinson, 6 U.S.C.M.A. 347, 352-3 (1955); United States v. Milldebrandt, 8 U.S.C.M.A. 635, 638 (1958); United States v. Davis, 19 U.S.C.M.A. 217, 223-4 (1970); United States v. Howard, 19 U.S.C.M.A. 547, 551 (1970); United States v. Mohr, 21 U.S.C.M.A. 360, 367 (1973); United States v. Ruiz, 23 U.S.C.M.A. 181, 183 (1974). Other cases merely mention the term without any discussion. They will be referred to only by C.M.A. citation (CMR/page) since they are only of academic interest: 6/92; 17/22; 18/187; 21/149; 21/201; 22/41; 24/240; 27/316; 29/275; 33/68; 226; 36/309; 37/64; 38/78; 40/74; 45/163. The term has also been mentioned in the following Supreme Court decisions: Sterling v. Constantin, 287 U.S. 378, 390-2 (1932); Hirabayashi v. United States, 320 U.S. 81, 86 (1943); Korematsu v. United States, supra at 227, 235, 240-1 (1944); In re Yamashita, 327 U.S. 1, 14, 24, 27, 46, 50, 78 (1946); Duncan v. Kahanamoku, 327 U.S. 304, 328 (1946); NLRB v. Jones and Laughlin Corp., 331 U.S. 416, 426 (1947); Libby et al. v. United States, 340 U.S. 71, 73-5 (1950); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 661, 686 (1952); Reid v. Covert, 354 U.S. 1, 46 (1957); Laird v. Tatum, 408 U.S. 1, 20 (1972); Parker v. Levy, 417 U.S. 733, 788 (1974). See also United States v. Pierce, 505 F.2d 1053, 1055-6 (1st Cir. 1974); Hess v. Schlesinger, 486 F.2d 1311, 1313 (1973); Anderson v. Laird, 466 F.2d 283, 297, 304, 310 (1972), cert. denied, 409 U.S. 1076.

United States v. Harris, 5 M.J. 44, 64 n.28 (C.M.A. 1978) (parallel citations omitted) (*overruled on other grounds by* United States v. Jones, 24 M.J. 294, 296 (C.M.A. 1987)). Judge Perry would resign from CAAF one year later to accept an appointment as a United States District Judge in South Carolina. *See* In Memoriam, *In Memoriam: Matthew J. Perry, Jr.*, 63 S.C. L. REV. 769, 771 (2012).

221. *See* United States v. Alleyne, 13 M.J. 331, 336 (C.M.A. 1982) ("Obviously, 'military necessity' is an amorphous term, but whatever it means, we are sure that [a gate search OCONUS is included].").

222. *See Tulloch*, 47 M.J. at 289–90 (C.A.A.F. 1997) (Crawford, J., dissenting) ("[T]he majority refuses to follow Supreme Court precedent and con-

The lack of a definition or framework is problematic. Unlike the inmate and student communities, the Court does not wade into the military community to articulate a specific standard to be applied by military courts. Instead, it relies on CAAF to administer the Constitution in the military community. The absence of an articulated framework presents at least two concerns. First, practitioners have no guide to frame issues for CAAF's review. This increases the probability of unfocused briefs that fail to narrow the issues before CAAF, or fail to address CAAF's concerns. Additionally, providing clear standards enables practitioners to properly narrow issues for CAAF, resulting in more effective briefs, consistent application of legal principles, and stability and predictability in military justice. Second, the absence of a clear framework can be a roadblock to CAAF's administration of military justice as a whole. While a particular court membership may understand each other's views on military necessity, it is less able to connect CAAF's jurisprudence throughout its institutional history.

A study of CAAF's jurisprudence uncovers numerous decisions in which it has found sufficient military necessity. As will be discussed below, some of those findings may no longer stand in the face of the evolving nature of the military community and the Court's interpretation of the Constitution. However, the results of this study provide some clarity to the process. The proceeding sections thus discuss the research methodology undertaken, and the results themselves.

B. Research Method

An initial search of the Court of Appeals for the Armed Forces database in Westlaw was conducted to by the author to uncover every reference to the phrase, "military necessity."[223] After

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tinues this Court's practice of fashioning a different rule for the military without adequate justification . . . .").

223. The decision to search for the phrase "military necessity" rather than "military purpose" was intentional. Though "military purpose" appears in decisions such as *Dowty* and the two phrases are at times used interchangeably, the author's experience with CAAF led to the decision that "military necessity" would be more often used and would accurately capture the development of the doctrine without the need to broaden the pool of decisions to review. That said, testing this study against the use of the phrase "military purpose" is a worthwhile endeavor.

eliminating decisions that did not cite the phrase for the purpose of determining whether to apply a civilian constitutional or statutory rule to the military community, the remaining decisions were grouped into categories. A second analysis was then conducted to determine which categories were considered by CAAF to be valid assertions of military necessity. These were grouped into three overarching themes: injury avoidance, good order and discipline, and mission accomplishment. A third analysis was then conducted to further break down each overarching theme into two broad examples of military necessity. These examples do not comprise all possible valid assertions of military necessity. They are as they are aptly described here—examples.

C. Some Initial Observations on the Results

Before turning to the results of this study, three observations on the study are discussed below. First, the study uncovered that at least one decision complicates the understanding of the military necessity doctrine by asserting that military necessity is just one of many factors in a balancing test CAAF undertakes to determine whether to apply a civilian statutory or constitutional rule.[224] Though not relied upon in subsequent cases, that proposition has yet to be expressly overruled or discarded.[225] Second, the results at least demonstrate that merely asserting military necessity, without more, is not enough. The absence of a developed framework for the military necessity doctrine illustrates that this rule is likely both ignored by practitioners and not regularly enforced by CAAF. However, this rule supports the proposition that a working military necessity doctrine requires more than a mere assertion of military necessity. A third and final observation discussed below is that there exists a small number of decisions asserting military necessity that, as stated earlier, may no longer be consistent with the evolution of both the military community and the Court's interpretation of the Constitution in certain areas.

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224. *Harris*, 5 M.J. at 64.

225. Admittedly, it could be argued that this proposition has been discarded in practice.

1. Inconsistent Articulation of When and How the Military Necessity Doctrine is Applied

An initial observation that complicates understanding the military necessity doctrine is that CAAF has not consistently articulated how the doctrine is to be applied. On at least one occasion, CAAF proclaimed that though military necessity is a significant and even overriding factor, it is but one factor in a balancing test.[226] In *United States v. Harris*, CAAF disagreed with the Government's assertion of military necessity for certain procedures undertaken at a military gate for searches of vehicles attempting to enter a military installation.[227] Private (PVT) Charles Harris rode as a passenger in a vehicle seeking to enter the main gate at Marine Base Twentynine Palms in California.[228] The Marine Corps prosecuted PVT Harris for possession of marijuana when, as he exited the vehicle for it to be inspected, he dropped two bags of the controlled substance.[229] CAAF agreed that military necessity could require invasive procedures during a gate search that would not otherwise be allowed in the broader civilian community, but that was not the end of the matter.[230] It went on to say that "military necessity is only a factor, rather than a determinant, in the balancing process."[231] Rather than first determining whether military necessity required a different application of Fourth Amendment jurisprudence and then applying a reasonableness test in light of its threshold decision, CAAF explained that military necessity, whatever it was and however it should be evaluated, was just one factor in a balancing test that also was not explained.

As a result, there is at least one decision that complicates a straightforward application of the military necessity doctrine in a constitutional challenge.[232] However, this analysis has largely

226. *Harris*, 5 M.J. at 64.

227. *Id.* at 45 ("We have determined that the procedures utilized by the authorities which led to the discovery and seizure of the marihuana rendered it inadmissible.").

228. *Id.*

229. *Id.*

230. *Id.* at 65.

231. *Id.*

232. In another decision, CAAF has implied that public policy may require a different application. United States v. Obligacion, 17 U.S.C.M.A. 36, 39

been ignored by CAAF in subsequent decisions. In fact, it may arguably have been abrogated by later decisions that do not consider military necessity as one factor in a balancing test. Ultimately, a well-defined doctrine will address these uncertainties and make explicit what should no longer be implied.

2. Simple Assertion is Not Enough

A second observation is that CAAF has, on at least one occasion, required more than a simple assertion of military necessity. In *United States v. Grunden*, CAAF explained that simply asserting "security" or "military necessity" was not enough to infringe on the accused's right to a public trial under the Sixth Amendment.[233] The facts of *Grunden* are relatively straightforward. Airman First Class ("A1C") Oliver Grunden, Jr. attempted to pass national defense information to undercover agents, in violation of an Air Force Regulation.[234] During his court-martial for failing to report contact with what Grunden believed to be agents of a foreign government and for attempted espionage,[235] the military judge closed the courtroom for essentially the entire trial on the basis that the espionage charges would go into classified information.[236] Nine witnesses testified during the closed proceeding, but only one witness discussed classified matters at length.[237]

(1967) ("In the ordinary case, the accused is entitled to look upon his accusers and to have the court weigh their demeanor in testifying. Occasionally, this requirement must give way to public policy.").

233. 2 M.J. 116, 121 (C.M.A. 1977) (*abrogated by* United States v. Torres, 2001 WL 36264237, *7–8 (C.A.A.F. May 25, 2001) ("The simple utilization of the terms 'security' or 'military necessity' cannot be the talisman in whose presence the protections of the *Sixth Amendment* and its guarantee to a public trial must vanish." (emphasis added)).

234. *Id.* at 119.

235. *Id.*

236. *Id.* at 120 ("Thus, despite the objection of the defense counsel, and the trial judge's own assurances that he would 'bend over backwards' to protect the appellant's rights, the public was excluded from virtually the entire trial as to the espionage charges.").

237. *Id.* Four made passing references, and the remaining four made no references at all. *Id.*

CAAF's analysis began with the text of the Sixth Amendment, which guarantees the right to a public trial.[238] It recognized that a court may be closed, partially or completely, for security or other good reasons.[239] However, it further noted that such actions must be taken sparingly and only to the extent necessary.[240] CAAF's then applied these principles to the Government's simple assertion of military necessity. CAAF recognized that a threshold burden existed that the Government must meet. Thus, simple assertion was not enough.[241] It then acknowledged that recognition of the uniqueness of the military community does not erase the requirement for reason and analysis when reviewing the constitutional protections service members retained:

> This Court recognizes that the Supreme Court [has] acknowledged the uniqueness of the military society, and that it has reaffirmed that belief in recent decisions. Yet, this Court once again must state that analysis and rationale will be determinative of the propriety of given situations, and that the mere uniqueness of the military society or military neces-

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238. *Id.* ("The right of an accused to a public trial is a substantial right secured by the Sixth Amendment to the Constitution of the United States." (citation omitted)).

239. *Id.* at 121 ("Unless otherwise limited by the directives of the Secretary of a Department, the convening authority, the military judge, or the president of a special court-martial without a military judge may, for security or other good reasons, direct that the public or certain persons thereof be excluded from a trial."). CAAF went on to say that "all spectators may be excluded from an entire trial, over the accused's objection, only to prevent the disclosure of classified information." *Id.*

240. *Id.* ("The authority to exclude should be cautiously exercised, and the right of the accused to a trial completely open to the public must be weighed against the public policy considerations justifying exclusion.").

241. *Id.* ("The simple utilization of the terms 'security' or 'military necessity' cannot be the talisman in whose presence the protections of the Sixth Amendment and its guarantee to a public trial must vanish.").

> sity cannot be urged as the basis for sustaining that which reason and analysis indicate is untenable.[242]

A balancing test was required to examine and analyze the need for, and scope of, any exclusion of the public.[243] Under this test, the Government must meet a heavy burden.[244] As applied to the instant case involving the right to a public trial, one of the military judge's tasks was to "determine whether the perceived need urged as grounds for the exclusion of the public is of sufficient magnitude so as to outweigh 'the danger of a miscarriage of justice which may attend judicial proceedings carried out in even partial secrecy.'"[245]

CAAF's acknowledgment of a threshold requirement was not, in and of itself, particularly noteworthy. The Court subjects closures of a courtroom challenged under the Sixth Amendment to strict scrutiny review.[246] Consequently, the party seeking to close a courtroom must assert "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."[247]

What is noteworthy is that CAAF required the Government to meet that threshold rather than address military necessity *sua sponte* in its decision. Though CAAF has appropriately placed the burden of persuasion on the party seeking a different rule due to

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242. *Id.* at 121 n.9 (citations omitted). CAAF's use of the phrase "once again" appears to be a re-assertion of an earlier passage in the same opinion, as this phrase is not followed by a citation to an earlier decision.

243. *Id.* at 121 ("Unless an appropriate balancing test is employed with examination and analysis of the need for, and the scope of any suggested exclusion, the result is, as here, unsupportable.").

244. *Id.* at 122 ("[T]he government must demonstrate that it has met the heavy burden of justifying the imposition of restraints on this constitutional right.").

245. *Id.* (quoting Stamicarbon v. Am. Cyanamid Co., 506 F.2d 532, 539 (2d Cir. 1974)).

246. Waller v. Georgia, 467 U.S. 39, 44–47 (1984).

247. *Id.* at 45 (quoting Press-Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 510 (1984)).

military necessity,[248] it has not always continued to require that party to further allege specific facts explaining what the exact necessity is and why it was important enough to justify the different rule. Thus, a more fully developed doctrine should also require more than asserting the phrase "military necessity."

3. Military Necessity Examples in Light of the Evolution in the Military Community and the Court's Constitutional Interpretation

Readers attempting to replicate this study are likely to uncover additional decisions in which CAAF found sufficient military necessity to apply a different rule that are not included in the results discussed in Part V. These include preventing statutory conflict within the UCMJ,[249] public policy,[250] and preventing the introduction of drugs onto an installation.[251] For reasons discussed below, these examples are less likely to be a successful assertion of military necessity today.

Though CAAF recently held that conflict with other UCMJ articles is a sufficient articulation of military necessity, this appears problematic. In *United States v. Easton*, CAAF upheld Article 44(c) of the UCMJ, declaring that double jeopardy does not attach in the military until the introduction of evidence.[252] This was at

248. Courtney v. Williams, 1 M.J. 267, 270 (C.M.A. 1976) ("[T]he burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule." (citation omitted)).

249. United States v. Easton, 71 M.J. 168, 176 (C.A.A.F. 2012).

250. United States v. Obligacion, 17 U.S.C.M.A. 36, 39 (1967); United States v. Gladwin, 14 U.S.C.M.A. 428, 433 (1964).

251. United States v. Acosta, 11 M.J. 307, 313 (C.M.A. 1981); United States v. Middleton, 10 M.J. 123, 129 n.11 (C.M.A. 1981); United States v. Hessler, 7 M.J. 9, 10 (C.M.A. 1979); United States v. Unrue, 22 U.S.C.M.A. 466, 469 (1973).

252. *Easton*, 71 M.J. at 170. Interestingly, the MCM described why the military provides one oath to the venire that includes the instructions to the ultimate panel, rather than separate the two, as is done in civilian practice. This is done for administrative convenience. MANUAL FOR COURTS-MARTIAL, UNITED STATES, A21-50 (2012). In sum, it is easier to execute the oath of the venire to tell the truth in voir dire and the oath swearing in the ultimate panel at one time, rather than at the start of voir dire and then once the venire is reduced to the panel selected to hear the case.

odds with the constitutional rule that double jeopardy attaches earlier, once the military jury is empaneled and sworn.[253] CAAF upheld Article 44(c) in large part because ruling it unconstitutional would bring other articles into question and possibly require finding them unconstitutional as well.[254] Any specific critique of CAAF's reasoning in *Easton* is beyond the scope of this article, but it is enough to say that Congress cannot ignore the Constitution.[255] Though there is arguably recent precedent allowing for the proposition that statutory consistency is a military necessity, a fully developed doctrine should not test the principle that the Constitution will always supersede a statutory scheme.

Secondly, public policy remains far too general a term to justify an otherwise constitutional violation. At least one court has defined the phrase as concerning "what is right and just and what affects the citizens of the State collectively."[256] Black's Law Dictionary defines the phrase as "principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society."[257] Consequently, it is just as ambiguous as "military necessity." It adds nothing to the endeavor to better understand the phrase. As such, advocates are best left to focus on more concrete examples that help narrow the definition of that phrase.[258]

Finally, preventing the introduction of drugs onto a military installation is unlikely to be a sufficient assertion of military necessity justifying infringing constitutional rights in the modern military community. In a series of prior decisions during the 1970s and early 1980s, CAAF relied on this general reason to justify searches and seizures that would otherwise violate the Fourth

253. Crist v. Bretz, 437 U.S. 28, 35 (1978).

254. *Easton*, 71 M.J. at 176 ("Were we to mechanically apply the holding in *Crist* to the military context, we would negate numerous portions of the UCMJ . . . .").

255. United States v. Graf, 35 M.J. 450, 461 (C.M.A. 1992) (quoting Rostker v. Goldberg, 453 U.S. 57, 67 (1981)).

256. Belline v. K-Mart Corp., 940 F.2d 184, 187 (7th Cir. 1991) (quoting Palmateer v. Int'l Harvestor Corp., 421 N.E.2d 876, 878–79 (Ill. 1981)).

257. *Public Policy*, BLACK'S LAW DICTIONARY (10th ed. 2014).

258. This is not to say public policy arguments shouldn't be made as part of an overall argument. However, the advocate relying solely on a public policy argument is less likely to be successful.

Amendment.[259] However, more recent decisions by the Court appear to undercut this reasoning.

Two landmark Confrontation Clause decisions, *Crawford v. Washington*[260] and *Melendez-Diaz v. Massachusetts*,[261] substantially affected federal and state criminal prosecutions in drug cases; the military community was no different. CAAF subsequently began interpreting the impact of *Crawford* and *Melendez-Diaz* on military drug prosecutions in a series of cases that determined which parts of a drug test report were testimonial hearsay and thus required live testimony.[262]

None of this further analysis would be necessary if preventing the introduction of drugs onto a military installation, as articulated in prior cases, sufficed as military necessity. If articulating that necessity justified a Fourth Amendment violation, why not also a Sixth Amendment violation? This is not to say the military has no justifiable interest in preventing the introduction of drugs onto an installation. The point here is that the basis, as articulated in prior cases, may be undercut by more recent case law.

With these three observations in mind, it is now possible to turn to the three themes and six examples of military necessity that emerge from CAAF's jurisprudence.

IV. THEMES AND EXAMPLES OF MILITARY NECESSITY

We now turn to the three overarching themes and six broad examples of military necessity. To be sure, these are not specific formulations to be applied mechanically. However, though the specific articulation will likely always be case-specific,[263] each

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259. *See, e.g.*, United States v. Middleton, 10 M.J. 123, 129 n.11 (C.A.A.F. 1981); United States v. Acosta, 11 M.J. 307, 312–13 (C.M.A. 1981); United States v. Hessler, 7 M.J. 9, 10 (C.M.A. 1979); United States v. Unrue, 22 U.S.C.M.A. 466, 469 (1973).

260. 541 U.S. 36 (2004).

261. 557 U.S. 305 (2009).

262. *See, e.g.*, United States v. Tearman, 72 M.J. 54 (C.A.A.F. 2013); United States v. Sweeney, 70 M.J. 296 (C.A.A.F. 2011); United States v. Cavitt, 69 M.J. 413 (C.A.A.F. 2011); United States v. Dollar, 69 M.J. 411 (C.A.A.F. 2011); United States v. Blazier, 69 M.J. 218 (C.A.A.F. 2010); United States v. Blazier, 68 M.J. 439 (C.A.A.F. 2010).

263. Note that in a facial challenge, the analysis is much more broad. In contrast to an as-applied challenge, in which the focus is on the particular case, a

example provides an avenue to articulate a specific military necessity that exists within CAAF's jurisprudential history. The challenge for the party seeking a different rule, generally the Government, will be to articulate a reasonably direct and detailed nexus between the conduct at issue and one of the following six examples.[264] Each is subsequently addressed in turn, grouped by overarching theme. Every subsection begins with an articulation of the example followed by a demonstration of it in action.

A. Mission Accomplishment

1. Essential to Mission Accomplishment

CAAF has held that the infringement of a constitutional right may be justified if such action was essential to mission accomplishment. Of course, such necessity requires a reasonably direct and detailed nexus to mission accomplishment. Some examples illustrate how this nexus can be successfully articulated.

In one example that concerned statutory interpretation, the Army court-martialed Private First Class ("PFC") Elmer Robinson for willful disobedience of a lawful command, in violation of Article 90 of the UCMJ.[265] PFC Robinson served as a cook at his unit's mess.[266] Dissatisfied, he eventually accepted an offer to serve as a cook's helper at the Officers' Mess.[267] He soon became dissatisfied again.[268] After showing up late to work on October 12, 1954, he refused to obey an order to begin performing his duties.[269]

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statute will be upheld unless there is not a single application of the statute that is constitutional. United States v. Salerno, 481 U.S. 739, 745 (1987).

264. To be sure, this is not a Government-focused article. Defense advocates will also benefit from tools allowing them to specifically crystallize for CAAF how the Government has failed to articulate a sufficient compelling interest.

265. United States v. Robinson, 6 U.S.C.M.A. 347, 349 (1955).

266. *Id.* at 349. A "mess" is a now-outdated term for the facility in which military members can eat. These facilities may now be called dining facilities or Officers' or Enlisted Clubs, or a joint club.

267. *Id.* at 350. Officers created a closed mess by pooling together funds to provide meals for their members. Open messes are now dining facilities or Officer or Enlisted Clubs.

268. *Id.*

269. *Id.*

PFC Robinson challenged the legality of the order on appeal on the basis that a federal statute prohibited officers from using enlisted men as servants.[270]

CAAF, however, disagreed with PFC Robinson's interpretation of the statute.[271] Its reasoning articulated a distinct and detailed nexus between the need to assign enlisted men to the Officers' Mess and the mission. Under conditions that existed in 1955, it was "absolutely essential that officers be fed either in unit messes or in officers' messes."[272] Therefore, an officers' mess whose principal purpose was "to feed officers so there will be less interruption with their official duties" that employs enlisted individuals does not offend the statute because it served an "essential military purpose."[273] CAAF noted that "[s]trained manpower conditions" required it to revisit its previous interpretation of the statute.[274] Specifically, "national conditions and the necessities of the Service [had] changed to such an extent that to follow the early interpretations would unnecessarily interfere with the building of an armed force capable of carrying out present day missions."[275] PFC Robinson served in an Officers' Mess located at Fort McNair, a location heavily used for training and education programs.[276] Consequently, the growth in personnel had outpaced similar growth in facilities.[277] Adopting PFC Robinson's interpretation "would so

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270. *Id.* (citing 10 U.S.C. § 608, prohibiting the use of enlisted men in an officers' open mess).

271. *Id.* CAAF acknowledged that early interpretation of the statute are no longer consistent with changes in circumstances. *Id*. ("[I]t is doubtful that the interpretations found in the early cases offer persuasive authority for a present day construction."). Early cases interpreted the statute literally. *Id.* Due to changed circumstances within the military society, that would no longer do. *Id.* at 351. The modern approach looked to "whether the employment was a military task beneficial to the Army, or a personal service rendered to an individual officer or group of officers." *Id.*

272. *Id.* at 353.

273. *Id.*

274. *Id.* at 351.

275. *Id.*

276. *Id.*

277. *Id.* For example, the Army had 4,604 officers in 1912. *Id.* Twenty-six years later, that number grew to 13,304 just before World War II. *Id.* At the time of CAAF's opinion in 1955, the officer corps had exploded to 128,208 soldiers. *Id.*

circumscribe the military community that the preparation for, or the waging of, war would be impossible."[278] The Officers' Mess, in this case, was just as essential to the mission as guarding officers' "barracks, polic[ing] their area, dispos[ing] of their garbage, polic[ing] their latrine, and transport[ing] them from place to place."[279]

CAAF also reasoned that the open mess was "an integral part of the Army establishment, an instrumentality of the Government and necessary to the interests of the armed forces."[280] Requiring officers sent to a training base temporarily, for a specific military purpose, to leave the base in search of commercial eating options took them away from too much of their duty day.[281] From that viewpoint, it is no different than a "garrison or field ration mess" that is available to the enlisted corps.[282]

In addition to the preceding example of military necessity, a sufficient "unusual circumstance" unique to the mission may also warrant infringing upon a constitutional right in a particular case.[283] An example of this analysis can be found in *United States v. Milldebrandt*.[284] Burdened with substantial personal financial problems, Disbursing Clerk Second Class ("DK2") James R. Milldebrandt requested a thirty-day leave of absence to earn some additional money as a civilian employee.[285] His commander granted the request but ordered DK2 Milldebrandt to submit weekly reports on his financial condition.[286] After DK2 Milldebrandt failed to comply, his commanding officer ordered him back to his station, where he faced court-martial for failing to obey a lawful order.[287]

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278. *Id.* at 352.

279. *Id.*

280. *Id.* at 353. CAAF also noted that the mess's "purpose is to provide services essential to the messing, billeting, morale and welfare of its members and all other officers who are temporarily on post." *Id.*

281. *Id.* It is important to understand this reasoning in the context of when it was decided. This was shortly after World War II ended, with all those experiences fresh in mind.

282. *Id.*

283. *See, e.g.*, United States v. Milldebrandt, 8 U.S.C.M.A. 635, 638 (1958).

284. *Id.*

285. *Id.* at 636.

286. *Id.*

287. *Id.* at 636–37.

During its review, CAAF determined that a sufficient unusual circumstance, such as what occurred in this case, might subject a military member on leave to military orders:

> Undoubtedly there may be instances when complete freedom from military duties cannot be the rule, for a serviceman on leave must hold himself amenable to orders of revocation and a commander should be authorized to direct him to furnish changes of address or to report where he may be reached for recall to duty if an emergency arises.[288]

But to be sufficient, the order must be "necessary to the successful pursuit of [a] military mission."[289] It must be "required to maintain the morale, discipline, or good order of the unit or to keep the military free from disrepute."[290]

Robinson and *Milldebrandt* serve as examples of articulating why a challenged statute or rule is *essential* to mission accomplishment, thus requiring a different application. The Government may also defend a statute or rule by arguing that applying the constitutional rule would significantly *impede* mission accomplishment. *United States v. Stuckey*[291] is such an example. As in both approaches, a reasonably direct and detailed nexus is required.

2. Impedes Mission Accomplishment

The infringement of a constitutional right in a particular case may also be justified if the civilian constitutional rule would materially impede mission accomplishment.[292] An example of this nexus can be found in the general court-martial[293] of Private

288. *Id.* at 638.

289. *Id.*

290. *Id.*

291. 10 M.J. 347 (C.M.A. 1981).

292. *See* United States v. Davis, 19 U.S.C.M.A. 217, 223 (1970) (quoting Felix Larkin, member of the UCMJ drafting committee).

293. There are three types of courts-martial: summary, special, and general. At the most basic level, a summary court-martial is akin to a county court-type offenses, a special court-martial to misdemeanor offenses, and a general court-martial mostly reserved for felony offenses. The primary distinction is that maximum potential punishment available. *See generally* 10 U.S.C. §§ 816–

("PVT") Nathaniel Stuckey.[294] The relevant issue on appeal concerned whether the military rule allowing a search authorization[295] to be issued without requiring law enforcement to establish probable cause under an oath or affirmation violated the Fourth Amendment.[296] PVT Stuckey argued that the civilian rule "impose[d] only a trivial burden on the Armed Services."[297] A simple oath was all that was needed, and the information need not be reduced to writing.[298] In addition, the UCMJ allows service regulations to easily grant to commanders the authority to administer oaths when necessary to establish probable cause.[299]

CAAF disagreed. Requiring a *per se* rule presented "formidable administrative difficulties" to the military justice sys-

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20 (2013). As the maximum potential punishments increase from a summary court-martial to a general court-martial, the legal protections increase. *See, e.g.*, 10 U.S.C. § 832 (2013 & Supp. 2014) (requiring a formal pre-trial investigation before convening a general court-martial); § 834 (2013 & Supp. 2014) (requiring written legal advice from the chief legal advisor on an installation before convening a general court-martial); § 826 (2013) (requiring a military judge to be assigned to a general court-martial, while merely allowing one to be assigned to a special court-martial); § 838 (2013) (acknowledging that an accused has a right to legal representation in a special and general court-martial but omitting a similar right in a summary court-martial); § 866 (2013) (establishing a formal appellate process, akin to the civilian appellate structure, in certain special and general courts-martial depending on the punishment received).

294. *Stuckey*, 10 M.J. 347. The court convicted PVT Stuckey of unpremeditated murder, auto theft, and robbery. *Id.* at 348. It sentenced him to a "dishonorable discharge, confinement at hard labor for [fifty] years, total forfeitures, and reduction to the lowest enlisted grade." *Id.*

295. The civilian equivalent to a search authorization is the search warrant.

296. *Stuckey*, 10 M.J. at 347. The Fourth Amendment commands that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." U.S. CONST. amend. IV. CAAF required probable cause for a search authorization to be established upon an oath or affirmation in 1980. United States v. Fimmano, 8 M.J. 197, 202 (C.M.A. 1980) (*abrogated by Stuckey*, 10 M.J. at 364). However, it did so prospectively. *Stuckey*, 10 M.J. at 348. PVT Stuckey's search occurred in 1974. *Id.* After determining that retroactive application of such a requirement would likely have "a significant impact on military justice and require setting aside many convictions," CAAF turned to the central holding in *Fimmano* requiring an oath or affirmation to establish probable cause. *Id.* at 349.

297. *Id.* at 362.

298. *Id.*

299. *Id.*

tem.[300] The system must be deployable.[301] But "the conditions in which [the armed] forces operate will vary dramatically from place to place and between large organizations and small detachments."[302] Sometimes, the information needed for probable cause would come from foreign nationals "unfamiliar with oaths" and "reluctant to speak under oath."[303] Federal magistrates that routinely relied on such oaths simply did not have to deal with the multiple language and cultural barriers faced by military commanders in deployed environments.[304] In addition, commanders who are tasked with making these decisions are not lawyers. Federal magistrates must record oral testimony received under oath in support of a search warrant.[305] Burdening a commander "at some farflung installation with such a procedure may be more onerous than for a Federal magistrate . . . [who is] a trained lawyer."[306] The

300. *Id.* at 364. The Army and the Air Force have since developed magistrate programs to deal with search authorizations. AR 27-10, *supra* note 162, at 52–58; U.S. DEP'T OF AIR FORCE, AFI 51-201, ADMINISTRATION OF MILITARY JUSTICE 28–47 (2013) [hereinafter AFI 51-201], http://static.e-publishing.af.mil/production/1/af_ja/publication/afi51-201/afi51-201.pdf.

301. *Stuckey*, 10 M.J. at 364 (stating that the consequences of violating the rule "will be the same wherever American armed forces are stationed"); *see* Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from This Revolution?*, 16 TUL. J. INT'L & COMP. L. 419, 425 (2008) ("Another, sometimes overlooked goal of a military justice system is that it must be deployable.").

302. *Stuckey*, 10 M.J. at 364.

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* CAAF also noted additional obstacles in requiring such a *per se* rule considering that a commander will often already have relevant information prior to the application for a search authorization:

> Judge Cook has written that in military justice "a commander may consider information previously known to him in determining whether probable cause exists to justify a search." If this observation is correct, how can it be reconciled with the requirement that probable cause be based only on sworn testimony? If, on the other hand, the statement is inaccurate, what is the means, if any, by which relevant information already known to the commander who has been requested to issue a search warrant may be considered in making his probable cause decision? Must the commander who possesses this information, in turn, refer the request for search authority to a

oath requirement simply materially impeded mission accomplishment.

B. Injury Avoidance

The military may also infringe upon a constitutional right in order to prevent grave danger to society or manifest injury to the particular armed service or the military in general. These examples are applicable to circumstances in which the armed service has prevented or required conduct in violation of the Bill of Rights. The creative advocate, however, may export this theme into other situations.

1. Grave Danger to Society

A challenged article or rule may survive a challenge if its purpose or application prevents a grave danger to society. This theme has most often appeared in cases that involve preventing an individual's freedom of action. Prior cases have specifically involved preventing the spread of an infectious disease through sexual contact.[307]

In one case, CAAF upheld the legality of a military order known as a safe sex order.[308] The Air Force court-martialed Staff Sergeant ("SSgt") Amos A. Womack for forcible sodomy and willful disobedience of a lawful order requiring him to inform sexual partners of his HIV infection for sexual acts involving himself and

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> higher echelon and then submit to the superior commander his own sworn recitation of the information which he possesses? Further, if official records or business records contain information relevant to a probable cause decision, will it be necessary that someone swear before the commander that the documents say what they purport to say, rather than merely submitting the records to the commander for his consideration?

Id. at 363 (citation omitted).

307. *See, e.g.*, United States v. Bygrave, 46 M.J. 491, 497 (C.A.A.F. 1997); United States v. Dumford, 30 M.J. 137, 137–38 (C.M.A. 1990); United States v. Womack, 29 M.J. 88, 90 (C.M.A. 1989).

308. *Womack*, 29 M.J. at 90–91. This order required Staff Sergeant ("SSgt") Amos Womack to inform all present and future partners of his HIV infection, inform all medical professionals of his infection, engage in safe sex, refrain from sodomy or homosexuality, refrain from illegal drug use, and refrain from donating bodily fluids. *Id.* at 89.

another Airman.[309] He pleaded guilty in a general court-martial and the military judge sentenced him to a dishonorable discharge, five years confinement, forfeiture of all his pay, and demotion to the lowest enlisted rank.[310] SSgt Womack challenged the legality of the safe sex order on appeal.[311] CAAF held that "[t]he military, and society at large, have a compelling interest in having those who defend the nation remain healthy and capable of performing their duty."[312] Consequently, the order served a valid military purpose: "to preserve unit readiness and to protect and safeguard the health of Air Force members."[313]

The key to this theme is the gravity of the danger. In the example above, the danger of spreading HIV was so grave it justified infringing a member's freedom of action through a specific and definite military order.[314] The danger need not be limited to the military community. It includes the civilian population as well.[315] Thus, the more grave the articulated danger, the more likely CAAF will find it sufficient military necessity.

2. Manifest Injury to the Armed Forces

The Government may also infringe a constitutional right to avoid manifest injury to an armed service. CAAF's case law, however, leaves us without a definition of manifest injury. CAAF referenced manifest injury while interpreting Article 17 of the

309. *Id.* at 88–89. Airman T awoke after accepting an invitation to sleep in SSgt Womack's dorm room to SSgt Womack performing fellatio upon him. *Id.* at 89.

310. *Id.* at 89 n.1.

311. SSgt Womack argued that the order had no valid military purpose and it interfered with his "private rights and personal affairs." *Id.* at 90.

312. *Id.*

313. *Id.* ("[T]he written order state[d] its purpose [was] 'to safeguard the overall health of members of a military organization to insure unit readiness and the ability of the unit to accomplish its mission.'"). In addition, CAAF has held that "preventing a servicemember who has HIV from spreading it to the civilian population is a public duty of the highest order and, thus, is a valid military objective." United States v. Dumford, 30 M.J. 137, 138 n.2 (C.M.A. 1990).

314. CAAF in *Womack* found the order to be "specific, definite, and certain." *Womack*, 29 M.J. at 90.

315. *See Dumford*, 30 M.J. at 138 n.2.

UCMJ in 1955.[316] The article established that one armed service may court-martial a member of another armed service only pursuant to regulations prescribed by the President.[317] The MCM stated that an accused in a joint force environment[318] must be delivered to his armed force unless doing so results in a manifest injury to the armed force to which he is attached.[319] In addition, a convening authority in a joint force environment can appoint members of another service to serve on a court-martial if doing do prevents manifest injury to the convening armed service.[320] CAAF did not delve into what constitutes a manifest injury. However, it at least provided a starting point for legal scholars to flesh out and for advocates to exploit.

For the purposes of prompting the dialogue, Black's Law Dictionary defines "manifest" as "easily understood or obvious."[321] Therefore, it appears insufficient to proclaim some general injury to the service. The advocate seeking to assert military necessity on the basis of avoiding manifest injury must demonstrate a reasonable connection to an obvious and distinct injury in order to articulate a manifest injury.

C. Good Order and Discipline

CAAF's jurisprudence also demonstrates that the military community is different. It is not the civilian community. It exists for a singular purpose—to wage war—though, the rationale for this fact as a basis to limit service members' constitutional rights has been called into question.[322] That said, the military community

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316. United States v. Hooper, 5 U.S.C.M.A. 391, 400–01 (1955).

317. *Id.* at 396 (quoting Article 17(a) of the UCMJ).

318. A joint force environment simply means an organization, command, or task force comprised of members of multiple military services.

319. *Hooper*, 5 U.S.C.M.A. at 400.

320. *Id.*

321. *See Manifest Error*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "manifest error" as "error that is plain and indisputable"); *Manifest Injustice*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "manifest injustice" as error that is "direct, obvious, and observable").

322. Mr. O'Connor noted that this phrase, taken from *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955), took the quote out of context and turned it on its head. O'Connor, *supra* note 79, at 229. The original purpose of the quote was to recognize that, because of this primary purpose, armies and navies are "not particularly well-suited to operate a professional system of crim-

existed before there was a United States and has developed its own laws and traditions.[323] At the core of this community is good order and discipline.

Good order and discipline, however, is often quoted, yet rarely, if ever, defined. The most general of explanations, that "[n]o question can be left open as to the right to command in the officer, or the duty of obedience in the soldier,"[324] appears inadequate in many areas of the modern military. That is certainly the case for the warfighter, when discipline is put to the test under hostile fire, but it becomes less adequate an explanation for the much larger number of personnel that support the warfighter in the relative safety of large, hardened bases, or stateside garrisons.[325]

Judge advocates are not immune from this ambiguous principle. Neither is CAAF. However, though the case law is thin, two themes emerge that may assist advocates in framing the issue for CAAF in a way that leads to detailed analysis.

1. Demand for Discipline and Duty

An overriding demand for discipline and duty has been determined to be a sufficient military necessity. Military society's needs are different in some respects than its civilian counterpart. Consequently, its jurisprudence "is and has always been separated from the ordinary Federal and State judicial systems in this country."[326] For the vast majority of military legal history, the Court

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inal justice." *Id.* However, the Court used this same quote to support its declaration that this primary purpose required "a greater power to criminalize conduct than would exist in civilian society." *Id.*

323. United States v. Tempia, 16 U.S.C.M.A. 629, 633 (1967) ("Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953))).

324. Parker v. Levy, 417 U.S. 733, 744 (1974) (quoting *In re* Grimley, 137 U.S. 147, 153 (1890)).

325. More than forty years ago, scholars noted that the contemporary military society would be unrecognizable to the "society apart" that existed in the 19th century. *See* Zillman & Imwinkelried, *supra* note 80, at 399–401.

326. *Tempia*, 16 U.S.C.M.A. at 633 (citing *Burns*, 346 U.S. at 140).

has played no role in its development.[327] The needs in this separate society include a high demand for discipline.

Beyond agreeing with the Court that, due to these needs, "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty,"[328] CAAF has provided little in the way of examples.

One such example can be found in CAAF's application of *Miranda v. Arizona*[329] to the military justice system. One year after the Court decided *Miranda*, CAAF determined that the principles enunciated there "appl[ied] to military interrogations of criminal suspects."[330] CAAF began its analysis by reaffirming that it would no longer consider the argument that service members can be deprived of their rights under the Bill of Rights simply due to their status as military members.[331] It then pivoted to assert the long held view that military society was different.[332] Consequently, "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."[333] That, however, was as far as CAAF went. It subsequently returned to its main point: "That military law exists and has devel-

327. *Id.* Notably, the Military Justice Act of 1983 granted the Court discretionary review of CAAF's decisions. Prior to that, the Court maintained a hands-off approach to military cases. *See* O'Connor, *supra* note 79, at 165–261.

328. *Tempia*, 16 U.S.C.M.A. at 633 (quoting *Burns*, 346 U.S. at 140).

329. 384 U.S. 436 (1966).

330. *Tempia*, 16 U.S.C.M.A. at 631 (citing *Miranda*, 384 U.S. 436). Interestingly, CAAF determined in *Tempia* that *Miranda* was a constitutional decision. *Id.* at 635. This was twenty-five years prior to federal court attention. *See* United States v. Pugh, 25 F.3d 669, 675 (8th Cir. 1994); United States v. Christopher, 956 F.2d 536, 538–39 (6th Cir. 1991). Notably, the Court's decision in *United States v. Dickerson* did not refer to CAAF's *Tempia* decision in its ultimate conclusion that *Miranda* constituted a constitutional decision. Dickerson v. United States, 530 U.S. 428, 444 (2000). It is noteworthy that the Court referred to the military justice system in the Opinion in *Miranda.* 384 U.S. at 489 ("[The UCMJ] has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him."). However, it did not in this instance. Why sister federal circuit courts do not cite to broad constitutional analysis by CAAF is worth further study.

331. *Tempia*, 16 U.S.C.M.A. at 633.

332. *Id.*

333. *Id.* (quoting *Burns*, 346 U.S. at 140).

oped separately from other Federal law does not mean that persons subject thereto are denied their constitutional rights."[334]

The lack of a developed jurisprudence does not mean that demand for discipline and duty is not a viable theme of military necessity. In addition to relying on the separate society principle, CAAF has at least acknowledged, in other settings, some acceptable restrictions that can be attributed to the demand for discipline and duty.[335] The need for discipline and duty can justify requiring a service member to be inoculated against disease, even though doing so violates his religious beliefs.[336] It can also be the reason the military can violate a military trainee's right of freedom of association when going through a reception station or during initial training.[337] Finally, this theme justifies "regulat[ing] relationships between officers and enlisted personnel."[338]

The creative advocate can likely build on this list. However, to shape CAAF's analysis, the advocate will need to articulate a sound reason and direct nexus for CAAF. A conclusory statement will be insufficient. Doing so will assist CAAF in developing a body of law in this area useful for practitioners, as well as CAAF itself.[339]

2. Responsiveness to Command

CAAF has held that "[t]he armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself."[340] Therefore, an article of the UCMJ or a rule may infringe a constitutional right if applying it a different way will "directly affect the capacity of the Government to discharge its responsibilities."[341]

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334. *Id.*
335. United States v. Womack, 29 M.J. 88, 91 (C.M.A. 1989).
336. *See id.*
337. *See id.*
338. *Id.* (citing United States v. Johanns, 20 M.J. 155 (C.M.A. 1985)).
339. Subsequent scholarly study in this area will also make a positive contribution.
340. United States v. Priest, 21 U.S.C.M.A. 564, 570 (1972).
341. *Id.*

This was the case in the court-martial of Journalist Seaman Apprentice ("JOSA") Roger Priest.[342] He edited, published, and distributed to service members an underground newsletter that protested United States involvement in Vietnam while on active duty.[343] This newsletter:

> [E]xpressly sought a breakdown in military discipline, called attention to methods by which those subject to military jurisdiction might safely flee from military control, heaped maledictions upon the United States, called into disrespect all military superiors and particularly those who had chosen the defense of the Country as their life's vocation, implicitly advocated assassination of the President and Vice President, and appealed to readers to take to the streets in violent revolution against the Government.[344]

JOSA Priest argued that his conduct was not directly prejudicial to good order and discipline.[345] CAAF disagreed.[346]

The majority began by declaring that "[d]isrespectful and contemptuous speech" is protected in the civilian world unless it incites and is likely to produce lawless action.[347] This was so because such conduct "does not directly affect the capacity of the Government to discharge its responsibilities."[348] The military was different. Speech that "undermine[s] the effectiveness of response to command" is not protected.[349]

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342. *Id.*
343. *Id.* at 566.
344. *Id.* at 571.
345. *Id.* at 569. The Navy charged JOSA Priest with making statements disloyal to the United States. *Id.* at 566.
346. *Id.* at 569.
347. *Id.* at 570.
348. *Id.*
349. *Id. But see* Zillman & Imwinkelried*, supra* note 80, at 410 ("If there is a lesson from Vietnam for military attorneys and commanders, it would be that mindless censorship often is the policy most disruptive of military discipline and morale.").

Thus, CAAF found JOSA Priest's conduct unprotected.[350] It stated that "[t]he hazardous aspect of license in this area is that the damage done may not be recognized until the battle has begun. At that point, it may be uncorrectable or irreversible."[351] Because this newsletter had a direct impact on the response of service members to command, CAAF upheld JOSA Priest's conviction.[352]

V. A PROPOSED FRAMEWORK FOR THE MILITARY NECESSITY DOCTRINE

With the foregoing results in hand, it is now possible to discuss how a proposed framework couple be employed in the future. We begin with the burden.

A. Meeting the Burden for a Different Application of a Rule

CAAF's existing placement of the burden remains conducive to a framework for analyzing when and how to deviate from constitutional or statutory norms. The party that seeks the deviation bears the burden of persuasion.[353] As the *Grunden* Court declared, this will require more than a simple assertion of military necessity. The burden is a heavy one; sufficient reason and analysis must be required of the party seeking a different application of a constitutional or statutory rule. The party seeking relief must provide enough such reason and analysis to allow CAAF to determine whether the assertion of military necessity is of sufficient magnitude to outweigh the danger of a miscarriage of justice that may result from depriving an American citizen of his or her constitutional rights.

The corollary of this requirement is that CAAF must hold itself to the same standard when articulating why it found sufficient military necessity to warrant a different application. This not only reinforces the need for practitioners to be exacting in their

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350. *Priest*, 21 U.S.C.M.A. at 571–72.

351. *Id.* at 571.

352. *Id.* at 572, 573.

353. Courtney v. Williams, 1 M.J. 267, 270 (C.M.A. 1976) ("[T]he burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule." (citing Kauffman v. Sec'y of the Air Force, 415 F.2d 991 (1969))).

efforts, but also provides consistency and predictability in the law of military justice.

B. The Proposed Framework in Which to Argue Military Necessity

This proposed framework borrows from the well-known strict scrutiny standard of review. That is, a government may infringe upon certain fundamental constitutional rights if it does so in the pursuit of a compelling interest that is narrowly tailored toward accomplishing that interest.[354] It is true that not all rights protected within the Bill of Rights receive strict scrutiny review when abridged. However, the purpose of this recommendation is to provide a framework that is consistent with the *Grunden* Court's requirements and understandable to practitioners. Thus, the strict scrutiny approach provides a ready-made solution to determining how to analyze whether a separate military rule is tenable.

1. *Similar Threshold Requirements*

The requirements within strict scrutiny review are similar to the *Grunden* requirement. In his empirical study of strict scrutiny as applied in federal courts, Professor Adam Winkler described a compelling interest as one that describes the "'societal importance' of the government's reasons" for enacting a particular law or taking a particular action.[355] He concluded that "only the most pressing circumstances can justify the government action."[356]

This threshold requirement is similar to that required by *Grunden*. An assertion of military necessity must be accompanied by reason and analysis "of sufficient magnitude" to overcome the danger of a miscarriage of justice.[357] It is a correspondingly heavy burden.

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354. *See* Hoffman v. United States, 767 F.2d 1431, 1435 (9th Cir. 1985) ("To withstand strict scrutiny a statute must be precisely tailored to serve a compelling state interest." (citing Plyler v. DOE, 757 U.S. 202, 216 (1982))).

355. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800 (2006) (citation omitted).

356. *Id.*

357. United States v. Grunden, 2 M.J. 116, 121, 122 (C.M.A. 1977).

Thinking in terms of a strict scrutiny approach requires no newly formulated test. Instead, it blends in a standard well-known to military and civilian practitioners alike. In addition, military necessity can be easily articulated if the preceding themes and examples are used, at least as a starting point.

2. *Military Necessity is a Compelling Interest*

Military necessity and the military mission easily fit within a most pressing circumstance of high societal importance. However, as indicated earlier, the key is to properly articulate a direct nexus between the challenged law, regulation, or action and one of the demonstrated themes and examples of military necessity currently existing within CAAF's jurisprudence. It cannot be sufficient to assert a theme. An argument should also include why the necessity exists and rely on citations to appropriate sources such as prior decisions and studies, to name just a few.

3. *The Value of a Narrow Tailoring Approach*

The aspect of this framework least familiar to the military practitioner is likely to be that of narrowly tailoring a deviation from traditional constitutional law interpretation. Though well-known to civilian practitioners and a potentially smaller number of military practitioners that remain engaged in constitutional law, CAAF has not historically cabined deviations to the least restrictive necessary. Rather, decisions often conclude the analysis upon finding military necessity and do not reach the additional question of whether the law, regulation, or action was the least restrictive means to accomplishing the compelling interest.

Adopting a narrowly tailored approach as part of the maturation of the military necessity doctrine is not without precedent. In *Parker v. Levy*, discussed earlier, CPT Levy challenged his convictions under Articles 133 and 134 of the UCMJ, on the basis that the two statutes were "void for vagueness under the Due Process Clause of the Fifth Amendment and overbroad in violation of the First Amendment."[358] The Court disagreed in part due to the fact that the Manual for Courts-Martial and CAAF itself have narrowed

358. Parker v. Levy, 417 U.S. 733, 752 (1974).

the application of two criminal statutes that literally prohibit a broad swath of conduct.[359]

A narrowly tailored approach is also consistent with the goal of the UCMJ of civilianizing military justice to the extent practical and corresponds to the evolving nature of the military society. Diminishing resources in an all-volunteer military requires asking those who serve to do more with less. One of the central tenets to maintaining a fighting force is a legitimate criminal justice system. Citizens who are confident that the military will only infringe on their freedoms to the minimum extent necessary to protect the Nation are more likely to sign up and stay in the armed forces.

VI. CONCLUSION

The existence of CAAF relieves the Court of the burden to supervise the relationship between the Constitution and the military community to the degree it has supervised the similarly situated inmate and student communities. CAAF has subsequently worked through the contours of this relationship in over sixty years of jurisprudence. This study has sought to advance the understanding of military necessity and when it is enough to apply a different rule in the military community than that required by the Court. Existing decisions appear to coalesce around three general themes and six more specific examples of military necessity that compel a different application of a constitutional rule or principle. However, additional study may broaden or restrict the number of examples on the path toward a more articulable and workable military necessity doctrine. Though certainly not the only available framework, the strict scrutiny styled framework proposed here offers two solutions. First, it provides the military community with a specific yet flexible framework that can be replicated throughout military courts, not to mention the benefit such guidance would have on judge advocates advising commanders on whether certain orders not directly related to military duty are lawful and enforceable un-

359. *Id.* at 754 ("The effect of these constructions . . . by [CAAF] and by other military authorities has been twofold: It has narrowed the very broad reach of the literal language of the articles, and at the same time has supplied considerable specificity by way of examples of the conduct which they cover.").

der the UCMJ. Second, it respects the uniqueness of the military community while staying true to the purpose of the UCMJ and the long held view that members of the military, no less than inmates or students, are entitled to the protections of the United States Constitution.

The Benefits of Arbitration: Arbitration in NCAA Student-Athlete Participation and Infractions Matters Provides for Fundamental Fairness

CHRISTIAN DENNIE*

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Intercollegiate athletics has been shaken by scandal, waning public perception of the National Collegiate Athletic Association ("NCAA"), and its system for enforcing NCAA legislation. Currently, the NCAA uses an internal governance system to resolve all types of disputes and grievances relating to NCAA legis-

lation.[1] This Article suggests that the NCAA act in accord with other sports organizations that allow for grievances and disputes to be heard by neutral arbitrators. This method of resolving disputes will provide student-athletes with a more balanced and fair alternative for addressing appeals in matters relating to student-athlete participation, such as positive drug screenings. By adopting arbitration as the forum to decide NCAA enforcement and infractions matters, the NCAA will be provided limited subpoena power as set forth in the Federal Arbitration Act and similar state statutes. Additionally, this Article proposes that the NCAA replace the Committee on Infractions ("COI") with a panel of trained and knowledgeable arbitrators to decide NCAA enforcement and infraction matters. Also, the NCAA would provide student-athletes with neutral ombudsman similar to what is provided by the United States Olympic Committee. The ombudsman would be permitted to provide advice to student-athletes separate and apart from the NCAA structure.

Part I of this Article provides an introduction to the NCAA and its history. Part II discusses the current state of NCAA enforcement and the NCAA Committee on Infractions and, specifically, the penalties permitted under NCAA legislation. Part III discusses the Federal Arbitration Act and review of arbitration proceedings provided by courts throughout the United States. Part IV details arbitration opportunities provided in professional sports including arbitration in Major League Baseball, National Basketball Association, National Football League, National Hockey League, PGA Tour, and United States Olympic Committee. Finally, Part V of this Article provides a plan to develop an NCAA arbitration system to resolve disputes and provides a system for student-athletes to have access to an ombudsman.

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1. NAT'L COLLEGIATE ATHLETIC ASS'N, 2014–15 NCAA DIVISION I MANUAL § 19.3 (2014) [hereinafter 2014 NCAA MANUAL], http://www.ncaapublications.com/productdownloads/D115OCT.pdf.

I. THE HISTORY OF NCAA ENFORCEMENT AND INFRACTIONS

The first reported intercollegiate athletics contest in the United States took place in 1852 when Harvard University challenged Yale University to a rowing contest similar to those staged in England by Oxford University and Cambridge University.[2] It became evident even at the earliest American intercollegiate athletic event that a governing body would be necessary to level the playing field. To tilt the competition in its favor, Harvard University sought to gain an unfair advantage over Yale University by recruiting an athlete who was not a student.[3] Subsequently, colleges and universities across the country challenged one another to athletic contests in a variety of sports.

In 1905, the United States was in an uproar over the violence associated with intercollegiate football.[4] Football student-athletes' use of gang tackling and mass formations led to numerous injuries and deaths.[5] The public urged universities to abolish football or take steps to reform the game.[6] As a result, President Theodore Roosevelt summoned the nation's top intercollegiate athletics leaders to discuss reformation of college football.[7] One such leader, Chancellor Henry M. MacCracken of New York University, called a meeting of officials from the nation's thirteen most prominent universities to discuss reformation of the college foot-

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2. *See* RONALD A. SMITH, SPORTS AND FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS 168 (Peter Levine & Steven Tischler eds., 1988).

3. Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 989 (1987).

4. *See id.* at 990.

5. *Id.* ("In 1905, there were eighteen deaths and over one hundred injuries in intercollegiate football."); *see also* DON YAEGER, UNDUE PROCESS: THE NCAA'S INJUSTICE FOR ALL 1–3 (1991) (explaining that the death of Harold Moore of Union College, the eighteenth fatality in college football in 1905, may have been the pressure necessary to reform college football); Christopher Klein, *How Teddy Roosevelt Saved Football,* HISTORY.COM (Sept. 6, 2012), http://www.history.com/news/how-teddy-roosevelt-saved-football (discussing how mass formations and gang tackling lead to numerous injuries).

6. YAEGER, *supra* note 5, at 3–4.

7. Smith, *supra* note 3, at 990.

ball playing rules.[8] Subsequently, a sixty-two member body formed the Intercollegiate Athletic Association of the United States ("IAAUS"), which would become known as the NCAA in 1910.[9] For the next ten years, the organization was merely a discussion group that developed rules applicable to intercollegiate football.[10]

As the world of intercollegiate athletics grew, the NCAA began to evolve from merely an organization that formulated football rules to creating eligibility, recruiting, and financial aid guidelines that would govern all intercollegiate sports.[11] However, the organization lacked an enforcement mechanism and struggled to implement its promulgated rules. Thus, in 1919, the NCAA created a policy whereby member institutions were encouraged not to compete against violating members.[12] It quickly became clear that such a deterrent was not feasible and also lacked strength.[13] In 1948, at the urging of the Big Ten, Pacific Coast, Southwest, and Southeastern conferences, the NCAA again attempted to develop a system to enforce its legislation by adopting the "Sanity Code," which prohibited member institutions from offering athletics-based financial aid.[14] The member institutions also created a three-member Compliance Committee to enforce the "Sanity Code," however; the "Sanity Code" was short-lived.[15] In 1951, member institutions voted to repeal the "Sanity Code" because the only punishment available was termination of NCAA membership.[16]

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8. *Id.*; *Formation of the NCAA: Un Unexpected Beginning*, NCAA HISTORY GUIDE (Nov. 21, 2012, 9:00 AM), http://ncaahistoryguide.com/formation-ncaa-unexpected-beginning/#more-52.

9. *Formation of the NCAA*, *supra* note 8. It was the flying wedge, football's major offense in 1905, which spurred the formation of the NCAA. *See* Myles Brand, *Address to the National Press Club* (Mar. 4, 2003), http://www.npr.org/programs/npc/2003/030304.mbrand.html.

10. *See* ARTHUR A. FLEISHER III, ET AL., THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR 42 (1992).

11. *See id.* at 42–44.

12. *Id.* at 42 (stating the NCAA resolution recommended that "members schedule games hereafter with those institutions only whose eligibility code is in general conformity with the principles advocated by [the NCAA]").

13. *Id.* at 46.

14. *Id.* at 47.

15. *Id.* at 47–48.

16. *Id.* at 47–49.

In 1954, the NCAA created the Committee on Infractions ("COI") to investigate and punish member institutions.[17] In 1973, the member institutions agreed to equip the committee with additional strength by providing an investigative staff that would be responsible for gathering and presenting evidence to the committee regarding alleged institutional infractions.[18] In 1984, member institutions formed the NCAA Presidents Commission that produced a multitude of changes, including increased punishment for violations.[19] The next year, the Presidents Commission revealed a plan to punish member institutions that blatantly violate NCAA rules by adopting the repeat violator bylaw, commonly known as the "death penalty."[20] The "death penalty" has been used to punish only one institution at the Division I level, Southern Methodist University, which prohibited the football team from competing in the 1987 football season.[21]

II. The Current State of NCAA Enforcement and the NCAA Committee on Infractions

In mid-2011, NCAA President Mark Emmert called a meeting of more than fifty presidents and chancellors at Division I institutions with the stated goal of restoring public trust in intercol-

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17. *Id.* at 50.

18. *See* Jack Falla, NCAA: The Voice of College Sports 139–40 (1981).

19. *See* Smith, *supra* note 3, at 986–87.

20. *Id.* at 987. The NCAA repeat violator bylaw stated the institution is prohibited from

> some or all outside competition in the sport involved in the latest major violation for a prescribed period as deemed appropriate by the Committee on Infractions and the prohibition of all coaching staff members in that sport from involvement directly or indirectly in any coaching activities at the institution during that period.

Nat'l Collegiate Athletics Ass'n, 2012–13 NCAA Division I Manual § 19.5.2.1.2(a) (2012) [hereinafter 2012 NCAA Manual], http://www.ncaapublications.com/productdownloads/D113.pdf.

21. *See* NCAA Comm. on Infractions, Southern Methodist University Infractions Report (1987), http://assets.sbnation.com/assets/388698/SMU_COI_report.pdf.

legiate athletics.[22] President Emmert created the NCAA Enforcement Working Group ("EWG") to study ways to improve intercollegiate athletics. After extensively analyzing the current model, the EWG found numerous changes needed to be made to the enforcement structure.[23] Accordingly, the EWG proposed legislation to alter the COI, as well as the violation and penalty structure, which was ultimately adopted on October 30, 2012 and effective August 1, 2013.[24]

A. NCAA Violation Structure

Historically, NCAA violations have been separated into two categories, secondary violations and major violations.[25] The NCAA defined a secondary violation as "isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant impermissible benefit (including, but not limited to, an extra benefit, recruiting inducement, preferential treatment or financial aid)."[26] Whereas, a major violation was defined as "[a]ll violations other than secondary violations" and multiple secondary violations.[27] In an effort to provide more clarity in the structure of NCAA violations, the EWG proposed, and the NCAA membership ultimately codified, legislation that provided for four levels of violations. These were dubbed Level I through Level IV violations, with Level I violations being most severe and Level IV violations being incidental infractions.[28]

Level I violations are labeled "Severe Breach of Conduct" and include violations that "provide[] a substantial or extensive recruiting, competitive or other advantage, or a substantial or ex-

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22. NCAA WORKING GROUP ON COLLEGIATE MODEL – ENFORCEMENT, FINAL REPORT 2 (2012) [hereinafter NCAA ENFORCEMENT REPORT], http://www.ncaa.org/sites/default/files/Final_Report_EWG_072412.pdf.

23. *Id.* at 4–6. Specifically, the EWG proposed the following changes: (1) developing a multilevel NCAA violation structure; (2) creating an expedited procedure to dispose of NCAA infractions cases; (3) enhancing the NCAA's penalty structure; and (4) reinforcing the sense of shared responsibility for compliance among individuals, coaches, and athletics administrators. *Id.*

24. *Id.* at 29.

25. 2012 NCAA MANUAL, *supra* note 20, §§ 19.5.1, 19.5.2.

26. *Id.* § 19.02.2.1.

27. *Id.* §§ 19.02.2.1, 19.02.2.2.

28. NCAA ENFORCEMENT REPORT, *supra* note 22, at 4.

tensive impermissible benefit."[29] Level II violations are labeled "Significant Breach of Conduct" and include violations that

> provide or are intended to provide more than a minimal but less than a substantial or extensive recruiting, competitive or other advantage; include more than a minimal but less than a substantial or extensive impermissible benefit; or involve conduct that may compromise the integrity of the NCAA Collegiate Model as set forth in the constitution and bylaws.[30]

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29. 2014 NCAA MANUAL, *supra* note 1, § 19.1.1. Specific codified examples include: (1) lack of institutional control; (2) academic misconduct; (3) failure to cooperate in an NCAA enforcement investigation; (4) individual unethical or dishonest conduct; (5) a head coach's violation of NCAA Bylaw 11.1.1.1 resulting from an underlying Level I violation; (6) cash payments provided by a coach or athletics administrator used to secure the enrollment of a prospective student-athlete; (7) intentional violations or reckless indifference to the NCAA constitution and bylaws; and (8) collective Level II and/or Level III violations. *Id.* NCAA Bylaw 11.1.1.1 states:

> An institution's head coach is presumed to be responsible for the actions of institutional staff members who report, directly or indirectly, to the head coach. An institution's head coach shall promote an atmosphere of compliance within his or her program and shall monitor the activities of all institutional staff members involved with the program who report, directly or indirectly, to the coach.

Id. § 11.1.1.1.

30. *Id.* § 19.1.2. Specific codified examples are (1) violations that do not rise to the level of a Level I violation, but are more serious than a Level III violation; (2) failure to monitor; (3) "systemic violations that do not amount to a lack of institutional control;" (4) "multiple recruiting, financial aid, or eligibility violations that do not amount to a lack of institutional control;" (5) a head coach's violation of NCAA Bylaw 11.1.1.1 resulting from an underlying Level II violation; and (6) collective Level III violations. *See, e.g.*, NCAA COMM. ON INFRACTIONS, THE GEORGIA INSTITUTE OF TECHNOLOGY PUBLIC INFRACTIONS DECISION (2014), http://www.ncaa.org/sites/default/files/Ga%20Tech%20Public%20Infractions%20Decision.pdf; NCAA COMM. ON INFRACTIONS, SAINT FRANCIS UNIVERSITY PUBLIC INFRACTIONS DECISION (2014), http://www.ncaa.org/sites/default/files/StFrancisPublicInfractionsDecision.pdf; NCAA COMM. ON INFRACTIONS, UNIVERSITY OF NEW HAMPSHIRE PUBLIC INFRACTIONS DECISION (2014), http://www.ncaa.org/sites/default/files/New%20Hampshire%20Public%20Decision.pdf.

Level III violations are labeled "Breach of Conduct" and include violations that are "isolated or limited in nature; provide no more than a minimal recruiting, competitive or other advantage; and provide no more than a minimal impermissible benefit."[31] Level IV violations are labeled "Incidental Infraction[s]" and include violations that are "technical in nature and [do] not constitute a Level III violation . . . [and] will not affect eligibility for intercollegiate athletics."[32] These violations are minor in nature and have been historically adjudicated at the conference level rather than by the NCAA.[33]

B. Committee on Infractions

With the adoption of legislative reform, the NCAA membership increased the COI from ten members to twenty-four members, allowing the chair of the COI to have greater flexibility to appoint panel members to expedite processing of infractions cases.[34] The changes to the COI were designed to empanel committee members who have intimate knowledge of the operations of intercollegiate athletics programs, including former coaches and presidents.[35] However, this change permits current athletics administrators and coaches to make decisions that will, in all likelihood, affect their peers, which may result in termination of employment for coaches and administrators.[36] For this reason, some have argued that COI panel members should not be affiliated with an NCAA

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31. 2014 NCAA MANUAL, *supra* note 1, § 19.1.3. Specific codified examples are (1) inadvertent violations that are isolated or limited in nature; and (2) extra-benefit, financial aid, academic eligibility and recruiting violations that do not create more than a minimal advantage. *Id.* § 19.1.3.

32. *Id.* § 19.1.4. NCAA legislation does not provide codified examples of Level IV violations; however, the NCAA maintains a list of incidental infractions that provides, among others, the following examples: (1) impermissible camp and clinic brochures; (2) failure to administer the NCAA Drug-Testing Consent Form; and (3) failure to submit a declaration of playing season. *See* NAT'L COLLEGIATE ATHLETICS ASS'N, LIST OF INCIDENTAL INFRACTIONS (LEVEL IV) (2015), http://www.ncaa.org/sites/default/files/Level%20IV%20Violations%20(September%204,%202015).pdf.

33. *Secondary Infractions Self-Reporting,* NCAA.ORG, http://www.ncaa.org/secondary-infractions-self-reporting (last visited Oct. 10, 2015).

34. *See* 2014 NCAA MANUAL, *supra* note 1, § 19.3.1.

35. *Id.* § 19.3.1.

36. *Id.* § 19.3.1.

member institution because there is an inherent lack of fairness and neutrality.[37]

The new NCAA enforcement model was calculated to increase efficiency and expedite the decision making process. With these pillars in mind, the NCAA membership adopted legislation that (1) permitted member institutions or involved individuals with the opportunity to petition COI for an accelerated hearing in Level II violation cases;[38] (2) increased the opportunity to resolve Level II cases on written submission;[39] (3) expanded the summary disposition process[40] for Level I and Level II cases to provide expanded opportunities for resolution via written submission and appearances via videoconferencing and other forms of communication;[41] and (4) allowed for expedited hearings in summary disposition cases where the parties agree on the facts but not on proposed penalties.[42]

C. NCAA Penalty Structure

The EWG sought and ultimately succeeded in substantially altering the penalty structure for NCAA infractions. In the EWG's report, the group set forth goals and guidelines as follows: (1) to provide member institutions and involved individuals with notice of the range of potential penalties; (2) to enhance consistency in applying penalties while also providing COI with discretion to alter penalties; (3) to expedite the enforcement process while not sacrificing integrity; (4) to impose penalties that require institutional responsibility for the governance of intercollegiate athletics;

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37. *See* Brent Schrotenboer, *Alabama Case Spotlights Emmert, Saban Friendship*, USA TODAY (Oct. 15, 2013, 5:05 PM), http://www.usatoday.com/story/sports/ncaaf/2013/10/08/alabama-illegal-benefits-case-spotlights-ncaa-mark-emmert-nick-saban-friendship/2948023/. *But see* Maureen A. Weston, *NCAA Sanctions: Assigning Blame Where it Belongs*, 52 B.C. L. REV. 551, 568–70 (2011).

38. 2014 NCAA MANUAL, *supra* note 1, § 19.7.7.2.

39. *Id.* § 19.7.

40. The summary disposition process is available in Level I and Level II cases when "the institution, involved individuals and the enforcement staff may elect to use the summary disposition procedures" when the parties agree to the facts of the dispute. *Id.* § 19.6.1.

41. *Id.* § 19.6.4.5.

42. *Id.* § 19.6.4.5.

(5) to hold individuals in positions of power and authority accountable for failing to appropriately oversee compliance matters; (6) to impose penalties on coaches and administrators whose conduct is inconsistent with NCAA legislation; and (7) to impose penalties that will eliminate the risk-reward analysis in committing violations of NCAA legislation.[43]

NCAA legislation groups Level I and Level II penalties. Prior to prescribing penalties, the COI is required to determine "whether any factors that may affect penalties are present for a case."[44] After determining whether aggravating[45] and mitigating[46] factors exist, COI shall prescribe core penalties for Level I and Level II violations.[47] The COI may only depart from the core pen-

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43. NCAA ENFORCEMENT REPORT, *supra* note 22, at 15.

44. 2014 NCAA MANUAL, *supra* note 1, § 19.9.2.

45. *Id.* COI will determine whether any aggravating factors exist, which consist of: (1) multiple Level I violations by the member institution or involved individuals; (2) a history of Level I, Level II, or major violations by the member institution, involved sports program(s), or involved individuals; (3) lack of institutional control; (4) obstructing an investigation or attempting to conceal evidence; (5) unethical conduct, compromising the integrity of the investigation, and/or failing to cooperate during the investigation and provide relevant information; (6) premeditated violations; (7) multiple Level II violations by the member institution or involved individuals; (8) an individual in an position of authority condoned, participated in or negligently disregarded a violation of NCAA legislation; (9) one or more violations of NCAA legislation that cause significant ineligibility or substantial harm to a student-athlete or prospective student-athlete; (10) a pattern of noncompliance within the involved sports program(s); (11) conduct intended for pecuniary gain; (12) intentional, willful, or blatant disregarding for the NCAA constitution and bylaws; or (13) other factors that warrant additional penalties. *Id.* § 19.9.3.

46. *Id.* § 19.9.4. COI will analyze whether mitigating factors exist to warrant a lower range of penalties, which consist of the following: (1) prompt self-detection and self-disclosure of the violation(s) of NCAA legislation; (2) prompt acknowledgment and acceptance of responsibility for the violations of NCAA legislation; (3) affirmative steps to expedite final resolution of the NCAA infractions matter; (4) an established history of self-reporting Level III or secondary violations; (5) implementation of a compliance system designed to ensure rules compliance; (6) exemplary cooperation in the investigation by the member institution or involved individuals; (7) unintentional violations of NCAA legislation that represent a deviation from otherwise compliant practices; and (8) others factors that warrant lower penalties. *Id.* § 19.9.4.

47. *Id.* §§ 19.9.5, 19.9.5.1–19.9.5.7. The core penalties include: (1) limitations on the member institution's participation in postseason play; (2) a fine,

alties upon a finding of extenuating circumstances and must explain the basis for altering the core penalties in its report.[48] NCAA legislation also groups penalties for Level III and Level IV violations.[49]

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return of received revenue, or reduction or elimination of distributions received from the NCAA; (3) limitations on the number of financial aid packages awarded; (4) a show-cause order that restricts an involved individual's ability to take part in athletically related duties; (5) suspension of the head coach for a certain number of athletic contests; (6) recruiting restrictions such as limitations on official visits, unofficial visits, recruiting communications, and off-campus recruiting activities; and (7) a probationary period. *Id.* §§ 19.9.5.1–19.9.5.7.

48. *Id.* § 19.9.6. In addition to the core penalties prescribed for Level I and Level II violations, COI may prescribe the following additional penalties: (1) prohibition against competition in the sport during the regular season; (2) prohibition against coaching staff members' involvement in coaching activities; (3) prohibition against institutional staff members serving on various NCAA committees and councils; (4) requirement that the member institution relinquish NCAA voting privileges; (5) recommendation that the member institution's membership in the NCAA be suspended or terminated; (6) public reprimand and censure; (7) vacation of records; (8) prohibition against television appearances; (9) disassociation of relations with a representative of an institution's athletics interests; (10) publicizing a member institution's probation; (11) institutionally imposed suspension of a staff member; and (12) other penalties that may be appropriate. *Id.* § 19.9.7.

49. *Id.* § 19.9.8. Penalties for Level III and Level IV violations include the following: (1) termination of the recruitment of a prospective student-athlete or, for enrolled student-athletes, direction to the member institution to take steps necessary to restore the student-athletes' eligibility; (2) forfeiture or vacation of athletics contests in which an ineligible student-athlete participated; (3) prohibition of the coaching staff's involvement in off-campus recruiting for up to one year; (4) a financial penalty ranging from $500.00 to $5000.00; (5) limitations on the number of financial aid packages awarded to a maximum of twenty percent of the maximum number of awards normally permissible in that sport; (6) recertification of institutional NCAA compliance policies and procedures to conform with the NCAA constitution and bylaws; (7) institutionally imposed suspension of the head coach or staff members for one or more competitions; (8) public reprimand; and (9) requirement that a member institution or involved staff member who has been found in violation of NCAA legislation show cause why a penalty or additional penalty should not be prescribed if it does not take appropriate disciplinary action against the involved individuals. *Id.* § 19.9.8.

III. THE FEDERAL ARBITRATION ACT

The Federal Arbitration Act ("FAA"), passed by Congress and signed into law by President Calvin Coolidge in 1925, was designed to curb judicial opposition to arbitration agreements.[50] In pertinent part, the FAA states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[51]

The legislative history of the FAA suggests Congress intended to affirm arbitration agreements that appeared in binding contractual agreements in order to reduce the cost and time of litigation in light of the substantial strain on the judiciary that resulted from a mountain of claims filed in the wake of the Industrial Revolution.[52] Through the passage of the FAA, Congress essentially "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[53]

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50. *See* JON. O. SHIMABUKURO, CONG. RESEARCH SERV., RL30934, THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS 2–3 (2003), http://digital.library.unt.edu/ark:/67531/metacrs3879/; *see also* Janet M. Grossnickle, Note, Allied-Bruce Terminix Cos. v. Dobson*: How the Federal Arbitration Act Will Keep Consumers and Corporations Out of the Courtroom*, 36 B.C. L. REV. 769, 772 (1995) ("[I]t appears that the Act was intended simply to complement state laws and make commercial arbitration agreements enforceable in federal courts.").

51. 9 U.S.C. § 2 (2012).

52. H.R. REP. NO. 96, at 1–2 (1924).

53. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

As courts' dockets swelled, judges began to take comfort in arbitration as a form of dispute resolution.[54] The FAA, under most circumstances, "limits a court's role to that of determining whether the party seeking arbitration has raised an issue that is within the scope of the arbitration agreement."[55] Courts interpret the scope of arbitration clauses liberally and heavily favor enforcement.[56] The United States Supreme Court has gone as far as to find state statutes prohibiting arbitration are invalid.[57]

The FAA also provides provisions that allow for courts to enforce written arbitration agreements involving interstate commerce.[58] Specifically, a party seeking to enforce an arbitration agreement has the ability to stay proceedings in federal courts,[59] appoint arbitrators,[60] and judicially enforce awards.[61] Most importantly, in accordance with the FAA, arbitrators are also permitted to issue subpoenas requiring the attendance of a witness and/or the production of documents.[62]

IV. ARBITRATION IN SPORTS

Arbitration is the preferred tribunal to resolve disputes in the sports industry. Arbitration provides an expedited and confidential process using appointed arbitrators with knowledge of the sports industry and arbitration. Collective bargaining agreements

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54. Sherrie Kaiser Goff, *Recent Development: Federal and State Securities Claims: Litigation or Arbitration?—*Dean Witter Reynolds, Inc. v. Byrd, 105 S. Ct. 1238 (1985), 61 WASH. L. REV. 245, 247 (1986).

55. *Id.*

56. Hanes Corp. v. Millard, 531 F.2d 585, 598 (D.C. Cir. 1976) ("[I]n construing arbitration agreements, every doubt is to be resolved in favor of arbitration."); Galt v. Libbey-Owens-Ford Glass Co., 376 F.2d 711, 714 (7th Cir. 1967) ("[C]ourts will use the Federal Arbitration Act to enforce agreements to arbitrate.").

57. *Keating*, 465 U.S. at 10.

58. 9 U.S.C. § 2 (2012).

59. *Id.* § 3.

60. *Id.* § 5.

61. *Id.* § 9.

62. *Id.* § 7. Section 7 of the FAA states, "The arbitrators selected . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case." *Id.*

("CBA") and athlete handbooks commonly provide for an expedited form of dispute resolution. This part details matters subject to arbitration as provided by the CBAs for Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, the PGA Tour player handbook and anti-doping policy, and the United States Olympic Committee's constitution and bylaws.

A. Major League Baseball

Major League Baseball ("MLB") offers a multi-layered system of arbitration to adjust grievances. Baseball provides a unique system for resolving salary negotiations known as salary arbitration.[63] Salary arbitration is a form of final offer arbitration that is invoked when a player has a total of three or more years of service[64] but less than six years of service.[65] In MLB salary arbitration, the player and his team exchange a single salary figure and submit the matter for decision to the arbitration panel.[66] The arbitrator or arbitrators must select one of the salary figures presented and may not provide for an alternate salary figure.[67] The MLB CBA also offers grievance arbitration relating to disputes involving "any agreement, or any provision of any agreement" between the

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63. MAJOR LEAGUE BASEBALL, 2012–2016 BASIC AGREEMENT, art. VI § E [hereinafter MLB CBA], http://mlb.mlb.com/pa/pdf/cba_english.pdf; *see also* Ed Edmonds, *Labor and Employment Law Issues in Sports: A Most Interesting Part of Baseball's Monetary Structure—Salary Arbitration in its Thirty-Fifth Year*, 20 MARQ. SPORTS L. REV. 1, 7–8 (2009); Eldon L. Ham & Jeffrey Malach, *Hardball Free Agency–The Unintended Demise of Salary Arbitration in Major League Baseball: How the Law of Unintended Consequences Crippled the Salary Arbitration Remedy—and How to Fix It*, 1 HARV. J. SPORTS & ENT. L. 63, 77 (2010).

64. MLB CBA, *supra* note 63, art. IV § E(1). A player known as a "Super 2" is eligible for salary arbitration. *Id.* A "Super 2" is a player with at least two years of service, but less than three years of service, and is eligible for arbitration when he has accumulated at least 86 days of service during the preceding year and ranks in the top 22% in total service in the class of players who have at least two years of service, but less than three years of service. *Id.* art. IV § E(1)(b).

65. *Id.* art. IV § E(1).

66. *Id.* art. IV § E(4).

67. *Id.* art. IV § E(13).

player's association or player and an MLB club.[68] In the event a grievance arises between the aforementioned parties, the aggrieved party may seek arbitration after attempting to resolve the dispute.[69]

As a part of MLB's Joint Drug Prevention and Treatment Program ("JDA"), players are afforded appellate rights including the opportunity to seek arbitration.[70] The deciding panel consists of a representative of the MLB Office of the Commissioner, a representative of the Major League Baseball Players Association, and a neutral, independent arbitrator.[71] The JDA states that a player "who tests positive for a Performance Enhancing Substance," or otherwise violates the Program through the use or possession of a Performance Enhancing Substance, will receive discipline of an 80 game suspension for the first violation, a 162 game suspension for the second violation, and a permanent suspension with the opportunity to seek reinstatement for the third violation.[72] A player may also be subjected to disciplinary action under Section 7(G)[73] of the JDA for "just cause" for using, possessing, selling, facilitating the sale of, distributing, or facilitating the distribution of any drug of abuse, performance enhance substance, and/or stimulant that is not otherwise referenced as a violation of another aspect in Section 7.[74] The arbitration panel is commissioned and has jurisdiction to review "[a] determination that a player has violated the [drug testing]

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68. *Id.* art. XI §§ A(1)(a), D, E.

69. *Id.* art. XI § B.

70. MAJOR LEAGUE BASEBALL, MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM § 8 [hereinafter MLB JDA], http://mlb.mlb.com/pa/pdf/jda.pdf.

71. *Id.* § 8(A).

72. *Id.* § 7(A). A different duration of discipline is mandated for use of stimulants, street drugs, and conviction for use of possession of a prohibited substance, and participation in the sale or distribution of a prohibited substance. *Id.* § 7(B)–(F).

73. *Id.* § 8(D) (discussing specific procedures for appeals relating to "just cause" discipline as provided in Section 7(G)(2)).

74. *Id.* § 7(G); *see also* Major League Baseball Players Ass'n v. Office of the Comm'r of Baseball, Alex Rodriguez, Panel Decision No. 131 (Jan. 11, 2014) (Horowitz, Arb.) (holding there was just cause to suspend Alex Rodriguez for the entire 2014 season in accordance with Section 7(G) of the MLB JDA).

Program,"[75] whether the level of discipline imposed was supported by "just cause," and therapeutic use exemptions.[76]

B. National Basketball Association

The National Basketball Association ("NBA") offers multiple forms of arbitration. Disputes involving the interpretation or application of the provisions of the collective bargaining agreement or the provisions of the uniform player contract are submitted to a grievance arbitrator.[77] In accordance with the NBA CBA, a grievance may be initiated by a player, team, the NBA, or the National Basketball Players Association ("NBPA").[78] The grievance arbitrator has broad jurisdiction and authority,[79] however, they do not have authority to "add to, detract from, or alter" the provisions of the NBA CBA.[80] Similarly, grievances relating to player injuries are decided by a grievance arbitrator, along with the assistance of an independent medical expert.[81]

Any dispute involving "a fine or suspension imposed upon a player by the commissioner [of the NBA] for conduct on the

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75. *MLB JDA supra note 70,* § 8(A)(1). The MLB Commissioner's Office has the burden of proof to establish that a player tested positive for a banned substance. *Id.* § 8(B)(1). A player does not violate the terms of the MLB JDA if he can show the presence of a banned substance was "not due to his fault or negligence." *Id.* § 8(B)(3).

76. *Id.* § 8(A)(1). The arbitration panel, however, is not permitted to reduce the discipline imposed below the stated level of the violation set forth in Section 7 of the MLB JDA. *Id.* § 8(A).

77. NAT'L BASKETBALL ASSOCIATION, COLLECTIVE BARGAINING AGREEMENT (2011), art. XXXI § 1(a)(i) [hereinafter NBA CBA], http://nbpa.com/cba/.

78. *Id.* art. XXXI § 2(a).

79. *See id.* art. XXXI § 6(b). The grievance arbitrators have the authority to

> (i) interpret, apply, or determine compliance with the provisions of the [NBA CBA]; (ii) interpret, apply or determine compliance with the provisions of Player Contracts; (iii) determine the validity of Player Contracts; (iv) award damages . . . ; (v) award declaratory relief . . . to determine whether [an NBA] Team may properly terminate a Player Contract . . . ; and (vi) resolve disputes.

Id.

80. *Id.*

81. *Id.* art. XXXI § 8(a).

playing court" or any action taken by the commissioner relating to preserving the "integrity of, or maintenance of public confidence in, the game of basketball" is also subject to player discipline arbitration.[82] The commissioner of the NBA shall decide between a fine of $50,000 or less, a suspension of twelve (12) game or less, or both.[83] However, if the dispute is not resolved to the player's satisfaction, the NBPA may seek to review the "financial impact" of the commissioner's decision by seeking arbitration by and through the arbitrator.[84] The player discipline arbitrator does not have authority to review financial penalties imposed for "technical fouls, ejections, or the violation of other similar NBA rules" and the standard of review is de novo.[85] If the fine imposed by the commissioner is more than $50,000 and/or the suspension is more than twelve (12) games, or both, then the grievance arbitrator shall serve as the arbitrator and apply an arbitrary and capricious standard of review.[86]

The CBA also calls for system arbitration involving disputes between the NBA and NBPA.[87] The systems arbitrator is afforded authority to make "findings of fact and award appropriate relief including, without limitation, damages, injunctive relief and specific performance," but does not have authority to impose an award of punitive damages.[88] The systems arbitrator has exclusive jurisdiction to determine disputes relating to matters such as basketball-related income, salary cap, minimum team salary, escrow arrangements, rookie pay scale, player eligibility, NBA draft, free agency, option clauses, circumvention, anti-collusion, certifications, mutual reservations of rights, group licensing rights, terms of

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82. *Id.* art. XXXI § 1(b)(ii).
83. *Id.* art. XXXI § 9(a).
84. *Id.* art. XXXI § 9(a)(5).
85. *Id.* art. XXXXI § 9(a)(5)(b).
86. *Id.* art. XXXI § 9(b); *see also* Sprewell v. Golden State Warriors, 266 F.3d 979, 984–88 (9th Cir. 2001) (holding the arbitrator did not exceed his scope of authority in determining that Sprewell should be suspended for the 1997–98 NBA season for choking and assaulting P.J. Carlesimo, the head coach of the Golden State Warriors).
87. NBA CBA, *supra* note 77, art. XXXII § 1.
88. *Id.* art. XXXII §3(b).

the CBA, expansion, and contraction.[89] The system arbitrator, however, does not have authority to "add to, detract from, or alter" the provisions of the NBA CBA or a player contract.[90]

C. National Football League

The National Football League ("NFL") also provides for multiple forms of arbitration. The NFL and the NFL Players Association ("NFLPA") agreed by and through the CBA to provide for a system arbitrator.[91] The system arbitrator has exclusive authority to determine disputes relating to the terms of the CBA and other limited and specific terms.[92] The system arbitrator shall make determinations of relief and damages including injunctive relief, fines, and specific performance.[93] A three-year statute of limitations is applied to matters initiated before the system arbitrator.[94]

The NFL CBA provides for the appointment of a non-injury grievance arbitrator.[95] A non-injury grievance,[96] as defined by Article 43 of the CBA, is any dispute involving the interpreta-

89. *Id.* art. XXXII § 1. *See also* art. VII (listing categories in which the systems arbitrator has exclusive jurisdiction).

90. *Id.* art. XXXII § 3(e).

91. NAT'L FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT art. 15 (2011), https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf [hereinafter NFL CBA].

92. *Id.* art. 15, § 1. For example, the following terms must be determined by the arbitrator: (1) definitions of the CBA; (2) the NFL player contract; (3) the college draft; (4) veterans and veteran free agency; (5) franchise and transition players; (6) transition rules for the 2011 season; (7) anti-collusion; (8) certification; (9) consultation and information sharing; (10) salaries; (11) minimum salaries; (12) performance-base pool; (13) additional regular season games; (14) mutual reservation of rights; (15) duration of the CBA; (16) law and principles governing the CBA; (17) rookie compensation; (18) revenue accounting; (19) calculation of salary cap; (20) salary cap accounting rules; and (21) circumvention of salary cap. *Id.* art. 14 § 3, art. 15 § 1.

93. *Id.* art. 15 § 2(a).

94. *Id.* art. 15 § 2(f).

95. *Id.* art. 43 § 1.

96. *Id.*; *see also* White v. Nat'l Football League, 533 F. Supp. 2d 929, 933 (D. Minn. 2008) (refusing to adopt the non-injury grievance decision of the NFL's special master and holding Michael Vick was entitled to retain the roster bonus he received from the Atlanta Falcons despite pleading guilty to federal criminal charges).

tion of, application of, or compliance with any provision of the CBA, the NFL player contract, the practice squad player contract, or provisions of the NFL constitution and bylaws or NFL rules that relate to the terms and conditions of employment of an NFL player.[97] A grievance may be initiated by a player, the club, the NFL management council, or the NFLPA and must be initiated within fifty-days of the date of the occurrence.[98] Additionally, the non-injury grievance arbitrator shall have authority to determine whether a player or his agent engaged in "good faith negotiations" over compensation as well as any workers' compensation claims for teams that elect not to be covered by workers' compensation laws of its state.[99] The non-injury grievance arbitrator does not have jurisdiction or authority to "add to, subtract from, or alter in any way the provisions of [the NFL CBA]" or

> to grant any remedy other than a money award, an order of reinstatement, suspension without pay, a stay of suspension pending decision, a cease and desist order, a credit or benefit award under the Bert Bell/Pete Rozelle NFL Player Retirement Plan, or an order of compliance with a specific term of [the NFL CBA] or any other applicable document, or an advisory opinion pursuant to [proposed playing rule changes].[100]

The NFL CBA also provides for the resolution of injury grievances by and through arbitration. An injury grievance, as defined by the CBA, is any complaint or claim "that, at the time a player's NFL Player Contract or Practice Squad Player Contract was terminated by a Club, the player was physically unable to perform the services required of him by that contract because of an injury incurred in the performance of his services under that contract."[101] A player, or the NFLPA on the player's behalf, must present an injury grievance to the player's team and to the NFL Management Council within twenty-five days from the date the play-

97. NFL CBA, *supra* note 91, art. 43 § 1.
98. *Id.* art. 43 § 2.
99. *Id.* art. 26 § 4, art. 41 § 3.
100. *Id.* art. 43 § 8.
101. *Id.* art. 44 § 1.

er's contract was known to be terminated.[102] The team will then make a determination whether to compensate the aggrieved player. If the player or the NFLPA do not agree with the decision made by the team, the player or the NFLPA may seek arbitration.[103]

All disputes relating to a fine or suspension imposed upon a player for conduct on the playing field or conduct "detrimental to the integrity of, or public confidence in, the game of professional football" may be appealed to the NFL commissioner.[104] Appeals of such discipline shall be made to "hearing officer" as appointed by the NFL commissioner after consultation with the executive director of the NFLPA.[105]

D. National Hockey League

The National Hockey League ("NHL") provides multiple forms of arbitration by and through the CBA between the National Hockey League and the NHL Players' Association ("NHLPA"). Like the MLB, the NHL also provides for salary arbitration.[106] The salary arbitrator has authority to establish the term of the player contract based on the player's or team's election of a one or two year agreement and the amount to be paid to the player.[107]

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102. *Id.* art. 44 § 2.

103. *Id.* art. 44 § 6.

104. *Id.* art. 46 § 1.

105. *Id.* art. 46 § 2(a); *see* NAT'L FOOTBALL LEAGUE, POLICY AND PROGRAM ON SUBSTANCES OF ABUSE 24 (2014), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Active%20Players/Drug_SOA_Policy_9-29-14.pdf.

106. COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL PLAYERS' ASSOCIATION art. 12 (2013) [hereinafter NHL CBA], http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf; *see also* Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 481 (E.D. Pa. 1972). The following players are eligible for salary arbitration: (1) an 18–20 year old player with four years of professional experience; (2) a 21 year old player with three years of professional experience; (3) a 22–23 year old player with two years of professional experience; and (4) a 24 year old or older player with one year of professional experience. NHL CBA, *supra*, art. 12 § 1(a).

107. NHL CBA, *supra* note 106, art. 12 § 9(n); *see also* Melanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems*, 10 SPORTS L. J. 189, 193–96 (2003).

The NHL CBA calls for grievances to be adjusted by an "impartial arbitrator."[108] A grievance is defined as "any dispute involving the interpretation or application of, or compliance with, any provision of [the NHL CBA]."[109] Grievances may only be initiated by the NHL or the NHLPA, unlike the NBA and NFL which both allow the players to initiate grievances as well.[110] Either party may seek an expedited hearing upon a showing of good cause.[111] The impartial arbitrator's decision is the full and final disposition of any grievance; however, the impartial arbitrator is not permitted to "add to, subtract from, or alter in any way the provisions" of the CBA.[112]

Additionally, the NHL CBA provides a mechanism to adjust system grievances. A system grievance "is any dispute involving the interpretation or application of or compliance with" the player compensation cost reduction system, team payroll range system, circumvention, entry level compensation, free agency, the team payroll range system, and the player compensation cost redistribution system as set forth in the CBA.[113] A system grievance may only be initiated by the NHL or the NHLPA.[114] The "system arbitrator" shall make findings of fact and award relief including damages and specific performance.[115]

NHL players are also permitted to appeal disciplinary matters to arbitration. The NHL commissioner is authorized to issue discipline for "on-ice conduct" by weighing the following factors: violations of league playing rules, injury to an opposing player, a history of repeated violations of league playing rules, the situation of the game in which the incident occurred, and other appropriate factors.[116] A player receiving discipline from the NHL has a right to a hearing to address penalties for on-ice conduct.[117] If the player believes the penalties issued are inappropriate, the NHLPA, on

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108. NHL CBA, *supra* note 106, art. 17 § 5.
109. *Id.* art. 17 § 1.
110. *Id.* art. 17 § 2(a); *see supra* notes 78 & 98.
111. NHL CBA, *supra* note 106, art. 17 § 17.
112. *Id.* art. 17 § 13.
113. *Id.* art. 48 § 1.
114. *Id.* art. 48 § 2(a).
115. *Id.* art. 48 § 5(c).
116. *Id.* art. 18 § 2.
117. *Id.* art. 18 § 4(b)(i).

the player's behalf, may file an appeal to the NHL commissioner.[118] If the NHL commissioner issues a suspension of six or more NHL games, then the NHLPA, on the player's behalf, may then file an appeal to the "Neutral Discipline Arbitrator."[119] In the event the NHL playing rules call for the automatic suspension of a player and the suspension is five games or more, the NHLPA, on the player's behalf, may file an appeal to the neutral discipline arbitrator.[120]

Players are also afforded the right to appeal "Off-Ice Conduct" to arbitration. The NHL commissioner has the authority to impose discipline on a player when the player has violated NHL rules or "has been or is guilty of conduct . . . that is detrimental to or against the welfare of the [NHL] or the game of hockey."[121] In the event the commissioner makes this determination, he may discipline the player by expelling or suspending the player, cancelling the player's contract, or imposing a fine.[122] The NHLPA, on behalf of the player, has the right to appeal any such decision to the NHL commissioner.[123] If the NHLPA and the NHL commissioner are unable to adjust the penalty imposed for off-ice conduct, the NHLPA may file an appeal to the impartial arbitrator on the player's behalf.[124] The standard of review used by the impartial arbitrator is whether the NHL commissioner's decision was "supported by substantial evidence and was not unreasonable based on the following considerations: (i) the facts and circumstances surrounding the conduct at issue; (ii) whether the penalty was proportionate to the gravity of the offense; and (iii) the legitimate interests of both the Player and the [NHL]."[125]

Like other leagues, the NHL has developed a system to test for performance enhancing substances. The NHL is permitted to test NHL players during training camp, the regular season,

118. *Id.* art. 18 § 12.
119. *Id.* art. 18 § 13(a).
120. *Id.* art. 18 § 17.
121. *Id.* art. 18–A § 2.
122. *Id.*
123. *Id.* art. 18–A § 3(d).
124. *Id.* art. 18–A § 4.
125. *Id.* art. 18–A § 4.

playoffs, the off-season, and upon reasonable cause.[126] The NHLPA, on the player's behalf, may appeal a positive drug test on an expedited basis to the impartial arbitrator.[127] The standard for review of a positive drug test is strict liability.[128]

E. PGA Tour

Unlike their contemporaries in other professional sports, PGA Tour players are not unionized and, thus, do not collectively bargain for their rights and obligations.[129] PGA Tour players are subject to sanctions for "conduct unbecoming of a professional golfer" and violations of PGA Tour Regulations.[130] Accordingly, PGA Tour players' appellate rights are limited to internal appeals made to the Chief of Operations of the PGA Tour in the case of minor penalties[131] and a written appeal to the Commissioner of the PGA Tour in the event of imposition of intermediate penalties[132] or major penalties[133] by the PGA Tour.[134] In the event the grievance

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126. *Id.* art. 47 § 6. A player who tests positive for a prohibited substance shall be suspended for twenty games for the first positive test, sixty games for the second positive test, and a permanent suspension for the third positive test. *Id.* art. 47 § 7(a).

127. *Id.* art. 47 § 9.

128. *Id.* art. 47 § 9(e). UCI v. Outchakov (CAS 2000/A/272) (holding the UCI definition of doping is a strict liability offense, thus overturning the federation's determination would require a showing that the rider was "guiltless").

129. Charles R. Daniel II, *The PGA Tour: Successful Self-Regulation or Unreasonably Restraining Trade?*, 4 SPORTS L. J. 41, 41–43 (1997).

130. PGA TOUR, 2014–2015 PLAYER HANDBOOK & TOURNAMENT REGULATIONS (2014), at 146 [hereinafter PGA REGULATIONS], https://player support.pgatourhq.com/Tour/PLP/playersupportinforegistration.nsf/xsp/.ibmmo dres/domino/OpenAttachment/Tour/PLP/playersupportinforegistration.nsf/C727 DB7A7733806285257CC50066F582/pgAttachments/2014-15%20PGAT%20 Handbook%20&%20Regulations.pdf.

131. The PGA Tour defines minor penalties as "a fine of not more than $10,000." *Id.* at 149.

132. The PGA Tour defines intermediate penalties as "a fine of between $10,001 and $20,000 and/or suspension from play for not more than three tournaments." *Id.* at 150.

133. The PGA Tour defines major penalties as "a fine in excess of $20,000, suspension from tournament play for more than three tournaments and/or permanent disbarment from play in PGA Tour cosponsored or coordinated events." *Id.* at 150.

134. *Id.* at 150–51.

is not adjusted at this level, the PGA Tour players have the right to make a final appeal to the PGA Tour Appeals Committee, which consists of three non-player members of the PGA Tour's Board of Directors.[135]

The PGA Tour, however, provides greater appellate rights in matters relating to the PGA Tour's anti-doping policies, including access to arbitration conducted by the American Arbitration Association ("AAA"). Drug testing is administered and collected by the National Center for Drug Free Sport ("Drug Free Sport").[136] If a PGA Tour player is found to have violated the anti-doping policies, he is subject to disqualification, including loss of results, points, and prize money, up to permanent ineligibility, and a fine up to $500,000.[137] In such event, players are presented with the opportunity to appeal positive drug test results in accordance with the appellate provisions of the intermediate penalties or major penalties as stated in the PGA Tour Regulations for drug of abuse violations[138] and to AAA for anti-doping violations, therapeutic use exemptions, and other disputes relating to the PGA Tour anti-doping policies and procedures.[139]

A PGA Tour player desiring to appeal to AAA shall notify the Commissioner of the PGA Tour of his desire to appeal.[140] The PGA Tour, then, is required to select an arbitrator, from a list of arbitrators, who is both an AAA arbitrator located in North America and an arbitrator with appointment to the Court of Arbitration for Sport.[141] The PGA Tour player will then be provided the opportunity to select an arbitrator from a list provided by AAA. The two arbitrators selected by the Tour and the player will choose the

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135. *Id.* at 151.

136. PGA TOUR, PGA TOUR ANTI-DOPING PROGRAM MANUAL 4 (2013) [hereinafter PGA TOUR DRUG TESTING POLICY], http://usga.org/uploadedFiles/2014-2015%20Anti-Doping%20Manual.pdf.

137. *Id.* at 15–16.

138. *Id.* at 12. The PGA Tour Drug Testing Policy defines drugs of abuse as "[s]ubstances which are normally associated with social abuse rather than athletic performance enhancement as identified on the PGA Tour Prohibited List." *Id.* at 19.

139. *Id.* at 12–13.

140. *Id.* at 13.

141. *Id.*

third arbitrator.[142] The anti-doping policies do not provide for the exchange of discovery other than the laboratory testing packet in the case and all documents considered by the therapeutic use exemption committee in ruling on a therapeutic use exemption.[143] The PGA Tour has the burden to establish by a balance of probability that an anti-doping violation occurred.[144] The panel shall have forty-five days from the formation of the arbitration panel to conduct the hearing and fifteen days from the close of the evidence to render a written decision.[145] Recently, the PGA Tour anti-doping policies and procedures came under scrutiny following the suspension of Vijay Singh, a longtime professional golfer.[146]

F. United States Olympic Committee

The United States Olympic Committee ("USOC") serves as the national representative of the United States to the International Olympic Committee. The USOC was federally chartered by Congress under the Amateur Sports Act of 1978 to act as the exclusive governing body of the United States participation in Olympic and Pan-American Games.[147] In 1998, the Amateur Sports Act of 1978 was amended and renamed the Ted Stevens Olympic & Amateur Sports Act ("ASA").[148] The ASA mandates that the USOC establish procedures that "provide swift resolution of conflicts and disputes involving amateur athletes, national governing bodies, and amateur sports organizations, and protect the opportunity of any

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142. *Id.* at 13.

143. *Id.* at 14.

144. *Id.*

145. *Id.* at 14–15.

146. Singh v. PGA Tour, Inc., 42 Misc.3d 1225(A), *4–6 (N.Y. Sup. Ct. Feb. 13, 2014). Singh was suspended for ninety days after admitting to using "deer antler spray" and all of Singh's prize money was to be held in escrow. *Id.* at *1. In accordance with PGA procedures, Singh timely filed for arbitration. *Id.* at *2. While the arbitration matter was pending, the World Anti-Doping Agency ("WADA") informed the PGA Tour it determined "deer antler spray" should be removed from the list of prohibited substances. *Id.* Shortly thereafter, Singh filed suit against the PGA Tour for recklessly administering the PGA Tour anti-doping program, subjecting him to ridicule and humiliation, and placing his prize money in escrow without legal authority. *Id.* This matter is currently pending in state court in New York.

147. 36 U.S.C. § 220503(3) (2012).

148. *Id.* §§ 220501–220529.

amateur athlete, coach, trainer, manager, administrator, or official to participate in amateur competition."[149] Additionally, the ASA requires an amateur sports organization (i.e., USOC) to submit "any controversy" to AAA and such controversy shall be conducted in accordance with AAA's Commercial Rules.[150]

AAA has jurisdiction over disputes involving the USOC and, specifically, over a controversy involving an athlete's opportunity to participate in national and international competition representing the United States.[151] Section 220522(a)(4) of the ASA states:

> An amateur sports organization is eligible to be recognized, or to continue to be recognized, as a national governing body only if it . . . agrees to submit to binding arbitration in any controversy involving . . . the opportunity of any amateur athlete . . . to participate in amateur athletic competition, upon demand of . . . any aggrieved amateur athlete . . . conducted in accordance with the Commercial Rules of the American Arbitration Association, as modified

149. *Id.* § 220503(8).

150. *Id.* § 220503(a)(4).

151. Athletes have commonly attempted to circumvent the ASA and file suit in state and federal courts; however, courts commonly uphold the requirements of the ASA. Michels v. U.S. Olympic Comm., 741 F.2d 155, 159 (7th Cir. 1984) (Posner, J., concurring) ("[T]here can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games."). The ASA also provides for national governing bodies ("NGB") to "establish procedures for determining eligibility standards for participation in competition" such as drug testing. 36 U.S.C. § 220523(a)(5). Accordingly, the USOC policies require that NGBs abide by and comply with the United States Anti-Doping Agency's ("USADA") drug testing protocols. Armstrong v. Tygart, 886 F. Supp. 2d 572, 585 (W.D. Tex. 2012). Athletes have the right to appeal doping violations to the Court of Arbitration for Sport, which is a private international arbitration tribunal based in Switzerland that provides for arbitration rulings for athletes engaged in international competition. *See* Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 LOY. U. CHI. L.J. 1203, 1212 (2005); *see also* COURT OF ARBITRATION FOR SPORT, PROCEDURAL RULES (Nov. 14, 2014), http://www.tas-cas.org/rules [https://web.archive.org/web/20141114201529/http:/www.tas-cas.org/rules] ("The seat of [Court of Arbitration for Sport] . . . is Lausanne, Switzerland.").

> and provided for in the corporation's constitution and bylaws . . . .[152]

Additionally, Section 220522(a)(8) of the ASA states a national governing body ("NGB") must

> provide[] an equal opportunity to amateur athletes, coaches, trainers, managers, administrators, and officials to participate in amateur athletic competition, without discrimination on the basis of race, color, religion, sex, age, or national origin, and with fair notice and opportunity for a hearing to any amateur athlete, coach, trainer, manager, administrator, or official before declaring the individual ineligible to participate.[153]

Section 9.1 of the USOC Bylaws provides:

> No member of the corporation may deny or threaten to deny any amateur athlete the opportunity to participate in the Olympic Games, the Pan American Games, the Paralympic Games, a World Championship competition, or other such protected competition as defined in Section 1.3 of these Bylaws nor may any member, subsequent to such competition, censure, or otherwise penalize, (i) any such athlete who participates in such competition, or (ii) any organization that the athlete represents.[154]

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152. 36 U.S.C. § 220522(a)(4).

153. *Id.* at § 220522(a)(8).

154. BYLAWS OF THE UNITED STATES OLYMPIC COMMITTEE § 9.1 (2014) [hereinafter USOC BYLAWS], http://www.teamusa.org/~/media/TeamUSA/Documents/Legal/Governance/2013%20Q4Bylaws%20Revisions%20120613.pdf. Under USOC Bylaws Section 1.3(w), "protected competition" means:

> 1) any amateur athletic competition between any athlete or athletes officially designated by the appropriate [National Governing Body] or [Paralympic Sports Organization] as representing the United States, either individually or as part of a team, and any athlete or athletes representing any foreign

USOC Bylaws Section 9.7 provides, "If the complaint [under Section 9.1] is not settled to the athlete's satisfaction the athlete may file a claim with the AAA against the respondent for final and binding arbitration."[155] Under both Sections 9.7 and 9.9 of the USOC Bylaws, the arbitration proceeding may be expedited.[156]

V. A PLAN FOR NCAA ARBITRATION

The NCAA has been chastised in the media and by the general public over the course of the last several years relating to a multitude of matters. Some have argued the NCAA lacks fundamental fairness[157] and does not provide member institutions, coaches, and student-athletes with a proper forum to address disputed matters.[158] The following discussion outlines a process that

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> country where (i) the terms of such competition require that the entrants be teams or individuals representing their respective nations and (ii) the athlete or group of athletes representing the United States are organized and sponsored by the appropriate NGB or PSO in accordance with a defined selection or tryout procedure that is open to all and publicly announced in advance, except for domestic amateur athletic competition, which, by its terms, requires that entrants be expressly restricted to members of a specific class or amateur athletes such as those referred to in Section 220526(a) of the Act; and 2) any domestic amateur athletic competition or event organized and conducted by an [*sic*] NGB or PSO in its selection procedure and publicly announced in advance as a competition or event directly qualifying each successful competitor as an athlete representing the United States in a protected competition as defined in 1) above.

Id. § 1.3(w).

155. *Id.* § 9.7.

156. *Id.* §§ 9.7, 9.9.

157. *See, e.g.*, Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1068 n.2 (2d Cir. 1972) (affirming substitution of neutral arbitrator for professional basketball commissioner under the Federal Arbitrator Act in order "to insure a fair and impartial hearing"); Morris v. N.Y. Football Giants, Inc., 575 N.Y.S.2d 1013, 1016–17 (N.Y. Sup. Ct. 1991) (holding that, under the circumstances, NFL Commissioner sitting as arbitrator had to be replaced by a neutral arbitrator pursuant to federal and state arbitral law).

158. *See* Richard G. Johnson, *Submarining Due Process: How the NCAA Uses Its Restitution Rule to Deprive College Athletes of Their Right of Access to the Courts . . . Until* Oliver v. NCAA, 11 FL. COASTAL L. REV. 459 (2010).

will benefit the NCAA, member institutions, coaches, and student-athletes. Under the following procedure, disputed matters will be presented to a neutral arbitrator or a panel of arbitrators with experience in disputes involving athletes and the sports industry. Drug test appeals, NCAA enforcement and infractions matters, and matters relating to student-athlete participation should be decided by arbitrators.[159] Providing for a neutral process to resolve disputed matters will restore impartiality, fairness, and trust in intercollegiate athletics.

A. Drug Test Appeals

The NCAA, along with member conferences and institutions, has drug-testing programs requiring student-athletes to be tested for street drugs and performance enhancing drugs.[160] Student-athletes are required to execute an NCAA form consenting to the NCAA drug-testing program before he or she is eligible to compete.[161] Student-athletes are subject to year-round testing, re-

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159. Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001) (stating when no dishonesty of the arbitrator is alleged the arbitrator's "improvident, even silly, factfinding" does not provide a basis for a reviewing court to refuse to enforce the award) (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 39 (1987)).

160. *See* Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 669 (Cal. 1994) (holding the NCAA's drug testing program does not violate the State of California's right to privacy); *see also* O'Halloran v. Univ. of Wash., 679 F. Supp. 997, 1007 (W.D. Wash. 1988) (denying a request for temporary injunction and holding the student-athlete failed to demonstrate "an invasion of any constitutionally protected right requiring invalidation [of the NCAA] drug-testing program"); Univ. of Colo. *ex rel.* Regents of the Univ. of Colo. v. Derdeyn, 863 P.2d 929, 935 (Colo. 1993) (holding "in the absence of voluntary consents, [University of Colorado's] random, suspicionless urinalysis-drug-testing of student athletes violates the Fourth Amendment to the United States Constitution and Article II, Section 7, of the Colorado Constitution"); Bally v. Northeastern Univ., 532 N.E.2d 49, 53–54 (Mass. 1989) (holding the student-athlete's claims that Northeastern University's drug testing program violated his civil rights and his right to privacy were unfounded).

161. 2012 NCAA MANUAL, *supra* note 20, § 14.1.4.1. 2012 NCAA Bylaw section 14.1.4.1 states "[e]ach academic year, a student-athlete shall sign a form . . . in which the student consents to be tested for the use of drugs prohibited by NCAA legislation." *Id.*; *see also* NAT'L COLLEGIATE ATHLETICS ASS'N, 2014–15 DRUG-TESTING PROGRAM § 3.1 (2014) [hereinafter NCAA DRUG POLICY], http://www.ncaa.org/sites/default/files/DT%20Book%202014-15.pdf;

gardless of when they will compete.[162] In accordance with the NCAA Drug-Testing Program, "Drug Free Sport" administers and manages for all NCAA student-athletes.[163]

A student-athlete who tests positive for a banned substance is subject to loss of eligibility for one full season.[164] A positive drug test may be appealed and the NCAA member institution shall appeal the test if requested to do so by the student-athlete.[165] An appeal is conducted telephonically and may be expedited if the student-athlete's next competition is imminent.[166] The body reviewing the appeal consists of "[a]t least three members" of the NCAA Drug-Education and Drug-Testing Subcommittee ("Appeals Committee").[167] The student-athlete is not restricted on the grounds for his or her appeal; however, the NCAA recognizes that

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Stephen F. Brock, et al., *Drug Testing College Athletes: NCAA Does Thy Cup Runneth Over?*, 97 W. VA. L. REV. 53, 110–13 (1994) (arguing the NCAA drug test consent form "is not necessarily dispositive and should not be relied upon by the NCAA").

162. NCAA DRUG POLICY, *supra* note 161, § 4.3.1.

163. *Id.* § 2.3.

164. 2014 NCAA MANUAL, *supra* note 1, at § 18.4.1.5.1. 2014 NCAA Manual section 18.4.1.5.1 states "[a] student-athlete who, as a result of a drug test administered by the NCAA, tests positive . . . [for a banned substance] shall be charged with the loss of one season of competition in all sports in addition to the use of a season . . . if he or she has participated in intercollegiate competition during the same academic year." *Id.* ; *see also* NCAA DRUG POLICY, *supra* note 161, § 3.2; Floralynn Einesman, *Drug Testing Students in California—Does It Violate the State Constitution?*, 47 SAN DIEGO L. REV. 681, 696–702 (2010) (discussing *Hill v. NCAA* and subsequent refinements to the law on drug testing); Dante Marrazzo, *Athletes and Drug Testing: Why Do We Care if Athletes Inhale?*, 8 MARQ. SPORTS L.J. 75, 89–91 (1997)(proposing less restrictive penalties for athletes who fail drug tests).

165. NCAA DRUG POLICY, *supra* note 161, §§ 8.2.4, 8.2.4.1.

166. *Id.* §§ 8.2.4.3–8.2.4.4.

167. NAT'L COLLEGIATE ATHLETIC ASS'N, 2014–15 NCAA DRUG-TESTING PROGRAM APPEALS PROCESS (2014) [hereinafter NCAA APPEAL], http://www.ncaa.org/sites/default/files/DT%20Appeals%20Process%202014-15%20draft.pdf. The Appeals Committee consists of the Director of Athletics from New England College, the Faculty Athletic Representatives from Dominican College and Duquesne University, the Head Athletic Trainer from University of South Florida, the Team Physician from the University of Toledo, the Deputy Director of Athletics from John Hopkins University, the Team Physician from the University of Georgia, and the Director of Sports Medicine from Harvard University. *Id.*

generally procedural and knowledge challenges are the most common arguments on appeal.[168] In making a procedural challenge, the student-athlete must establish that "*it is more likely than not* that any substantiated problem with the collection or testing procedures *materially affect[ed]* a sample's integrity."[169] In making a knowledge challenge, the student-athlete must establish that he or she "was not aware [he or she] had been administered . . . a substance by another person that later is found to have contained a banned ingredient" or the student-athlete asked "specific and reasonable questions" regarding a specific substance and "did not know *and* could not reasonably have known or suspected . . . the information provided by staff was erroneous."[170] Additionally, a student-athlete may argue for a reduction of the penalty based on mitigating factors.[171] If the Appeals Committee finds mitigating factors exist, the Appeals Committee may reduce the penalty imposed on the student-athlete to the first fifty percent of the regular season if the season has yet to begin or the next fifty percent of the season if the student-athlete tests positive for a banned substance during the season.[172]

Student-athletes certainly do not have the protections provided to their colleagues competing in professional athletics. Without a collective bargaining agreement, the NCAA can implement policies without student-athletes having the opportunity to legitimately voice concerns. Student-athletes would benefit substantially by having a neutral arbitrator or arbitrators to consider evidence presented rather than the Appeals Committee that does not have legal training and, frankly, is likely not skilled in drug-

168. *See id.*

169. *Id.*

170. *Id.*

171. *See id.* The Appeals Committee will not consider the following as mitigating factors: (1) the type or amount of the banned substance detected; (2) the student-athlete's good character; (3) the remorse demonstrated by the student-athlete; and (4) whether the substance used enhances athletics performance; and (5) family hardship or history of family dysfunction. *Id.* Examples of information that lean towards a finding of mitigating factors are: (1) inadequate drug education was provided by the NCAA member institution; or (2) the circumstances by which the student-athlete ingested the banned substance were outside of his or her control. *Id.*

172. *Id*.

testing analysis and review. A neutral arbitrator would have the ability to review the evidence independent of affiliation with an institution, conference, or the NCAA. Indeed, bodies like the USOC and USADA allow for the presentation of evidence to neutral arbitrators as it relates to drug testing results. At present, the only options for the Appeals Committee are to uphold the punishment, find no violation occurred, or reduce the penalty to fifty percent of athletics contests. A neutral arbitrator would not be restricted by procedures that provide limited alternative forms of punishment. Furthermore, non-lawyers are simply not equipped to address procedural arguments and, often times, these arguments are met with skepticism by laypersons.

Accordingly, the NCAA should permit student-athletes, or member institutions on behalf of the student-athlete, to present evidence to a neutral arbitrator. The arbitrator should be afforded the opportunity to review the evidence on an expedited basis, if necessary, and determine whether punishment is necessary, and provide for reduction of punishment, if deemed appropriate. This system would allow student-athletes the opportunity to present evidence to trained experts knowledgeable in deciding complex drug-testing matters, providing a sense of fairness and objectivity.

B. NCAA Enforcement and Infractions

The NCAA enforcement process is a lightning rod for debate and discussion. The enforcement process has been the subject of scrutiny and numerous lawsuits including claims for tortious interference with a contract,[173] violations of due process,[174] defamation,[175] and violations of the Sherman Act.[176] States have also

173. Harrick v. Nat'l Collegiate Athletic Ass'n, 454 F. Supp. 2d 1255, 1259 (N.D. Ga. 2006) (stating the NCAA is not a stranger to the coaching agreement between Harrick and the University of Georgia).

174. Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 195–96, 199 (1988) (holding the NCAA is not a state actor); Cohane v. Nat'l Collegiate Athletic Ass'n, 215 F. App'x 13, 16 (2d Cir. 2007) (holding the NCAA's motion to dismiss should have been denied because *Tarkanian* is distinguishable). *See also* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 939 P.2d 1049, 1050 (Nev. 1997); Larry Stewart, *Tarkanian, NCAA Settle for $2.5 Million,* L.A. TIMES (Apr. 2, 1998), http://articles.latimes.com/1998/apr/02/sports/sp-35333 (explaining the settlement between Jerry Tarkanian and the NCAA).

175. Scott Enyeart, *Judge in Todd McNair Suit Says NCAA 'Malicious' in Investigation of USC*, SB NATION L.A. (Nov. 21, 2012 4:49 PM),

attempted to adopt legislation that would provide greater due process to student-athletes by limiting the NCAA's authority during investigations.[177]

Recently, the NCAA's practices were questioned during the investigation of the University of Miami ("Miami"). The Miami investigation stemmed from accusations by former Miami booster and convicted felon, Nevin Shapiro, in which he indicated he provided thousands of dollars in impermissible benefits to Miami student-athletes.[178] During the investigation, the NCAA hired Nevin Shapiro's bankruptcy attorney to obtain information the NCAA could not access and, thus, used the attorney's ability to subpoena records to obtain missing information.[179] Subsequently, the NCAA hired a law firm to investigate this practice and, ultimately, concluded the NCAA used improper means to obtain records.[180]

The Miami investigation has not been the only source of scrutiny. In July 2014, Big 12 Conference commissioner Bob Bowlsby said "[NCAA] [e]nforcement is broken. The infractions committee hasn't had [an FBS] hearing in almost a year, and I

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http://losangeles.sbnation.com/2012/11/21/3677898/judge-todd-mcnair-ncaa-malicious-usc-investigation?_ga=1.78305556.1611737641.1439999234 (stating there is evidence the NCAA acted maliciously towards Todd McNair and the NCAA infractions report contained was flawed).

176. Justice v. Nat'l Collegiate Athletic Ass'n, 577 F. Supp. 356, 383 (D. Ariz. 1983) (holding the NCAA sanctions enforced by the NCAA were not anti-competitive, were reasonably related to the NCAA's central objectives, and were not overbroad; therefore, the NCAA's actions to sanction the University of Arizona did not constitute an unreasonable restraint of trade in violation of the Sherman Act).

177. Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 640 (9th Cir. 1993) (holding Nevada legislation that provided for procedural changes during NCAA investigations violated the dormant commerce clause).

178. NAT'L COLLEGIATE ATHLETIC ASS'N, UNIVERSITY OF MIAMI PUBLIC INFRACTIONS REPORT 1–2 (2013) http://www.ncaa.org/sites/default/files/Miami%20Public%20Inf%20Rpt.pdf; KENNETH L. WAINSTEIN ET AL., CADWALADER, WICKERSHAM, & TAFF, LLP, REPORT ON NCAA'S ENGAGEMENT OF A SOURCES'S COUNSEL AND USE OF THE BANKRUPTCY PROCESS IN ITS UNIVERSITY OF MIAMI INVESTIGATION 2 (2013), http://www.ncaa.org/sites/default/files/NCAA%2B-%2BReport.pdf.

179. WAINSTEIN ET AL., *supra* note 178.

180. *Id.* at 2–4.

think it's not an understatement to say cheating pays presently."[181] The NCAA enforcement system has consistently been labeled slow and lacking the necessary weapons to obtain information. Some have recommended arbitration as the forum to alleviate these issues; however, the adoption of arbitration has been linked to federal legislation, which is unlikely to gain support on Capitol Hill.[182]

The better solution is to adopt arbitration as a part of the agreement between the NCAA and member institutions, conferences, coaches, and student-athletes. The NCAA's constitution, bylaws, and regulations operate as a contract between the member institutions and conferences and coaches and student-athletes are third-party beneficiaries to these agreements.[183] As a result, the NCAA can simply adopt arbitration as the system to resolve of all NCAA infraction investigations. This approach would remove the COI as the deciding body in such cases and appoint a three-member panel of neutral arbitrators. Like many other arbitration panels, the NCAA would create a body of arbitrators from which to select and could easily use an established forum, such as the AAA, to access top arbitrators with industry knowledge.

Critics of NCAA enforcement forcefully argue that implementation is ineffective because investigators do not have the authority to issue subpoenas to obtain evidence in order to substantiate claims. Under Section 7 of the FAA, arbitrators are permitted to issue subpoenas to obtain documents and/or compel the presence of a witness.[184] Similarly, state laws allow arbitrators to issue subpoenas.[185] The ability to issue a subpoena would not only pro-

181. Jake Trotter, *Bob Bowlsby Sees Bleak Landscape*, ESPN (July 22, 2014), http://espn.go.com/college-sports/story/_/id/11243234/bob-bowlsby-big-12-commissioner-says-cheating-pays-ncaa-enforcement-broken. *Contra NCAA Enforcement Chief Fires Back*, ESPN (July 24, 2014), http://espn.go.com/college-football/story/_/id/11256975/ncaa-enforcement-director-jonathan-duncan-defends-investigators.

182. Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837, 875–76 (2014).

183. Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 623–24 (Colo. App. 2004); *see also* Hall v. Nat'l Collegiate Athletic Ass'n*,* 985 F. Supp. 782, 796–97 (N.D. Ill. 1997).

184. 9 U.S.C. § 7 (2012).

185. UNIF. ARBITRATION ACT § 17(A) (2000), (NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS), http://www.uniformlaws.org/shared/docs/

vide NCAA investigators with the information needed to corroborate a claim but would also move cases forward more expeditiously. However, subpoena power should not be taken lightly. In order to obtain a subpoena, the requesting party would be required to establish that the information sought is relevant and cannot be obtained from another source.[186] If there is a dispute regarding the relevancy of such information or allegations that such information is intrusive, the objecting party can seek to quash the subpoena and/or seek an in-camera review where documents and information can be redacted, if necessary. Similarly, a witness would also be afforded the opportunity to seek protection by arguing either that he or she cannot provide relevant testimony or that he or she the request was made for a malicious purpose, such as harassing the witness.

Creating a system of arbitration conducted by neutral parties with industry knowledge will restore the faith in NCAA enforcement by (1) granting greater access to witnesses and information; (2) the ability to rectify "prosecutorial overreaching"; and (3) providing more expedient resolution of cases. The opportunity to subpoena witnesses and documents will expedite the investigation process, which will be closely monitored by a panel of arbitrators. The goal of arbitration is to advance matters more quickly. Arbitrators are more readily available than athletics administrators and others currently sitting on the COI. Additionally, arbitrators would be permitted to address "prosecutorial overreaching" like that which allegedly occurred in the Miami case. By having a panel of arbitrators oversee the process, all those involved will be forced to respond to a higher body (i.e., the arbitration panel) and

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arbitration/arbitration_final_00.pdf. In 2000, the Uniform Law Commission created the Revised Uniform Arbitration Act, which has been enacted by 19 states. *See* UNIFORM LAW COMMISSION, *Legislative Enactment Status, Arbitration Act* (2000), UNIFORMLAWS.ORG, http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20%282000%29. Other states have existing legislation that provides for the issuance of subpoenas by an arbitrator. *See, e.g.*, CAL. CIV. PROC. CODE §§ 1283.05, 1283.1 (2007); FLA. STAT § 682.08 (2015); IND. CODE § 34-57-2-8 (2008); TEX. CIV. PRAC. & REM. CODE ANN. § 171.051 (2011).

186. Josephine (Jo) R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 294 (2010).

will be forced to conform to the applicable standards as called for in NCAA legislation. Established neutral parties will restore fundamental fairness and create a more positive public perception of NCAA enforcement.

C. Participation Appeals

Student-athletes are only afforded a short period of time to compete in intercollegiate athletics. Specifically, student-athletes have five years to participate in four seasons of intercollegiate athletics competition in any one sport.[187] It is not uncommon for student-athletes to assert their demand to compete in court after the NCAA process fails to provide the relief sought.[188] As a result, student-athletes are often left believing they do not have an impartial forum to resolve their disputes.[189]

The USOC has provided a guide that delivers a process that will provide a version of due process to student-athletes. Section 9.1 of the USOC Bylaws provides American athletes with the opportunity to seek arbitration for a matter that negatively impacts participation and, specifically, prohibits the athlete's opportunity to compete.[190] Presently, if a student-athlete has a grievance or desires to supplement treatment under NCAA legislation, he or she is afforded the opportunity to file a waiver of NCAA legislation.[191] 2014 NCAA Bylaw 14.02.13 defines a waiver as "an action ex-

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187. 2014 NCAA MANUAL, *supra* note 20, §§ 12.8, 12.8.1 (stating student-athletes "shall not engage in more than four seasons of intercollegiate competition" within five calendar years beginning the first semester the student-athlete triggers full-time enrollment at an institution of higher learning).

188. Matthews v. Nat'l Collegiate Athletic Ass'n, 79 F. Supp. 2d 1199, 1207–08 (E.D. Wash. 1999) (holding a penalty requiring the student-athlete to miss three football contests does not constitute irreparable harm and, thus, a preliminary injunction was not warranted); Hall v. Nat'l Collegiate Athletic Ass'n, 985 F. Supp. 782, 802 (N.D. Ill. 1997) (holding the student-athlete was not entitled to injunctive relief that would allow him to compete); Nat'l Collegiate Athletic Ass'n v. Yeo, 171 S.W.3d 863, 870 (Tex. 2005) (holding a court does not act as a "super referee" in the interpretation of NCAA legislation).

189. *See generally* Travis L. Miller, *Home Court Advantage: Florida Joins States Mandating Due Process in NCAA Proceedings*, 20 FLA. ST. U. L. REV. 871 (1993) (noting that NCAA's procedures have been criticized as unfair).

190. USOC BYLAWS, *supra* note 154, § 9.1.

191. 2012 NCAA MANUAL, *supra* note 20, § 14.02.15.

empting an individual or institution from the application of a specific regulation. A waiver requires formal approval . . . based on evidence of compliance with the specified conditions or criteria under which the waiver is authorized or extenuating circumstances . . . ."[192]

NCAA legislation provides a plethora of waiver opportunities, but requires a member institution to file a waiver on behalf of a student-athlete.[193] A student-athlete is not afforded the opportunity to file a waiver on his or her own without the support of a member institution.[194] Obviously, this is contrary to the USOC arbitration system that permits athletes to challenge the USOC or NGB.[195] This is certainly a concern if the student-athlete is considering transferring to a new institution or the member institution does not politically want to advance certain waiver requests.

The NCAA's numerous waiver opportunities should continue as the initial layer of review for student-athlete participation matters as this process often times provides relief to student-athletes. NCAA representatives, conference representatives, and representatives from member institutions sit on various waiver committees that attempt to resolve disputes involving student-athletes. In the event a waiver request relates to the student-athlete's ability to participate in intercollegiate athletics competitions and such request is denied, student-athletes should be afforded an opportunity to appeal to a neutral arbitrator or special master that presides over these matters. Additionally, if time is of the essence and/or athletic competition is imminent, student-athletes should be afforded the opportunity to present matters directly to a neutral arbitrator or special master to accelerate the time necessary for response and decision. Unlike the present legislation, student-athletes should not be required to obtain the support of a member institution to file a request to be heard by a neutral arbitrator.

The most glaring NCAA legislation that must provide for appellate opportunities for student-athletes include initial-

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192. 2014 NCAA MANUAL, *supra* note 1, § 14.02.03.
193. 2012 NCAA MANUAL, *supra* note 20, § 14.1.7.3.2.1.
194. *See id.*
195. USOC BYLAWS, *supra* note 154, § 9.

eligibility,[196] progress towards degree,[197] transfer regulations,[198] and national letter of intent appeals.[199] A neutral arbitrator or special master with knowledge of the NCAA's system and sports industry should be appointed to hear these cases and others that relate to any restriction on student-athlete participation. Student-athletes would be afforded the opportunity to present all evidence in writing and hold a hearing telephonically. Like USOC legislation, hearings could be expedited upon request of the student-athlete.[200] This subtle change would provide student-athletes with the opportunity to present their cases to a neutral third-party not connected with the NCAA or a member institution. Again, arbitration provides for fundamental fairness in a process that has historically been heavily chastised and considered arduous.

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196. The Initial-Eligibility Waivers Committee decides waivers relating to initial-eligibility "based on objective evidence that demonstrates circumstances in which a student's overall academic record warrants a waiver." 2012 NCAA MANUAL, *supra* note 20, § 14.3.1.5.

197. Student-athletes are required to meet certain NCAA requirements to maintain athletics eligibility. *See id.* § 14.4.3.1. If a student-athlete fails to meet such requirements, then he or she may seek a waiver of NCAA legislation by appealing to the Division I Progress-Toward-Degree Waivers Committee based on a showing of "objective evidence that demonstrates circumstances that warrant the waiver." *Id.* §§ 14.4.3.7, 14.4.3.9.

198. A student-athlete who transfers to a new member institution is required to complete one full academic year in residence, unless he or she can satisfies an exception to NCAA legislation. *Id.* § 14.5.1. If a student-athlete fails to meet an exception to NCAA legislation, then he or she may seek a waiver to the Academic Cabinet. *Id.* §§ 14.5.6.8.1, 14.5.6.9.

199. A student-athlete who executed a national letter of intent ("NLI") faces a substantial penalty if he or she does not abide by the requirements of the NLI. Specifically, the NLI language states "[a] student who does not attend the signing institution for at least one academic year (two semesters or three quarters) must serve one academic year in residence and will lose one season of competition in *all sports* upon enrollment at another NLI member institution." NAT'L LETTER OF INTENT, NLI APPEALS PROCESS (emphasis in original), http://www.nationalletter.org/documentLibrary/appealsProcessSheet100110.pdf. Student-athletes are afforded the right to a final appeal before the NLI Appeals Committee and are permitted to present their case via telephone conference call. *Id.*

200. USOC BYLAWS, *supra* note 154, §§ 9.7, 9.9.

VI. CONCLUSION

The NCAA has recently been heavily scrutinized and some believe the NCAA has lost the faith of the general public. Many of these concerns relate to a perceived lack of fundamental fairness in the process governed by the NCAA. By shifting to arbitration, the NCAA is afforded the opportunity to bring neutrality to a process that has historically been challenged ad nauseam. Any arbitration package adopted by the NCAA through enacted legislation should include the opportunity for student-athletes to appeal positive drug tests and matters affecting participation to arbitration and remove the COI from deciding infractions matters in favor of neutral arbitrators. By adopting arbitration as the forum to resolve these matters, the NCAA would be afforded the opportunity to issue subpoenas on a limited basis to better obtain evidence in NCAA infractions proceedings. Arbitration is the answer to improving the NCAA's system for adjudicating matters. Arbitration will bring fundamental fairness to the NCAA structure.

Essay

Equal Justice for Same-Sex Married Couples: Reflections by a Tennessee Lawyer Who Helped Achieve National Marriage Equality

MAUREEN TRUAX HOLLAND*

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I. INTRODUCTION

Listening to Justice Kennedy read his majority decision summary in *Obergefell v. Hodges*[1] is an experience and feeling housed in that mind-space preserved for life-time achievements and life-changing moments. It is June 26, 2015, and sitting next to me in the courtroom of the Supreme Court of the United States ("Supreme Court" or "Court") is another attorney on the case,

* A civil rights, employment lawyer who focuses on problem-solving law, known as holistic law. She served as the first Senior Judicial Law Clerk to the Hon. Jon P. McCalla from 1992–95 having previously worked as a judicial law clerk to four Vermont courts (twelve judges). She owns Holland & Associates, PC. *See* http://www.hollandattorney.com/.

1. 135 S. Ct. 2584 (2015).

Douglas Hallward-Driemeier.[2] I am in the first row (middle left, facing the bench) of seats reserved for Supreme Court attorneys associated with the case. Partially in front of me and slightly left is another row with seats, closest is attorney Mary Bonauto.[3] Justice Kennedy with great eloquences begins and a hush and stillness takes over the courtroom. We already know a significant decision has been made and was to be read when retired Justice John Paul Stevens[4] entered the Courtroom a few minutes before the nine justices and took a seat in the dignitary section, a row of reserved seats on the right side of the courtroom facing the lawyers and the bench.[5] Excitement mixed with trepidation fills the air, and we are held at attention as Justice Kennedy reads for the majority.[6] At

2. Hallward-Driemeier was the oralist for Question 2—"Does the Fourteenth Amendment require a state [like Tennessee] to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?" *See* Tanco v. Haslam, 135 S. Ct. 1040 (2015) (mem.), *cert. granted sub nom. Obergefell*, 135 S. Ct. 2584 ("The cases are consolidated and petition for writ of certiorari . . . [are] granted limited to the following questions: 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?").

3. Bonauto was the oralist for Question 1—"Does the Fourteenth Amendment require a state [like Tennessee] to license a marriage between two people of the same sex?" *See Tanco*, 135 S. Ct. at 1040.

4. Justice Stevens retired on June 29, 2010. *Biographies of Current Justices of the Supreme Court*, SUP. CT. OF THE U.S., http://www.supremecourt.gov/about/biographies.aspx (last updated Oct. 31, 2015). Justice Stevens dissented along with Justices Blackmun, Brennan, and Marshall in *Bowers v. Hardwick*, a 5-4 decision holding that a Georgia statute which criminalized sodomy was constitutional and that there was no fundamental right to "engage in homosexual sodomy." 478 U.S. 186, 199 (1986). Justice Stevens was in the majority when *Bowers* was overruled in 2003, by another June 26 decision, *Lawrence v. Texas*. *See* Lawrence v. Texas, 539 U.S. 558 (2003). In *Lawrence* the U.S. Supreme Court held 6-3 that anti-sodomy laws were unconstitutional and consensual sexual conduct was a liberty interest protected by the due process clause of the Fourteenth Amendment. *Id.* at 558.

5. *The Supreme Court Building*, SUP. CT. OF THE U.S., http://www.supremecourt.gov/about/courtbuilding.aspx (last visited Oct. 31, 2015) ("The black chairs in front of [the red] benches are for the officers of the Court and visiting dignitaries.").

6. The Justice with the most seniority (most years as a Supreme Court Justice) in the majority reads from the bench in open court.

first those present are not sure the expanse of this decision, but soon it is evident the ruling is landmark. Justice Kennedy reads with deliberate clarity and a tempo reminiscent of poetry; lawyers begin to cry—quietly, but audibly—as the fight for equality has found acceptance and protection in the Constitution.

My experiences as one of the Tennessee attorneys on this monumental case joins other personal memories in that special memory-space for life-changing events: the sight and sounds of my children when they entered my life; my first trip to Paris when I walked out of the subway station to the iconic Eiffel Tower; standing on the front steps of my first house viewing the sunset over the small lake; and hearing my wife say all five of my names during our wedding vows on a boat in Lake Champlain.[7] Thereto are professional accomplishments carefully preserved in my memory: walking across the stage to receive my law school diploma;[8] my work as Chair of the Labor & Employment Law Section of the Memphis Bar Association and President of the local chapter of the Federal Bar Association; being interviewed for numerous publications including the American Bar Association Journal[9] about practicing law in a problem-solving style known as holistic law;[10] and on a lighter note, being the focus of the center article in the Memphis Health and Fitness magazine sporting my tattoo of the scales of justice (a proud moment given my then 51 years of age).[11]

These professional events are now a distant second to what has become my life over the past two years. Now at the forefront

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7. My full name is Maureen Adonica Snowdy Truax Holland and all five names appear on my law licenses and my U.S. Supreme Court Admission Certificate.

8. Juris Doctor, Vermont Law School, *cum laude*, 1989.

9. Jenny B. Davis, *What I Like About My Lawyer*, 89 A.B.A. J. 33, 35–36 (Jan. 2003) ("My first impression of [Holland] was that she was a very clear thinker . . . she was hearing what I was saying as well as listening. In doing that, she was able to direct my thinking along lines I hadn't considered. She showed me a different way to think about the case.").

10. Rebekah Hearn, *Holland Uses Holistic Law to Solve Problems Peacefully*, THE DAILY NEWS, May 8, 2008, http://www.memphisdailynews.com/editorial/Article.aspx?id=36981.

11. *Weekend Warriors*, *Maureen Truax Holland*, MEM. HEALTH AND FITNESS, Sept. 2013, at 32, http://issuu.com/memhealthandfitness/docs/hf_sept_2013-web.

of my professional accomplishments is my time working on the Supreme Court case that created opportunity and recognition for all same-sex couples married in the United States: the opportunity and constitutionally protected right for same-sex couples to marry in any of the fifty states and the requirement under the Fourteenth Amendment that each state recognize same-sex marriages for those couples previously married in other states. That case, *Obergefell v. Hodges*,[12] began in Tennessee as *Tanco v. Haslam*;[13] and that is the story I want to share.

II. BACKGROUND & *UNITED STATES V. WINDSOR*

> There is no difference between same- and opposite-sex couples with respect to this principle [that marriage is fundamental], yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable. It is demeaning to lock same-sex couples out of a central institution of the Nation's society, for they too may aspire to the transcendent purposes of marriage.[14]

On June 26, 2013, exactly two years prior to *Obergefell*, the United States Supreme Court issued its decision in *United States v. Windsor*.[15] The Court had taken two cases relating to the rights of same-sex married couples: *Windsor*, addressing the right to have their marriages recognized for purposes of federal benefits[16] and *Hollingsworth v. Perry*, addressing the right to have equal constitutional protection against state voter attacks seeking to

12. 135 S. Ct. 2584 (2015).

13. 7 F. Supp. 3d 759 (M.D. Tenn. 2014), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584.

14. *Obergefell*, 135 S. Ct. at 2590.

15. 133 S. Ct. 2675 (2013).

16. *Id.* By a 5-4 opinion, the Supreme Court held that the Petitioners did not have standing and did not reach the merits of the case as to whether or not Proposition 8, which amended the California Constitution and directed that the only valid marriages in California were between a man and a woman, violated of the Fourteenth Amendment equal protection clause. *Id.*

limit marriage to a man and a woman.[17] Finding a lack of standing in *Hollingsworth*, the Supreme Court never reached, and arguably sidestepped the issues of federal constitutional protections for marriage equality at the state level.[18] But with *Windsor*, the Court struck down the Defense of Marriage Act ("DOMA") section 3,[19] unlocking the vast majority of federal benefits for same-sex married couples.[20] Justice Kennedy, writing for the majority in *Windsor*, put a stop to the injurious withholding of federal benefits from same-sex married couples and their families.[21] Although voiding section 3 of DOMA, *Windsor* did not reach the constitutionality of section 2 of DOMA,[22] which statutorily allowed states such as Tennessee to refuse to recognize the marriages of same-sex couples performed in others states.[23] Justice Scalia, in his dissent in

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17. 133 S. Ct. 2652, 2659. *Hollingsworth* was a challenge to Proposition 8, a California State amendment providing "[o]nly marriage between a man and a woman is valid or recognized in California." *Id.* (quoting CAL. CONST. art. I, § 7.5).

18. *See id.* at 2668.

19. The Defense of Marriage Act ("DOMA") provided that:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

Pub. L. No. 104-199, § 3(a) (1996) (codified by 1 U.S.C. § 7 (1996)) (invalidated by *Windsor*, 133 S. Ct. 2675).

20. The Court in *Windsor* recognized "over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law." *Windsor*, 133 S. Ct. at 2683. Shortly following *Windsor*, the Internal Revenue Service ("IRS") announced that legally married same-sex couples would have recognition of their marriages. Rev. Rul. 2013-17, 2013-2 C.B. 201.

21.
> DOMA [section 3] instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statue is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.

Windsor, 133 S. Ct. at 2696.

22. Pub. L. No. 104-199, § 2(a) (1996) (codified by 28 U.S.C. § 1738C).

23. *Id.*

Windsor, envisioned with tangible disapproval that state laws "excluding same-sex marriage" would be the next battleground where the "state-law shoe [would] be dropped."[24] Justice Scalia went so far as to take sections from the majority opinion and re-write them in his dissent to demonstrate the ("inevitable") likelihood that state laws denying same-sex couples their marital status would fall in the same way federal laws had.[25] His disagreement aside, the fact that state-established DOMA-equivalents would be challenged was correct. As explained in our merit brief in *Tanco*, "The injustices effected by Tennessee's Non-Recognition Laws are similar to those inflicted by section 3 of DOMA, which this [Supreme] Court struck down in *United States v. Windsor*. The same outcome is appropriate here."[26] The *Obergefell* Court would later agree, especially with respect to the impact on children:

> Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stig-

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> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Id.

24. *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting).

25. *Id.* at 2709–10.

> ~~DOMA's~~ *This state law's* principal effect is to identify a subset of ~~state-sanctioned marriages~~ *constitutionally protected sexual relationships*, see *Lawrence*, and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And ~~DOMA~~ *this state law* contrives to deprive some couples ~~married under the laws of their State~~ *enjoying constitutionally protected sexual relationships*, but not other couples, of both rights and responsibilities.

Id. (alterations in original).

26. Brief for Petitioner at *17, *Obergefell*, 135 S. Ct. 2584 (2015) (No. 14-562), 2015 WL 860739.

> ma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.[27]

Windsor was the latest and perhaps sturdiest legal building block of Supreme Court cases of marriage as a fundamental right, deserving of equal access and protection for same-sex couples. The *Obergefell* Court relied on *Windsor* and a series of other vital cases[28] in reaching its "analysis [that] compels the conclusion that same-sex couples may exercise the [fundamental] right to marry."[29] These legal building block cases include *Loving*, *Zablocki*, *Turner*, *Griswold*, *Romer*, and *Lawrence*. In *Loving v. Virginia*[30] the Supreme Court "invalidated bans on interracial unions" and held that "marriage is 'one of the vital personal rights essential to the orderly pursuit of happiness by free men.'"[31] In *Zablocki v. Redhail*,[32] the Court held "the right to marry was burdened by a law prohibiting fathers who were behind on child support from

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27. Obergefell v. Hodges, 135 S. Ct. 2584, 2600–01 (2015) (citing *Windsor*, 133 S. Ct. at 2694–95).

28. In acknowledgement of the importance of *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), which was the first time any state highest court had ruled in favor of marriage equality for same-sex couples, the *Obergefell* Court quotes from the *Goodridge* decision:

> Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition."

Obergefell, 135 S. Ct. at 2599 (quoting *Goodridge*, 798 N.E.2d at 955). The author of the *Goodridge* opinion, Chief Justice Margaret Marshall, was in attendance at the oral argument in *Obergefell*, and the *Obergefell* oralist for question 1, Mary Bonato, argued the case for the *Goodridge* Plaintiffs.

29. *Obergefell*, 135 S. Ct. at 2589.

30. 388 U.S. 1 (1967).

31. *Obergefell*, 135 S. Ct. at 2598 (quoting *Loving*, 388 U.S. at 12).

32. 434 U.S. 374 (1978).

marrying."[33] In *Turner v. Safley*,[34] the Court found that regulations preventing prison inmates from marrying "abridged" the fundamental right to marry.[35] The Court held in *Griswold v. Connecticut*[36] that married couples had a Constitutional protection in the use of contraceptives.[37] *Romer v. Evans*[38] "invalidated" Colorado's Constitutional Amendment that stopped any political branch or subdivision in Colorado from "protecting persons against discrimination based on sexual orientation."[39] On June 26, 2003, Justice Kennedy again wrote for the majority in *Lawrence v. Texas*,[40] where the Court overruled its previous decision in *Bowers v. Harwick*,[41] and held that laws which made same-sex intimacy a crime "'demea[n] the lives of homosexual persons.'"[42]

Windsor, because of the wide-sweeping nature of the language striking down section 3 of DOMA, set in motion a rush to the Supreme Court to change history by challenging state non-recognition laws for same-sex marriages (mini-DOMAs); but which case would rise and would remain was an unanswered question. In the Sixth Circuit, a case in Michigan filed in district court in 2012 had been on hold pending the outcome of *Windsor*.[43] Like

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33. *Obergefell*, 135 S. Ct. at 2598 (citing *Zablocki*, 434 U.S. at 384).
34. 482 U.S 78 (1987).
35. *Obergefell*, 135 S. Ct. at 2584 (citing *Turner*, 482 U.S. at 95).
36. 381 U.S. 479 (1965).
37. *Obergefell*, 135 S. Ct. at 2589 (citing *Griswold*, 381 U.S. at 485). "[M]arriage is a right 'older than the Bill of Rights . . . a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.'" *Id.* at 2599 (quoting *Griswold*, 381 U.S. at 486).
38. 517 U.S. 620 (1996).
39. *Obergefell*, 135 S. Ct. at 2596 (citing *Romer*, 517 U.S. 620).
40. 539 U.S. 558 (2003).
41. 478 U.S. 186 (1986). The Court in *Bowers* had upheld a Georgia law criminalizing certain same-sex intimate acts. *Id.* at 196.
42. *Obergefell*, 135 S. Ct. at 2596 (quoting *Lawrence*, 539 U.S. at 575) (alteration in original).
43. DeBoer v. Snyder, 973 F. Supp. 2d 757, 760 (E.D. Mich. 2014), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584. *DeBoer* initially challenged Michigan's ban on adoption; but in September 2012 the case was amended adding a challenge to same-sex marriage bans. *Id.* Following *Windsor*, the case went to trial in February and March 2014 with a decision in favor of the Plaintiffs. *Id.* at 775. The State of Michigan appealed to the Sixth Circuit in March 2014. *See DeBoer*, 772 F.3d 388, *rev'd sub nom. Obergefell*, 135 S. Ct. 2584.

in the Michigan case, these State or mini DOMAs[44] became the focus around the country with lawyers and plaintiffs joining force to challenge state bans. By July 2013, Tennessee began to assemble a legal team.

III. MARRIAGE EQUALITY IN TENNESSEE

In July 2013, I began a discussion about *Windsor* with a friend of mine, Abby Rubenfeld, a civil rights and family law attorney in Nashville. She and an attorney friend of hers, Regina Lambert in Knoxville, supported by the National Center for Lesbian Rights ("NCLR")[45] had started to form a legal team to challenge marriage equality in Tennessee. Abby had worked with NCLR in the past, especially Shannon Minter.[46] Shannon, along with his support team of attorneys at NCLR, David Codell, Chris Stoll, Amy Whelan, Asaf Orr, and Jamie Huling Delaye, would play a vital role on our team. I would then join Abby and Regina supported by NCLR, and together we would assemble a team to challenge the State of Tennessee's Constitution[47] and statutes[48] that

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44. "State or mini DOMAs" refers to state constitutions and/or statutes limiting legally recognized marriages to those between a man and a woman, including that these laws did not allow for states to recognize same-sex marriages validly performed in another state that allowed for same-sex marriage.

45. NCLR, located in San Francisco, California, is a "national legal organization committed to advancing the civil and human rights of lesbian, gay, bisexual, and transgender people and their families through litigation, legislation, policy and public education." *Mission & History*, NAT'L CTR. FOR LESBIAN RIGHTS, http://www.nclrights.org/about-us/mission-history/ (last visited Nov. 1, 2015). Kate Kendell, Esq. is the Executive Director. *NCLR Staff, Board & Councils*, NAT'L CTR. FOR LESBIAN RIGHTS, http://www.nclrights.org/about-us/staff/ (last visited Nov. 1, 2015).

46. Shannon Price Minter, Esq. is the Legal Director of NCLR. *NCLR Staff, Board & Councils*, NAT'L CTR. FOR LESBIAN RIGHTS, http://www.nclrights.org/about-us/staff/ (last visited Nov. 1, 2015). He was also appointed in June 2015 by President Obama to the President's Commission on White House Fellowships. *President Obama Announces More Key Administration Posts*, THE WHITE HOUSE (June 8, 2015), https://www.whitehouse.gov/the-press-office/2015/06/08/president-obama-announces-more-key-administration-posts.

47. TENN. CONST. art. XI, § 18.

> The historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only

limited marriage to be between a man and a woman. Missing though was a Tennessee law firm[49] that could add resources and additional depth to the legal team. Soon William ("Bill") L. Harbison,[50] a Nashville attorney, along with three other members of his firm Sherrard & Roe, PLC would join our legal team and provide invaluable support. These three members are Scott Hickman, Phil Cramer, and John Farringer.

A. Finding Plaintiffs and Filing in District Court

The addition of plaintiffs to the case was more or less an organic process with potential plaintiffs contacting known LGBT advocacy groups and lawyers,[51] and members of these advocacy groups and lawyers asking friends or acquaintances. The lawyers prepared questionnaires for potential plaintiff couples, spoke with prospective clients, and began finding plaintiffs who would advance the personal side of litigation—couples married in other jurisdictions whose presence in Tennessee, and desire for recognition of their marriage, would resonate with Tennesseans and, hopefully, the Court. More than just joining a lawsuit, we were asking these potential plaintiffs to open their lives and their homes to the public

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> legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.

Id.

48. TENN. CODE ANN. § 36-3-113 (2014 & Supp. 2015) ("Marriage between one man and one woman only legally recognized marital contract.").

49. We had an interested attorney from a medium-sized Tennessee law firm who, due to opposition from the members of the firm worried about the attitude of their clients, would not allow the attorney to participate in the case. So we looked for another.

50. Bill's father, William J. Harbison, was a Tennessee Supreme Court Special Justice, then elected Justice and Chief Justice from 1966–1990.

51. I would be remiss if I did not mention the important grassroots work of Tennessee Equality Project, www.tnequalityproject.org, and the numerous Tennessee LGBT centers and organizations, including the Memphis Gay and Lesbian Community Center, www.mglcc.org.

through court filings and press interviews. In 2013 there were a lot of unknowns—how long would it take, whether we would have to go through a full trial, and whether there would be negative reaction that might be worrisome for a family with children. Within a few weeks we had our Plaintiffs: Dr. Valeria Tanco and Dr. Sophy Jesty; Sergeant First Class Ijpe DeKoe and Thomas Kostura; Kellie Miller and Vanessa Devillez;[52] and Johno Espejo and Matthew Mansell. Each was a "married same-sex couple[] who moved to Tennessee to purse their livelihoods and make new homes for themselves and their families after they legally married in another state."[53]

Tanco v. Haslam began the Tennessee fight for marriage equality, contesting the state's non-recognition of married same-sex couples. On October 21, 2013, seven Tennessee lawyers and the NCLR filed suit after weeks of drafts, redrafts, edits, conversations, strategy meetings and the like, on behalf of several same-sex married couples to challenge the Tennessee Constitutional Provision article XI, section 18 and section 36-3-113 of the Tennessee Code Annotated, both which limited marriage and marriage recognition to marriages between "one man and one woman."[54] Although we dreamed and talked as if our case would make it to the Supreme Court, we were well aware that the reality was far less likely. Each step in the Tennessee case was careful, thought out, and collaborative. At points in time I found myself holding together my small Memphis law firm and also working what felt like a second full-time job on *Tanco*.[55] Each of the Tennessee Attorneys and NCLR worked tirelessly to find consensus.

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52. By Stipulation of Dismissal, Plaintiffs Kellie Miller and Vanessa Devillez withdrew on March 10, 2014. *See* Stipulation of Dismissal of Plaintiffs Kellie Miller and Vanessa Devillez and Defendant Bill Gibbons at 1, Tanco v. Haslam, No. 3:13-cv-01159 (M.D. Tenn. Mar. 10, 2014), http://attorneygeneral.tn.gov/cases/tanco/tancostipulation-3-10-2014.pdf.

53. Complaint for Declaratory and Injunctive Relief at 2, Tanco v. Haslam, No. 3:13-cv-01159 (M.D. Tenn. Oct. 21, 2013), http://attorneygeneral.tn.gov/cases/tanco/tancocomplaint.pdf.

54. TENN. CONST. art. XI, § 18; TENN. CODE ANN. § 36-3-113 (2014 & Supp. 2015).

55. I could not have done this though without the ongoing support of my associate attorney and daughter Yvette G. Holland, a graduate of the University of Memphis Law School, who managed the office when I was away; and Tara

Together we would think through and find that consensus at each turn and with each strategic step, including the broader concepts to the finer details, like for each and every paragraph of the Complaint. We formed a bond and quickly become a cohesive legal team dedicated to the same purpose, and we had only just begun. The Complaint for Declaratory and Injunctive Relief asserted that same-sex married couples had protected interests under the U.S. Constitution's Fourteenth Amendment due process and equal protection clauses.[56] It further set out that prohibitions against the recognition of valid out-of-state marriages of same-sex couples were in direct contravention of "Tennessee's long-standing rule that 'a marriage valid where celebrated is valid everywhere.'"[57] This was not the same legal case some states' advocates had taken on behalf of same-sex couples trying to marry. This was a same-sex marriage *recognition* case. Undoubtedly, recognition of the fundamental right to marry would be an essential argument and a key component, but our primary focus was in having the State of Tennessee recognize the validity of marriages for same-sex couples who had married out-of-state, as the State has traditionally provided for "common law marriages entered into in another state and valid under the law of that state, even though Tennessee law does not provide for couples to enter into common law marriages within the state."[58] Suit was filed in Federal Court—the United States District Court for the Middle District of Tennessee, in Nashville, the capital of Tennessee.

> Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted

Brown, my paralegal and a current student at the University of Memphis Law School.

56. Complaint, *supra* note 53.

57. *Id.* at 1–2 (quoting Farnham v. Farnham, 323 S.W.3d 129, 134 (Tenn. Ct. App. 2009)).

58. *Id.* at 8 (quoting Shelby County v. Williams, 510 S.W.2d 73,74 (Tenn. 1974); *In re* Estate of Glover, 882 S.W.2d 789, 789–90 (Tenn. Ct. App. 1994); Lightsey v. Lightsey, 407 S.W.2d 684, 690 (Tenn. Ct. App. 1966)).

> for almost a year. When he returned, the two settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.[59]

As soon as the case was filed, our journey in the press also began. Because I was the only attorney in the Western part of Tennessee, and given that one of our Plaintiff couples lived in Memphis, part of my role involved attendance at and preparation for press interviews of the local couple. My press liaison work[60] was extensive[61] as it became usual for each press interview to take approximately an hour and a half. On one of these press interviews I had the pleasure of meeting a famous civil rights photographer, Richard Copley.[62] Copley, known for his "I am a Man"[63]

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59. Obergefell v. Hodges, 135 S. Ct. 2584, 2595 (2015).

60. NCLR coordinated the press interviews for the case with the guidance of NCLR's Erik Olvera, Director of Communications, and Alberto R. Lammers, Assistant Director of Communications.

61. Ijpe Dekoe and Thom Kostura were in multiple news articles over the course of the suit. *See*, *e.g.*, Bianca Phillips, *Seeking Recognition*, MEM. FLYER (Oct. 31, 2013), http://www.memphisflyer.com/memphis/seeking-recognition/Content?oid=3537303; David Waters, *David Waters: Memphis Gay Couple Married in U.S., Not Tennessee*, THE COM. APPEAL (May 13, 2014), http://www.commercialappeal.com/news/david-waters-memphis-gay-couple-married-in-us-not-tennessee-ep-457570284-328960231.html; Katie Fretland, *Memphis Couple, Attorney Take Marriage Equality Case to U.S. Supreme Court*, THE COM. APPEAL (Nov. 29, 2014), http://www.commercialappeal.com/news/local-news/memphis-couple-attorney-take-marriage-equality-case-to-us-supreme-court_07251752.

62. As a first-time paid "rookie photographer," Copley found himself in the midst of civil rights history taking photos at Mason Temple in Memphis, Tennessee, where the Rev. Martin Luther King, Jr. would rally sanitation workers in his "Mountaintop" speech. Christina Caron, *MLK and Me: How a Rookie Photographer Captured History*, NBC NEWS (Apr. 4, 2013 5:19 PM), http://photoblog.nbcnews.com/_news/2013/04/04/17603354-mlk-and-me-how-rookie-photographer-captured-history?lite.

sanitation strike photos in Memphis, Tennessee, in 1968, was the freelance photographer for Thom and Ijpe's NBC interview in Memphis.[64] We discussed his excitement at memorializing these momentous civil rights moments, from photos of Rev. Martin Luther King, Jr. to video of Thom and Ijpe on the precipice of helping attain marriage equality. He adjusted his video camera so I could see the interview, both standing behind the camera looking at Thom and Ijpe, and looking directly and literally into the lens of history.

Knowing that the case might take a year or more to work its way to a trial, and knowing that our Plaintiffs were suffering harm each day the case was delayed, we moved the legal process into high gear by shifting focus to a Motion for Preliminary Injunction to address the "severe and irreparable constitutional and practical harms on Plaintiffs and their children,"[65] including those mentioned in *Windsor*, "dignity" harms that "demean[] the couple[s]" and "humiliates . . . children now being raised by same-sex couples."[66] At the time of filing, Knoxville Plaintiffs Dr. Valeria ("Val") Tanco and Dr. Sophy Jesty were expecting their first child in the Spring of 2014, and part of the request was that both parents would be legally recognized and that both parents would be able to make medical decisions for their child—a benefit denied to them at the time, as only the birth mother would have recognition as the legal parent.[67] The Motion for Preliminary Injunction spoke to many other denied benefits, including, health care and coverage, drivers' licenses recognizing married name changes, ownership of marital property, allowed inheritance for married couples without

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63. Louis Gogans, "*I Am a Man" Exhibit Brings People Back to 1968*, MEM. FLYER (July 25, 2014), http://www.memphisflyer.com/CallingtheBluff/archives/2014/07/25/i-am-a-man-exhibit-brings-people-back-to-1968.

64. *See* Photo of NBC interview team: Ron, David, & Richard Copley, with Ijpe Dekoe, Thomas Kostura, and Maureen T. Holland. @MaureenTHolland, TWITTER (Apr. 8, 2015, 5:17 PM), https://twitter.com/maureentholland/status/585959649452630016.

65. Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction at 2, Tanco v. Haslam, 3:13-cv-01159 (M.D. Tenn., Nov. 19, 2013), http://attorneygeneral.tn.gov/cases/tanco/tancomemoinsupport.pdf.

66. *Id.* (quoting United States v. Windsor, 133 S. Ct. 2675, 2694 (2013)).

67. *Id.* at 8.

taxation, status as second-class citizens, and the denial of dignity, stability, and respect for their marriages.[68]

To prevail, the Plaintiffs had to meet the standard for a Preliminary Injunction[69]—and did. The *Obergefell* Court would later acknowledge the importance of marital benefits for same-sex couples and their families.

> Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[70]

Judge Trauger from the Middle District of Tennessee agreed with the Plaintiffs, issuing a Preliminary Injunction on March 14, 2014, with a Memorandum decision examining each of the arguments by the parties and setting forth her analysis of the law.[71]

In granting the relief to Plaintiffs, Judge Trauger foretold a hopeful prospect:

> At some point in the future, likely with the benefit of additional precedent from circuit courts and, perhaps, the Supreme Court, the court will be asked to make a final ruling on the plaintiffs' claims. At this

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68. *See id.* at 4–5.

69. The Motion for Preliminary Injunction explained in detail how Plaintiffs met each of the four factors for granting a Preliminary Injunction: "(1) whether Plaintiffs are likely to succeed on the merits, (2) whether they are likely to suffer irreparable harm in the absence of preliminary relief, (3) whether the balance of equities tips in their favor, and (4) whether an injunction is in the public interest." *Id.* (citing United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth., 163 F.3d 341, 348 (6th Cir. 1998)).

70. Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015) (citing *Windsor*, 133 S. Ct. at 2694).

71. Tanco v. Haslam, 7 F. Supp. 3d 759 (M.D. Tenn. 2014), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584.

> point, all signs indicate that, in the eyes of the United States Constitution, the plaintiffs' marriages will be placed on an equal footing with those of heterosexual couples and that proscriptions against same-sex marriage will soon become a footnote in the annals of American history.[72]

Despite the State of Tennessee's objection, the marriages of these Plaintiff couples were recognized pursuant to court order from March 14, 2014, until April 25, 2014, when the Sixth Circuit Court of Appeals issued a stay pending an expedited consideration on the merits.[73] For these weeks, and for the first time in Tennessee history, the Plaintiffs were married; hope glimmered in small celebrations. During these critical days, Val gave birth to a baby girl, Emilia, and Sophy and Val's names were both placed on their newborn daughter's birth certificate.[74] Mother and Mother had parental rights, but what would the Sixth Circuit decide?

B. The Sixth Circuit

As the excitement around the case grew, so did requests for attorneys to explain the process and for the Plaintiffs and their families to be more visible as the uncertainty at the Sixth Circuit loomed.[75] We hastened to get our brief filed at the Sixth Circuit, and although ours was not the first case at the Sixth Circuit, the Court of Appeals consolidated the pending cases from Ohio,[76]

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72. *Id*. at 19.

73. Tanco v. Haslam, No. 14-5297, 2014 U.S. App. LEXIS 22051 (6th Cir. Apr. 25, 2014) (per curiam).

74. Emilia was born March 27 during the period where Sophy and Val's marriage was recognized by Judge Trauger's Order. *See* Joan Biskupic, *Valeria Tanco and Sophy Jesty, Tennessee Lesbian Moms, Become a Legal First for Gay Marriage*, HUFFINGTON POST (Apr. 9, 2014, 7:00 AM), http://www.huffington post.com/2014/04/09/tennessee-lesbian-moms-case_n_5116823.html.

75. *See*, *e.g.*, James Grady, *Legal Limbo: Inside Tennessee's Marriage Equality Lawsuit*, OUT AND ABOUT NASHVILLE (May 27, 2014), https://www. outandaboutnashville.com/story/legal-limbo-inside-tennessee-s-marriage.

76. *Obergefell v. Wymyslo* was filed in July 2013 by two men who had married in Maryland and sought to have the state of Ohio recognize their marriage on death certificates. 962 F. Supp. 2d 968 (S.D. Ohio 2013), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584. The Southern District of Ohio granted a temporary re-

Michigan,[77] Kentucky,[78] and Tennessee for oral argument on August 6, 2014.[79] On July 21, 2014, the Sixth Circuit announced that

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straining order to prevent Ohio from recording any death certificate in connection to the couple unless it recorded the deceased as being married at the time of death (one was suffering a terminal illness). *Id.* at 997–98. This case was later amended to add additional plaintiffs including a funeral director. *Id.* Following a ruling for Plaintiffs in December 2013, this case was appealed and consolidated by the Sixth Circuit with *Henry v. Hodges*, a suit brought by four couples and the adopted child of one of the couples seeking to be listed on their children's birth certificates. *See DeBoer*, 772 F.3d at 398–99, *rev'd sub nom. Obergefell*, 135 S. Ct. 2584. These cases were advocated by private lawyers, the American Civil Liberties Union ("ACLU") of Ohio, and Lambda Legal. It was consolidated with *Tanco v. Haslam* by the Sixth Circuit and later by the Supreme Court. *Id.*; *see Obergefell*, 135 S. Ct. 2584; Joint Petition for a Writ of Certiorari, *Obergefell*, 135 S. Ct. 2584 (No. 14-556), 2014 WL 5907570 (Ohio).

77. *DeBoer v. Snyder* was filed in January 2012 by a lesbian couple, on behalf of themselves and their three children, to challenge Michigan's ban against them jointly adopting their children, and by amendment in September 2012 to also challenge Michigan's ban against same-sex couples marrying. 973 F. Supp. 2d 757 (E.D. Mich. 2014), *rev'd* 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584. *DeBoer* was put on hold pending the rulings in *Windsor* and *Hollingsworth*. *Id.* at 760. Following a trial in February and March 2014 with a ruling in favor of Plaintiffs, the case was appealed to the Sixth Circuit in March 2014 and became the lead case at the Sixth Circuit as it was the first case appealed at that level. This case was consolidated with *Tanco* by the Sixth Circuit and later by the Supreme Court. *See DeBoer*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584. Advocates for the Plaintiffs included private lawyers, the ACLU of Michigan ,and Gay & Lesbian Advocates and Defenders ("GLAD"). *See* Petition for Writ of Certiorari, *Obergefell*, 135 S. Ct. 2584 (No. 14-571), 2014 WL 6449712 (Michigan). *Official DeBoer v Snyder Legal Case Website*, NAT'L MARRIAGE CHALLENGE, http://nationalmarriagechallenge.com/ (last visited Nov. 1, 2015).

78. *Bourke v. Beshear* was filed in July 2013 by four same-sex couple who were legally married in other jurisdictions and who sought marriage recognition in Kentucky. 996 F. Supp. 2d 542 (WD. Ky. 2014). The trial court issued a summary judgment decision for plaintiffs in February 2014. *See* Petition for a Writ of Certiorari at *9, *Obergefell*, 135 S. Ct. 2584 (No. 14-574), 2014 WL 8731960 (Kentucky). Following the decision, two same-sex couples seeking to marry intervened and the trial court entered an order granting the intervening plaintiffs summary judgment. *Id.* This case was appealed to the Sixth Circuit and consolidated with *Tanco* by the Sixth Circuit and later by the Supreme Court. *See DeBoer*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584. Advocates included private attorneys and the ACLU of Kentucky. *See* Petition for a Writ of Certiorari, *supra* note 78.

Judges Sutton, Cook, and Daughtrey would be on the panel.[80] A public notice was issued regarding media at the oral argument.[81] We had no idea whether consolidation would mean one or multiple decisions.

On August 6, 2014, nearly all of the Plaintiffs from each of the consolidated cases and attorneys for both sides entered the Sixth Circuit Court of Appeals. By Order of the Sixth Circuit we were to remain in the courtroom throughout the arguments, or be prevented from reentry. No exceptions. As was our ongoing course of action, the Tennessee attorneys came to consensus that Bill Harbison would argue for us. He had experience as an appellate attorney and an affable style of persuasion that would provide confidence and clarity to our arguments. Extra chairs lined the courtroom. Just before the panel of Judges entered, as many members of the press that could be compressed into the remaining seats were allowed into the room. Two over-flow courtrooms had been set up with live audio streaming of the oral arguments. Sitting as still as we could manage, we listened and watched the panel challenge each other through questions posed to the oralists.[82]

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79. Steve Delchin, *Sixth Circuit Gearing Up to Hear Same-Sex Marriage Appeals on August 6, 2014*, SQUIRE PATTON BOGGS: SIXTH CIR. APP. BLOG (July 21, 2014), http://www.sixthcircuitappellateblog.com/news-and-analysis/sixth-circuit-gearing-up-to-hear-same-sex-marriage-appeals-on-august-6-2014/.

80. *Id.*

81. *Id.*; *see also* Steve Delchin, *Sixth Circuit Same-Sex Marriage Appeals Generating National Interest; Media Turning to Sixth Circuit Appellate Blog for Insight and Analysis*, SQUIRE PATTON BOGGS: SIXTH CIR. APP. BLOG (August 5, 2014), http://www.sixthcircuitappellateblog.com/news-and-analysis/sixth-circuit-same-sex-marriage-appeals-generating-national-interest-media-turning-to-sixth-circuit-appellate-blog-for-insight-and-analysis/.

82. *See* Adam Polaski, *Listen: Oral Arguments at the 6th Circuit Court of Appeals*, FREEDOM TO MARRY (Aug. 6, 2014 2:00 PM), http://www.freedomtomarry.org/blog/entry/listen-oral-arguments-at-the-6th-circuit-court-of-appeals (making publicly available the oral arguments given to the three-judge panel at the United States Court of Appeals for the Sixth Circuit); *see also* *Courtroom Audio*, U.S. CT. OF APPEALS FOR THE SIXTH CIR., http://www.ca6.uscourts.gov/internet/court_audio/aud2.php?link=http://www.ca6.uscourts.gov/internet/court_audio/audio/08-06-2014%20-%20Wednesday/14-3057%2014%203464%20Obergefell%20and%20Henry%20v%20Himes.mp3&name=14-3057%2014%203464%20Obergefell%20and%20Henry%20v%20Himes (last visited Nov. 1, 2015).

National attention had grown exponentially. When oral argument was over, we ventured outside where the press was waiting for interviews and photos. I had the good fortune of making one of the main photos.[83] Outside the courthouse in downtown Cincinnati, on a paid advertisement flagpole located nearest one of the entryways to the courthouse, was a rainbow or gay pride flag advertising Kroger. I had noticed it the day prior when I was mapping the route from my hotel to the courthouse. It was less an omen and more a sign of the times with cities and counties like Cincinnati providing anti-LGBT discrimination ordinances, despite the opposition from the State of Ohio in recognizing or allowing same-sex marriages.[84] Such contradictions of acceptance and protections were true of Tennessee with Memphis,[85] Shelby County,[86] and Knoxville[87] having anti-LGBT discrimination ordinances or

83. *See* Photo, *Tennessee:* Tanco v. Haslam, FREEDOM TO MARRY (Aug. 6, 2014, 2:00 PM), http://www.freedomtomarry.org/blog/entry/listen-oral-arguments-at-the-6th-circuit-court-of-appeals.

84. CINCINNATI, OHIO, CODE § 914-1-D1 (1992) ("'Discriminate' shall mean to unlawfully segregate, separate or treat individuals differently based on race, gender, age, color, religion, disability status, marital status, sexual orientation or transgender status, or ethnic, national or Appalachian regional origin").

85. MEMPHIS, TENN., CODE, § 3-8-6 (2012) ("There shall be no discrimination in city employment of personnel because of religion, race, sex, creed, political affiliation, national origin, ethnicity, age, disability, sexual orientation, gender identity or other non-merit factors, nor shall there be any discrimination in the promotion or demotion of city employees because of religion, race, sex, creed, political affiliation, national origin, ethnicity, age, disability, sexual orientation, gender identity or other non-merit factors. Gender identity means the actual or perceived gender-related identity, appearance, or mannerisms, or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth.").

86. Jerry Jones, *Shelby County Passes Non-discrimination Resolution*, OUT AND ABOUT NASHVILLE (June 2, 2009), http://www.outandaboutnashville.com/story/shelby-county-passes-non-discrimination#.VfNy0Z3BwXA.

87. KNOXVILLE, TENN., CODE § 15-57 (1962) ("It shall be an unlawful employment practice for the city to discriminate against a qualified individual on the basis of non-merit factors such as race, ethnic origin, color, national origin, gender, gender identity, genetic information, sexual orientation, age except as otherwise specifically provided in this part, religion, creed, or disability in admission to, access to, or operations of its programs, services, or activities. Discrimination against any qualified individual in recruitment, examination,

resolutions while the State of Tennessee contested the recognition of same-sex marriages.

> Yet by virtue of their exclusion from that institution [of marriage], same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives.[88]

During the argument at the Sixth Circuit Court of Appeals, it became apparent from the questions by Judge Sutton and Judge Cook that state's rights was the rubric they were following. Judge Daughtrey unabashedly challenged the attorneys for the states to explain how the state's justification to prevent recognition of same-sex married couples or allow their marriage stopped or interfered with the goal of the states to support what the state had called "responsible procreation" and what had become known as the "irresponsible procreation theory" whereby opposite sex couples have "unintended offspring."[89]

August 2014 melted away, September breezed by, October fell to the wayside, and still the Sixth Circuit had not issued any decision on the pending marriage equality cases. Tension, speculation, and anxiety ran high as the Supreme Court declined to accept yet another writ. Justice Ginsburg spoke at the University of Minnesota Law School and responded to a question about whether the Court would take a case on same-sex marriage by saying:

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appointment, training, promotion, demotion, retention, discipline, or any other employment practices because of non-merit factors shall be prohibited.").

88. Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015).

89. *See* DeBoer v. Snyder, 772 F.3d 388, 422 (6th Cir. 2014) (Daughtrey, J. dissenting) ("[T]he defendants in each of these cases . . . spent virtually their entire oral arguments professing what has come to be known as the 'irresponsible procreation' theory: that limiting marriage and its benefits to opposite-sex couples is rational, even necessary, to provide for 'unintended offspring' by channeling their biological procreators into the bonds of matrimony."), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584; *see also* Joint Petition for a Writ of Certiorari, *supra* note 76.

> There is a case presenting the question still pending before the Court of Appeals for the Sixth Circuit. If that court should disagree with the others, there will be greater cause for the Supreme Court to take up the question. But when all of the Courts of Appeals are in agreement, there's no similarly urgent need to decide the matter at once. It remains to be seen what the Sixth Circuit will rule and when it will rule. Sooner or later, yes, the question will come to the Supreme Court.[90]

The answer arrived on November 6, 2014, when the Sixth Circuit issued its consolidated decision, reversing the rulings by the trial courts and declaring that the states were justified in denying marriage recognition to same-sex couples and in limiting marriage to a man and a woman.[91] A gauntlet was thrown. Not knowing the priorities of the Supreme Court, each Plaintiff group filed a separate writ of certiorari.[92] We filed two hours after Ohio, with Kentucky and Michigan filing third and fourth.

C. Supreme Court

For filing the writ, we wanted additional Supreme Court depth and knowledge, so one of our team members at NCLR reached out to his law school colleague Douglas Hallward-Driemeier at Ropes & Gray, LLP, in its Washington, D.C., office to join the team. Doug, along with his team, Christopher Thomas Brown, Paul Kellogg, Samira Omerovic, Joshua Goldstein, John Dey, and Emerson A. Siegle, quickly accepted our offer of invitation. He had argued fourteen cases at the Supreme Court and had extensive appellate experience. We also began the complex task of not only working on our own writ of certiorari, but also reaching

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90. Justice Ruth Bader Ginsburg & Robert A. Stein, *The Stein Lecture: A Conversation Between Justice Ruth Bader Ginsburg and Professor Robert A. Stein*, 99 MINN. L. REV. 1, 18 (2014).

91. *DeBoer*, 772 F.3d 388.

92. Petition for Writ of Certiorari, *supra* note 76; Petition for Writ of Certiorari, *Obergefell*, 135 S. Ct. 2584 (No. 14-562), 2014 WL 6334259 (Tennessee); Petition for Writ of Certiorari, *supra* note 77; Petition for Writ of Certiorari, *supra* note 78.

out to the other teams as we loosely began a coordinated effort to reach the Supreme Court.

By January all teams' writs of certiorari were ready for consideration at the Supreme Court Justices' weekly conferences. The Justices would meet on January 9, 2015, and possibly January 16, 2015, to make a decision as to whether to take one, some, or all of the pending cases.[93] On January 16, 2015, the Supreme Court accepted each of the writs, consolidating the cases using the Ohio name of *Obergefell* as they had filed their writ first.[94] Case names are like going to dinner—she who arrives first gets her name on the reservation. As set forth *infra*, two questions that had to be answered by the parties: (1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? Or, what I refer to as, "Can we get married?" and (2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state? Or, what I refer to as, "Are we still married?"

According to the Supreme Court, "approximately 10,000 petitions for a writ of certiorari [are filed] each year" and the

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93. Lyle Denniston, *Same-sex Marriage Cases Ready, Scheduled (UPDATED)*, SCOTUSBLOG (Dec. 23, 2014, 3:43 PM), http://www.scotusblog.com/2014/12/same-sex-marriage-cases-ready-scheduled/#more-223139.

94. *See* Tanco v. Haslam, SCOTUSBLOG (Jan. 16, 2015), http://www.scotusblog.com/case-files/cases/tanco-v-haslam/ ("Petition GRANTED The petitions for writs of certiorari in No. 14-556, No. 14-571, and No. 14-574 are granted. The cases are consolidated and the petitions for writs of certiorari are granted limited to the following questions: 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state? A total of ninety minutes is allotted for oral argument on Question 1. A total of one hour is allotted for oral argument on Question 2. The parties are limited to filing briefs on the merits and presenting oral argument on the questions presented in their respective petitions. The briefs of petitioners are to be filed on or before 2 p.m., Friday, February 27, 2015. The briefs of respondents are to be filed on or before 2 p.m., Friday, March 27, 2015. The reply briefs are to be filed on or before 2 p.m., Friday, April 17, 2015. VIDED.").

"Court grants and hears oral argument in about 75–80."[95] That would mean that less than approximately eight percent of writs are granted. The Supreme Court took all of the Sixth Circuit cases, and we were elated.

1. Preparing for the Supreme Court

The expedited briefing schedule[96] meant our team would work late many nights to meet the deadlines. We also had many more meetings, conferences, and emails as we coordinated with the other teams through the process of writing and submitting the briefs. Many edits, tremendous work on the appendix, and continued press conferences filled my days. Not only did we have to learn a process about which many of us were less familiar, but we had to coordinate that process with legal teams and Plaintiffs whom we did not know very well. This substantially increased our time on the case as we were engaged in preparing briefs and a joint appendix with many emails, phone conferences, joint meetings, and subgroup conferences. There are perhaps few things as motivating and encouraging as a common purpose. Each of the teams and all those involved truly wanted to change the landscape and stop the destructive force of denial of marriage and denial of recognition for same-sex married couples and their families. This common purpose created a momentum and a desire to work later, harder and with an eye toward collaboration.

> Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclu-

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95. *Frequently Asked Questions (FAQ)*, SUP. CT. OF THE U.S., http://www.supremecourt.gov/faq.aspx#faqgi9 (last visited Nov. 1, 2015).

96. An expedited briefing schedule means that the parties have a shorter than usual time to file their briefs to have the briefs filed in time for oral argument. *See*, *e.g.*, S. CT. R. 25; *Supreme Court Procedure*, SCOTUSBLOG, http://www.scotusblog.com/reference/educational-resources/supreme-court-procedure/ (last visited Nov. 1, 2015).

> sion that soon demeans or stigmatizes those whose own liberty is then denied.[97]

Choosing of oralists was an especially challenging proposition. There were approximately forty-eight lawyers all capable of arguing, but only two positions. We had hoped that the Court might consider four oralists given that there were four cases, but that was not to be an available solution. So after frequent and copious conversations a plan emerged—we would choose our oralists by an organic process of moots or practice arguments, and discussion. Although it sounds fairly simple, the process was not. In the end though, two were chosen: Doug Hallward-Driemeier and Mary Bonauto.[98] They were a perfect choice of diversity and complimentary arguing styles. They were, in the words of Shannon Minter, our "dream team."[99] Doug had argued fourteen cases before the Court, and would argue another prior to the *Obergefell* oral argument, making *Obergefell* his sweet sixteenth argument. Mary, although not having argued at the Supreme Court before had argued at the appellate level in other forums, including the landmark case of *Goodridge*.[100]

National press coverage was at a new level with national organizations interviewing Plaintiffs[101] and pundits predicting the

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97. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

98. Hallward-Driemeier is a partner at Ropes & Gray, LLP. *Douglas Hallward-Driemeier*, ROPES & GRAY, https://www.ropesgray.com/douglas hallward-driemeier/ (last visited Nov. 1, 2015). Bonauto is the Civil Rights Project Director at GLAD. *Mary L. Bonauto*, GAY & LESBIAN ADVOC. & DEFENDERS, https://www.glad.org/about/staff/mary-bonauto (last visited Nov. 1, 2015).

99. Ariane de Vogue, *Meet the Lawyers Who Will Argue the Gay Marriage Case,* CNN (Apr. 27, 2015, 4:22 PM), http://www.cnn.com/2015/04/24/politics/supreme-court-gay-marriage-lawyers/.

100. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); *see also supra* note 28.

101. *See, e.g.*, Samantha Masunaga, *From Traffic Ticket to Supreme Court: A Gay Couple's Legal Odyssey*, L.A. TIMES (Jan. 18, 2015, 9:00 AM), http://www.latimes.com/nation/la-na-same-sex-marriage-plaintiffs-20150117-story.html; Erik Oritz, *Supreme Court Gay Marriage Debate Puts Ohio Man Jim Obergefell in Center*, NBC NEWS (Apr. 26, 2015, 6:15 PM), http://www.nbcnews.com/politics/supreme-court/supreme-courts-gay-marriage-debate-puts-ohio-man-jim-obergefell-n347836.

outcome of the cases. Surpassing *Windsor*, which had ninety-six amicus briefs filed, *Obergefell* would have 147 by the time of oral argument, with 77 briefs in support of plaintiffs and sixty-six in support of respondents.[102] Timelines approached quickly and soon the case was briefed and ready for argument. To prepare, a series of moots were held. We held a moot for the Tennessee team in Nashville, and then we traveled to Washington, D.C., for moots at Georgetown University Law Center and Howard University School of Law.[103] Both Georgetown and Howard have moot programs where the school brings together the legal teams (one side of each argument, which for our case meant a moot for the Plaintiffs) and a panel of faculty and experienced Supreme Court oralists or "advocates." Students are allowed to attend but precautions are taken to ensure the confidentiality of the process.[104]

> Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundament right to marry.[105]

2. Oral Argument

The days were long leading to oral argument. On the day of the argument, I left my in-laws' condo with my wife, arriving at a hotel near the Court to meet the Attorneys and Plaintiffs. Together we took a bus to Court, found my place in line, which had

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102. *See* Ruthann Robson, *Guide to the Amicus Brief in* Obergefell v. Hodges: *The Same-Sex Marriage Cases*, CONST. L. PROFESSOR BLOG (Apr. 16, 2015), http://lawprofessors.typepad.com/conlaw/2015/04/guide-to-amicus-briefs-in-obergefell-v-hodges-the-same-sex-marriage-cases.html.

103. *See The Marriage Equality Supreme Court Moot*, Part 1-10, HOW. U. SCH. OF L. (Apr. 22, 2015), http://www.law.howard.edu/1904.

104. *See Moot Court Program*, SUP. CT. INSTITUTE: GEO. U. L. CTR., https://www.law.georgetown.edu/academics/centers-institutes/supreme-court-institute/moot-court-program/index.cfm (last visited Nov. 1, 2015).

105. Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

been preserved by a line-stander,[106] and slowly got through security inside the courtroom. As we had limited tickets, many of the lawyers like myself had given up their seat tickets to ensure that the Plaintiffs would all get an opportunity to sit through oral argument Question 1 or 2. Sitting to my immediate left was the attorney oralist for the Plaintiff in *Lawrence*, and a few seats to my right was the attorney oralist for the Plaintiff in *Windsor*. The courtroom was filled with lawyers, law professors, Supreme Court advocates, press, Plaintiffs, guests, and members of the public. The Marshal announced the entry of the Justices into the courtroom and soon oral argument began. While Mary and Doug fielded questions from the Justices and advocated for equality,[107] outside was a rally.[108] During the argument there would be an outburst and the man yelling "abomination" and "hell" would be carried out by at least 5 courtroom officers.[109] This outburst did not disturb the Solicitor General who paused and nearly walked away from the podium during the commotion, but decided better and began his argument. This case was the first time the U.S. Government had taken a position in favor of same-sex marriage equality.[110] The Solicitor General argued fifteen of the allocated ninety minutes dedicated to "whether the Fourteenth Amendment requires

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106. Beginning the October Term 2015, line-standers are no longer allowed for attorneys in the bar line, "only Bar members who actually intend to attend argument will be allowed in the line for the Bar section. *See* Lyle Denison, *No Subs For Lawyers in Court Lines*, SCOTUSBLOG (Oct. 5, 2015, 3:57 PM), http://www.scotusblog.com/2015/10/no-subs-for-lawyers-in-court-lines/.

107. When recounting this day Ijpe would remark that hearing Doug share each of the Plaintiff couples' stories "chilled" him. *See infra* note 109.

108. My wife, Taylor Williams, older daughter Margot Chapman, son-in-law Clay Chapman, daughter Yvette Holland, and her boyfriend Trey Kirk waited outside with megaphones blaring. My best friend from high school, Kasey Wilson, was outside taking photos for a video and photo album she would create for me.

109. Bianca Phillips, *Q&A with Memphis Couple in Supreme Court Same-Sex Marriage Case,* MEM. FLYER (June 28, 2015, 4:43 PM), http://www.memphisflyer.com/MemphisGaydar/archives/2015/04/28/qanda-with-memphis-couple-in-supreme-court-same-sex-marriage-case.

110. Brief for the United States as Amicus Curiae Supporting Petitioners at *2, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1004710.

states to license a marriage between two people of the same sex?"[111]

Leaving the Courtroom and walking down the stairs of the Supreme Court felt overwhelming and exciting at once. Photos abound of this day.[112] Now the real wait began.

VI. DECISION

We knew the Court would likely rule in June and most predictably by the end of the term. There was a lot of speculation that the decision would come out on June 29, but not being much of a gambler, I opted to arrive early, on the evening of June 25th and stay in Washington, D.C., through June 29th or 30th. By June 25, 2015, word reached us that a decision would be issued on a day other than Monday or Thursday, the days generally for announcements in June. It seemed all too coincidental that June 26 was the day *Lawrence* and *Windsor* decisions had been issued.[113] Would that hold true for this case?

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for

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111. Oral Argument at 27:58, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), http://www.supremecourt.gov/oral_arguments/audio/2014/14-556-q1.

112. Ijpe Dekoe, *Gay-Marriage Plaintiff: Our Names Are Now Part of the History of Marriage Equality*, TIME MAG. (May 1, 2015), http://time.com/author/ijpe-dekoe/.

113. *See* cases cited *supra* notes 4, 15.

> equal dignity in the eyes of the law. The Constitution grants them that right.[114]

So early on the morning of June 26, 2015, I again left my in-laws' condo in Washington, D.C., with my wife and made my way into the courtroom. This time I'm sitting next to Doug. Over the sounds of lawyers crying for joy, Kennedy continues to read:[115]

> The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.[116]

Doug is holding my hand firmly, as one would an armchair and I place my hand over his. We won. . . . *It is so ordered*.[117]

114. *Obergefell*, 135 S. Ct. at 2608.
115. Opinion Announcement, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574), https://www.oyez.org/cases/2014/14-556.
116. *Obergefell*, 135 S. Ct. at 2607–08.
117. *Id.* at 2608.

No Safe Harbors: Examining the Shift From Voluntary Treatment Options to Criminalization of Maternal Drug Use in Tennessee

SARAH E. SMITH*

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I. INTRODUCTION

Tennessee police arrested Mallory Loyola for assault in July 2014 based on Tennessee's recently amended assault statute for

harm caused to her child based on drug use during her pregnancy.[1] Effective July 1, 2014, Tennessee Code Annotated ("T.C.A.") section 39-13-107 was amended:

> [A woman can be prosecuted] for assault under § 39-13-101 for the illegal use of a narcotic drug, as defined in § 39-17-402,[2] while pregnant, if her child is born addicted to or harmed by the narcotic drug and the addiction or harm is a result of her illegal use of a narcotic drug taken while pregnant.[3]

Days after the amendment passed, Mallory Loyola gave birth to a baby girl, and the child tested positive for methamphetamine.[4] Police subsequently arrested Mallory Loyola in Monroe County, Tennessee on assault charges.[5] Loyola pled guilty to a crime that she did not commit as the statute covers only "narcotic drug[s]," and the statutory language does not include methamphet-

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1. *See* TENN. CODE ANN. § 39-13-107(c)(2) (2014); Lindsay Beyerstein, *Bad Medicine in Tennessee for Pregnant and Drug-Addicted Women*, ALJAZEERA AMERICA, (Sept. 30, 2014, 5:00 AM), http://america.aljazeera.com /articles/2014/9/30/tennessee-new-lawsb1391.html.

2. TENN. CODE. ANN. § 39-17-402 (2012). The definition of "narcotic" includes opiums, opiates, coca leaves, salts, and their derivatives. *Id.*

3. TENN. CODE ANN. § 39-13-107(c) (2014).

4. *Using Meth While Pregnant: That's Assault in Tennessee*, WRCBTV.COM Chattanooga (July 14, 2014, 2:36 PM), http://www.wrcbtv.com /story/26014723/using-meth-while-pregnant-thats-assault-in-tennessee (hereinafter *Using Meth*); *see* Beyerstein, *supra* note 1; Rosa Goldensohn & Rachael Levy, *The State Where Giving Birth Can Be Criminal*, THE NATION (Dec. 10, 2014), http://www.thenation.com/article/192593/state-where-giving-birth-can-be-criminal. Methamphetamine is a Schedule II drug in Tennessee and acts as a stimulant to the central nervous system. *See* TENN. CODE ANN. § 39-13-408(d) (2012).

5. While there may have been opiates in Loyola's system, the arrest was based on the methamphetamine use. *See Using Meth*, *supra* note 4.

amine.[6] A judge sent Loyola to drug rehabilitation as a result of a plea agreement requiring her successful completion of treatment.[7] Loyola's charges were dismissed in February 2015 when she successfully completed treatment, but the arrest and media attention remain.[8]

The Tennessee amendment to the assault statute is inconsistent with the Tennessee General Assembly's intent in the passage of the "Safe Harbor Act" in 2013.[9] The Safe Harbor Act was designed to create priority for pregnant women in treatment centers and provide protection from Juvenile Court proceedings where treatment is successfully completed.[10] The Safe Harbor Act is not punitive towards women with substance abuse problems, but rather established protections for pregnant women seeking drug treatment.[11] This Note discusses the background and implications of the law under which Loyola was charged. Tennessee's amendment to the assault statute fails to address the public health concerns of maternal drug addiction and violates three constitutional protec-

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6. *Using Meth*, *supra* note 4. Since this arrest, the Tennessee General Assembly introduced an additional amendment to this statute that includes methamphetamine specifically in the statutory language. *See* S.B. 586, 109th Gen. Assemb., 1st Reg. Sess. (Tenn. 2015); H.B. 1340, 109th Gen. Assemb., 1st Reg. Sess. (Tenn. 2015). The addition of this amendment shows the original language of the statute does not cover methamphetamine. Methamphetamine is a schedule II drug and stimulant. TENN. CODE ANN. § 39-17-408 (2012). For a discussion of the initial non-inclusion of methamphetamine, see *infra* Section IV.C. During the publication period for this Note, that amendment failed to pass, leaving the assault statute as referenced in this Note. *See* Tenn. S.B. 586; Tenn. H.B. 1340.

7. Aaron Wright, *Mom Charged Under Drug-Addicted Baby Law Going to Rehab*, WBIR.COM (Aug. 5, 2014, 7:45 PM), http://www.wbir.com/story/news/local/mcminn-monroe/2014/08/05/woman-charged-under-drug-addicted-baby-law-to-appear-in-court/13614755/.

8. *See Mom's Charge in Prenatal Drug Case Dropped After She Completes Program*, WBIR.COM (Feb. 6, 2015, 7:24 PM), http://www.wbir.com/story/news/2015/02/06/moms-charge-in-newborn-drug-case-dropped-after-she-completes-program/23002693/.

9. *See* Safe Harbor Act of 2013, 2013 Pub. Ch. 398 (codified at TENN. CODE ANN. § 33-10-104(f) (2014)).

10. *Tenn. S. Health & Welfare Comm.*, S. 0459, 108th Gen. Assemb., 2d Reg. Sess. (Tenn. 2013), http://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=SB0459&ga=108.

11. *Id.*

tions: (1) the protection against cruel and unusual punishment, (2) the protection against warrantless searches, and (3) substantive due process. Tennessee should return to the provisions of the Safe Harbor Act and expand its effect to focus on the health, safety, and welfare of mothers living with drug addiction.

Part II of this Note reviews the history of civil and criminal punishments of maternal drug use and Neonatal Abstinence Syndrome ("NAS"), including the public health concerns that drugs pose to vulnerable children and the cycle of drug abuse. Part III looks at the history of Tennessee's response to NAS, including civil, criminal, and public health remedies. Part IV addresses constitutional violations in elements of T.C.A. section 39-13-107, including the vague statutory language, warrantless searches, and its implication of a "status" crime. Lastly, Part V discusses a public health approach to NAS and proposes the Tennessee General Assembly take no action upon the criminal statute's sunset provision on July 1, 2016.[12] This Note concludes that the solution is for Tennessee to focus on expanding and funding the Safe Harbor Act to incentivize pregnant women who are addicted to drugs to seek treatment.

II. BACKGROUND—NEONATAL ABSTINENCE SYNDROME & CRIMINALIZATION OF ITS CAUSE

Illicit drug use is problematic among pregnant women in the United States.[13] NAS is a health problem primarily capable of being solved by addressing the overall public health needs of the mother. Opiate use and abuse of prescription medications close to birth have particularly adverse health effects on newborns, includ-

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12. 2014 Tenn. Pub. Acts Ch. 820 § 3 (codified as amended at TENN. CODE ANN. § 39-13-107 (2014)). The sunset provision establishes the effectiveness of the bill for a 2-year period, reverting back to earlier statutory text unless re-enacted by the General Assembly. *See id.* This option gives the General Assembly the ability to determine the effectiveness of the statute.

13. Office of Nat'l Drug Control Policy, *Substance Abuse and Maternal and Child Health,* THE WHITE HOUSE https://www.whitehouse.gov/ondcp/substance-abuse-maternal-child-health (last visited Oct. 21, 2015).

ing seizures and other neurological strains.[14] States take different approaches to addressing or controlling prenatal drug use, and the vast difference among state approaches shows the difficulty in addressing both the problems of the mother and the needs of the child.

A. Neonatal Abstinence Syndrome

Four and a half percent of pregnant women ages fifteen to forty-four in the United States report illicit drug use during pregnancy, including nonmedical use of prescription drugs.[15] Chronic fetal exposure to drugs or alcohol can cause permanent developmental and behavioral abnormalities "consistent with drug effect."[16] Signs of withdrawal include crying, jitteriness, fever, tremors, respiratory distress, seizures, and other symptoms typical of drug withdrawal.[17] These neonatal withdrawal signs appear in 55–94% of infants exposed to opiates during pregnancy.[18] Withdrawal symptoms are presented in infants exposed to other legal and illegal drugs, including alcohol.[19] The long-term effects of NAS are difficult to ascertain because there are only a small number of long-term studies on infants born with NAS, and other environmental factors make the results difficult to quantify.[20] While

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14. Mark L. Hudak et al., *Neonatal Drug Withdrawal*, 129 PEDIATRICS e540, e545 (2012), http://pediatrics.aappublications.org/content/129/2/e540.full.pdf.

15. *Id.* at e540. This is most likely an underestimate because the number of women self-reporting can be much lower than those actually tested. *Id.* at e540–41.

16. *Id.* at e541.

17. *Id.* at e543; *see also Neonatal Abstinence Syndrome*, U.S. NAT'L LIBRARY OF MED., http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0004566/ (last visited Oct. 21, 2015).

18. Hudak et al., *supra* note 14, at e541; *see Information About Drugs*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, http://www.unodc.org/unodc/en/illicit-drugs/definitions/ (last visited Oct. 21, 2015) ("Opiates is the generic name given to a group which includes naturally occurring drugs derived from the opium poppy (Papaver somniferum) such as opium, morphine and codeine, semi-synthetic substances such as heroin . . . .").

19. Hudak et al., *supra* note 14, at e541 (noting also it is difficult to distinguish the cause of NAS symptoms in women who abuse multiple substances, which is not uncommon).

20. *Id.* at e550. *See generally* NEW SOUTH WALES MINISTRY OF HEALTH, NEONATAL ABSTINENCE SYNDROME GUIDELINES 1 (2013), http://www.health.

withdrawal symptoms in infants are present upon birth, the negative health impact of NAS appears to normalize during early infancy.[21]

NAS is a particularly prevalent problem in Tennessee.[22] Tennessee is ranked 44th for low birthweight in the United States which is linked to low income and lack of access to health care.[23] In Tennessee, there has been a sharp rise in the number of cases of NAS since the mid-2000s, largely attributable to the rise in prescription drug abuse within the state.[24] In 2000, there were only 57 reported cases of NAS.[25] In 2013, Tennessee had 855 reported cases of NAS, 27.6% of which resulted from non-prescription sub-

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nsw.gov.au/policies/gl/2013/pdf/GL2013_008.pdf [hereinafter NEW SOUTH WALES] ("Provided that neonatal abstinence syndrome is appropriately managed, it is not currently known to be associated with any long-term health problems."); Susan Okie, *The Epidemic That Wasn't*, THE NEW YORK TIMES (Jan. 26, 2009), http://www.nytimes.com/2009/01/27/health/27coca.html?pagewanted=all&_r=0 (last visited Oct. 21, 2015) (stating scientific evidence shows relatively small long-term effects of NAS on a child's health).

21. Hudak et al., *supra* note 14, at e550; *see also* NEW SOUTH WALES, *supra* note 20, at 4.

22. *See* Douglas Springer, *Guest Column: Pregnancy, Narcotics Exact Huge Toll*, THE COM. APPEAL (May 18, 2014), http://www.commercialappeal.com/news/guest-column-pregnancy-narcotics-exact-huge-toll-ep-510192033-328957531.html ("Tennessee has one of the highest rates of NAS by population of any state, a rate that has more than tripled in the past eight years into a statewide epidemic.").

23. *See Tennessee Maintains 36th Ranking in Child Well-Being Report*, TENN. STATE COURTS (July 21, 2015), https://tncourts.gov/news/2015/07/21/Tennessee-maintains-36th-ranking-child-well-being-report ("Low-birthweight risk factors, often linked with low income and lack of health care access, include mothers with chronic health conditions, inadequate prenatal care and overweight or low maternal weight.").

24. *Neonatal Abstinence Syndrome (NAS)*, TENN. DEP'T OF HEALTH, http://tn.gov/health/topic/nas (last visited Oct. 22, 2015); Tony Gonzalez & Shelley DuBois, *Tennessee Faces Epidemic of Drug-Dependent Babies*, THE TENNESSEAN (June 13, 2014), http://www.tennessean.com/story/news/investigations/2014/06/13/drug-dependent-babies-challenge-doctors-politicians/10112813/ (showing data from 1999–2014, as well as changes in regulations in prescribing pain medication to assist in reducing drug-dependent children and access to pain medication prescriptions from multiple doctors).

25. *See* Gonzalez & DuBois, *supra* note 24 (infant drug dependency chart).

stances.[26] In 2014, there were 973 reported cases of NAS.[27] There is a comparable increase between July 1, 2013 and the end of 2014 while the law was in effect.[28] Significantly, these statistics show there was no significant drop in cases of NAS while the law has been in effect. Beyond the state interest in protecting newborns, NAS is costly to the state. The average Medicaid-eligible newborn with NAS costs over $40,000 in delivery expenses, as compared to around $7,000 for a healthy baby.[29] Drug dependency in newborns remains a prevalent problem in Tennessee.

B. History of Criminal and Civil Penalties for Maternal Drug Abuse

1. Rise of Criminalization

In the 1980s and 1990s, the use of crack cocaine during pregnancy was considered a national epidemic.[30] During this time, media coverage of the drug epidemic grew, and the criminalization of maternal substance abuse began.[31] Scientists began to study the

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26. TENN. DEP'T OF HEALTH, DRUG DEPENDENT NEWBORNS (2013), http://tn.gov/assets/entities/health/attachments/NASsummary_Week_52.pdf (year-to-date statistics).

27. TENN. DEP'T OF HEALTH, DRUG DEPENDENT NEWBORNS (2015), https://www.tn.gov/assets/entities/health/attachments/NASsummary_Week_5314.pdf (year-to-date statistics).

28. *See id.*; *see also* Allie Spillyards, *Drug Addicted Babies* (Local 8 News WVLT television broadcast Nov. 28, 2012), https://www.youtube.com/watch?v=wLzcdHj48Tk.

29. MICHAEL D. WARREN, TENN. DEP'T OF HEALTH, TENNESSEE EFFORTS TO PREVENT NEONATAL ABSTINENCE SYNDROME, https://www.tn.gov/assets/entities/tccy/attachments/pres-CAD-13-NAS.pdf; *see also* Gonzalez & DuBois, *supra* note 24 ("Taxpayers bear the brunt of this cost — most of these babies and their mothers are on TennCare, the state's health insurance program for the poor.").

30. *See* Okie, *supra* note 20.

31. *See* Shona B. Glink, *Note: The Prosecution of Maternal Fetal Abuse: Is This the Answer?*, 1991 U. ILL. L. REV. 533 (1991).

> Nationwide, state prosecutors are prosecuting women for "fetal abuse" under a variety of criminal statutes. Although a few prosecutions focus on conduct other than the use of illegal drugs that cause prenatal injuries, the majority of pending cases involve women who continue to use illegal drugs during

effects of substance abuse on fetus development.[32] These studies discovered the impact of NAS, showing alcohol, strenuous activity, cigarettes, and drugs could all have detrimental effect on fetuses.[33] Women using drugs during pregnancy were charged with a variety of crimes in various states during these years, including homicide and assault.[34]

2. Modern Courts

States continue to vary greatly in their response to drug use during pregnancy. As of late 2014, 18 states consider drug use during pregnancy to be child abuse.[35] Four states require drug testing when abuse is suspected.[36] In three states, prenatal drug abuse is grounds for civil commitment—or the forced enrollment in a treatment program.[37] These states' provisions are widely varying,

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> their second or third pregnancies, even though they already have given birth to at least one drug-dependent baby.

Id. at 535; *see also* Seema Mohapatra, *Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy*, 26 WIS. J.L. GENDER & SOC'Y 241, 248 (2011) (stating the first criminal indicted for child endangerment for drug use during pregnancy was in 1977).

32. Glink, *supra* note 31, at 541–43 (noting studies showed the most significant effect on children was from alcohol abuse during pregnancy).

33. *Id.*

34. Mohapatra, *supra* note 31, at 250–51.

35. GUTTMACHER INST., SUBSTANCE ABUSE DURING PREGNANCY (2015), http://www.guttmacher.org/statecenter/spibs/spib_SADP.pdf. These states are: Alabama, Arkansas, Colorado, Florida, Illinois, Indiana, Iowa, Louisiana, Minnesota, Nevada, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wisconsin. *Id.* Only six of those states also give priority to pregnant women in drug treatment programs (Oklahoma, Rhode Island, Texas, Tennessee, Utah & Wisconsin). *Id.*; *see also* Niraj Chokshi, *Criminalizing Harmful Substance Abuse During Pregnancy: Is There a Problem With That?*, THE WASHINGTON POST (May 1, 2014), http://www.washingtonpost.com/blogs/govbeat/wp/2014/05/01/criminalizing-harmful-substance-abuse-during-pregnancy-is-there-a-problem-with-that/.

36. GUTTMACHER INST., *supra* note 35. These states are Iowa, Kentucky, Minnesota, and North Dakota. *Id.*

37. Elisabeth Fitzpatrick, Note: *Cochran v. Commonwealth: Revisiting Whether Kentucky Should Charge, Commit, or Cure Pregnant Substance Abusers*, 50 U. LOUISVILLE L. REV. 551, 557 (2012); *see also* GUTTMACHER INST., *supra* note 35. Currently only Minnesota, South Dakota and Wisconsin find drug use to be grounds for civil commitment of the mother. *Id.*

but all three states permit involuntary civil commitment when a mother is shown to abuse certain drugs.[38] The civil commitment allows a judge to place a mother into protective custody and commit her to an inpatient alcohol or drug rehabilitation facility.[39] The widely varying criminal and civil penalties suggest there is great debate about the most successful method for preventing or treating NAS in the United States.

Several states include "fetus" in the definition of "child," which greatly impacts criminal penalties for prenatal drug use. In South Carolina, viable fetuses are considered persons and afforded privileges,[40] allowing a woman to be charged with child abuse for using drugs while pregnant.[41] In *Whitner v. State*, Cornelia Whitner pled guilty to criminal child abuse for ingesting crack cocaine while pregnant.[42] Whitner's petition for post-conviction relief was denied based on the inclusion of viable fetuses in the child abuse statute rather than based on the presence of NAS symptoms in her newborn.[43] Similarly, in Alabama, a woman can be charged with "chemical endangerment of a child" because the plain meaning of "child" now includes an unborn child.[44] In 2013, the Alabama Supreme Court found the applicability of the child endangerment statute to all unborn children is consistent with the definition of "child" under Alabama law.[45] In these states, penalties are based

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38. Fitzpatrick, *supra* note 37, at 556–58; *see* MINN. STAT. ANN. § 253B.02(2) (West 2013); S.D. CODIFIED LAWS § 34-20A-70(2)-(3) (2013); WIS. STAT. ANN. § 48.193 (West 2012).

39. *See* Fitzpatrick, *supra* note 37, at 556.

40. *See e.g.*, McKnight v. State, 661 S.E.2d 354, 365 (S.C. 2008); Whitner v. State, 492 S.E.2d 777, 780–81 (S.C. 1997); State v. Horn, 319 S.E.2d 703, 704 (S.C. 1984) (finding a fetus is a "child" in South Carolina under various criminal statutes); *see also* Roe v. Wade, 410 U.S. 113, 160 (1973) (placing viability between 24–28 weeks).

41. *See Whitner*, 492 S.E.2d at 781–84.

42. *Id.* at 778–79. Whitner filed for post-conviction relief based on the lack of subject matter jurisdiction as a non-existent offense. *Id.* at 779.

43. *Id.* at 781. The Court focused on the South Carolina legislature's intent to include all viable fetuses as children in criminal statutes intended to protect the child. *Id.* at 781.

44. *Ex parte* Ankrom, 152 So. 3d 397, 419, 421 (Ala. 2013); *see also Ex parte* Hicks, 153 So. 3d 53 (Ala. 2014).

45. *Ankrom*, 152 So. 3d at 419.

primarily upon the definition of a child, rather than the criminalization of a woman's prenatal actions on post-birth effects.[46]

In Wisconsin, a judge can take a pregnant woman into custody through a civil proceeding when the woman uses drugs, refuses treatment or does not made a good faith effort to seek treatment, and there is substantial risk to the child.[47] The judge can then order the woman into custody to an inpatient alcohol or drug abuse treatment center.[48] Prenatal alcohol abuse and a non-exhaustive list of drug abuses are included in the list of punishable acts in Wisconsin.[49] Additionally, a juvenile judge in Wisconsin may incarcerate a pregnant woman who is found to have used drugs during her pregnancy based on juvenile court's jurisdiction over the safety and welfare of the child.[50] The fetus is given a

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46. *See, e.g.*, *id.*; *Hicks*, 153 So. 3d at 59. *Compare* Kathleen Adams, *Chemical Endangerment of a Fetus: Societal Protection of the Defenseless or Unconstitutional Invasion of Women's Rights*, 65 ALA. L. REV. 1353 (2014) (arguing inclusion of fetuses in child abuse statutes is against public policy and constitutional principles), *with* Note & Comment: Alisha Marano, *Punishing is Helping: An Analysis of the Implications of* Ex Parte Akrom *and How the Intervention of the Criminal Justice System is a Step in the Right Direction Toward Combating the National Drug Problem and Protecting the "Child",* 35 U. LA VERNE L. REV. 113 (2013) (arguing that all states should consider fetuses in child abuse statutory protections, regardless of their stance on the definition of personhood).

47. Fitzpatrick, *supra* note 37 at 557–58; *see* Complaint at 1, Loertscher v. Van Hollen, No. 14-cv-820 (W.D. Wisc. Dec. 15, 2014) ("[The State] petitioned for, obtained, and sought enforcement of court orders against her, mandating unwanted and inappropriate medical treatment and incarceration. [The State] arrested her and jailed her while she was pregnant, and they then subjected her to solitary confinement, deprivations, and abuse while she was incarcerated."); *see also* Bruce Vielmetti, *Pregnant Woman Challenging Wisconsin Protective Custody Law*, MILWAUKEE-WIS. JOURNAL SENTINEL, (Jan. 2, 2015), http://www.jsonline.com/news/wisconsin/pregnant-woman-challenging-wisconsin-protective-custody-law-b99411705z1-287395241.html.

48. Fitzpatrick, *supra* note 37 at 557–58. Substance abuse during pregnancy is also grounds for civil commitment in Minnesota and South Dakota. GUTTMACHER INST., *supra* note 35.

49. *See* WIS. STAT. ANN. § 48.193 (West 2012) (including abuse of alcohol, tobacco, and controlled substance in the description of when a judge can court-order a pregnant woman into protective custody).

50. *See id.*; *see also* Vielmetti, *supra* note 47 ("Tamara Loertscher, 30, of Medford was jailed in Taylor County for 18 days — including three in solitary confinement — after a judge found her in contempt for refusing to move to a

guardian ad litem[51] and held in protective custody, via the commitment of the pregnant woman.[52] The mother may be subjected to involuntary drug treatment.[53]

Alternatively, the Kentucky Supreme Court found criminal penalties for a woman's prenatal conduct subject women to an "indefinite number of new crimes covering the full range of a behavior—rendering the statutes void for vagueness."[54] The Kentucky Court noted the punishment for possession of drugs cannot be enhanced simply because a woman is pregnant or punished additionally for harm to a child.[55] In *Cochran v. Commonwealth*, the Kentucky Supreme Court recognized additional problems arising from the criminal prosecution of a pregnant drug user in a case in which a woman was charged with first-degree wanton endangerment for ingesting cocaine *in utero*.[56] The Court noted "punitive actions . . . discourag[es] these individuals from seeking the essential prenatal care and substance abuse treatment necessary to deliver a healthy newborn," finding Kentucky intended to treat *in utero* drug use as a public health concern.[57]

Most states, however, have no avenue for criminal or civil penalties for prenatal drug use.[58] The states utilizing prenatal drug

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residential treatment center, according to the federal civil rights lawsuit she filed in Madison.").

51. A guardian ad litem is a court-appointed attorney who represents the best interests of the child in court proceedings. For a discussion of the appointment of guardians ad litem for fetuses, see Mark H. Bonner & Jennifer A. Sheriff, *A Child Needs a Champion: Guardian Ad Litem Representation for Prenatal Children*, 19 WM. & MARY J. WOMEN & L. 511 (2013). This Note does not discuss the role of juvenile proceedings in regards to maternal substance abuse.

52. WIS. STAT. ANN. § 48.193; *see also* Fitzpatrick, *supra* note 37, at 557–58; Vielmetti, *supra* note 47.

53. *See* WIS. STAT. ANN. § 48.193; *see also* Vielmetti, *supra* note 47.

54. Cochran v. Commonwealth, 315 S.W.3d 325, 325 (Ky. 2010). The Supreme Court in Kentucky additionally based this holding on the Maternal Health Act of 1992, finding the Kentucky legislature had no intention of criminalizing prenatal drug and alcohol use. *Id.* at 329 (citing Maternal Health Act of 1992, 1992 Ky. Acts, ch. 442 (H.B. 192)).

55. *Id.* (citing *Commonwealth v. Welch*, 864 S.W.2d 280, 284 (Ky. 1993)).

56. *Id.* at 327, 329.

57. *Id.* at 329. See Fitzpatrick, *supra* note 37 for an in-depth discussion of the decision in *Cochran v. Commonwealth*.

58. *See* Fitzpatrick, *supra* note 37, at 558.

use statutes primarily operate in a criminal system defining a viable fetus as a child.[59] The variety of approaches in states show there is not one path to treating or addressing NAS. Some states have taken extreme approaches to address NAS, but no solution has proven entirely effective for addressing the issue.[60]

III. TENNESSEE APPROACHES

Tennessee has used a variety of methods to address NAS. Prior to 2013, the punitive measures against women for drug abuse during pregnancy focused on child abuse and neglect in civil proceedings in juvenile court.[61] Rates of NAS grew steadily throughout the 2000s,[62] prompting the Tennessee General Assembly to pass the Safe Harbor Act in 2013 to address public health concerns regarding maternal drug abuse.[63] A year later, the General Assembly addressed the issue criminally and passed an amendment to the assault statute to include maternal drug abuse during pregnancy.[64] The amendment to Tennessee's assault statute is the first of its kind in the country: it charges a mother criminally based on the harm that occurs to a child after birth.[65]

A. *Before the Safe Harbor Act*

Prior to the passage of the Safe Harbor Act, there was no specific mandate or provision for charging a woman with a crimi-

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59. *See e.g.*, McKnight v. State, 661 S.E.2d 354, 365 (S.C. 2008).

60. *See* GUTTMACHER INST., *supra* note 35.

61. *See* Cornelius v. State, 314 S.W.3d 902, 910–11 (Tenn. Ct. App. 2009); *In re* Benjamin M., 310 S.W.3d 844, 848–51 (Tenn. Ct. App. 2009); *see also* TENN. CODE ANN. § 37-1-102(b)(12) (2014) (defining "dependent and neglected child" for civil proceedings); Liability for Infants Born with Narcotic Drug Dependency, Tenn. Att'y Gen. Op. No. 13-01 (Feb. 1, 2013) ("[P]renatal drug use may be found to constitute abuse or severe child abuse in the civil context of juvenile court proceedings.").

62. *See Neonatal Abstinence Syndrome (NAS)*, *supra* note 24.

63. *Tenn. S. Health & Welfare Comm.*, S. 0459, 108th Gen. Assemb., 2d Reg. Sess. (Tenn. Feb. 27 2013), http://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=SB0459&ga=108 (noting that access to prenatal care and drug rehabilitation options provides both better opportunities for a healthy delivery and gives the mother options for healthcare).

64. TENN. CODE ANN. § 39-13-107(c) (2014); *see supra* Part I.

65. § 39-13-107(c); GUTTMACHER INST., *supra* note 35.

nal offense based on drug use during pregnancy.[66] Tennessee women could be charged with a criminal offense depending on the type of harm caused to the infant, a question of fact requiring evidentiary support.[67] The Tennessee Attorney General, in an opinion regarding maternal drug use stated:

> [T]he question of whether the symptoms associated with withdrawal constitute an injury that would support the charges of assault, aggravated assault, or reckless endangerment must be determined by the trier of fact. However, a medical expert who is knowledgeable about the symptoms of withdrawal from a drug addiction could aid the trier of fact in making this determination.[68]

A court in the Middle District of Tennessee found ingestion of cocaine during pregnancy causing an unborn child serious bodily injury could not be considered a crime under the aggravated child abuse statute.[69] Drug use during pregnancy can constitute

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66. *See* Criminal Liability of Mother of Child Born with Drug Addiction, Tenn. Att'y Gen. Op. No. 08-114, 1 (May 21, 2008), http://www.tn.gov/attorneygeneral/op/2008/op/op114.pdf ("The question of whether the symptoms of withdrawal alone could constitute bodily injury or serious bodily injury is a question of fact that would most likely require expert medical evidence to resolve.").

67. State v. Barnes, 954 S.W.2d 760, 765–66 (Tenn. Crim. App. 1997); *see also* Criminal Liability of Mother of Child Born with Drug Addiction, *supra* note 66, at 1.

68. Criminal Liability of Mother of Child Born with Drug Addiction, *supra* note 66, at 2.

69. State v. Hudson, No. M2006-01051-CCA-R9-CO, 2007 WL 1836840, at *1 (Tenn. Crim. App. June 27, 2007). In *Hudson*, the Court of Criminal Appeals dismissed an indictment for aggravated child abuse and neglect where the mother ingested cocaine during her pregnancy. *Id.*; *see also* Drug Tests on Pregnant Women and Infants and the Child Abuse Reporting Statute, Tenn. Att'y Gen. Op. No. 02-136, 2 (Dec. 23, 2002), http://attorneygeneral.tn.gov/op/2002/op/op136.pdf. It is important to note at this point, the Attorney General attached a hospital reporting requirement to a positive drug screen on a child. *Id.* However, that reporting requirement "cannot attach before the birth of the child . . . the reporting requirement attaches after the child is born when someone becomes aware the child was born with drugs in his or her system." *Id.* at 2–3; *see*, *e.g.* Richards v. State, No. E2004-02326-CCA-R3-PC,

severe child abuse in juvenile court dependency and neglect proceedings, which are separate from criminal proceedings.[70] The Tennessee Court of Appeals has held illicit drug use during pregnancy that causes harm to a child once born can be the basis for a dependency and neglect and a child abuse proceeding in juvenile court, which has a different standard and purpose than criminal proceedings.[71]

B. The Safe Harbor Act

In 2013, the Tennessee General Assembly passed the Safe Harbor Act.[72] The Safe Harbor Act protects the rights of pregnant

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2005 WL 2138244, at *2–3 (Tenn. Crim. App. Sep. 2, 2005) (reversing the denial of a petition for post-conviction relief where two women pled guilty to aggravated child abuse after using illicit drugs during pregnancy where their actions fell outside the scope of the statute).

70. *In re* Benjamin M., 310 S.W.3d 844, 849–50 (Tenn. Ct. App. 2009). The Court noted preceding criminal cases do not control in civil proceedings in juvenile court, where the court is considering only the best interest of the affected child rather than incarcerating an individual. *Id.* Therefore, abuse can be found in a civil proceeding for removal regardless of the criminal liability for the mother's drug use during her pregnancy. The Tennessee Supreme Court has not addressed this issue, however, there are several holdings at the Court of Appeals level indicating support of this finding. *See, e.g.*, *In re* C.L., No. E2013-02035-COA-R3-PT, 2014 WL 2442970, at *1 (Tenn. Ct. App. May 28, 2014); *In re* B.A.C., 317 S.W.3d 718, 725–26 (Tenn. Ct. App. 2009) (finding in utero drug use as the basis of termination of parental rights).

71. *In re Benjamin M.*, 310 S.W.3d at 850–51 ("When a child is born alive but injured, the pre-birth timing of the actions is not dispositive."). Juvenile court proceedings are not criminal proceedings. *Id.* at 849 ("Our criminal law is premised upon society's accepted value that it is better for several guilty people to go free than to jail one innocent person . . . . The focus of [juvenile court] proceedings is on the best interest of the affected child.").

72. *See* TENN. CODE ANN. § 33-10-104(f) (2015).

> (1) Notwithstanding subsection (e), a pregnant woman referred for drug abuse or drug dependence treatment at any treatment resource that receives public funding shall be a priority user of available treatment. All records and reports regarding such pregnant woman shall be kept confidential. The department of mental health and substance abuse services shall ensure that family-oriented drug abuse or drug dependence treatment is available, as appropriations allow. A treatment resource that receives public funds shall not refuse to treat a person solely because the person is pregnant as long as appropriate services are offered by the treatment resource.

women who seek drug treatment by giving them first priority in treatment facilities,[73] in addition to providing some protections from termination of her parental rights and dependency and neglect proceedings when—or if—treatment is successfully completed.[74] The Safe Harbor Act was passed in the wake of debate between lawmakers and health officials over the best method to combat NAS.[75] This debate resulted in a compromise agreement between

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> (2)
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> (A) If during prenatal care, the attending obstetrical provider determines no later than the end of the twentieth week of pregnancy that the patient has used prescription drugs which may place the fetus in jeopardy, and drug abuse or drug dependence treatment is indicated, the provider shall encourage counseling, drug abuse or drug dependence treatment and other assistance to the patient.
>
> (B) If the patient initiates drug abuse or drug dependence treatment based upon a clinical assessment prior to her next regularly scheduled prenatal visit and maintains compliance with both drug abuse or drug dependence treatment based on a clinical assessment as well as prenatal care throughout the remaining term of the pregnancy, then the department of children's services shall not file any petition to terminate the mother's parental rights or otherwise seek protection of the newborn solely because of the patient's use of prescription drugs for non-medical purposes during the term of her pregnancy.
>
> (C) Notwithstanding subdivision (f)(2)(B), nothing shall prevent the department of children's services from filing any petition to terminate the mother's parental rights or seek protection of the newborn should the department determine that the newborn's mother, or any other adult caring for the newborn, is unfit to properly care for such child.

Id.

73. *Id.* ("[A] pregnant woman referred for drug abuse or drug dependence treatment at any treatment resource that receives public funding shall be a priority user of available treatment.").

74. *Id.* ("[If a mother who initiates treatment and complies with a treatment program throughout pregnancy], then the department of children's services shall not file any petition to terminate the mother's parental rights or otherwise seek protection of the newborn solely because of the patient's use of prescription drugs for non-medical purposes during the term of her pregnancy."); *see* TENN. CODE ANN. § 36-1-113 (2014).

75. *See* Tony Gonzalez, *Drug-Addicted Babies Bring Competing Approaches in Proposed TN Legislation*, THE TENNESSEAN (Mar. 11, 2013),

the Tennessee General Assembly, the Tennessee Department of Health, the Tennessee Department of Mental Health and Substance Abuse Services, the Tennessee Department of Children's Services, TennCare, and a number of other state agencies.[76] The Safe Harbor Act received national support as a model approach to NAS,[77] and the President of the Tennessee Medical Association lauded the passage of the Safe Harbor Act as a product of collaboration between health officials across the state.[78] Despite its public support, Tennessee legislators continued to debate solutions to NAS subsequent to the Safe Harbor Act's passage.

C. Criminalizing Maternal Drug Abuse in Tennessee

Tennessee had been unsuccessful in passing a specific criminal statute to combat NAS prior to 2014.[79] A year after the Safe Harbor Act's enactment, lawmakers proposed legislation to establish criminal penalties for maternal drug use.[80] The Tennes-

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http://archive.tennessean.com/article/20130311/NEWS07/303110017/Drug-addicted-babies-bring-competing-approaches-proposed-TN-legislation.

76. *Information Available to Health Care Providers and Patients about New State Laws related to Neonatal Abstinence Syndrome*, TENN. ACAD. OF FAMILY PHYSICIANS (June 30, 2013), http://www.tnafp.org/documents/NAS%20 FAQ%2063014.pdf; *see also The 108th General Assembly*, AMERICAN ACAD. OF PEDIATRICS, TENN. CHAPTER, http://www.tnaap.org/Legislative/legislative.htm (last visited Oct. 26, 2015) (noting the Tennessee General Assembly passed the Safe Harbor Act but failed to fund the $2 million attached to the bill).

77. Springer, *supra* note 22. Dr. Douglas Springer is the President of the Tennessee Medical Association ("TMA"). *Id.* He notes the rate of NAS has tripled in the last eight years in Tennessee, and the TMA backed the Safe Harbor Act as a method for medical intervention. *See id.*; *see also* Gonzalez & DuBois, *supra* note 24 ("When you talk about forward-leaning states that are looking at NAS, you always hear Tennessee . . . .") (quoting Michael Botticelli, Deputy Director of the Office of National Drug Control Policy).

78. Springer, *supra* note 22.

79. *See, e.g.*, S.B. 2874, 107th Gen. Assemb. (Tenn. 2012).

80. TENN. CODE ANN. § 39-13-107(c) (2014).

> (1) Nothing in subsection (a) shall apply to any lawful act or lawful omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant, or to any lawful medical or surgical procedure to which a pregnant woman consents, performed by a health care professional who is licensed to perform such procedure.
>
> (2) Notwithstanding subdivision (c)(1), nothing in this section shall preclude prosecution of a woman for assault under §

see General Assembly amended the general assault statute, T.C.A. section 39-13-107(c), to specifically include illegal use of a narcotic by a pregnant woman if the child is born "addicted to or harmed by" the *in utero* drug use.[81] This statute is the first criminal statute in the United States to make substance abuse during pregnancy a specific criminal act.[82] Initially, the Bill allowed for a felony charge of aggravated assault where serious bodily injury occurs.[83] Health care professionals tried to limit the punitive scope of the Bill by limiting the assault charge to a misdemeanor and by creating a "sunset" provision effective July 2016 to evaluate the effectiveness of the statute.[84] The "sunset" provision provides that the law is only in effect for two years.[85] At the end of that time, the General Assembly will be required to pass the Bill again.

The Bill passed both the state house and senate and set in place a standalone prosecution for assault based on drug use during pregnancy.[86] Sponsoring Senator Reginald Tate alleged during the

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> 39-13-101 for the illegal use of a narcotic drug, as defined in § 39-17-402, while pregnant, if her child is born addicted to or harmed by the narcotic drug and the addiction or harm is a result of her illegal use of a narcotic drug taken while pregnant.
> (3) It is an affirmative defense to a prosecution permitted by subdivision (c)(2) that the woman actively enrolled in an addiction recovery program before the child is born, remained in the program after delivery, and successfully completed the program, regardless of whether the child was born addicted to or harmed by the narcotic drug.

Id.

81. *Id.* ("[N]othing in this section shall preclude prosecution of a woman for assault . . . if her child is born addicted to or harmed by the narcotic drug . . . .").

82. GUTTMACHER INST., *supra* note 35.

83. *Tenn. S. Judiciary Comm.*, S. 1391, 108th Gen. Assemb., 2d Reg. Sess. (Tenn. 2014) (testimony of Senator Reginald Tate) http://tnga.granicus.com/MediaPlayer.php?view_id=269&clip_id=9050.

84. Springer, *supra* note 22 ("The Tennessee Medical Association opposed the bill, and advocated successfully for two important modifications . . . . [T]he lesser simple assault charge is enough to get women into drug court and . . . their cases could potentially be resolved by judicial deferment of prosecution or placement in a pretrial diversion program.").

85. *Id.*

86. Bill History, S.B. 1391, 108th Gen. Assemb., http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB1391&ga=108.

committee hearing: "[T]his bill does not go out and find anybody to charge them with a particular charge. You would have to . . . be before some court system to even be charged with under the influence of narcotics or being on drugs while you were pregnant."[87] Despite Senator Tate's assertion, T.C.A. section 39-13-107(c) creates a standalone statute for assault.[88] The statute allows prosecution of assault without an existing narcotics charge or other related charge.[89] The statute also provides that successful completion of treatment during pregnancy serves as a defense to the crime.[90] State officials consider the law a "velvet hammer," intended to provide treatment through state drug court proceedings.[91] This creates a diversion program in drug court that is available for women who successfully complete treatment.[92] Both lawmakers and state officials cite the bill as giving "protection" from prosecution for women who seek treatment.[93] But, successful completion

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87. *Tenn. S. Judiciary Comm.*, *supra* note 83.

88. TENN. CODE ANN. § 39-13-107(c) (2014).

89. *Id.*

90. *Id.*; *see also* Amy Weirich, *Letter: New Law Helps Babies, Moms*, THE COM. APPEAL (June 7, 2014), http://www.commercialappeal.com/news/letter-new-law-helps-babies-moms-ep-510115421-328941561.html.

91. Weirich, *supra* note 90; *see Tenn. S. Judiciary Comm.*, *supra* note 83 (testimony of Barry Stavis) ("The whole intent of this bill balances deterrent [sic] with accountability and with treatment"); *see also id.* (testimony of Senator Mike Bell). Senator Bell expressed concern that several of the counties he represented do not currently have a Drug Court available or access to treatment options. *Id.*

92. In Tennessee, Drug Court provides drug addicts and alcoholics the ability to avoid incarceration by completion of a court-supervised treatment program. *See* Samantha Bryson, *New State Law Could Scare Mothers of Babies with Neonatal Abstinence Syndrome From Treatment*, THE COM. APPEAL (July 25, 2014) (quoting Shelby County Drug Court Judge Tim Dwyer) http://www.commercialappeal.com/news/crime/new-state-law-could-scare-mothers-of-babies-with-neonatal-abstinence-syndrome-from-treatment-some-ep-324362721.html. When an offender does not successfully adhere to the strict requirements of a drug treatment program, he or she will be sent back to jail for the remainder of the sentence. *See* Yolanda Jones & Samantha Bryson, *Mother Charged with Drug Use While Pregnant Back in Jail*, THE COM. APPEAL (Jan. 22, 2015), http://www.commercialappeal.com/news/local-news/mother-charged-with-drug-use-while-pregnant-back-in-jail_16552921.

93. *See* Weirich, *supra* note 90 ("[The law's] goal is not to incarcerate mothers but to empower these women to overcome their addictions. Our plan is

of treatment is only a defense to the charge of assault, not a grant of immunity.[94]

In Shelby County (Memphis), Jamillah Falls was one of the first mothers arrested under the assault statute. Falls was processed through Drug Court with Judge Tim Dwyer, and was ordered to a residential rehabilitation program instead of a jail sentence of up to 11 months and 29 days.[95] Falls went through residential treatment, but then failed to meet the requirements of the program at a halfway house and returned to jail.[96] Even in Shelby County, Falls had few options to seek residential treatment prior to her arrest.[97]

Senator Mike Bell expressed concern with the defense of the completion of successful treatment, noting women in his dis-

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to refer such women to drug court treatment programs operating in many of Tennessee's judicial districts, including Shelby County, and provide them the opportunity to participate in the program."). Amy Weirich is the District Attorney General in Shelby County (Memphis), Tennessee. *See id.*

94. Immunity from prosecution prevents charges being filed, whereas a defense to a crime may allow a case to be later dismissed when evidence presented to a jury provides for a valid defense to the crime. For a comparison of how Tennessee treats immunity agreements versus traditional defenses, see State v. Howington, 907 S.W.2d 403, 409 (Tenn. 1995) (citing Zani v. State, 701 S.W.2d 249, 254 (Tex. Crim. App. 1985)). The burden is on the State to show a defendant breached an immunity agreement; whereas the burden of evidence of a traditional defense to a crime is on the defendant. *See id.*

95. Samantha Bryson, *Addicted Mom Charged Under New Law Will Go to Rehab, Not Jail*, THE COM. APPEAL (Aug. 6, 2014), http://www.commercialappeal.com/news/local-news/addicted-mom-charged-under-new-law-will-go-to-rehab-not-jail_32005503.

96. Jones & Bryson, *supra* note 92.

97. Wendi C. Thomas, *Treatment Options Scarce for Pregnant Women with Addictions*, THE COM. APPEAL (Aug. 7, 2014), http://www.commercialappeal.com/news/local-news/crime/treatment-options-scarce-for-pregnant-women-with-addictions_24325724. This news article notes that there are limitations on available treatment options for pregnant women in Shelby County: one does not accept pregnant women; one only takes private insurance or self-pay at $27,000 for a month; one has only room for ten women with a diagnosis of mental illness; and one that only has a detox center. *Id.* Shelby County is the most populous county in Tennessee. *Tennessee County Selection Map*, UNITED STATES CENSUS BUREAU (2010), http://quickfacts.census.gov/qfd/maps/tennessee_map.html (click on "Shelby") (showing the population of Shelby County at almost 1,000,000 per the 2010 census).

trict—among many others—do not have access to treatment facilities in close range.[98] Drug courts are not available in every county in Tennessee, and Davidson County (Nashville) is the only county with a residential drug court treatment program.[99] The same health and substance abuse professionals providing support and guidance in the passage of the Safe Harbor Act testified against the passage of the assault amendment in the hearings to House Bill 1295 and Senate Bill 1391.[100] These professionals cite concern that the criminalization of maternal substance abuse would actually deter women from seeking treatment for fear of prosecution.[101] Professionals also cited concern for women who may avoid prenatal care for fear of prosecution.[102] Representative Terri Weaver rebutted these concerns, calling drug abusing mothers "the worst of the worst . . . not those who would consider going to prenatal care [in the first place]."[103] Beyond the initial controversy of the amendment, the statute now presents broader constitutional issues.

IV. CONSTITUTIONAL ANALYSIS OF TENN. CODE ANN. SECTION 39-13-107

There are a number of potential constitutional issues[104] that arise under the language of T.C.A. section 39-13-107. First, the

98. *Tenn. S. Judiciary Comm.*, *supra* note 83.

99. *Id.* (testimony of Nathan Ridley).

100. *Id.* (testimony of Kurt Hippell, Valerie Nageshiner, and Marynell Brian).

101. *Id.* Representatives from Children's Hospital Alliance, March of Dimes, the Department of Mental Health and Substance Abuse and the Tennessee Department of Health spoke at legislative hearings regarding concerns for access to prenatal care, determent from substance abuse treatment, and the lack of time given for the Safe Harbor Act to have a positive impact on treating mothers to impact NAS statistics. *See* Bryson, *supra* note 92.

102. *Tenn. S. Judiciary Comm.*, *supra* note 83 (testimony of Kurt Hippell, Valerie Nageshiner and Marynell Brian).

103. Gonzalez & DuBois, *supra* note 24 (quoting Rep. Terri Lynn Weaver).

104. For a discussion of constitutional issues in the early 1990s associated with a rise in criminal prosecutions of drug-addicted mothers, see Doretta Massardo McGinnis, Comment, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505, 506 (1990) ("The fundamental right to bear a child will be denied to a class of women—drug addicts —based on their status as addicts and the effects that their addictive behav-

statute violates the eight and fourteenth amendments' prohibition on cruel and unusual punishment by creating a "status" crime punitive to only narcotic addicts. Second, the statute potentially violates the fourth amendment's protection against search and seizure by the use of public and private hospitals' blood testing for evidence of prenatal drug use. Third, the language of the statute is unconstitutionally vague in violation of substantive due process protections.

A. Eighth and Fourteenth Amendments: Cruel and Unusual Punishment

In *Robinson v. California*, the Supreme Court held imprisonment for the status of narcotic addiction, an illness "contracted innocently or involuntarily," is cruel and unusual punishment in violation of the fourteenth amendment.[105] Police arrested Defendant Robinson for having needle marks on his arm under a California statute that made it illegal to have an addiction to narcotics.[106] The Supreme Court determined while a state may impose criminal sanctions for "unauthorized manufacture, prescription, sale, purchase, or possession of narcotics," a California court could not convict Robinson of the crime of drug addiction.[107] The appellate court erred in instructing a jury they could convict Robinson of a crime even if the jury disbelieved the evidence of Robinson's use of drugs within Los Angeles.[108] The Supreme Court focused on the nature of the statute because it created a "status" crime. The State of California did not require evidence of use or possession of

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iors are likely to have on their children. The rights of privacy and reproductive freedom currently accorded all women may be further eroded. Such restrictions may, however, be found constitutional if courts accept the view that fetal rights outweigh women's rights in the context of a pregnant woman's behavior likely to cause fetal harm."). The development of constitutional law regarding the status of pregnant women has since developed to eradicate some of the early claims. *See* Jill E. Habig, Comment, *Defining the Protected Class: Who Qualifies for Protection Under the Pregnancy Discrimination Act?*, 117 YALE L.J. 1215 (2008).

105. Robinson v. California, 370 U.S. 660, 667 (1962).

106. *Id.* at 661–63; *see* CAL. HEALTH & SAFETY CODE § 11721 (Deering 1953) (repealed 1972).

107. *Robinson*, 370 U.S. at 664–66.

108. *Id.*

an illegal substance within the state, but only proof of addiction.[109] The Supreme Court recognized, "[I]mprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold."[110]

A criminal offense for maternal narcotic use may be distinguishable from the facts in *Robinson*, but the Court's reasoning in striking the California statute can be applied in Tennessee:

> [The California law] is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms." . . . It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill . . . . [A] law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment . . . .[111]

The Court found the state had requisite power to punish a broad range of behavior associated with drug trafficking and drug use, but a crime based solely on the status of addiction was unconstitutional.[112] T.C.A. section 39-13-107 does not require proof of specific use or possession within the state by the mother in accordance with existing drug law as an element of the crime of neonatal assault.[113] Criminal charges for maternal drug use punish a wom-

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109. *Id.* at 665–66; *see* Mohapatra, *supra* note 31.

110. *Robinson*, 370 U.S. at 667.

111. *Id.* at 666; *see also* Mohapatra, *supra* note 31, at 253–54 (discussing *Robinson* in the context of criminalizing maternal drug use).

112. *Robinson*, 370 U.S. at 664–65.

113. *See* TENN. CODE ANN. § 39-13-107(c) (2014). The elements of the offense on its face require the showing of addiction or harm to the child by illegal drug use as a separate offense from the elements of the crime of drug possession or distribution. *See generally* TENN. CODE ANN. § 39-17-418 (2014) (list-

an's status as a drug addict.[114] Tennessee must require proof of specific use for the assault statute to stand under *Robinson*'s "status crime" limitation.

B. Fourth Amendment: Warrantless Searches

The United States Supreme Court also found that requiring mandatory blood tests for the purpose of incriminating patients violates the Fourth Amendment.[115] In *Ferguson v. City of Charleston*, the Supreme Court held hospitals violate a patient's constitutional rights when they obtain evidence for the purpose of incriminating patients without informing the patient.[116] In *Ferguson*, ten petitioners were arrested after testing positive for cocaine when hospital employees turned over their urine samples to police.[117] The hospital had a policy of testing patients receiving prenatal treatment for current drug use.[118] The positive results of these tests were turned over to state authorities to prosecute mothers for child abuse whose newborns tested positive for drugs.[119] The Court

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ing the elements for the criminal charge of possession of a controlled substance in Tennessee).

114. *See* Marcy Stovall, *Looking for a Solution: In Re* Valerie D *and State Intervention in Prenatal Drug Abuse*, 25 CONN. L. REV 1265, 1276–77 (1993) ("Though [a woman's] original decision to use drugs [is] presumably voluntary, the subsequent nature of the addiction limits her choice, even if she wishes to stop using drugs. Punishing prenatal drug use thus comes very close to penalizing a woman for her status as an addict, and the Supreme Court has forbidden punishment based on an individual's status as an addict.") (citation omitted).

115. Ferguson v. City of Charleston, 532 U.S. 67, 84–86 (2001).

116. *Id.* ("While state hospital employees, like other citizens, may have a duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients*, they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require.").

117. *Id.* at 73.

118. *Id.* at 70.

119. *Id.* at 70–71; see *supra* discussion Section II.B.2 for analysis of South Carolina's child abuse statute, distinguished from Tennessee's based on its inclusion of a viable fetus in the definition of a child. This definition of child allows the prosecution for child abuse for drug use in the third trimester rather than a separate crime against a fetus.

found the policy was designed specifically to provide admissible evidence in a criminal prosecution without a search warrant.[120]

In *Ferguson*, the Court recognized the importance of access to diagnostic and prenatal care without fear of warrantless searches for criminal prosecutions.[121] The Court's prohibition of warrantless searches is analogous to charges brought under T.C.A. section 39-13-107 based upon positive drug screens handed over to law enforcement while in the hospital to give birth. Urine or blood screens taken in the regular course of treatment in a hospital delivery turned over to police for purposes of prosecution are unconstitutional warrantless searches in violation of the Fourth Amendment.[122]

C. Void-for-Vagueness: Substantive Due Process

A statute violates an individual's substantive due process rights if it fails to "provide a person of ordinary intelligence fair notice of what [activity] is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[123] The void-for-vagueness doctrine arises under substantive due process rights, predominately to reign in police discretion.[124]

In *Cochran v. Commonwealth*, the Kentucky Supreme Court found criminal child abuse statutes could not apply to maternal drug abuse because women would be subject to an indefinite

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120. *Ferguson*, 532 U.S. at 86.

121. *Id.* at 84. ("Given the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of 'special needs.'").

122. *See id.* at 86; *see also* Sandi J. Toll, Note, *For My Doctor's Eyes Only*: Ferguson v. City of Charleston, 33 LOY. U. CHI. L.J. 267 (2001) (analyzing the implications of *Ferguson* in the context of fetal abuse protections). "[T]he *Ferguson* decision affirms that the special needs exception may only be applied when the government's interest in conducting the search is divorced from any law enforcement purpose." *Id.* at 319.

123. United States v. Williams, 553 U.S. 285, 304 (2008); *see also* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("[A]n enactment is void for vagueness if its prohibitions are not clearly defined.").

124. *See* Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1500–01 (2007).

number of new crimes covering a broad range of behavior.[125] In *Cochran*, the defendant gave birth to a child who tested positive for cocaine, and police arrested her for wanton child endangerment.[126] The Kentucky Supreme Court determined the application of a criminal abuse statute to prenatal conduct:

> [This application] could have an unlimited scope and create an indefinite number of new "crimes" . . . a "slippery slope" whereby the law could be construed as covering the full range of a pregnant woman's behavior - a plainly unconstitutional result that would, among other things, render the statutes void for vagueness.[127]

The Court focused on the void-for-vagueness doctrine, finding the statute "transgress[ed] reasonably identifiable limits."[128]

T.C.A. section 39-13-107(c) is unconstitutionally vague in two ways: (1) the element of harm and (2) the requirement of "narcotic" use. The statute requires proof that a child is born "addicted to or harmed by" narcotic use.[129] The parameters for "addicted to" or "harmed by" are unconstitutionally vague because neither "harm" nor "addiction" are defined in the Tennessee Code. There are a variety of factors that may affect the health of a fetus, and it is impossible to isolate specific harm to a delivered infant due to prenatal use of a particular drug.[130] Under the current statute, the prosecution retains the discretion to determine when there is a level of "harm" or "addiction" sufficient to justify an arrest for assault.

In addition to the undefined terms, the language of T.C.A. section 39-13-107(c) includes specific reference to illegal use of

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125. Cochran v. Commonwealth, 315 S.W.3d 325, 328 (Ky. 2010) (citing Commonwealth v. Welch, 864 S.W.2d 280, 283 (Ky. 1993).

126. *Id.* at 327.

127. *Id.* (citing *Welch*, 864 S.W.2d at 283).

128. *Welch*, 864 S.W.2d at 283.

129. TENN. CODE ANN. § 39-13-107(c) (2014).

130. *See* Hudak, *supra* note 14, at e542 (Table 2); *see also* Okie, *supra* note 20 ("[F]actors like poor parenting, poverty and stresses like exposure to violence were far more likely to damage a child's intellectual and emotional development . . . .").

only "narcotic" drugs. The definition of a "narcotic" is cross-referenced to the definition of narcotic as used in other criminal drug-related statutes.[131] Narcotic drugs as defined in Tennessee include: opiums, salts, poppy, coca leaves and their derivatives.[132] By defining narcotic, the statutory language does not include the abuse of prescribed drugs, but is limited to only "illegal drug use."[133] Prescription drug abuse is one of the larger causes of NAS.[134] It is impossible to distinguish the cause of NAS symptoms between drug classifications and illegal or legal drug abuse.[135] Additionally, several women have been arrested under

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131. TENN. CODE ANN. § 39-17-402(17) (2012).

132. *Id.*

133. *See id.* The statutory language limits the behavior of the mother to "illegal drug use" leading to harm or addiction to a "narcotic drug." TENN. CODE ANN. § 39-13-107(c). There was failed legislation in both the Tennessee State House and Senate in early 2015 to specifically include methamphetamine in the statutory language. *See* S.B. 586, 109th Gen. Assemb., 1st Reg. Sess. (Tenn. 2015); H.B. 1340, 109th Gen. Assemb., 1st Reg. Sess. (Tenn. 2015) (allowing prosecution for assault if "harm is a result of [a mother's] illegal use of a narcotic drug or methamphetamine, taken while pregnant."). In addition, an equal protection argument has been made in the past that application of maternal drug abuse statutes to certain classes of drugs violates the equal protection clause of the fourteenth amendment based on protected racial classes. *See* U.S. CONST. amend. XIV, § 1; Krista Stone-Manista, Comment, *Protecting Pregnant Women: A Guide to Successfully Challenging Criminal Child Abuse Prosecutions of Pregnant Drug Addicts*, 99 J. CRIM. L. & CRIMINOLOGY 823 (2009); *see also* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991). Roberts analyzes the development of the early prosecutions of maternal fetus abuse, comparing the prosecution of mothers of "crack babies" and encouraging abortions in African American women with forced sterilization of black women. See *id.* at 1450–56 for an early discussion of the implications of the equal protection clause in light of maternal fetal abuse prosecutions.

134. Hudak et al., *supra* note 14, at e541.

135. Hudak et al., *supra* note 14, at e542 ("Pregnant women who abuse methamphetamine are at increased risk of pre-term birth, placental abruption, fetal distress, and intrauterine growth restrictions at rates similar to those for pregnant women who use cocaine. . . . [O]nly 4% of infants exposed to methamphetamine were treated for drug withdrawal, but it was not possible to exclude concomitant abuse of other drugs as contributory in all cases."); *see also id.* at e542 (Table 2).

the statute for using methamphetamine during their pregnancy.[136] The vague application of the law as written violates due process as provided in the Fourteenth Amendment.

V. ADOPTING A DIFFERENT APPROACH: HEALTH IMPACT OF CRIMINAL PROSECUTION OF MATERNAL DRUG USE

The appropriate viewpoint to approach maternal drug abuse is to take a public health perspective. The 2009 National Survey on Drug Use and Health reports on the usage of illicit drugs, heavy alcohol use, and tobacco use during pregnancy.[137] Binge or heavy drinking in the first trimester is reported by 11.9% of pregnant women; recent tobacco use by 15.3%.[138] Studies show illicit drug use is no more harmful to a fetus than either tobacco or alcohol use during pregnancy.[139] There has not been a change in the rate of maternal drug use nationally since the rise of child abuse statutes punishing women for drug use during pregnancy, indicating these statutes are ineffective.[140] However, fear of criminal retribution discourages women from seeking prenatal care, undermining both the health of the mother and the health of the fetus.[141]

Criminalizing drug use during pregnancy is more likely to prevent women from seeking proper prenatal care or seek treat-

136. Hudak, *supra* note 14, at e541 ("[C]hronic use of narcotic prescriptions . . . among pregnant women cared for at a single clinic increased fivefold from 1998 to 2008, and 5.6% of infants delivered to these women manifested signs of neonatal withdrawal."); *see Using Meth*, *supra* note 4; Goldensohn & Levy, *supra* note 4.

137. *See* Hudak, *supra* note 14, at e540.

138. Hudak, *supra* note 14, at e540.

139. Mohapatra, *supra* note 31, at 244 (noting women are not prosecuted for alcohol or tobacco use during pregnancy and "an illicit drug-abusing mother . . . is easily vilified by the public and prosecutors as giving birth to a 'crack baby,' or more recently a 'meth baby.'"); Hudak, *supra* note 14, at e542 (showing signs of neonatal abstinence syndrome resulting from alcohol use).

140. Mohapatra, *supra* note 31, at 244 (citation omitted). It is too soon since the passage of this statute in Tennessee to determine its effects on in utero drug use.

141. *See Legal Interventions During Pregnancy*, Report of American Medical Association Board of Trustees, 264 JAMA 2663, 2670 (1990).

ment.[142] The possibility of punishment for maternal drug use discourages women from seeking drug treatment options.[143] After criminal prosecutions of maternal drug use began in South Carolina, there was an 80% reduction in admissions of pregnant women in drug treatment programs.[144] Women who do not seek appropriate prenatal care have higher rates of infant mortality.[145] By lessening the focus on criminal prosecutions, women in Tennessee would have more incentive to seek treatment and less fear for retribution despite seeking treatment options

Drug rehabilitation facilities are also rarely accessible to many Tennessee women.[146] Senator Mike Bell voted against the amendment to T.C.A. section 39-13-107 because he believed there were not sufficient clinics accessible to pregnant women to make treatment a viable option for his constituents in Bradley, McMinn, Meigs, Monroe and Polk Counties.[147] Health organizations noted the need for funding for clinics when the Safe Harbor Act passed in 2013 to remedy this accessibility.[148]

A public health approach increasing funding for drug treatment facilities who accept pregnant women, as well as resource centers for prenatal care, would encourage both drug treatment options and prenatal care. Creating a statutory environment where women are encouraged to seek treatment promotes the health of the mother and the child both during the pregnancy and

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142. *Id.* ("Pregnant women will be likely to avoid seeking prenatal or other medical care for fear that their physician's knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment.").

143. Fitzpatrick, *supra* note 37, at 566–68 (citing Martha A. Jessup et al., *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 J. DRUG ISSUES 285 (2003)). Fitzpatrick discusses the fear of loss of custody, arrest, or prosecution prevented women from seeking treatment options, and rather to flee from care. *Id.*

144. Mohapatra, *supra* note 31, at 254.

145. *See id.* at 568.

146. *See* Gonzalez & DuBois, *supra* note 24.

147. *See Tenn. S. Judiciary Comm.*, S. 1391, 108th Gen. Assemb., 2d Reg. Sess. (Tenn. 2014) (statement of Senator Mike Bell), http://wapp.capitol.tn.gov/apps/videocalendars/VideoCalendarOrders.aspx?CalendarID=1336&GA=108.

148. *See The 108th General Assembly,* AMERICAN ACAD. OF PEDIATRICS, TENN. CHAPTER, http://www.tnaap.org/Legislative/legislative.htm (last visited Oct. 27, 2015).

afterward.[149] The Safe Harbor Act provided protection from arrest or removal proceedings where that treatment is successful.[150]

The Tennessee General Assembly should allow the assault amendment to sunset to protect the constitutional rights of pregnant women in Tennessee. The vague language of T.C.A. section 39-13-107(c) and its potential application as a "status" crime render it constitutionally void.[151] The amendment creates a status crime, requiring no proof or parameter for evidence of specific drug use.[152] By adopting a public health approach, the Tennessee General Assembly can both address the grave problems of NAS and avoid violating individual rights. To protect individual rights and lessen the impact of NAS on Tennessee children, the Tennessee General Assembly should expand the availability of treatment to pregnant women.

The Tennessee General Assembly should abandon the assault amendment and focus on expanding the Safe Harbor Act. Prioritizing pregnant women in drug rehabilitation facilities is the first step in a public health approach to addressing NAS. In 2013, Tennessee was a leading state in addressing drug abuse from a health perspective through the passage of the Safe Harbor Act, which guaranteed pregnant women's priority in treatment facilities.[153] Treatment is a long-term solution, and women should be incentivized with treatment rather than punished or forced into treatment. Women-specific substance abuse centers may be necessary to ensure proper prenatal care is available and to specifically

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149. *See* Tony Gonzalez, *Drug Czar Slams Criminalizing Moms as Haslam Mulls Veto*, THE TENNESSEAN (April 28, 2014, 6:45 PM) (statement of Michael Botticelli, Director of the White House Office of National Drug Control Policy), http://www.tennessean.com/story/news/politics/2014/04/28/drug-czar-slams-criminalizing-moms-haslam-mulls-veto/8435967/ ("What's important is that we create environments where we're really diminishing the stigma and the barriers, particularly for pregnant women, who often have a lot of shame and guilt about their substance abuse disorders. . . . We know that it's usually a much more effective treatment and less costly to our taxpayers if we make sure that we're treating folks.").

150. *See* TENN. CODE ANN. § 33-10-104(f) (2013).

151. *See* discussion *supra* Section IV.A; *see also* Cochran v. Commonwealth, 315 S.W.3d 325, 328 (Ky. 2010) ("[A]pplication of the criminal abuse statutes to prenatal conduct would render the statutes void for vagueness . . . .").

152. *See* Robinson v. California, 370 U.S. 660, 763 (1962).

153. TENN. CODE ANN. § 33-10-104(f).

monitor the dangers of detoxing from a drug addiction while pregnant.[154] A different approach to addressing NAS involves taking a public health perspective and using mental health professionals to establish standards for state provision of funding necessary to better access to treatment options.[155] By returning to the provisions of the Safe Harbor Act, the state would guarantee priority of access to drug treatment programs for pregnant women.

VI. CONCLUSION

The startling rates of NAS in Tennessee dictate a state interest in providing a remedy to protect the interest of both the mother and the child. The Tennessee General Assembly first enacted the Safe Harbor Act and later amended the assault statute in order to provide a remedy.[156] These remedies both attempt to protect children afflicted with NAS while taking different approaches, but T.C.A. section 39-13-107(c) violates individual rights protected by the United States Constitution. Criminalizing maternal drug use without requiring specific proof of conduct renders this crime a "status" crime inflicting cruel and unusual punishment in violation of the Eighth Amendment. The statute is void-for-vagueness where "harm" is not defined by the Tennessee code and the statute includes only one category of illegal drug use.[157] The state interest in criminalizing maternal drug use does not outweigh the potential constitutional violations. Because a public health approach encompasses both the interests of the child and mother, Tennessee

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154. Mohapatra, *supra* note 31, at 267–69. Mohapatra also addresses the difficulty for many women to seek residential treatment where those treatment options offer no childcare for women who may have existing children.

155. For an approach to maternal drug use utilizing a public health perspective, see *Cochran*, 315 S.W.3d at 329 ("[T]he General Assembly finds it is necessary to treat the problem of alcohol and drug use during pregnancy solely as a public health problem by seeking expanded access to prenatal care and to alcohol and substance abuse education and treatment programs." (quoting The Maternal Health Act of 1992, 1992 Ky. Acts, ch. 442 (H.B. 192))); *see generally* Mohapatra, *supra* note 31 (advocating for a public health approach to in utero drug use).

156. *See supra* Sections III.B-C.

157. TENN. CODE ANN. § 39-13-107(c) (2014); *see Cochran*, 315 S.W.3d at 328.

should retain the Safe Harbor Act and provide funding to facilities providing treatment for pregnant drug addicts.

Warheads on Foreheads: The Applicability of the 9/11 AUMF to the Threat of ISIL

GREGORY A. WAGNER*

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I. INTRODUCTION

At the beginning of 2014, a terrorist organization known as the Islamic State of Iraq and Syria ("ISIL")[1] began taking control

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of large swaths of land in Iraq and Syria, including major Iraqi cities such as Fallujah and Mosul.[2] The rapid loss of control in the area was particularly embarrassing for the United States, as it had recently withdrawn troops from Iraq after nearly a decade in the country.[3] Heavy fighting between the Iraqi Security Forces and ISIL left Iraq ravaged, with over 33,000 civilian casualties in 2014.[4] In May 2014, the Department of State officially designated ISIL as a terrorist organization, signifying the United States Gov-

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rine Corps, the Department of Defense, or the United States Government. I would like to thank Major General Albert C. Harvey, USMCR (ret.), Professor David Romantz, Kevin T. Brown, and Jake Strawn for their invaluable insight and assistance with this Note.

1. Other aliases listed are: "the Islamic State of Iraq and al-Sham (ISIS), the Islamic State of Iraq and Syria (ISIS), ad-Dawla al-Islamiyya fi al-'Iraq wa-sh-Sham, Daesh, Dawla al Islamiya, and Al-Furqan Establishment for Media Production." *Terrorist Designations of Groups Operating in Syria*, U.S. DEP'T OF STATE (May 14, 2014), http://www.state.gov/r/pa/prs/ps/2014/05/22 6067.htm. Subsequent to this press release by the Department of State, ISIL changed its own name to the "Islamic State." Adam Withnall, *Iraq Crisis: Isis Declares its Territories a New Islamic State With 'Restoration of Caliphate' in Middle East*, THE INDEP. (June 30, 2014), http://www.independent.co.uk/news/world/middle-east/isis-declares-new-islamic-state-in-middle-east-with-abu-bakr-albaghdadi-as-emir-removing-iraq-and-syria-from-its-name-9571374.html. This Note will use the original moniker designated by the U.S. Department of State.

2. *Analyzing the ISIS Timeline: The Rise of the Islamic State (ISIL/ISIS)*, NTREPID, http://www.ntrepidcorp.com/timestream/isis/ (last visited Oct. 7, 2015).

3. *See* Press Release, Office of the Press Sec'y, *Remarks by the President at the United States Military Academy Commencement Ceremony*, THE WHITE HOUSE (May 28, 2014, 10:22 AM), http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-united-states-military-academy-commencement-ceremony ("We have removed our troops from Iraq."). The announcement of full troop withdrawal was less than three weeks before sending 275 service members back to Iraq. Press Release, Office of the Press Sec'y, *Text of a Letter From the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate*, THE WHITE HOUSE (June 16, 2014), http://www.whitehouse.gov/the-press-office/2014/06/16/text-letter-presi dent-speaker-house-representatives-and-president-pro-te (stating that 275 military personnel were being sent to Iraq for "support and security").

4. HUMAN RIGHTS OFFICE, UNITED NATIONS ASSISTANCE MISSION FOR IRAQ, REPORT ON THE PROTECTION OF CIVILIANS IN ARMED CONFLICT IN IRAQ: 11 SEPTEMBER – 10 DECEMBER 2014, at i (2014), http://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_POC_Report_11Sep-10Dec2014_EN.pdf.

ernment's first official acknowledgement of ISIL and the severity of the situation.[5] On August 8, 2014, President Barack Obama ordered the first of many airstrikes targeting ISIL in Iraq, an action known as "Operation Inherent Resolve,"[6] the first active hostility the United States took against the newly designated terrorist group.[7] Prior to beginning the airstrikes, President Obama did not seek any type of congressional authorization. In support of his engagement of the United States in armed conflict against ISIL, President Obama cited legal authority pursuant to constitutional and statutory authority as the Commander in Chief.[8] While the White House was not initially specific as to the particular statutory justification for the strikes on ISIL, it eventually stated the statuto-

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5. *See Terrorist Designations of Groups Operating in Syria*, U.S. DEP'T OF STATE (May 14, 2014), http://www.state.gov/r/pa/prs/ps/2014/05/226067.htm (designating the primary name and label for the "Foreign Terrorist Organization").

6. *Iraq and Syria Operations Against ISIL Designated as Operation Inherent Resolve*, U.S. CENT. COMMAND (Oct. 15, 2014), http://www.centcom.mil/en/news/articles/iraq-and-syria-ops-against-isil-designated-as-operation-inherent-resolve (officially naming the military operation against ISIL as "Operation INHERENT RESOLVE").

7. Press Release, Office of the Press Sec'y, *Letter from the President—War Powers Resolution Regarding Iraq*, THE WHITE HOUSE (Aug. 8, 2014), http://www.whitehouse.gov/the-press-office/2014/08/08/letter-president-war-powers-resolution-regarding-iraq [hereinafter August Press Release].

8. Press Release, Office of the Press Sec'y, *Letter from the President—War Powers Resolution Regarding Iraq*, THE WHITE HOUSE (Sept. 23, 2014) http://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq [hereinafter September Press Release]. There is a school of thought that, under the Commander in Chief and/or Vesting Clauses of the Constitution, no restriction can be placed on the President's ability to make and carry out war. *See* U.S. CONST. art. II, § 1, cl. 1 ("The executive power shall be vested in a President of the United States of America."); U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . ."). These arguments are outside of the scope of this Note, but this Note takes the approach that this reading of the Constitution would make Congress' constitutional right to declare war meaningless, and therefore, the President must have congressional approval prior to entering armed conflict. Despite other positions on the President's inherent constitutional powers, it is undisputed that a Congressional authorization to use military force increases the power and legitimacy of a military operation. *See infra* Section II.B.

ry authority was under both the 9/11 and 2002 Authorizations to Use Military Force ("AUMF").[9]

The 9/11 AUMF was enacted in response to the September 11, 2001 terrorist attacks on the United States.[10] It authorizes military action against "those nations, organizations, or persons" who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations."[11] While the 9/11 AUMF can perhaps be stretched into authorizing the strikes against ISIL based on a tenuous link to the 9/11 attacks, this was likely not the intent of Congress when it passed the 9/11 AUMF. Congress intended to pursue those who were responsible for the September 11, 2001 attacks and prevent them from attacking U.S. soil again.[12] Fourteen years later, this authorization should not be cited for authorization to enter into a new, large-scale conflict against a group that is not directly linked to the September 11, 2001 attacks. Although the actions of ISIL

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9. September Press Release, *supra* note 8. The 2002 AUMF authorized use of military force "against the continuing threat posed by Iraq" and was used as the legal justification to invade Iraq in 2003. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-234, 116 Stat. 1498. The application of the 2002 AUMF is outside the scope of this Note, but it largely revolves around Iraq as a state actor and the possession of "weapons of mass destruction." *Id.*; *see also* Zeke J. Miller, *White House: Iraq War Vote Obama Opposed Could Be Used for ISIS Strikes*, TIME (Sept. 13, 2014), http://time.com/3362683/obama-isis-iraq-syria-war-aumf/ ("[T]he 2002 law would provide additional legal underpinning to strikes in Iraq—and even Syria—as scholars question the applicability of the 2001 authorization to ISIS . . . ."). Months before the initial strikes against ISIL, the National Security Advisor, Susan E. Rice, wrote to the Speaker of the House of Representatives, stating, "[T]he [2002] Iraq AUMF is no longer used for any U.S. government activities and the Administration fully supports its repeal." Letter from Susan E. Rice, Assistant to the President for National Security Affairs, to the Honorable John A. Boehner, Speaker of the House of Representatives, U.S. HOUSE OF REPRESENTATIVES (Jul. 25, 2014), http://armedservices.house.gov/index.cfm/files/serve?File_id=D6A70EF0-E7ED-4A8B-B39B-9774CE10B7D3 [hereinafter Letter from Susan E. Rice].

10. *See infra* Part III.

11. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

12. *See infra* note 65 and accompanying text.

are atrocious,[13] the Constitution mandates positive actions on behalf of Congress and the nation deserves a debate and clear authorizations to engage in armed conflict.[14] Allowing the President to enter a large-scale armed conflict without the consent of Congress is dangerous, because it avoids the checks and balances prescribed by the Constitution.

In addition to the constitutional problems raised by the pursuit of this operation without actual authorization, it is important to formally authorize the fight against ISIL because of the anticipated duration and costs of the operation. In human costs, as of July 28, 2015, eight United States service members have been killed in support of Operation Inherent Resolve.[15] In financial costs, as of November 3, 2015, the operation has cost the United States at least $4.75 billion and is expected to continue to cost between $2.4 and 3.8 billion per year.[16] Operation Inherent Resolve is expected to last for several years.[17] As of September 2015, there have been

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13. *See, e.g.*, Stephanie Nebehay, *Islamic State Commanders Liable for Mass War Crimes: U.N.*, REUTERS (Nov. 14, 2014), http://www.reuters.com /article/2014/11/14/us-mideast-crisis-un-warcrimes-idUSKCN0IY1CV20141114?feedType=RSS&feedName=worldNews.

14. *See infra* Section II.A.

15. HANNAH FISCHER, CONG. RESEARCH SERV., RS22452, A GUIDE TO U.S. MILITARY CASUALTY STATISTICS: OPERATION FREEDOM'S SENTINEL, OPERATION INHERENT RESOLVE, OPERATION NEW DAWN, OPERATION IRAQI FREEDOM, AND OPERATION ENDURING FREEDOM 1 (2015), http://fas.org/sgp/crs/natsec/RS22452.pdf (detailing the number of casualties reported by the Department of Defense for named operations); *DoD Identifies Army Casualty*, U.S. DEP'T OF DEF. (Oct. 23, 2015), http://www.defense.gov/News/News-Releases/News-Release-View/Article/625690/dod-identifies-army-casualty (stating that Army Special Operations Master Sergeant Joshua L. Wheeler was killed by small-arms fire in Iraq).

16. *Operation Inherent Resolve: Targeted Operations Against ISIL Terrorists*, U.S. DEP'T OF DEF., http://www.defense.gov/home/features/2014/0814 _iraq/ (last visited Nov. 3, 2015); Bendery, *infra* note 106; Todd Harrison, John Stillion, Eric Lindsey & Jacob Kohn, *Estimating the Cost of Operations against ISIL*, CENTER FOR STRATEGIC AND BUDGETARY ASSESSMENTS (Sept. 29, 2014), http://www.csbaonline.org/publications/2014/09/estimating-the-cost-of-operations-against-isil/.

17. *Opening Statement Before the S. Comm. on Foreign Relations*, 113th Cong. (Dec. 9, 2014) (statement of Hon. John F. Kerry, Secretary of State), http://www.foreign.senate.gov/imo/media/doc/Secretary%20Kerry%20-%20Testimony.pdf ("It will be years, not months, before [ISIL] is defeated.").

over 23,000 military flights over Iraq and Syria, with over 24,000 munitions deployed.[18] This is not a small-scale contingency operation, but one that has already had a large impact on the United States and the rest of the world.

Congress should repeal the 9/11 AUMF and pass a new AUMF to authorize the President to engage the U.S. military into this conflict. The President should not be allowed to use the 9/11 AUMF as a justification to enter into a new long-term conflict without congressional action. Likewise, and probably more importantly, Congress should not shirk its responsibilities and sit idly by as the President takes unilateral military action without the proper authorization. This is setting a dangerous precedent for the unilateral commitment of the armed forces and is acceding constitutional powers to the executive branch that are explicitly reserved for the Congress.

This Note advocates for a new AUMF that allows for the targeting of ISIL because the use of outdated and contentious legal authority to engage in major combat operations unrelated to the September 11, 2001 attacks is inappropriate and skirts the checks and balances required by the Constitution. Part II of this Note delves into a historical background of presidential powers in the context of national security. It discusses a brief history of the War Powers Resolution[19] and its importance in the legality of current armed conflict. It also briefly reviews and analyzes Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*),[20] and the state of the President's power in conjunction with Congress as the conflict with ISIL evolved. Part III ana-

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18. *Combined Forces Air Component Commander 2010–2015 Airpower Statistics*, U.S. DEP'T OF DEF. (May 31, 2015), http://www.defense.gov/Portals/1/features/2014/0814_iraq/docs/September_30_2015.pdf (showing the number of flights flown and weapons deployed in support of Operation Inherent Resolve). For an interesting graphic that displays an interactive map with a timeline that shows the increase in frequency and location of coalition airstrikes against ISIL targets for the first few months of the operation, see *How the Air Campaign Against ISIS Grew*, N.Y. TIMES, http://www.nytimes.com/interactive/2014/12/31/world/middleeast/isis-airstrikes-map.html (last visited Oct. 7, 2015).

19. 50 U.S.C. §§ 1541–1548 (2013).

20. 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

lyzes the 9/11 AUMF,[21] including its text, legislative history, and application to armed conflict with ISIL. This part highlights some of the major issues with applying antiquated legal authority to a new and significant threat and will suggest why Congress did not take more action to either approve or disapprove of the President's unilateral actions. Part IV outlines specific proposals for a new AUMF, including requirements for target identification, constraints, and a revision of both the 9/11 AUMF and 2002 AUMF. This part provides recommendations that will be useful to the legislature in drafting a new AUMF with regard to ISIL but will likewise be useful as a reference to any future AUMF.

II. HISTORICAL BACKGROUND

The United States Constitution explicitly gives Congress—and solely Congress—the ability to declare war.[22] The President of the United States is instrumental in the conduct of war as the Commander in Chief of the armed forces,[23] but does not have the unilateral ability to commit the military into armed conflict except under exigent circumstances.[24] Even under exigent circumstances, the President has limited authority to conduct war and must meet strict statutory guidelines set forth by Congress.[25] The Founding

21. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

22. U.S. CONST. art. I, § 8, cl. 11 (stating that Congress shall have power "[t]o declare War"). There is some debate as to what exactly the power "[t]o declare War" means. *See* Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002). Congress also has the ability to control war through their appropriations power, known as "the power of the purse." *See generally* WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE (1994) (discussing when and how Congress can control the actions of the Executive through the funding, or non-funding, of any National Security matter).

23. U.S. CONST. art II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . ."). *Contra* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 252–56 (1996) (arguing that a broad reading of the Commander in Chief clause would give the President all powers not solely conferred to Congress).

24. War Powers Resolution of 1973, 50 U.S.C. §§ 1541–1548; *see infra* Section II.A.

25. *See* 50 U.S.C. §§ 1541–1548; *see also infra* Section II.A.

Fathers were very deliberate about the division of these powers because they realized the imperative need for the checks and balances provided by this structure to promote debate and prevent tyranny.[26]

A. War Powers Resolution

The intricacies of the War Powers Resolution are outside the scope of this Note, but a brief discussion is necessary for a general understanding of the necessity of AUMFs.[27] The War Powers Resolution requires the President to have congressional authorization to conduct armed conflict, and AUMFs are the statutory means by which Congress makes this authorization.[28]

1. Enactment of the War Powers Resolution

The War Powers Resolution has been controversial since its inception. It was enacted in 1973, despite President Nixon's veto,[29] in order to specifically frame via statute the instances when the President can introduce the United States military into armed conflict without prior approval by Congress.[30] In his veto, President Nixon stated that the War Powers Resolution was "clearly

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26. *See* Yoo, *supra* note 23, at 174 (explaining that while presidential initiative in war could have been encouraged by the Framers of the Constitution, Congress possesses the "ultimate check on executive actions").

27. For a more detailed account of the War Powers Resolution, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) and Bradley Larschan, *The War Powers Resolution: Conflicting Constitutional Powers, the War Powers and U.S. Foreign Policy*, 16 DENV. J. INT'L L. & POL'Y 33 (1987).

28. *See* JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RESEARCH SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 5 (2014), https://www.fas.org/sgp/crs/natsec/RL31133.pdf.

29. *Id.* at 26. For one perspective as to how Congress was able to override the President's veto, see Michael A. Newton, *Inadvertent Implications of the War Powers Resolution*, 45 CASE W. RES. J. INT'L L. 173, 179–80 (2012).

30. *See* 50 U.S.C. § 1541(c). Presidential authority to introduce the armed forces into hostilities is limited to "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." *Id.*

unconstitutional" and "undermin[ed] our foreign policy."[31] Every one of President Nixon's successors also found the War Powers Resolution to be unconstitutional.[32] This is because some, including President Nixon, argue that the President has the unilateral ability to engage in military conflict without the prior authorization of Congress based on the Commander-in-Chief clause in the U.S. Constitution.[33] The Commander in Chief clause states that "[t]he President shall be Commander in Chief of the Army and Navy of the United States."[34] A broad reading of this clause could lead one to conclude that the President has the unilateral ability to commit military forces into armed conflict. This conclusion is outside of the scope of this Note, and while the War Powers Resolution remains controversial, it is still the law today.[35]

2. Requirements of the War Powers Resolution

The War Powers Resolution sets several restrictions and requirements on the executive branch to maintain a check on the President's powers. Arguably the most important restriction set by the War Powers Resolution is the automatic termination of use of the armed forces within sixty days of their introduction into hostilities unless there is *specific* congressional approval.[36] This allows

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31. *Richard Nixon: Veto of the War Powers Resolution*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=4021 (last visited Oct. 11, 2014). In his letter addressed to the House of Representatives, President Nixon was "deeply disturbed by the practical consequences of [the] resolution," and he predicted far-reaching consequences to the United States' foreign policy. *Id.*

32. RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R41199, THE WAR POWERS RESOLUTION: AFTER THIRTY-SIX YEARS 6 (2010), https://www.fas.org/sgp/crs/natsec/R41199.pdf.

33. *Id.* at 6–7.

34. U.S. CONST. art. II, § 2, cl. 1.

35. *See* Newton, *supra* note 29, at 173; Robert F. Turner, *The War Powers Resolution at 40: Still an Unconstitutional, Unnecessary, and Unwise Fraud that Contributed Directly to the 9/11 Attacks*, 45 CASE W. RES. J. INT'L L. 109 (2012); *see also* September Press Release, *supra* note 8.

36. *See* 50 U.S.C. § 1544(b) (2013).

> Within sixty calendar days after a report is submitted . . . the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a *specific* authorization for such use of

the President the limited ability to introduce forces in exigent circumstances in defense of the nation without congressional approval,[37] but if the President has not obtained congressional approval after sixty days, this use of the armed forces is automatically terminated.[38] If Congress does not specifically approve of the operation, the President is required to end hostilities within thirty days of the automatic termination.[39] Overall, the President can engage troops in armed conflict for ninety days before the conflict is declared in violation of the War Powers Resolution.[40]

Regarding armed conflict with ISIL, the United States entered into hostilities by the use of airstrikes that were conducted beginning on August 8, 2014.[41] The ninety-day mark, by which the President was required to end hostilities and withdraw troops without specific congressional approval, was November 6, 2014.[42] The passage of this deadline raised the question of whether President Obama's use of Armed Forces was legal because there was no *specific* congressional authorization given for armed conflict with ISIL.[43] If there was no legitimate congressional authorization, then the President violated the War Powers Resolution and avoided the system of checks and balances on which the government rests.

> United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.

Id. (emphasis added). Other requirements include regular consultation with Congress and periodic reports when Armed Forces are committed into hostilities. *Id.* at §§ 1542–1543.

37. *Id.* § 1541(c).

38. *Id.* § 1544(b). The War Powers Resolution created procedures that expedited the process for Congress to declare war or authorize the use of military force in order to allow compliance with the sixty-day requirements. ELSEA & WEED, *supra* note 28, at 77–80.

39. 50 U.S.C. § 1544(b).

40. *Id.*; *see also* THE CONSTITUTION PROJECT, DECIDING TO USE FORCE ABROAD: WAR POWERS IN A SYSTEM OF CHECKS AND BALANCES 33–34 (2005), http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad1.pdf (arguing that the ninety-day time limit gives both the President and Congress a "free pass" to enter into armed conflict).

41. August Press Release, *supra* note 7.

42. *See* Sen. Rand Paul, *Obama's ISIS War is Illegal*, DAILY BEAST (Nov. 10, 2014, 5:45 AM), http://www.thedailybeast.com/articles/2014/11/10/obama-s-isis-war-is-illegal.html.

43. *Id.*

3. Enforcement of the War Powers Resolution

As previously mentioned, the War Powers Resolution has always been controversial, and several Presidents have been challenged regarding their alleged violations of the War Powers Resolution.[44] Some Presidents have claimed the inherent constitutional power to introduce military forces into armed conflict and subsequently exercised their claimed authority.[45] While speaking at the Texas State Republican Convention in Dallas, Texas, President George H. W. Bush defiantly stated, "I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait."[46] On several occasions, individual citizens, and even Congresspersons, have taken these national security issues to the courts to question the unilateral authority of the Commander in Chief and enforce the War Powers Resolution. However, courts have avoided the issue and considered it non-justiciable for three reasons: political question,[47] lack of standing,[48] and ripeness.[49] This lack of remedy available through Article III courts highlights the necessity for Congress to take a stand on the President's actions and demand the constitutionally required

44. *See infra* notes 47–49 and accompanying text.

45. *See supra* notes 31–35 and accompanying text.

46. *George Bush: Remarks at the Texas State Republican Convention in Dallas, Texas,* AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=21125 (last visited Oct. 10, 2015). President George H. W. Bush also told his then-Deputy National Security Advisor Robert Gates, "'[i]f I don't get the votes' in Congress for war . . . 'I'm going to do it anyway. And if I get impeached, then so be it.'" Jon Meacham, *The Hidden Hard-line Side of George H. W. Bush*, POLITICO (Nov. 12, 2015), http://www.politico.com/magazine/story/2015/11/jon-meacham-book-george-h-w-bush-213347.

47. *See* El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 842 (D.C. Cir. 2010) ("[Courts] have consistently held . . . that courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security.").

48. *See* Campbell v. Clinton, 203 F.3d 19, 23–24 (D.C. Cir. 2000) (holding that the thirty-one Congressmen who filed suit seeking a declaration that the President's use of military forces was illegal had no standing).

49. *See* Dellums v. Bush, 752 F. Supp. 1141, 1143 n. 1, 1151 (D.C. Cir. 1990) (holding that the fifty-four Congressmen who sued regarding the legality of the unilateral introduction of forces constituted a minority of Congress, and thus, the issue was not ripe because Congress as a whole had not spoken on the issue).

checks and balances because there is no other way to check the President's powers. When determining whether the President has the actual authority to take military action in a national security situation, or whether Congress has already granted that authority, courts look to a tripartite scheme. This scheme categorizes the President's power into one of three levels based upon differing levels of congressional support.

B. Justice Jackson's Concurrence in the Steel Seizure *case*

In his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*), Justice Robert Jackson set up a three-level tiered hierarchy assessment to determine how much power the President has in any given national security issue.[50] Although it was just a concurrence, Justice Jackson's concurring opinion has been subsequently cited by the Court on multiple occasions and treated as if it were law.[51] Justice Jackson's opinion is now the standard scheme by which national security issues are judged.[52]

The first tier of executive power rests upon full support from Congress and gives the President the most power possible because "it includes all that [the President] possesses in his own right plus all that Congress can delegate."[53] The second tier is achieved "[w]hen the President acts in absence of either a congres-

50. 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

51. Medellin v. Texas, 552 U.S. 491, 494 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in [the area of national security law]."); Dames & Moore v. Regan, 453 U.S. 654, 661 (1981). Justice Jackson's analysis "brings together as much combination of analysis and common sense as there is" in the area of national security law. *Id.* Reportedly, in the fifty cases to use Justice Jackson's framework, every case in this category was found to be constitutional. *See* Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 311 (2010). Interestingly, Chief Justice Rehnquist, who authored the opinion in *Dames & Moore v. Regan*, was Justice Jackson's law clerk at the time the *Steel Seizure* opinion was written. WILLIAM H. REHNQUIST, THE SUPREME COURT 169 (new ed. 2001).

52. *See* Adam J. White, *Justice Jackson's Draft Opinions in the Steel Seizure Cases*, 69 ALB. L. REV. 1107, 1107 (2006) ("As the nation debates the Constitution's limits on executive action in the global war on terror, Justice Jackson's opinion has grown ubiquitous in legal discourse.").

53. *Steel Seizure*, 343 U.S. at 635.

sional grant or denial of authority[.]"[54] In this case, the President "can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[55] The main difference between the first and second tiers is that, in the second tier, if the President acts outside his existing scope of authority, the President may or may not be acting legally. Finally, in the third tier, Congress expressly or impliedly disapproves the presidential action, and claims of presidential power "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[56] In this tier, the President is at his weakest as far as legal authority; he may only rely on his inherent constitutional authority because Congress could simply amend or repeal any current statute on which he relies upon.

In a public address to the nation about a month after authorizing strikes against ISIL, President Obama stated that he "believe[s] we are strongest as a nation when the President and Congress work together."[57] This belief is consistent with the first tier of support, where Congress has explicitly authorized action. In the case of ISIL, the President is in the second tier because there has been no explicit and specific authorization of his use of force by Congress. In the event that Congress does pass a new AUMF, the President will be in the first tier, in his most powerful position. In the event that Congress does not pass an additional AUMF and speaks against further action against ISIL, the President will be in the third tier and will be very limited in his ability to legally continue military action against ISIL. In the meantime, the pursuit of armed conflict against ISIL is on shaky legal ground due to a lack of action on the part of Congress and the President's reliance on the 9/11 AUMF.

54. *Id.* at 637.

55. *Id.*

56. *Id.* at 638.

57. Press Release, Office of the Press Sec'y, *Statement by the President on ISIL*, THE WHITE HOUSE (Sept. 10, 2014), http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1.

III. THE 9/11 AUMF

The 9/11 AUMF[58] is presumably the authorization used by the Obama administration as its justification to authorize the armed conflict against ISIL.[59] It is difficult to determine exactly whether the 9/11 AUMF authorizes the strikes against ISIL because of the ambiguity written into the statute and its scant legislative history.[60]

This statute gives the President the *sole unharnessed power* to determine *who* to attack, *what* to attack, and *how* to attack, as long as there is some tenable link to the September 11, 2001 terrorist attacks.[61] Per the language itself, the President alone has this authority; Congress has no authority to check the massive amount of power given to the President by Congress in the 9/11 AUMF.[62] Because this AUMF is exclusively tied to the September 11, 2001 attacks, its application to subsequent terrorist groups has become increasingly tenuous. The specific requirement of those responsible for the September 11, 2001 attacks also makes the 9/11 AUMF difficult to discern because relationships between terrorists and their organizations are generally not well documented. What qualifies as having "aided the terrorist attacks that occurred on Sep-

58. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

59. September Press Release, *supra* note 8 (mentioning both the 9/11 and 2002 AUMFs as justification). However, the draft AUMF that President Obama sent to Congress on February 11, 2015, recommends repealing the 2002 AUMF, implying that it is not being used and is not necessary. *See* Joint Resolution, THE WHITE HOUSE (Feb. 11, 2015) [hereinafter Obama Proposed Resolution], http://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf; Press Release, Office of the Press Sec'y, *Letter from the President—Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant*, THE WHITE HOUSE (Feb. 11, 2015), http://www.whitehouse.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection [hereinafter 2015 Press Release]; *see also infra* note 130.

60. For a detailed analysis highlighting some of the ambiguities and problems with determining who and what exactly is authorized as a target under the 9/11 AUMF, see Graham Cronogue, Note, *A New AUMF: Defining Combatants in the War on Terror*, 22 DUKE J. COMP. & INT'L L. 377, 379–86 (2012).

61. *See* Authorization for Use of Military Force, 115 Stat. 224.

62. *See generally id.* (stating that the President has the power to determine who to target under the authorization of the 9/11 AUMF).

tember 11, 2001"[63] or of having "harbored such organizations or persons"[64] is a matter of interpretation and can be modified to fit the purposes of the administration.

A. History of the 9/11 AUMF

On September 11, 2001, terrorists hijacked four commercial airplanes and crashed two into the World Trade Center buildings, one into the Pentagon, and the fourth into a field in Pennsylvania, killing nearly 3,000 civilians.[65] The very next day, President George W. Bush asserted that the United States would use "all of our resources to conquer this enemy" who carried out these "acts of war."[66] On the same day the President spoke, the leaders of the House and Senate met and agreed to bypass the formal legislative review process to expedite legislation in response to the terrorist attacks.[67] On September 14, merely two days later, the Senate passed the joint resolution with a vote of 98-0 and the House passed it with a vote of 420-1.[68] Due to the expedited nature and sense of urgency for enacting this legislation, the legislative history is relatively scant compared to the amount of power it purports to grant the President. President Bush signed the joint resolution, short titled "Authorization for Use of Military Force," ("9/11 AUMF") on September 18, 2001, just seven days after the attack.[69] The 9/11 AUMF states:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such

63. *Id.*

64. *Id.*

65. RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS22357, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY 1 (2007), https://www.fas.org/sgp/crs/natsec/RS22357.pdf.

66. *Id.* (citation omitted).

67. *See id.* at 2. For more details on the congressional procedures used in conjunction with declarations of war or Authorizations for Use of Military Force, see ELSEA & WEED, *supra* note 28, at 77–80.

68. GRIMMETT, *supra* note 65, at 3.

69. *Id.*

> organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[70]

This grant of power is extremely broad, with very few restrictions.[71] Per the statutory language, the only restriction is that targets of the 9/11 AUMF must be linked to the terrorist attacks that occurred on September 11, 2001.[72] The 9/11 AUMF has been used globally to target terrorists since its enactment, and is the primary legal authorization for the U.S. military operations in Afghanistan.[73]

The White House initially proposed language for an AUMF on September 12, 2001, but Congress rejected the language as overreaching.[74] The White House's proposal would have granted

70. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

71. *See* discussion *infra* Section III.B.

72. There has been some litigation as to the scope of the 9/11 AUMF, but all of that litigation has revolved around the authority to detain enemy combatants, which is outside the scope of this Note. *See generally* Boumediene v. Bush, 553 U.S. 723, 732 (2008) (holding that the 9/11 AUMF does not prevent a detainee's right to habeas corpus); Hamdan v. Rumsfeld, 548 U.S. 557, 559 (2006) (holding that the 9/11 AUMF does not override Congress' specific authorization of military commissions); Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion) (holding that the United States has the authority under the 9/11 AUMF to detain individuals who fought against the United States as vaguely identified in the AUMF's language, but failing to define the scope of the AUMF).

73. *See* MATTHEW C. WEED, CONG. RESEARCH SERV., R43760, A NEW AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST THE ISLAMIC STATE: ISSUES AND CURRENT PROPOSALS IN BRIEF 13 (2015), https://www.fas.org/sgp/crs/natsec/R43760.pdf.

74. *See* GRIMMETT, *supra* note 65, at 3–4; David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71, 73 (2002). When signing the bill, President Bush stated that "[o]ur whole Nation is unalterably committed to a direct, forceful, and comprehensive response to these terrorist attacks and the scourge of terrorism directed against the United States and its interests." Press Release, Office of the Press Sec'y, *President Signs Authorization for Use of Military Force Bill*, THE WHITE HOUSE

the President even more power, including the power "to deter and pre-empt any future acts of terrorism or aggression against the United States."[75] By not allowing the White House's suggested language, Congress restricted its authorization of force to only those organizations that were involved in the September 11, 2001 attacks and their associated forces.[76] At the time, necessity dictated quick legislation. Congress acted swiftly in order to authorize the use of military force in order to show the world that the United States would not allow these types of attacks. While this hasty legislation was necessary at the time of enactment, the lack of deliberations and consideration have led to an over grant of unchecked power to the President.

B. Scope and Limitations of the 9/11 AUMF

As a result of the quickly enacted legislation, several key components to an AUMF were left out of the 9/11 AUMF. Importantly, the 9/11 AUMF does not have a sunset provision,[77] or any actual target constraints other than a required link to the September 11, 2001 attacks. Under the Obama Administration's interpretation and application of the 9/11 AUMF, the tenuous link to the September 11, 2001 attacks could allow the 9/11 AUMF to be applied indefinitely.[78] There is also no requirement that any indi-

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(Sept. 18, 2001), http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010918-10.html.

75. Abramowitz, *supra* note 74; *see also* GRIMMETT, *supra* note 65, at 2–3 (stating that the proposed language "would have granted the President open-ended authority to act against all terrorism and terrorists or potential aggressors against the United States anywhere" and not merely "the authority to act against the terrorists involved in the September 11, 2001 attacks, and those nations, organizations and persons who had aided or harbored the terrorists.").

76. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

77. A "sunset law" can be inserted into a law so the law expires at a specified time or interval, unless it is renewed. *Sunset Law*, BLACK'S LAW DICTIONARY (10th ed. 2014).

78. *Contra* Beau D. Barnes, *Reauthorizing the "War on Terror": The Legal and Policy Implications of the AUMF's Coming Obsolescence*, 211 MIL. L. REV. 57, 71 (2012) ("[I]t is nearly impossible for the AUMF to last forever."); Cronogue, *supra* note 60, at 385 ("[T]he AUMF should not last any longer than it takes to destroy, imprison, or force the surrender of all 'nations, organizations or persons' who have a sufficient tie to 9/11.").

viduals targeted under the 9/11 AUMF have any connection to the September 11, 2001 attacks; they only need to belong to an organization that once had a connection to the attacks.[79] This means the President can theoretically use the 9/11 AUMF forever and allows the President to skirt constitutional requirements and avoid the integrated system of checks and balances.

The only member of Congress—out of 519 members—who voted against the 9/11 AUMF did so because she was concerned that it authorized military force as "a blank check . . . anywhere, in any country . . . and without time limit."[80] This fear has come to fruition; President Obama is stretching the 9/11 AUMF to justify his actions against ISIL. The only member of Congress to raise the issue of the duration of the authorization during deliberations was then-Chairman of the Senate Foreign Relations Committee, then-Senator Joe Biden, who explicitly rejected a time limit for the authorization.[81] This open-ended authorization, combined with ambiguous statutory language and the unilateral determination by the President as to who can be targeted by the authorization, is a recipe for unharnessed power to engage in armed conflict.

The geographical scope of the 9/11 AUMF is another open-ended authorization because it is not limited within the text of the statute itself.[82] The statutory language does not specifically limit the application of the 9/11 AUMF to locations abroad; that limitation may only be inferred through the statute's reference to the

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79. There are already ISIL fighters who were not even born near September 11, 2001. Harriet Alexander, *'Our Youngest Martyr Yet'—Isil Boasts About Death of 10-Year-Old*, TELEGRAPH (Oct. 09, 2014, 5:09 PM), http://www.telegraph.co.uk/news/worldnews/islamic-state/11151906/Our-youngest-martyr-yet-Isil-boasts-about-death-of-10-year-old.html (reporting that ISIL is proud of a child soldier who was killed in action); HUMAN RIGHTS OFFICE, UNITED NATIONS ASSISTANCE MISSION FOR IRAQ, *supra* note 4, at 17–18 (reporting that children as young as fourteen are undergoing military training by ISIL).

80. Barbara Lee, *Why I Opposed the Resolution to Authorize Force*, S.F. GATE (Sept. 23, 2001, 4:00 AM), http://www.sfgate.com/opinion/article/Why-I-opposed-the-resolution-to-authorize-force-2876893.php; *see* GRIMMETT, *supra* note 65, at 3.

81. 147 CONG. REC. S9422–23 (daily ed. Sept. 14, 2001).

82. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

War Powers Resolution, which only applies abroad.[83] Several members of Congress noted during deliberations that the application of the 9/11 AUMF was limited to use of force abroad.[84] Without the specific geographic limitation in the statute, because the President is not following other aspects of the War Powers Resolution, he may not be restricted from using the 9/11 AUMF domestically. While this may be a stretch, it is likely that the public will never know if the 9/11 AUMF is ever used domestically due to national security restrictions.

C. Issues with Applying the 9/11 AUMF to ISIL

In May 2013, in a speech to the National Defense University, President Obama stated that he wanted to repeal the very same AUMF that his administration had been citing for authority to pursue armed conflict with ISIL.[85] Since that speech, President Obama and his senior staff have changed their interpretation of the

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83. Abramowitz, *supra* note 74, at 75 ("While inserting [the word 'abroad'] was suggested during staff discussions, it was arguably unnecessary in light of the references in section 2(b) of the joint resolution to the War Powers Resolution . . . which generally deals with introducing U.S. forces abroad."). However, the preamble to the 9/11 AUMF does mention self-defense "both at home and abroad." Authorization for Use of Military Force, 115 Stat. 224.

84. *See, e.g.*, 147 CONG. REC. S9423 (daily ed. Sept. 14, 2001) (statement of Sen. Joseph R. Biden, Jr.) ("[I]t should go without saying, however, that the resolution is directed only at using force abroad to combat acts of international terrorism"); 147 CONG. REC. H5639 (daily ed. Sept. 14, 2001) (statement of Rep. Tom Lantos) ("[The 9/11 AUMF] empowers the President to bring to bear the full force of American power *abroad*.") (emphasis added).

85. Press Release, Office of the Press Sec'y, Fact Sheet: The President's May 23 Speech on Counterterrorism, THE WHITE HOUSE (May 23, 2013), http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-president-s-may-23-speech-counterterrorism [hereinafter The President's Speech on Counterterrorism]. The irony of citing an authorization that the President had called for a repeal on as a legal justification was not lost. *See* Press Release, Office of the Press Sec'y, *Press Briefing by Press Secretary Josh Earnest*, THE WHITE HOUSE (Sept. 11, 2014), http://www.whitehouse.gov/the-press-office/2014/09/11/press-briefing-press-secretary-josh-earnest-9112014 [hereinafter *Press Briefing*]. A question posed to the Press Secretary was, "And if I could just ask finally whether you see any irony in using as your legal justification for these airstrikes an authorization for military force that the President himself has called for repeal of." *Id.*

9/11 AUMF on multiple occasions.[86] These changes in interpretation further question the legitimacy of the use of the 9/11 AUMF and our nation's ability to prosecute war and support our service members.[87] While the background for the changes in the President's interpretation are not clear, the increased scope of authority interpreted from the same 9/11 AUMF indicates an attempt to stretch the AUMF's authority in order to keep operations, like the one against ISIL, legal.

Under the Presidential Policy Guidance that President Obama signed on May 22, 2013, in order to use lethal force in counterterrorism operations abroad, there must be a sufficient legal basis.[88] For the legal authority of the 9/11 AUMF to apply against ISIL, the President must establish a connection between ISIL and forces that "aided the terrorist attacks that occurred on September 11, 2001" to keep in line with the statute's authorization.[89] This application begs the question of how closely linked an individual or organization has to be to the September 11, 2001 attacks to be targeted under the scope of the 9/11 AUMF. Unfortunately, the statutory language and legislative history of the 9/11 AUMF do not provide the answer to what is considered an associated force. The relationship of ISIL to al Qaeda[90] is not official or extremely clear.

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86. *See* William S. Castle, *The Argument for a New and Flexible Authorization for the Use of Military Force*, 38 HARV. J. L. & PUB. POL'Y 509, 523–31 (2015).

87. *Id.* at 523.

88. THE WHITE HOUSE, U.S. POLICY STANDARDS AND PROCEDURES FOR THE USE OF FORCE IN COUNTERTERRORISM OPERATIONS OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (May 22, 2013), http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf; The President's Speech on Counterterrorism, *supra* note 85.

89. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). For an argument that strongly opposes any suggested legitimate link between al Qaeda and ISIL, see Ryan Goodman & Shalev Roisman, *Assessing the Claim that ISIL is a Successor to Al Qaeda—Part 1 (Organizational Structure)*, JUST SECURITY (Oct. 1, 2014 9:04 AM), http://justsecurity.org/15801/assessing-isil-successor-al-qaeda-2001-aumf-part-1-organizational-structure.

90. Al Qaeda was quickly determined to be responsible for the attacks on September 11, 2001. *See* Michael J. Morell, *11 September 2001: With the President*, STUD. IN INTELLIGENCE, Sept. 2006, at 23, 30, http://www.foia.cia.gov/sites/default/files/DOC_0001407035.pdf (reporting that the President's CIA

ISIL at least *had* some connections previously with al Qaeda, and officials with the Obama Administration have stated that the 9/11 AUMF applies to ISIL based on that relationship.[91] However, the relationship between the organizations seems to have ended with al Qaeda shunning the actions of ISIL,[92] but the authorization is not clear as to the effect of that split. Al Qaeda's General Command stated that "ISIS 'is not a branch of the al-Qaeda group . . . does not have an organizational relationship with it and [al-Qaeda] is not the group responsible for their actions.'"[93] The Obama Administration explains that the split of al Qaeda and ISIL has no effect on its ability to target ISIL because a previous long relationship existed between the two organizations, there are continued ties between the organizations' fighters, and there are similar tactics and goals amongst the organizations.[94] However, the link between these organizations is not clear, and will likely never be clear because by their very natures as terrorist organizations, they are secretive. It would not be difficult to exaggerate a link between the organizations if that relationship would assist one's purposes.[95]

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briefer briefed the President aboard Air Force One within hours of the attacks that al Qaeda and Osama bin Laden were likely responsible for the attacks), Press Release, Office of the Press Sec'y, *Address to a Joint Session of Congress and the American People*, THE WHITE HOUSE (Sept. 20, 2001 9:00 PM), http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html (statement of President George W. Bush).

91. Miller, *supra* note 9. For a detailed timeline on the origins of ISIL, see NTREPID, *supra* note 2.

92. Liz Sly, *Al-Qaeda Disavows Any Ties With Radical Islamist ISIS Group in Syria, Iraq*, WASH. POST (Feb. 3, 2014), http://www.washingtonpost.com/world/middle_east/al-qaeda-disavows-any-ties-with-radical-islamist-isis-group-in-syria-iraq/2014/02/03/2c9afc3a-8cef-11e3-98ab-fe5228217bd1_story.html.

93. *Id.* (alterations in original).

94. *Press Briefing*, *supra* note 85. However, not everyone believes that the Obama Administration is being straightforward regarding the link between al Qaeda and other terrorist groups. Khorasan is also a newly designated terrorist group in Iraq that has alleged links to al Qaeda as well. *See infra* note 95.

95. *See generally* Anna Mulrine, *Is Khorasan a Real Threat—or a Way to Avoid a Vote on US Military Action?*, CHRISTIAN SCI. MONITOR (Sept. 29, 2014), http://www.csmonitor.com/USA/Military/2014/0929/Is-Khorasan-a-real-threat-or-a-way-to-avoid-a-vote-on-US-military-action-video?cmpid=TW (suggesting that the Obama Administration may have created a tenuous link between a newly designated terrorist group and al Qaeda as well as exaggerated the im-

This highlights the difficulty of relying on a broadly written and ambiguous statute to justify a large-scale armed conflict.[96]

Even if the link to al Qaeda could be established, the United States should not wish to enter into a long-term armed conflict based on shaky ties to al Qaeda. The deployment of our armed forces into conflict should be done after serious debate and not merely based on the unilateral decisions of the executive branch. If Congress does in fact approve of and support the President's actions, Congress should have enacted legislation to keep in line of their constitutional responsibilities.

D. Why Has Congress Not Authorized the Use of Military Force Against ISIL?

The United States Constitution explicitly entrusts the power to declare war solely in the Congress.[97] Historically, the President asks Congress to declare war or authorize the deployment of the military prior to introducing the military into armed conflict.[98] Congressman John Boehner, while the Speaker of the House of Representatives, stated that Congress will vote on a new AUMF when the President asks for one, but the President did not do so prior to the sixty days required by War Powers Resolution.[99] The President has asserted the authority to conduct the strikes against ISIL, but has also "welcome[d] congressional support for this ef-

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minence of action against the group in order to continue airstrikes without enacting legislation).

96. *See* Jack Goldsmith, *The Legal Consequences of Islamic State + Al Qaeda Cooperation, and Implications for AUMF Reform*, LAWFARE (Nov. 14, 2014, 10:20 AM), http://www.lawfareblog.com/2014/11/the-legal-consequences-of-islamic-state-al-qaeda-cooperation-and-implications-for-aumf-reform/.

97. U.S. CONST. art. I, § 8, cl. 11 ("[The Congress shall have power] To declare War . . . .").

98. ELSEA & WEED, *supra* note 28, at 1, 5 (stating that prior to all eleven declarations of war and most of the AUMFs, the President formally requested the authorization from Congress).

99. Jack Goldsmith, *History Suggests that Congress Will Only Authorize Force Against the Islamic State if the President Proposes and Pushes for an Authorization (or Screws Up Unilateral Force Badly)*, LAWFARE (Oct. 7, 2014, 8:30 AM), http://www.lawfareblog.com/2014/10/history-suggests-that-congress-will-only-authorize-force-against-the-islamic-state-if-the-president-proposes-and-pushes-for-an-authorization-or-screws-up-unilateral-force-badly/; Paul, *supra* note 42.

fort in order to show the world that Americans are united in confronting this danger."[100] Some in Congress also believe that the President has the ability to target ISIL based on the 9/11 AUMF, but others do not.[101] This highlights the need for rigorous debate on both sides of this argument to ensure that our military operations remain both legal and supported by the citizens of the United States through their elected representation.

Critics have argued that Congress should have taken initiative in drafting and authorizing a new AUMF, and by not doing so, abdicated one of its most sacred responsibilities.[102] By not addressing this issue as a Congress, Congress is arguably implicitly authorizing the President to conduct these airstrikes under the authority of the 9/11 AUMF. Implicit authorization for armed conflict is not sufficient. While Congress as a whole did not take action to authorize the airstrikes within the first sixty days, several members of Congress did take action and there were at least seven proposed "ISIL AUMFs" in some form of legislation within the first sixty days after beginning airstrikes.[103] Each of these bills

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100. *Statement by the President on ISIL*, *supra* note 57.

101. Jake Miller, *John Boehner "Happy" to Have Congress Vote on Anti-ISIS Mission*, CBS NEWS (Sept. 28, 2014, 5:53 PM), http://www.cbsnews.com/news/john-boehner-happy-to-have-congress-vote-on-anti-isis-mission; Paul, *supra* note 42.

102. Jeremy Diamond, *McCain: ISIS' Rise Like 'Watching a Train Wreck,'* CNN (Sept. 29, 2014, 12:21 PM), http://newday.blogs.cnn.com/2014/09/29/mccain-isis-rise-like-watching-a-train-wreck (reporting that the chairman of the House Foreign Affairs Committee "criticized the President for his 'political failure'" and calling the President to lead a strategy to root out ISIL); Oliver Knox, *How to Force Congress to Vote on Obama's War Against the Islamic State*, YAHOO NEWS (Oct. 03, 2014, 4:58 AM), http://news.yahoo.com/a-call-to-congress-to-vote-on-obama-s-is-war-205104044.html?soc_src=mediacontentsharebuttons (interviewing retired Rep. Tom Campbell, who sued President Clinton regarding airstrikes in Serbia, Rep. Campbell states that refusing to take a stand on support for military action against ISIL "is Congress running way [sic] from its responsibility"); Diedre Walsh, *Boehner Might Bring Congress Back for Syria Debate After All*, CNN (Sept. 30, 2014, 8:57 AM), http://www.cnn.com/2014/09/29/politics/john-boehner-mixed-messages/ (quoting House Democratic Leader Nancy Pelosi) ("Since when do we sit around waiting, using the excuse he didn't ask? No, if you want to have an authorization that has any constraints on the President, you don't wait for him to write it.").

103. H.R.J. Res. 128, 113th Cong. (2014) (as introduced to the House, Sept. 19, 2014, by Rep. John Larsen); S.J. Res. 44, 113th Cong. (2014) (as in-

stalled in committee with minimal consideration until after the 113th Congress concluded its term.[104]

Only one piece of legislation made it through the committee process before the end of the congressional term. It was a proposed AUMF drafted by Senator Robert Menendez, the Chairman of the Senate Foreign Relations Committee for the 113th Congress.[105] The bill was seen largely as a political gesture, as it was introduced immediately before the end of the congressional term where it would have been unlikely to have any effect because of the impending break in between sessions.[106] Senator Bob Corker, at the time the ranking member of the Senate Foreign Relations Committee, stated that the bill was "going nowhere."[107] Senator Corker, who took over as the Chairman of the Senate Foreign Relations Committee for the 114th Congress, has also stated that he will not support Senator Menendez's proposed AUMF because of a lack of support and input from the Obama Administration.[108] Senator Corker stated that the executive branch needs to set guide-

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troduced to the Senate, Sept. 17, 2014, by Sen. Tim Kaine); H.R.J. Res. 125, 113th Cong. (2014) (as introduced to the House, Sept. 16, 2014, by Rep. Adam Schiff); H.R. 5415, 113th Cong. (2014) (as introduced to the House, Sept. 8, 2014, by Rep. Frank Wolf); S.J. Res. 42, 113th Cong. (2014) (as introduced to the Senate on Sept. 8, 2014, by Sen. Bill Nelson); S.J. Res. 43, 113th Cong. (2014) (as introduced to the Senate, Sept. 8, 2014, by Sen. James Inhofe); H.R.J. Res. 123, 113th Cong. (2014) (as introduced to the House, Sept. 8, 2014, by Rep. Darrell Issa).

104. *See* WEED, *supra* note 73, at 4.

105. S.J. Res. 47, 113th Cong. (2014) (as introduced to the Senate, Dec. 13, 2014, by Sen. Robert Menendez); *Senate Foreign Relations Committee Passes Authorization for Use of Military Force Against ISIL*, U.S. SENATE COMMITTEE ON FOREIGN REL. (Dec. 11, 2014), http://www.foreign.senate.gov/press/chair/release/senate-foreign-relations-committee-passes-authorization-for-use-of-military-force-against-isil. Senator Menendez's bill had no subsequent action after introduction to the Senate. S.J. Res. 47, 113th Cong. (2014).

106. Jennifer Bendery, *Senate Committee Votes to Authorize War Against Islamic State*, HUFFINGTON POST (Dec. 11, 2014, 2:14 PM), http://www.huffingtonpost.com/2014/12/11/war-authorization-islamic-state-isil_n_6308114.html.

107. *Corker Statement on Committee Consideration of Authorization for the Use of Military Force Against ISIS*, U.S. SENATE COMMITTEE ON FOREIGN REL. (Dec. 11, 2014), http://www.foreign.senate.gov/press/ranking/release/corker-statement-on-committee-consideration-of-authorization-for-the-use-of-military-force-against-isis.

108. Bendery, *supra* note 106.

lines and strategy for success of the mission before Congress acts.[109]

It is also speculated that Congress shirked its responsibilities to authorize the use of military force for political reasons.[110] The midterm elections for Congress occurred on November 4, 2014,[111] merely two days before the President was required to cease military operations targeting ISIL[112] pursuant to the War Powers Resolution's automatic expiration.[113] It has been suggested that Congress was hesitant to engage in a debate over a hot topic immediately prior to the election.[114] Congress was not in session immediately prior to the election in order to campaign, but Congress could have convened for a vote if necessary.[115]

The day after the 2014 congressional midterm elections, President Obama publically stated that he would ask Congress for a new AUMF for use against ISIL.[116] President Obama wants a new AUMF for ISIL because "[t]he world needs to know we are united behind this effort, and the men and women of our military deserve our clear and unified support."[117] However, Speaker Boehner stated that he would not ask Congress to vote on action against ISIL until the new Congress was seated in the new term.[118]

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109. *See id.*

110. Walsh, *supra* note 102 (quoting Senator John McCain). Senator McCain characterized delaying the debate on an authorization for military action against ISIL as "an act of cowardice on the part of Congress . . . [t]hey didn't want to vote before the election." *Id.*

111. *See* Steven Collinson, *Republicans Seize Senate, Gaining Full Control of Congress*, CNN (Nov. 5, 2014, 10:43 AM), http://www.cnn.com/2014/11/04/politics/election-day-story/index.html.

112. Paul, *supra* note 42 (stating that the ninety day mark to automatically cease military operations was November 6, 2014).

113. 50 U.S.C. § 1544(b) (2013).

114. *See supra* note 110.

115. Miller, *supra* note 101.

116. Press Release, Office of the Press Sec'y, *Remarks by the President in a Press Conference*, THE WHITE HOUSE (Nov. 5, 2014), http://www.whitehouse.gov/the-press-office/2014/11/05/remarks-president-press-conference.

117. *Id.*

118. Carl Hulse, *Today in Politics: Boehner Says New Congress Should Debate Military Action*, N.Y. TIMES (Sept. 25, 2014, 7:06 AM), http://www.nytimes.com/politics/first-draft/2014/09/25/?entry=685&_r=0 (quoting then-Speaker Boehner) ("I would suggest to you that early next year, assum-

Speaker Boehner stated that a lame duck Congress was the wrong entity to enact such an important piece of legislation and preferred to take action once the new Congress was seated.[119]

The next major address by the White House regarding an ISIL AUMF was at the 2015 State of the Union. During the President's State of the Union address on January 20, 2015, President Obama either acknowledged the requirement for an ISIL AUMF, or perhaps had a Freudian slip.[120] In the transcript of the State of the Union address, President Obama briefly calls on the Congress to create a new ISIL AUMF and then moves on to a new subject.[121] As the President delivered the speech, however, he added the line "[w]e need that authority," when discussing the requested ISIL AUMF.[122] While this went largely unnoticed, it may have been a sign that the President believes the ISIL AUMF is necessary, and not merely an act of good faith by the President to let Congress get on board with President Obama's plan as he has suggested.

Following up on his State of the Union address, on February 11, 2015, President Obama sent a draft ISIL AUMF to Congress.[123] In this draft ISIL AUMF, the President proposed a three-year sunset provision, the authority for limited ground operations, and a reporting requirement to Congress.[124] However, there was no provision for a repeal of the 9/11 AUMF, which the President specifically noted in his transmittal letter.[125] Instead, the President stated that his newly proposed ISIL AUMF could serve as "model" for how the President and Congress can "work together to tailor

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ing that we continue in this effort, there may be that discussion and there may be that request [for an AUMF] from the president[.]").

119. *Id.*

120. *Retroactively Authorizing War*, N.Y. TIMES (Jan. 31, 2015), http://www.nytimes.com/2015/02/01/opinion/sunday/retroactively-authorizing-war.html; *see* President Barack Obama, State of the Union Address (Jan. 20, 2015), http://www.whitehouse.gov/sotu (at 36:58).

121. *State of the Union 2015: Full Transcript*, CNN (Jan. 20, 2015, 9:08 PM), http://www.cnn.com/2015/01/20/politics/state-of-the-union-2015-transcript-full-text/.

122. *Retroactively Authorizing War*, *supra* note 120 (quoting State of the Union Address, *supra* note 120).

123. 2015 Press Release, *supra* note 59.

124. Obama Proposed Resolution, *supra* note 59.

125. 2015 Press Release, *supra* note 59.

the authorities granted by the [9/11] AUMF."[126] Further, the President stated that he "remain[s] committed to working with the Congress and the American people to refine, and ultimately repeal, the [9/11] AUMF."[127] It is clear that this is not a priority for the Obama Administration since it took so long to put forth a bill and there has been little action on its behalf to prod Congress to do Congress' job. This was a wise move by the Obama Administration, however, because it shows the American people that it has done its duty to propose legislation and that Congress failed to follow up. Additionally, President Obama does not have any real incentive to give up his unharnessed power that he claims from the 9/11 AUMF. It is the responsibility of Congress to maintain its constitutional powers and define the scope of legislation. If Congress is not going to do so, the President is smart to maintain the current status quo.

Despite calls for the President to act and propose a new ISIL AUMF, Congress has done nothing with the President's proposal.[128] Perhaps it is because Congress realizes the futility of passing a new AUMF while leaving the 9/11 AUMF in place.[129] There is no reason to pass a new AUMF for ISIL and leave the 9/11 AUMF in place. If the President wanted to exceed the ISIL AUMF's mandates, he could merely fall back on the 9/11 AUMF at any time. There are also politically charged speculations that potential presidential contenders in 2016 do not want to commit to a position on ISIL before the primaries.[130] Potential presidential

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126. *Id.*

127. *Id.*

128. Karen DeYoung, *Debate Over War Authorization in Congress Fades with Little Result*, WASH. POST (Apr. 30, 2015), https://www.washingtonpost.com/world/national-security/debate-over-war-authorization-in-congress-fades-with-little-result/2015/04/30/ee4b961a-ef62-11e4-8abc-d6aa3bad79dd_story.html.

129. Benjamin Wittes, *The Consequences of Congressional Inaction on the AUMF*, LAWFARE BLOG (Apr. 8, 2015, 9:56 AM), http://www.lawfareblog.com/consequences-congressional-inaction-aumf ("In effect, President Obama told Congress to go through the motions of passing a resolution if it wished but to do so understanding that its actions wouldn't matter.").

130. Peter Beinart, *Why Won't the GOP Declare War on ISIS?*, THE ATLANTIC (May 28, 2015), http://www.theatlantic.com/politics/archive/2015/05/congress-aumf-isis-war/394268.

contenders do not want to engage in heated debates over national security regarding their hopeful future powers.

IV. AN ARGUMENT AND PROPOSAL FOR A NEW AUMF

A new AUMF specifically authorizing military action against ISIL ("ISIL AUMF") should be enacted by Congress. A new ISIL AUMF must balance flexibility for the President with reasonable constraints on his ability to conduct an endless war. Several of the requirements and constraints that should be included have already been listed in the various proposed AUMFs in Congress,[131] but none include all of the provisions that should be included in the final ISIL AUMF. Below is a non-exclusive list of clauses and considerations that should be included in the new ISIL AUMF in order to avoid the same problems as previous authorizations.

In addition to enacting a new ISIL AUMF, Congress should repeal the 9/11 AUMF. If the 9/11 AUMF is not repealed, it will render the ISIL AUMF meaningless because the President will still be able to unilaterally determine that a group or individual has some nexus to the September 11, 2001 attacks and use that as the authorization for a military attack if the ISIL AUMF did not work for a particular target. The 9/11 AUMF could serve as a backup for any questionable targets not supported by the ISIL AUMF, so there would never be any new restraint on the President's powers. Since the purpose of the 9/11 AUMF—to enable military operations against those responsible for the September 11, 2001 attacks—has largely been accomplished, its repeal would not be counter to congressional intent.[132]

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131. For a detailed list of the requirements and constraints in the AUMFs proposed by the 113th Congress, see WEED, *supra* note 73, at 10–17. *See also* S.J. Res. 47, 113th Cong. (2014) (as introduced to the Senate, Dec. 13, 2014, by Sen. Robert Menendez).

132. Press Release, Office of the Press Sec'y, *Statement by the President on the End of the Combat Mission in Afghanistan*, THE WHITE HOUSE (Dec. 28, 2014), http://www.whitehouse.gov/the-press-office/2014/12/28/statement-presid ent-end-combat-mission-afghanistan. President Obama declared that the combat mission in Afghanistan is over and claiming successes of "devastating the core al Qaeda leadership, delivering justice to Osama bin Laden, disrupting terrorist plots and saving countless American lives." *Id.*; *see also* Barnes, *supra* note 78,

The repeal of the 9/11 AUMF should occur via a sunset provision that requires the executive branch to cease any operations that are currently authorized under the 9/11 AUMF. If there are still any ongoing operations using the 9/11 AUMF as authorization, the executive branch should seek independent authorization for it, and if it has merit, should receive authorization without a problem. If the sunset provision occurs before President Obama leaves office, this will ensure that the new administration starts with a clean slate and without the unnecessary authorizations[133] still on the table.

A. Purpose of the ISIL AUMF

The purpose section is one of the most important sections of an AUMF because it defines the intent of the authorization itself and will serve as guidance to any further questions and interpretations that need to be made based off of the AUMF. The purpose should revolve around the defense of the national security of the United States and its allies, but should not get too specific so that it maintains some flexibility. The purpose needs to be more straightforward than the 9/11 AUMF so as to not be abused in the future.

The ISIL AUMF should include a strong recommendation that the actions taken by the United States be in conjunction with those of a broader coalition of governments.[134] This will ensure that the United States is not the only nation that is invested in the security and stability of the region. Although the United States should not rest its national security on the actions of a coalition, it is very important to have buy-in on this operation from our allies—particularly those within the region.[135]

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at 71 (stating it is "nearly impossible" for the 9/11 AUMF to lack a temporal limit because of its nexus to the September 11, 2001 attacks).

133. While this Note did not cover the 2002 AUMF, the ISIL AUMF must also contain a clause immediately repealing the 2002 AUMF. *See, e.g.*, Letter from Susan E. Rice, *supra* note 9 ("[T]he [2002] Iraq AUMF is no longer used for any U.S. government activities and the Administration fully supports its repeal.").

134. This was similarly proposed in three of the draft ISIL AUMF proposals. WEED, *supra* note 73, at 7.

135. ABCA ARMIES PROGRAM, COALITION OPERATIONS HANDBOOK IX (4th ed. 2008), http://usacac.army.mil/cac2/AIWFC/COIN/repository/COH.pdf ("Another reason nations conduct coalition operations is that rarely can one nation go it alone either politically or militarily. . . . This blending of capabilities

In addition to the actual purpose of the authorization, the AUMF should declare consistency with the War Powers Resolution to show recognition of Congress' authority to declare war. It is included in all eight of the ISIL AUMFs proposed by the 113th Congress.[136] This can be done in a boilerplate fashion, but it goes to show that the President acknowledges Congress' power in this area.

B. Scope and Limitations of the ISIL AUMF

It is very important for Congress to specify whom it is authorizing the executive to target through the ISIL AUMF because an open-ended authorization will result in another 9/11 AUMF. The best way to ensure that the President is upholding Congress' intent of the authorization is to be specific in the language of the statute. The ISIL AUMF should list "ISIL" as the main target for the AUMF. While an authorization listing ISIL will solve the immediate problem, the authorization becomes more difficult if/when ISIL splinters off into subsequent organizations. When the coalition against ISIL is inevitably successful in dismantling and dispersing ISIL, the remainder of the organization will likely create different organizations with similar goals. The ISIL AUMF should also state that "subsequent organizations" to ISIL may be targeted as well, however, there should be a procedure in place to quickly authorize force on each of these subsequent organizations.

The determination of "subsequent organizations" or "associated forces" is difficult because terrorist organizations operate under a shroud of secrecy. The 9/11 AUMF has oversight problems because it gives the President the sole ability to determine

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and political legitimacy makes possible certain operations that a single nation could not or would not conduct unilaterally.").

136. S.J. Res. 47, 113th Cong. (2014) (as introduced to the Senate, Dec. 13, 2014, by Sen. Robert Menendez); H.R.J. Res. 128, 113th Cong. (2014) (as introduced to the House, Sept. 19, 2014, by Rep. John Larsen); S.J. Res. 44, 113th Cong. (2014) (as introduced to the Senate, Sept. 17, 2014, by Sen. Tim Kaine); H.R.J. Res. 125, 113th Cong. (2014) (as introduced to the House, Sept. 16, 2014, by Rep. Adam Schiff); H.R. 5415, 113th Cong. (2014) (as introduced to the House, Sept. 8, 2014, by Rep. Frank Wolf); S.J. Res. 42, 113th Cong. (2014) (as introduced to the Senate on Sept. 8, 2014, by Sen. Bill Nelson); S.J. Res. 43, 113th Cong. (2014) (as introduced to the Senate, Sept. 8, 2014, by Sen. James Inhofe); H.R.J. Res. 123, 113th Cong. (2014) (as introduced to the House, Sept. 8, 2014, by Rep. Darrell Issa).

whom he can target under the authorization.[137] This leaves Congress in the dark about who is being targeted and gives the President a blank slate to target whomever he can loosely tie to the September 11, 2001 attacks. Congress has no real ability to control whom the President targets because there is not a requirement in the 9/11 AUMF for the President to consult Congress before he targets groups or individuals under the authorization.[138] Congress' only recourse subsequent to military actions under the 9/11 AUMF is to alter the authorization or impeach the President. To avoid this problem in the ISIL AUMF, Congress should put in a requirement that any subsequent forces to be targeted under authorization of the ISIL AUMF must be approved by Congress. This procedure could be expedited in a particular committee so there is minimal loss of efficiency.[139] The committee would develop specific, non-public,[140] standards for target approval, and the executive branch would need to meet the criteria to be approved.[141]

It is in the best interest of the United States to eradicate ISIL and associated forces from the effected region, which means it is worth the full commitment of the United States Armed Forces. This means that Congress should not restrict the type of forces that could be employed by military commanders to accomplish their mission. When politicians decide that armed conflict is the answer, it should be up to military commanders to fight the fight. Several of the proposed ISIL AUMFs limit the deployment of

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137. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("[T]he President is authorized to use all necessary and appropriate force against those . . . *he* determines planned, authorized, committed, or aided the terrorist attacks . . . .") (emphasis added).

138. *Id.*

139. It is not unusual to expedite issues of importance to Congress. The War Powers Resolution created an exception that expedited procedures for Congress to declare war or authorize the use of military force. ELSEA & WEED, *supra* note 28, at 77–80.

140. It is important that there are specific standards, but it is equally important that the standards are not made public. If the standards are made public, terrorist organizations around the world will know what to do and not to do to be safe under the AUMF's targeting scheme.

141. One example of a standard that could be implemented is that the individual or group to be targeted must have a similar purpose as ISIL, as best determined by intelligence officials, and agreed upon by the coalition at the time.

ground combat forces.[142] Some of the proposed AUMFs make distinction between "in a combat role" and "direct combat operations,"[143] but this distinction is not realistic and inhibits military progress. These limitations would allow ground troops to deploy in limited advisor and targeting roles, but not in an effort to engage the enemy. The result of a limited ground combat authorization would likely be that the rules of engagement would be overly restrictive and put ground troops in unnecessary danger.[144] Including these limitations in an AUMF is in an effort to prevent the United States from getting engaged in another large-scale conflict with a high number of casualties. However, this significantly inhibits military commanders and potential progress.[145] Allowing a small amount of ground forces in key areas can set up our coalition partners to engage in the bulk of ground combat.[146]

The President initially stated that he would not use ground troops against ISIL, but some of his senior military commanders

142. H.R.J. Res. 128, 113th Cong. (2014) (as introduced to the House, Sept. 19, 2014, by Rep. John Larsen); S.J. Res. 44, 113th Cong. (2014) (as introduced to the Senate, Sept. 17, 2014, by Sen. Tim Kaine); H.R.J. Res. 125, 113th Cong. (2014) (as introduced to the House, Sept. 16, 2014, by Rep. Adam Schiff); S.J. Res. 42, 113th Cong. (2014) (as introduced to the Senate on Sept. 8, 2014, by Sen. Bill Nelson).

143. WEED, *supra* note 73, at 13.

144. *See, e.g.*, Missy Ryan & Erin Cunningham, *U.S. Advisers in Iraq Stay Out of Combat but See Fighting Edging Closer*, WASH. POST (Jan. 1, 2015), http://www.washingtonpost.com/world/national-security/us-advisers-in-iraq-stay-out-of-combat-but-see-fight-edge-nearer/2015/01/01/6da57c3a-9038-11e4-ba53-a477d66580ed_story.html (reporting that U.S. service members stationed in Iraq in advisory roles have been subject to repeated artillery and rocket fire on the bases where they live).

145. *See* Jordain Carney, *McKeon: AUMF That Bans Ground Troops 'DOA'*, NAT'L J. (Nov. 13, 2014), http://www.nationaljournal.com/defense/mckeon-aumf-that-bans-u-s-ground-troops-doa-20141113.

146. Paul Szoldra, *Legendary Marine General James Mattis: To Fight ISIS, 'Boots On The Ground' Needs to Be an Option*, BUS. INSIDER (Sept. 18, 2014, 11:36 AM), http://www.businessinsider.com/mattis-testimony-isis-2014-9. Additionally, the United States should not provide comfort to ISIL by informing them that they will not encounter any U.S. ground forces. *Id.* (quoting General James Mattis) ("Whichever strategy is chosen, we should be reticent in telling our adversaries in advance . . . which of our capabilities we will not employ. . . . [W]e may not wish to reassure our enemies in advance that they will not see American 'boots on the ground' . . . .").

appear to have a different opinion on the issue.[147] In the President's draft ISIL AUMF, he proposes limiting ground troops from "enduring offensive ground combat operations."[148] The list of examples in which the President wishes to employ ground troops are "rescue operations," "the use of special operations forces to take military action against ISIL leadership," and "intelligence collection and sharing, missions to enable kinetic strikes, or the provision of operational planning and other forms of advice and assistance to partner forces."[149] The scope of operations limitations in the President's draft ISIL AUMF is a way to keep the United States from getting into another major ground conflict. It is a good middle-ground solution to the use or limitation of ground forces, because it provides for their use in important situations, but limits their over-use.

In addition to the lack of restrictions on ground troops, no geographical limitation should be placed on the ISIL AUMF other than to explicitly state that these actions must be carried out "abroad." Two of the proposed ISIL AUMFs have listed geographical limitations of Iraq and Syria.[150] Placing geographical limitations puts ISIL on notice of safe havens and allows the enemy to operate and control border regions and use the border as a defense. It is not possible to predict where ISIL will go when confronted with superior force, so the best option is to leave the President's and military's options open.

C. Reports to Congress

Due to the continuously shifting nature of military operations, Congress should be kept up to date by means of regular re-

147. *See* Helene Cooper, David D. Kirkpatrick and Rick Gladstone, *Top U.S. General Says He's Open to Using Ground Troops to Retake Mosul*, N.Y. TIMES (Nov. 13, 2014), http://www.nytimes.com/2014/11/14/us/top-us-general-says-hes-open-to-using-ground-troops-in-iraq.html?ref=world&_r=0; *Statement by the President on ISIL*, *supra* note 57 ("[The fight against ISIL] will not involve American combat troops fighting on foreign soil."). The Department of Defense has subsequently admitted to employing ground troops in both Iraq and Syria. *Department of Defense Background Briefing on Enhancing Counter-ISIL Operations*, U.S. DEP'T OF DEF. (Oct. 30, 2015) (noting that special operations forces are "continuing raids and joint operations in both Iraq and Syria").

148. Obama Proposed Resolution, *supra* note 59, at 2.

149. 2015 Press Release, *supra* note 59.

150. *See* Obama Proposed Resolution, *supra* note 59.

ports on the progress and actions taken by the executive branch. These reports should come every sixty days throughout the duration of the authorization. The reports should include, at a minimum, the requirements required by Congressman Issa's proposed ISIL AUMF: "status of all actions taken;" "description of all proposed actions;" "status of engagement of allies of the United States and international coalitions in combating" ISIL; and "estimated budgetary effects of actions proposed."[151] The description of all proposed actions is a way for Congress to understand the executive branch's strategy going forward in the region. In addition to these requirements, the executive branch should also be required to submit a report identifying any other ISIL associated forces or other groups that the executive branch wishes to engage under the authorization of the ISIL AUMF. These requirements will ensure that Congress has a thorough understanding of what is taking place with regards to military action in the region and are in accordance with the constitutional division of powers in the United States.

D. Sunset Provision

Lastly, the ISIL AUMF should contain a sunset provision that ends the authorization three years from the date of enactment, unless reauthorized by Congress. A sunset provision gives the President, diplomats, and the military enough time to make an honest assessment and effort at achieving the purpose of the authorization without committing to a long-term conflict. If it becomes clear that the purpose of the AUMF cannot be met within the three-year authorization, Congress can reauthorize it as necessary. The purpose behind this limited amount of time is so that the United States does not get entrenched in another long-term conflict, such as Iraq and Afghanistan. The 9/11 AUMF lacks a sunset provision and has been stretched into a de-facto long-term authorization to fight global terrorism. A sunset provision sends the signal to regional allies in the Middle East that the United States intends to conclusively limit its presence in the region.

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151. H.R.J. Res. 123, 113th Cong. (2014) (as introduced to the House, Sept. 8, 2014, by Rep. Darrell Issa).

V. CONCLUSION

Congress is solely responsible for authorizing and declaring war[152] and should execute its constitutional responsibilities. Congress should not be allowed to shirk its responsibility based on political considerations while the members of the United States Armed Forces are held in limbo as the military situation in the region deteriorates. It is important for the country, particularly its armed forces, to know where the government stands on any particular armed conflict.[153] By Congress allowing the President to use an outdated authorization, Congress conceded some of its own constitutional responsibilities and did subsequent Congress' a disservice, as future administrations will use this as precedent. A new ISIL AUMF should include a specific scope and limitations provision as well as a sunset provision. A specific ISIL AUMF should be a high priority for both Congress and the President and should be vigorously debated to ensure the mistakes made in previous authorizations are not repeated.

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152. U.S. CONST. art. I, § 8, cl. 11. (stating Congress shall have the power "[t]o declare War").

153. *See generally* John T. Bennett, *Hagel: 'I Don't Know' When White House Will Seek AUMF for Islamic State*, DEFENSENEWS (Nov. 13, 2014, 7:32 PM), http://www.defensenews.com/article/20141113/CONGRESSWATCH/311130033/Hagel-Don-t-Know-When-White-House-Will-Seek-AUMF-Islamic-State (stating that the Secretary of Defense for the first few months of the ISIL strikes, Secretary Chuck Hagel, does not know when the President is going to seek a new AUMF).

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American Bar Association: Joint Task Force on Reversing the School-to-Prison Pipeline

SARAH E. REDFIELD & JASON P. NANCE

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ACKNOWLEDGEMENTS

The ABA's Joint Task Force on Reversing the School-to-Prison Pipeline gratefully acknowledges and thanks Rachel Patrick, with gratitude for her work on this and so many other projects to improve the lives of our young people.

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This report was originally published at https://www.americanbar.org/content/dam/aba/administrative/diversity_pipeline/stp_preliminary_report_final.authcheckdam.pdf. Due to the participation of *The University of Memphis Law Review*, the authors' desire for as broad exposure as possible, and the imminence of the issue both locally and nationally, the report is being reprinted here with light editing.

NOTICE

This draft report is subject to further review and modification by the Joint Task Force. The content of this report has not been presented in its entirety to, or approved by, the American Bar Association House of Delegates or the Board of Governors, and therefore should not be construed as representing ABA policy, unless adopted pursuant to the bylaws of the Association.

PRELIMINARY REPORT AND RECOMMENDATIONS

January 28, 2016

PREFACE

In 2014, the American Bar Association (ABA) Coalition on Racial and Ethnic Justice (COREJ) turned its attention to the continuing failures in the education system where certain groups of students—for example, students of color, with disabilities, or LGBTQ—are disproportionately over- or incorrectly categorized in special education, are disciplined more harshly, including refer-

ral to law enforcement for minimal misbehavior, achieve at lower levels, and eventually drop or are pushed out of school, often into juvenile justice facilities and prisons—a pattern now commonly referred to as the School-to-Prison Pipeline (StPP). While this problem certainly is not new, it presented a convergence of several laws, policies, and practices where the legal community's intervention is critical.

Joined by the ABA Pipeline Council and Criminal Justice Section, and supported by its sister ABA entities, COREJ sponsored a series of eight Town Halls across the country to investigate the issues surrounding this pipeline. The focus of these Town Halls was to: 1) explore the issues as they presented themselves for various groups and various locales; 2) gather testimony on solutions that showed success, with particular focus on interventions where the legal community could be most effective in interrupting and reversing the StPP; and 3) draw attention to the role implicit bias plays in creating and maintaining this pipeline. This report is a result of those convenings. Also a result was the formation of a Joint Task Force among the three convening entities to provide an organizational structure to address Reversing the School-to-Prison Pipeline (RStPP)

To analyze the complexities surrounding the school-to-prison pipeline and identify potential solutions to reverse these negative trends, the Joint RStPP Task Force:

1. Organized and conducted eight Town Hall meetings in various parts of the United States, during which several area experts and community members voiced concerns, discussed the problems, and proposed solutions.
2. Analyzed and cumulated national data from the U.S. Department of Education's Civil Rights Data Collection and other available local data to gauge the magnitude and scope of the problems.
3. Served as a clearinghouse for information and reports relevant to the RStPP effort and disseminated that information.
4. Examined national and state laws and local school districts' policies and practices that have combined to push an increasing number of students out of school and into the justice system.
5. Analyzed laws that several states have enacted to reverse the school-to-prison pipeline.

6. Evaluated evidence-based policies and practices that various schools have implemented to reverse the school-to-prison pipeline.
7. Organized and conducted a roundtable discussion to focus exclusively on mapping out solutions to reverse these negative trends by identifying model programs and successful strategies.
8. Planned for two additional Town Halls focused on LGBTQ (San Diego) and entry points to the pipeline and juvenile justice (Memphis).
9. Drafted this preliminary report and prepared recommendations for consideration by the larger ABA.

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EXECUTIVE SUMMARY OF FINDINGS AND RECOMMENDATIONS

The school-to-prison pipeline—the metaphor encompassing the various issues in our education system that result in students leaving school and becoming involved in the criminal justice system—is one of our nation's most formidable challenges. It arises from low expectations and engagement, poor or lacking school relationships, low academic achievement, incorrect referral or categorization in special education, and overly harsh discipline, including suspension, expulsion, referral to law enforcement, arrest, and treatment in the juvenile justice system.

The Joint Task Force on Reversing the School-to-Prison Pipeline has addressed itself to issues of that pipeline by cumulating and analyzing the national and regional data as well as federal, state, and local law and policy. In 2014–2015, the Joint Task Force conducted eight Town Hall meetings to serve as a clearinghouse for information and reports relevant to the RStPP effort and a forum for understanding and evaluating evidence-based policies and practices that various schools and other institutions have implemented to reverse the school-to-prison pipeline. The Task Force has also conducted expert and roundtable discussions to map solutions to reverse these negative trends by identifying model programs and successful strategies.

While many have known about the problems associated with the school-to-prison pipeline for years, recent data from the U.S. Department of Education's Civil Rights Data Collection now elucidate their magnitude and that magnitude is unacceptably large

and out of proportion to the population of our young people. This disproportionality manifests itself all along the educational pipeline from preschool to juvenile justice and even to adult prison for students of color, for students with disabilities, for LGBTQ students, and for other groups in particular settings. These students are poorly served at every juncture.

Students of color are disproportionately:

- lower achievers and unable to read at basic or above
- damaged by lower expectations and lack of engagement
- retained in grade or excluded because of high stakes testing
- subject to more frequent and harsher punishment
- placed in alternative disciplinary schools or settings
- referred to law enforcement or subject to school-related arrest
- pushed or dropping out of school
- failing to graduate from high school
- feel threatened at school and suffer consequences as victims

For students with disabilities, disproportionality manifests itself in similar ways, and race and ethnicity, gender, and disability compound. Students with disabilities (or those who are labeled as disabled by the school) are disproportionately:

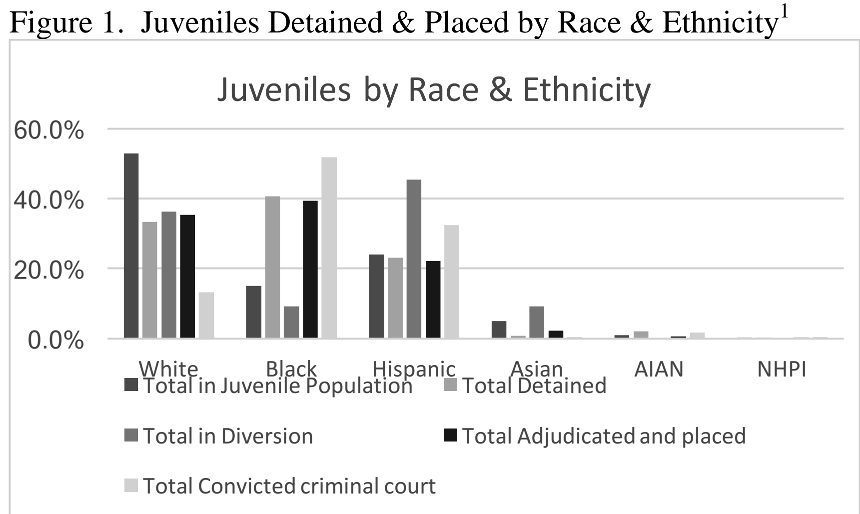
- students of color, especially in discretionary categories under the Individuals with Disabilities Education Act (IDEA)
- less likely to be academically proficient
- disciplined, and more harshly so
- retained in grade, but still dropping out or failing to graduate
- more likely to be placed in alternative disciplinary schools or settings or otherwise
- more likely to spend time out of the regular classroom, to be secluded or restrained
- referred to law enforcement or subject to school-related arrest and incarceration

Students who are LGBTQ face similar disproportional negative treatment and are more likely victimized and blamed as victims, and, again, the negatives compound.

These same differences plague the juvenile justice system where youth of color, youth with disabilities, and LGBTQ youth are typically disproportionately arrested, referred, detained (long-

er), charged, and found delinquent (or transferred to adult court). They are disproportionately confined instead of being placed on probation or into a diversion program. And all along the way, these young people caught in the school-to-prison pipeline are less likely to have access to meaningful education to allow them to graduate from high school and prepare for higher education and work opportunities.

Figure 1. Juveniles Detained & Placed by Race & Ethnicity[1]



These negative disproportionalities might be understood if removals from school were in fact making schools safer or if confinement in juvenile detention or other facilities led to improved outcomes. This does not appear to be the case in practice or in theory. Nor can the disproportionate treatment of certain students and their overrepresentation in the negatives of our education and juvenile justice systems be explained away because certain groups are more likely to be engaged in bad or delinquent behavior.

The causes of the school-to-prison pipeline are many, complex, and interrelated. These include criminalization of school discipline and the increased presence of law enforcement officers in

1. *Easy Access to the Census of Juveniles in Residential Placement: 1997-2013*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION [hereinafter JJDP, *Easy Access*], http://www.ojjdp.gov/ojstatbb/ezacjrp/asp/selection.asp (select “Race”; “Most Serious Offense General”; “12 or younger”; click “Show Table”) (last visited Jan. 25, 2016).

schools. Throughout these causes runs evidence of implicitly biased discretionary decisions, which, unintentionally, bring about these results.

RECOMMENDATIONS

The school-to-prison pipeline is a complex problem with no easy or simple solutions. At their core, solutions should focus on ways to (a) improve academic achievement and increase the likelihood that students will remain in school, graduate, and prepare to become positive, contributing members of our society; (b) decrease the number of suspensions, expulsions, and referrals to law enforcement; and (c) decrease disparities along racial and other lines relating to discipline and academic achievement. While completely dismantling the school-to-prison pipeline is a task that our entire nation must take on, there are affirmative steps that the American Bar Association is well positioned to take to reverse these negative trends.

Based on its national investigation, including the information gathered at the national Town Hall meetings and roundtable discussions and the extensive review of the current research, the Task Force recommends that the ABA take steps to:

ABA AND PARTNERS: CONVENINGS AND TRAINING

1. Adopt ABA policy and specific resolutions as appropriate to implement these recommendations.
2. Join with other partners to continue additional Town Halls discussing solutions and offering training on implementation.
3. Support legal representation for students at the point of exclusion from school, including development of model best practice training modules for lawyers and law students for representation for students facing suspension or expulsion.
4. Support ongoing convenings where educators, School Resource Officers, law enforcement, and juvenile justice decision makers join together to develop strategies to reverse the School-to-Prison-Pipeline.
5. Develop training modules for training of SROs and police dealing with youth on appropriate strategies for LGBTQ students

and students with disabilities.

6. Develop training modules on Implicit Bias and De-Biasing for decision makers along the StPP including teachers and administrators, school resource officers, police, juvenile judges and others dealing with juveniles, to reduce disproportionalities.
7. Encourage its members to continue engagement in youth mentoring initiatives.
8. Support related legislative and policy initiatives.

LEGISLATION AND POLICY

9. Remove zero-tolerance policies from schools.
10. Support legislation eliminating criminalizing student misbehavior that does not endanger others.
11. Support legislation eliminating the use of suspensions, expulsions, and referrals to law enforcement for lower-level offenses
12. Support demonstrated alternative strategies to address student misbehavior, including Restorative Justice.
13. Provide model policy and support school policy and agreements that clarify the distinction between educator discipline and law enforcement discipline.
14. Provide appropriate training for School Resource Officers.
15. Identify funding and provide safe harbor for participants in evaluative research on implicit bias and de-biasing training.
16. Provide for continued and more detailed data reporting relating to school discipline and juvenile detention and disproportionality.

I. OVERVIEW OF THE SCHOOL-TO-PRISON PIPELINE PROBLEM[2]

A. Introduction

> A sheriff's deputy summoned to handle four-year old elementary student with ADHD, admittedly having a temper tantrum, handcuffs the boy. When his mother arrives at the school she learns that he has already been taken to the sheriff's office where handcuffs have been replaced with shackles. The mother says that her son "deserves to go to school and feel safe and know that he'll come back home to his mommy. He won't be carted off like a criminal."[3]

But it seems that this child and far too many more of our young people will indeed be carted off like a criminal.

The school-to-prison pipeline—the metaphor encompassing the various issues in our education system that result in students leaving school and becoming involved in the criminal justice system—is one of our nation's most formidable challenges.[4] It arises

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2. Some of this report is taken from the following sources: Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L. J. 313 (2016); Jason P. Nance, *Schools, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919 (2016) [hereinafter *Schools, Police*].

3. Hawes Spencer, *Child Handcuffed and School Policies Questioned*, NPR RADIO (Dec. 9, 2014), http://wvtf.org/post/child-handcuffed-and-school-policies-questioned#stream/0; *see also* Melinda D. Anderson, *When Schooling Meets Policing*, THE ATLANTIC (Sept. 21, 2015) http://www.theatlantic.com/education/archive/2015/09/when-schooling-meets-policing/406348/ (cumulating similar incidents of police involvement with schools); Tunette Powell, *My Son Has Been Suspended Five Times. He's 3.*, WASH. POST: POSTEVERYTHING (July 24, 2014), https://www.washingtonpost.com/posteverything/wp/2014/07/24/my-son-has-been-suspended-five-times-hes-3/.

4. *See* Hawker v. Sandy City Corp., 774 F.3d 1243, 1245–46 (10th Cir. 2014) (Lucero, J., concurring) (quoting Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 83 (2014)); U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 4–5 (2014) [hereinafter DEAR COLLEAGUE LETTER], http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf. Professor Monique Morris defines this

from low expectations, low academic achievement, incorrect referral or categorization in special education, and overly harsh discipline, including suspension, expulsion, referral to law enforcement, arrest, and treatment in the juvenile justice system.

While many have known about the problems associated with the school-to-prison pipeline for years, recent data from the U.S. Department of Education's Civil Rights Data Collection ("CRDC") now elucidate their magnitude. According to the CRDC, during the 2011–2012 school year, schools referred approximately 260,000 students to law enforcement, and approximately 92,000 students were arrested on school property during the school day or at a school-sponsored event.[5] Local data provide additional, sobering evidence of this problem,[6] especially in light of the substantial evidence that many of these referrals to law enforcement were for minor offenses.[7] The number of student sus-

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school to prison pipeline as "the school-based policies, practices, conditions, and prevailing consciousness that facilitate criminalization within educational environments and the processes by which this criminalization results in the incarceration of youth and young adults," a definition that adds emphasis to the "prevailing consciousness" that facilitates these results. Monique W. Morris, *Searching for Black Girls in the School-to-Prison Pipeline*, NAT'L COUNCIL ON CRIME & DELINQ. (Mar. 18, 2013), http://www.nccdglobal.org/blog/searching-for-black-girls-in-the-school-to-prison-pipeline.

5. *See* U.S. DEP'T OF EDUC. OFF. FOR C.R., CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE 6 (2014) http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf [hereinafter U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS].

6. *See* sources cited supra note 2 (documenting data that school-based arrests have increased in several states and in several school districts throughout the country).

7. *See, e.g.*, FLA. STATE CONF. NAACP, ADVANCEMENT PROJECT & NAACP LEGAL DEFENSE AND EDUC. FUND, INC., ARRESTING DEVELOPMENT: ADDRESSING THE SCHOOL DISCIPLINE CRISIS IN FLORIDA 6 (2006) [hereinafter ARRESTING DEVELOPMENT], http://b.3cdn.net/advancement/e36d17097615e7c612bbm6vub0w.pdf (stating that during the 2004–05 school year, there were 26,990 school-based referrals to the Florida Department of Juvenile Justice, and seventy-six percent of those referrals were for "disorderly conduct, trespassing, or assault and/or battery, which is usually nothing more than a schoolyard fight."); ACTION FOR CHILDREN N.C., FROM PUSH OUT TO LOCK UP: NORTH CAROLINA'S ACCELERATED SCHOOL-TO-PRISON PIPELINE 9 (2013), http://www.ncchild.org/wp-content/uploads/2014/05/2013_STPP-FINAL.pdf. ("Students were most commonly referred to the juvenile justice system for low-

pensions and expulsions have also dramatically increased in recent years.[8] According to the CRDC, approximately 3.5 million students were suspended at least one time during the 2011–2012 school year, and approximately 130,000 were expelled from school during that same time period.[9] As with referrals to law enforcement and school-based arrests, data also indicate that the majority of these suspensions and expulsions resulted from only trivial infractions of school rules or offenses, not from offenses that endangered the physical well-being of other students.[10] Numbers are similar for those detained in the juvenile justice system.[11]

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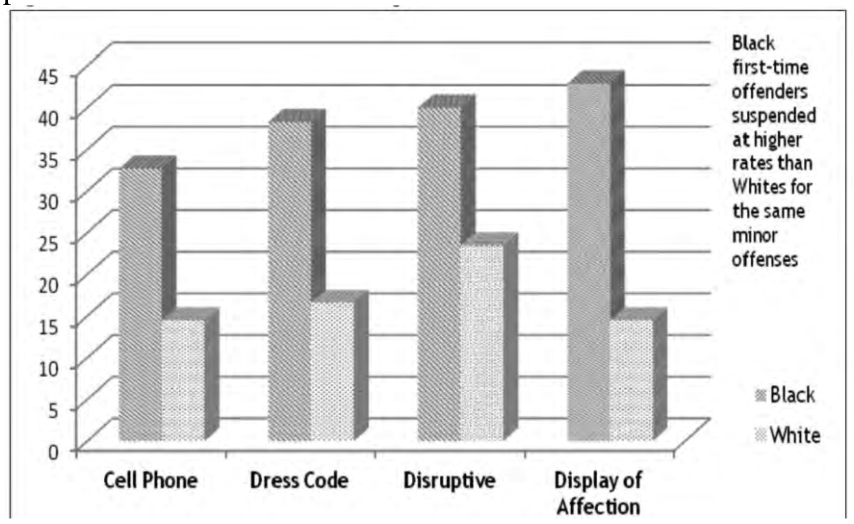
level offenses[.]"); JUSTICE POLICY INST., EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS 15 (2011) [hereinafter EDUCATION UNDER ARREST], http://www.justicepolicy.org/uploads/justicepolicy/documents/ educationunderarrest_fullreport.pdf (observing that during the 2007–08 school year in Birmingham, Alabama, ninety-six percent of students referred to juvenile court were for misdemeanors that included disorderly conduct and affray).

8. For example, the number of students in secondary schools suspended or expelled increased "from one in thirteen in 1972–73 to one in nine in 2009–10." *See* JACOB KANG-BROWN ET AL., VERA INST. OF JUST., A GENERATION LATER: WHAT WE'VE LEARNED ABOUT ZERO TOLERANCE IN SCHOOLS 2 (2013), http://www.vera.org/sites/default/files/resources/downloads/zero-tolerance-in-schools-policy-brief.pdf.

9. *See* U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5.

10. *See* TONY FABELO ET AL., BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 37 (2011), https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf, (reporting that 97 percent of suspensions and expulsions in Texas resulted from offenses that did not require suspension or expulsion under law); Daniel J. Losen, *Sound Discipline Policy for Successful Schools: How Redressing Racial Disparities Can Make a Positive Impact for All*, *in* DISRUPTING THE SCHOOL-TO-PRISON PIPELINE 45, 54–55 (Sofía Bahena et al. eds., 2012) (explaining that the vast majority of suspensions and expulsions are for minor offenses); *see also* AM. BAR ASS'N, CRIMINAL JUSTICE (REPORT NO. 103B) 2 (2001), http://www.americanbar.org/content/dam/aba/directories/policy/2001_my_103b.authcheckdam.pdf (explaining that students have been suspended or expelled for shooting a paperclip with a rubber band or bringing a manicure kit to school); Am. Psychol. Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCH. 852, 852 (2008) (explaining that a ten-year-old girl was expelled because her mother put a small knife in her lunchbox to cut up an apple); *id.* (describing that a student was expelled for talking on a cell phone to his mother

Figure 2. Discipline Disproportionality Minor Offense NC Example[12]



1. The Context

This report discusses data and issues that cause and maintain the school-to-prison pipeline. Some general aspects of the issue offer a frame for the particular, and go a long way toward explaining the way young people enter and remain in the pipeline. These overarching topics are reviewed here to provide context and

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who was on deployment as a solder to Iraq and with whom he had not spoken to for thirty days). *Id.*

11. *See generally Criminal Justice Reform, Part II: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 114th Cong. (2015) (statement of Liz Ryan, Youth First! Initiative), https://oversight.house.gov/wp-content/uploads/2015/07/Ryan-YouthFirst-Statement-7-15-Criminal-Justice-II-COMPLETE.pdf (summarizing the data); Press Release, Office of the Press Sec'y, Presidential Proclamation—National Youth Justice Awareness Month, 2015, The White House (Sept. 30, 2015), https://www.whitehouse.gov/the-press-office/2015/09/30/presidential-proclamation-national-youth-justice-awareness-month-2015.

12. DANIEL J. LOSEN & JONATHAN GILLESPIE, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 33 fig. 10 (2012), http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf (data from Public Record request).

developed further in later sections. Concepts discussed include the meaning of disproportionality; differences in relationships and expectations as they relate to the exercise of discretion. Also of particular significance is the research that debunks two common misperceptions and demonstrates instead that the disproportionalities along the school-to-prison pipeline are *not* simply attributable to bad (worse) behavior of certain groups and that excluding students from their regular school setting and/or detaining them in juvenile or other facilities does *not* necessarily contribute to either a safer or better environment or to more successful outcomes for those students.

Figure 3. U.S. Population by Race & Ethnicity[13]

Population

0.3%
6%
1.3%
17%
13%
63%

White
Black or African American
American Indian and Alaska Native
Asian
Native Hawaiian and Other Pacific Islander
Hispanic

a. The Meaning of Disproportionality

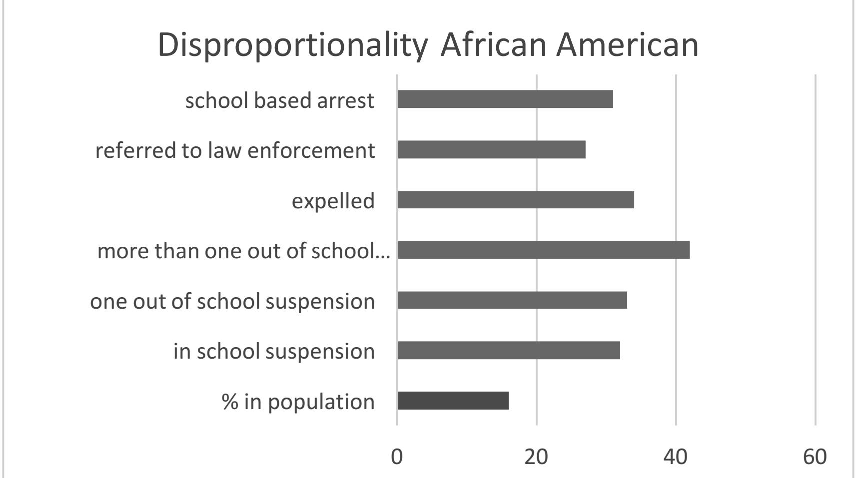
Disproportionality refers to the difference between a group's representation in the population at large and its over or under representation in specific areas.[14] African-American stu-

13. *Population Distribution by Race/Ethnicity*, KAISER FAMILY FOUNDATION, http://kff.org/other/state-indicator/distribution-by-raceethnicity/?curentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (last visited Oct. 22, 2016).

14. *See id.; see also* Figure 4. The Meaning of Disproportionality & Figure 5. U.S. Juvenile Population by Race & Ethnicity.

dents offer an illustration, which is expanded with additional data throughout the report.

Figure 4. Disproportionality Illustrated



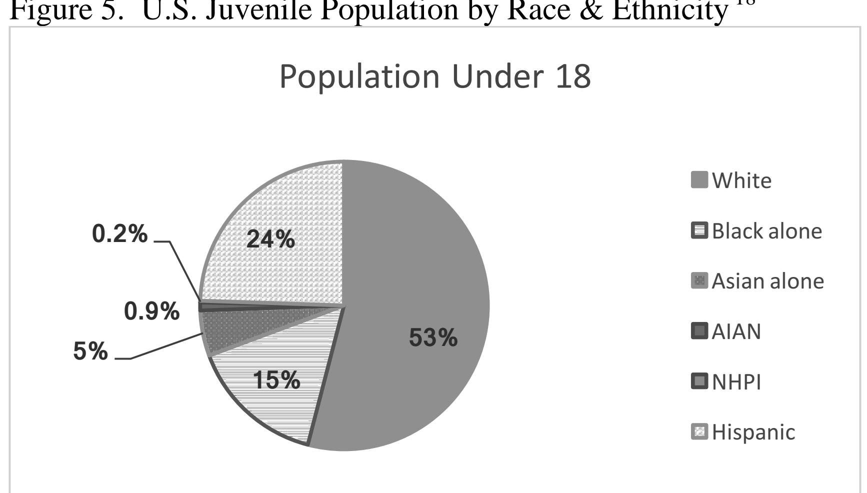
African-American students comprised only sixteen percent of the student population during the 2011–2012 school year, but they represented thirty-two percent of students who received an in-school suspension; thirty-three percent of students who received one out-of-school suspension; forty-two percent of students who received more than one out-of-school suspension; and thirty-four percent of students who were expelled.[15] During that same time frame, African-American students represented twenty-seven percent of the students who were referred to law enforcement and thirty-one percent of students who were subject to a school-based arrest.[16] In addition, although African-American children represent-

15. *See* U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5, at 1–2; LOSEN & GILLESPIE, *supra* note 12, at 6 (finding that one out of every six Black students enrolled in K–12 public schools has been suspended at least once, but only one out of twenty White students has been suspended).

16. U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5, at 6. The CRDC data is corroborated by substantial additional localized data. *See* Russell J. Skiba, Mariella I. Arredondo & Natasha T. Williams, *More than a Metaphor: The Contribution of Exclusionary Discipline to a School-to-Prison Pipeline*, 47 EQUITY & EXCELLENCE IN EDUC. 546, 550 (2014); MATTHEW P. STEINBERG, ELAINE ALLENSWORTH & DAVID W. JOHNSON, STUDENT AND TEACHER SAFETY IN CHICAGO PUBLIC SCHOOLS: THE ROLES OF COMMUNITY CONTEXT AND

ed eighteen percent of preschool enrollment, they represented forty-eight percent of the preschool children who received more than one out-of-school suspension.[17]

Figure 5. U.S. Juvenile Population by Race & Ethnicity [18]



While disproportionality is most often discussed in terms of Black boys,[19] the problem is not limited to this group. Operative

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SCHOOL SOCIAL ORGANIZATION 46 (2011) (maintaining that low-performing students are less likely to be engaged in school and more likely to be frustrated and misbehave); *see also* Matthew P. Steinberg, Elaine Allensworth & David W. Johnson, *What Conditions Support Safety in Urban Schools? The Influence of School Organizational Practices on Student and Teacher Reports of Safety in Chicago*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 118, 125 (Daniel J. Losen ed., 2015) (explaining that low-achieving students are less likely to be engaged and more likely to act out).

17. U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5, at 1.

18. *Families and Living Arrangements*, U.S. CENSUS BUREAU tbl.C3, https://www.census.gov/hhes/families/data/cps2012C.html (last visited Jan. 14, 2016); *see also* WILLIAM O'HARE, THE CHANGING CHILD POPULATION OF THE UNITED STATES: ANALYSIS OF DATA FROM THE 2010 CENSUS (2011), http://files.eric.ed.gov/fulltext/ED527048.pdf.

19. *See, e.g.*, FOUNDATION CENTER, TRANSFORMING PERCEPTION: BLACK MEN AND BOYS, http://www.issuelab.org/resource/transformingperception_black_men_and_boys; Oscar Barbarin & Gisele M. Crawford, *Acknowledging and Reducing Stigmatization of African American Boys*, 61 YOUNG CHILD. 79 (2006); Ronald F. Ferguson, *Teachers' Perceptions and Expectations and the Black-White Test Score Gap*, 38 URB. EDUC. 460 (2003).

variations and disproportionalities exist within each broad category and across geographical areas.[20] While other groups may not have been studied as deeply,[21] the disproportionalities and concerns are real. For example, disproportionality is evident in differential treatment by gender where African-American girls are more often and more severely disciplined than other girls,[22] most often, for "subjectively defined behaviors, or behaviors considered inappropriate by educators."[23] This is true further along the pipeline as

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20. *See, e.g.*, LOSEN & GILLESPIE, *supra* note 12, at 18–22 (reviewing disproportionality in discipline/special education by state). *See generally* OFF. FOR CIVIL RIGHTS, U.S. Dep't of Educ., Resolution Letter, Christian County (KY) Public Schools (Feb. 28, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/investigations/03115002-a.html (finding a violation of Title VI based on different treatment against African-American students who were disciplined more frequently and harshly than White students whose behavior was similar and whose disciplinary histories were similar or worse).

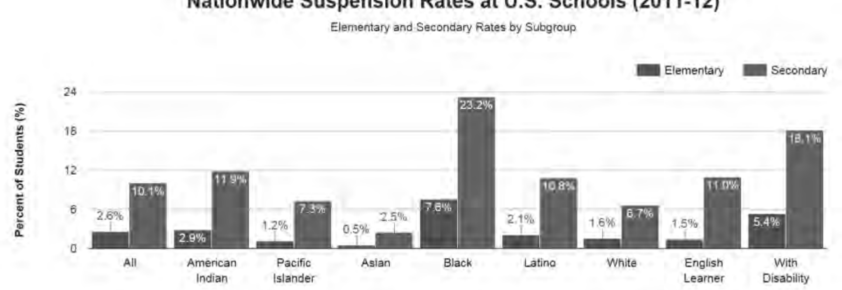
21. KIMBERLÉ WILLIAMS CRENSHAW ET AL., BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED, AND UNDERPROTECTED 7 (2015), http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/54dcc1ece4b001c03e323448/1423753708557/AAPF_BlackGirlsMatterReport.pdf ("[M]uch of the existing research literature excludes girls from the analysis, leading many stakeholders to infer that girls of color are not also at risk."); DANIEL LOSEN ET AL., ARE WE CLOSING THE SCHOOL DISCIPLINE GAP? 30 (2015) [hereinafter ARE WE CLOSING], http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf ("Given the high rates and extraordinarily large gaps revealed by the intersection of race and gender, we join the call for more research into the discipline gap at these intersections, as they raise questions about the possible influence of race-specific gender bias and stereotypes.").

22. Jamilia J. Blake et al., *Unmasking the Inequitable Discipline Experiences of Urban Black Girls: Implications for Urban Educational Stakeholders*, 43 URB. REV. 90, 90 (2011) ("Black girls are overrepresented in exclusionary discipline practices and Black girls reason for discipline referrals differs significantly from White and Hispanic girls."); Francine T. Sherman, *Justice for Girls: Are We Making Progress?*, 59 UCLA L. REV. 1584, 1617 (2012) (finding Black girls to be the fastest growing group of girls referred to juvenile courts and in detention); CRENSHAW ET AL., *supra* note 21, at 7 ("[P]unitive disciplinary policies also negatively impact Black girls and other girls of color."); Morris, *supra* note 4, (calling for more attention to Black girls).

23. Amy S. Murphy, Melanie A. Acosta & Brianna L. Kennedy-Lewis, *"I'm Not Running Around with My Pants Sagging, so How Am I Not Acting Like a Lady?": Intersections of Race and Gender in the Experiences of Female Mid-*

well where the data shows that the proportion of female youth arrested and entering the juvenile justice system for law violations has increased from 1980–2010 across the spectrum of crimes from less to most serious.[24] There are also group differences when the data is reviewed by age.[25]

Figure 6. At Least One Out of School Suspension Elementary & Secondary by Group[26]



Also significant in considering the data is the tendency of negatives of groups to compound where a student is part of more than one group, e.g., students of color who are also students with disabilities or LGBTQ students.[27]

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dle School Troublemakers, 45 URB. REV. 586, 586, 594, 596 (2013) (reporting on the connection to achievement, noting that the "girls each shared their desires to be academically successful, yet often feel stymied.").

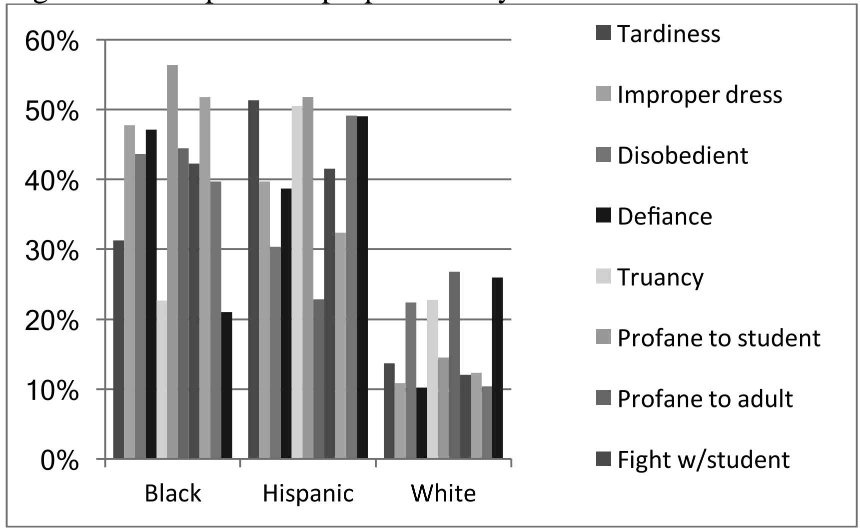
24. NAT'L CTR. FOR JUV. JUST., NAT'L COUNCIL OF JUV. & FAM. COURT JUDGES, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 121 (Melissa Sickmund & Charles Puzzanchera, eds., 2014) [hereinafter OJJDP 2014 NATIONAL REPORT], http://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf.

25. *See infra* Figure 6. At Least One out of School Suspension Elementary & Secondary by Group; *see also* Claudia Rowe, *Race Dramatically Skews Discipline, Even in Elementary School*, SEATTLE TIMES, June 23, 2015, http://www.seattletimes.com/education-lab/race-dramatically-skews-discipline-even-in-elementary-school/ (providing comparative data for Seattle elementary schools).

26. U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5, at 2; *Nationwide Suspension Rates at U.S. Schools (2011-12)*, UCLA CTR. FOR CIVIL RIGHTS REMEDIES, http://www.schooldisciplinedata.org/ccrr/index.php (last visited Jan. 12, 2016).

27. DANIEL LOSEN, DAMON HEWITT & IVORY TOLDSON, ELIMINATING EXCESSIVE AND UNFAIR EXCLUSIONARY DISCIPLINE IN SCHOOLS POLICY RECOMMENDATIONS FOR REDUCING DISPARITIES 4 (2014),

Figure 7. Discipline Disproportionality Girls[28]



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http://www.indiana.edu/~atlantic/wpcontent/uploads/2014/04/Disparity_Policy_031214.pdf; *see also* NAT'L DISABILITIES RIGHTS NETWORK, ORPHANAGES, TRAINING SCHOOLS, REFORM SCHOOLS AND NOW THIS? RECOMMENDATIONS TO PREVENT THE DISPROPORTIONATE PLACEMENT AND INADEQUATE TREATMENT OF CHILDREN WITH DISABILITIES IN THE JUVENILE JUSTICE SYSTEM *12 (2015),* http://www.ndrn.org/images/Documents/Issues/Juvenile_Justice/NDRN_-_Juvenile_Justice_Report.pdf (discussing the disproportionate incarceration rate of children with different racial or ethnic backgrounds as well as with disabilities); U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5, at 3–7 (demonstrating the disproportionate punishment of these various groups); Brianne Dávila, *Critical Race Theory, Disability Microaggressions and Latina/o Student Experiences in Special Education*, 18 RACE ETHNICITY & EDUC. 443, 453–54 (2015) ("Disability does not simply replace race in these instances, but represents a complex interplay of race and disability in the lives of Latina/o students in special education."); Janel A. George, *Stereotype and School Pushout: Race, Gender, and Discipline Disparities*, 68 ARK. L. REV. 101, 104 (2015) (commenting on race and gender combined); Sherman, *supra* note 22, at 1617 (citing Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502 (2012) ("[D]espite the rapid growth in the number of black girls in the juvenile justice system, the intersection of race and gender in juvenile justice is almost never considered."); *cf.* Valerie Purdie-Vaughns & Richard P. Eibach, *Intersectional Invisibility: The Distinct Advantages and Disadvantages of Multiple Subordinate-Group Identities*, 59 SEX ROLES 377, 378–80 (2008) (discussing the disadvantages of multiple and single group identities).

28. *See* Blake et al., *supra* note 22, at 96–104 (using compiled data and illustration sources).

b. Differences in relationships and expectations relate to the exercise of discretion, and both can be damning

Relationships are one of the most significant factors in student learning; where those relationships are lacking or based on low expectations, learning will be damaged.[29] Differences in expectations and engagement influence teaching and learning;[30] they influence the quality of instruction[31] and the feedback students receive.[32] The so-called Pygmalion effect—a self-fulfilling prophecy or expectation effect where when teachers expect good performance they get it and vice versa—has long been known in educa-

29. *See generally* JOHN HATTIE, VISIBLE LEARNING: A SYNTHESIS OF OVER 800 META-ANALYSES RELATING TO ACHIEVEMENT 921–32 (2009) (discussing factors in achievement and highlighting relationships and expectations).

30. SARAH E. REDFIELD, DIVERSITY REALIZED: PUTTING THE WALK WITH THE TALK FOR DIVERSITY IN THE PIPELINE TO THE LEGAL PROFESSION ch.4 (2009) [hereinafter REDFIELD, DIVERSITY] (summarizing issues of engagement in the context of the so-called new 3Rs: rigor, relevance, relationship); Sheri A. Castro Atwater, *Waking Up to Difference: Teachers, Color-Blindness, and the Effects on Students of Color*, 35 J. INSTRUCTIONAL PSYCHOL. 246, 246, 252 (2008) (discussing significance of understanding the difference "between a 'race should not matter' philosophy and a 'race does not matter' philosophy"); Monica Biernat & Amanda K. Sesko, *Communicating About Others: Motivations and Consequences of Race-Based Impressions*, 49 J. EXPERIMENTAL SOC. PSYCHOL. 138 (2013) (discussing White tendency to use different "within-category judgment standards"). *See generally* BARUTI K. KAFELE, CLOSING THE ATTITUDE GAP (2013) (discussing the importance of knowing and believing in one's students).

31. Drew S. Jacoby-Senghor et al., *A Lesson in Bias: The Relationship Between Implicit Racial Bias and Performance in Pedagogical Contexts*, 63 J. EXPERIMENTAL SOC. PSYCHOL. 50, 53 (2016) (describing how implicit bias impacts instructor anxiety, lesson quality, and student performance).

32. Alyssa Croft & Toni Schmader, *The Feedback Withholding Bias: Minority Students Do Not Receive Critical Feedback from Evaluators Concerned About Appearing Racist*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1139, 1142–44 (2012) (discussing feedback withholding bias, feedback inflation, and their potential impact on students); John Hattie & Helen Timperley, *The Power of Feedback*, 77 REV. EDUC. RES. 81, 81 (2007) (noting that feedback is one of the most powerful influences on student learning and achievement); *Feedback in Schools by John Hattie*, VISIBLE LEARNING, http://visible-learning.org/2013/10/john-hattie-article-about-feedback-in-schools/ ("The culture of the student can influence the feedback effects: Feedback is not only differentially given but also differentially received.") (last visited Oct. 22, 2016).

tion.[33] Such self-fulfilling expectations, together with related depletion,[34] can be a primary cause for racial disparities relating to academic achievement and subsequent pipeline events.[35]

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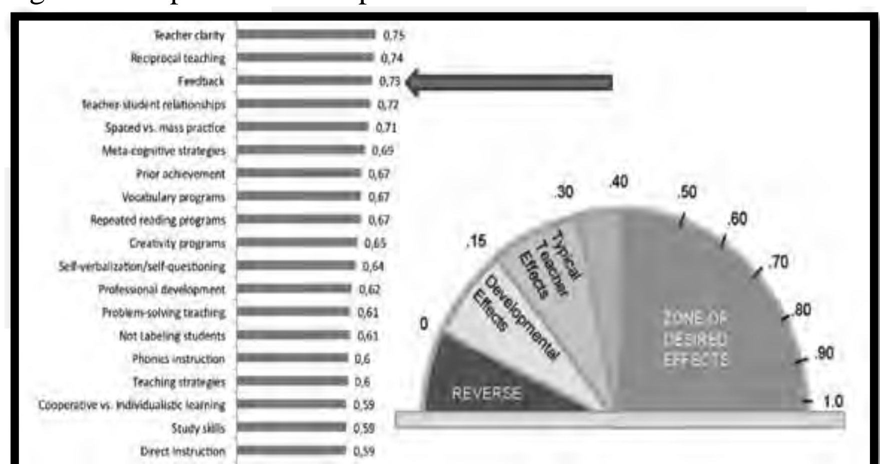
33. ROBERT L. GREEN, EXPECT THE MOST—PROVIDE THE BEST, 6–8, 29–39 (2014) (reviewing importance of expectations and offering case studies); ROBERT ROSENTHAL & LENORE JACOBSON, PYGMALION IN THE CLASSROOM (1968); Rosa Hernández Sheets, *From Remedial to Gifted: Effects of Culturally Centered Pedagogy*, 34 THEORY INTO PRAC. 186 (1995) (reporting that Spanish-speaking students who failed second-year Spanish, who are later labeled Advanced and encouraged by their teacher, go on to pass the Advanced Placement Spanish exam); *cf.* Kathleen Cotton, *Expectations and Student Outcomes*, SCH. IMPROVEMENT RES. SERIES (1989), http://educationnorthwest.org/sites/default/files/expectations-and-student-outcomes.pdf ("The most important finding from this research is that TEACHER EXPECTATIONS CAN AND DO AFFECT STUDENTS' ACHIEVEMENT AND ATTITUDES.").

34. Jennifer A. Richeson et al., *African Americans' Racial Attitudes and the Depletion of Executive Function After Interracial Interactions*, 23 SOC. COGNITION 336 (2005); Jennifer A. Richeson & J. Nicole Shelton, *Negotiating Interracial Interactions: Costs, Consequences, & Possibilities*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 316, 316 (2007) ("[I]ndividuals often exit interracial interactions feeling drained both cognitively and emotionally."); *infra* note 407.

35. *See generally* Jamilia J. Blake et al., *Challenging Middle-Class Notions of Femininity: The Causes of Black Females' Disproportionate Suspension Rates*, *in* CLOSING THE SCHOOL DISCIPLINE GAP, *supra* note 16, at 76 (citation omitted) ("Although a number of factors are believed to contribute to disproportionate disciplinary practices, racial/ethnic bias has been implicated more frequently."); Pamela Fenning & Jennifer Rose, *Overrepresentation of African American Students in Exclusionary Discipline: The Role of School Policy*, 42 URB. EDUC. 536, 537 (2007) (explaining that students of color are targeted by teachers out of fear and anxiety of losing control of the classroom); Kent McIntosh et al., *Education not Incarceration: A Conceptual Model for Reducing Racial and Ethnic Disproportionality in School Discipline*, 5 J. APPLIED RES. ON CHILD. no. 2, 2014, at 3 (stating that conscious or unconscious bias is an important factor in the discipline gap).

Figure 8. Importance of Expectation[36]



Where labeling of young people is virtually omnipresent—Limited English Proficiency, emotionally disturbed, intellectually disabled, troubled, trouble-maker, noncompliant, insubordinate, delinquent, from a bad family—decisions and actions flow from these labels and expectations they engender among both educators and students.[37] A recent study of school personnel found that less than one-third of teachers believe that schools should expect all students to meet high academic standards; and most do not believe that *at risk* students would respond to these high expectations and work harder.[38] As a study of teachers and administrators on this

36. Rodney Lee, Equity and Diversity Educ. Dep't, Clark Cty., Las Vegas, NV, Presentation, Effect Size (on file with authors) (compiling information from HATTIE, *supra* note 29); *see also Hattie Ranking: Influences And Effect Sizes Related To Student Achievement*, VISIBLE LEARNING, http://visible-learning.org/hattie-ranking-influences-effect-sizes-learning-achievement/ (demonstrating the most and least effective influences upon students) (last visited Oct. 22, 2016).

37. *See, e.g.*, HATTIE, *supra* note 29, at 2840 ("Smith (1980) found that when labeling information on pupil ability is given to teachers, they reliably rate student ability, achievement, and behavior according to the information provided.").

38. JOHN M. BRIDGELAND ET AL., ON THE FRONT LINES OF SCHOOLS: PERSPECTIVES OF TEACHERS AND PRINCIPALS ON THE HIGH SCHOOL DROPOUT PROBLEM 2 (2009), http://www.civicenterprises.net/MediaLibrary/Docs/ED%20-%20on%20the%20front%20lines%20of%20schools.pdf.

particular point found strong and high-level expectations often remain least present where they are most needed, leading one education expert to observe: "The biggest resistance to improving high schools is a deep-seated belief that many of our students cannot learn much. We've created a system that allows them to validate that . . . ."[39] Researchers have empirically demonstrated that teachers with negative attitudes towards ethnic minorities viewed those students as less intelligent and less capable of obtaining promising post-career prospects; and student achievement differences between ethnic minority students and other students were larger in classrooms with prejudiced teachers than with teachers who held less prejudicial attitudes.[40]

In such a system, the exercise of discretion is critical.[41] Discretionary decisions place students in tracks or locations where

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39. Kathleen Vail, *Remaking High Schools*, AM. SCH. BOARD J., Nov. 2004,http://www.wacharterschools.org/news/natlnews/2004-11_ASBJHighSchool.htm.

40. *See* Linda van den Bergh et al., *The Implicit Prejudiced Attitudes of Teachers: Relations to Teacher Expectations and the Ethnic Achievement Gap*, 47 AM. EDUC. RES. J. 497, 518 (2010); Clark McKown & Rhona S. Weinstein, *Teacher Expectations, Classroom Context, and the Achievement Gap*, 46 J. SCH. PSYCHOL. 235, 256 (2008) (demonstrating empirically that teachers with high prejudicial attitudes towards minority students experienced higher gaps in student achievement along racial lines than teachers with lower biases); Harriet R. Tenenbaum & Martin D. Ruck, *Are Teachers' Expectations Different for Racial Minority than for European American Students? A Meta-Analysis*, 99 J. EDUC. PSYCHOL. 253, 271 (2007) (observing that teachers have higher expectations for White students than for minority students, and that teacher expectancies may lead to differences in academic performances); *see also infra* notes 426–430 and accompanying text; CHERYL STAATS, KIRWIN INST. FOR THE STUDY OF RACE AND ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 30–34 (2013) http://www.issuelab.org/resource/state_of_the_science_implicit_bias_review_2013.

41. *See, e.g.*, Catherine Kramarczuk Voulgarides & Natalie Zwerger, *Identifying the Root Causes of Disproportionality*, METROPOLITAN CTR. FOR RES. ON EQUITY & TRANSFORMATION SCHS., https://steinhardt.nyu.edu/scmsAdmin/media/users/ll81/Identifying_the_Root_Causes_of_Disproportionality.pdf ("Teachers may hold [lower] implicit, preconceived notions about particular racial and ethnic groups of students that they may subconsciously apply to students."); *see also* George, *supra* note 27, at 102, 105, 110 ("Whether educators admit it or not, they—like everyone else—are vulnerable to harboring bias, and when the opportunity to exercise discretion in decision making arises,

those identified as "low-performing students" go to low level, unchallenging classes.[42] Discretionary decisions place students disproportionately in certain special education categories.[43] This foreshadows, or perhaps reflects, the related finding that many students "expressed sadness that they were not challenged more and that the classes and teachers were not inspiring."[44] Estimates place the impact of such negative teacher perceptions at "almost 3 times as great for African Americans as for whites," larger for poor and female students, and "cumulative across disadvantages or stigmas."[45]

Discretionary decisions also determine if a parent is called or a student is sent to the office or referred to law enforcement.[46] These decisions are often made without basis in fact; as the researchers reviewing school discipline in Texas put it:

> Instead, the determining factor is how teachers and administrators interpret and apply these codes of conduct. What behaviors, for example, amount to "classroom disruption"? Should a student immediately be removed from the classroom for any sign of

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it usually plays out against African American students, including African American girls.").

42. John M. Bridgeland et al., THE SILENT EPIDEMIC: PERSPECTIVES OF HIGH SCHOOL DROPOUTS 5 (2006) http://www.gatesfoundation.org/united-states/Documents/TheSilentEpidemic3-06FINAL.pdf [hereinafter THE SILENT EPIDEMIC] ("Studies show that the expectations that teachers have for their students has an effect both on student performance and whether they drop out of school.").

43. *See infra* p. 29. Students with disabilities are disproportionately students of color, especially in discretionary categories and these categories compound.

44. THE SILENT EPIDEMIC, *supra* note 42, at 5. However, it is not clear how much of this response is a defense mechanism, covering for work or performance levels not achieved by students.

45. Ferguson, *supra* note 19, at 460, 472, 474–75.

46. *See* further discussion *infra* pp. 53–54. Students of color are disproportionately referred to law enforcement or subject to school-related arrest. Students with disabilities are disproportionately referred to law enforcement or subject to school-related arrest and incarceration. *See generally* JENNI OWEN ET AL., INSTEAD OF SUSPENSION: ALTERNATIVE STRATEGIES FOR EFFECTIVE SCHOOL DISCIPLINE (2015), https://law.duke.edu/childedlaw/schooldiscipline/downloads/instead_of_suspension.pdf (discussing other options).

> it, and, if so, which of the various possible consequences listed in the code of conduct should be imposed? How school administrators interpret these codes, and their responses to violations, varies enormously.[47]

And discretion shows in the results. In the Texas discipline data, African-American and Hispanic children have been found to be "slightly" more likely to be sent to the office and "substantially" more likely to be suspended or expelled.[48] Even when sent to the office, there are differences in the kind of triggering behavior—for African-American students, the more subjective "disrespect, excessive noise, threatening behavior, and loitering" and White students, the more objective "smoking, vandalism, leaving without permission, and using obscene language."[49] Harsher treatment also occurs for relatively minor "offenses," again, disproportionately so: "suspensions frequently occur in the absence of any physical violence or blatant verbal abuse . . . . [R]emoving a student from class is a highly contextualized decision based on subtle race and gender relations . . . ."[50] Discretionary decisions will also determine if a student is arrested, detained, or diverted.[51]

c. Bad or worse behavior is not the explanation for disproportionality

Disproportionate treatment of students and their overrepresentation in the negatives of our education and juvenile justice systems cannot be explained away because certain groups are more

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47. FABELO ET AL., *supra* note 10, at 17 (citation omitted).

48. John M. Wallace, Jr. et al., *Racial, Ethnic, and Gender Differences in School Discipline Among U.S. High School Students: 1991-2005*, 47 NEGRO EDUC. REV. 59, 54–55 tbls.2 & 3 (2008).

49. Daniel J. Losen, National Education Policy Center, Discipline Policies, Successful Schools, and Racial Justice 7 (2011), http://www.greatlakescenter.org/docs/Policy_Briefs/Losen_Discipline_PB.pdf; Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 332 (2002).

50. Frances Vavrus & KimMarie Cole, *"I Didn't Do Nothin'": The Discursive Construction of School Suspension*, 34 URB. REV. 87, 87 (2002).

51. *See infra* note 243 and accompanying text.

likely to be engaged in bad or delinquent behavior.[52] According to the U.S. Department of Education's Office of Civil Rights, discipline and other disparities are based on race and cannot be explained by more frequent or serious misbehavior by minority students.[53] As the Department recently stated, quite emphatically and unambiguously, "in our investigations we have found cases where African-American students were disciplined more harshly and more frequently *because of their race* than similarly situated white students. *In short, racial discrimination in school discipline is a real problem*."[54]

Substantial empirical research corroborates the U.S. Department of Education's conclusion.[55] School discipline records

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52. *See, e.g.*, JUV. DET. ALTS. INITIATIVE, THE ANNIE E. CASEY FOUND., DETENTION REFORM: AN EFFECTIVE APPROACH TO REDUCE RACIAL AND ETHNIC DISPARITIES IN JUVENILE JUSTICE fig.1 (2009), http://www.aecf.org/m/resourcedoc/aecf-DetentionReform3ReduceRacialDisparities-2009.pdf [hereinafter JDAI].

53. *See* DEAR COLLEAGUE LETTER, *supra* note 4.

54. *Id.* (emphasis added).

55. *See, e.g.*, Catherine P. Bradshaw et al., *Multilevel Exploration of Factors Contributing to the Overrepresentation of Black Students in Office Disciplinary Referrals*, 102 J. EDUC. PSYCHOL. 508, 508 (2010) (finding that after controlling for teacher ratings of students' behavior problems, African-American students were more likely than White students to be referred to the office for disciplinary reasons); LOSEN, *supra* note 49, at 6–7; Sean Kelly, *A Crisis of Authority in Predominantly Black Schools?*, 112 TCHRS. C. REC. 1247, 1261–62 (2010) (examining data from teacher surveys and finding that when controlling for factors such as low achievement and poverty, that African-American students were no more disruptive than other students); Anna C. McFadden et al., *A Study of Race and Gender Bias in the Punishment of Handicapped School Children*, 15 EDUC. & TREATMENT CHILD. 140, 144 (1992) (finding that African-American male disabled students were punished more severely than other students for the same offenses); Russell J. Skiba et al., *Where Should We Intervene? Contributions of Behavior, Student, and School Characteristics to Out-of-School Suspension*, *in* CLOSING THE SCHOOL DISCIPLINE GAP, supra note 16, at 132–34, 134 (finding that race was a strong predictor of out-of-school suspensions); Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the "School-to-Jail" Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633, 653–54 (2011) (finding that African-American students are significantly more likely than Whites to be disciplined even after taking into account other salient factors such as grades, attitudes, gender, special education or language programs, and their conduct in school as perceived by teachers); Russell J. Skiba et al., *Race Is Not*

and students' self-reports also show that the concerning differences and disproportionality are not simply attributable to the stigmatized group behaving "badly" relative to their peers or to socioeconomic factors.[56] The Discipline Disparity Collaborative reports:

> The crux of the matter then, is whether African American students engage in more seriously disruptive behavior that could justify different rates and severity of consequences. A number of different methods have been used to test the idea that differential punishment is due to different rates of misbehavior. Regardless of the method, such studies have provided little to no evidence that African American students in the same school or district are engaging in more seriously disruptive behavior that could warrant higher rates of exclusion or punishment.[57]

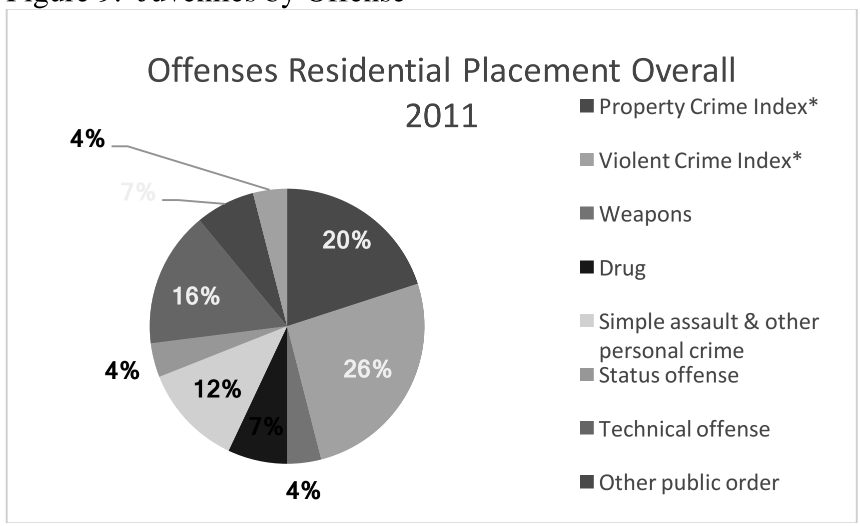
Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline, 40 SCH. PSYCHOL. REV. 85, 95–101 (2011) (finding significant disparities for minorities with respect to school discipline after examining an extensive national sample).

56. *See, e.g.*, Anne Gregory & Aisha R. Thompson, *African American High School Students and Variability in Behavior across Classrooms*, 38 J. COMMUNITY PSYCHOL. 386 (2010); Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RESEARCHER 59 (2010); John D. McCarthy & Dean R. Hoge, *The Social Construction of School Punishment: Racial Disadvantage Out of Universalistic Process*, 65 SOC. FORCES 1101, 1101 (1987); Russell J. Skiba et al., *supra* note 49; Wallace, Jr. et al., *supra* note 48, at 54–55 tbls.2 & 3; Gary G. Wehlage & Robert Rutter, *Dropping Out: How Much Do Schools Contribute to the Problem?*, WIS. CTR. FOR EDUC. RES., 374 (1986) http://files.eric.ed.gov/fulltext/ED275799.pdf (last visited Oct. 22, 2016).

57. RUSSELL J. SKIBA & NATASHA T. WILLIAMS, SUPPLEMENTARY PAPER I: ARE BLACK KIDS WORSE? MYTHS AND FACTS ABOUT RACIAL DIFFERENCES IN BEHAVIOR 3 (2014) (citations omitted), http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/African-American-Differential-Behavior_031214.pdf. This report continues, "Actual tests, however, have not supported the hypothesis of differential behavior. Regardless of whether the outcome variables are office disciplinary referrals at the school level, major offenses (e.g., weapons or substance use and possession) at the state level, or self-report data from national studies, controls for the extent or type of disruptive behavior have led to small and often nonsignificant changes in measured disproportionality. The fact that

In the juvenile justice system, studies are similar. Here, in what the Annie B. Casey Foundation labels as a "tragic irony," many of the young people detained are held for status offenses such as running away, truancy, incorrigibility, and technical violations such as violations of probation, parole, or valid court orders—not for violent crimes.[58]

Figure 9. Juveniles by Offense[59]



"Property Crime Index" includes crimes such as burglary, theft, auto theft, and arson. "Violent Crime Index" includes crimes such as criminal homicide, violent sexual assault, robbery, and aggravated assault. "Technical offenses" include probation, parole, and

race remains a significant predictor of discipline after controlling for a range of disciplinary infractions strongly suggests that factors related to student behavior are not sufficient to account for racial/ethnic disparities in discipline." *Id.* at 4 (citations omitted).

58. RICHARD A. MENDEL, THE ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 13 (2011), http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf; *see also* JJDP, *Easy Access*, *supra* note 1 (select "Age" as Row Variable and "Most serious Offense Detail" as Column Variable; then follow "Show Table") (comparing age of offender to type of offense).

59. JJDP, *Easy Access*, *supra* note 1 (select "Placement Status General" as Row Variable and "Most serious Offense Detail" as Column Variable; then follow "Show Table").

valid court order violations. "Status offenses" include running away, truancy, and incorrigibility.

Whatever the offense, racial and ethnic data remain disturbing, but, as with school data explained above, the data cannot support the view that this is because these young people are more criminal. Recognizing that "[s]ome have argued that this overrepresentation of youth of color in the justice system is simply a result of those youths committing more crimes than White youth," The National Council on Crime and Delinquency summarizes that "a true analysis is much more complicated" and does not support this conclusion.[60]

d. Exclusion and detention do not achieve better outcomes for students

As some of the leading researchers in the field have concluded, "High suspension rates do not improve learning conditions."[61] It perhaps goes without saying that time spent learning is among the strongest predictors of achievement.[62] Results of being out of school directly disadvantage the students and the impact is likely circular and cumulative.[63]

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60. NAT'L COUNCIL ON CRIME AND DELINQUENCY, AND JUSTICE FOR SOME 1 (2007), http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf. *But see* Michael J. Leiber & Jennifer H. Peck, *Race in Juvenile Justice and Sentencing Policy: An Overview of Research and Policy Recommendations*, 31 LAW & INEQ. 331, 341 (2013) (finding some validity to the "differential offending perspective").

61. ARE WE CLOSING, *supra* note 21, at 9; *see also* Amy P. Meek, Note, *School Discipline "As Part of the Teaching Process": Alternative and Compensatory Education Required by the State's Interest in Keeping Children in School,* 28 YALE L. & POL'Y REV. 155, 158 (citation omitted) (2009) ("Researchers have shown, however, that high suspension rates do not improve school climates . . . .").

62. ALAN GINSBURG, PHYLLIS JORDAN AND HEDY CHANG, ABSENCES ADD UP: HOW SCHOOL ATTENDANCE INFLUENCES STUDENT SUCCESS 1, 3 (2014), http://www.attendanceworks.org/wordpress/wp-content/uploads/2014/09/Absenses-Add-Up_September-3rd-2014.pdf ("The association between poor attendance and lower NAEP scores is robust and holds for every state and for each of the 21 urban districts regardless of size, region or composition of the student population.").

63. *Id.* at 2. These harms are also consonant with the growing research on the impact on children of adverse childhood experiences ("ACE") of child-

Student underachievement often leads to student misbehavior in the classroom. Empirical studies confirm that it is common for low-performing students to misbehave out of frustration or embarrassment when they are unable to learn the academic material and meet grade-level expectations.[64] For example, research shows that when students are retained in grade, this does not improve their subsequent academic achievement.[65] As many educators well understand, when students begin to comprehend that the educational process is not working for them—that they will not be admitted to college, have access to a good-paying job, or enjoy a promising career—they have fewer incentives to obey school rules and take school seriously,[66] leading to disciplinary exclusion, often for trivial violations of school rules.[67]

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hood abuse and neglect (including educational neglect). *See generally Injury Prevention & Control: Division of Violence Protection*, CENTERS FOR DISEASE AND CONTROL AND PREVENTION, https://www.cdc.gov/violenceprevention/acestudy/about.html (last visited Oct. 23, 2016) (detailing the increased risk of poor outcomes as a result of ACE).

64. *See* STEINBERG, ALLENWORTH & JOHNSON, STUDENT AND TEACHER SAFETY IN CHICAGO PUBLIC SCHOOLS, *supra* note 16, at 46 (observing that low-performing students are less likely to be engaged in school and more likely to be frustrated and misbehave); Steinberg, Allenworth & Johnson, *What Conditions Support Safety in Urban Schools?*, *supra* note 16, at 125 (maintaining that low-performing students are less likely to be engaged and more likely to act out).

65. HATTIE, *supra* note 29, at 2301–06 (summarizing research regarding negative effects of retention in grade on achievement and behavior).

66. STEINBERG, ALLENWORTH & JOHNSON, STUDENT AND TEACHER SAFETY IN CHICAGO PUBLIC SCHOOLS, *supra* note 16, at 27–31, 46 (finding that students' academic skills are highly correlated with overall safety at the school); PAUL WILLIS, LEARNING TO LABOR 72 (1977) (explaining that "teachers' authority becomes increasingly the random one of the prison guard, not the necessary one of the pedagogue" when students think that the knowledge, skills, and credentials acquired in school are irrelevant); Pedro A. Noguera, *Schools, Prisons, and Social Implications of Punishment: Rethinking Disciplinary Practices*, 42 THEORY INTO PRAC. 341, 342 (2003).

67. *See* AM. BAR ASS'N, *supra* note 10, at 2; ACTION FOR CHILDREN N.C., *supra* note 7, at 9–10 ("Students were most commonly referred to the juvenile justice system for low-level offenses . . . ."); EDUCATION UNDER ARREST, *supra* note 7, at 14–15 (reporting that in 2007–08, ninety-six percent of school-based referrals in Birmingham, Alabama, were for misdemeanors); FABELO ET AL., *supra* note 10, at 37 (reporting that ninety-seven percent of suspensions and expulsions in Texas resulted from offenses that did not require suspension or expulsion under law); FLA. DEP'T OF JUVENILE JUSTICE, OFFICE

And student misbehavior and discipline often lead to student underachievement,[68] in "a downward spiral of academic failure, disengagement from school, and antisocial behaviors."[69] As leading researchers put it,

> If we ignore the discipline gap, we will be unable to close the achievement gap. Of the 3.5 million students who were suspended in 2011-12, 1.55 million were suspended at least twice. Given that the average suspension is conservatively put at 3.5 days, we estimate that U.S. public school children lost nearly 18 million days of instruction in just one school year because of exclusionary discipline.[70]

FOR PROGRAM ACCOUNTABILITY, DELINQUENCY IN FLORIDA'S SCHOOLS 8 (2011), https://www.prisonlegalnews.org/media/publications/fl_dept_of_ juvenile_justice_study_on_delinquency_in_fl_schools_2004-2011.pdf (observing that "disorderly conduct" was the second most common school-related delinquency referral in Florida schools from 2005–2011); ARRESTING DEVELOPMENT, *supra* note 7, at 6 (reporting that during the 2004–05 school year in Florida, seventy-six percent of school-based referrals to law enforcement were for misdemeanor offenses such as disorderly conduct); S.C. DEP'T OF JUVENILE JUSTICE, 2012–2013 ANNUAL STATISTICAL REPORT 5 (2013), http://www.state.sc.us/djj/pdfs/2012-13%20Annual%20Statistical%20Report .pdf (stating that the third most frequent offense associated with referrals to family court in 2012–2013 was "disturbing schools").

68. Elizabeth Glennie et al., *Addition by Subtraction: The Relation Between Dropout Rates and School-Level Academic Achievement*, 114 TCHRS. C. REC. 1, 2 (2012), http://www.tcrecord.org/Content.asp?ContentID=16529 ("[I]mprovements in school-level academic performance will lead to improvements (i.e., decreases) in school-level dropout rates. . . . [and] more evidence of a negative side of the quest for improved academic performance. When dropout rates increase, the performance composites in subsequent years increase."); Tary J. Tobin & Claudia G. Vincent, Univ. of Or., Presentation, Culturally Competent School-Wide Positive Behavior Support: From Theory to Evaluation Data, 7th International Conference on Positive Behavior Support, St. Louis, Mo. (Mar. 26, 2010).

69. REBECCA STAVENJORD, EXCLUSIONARY DISCIPLINE IN MULTNOMAH COUNTY SCHOOLS: HOW SUSPENSIONS AND EXPULSIONS IMPACT STUDENTS OF COLOR 9 (2012), http://allhandsraised.org/content/uploads/2012/10/ exclusionary_discipline_1-3-12.pdf.

70. ARE WE CLOSING, *supra* note 21, at 4 (emphasis omitted).

Several empirical studies support these conclusions. Analyzing longitudinal data from Florida, scholars Robert Balfanz, Vaughan Byrnes, and Joanna Hornig Fox found that the odds of a student dropping out of school increased from sixteen percent to thirty-two percent the first time that a student was suspended in the ninth grade and increased each additional time that student was suspended.[71] Further, when controlling for other factors such as student demographics, attendance, and course performance, they found that each suspension decreased the odds that a student would graduate from high school by twenty percent and decreased the odds of a student attending a postsecondary institution by twelve percent.[72] Similarly, analyzing longitudinal data from Texas, scholar Miner P. Marchbanks III and his colleagues discovered that when a student received some type of exclusionary discipline, including an in-school suspension, out-of-school suspension, expulsion, a disciplinary alternative placement, or a juvenile justice placement, that student was 23.5 percent more likely to drop out of school after accounting for other salient factors; Marchbanks claimed that even this was a conservative measure,[73] and that "[w]hen a student was suspended or expelled, his or her likelihood of being involved in the juvenile justice system the subsequent year increased significantly."[74] And once students so disciplined

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71. *See, e.g.*, Robert Balfanz et al., *Sent Home and Put Off Track*, *in* CLOSING THE SCHOOL DISCIPLINE GAP, *supra* note 16, at 22 (finding that in a longitudinal study of 181,897 Florida students, after controlling for student demographics and other indicators that a student is not on track to graduating, that each suspension decreases the odds that a student will graduate by twenty percent); ARE WE CLOSING, *supra* note 21, at 4 (discussing the negative impact of suspensions on academic performance).

72. Balfanz et al., *supra* note 71, at 22.

73. *See* Miner P. Marchbanks III et al., *The Economic Effects of Exclusionary Discipline on Grade Retention and High School Dropout*, *in* CLOSING THE SCHOOL DISCIPLINE GAP, *supra* note 16, at 64.

74. FABELO ET AL., *supra* note 10, at xi–xii; *see also* Patrick S. Metze, *Plugging the School-to-Prison Pipeline by Addressing Cultural Racism in Public Education Discipline*, 16 U.C. DAVIS J. JUV. L. & POL'Y 203, 228–29 (2012). It appears to be a little known fact that when Trayvon Martin was shot by George Zimmerman, he was staying at his father's house because he had been suspended from school. Janel George, Senior Education Policy Counsel, NAACP Legal Defense and Educational Fund, Inc., Presentation at the School-to-Prison Pipeline San Diego Town Hall (Feb. 5, 2016).

they are significantly more likely to find themselves moving further along the pipeline toward prison. Once involved with the juvenile justice system, concerning results continue.[75] At the prison end of the pipeline, educational opportunity is severely limited in most states.[76]

Nor do schools with high levels of exclusionary discipline attain a higher level of academic achievement for the school as a whole: "Perhaps more important, recent research indicates a negative relationship between the use of school suspension and expulsion and school-wide academic achievement, even when controlling for demographics such as socioeconomic status."[77] What is more, "when harsh exclusionary policies are discontinued in schools, referrals to juvenile correctional facilities also decrease."[78]

Once in the juvenile justice system and prison part of the pipeline, the results are the same. Detention/incarceration does not accomplish one of its primary objectives, which is to deter criminal behavior. Evidence of improved outcomes from detention is similar in terms of reasons for arrest and detention, and the results are similarly unimpressive. As the Annie B. Casey report summarized: "The vast majority of studies find that incarceration is no more effective than probation or alternative sanctions in reducing the criminality of adjudicated youth, and a number of well-

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75. Anne M. Hobbs et al., *Assessing Youth Early in the Juvenile Justice System*, 3 J. OF JUV. JUST. 80, 81–90 (2013) ("Research confirms that the practice of detaining juveniles for relatively low-level offenses is both ineffective and detrimental . . . . Early Assessment . . . appears to reduce recidivism.").

76. COUNCIL OF STATE GOV'TS JUSTICE CTR., LOCKED OUT: IMPROVING EDUCATIONAL OUTCOMES FOR INCARCERATED YOUTH 3 (2015) https://csgjusticecenter.org/wp-content/uploads/2015/11/LOCKED_OUT_Improving_Educational_and_Vocational_Outcomes_for_Incarcerated_Youth.pdf [hereinafter LOCKED OUT]; *see also* NAT'L EVALUATION AND TECH. ASSISTANCE CTR. FOR THE EDUC. OF CHILDREN AND YOUTH WHO ARE NEGLECTED, DELINQUENT, OR AT-RISK, FACT SHEET: JUVENILE JUSTICE EDUCATION (2011), http://www.neglected-delinquent.org/sites/default/files/NDFactSheet.pdf (discussing the state of the education system in juvenile justice centers).

77. Am. Psychol. Ass'n Zero Tolerance Task Force, *supra* note 10, at 854.

78. ROBERT L. LISTENBEE, JR. ET AL., REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 184 (2012) http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf.

designed studies suggest that correctional placements actually exacerbate criminality."[79] In a comprehensive meta-analysis examining 7,304 juveniles across twenty-nine studies over a thirty-five year period, scholars Anthony Petrosino, Carolyn Turpin-Petrosino, and Sarah Guckenburg found that juvenile justice processing did not effectively deter delinquency; instead, it actually increased delinquency and future involvement in the justice system.[80] In short, the research overwhelmingly demonstrates that the "official processing of a juvenile law violation may be the *least* effective means of rehabilitating juvenile offenders."[81]

e. Nor are the schools safer[82]

The negative disproportionalities might be understood if indeed removals from school were in fact making schools safer, or, if indeed, confinement in juvenile detention or other facilities led to improved outcomes. This does not appear to be the case in prac-

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79. MENDEL, *supra* note 58, at 9–12 ("[T]he overall body of recidivism evidence indicates plainly that confinement in youth corrections facilities doesn't work well as a strategy to steer delinquent youth away from crime. . . . Follow-up studies have long shown that youth released from juvenile correctional facilities seldom succeed in school."); *see also* ANTOINETTE DAVIS ET AL., SUPERVISION STRATEGIES FOR JUSTICE-INVOLVED YOUTH 1–2 (2014), http://nccdglobal.org/sites/default/files/publication_pdf/supervision-strategies.pdf.

80. ANTHONY PETROSINO ET AL., FORMAL SYSTEM PROCESSING OF JUVENILES: EFFECTS ON DELINQUENCY 6−18 (2013) http://permanent.access.gpo.gov/gpo59099/cops-p265-pub.pdf; *see also* Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital, and Future Crime: Evidence from Randomly Assigned Judges*, 130 Q. J. ECON. 759 (2015) (demonstrating empirically that juvenile incarceration lowers the probability that a juvenile will complete high school and increases the probability of adult incarceration); PEW CHARITABLE TRS., RE-EXAMINING JUVENILE INCARCERATION (2015), http://www.americanbar.org/content/dam/aba/ uncategorized/criminal_justice/2015_Reexamining_Juvenile_Incarceration.authcheck dam.pdf.

81. Hobbs et al., *supra* note 75, at 81 (emphasis added); *see supra* Figure 9. Juvenile by Offense.

82. *See* Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1, 21 (2013) (reviewing relevant research that punitive measures "negatively affect the learning environment").

tice or in theory.[83] As researchers Dan Losen and Russell Skiba summarize, "[T]here is no evidence that frequent reliance on removing misbehaving students improves school safety or student behavior."[84]

In school situations, many removals are for behaviors that do not invoke real safety concerns;[85] the vast majority of suspensions—95% of the 3.3 million children suspended from school each year—are for nonviolent offenses such as violating the dress code or "disruptive" behavior.[86]

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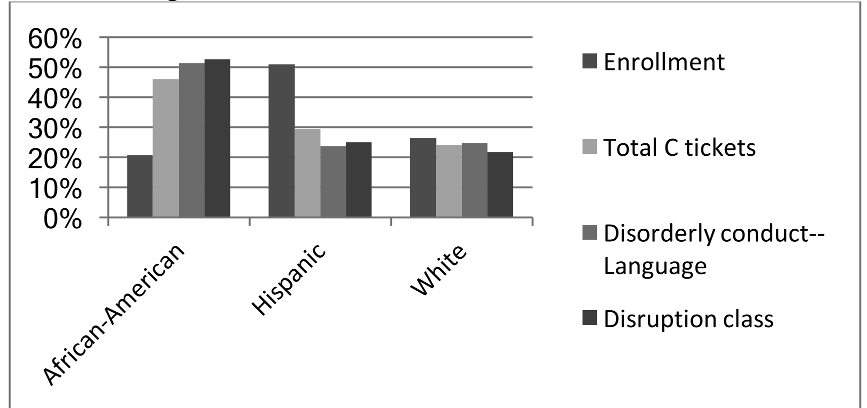
83. *See* RICHARD A. MENDEL, JUVENILE DETENTION ALTERNATIVES INITIATIVE PROGRESS REPORT 17 (2014), http://www.aecf.org/m/resourcedoc/aecf-2014JDAIProgressReport-2014.pdf; Nance, *supra* note 82, at 25 ("Strict Security Measures Applied Disproportionately to Minority Students Are Particularly Harmful."). *See generally* PEDRO A. NOGUERA, THE TROUBLE WITH BLACK BOYS 121–23 (2008) (describing removing "bad apples" as not successful in improving classroom).

84. DANIEL J. LOSEN & RUSSELL SKIBA, SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 2 (2010), http://www.splcenter.org/sites/default/files/downloads/publication/Suspended_Education.pdf (citation omitted).

85. *See* Russell Skiba & M. Karega Rausch, *School Disciplinary Systems: Alternatives to Suspension and Expulsion*, *in* CHILDREN'S NEEDS III: DEVELOPMENT, PREVENTION, AND INTERVENTION 87, 89 (George G. Baer & Kathleen M. Minke eds., 2006), http://www.indiana.edu/~equity/docs/Alternatives_to_Expulsion.pdf; Skiba, Arredondo & Williams, *supra* note 16, at 550; *e.g.*, ROBIN L. DAHLBERG, ARRESTED FUTURES: THE CRIMINALIZATION OF SCHOOL DISCIPLINE IN MASSACHUSETTS'S THREE LARGEST SCHOOL DISTRICTS 34 (2012), https://www.aclu.org/files/assets/maarrest_reportweb.pdf; FABELO ET AL., *supra* note 10, at 13; ARTHUR BURKE & VICKI NISHIOKA, SUSPENSION AND EXPULSION PATTERNS IN SIX OREGON SCHOOL DISTRICTS 1 (2014) [hereinafter "OREGON"], http://files.eric.ed.gov/fulltext/ED544799.pdf.

86. ROBERT L. LISTENBEE, JR. ET AL., *supra* note 78, at 183–84; COMM. ON ASSESSING JUVENILE JUSTICE REFORM, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 23 (Richard J. Bonnie et al. eds., 2013), http://www.nap.edu/download.php?record_id=14685# [hereinafter REFORMING JUVENILE JUSTICE].

Figure 10. Discipline disproportionality Illustrated, Bryant ISD, Texas Example[87]



"C tickets" are given in Texas by School Resource Officers for discipline infractions. The total here includes the subsets of disorderly and disruptive.

As researcher Daniel Losen summarizes: "Contrary to popular belief, most suspensions are not for guns, drugs or violence . . . . Accordingly, the high rates of disciplinary removal from school currently seen in American schools cannot reasonably be attributed to the necessary responses to unlawful or dangerous misbehavior."[88]

Many removals stem from the application of the zero tolerance concept.[89] The concept of zero tolerance, which calls for au-

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87. Letter from NAACP Legal Def. & Educ. Fund & Nat'l Ctr. for Youth Law, to Dallas Office for Civil Rights, U.S. Dep't of Educ. (Feb. 20, 2013), http://youthlaw.org/wp-content/uploads/2014/11/Bryan_ISD_OCR_Complaint_FINAL.pdf (citing data obtained by Texas Appleseed through Open Record Requests); *see also supra* Figure 6. At Least One Out of School Suspension Elementary & Secondary by Group.

88. Daniel J. Losen, *supra* note 49, at 8; *see also* ARE WE CLOSING, *supra* note 21, at 10–11.

89. *See, e.g.*, Ratner v. Loudoun Cty. Pub. Schs., 16 Fed. App'x 140, 141–42 (4th Cir. 2001) (per curiam) (upholding the suspension of a 13-year-old student who took a knife away from a fellow student because the student told him that she was going to commit suicide even though all agreed that Ratner posed no threat, in fact the opposite). *See generally* Lenore Skenazy, *Here Are 10 Outrageous 'Zero Tolerance' Follies of 2014*, HIT & RUN BLOG (Dec. 29,

tomatic discipline in every case of the specified behavior, was spawned by the requirements of the Gun Free School Zone Act in 1994[90] and grew to include other behaviors.[91] A zero tolerance approach limited discretion, though research eventually revealed that discretion continued and the approach was not especially effective.[92] The American Psychological Association ("APA") Zero Tolerance Task Force concluded that these policies do not bring about improved school safety. On the contrary, "data on a number of indicators of school climate have shown the opposite effect, that is, that schools with higher rates of school suspension and expulsion appear to have *less* satisfactory ratings of school climate, to have less satisfactory school governance . . . ."[93]

2014, 9:30 AM), https://reason.com/blog/2014/12/29/the-top-10-zero-tolerance-follies-of-201#.ozntkut:gd1T.

90. Gun-Free Schools Act of 1994, 20 U.S.C. §§ 8921–23, *repealed by* No Child Left Behind Act of 2001, Pub. L. No. 107-110, tit. X, § 1011(5)(C), 115 Stat. 1986.

91. *See generally* ASHLEY NELLIS, RETURN TO JUSTICE: RETHINKING OUR APPROACH TO JUVENILES IN THE SYSTEM 95 (2015) (reviewing history and discussing of examples as applied beyond weapons).

92. Thalia González, *Restoring Justice: Community Organizing to Transform School Discipline Policies*, 15 U.C. DAVIS J. JUV. L. & POL'Y 1, 9–10 (2011); KANG-BROWN ET AL., *supra* note 8, at 4; LOSEN & SKIBA, *supra* note 84, at 9; Am. Psychol. Ass'n Zero Tolerance Task Force, *supra* note 10, at 856–57; AM. BAR ASS'N JUVENILE JUSTICE COMM'N, *supra* note 10, at 4–6; *see also Ending the School-to-Prison Pipeline: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 156–62 (2013) (statement of Laurel G. Bellows, President, American Bar Association); Nat'l Inst. of Justice, *School-Based Bullying Prevention Programs*, CRIMESOLUTIONS.GOV, https://www.crimesolutions.gov/PracticeDetails.aspx?ID=20&utm_source=eblast-govdelivery&utm_medium=eblast&utm_campaign=pract20-school-based-bullying (last visited Jan. 11, 2016) (discussing failure of these policies regarding bullying). *See generally* Russell J. Skiba & Daniel J. Losen, *From Reaction to Prevention: Turning the Page on School Discipline*, AM. EDUCATOR, Winter 2015–2016, http://www.aft.org/ae/winter2015-2016/skiba_losen#sthash.PoX9AxdK.dpuf (providing overview of development and waning of this approach).

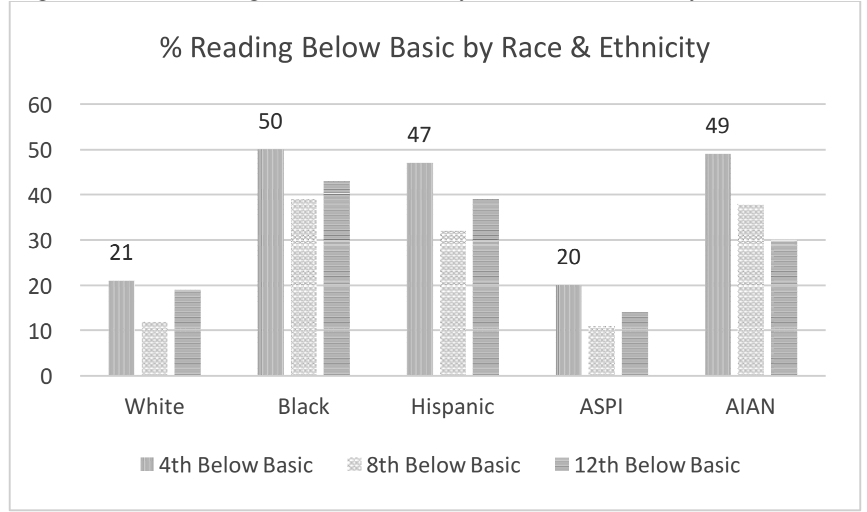
93. Am. Psychol. Ass'n Zero Tolerance Task Force, *supra* note 10, at 854.

B. The Manifestations

1. Disproportionality manifests itself all along the pipeline where students of color are poorly served[94]

a. Students of color are disproportionately lower achievers and unable to read at basic or above

Figure 11. Reading Below Basic by Race & Ethnicity[95]



The overall achievement gap between African-American, Hispanic, and American Indian Alaskan Native (AIAN) students and their White and Asian peers has been a subject of concern since at least 1966 when the U.S. Department of Health Education

94. Scholar Margaret Burchinal and her colleagues have described the "substantial gap in educational achievement between Black and White children [a]s one of the most pernicious problems facing American society." Margaret Burchinal et al., *Examining the Black-White Achievement Gap Among Low-Income Children Using the NICHD Study of Early Child Care and Youth Development*, 82 CHILD DEV. 1404, 1404 (2011). *See generally* CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 1 (2010) (explaining that conditions increasing the probability that a student will be involved in the criminal justice system are broad and might include depriving students of needed resources to enhance their educational opportunities).

95. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 2013, at 233 tbl.221.20 (2013), http://nces.ed.gov/pubs2015/2015011.pdf.

and Welfare commissioned the *Equality of Educational Opportunity Study* (Coleman Report).[96]

Because reading is one of the most critical skills for every student and citizen and relates to many other academic and societal skills, one's ability to read offers a clear example of a primary academic concern.[97] Differences in reading skills begin early and endure.[98] At kindergarten, African-American and Hispanic children are significantly less likely to know their letters or recognize beginning and ending sounds than their White and Asian peers.[99] For example, 50% of Hispanic children recognize the letters of the alphabet when they enter kindergarten compared to 57% of African-American, 71% of White, and 80% of Asian American children.[100]

At the end of the third grade, most gaps identified in preschoolers persist.[101] Significantly, a student who is not "a modest-

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96. *See Equality of Educational Opportunity Study*, INTER-UNIVERSITY CONSORTIUM FOR POL. & SOC. RES., http://www.icpsr.umich.edu/icpsrweb/ICPSR/ studies/06389 (last visited Oct. 29, 2016).

97. *See generally* REDFIELD, DIVERSITY, *supra* note 30, at ch. 3 (reviewing reading, writing, history, and civics). Several demographic groups are disproportionately represented in this bottom tier, including those who did not graduate from high school, those who did not speak English before starting school, Hispanic & Black adults, and those with multiple disabilities. Nat'l Ctr. for Educ. Stat., *National Assessment of Adult Literacy ("NAAL")*, http://nces.ed.gov/naal/kf_demographics.asp (last visited Oct. 29, 2016).

98. Burchinal et al., *supra* note 94, at 1401 ("[R]acial disparities in school achievement increase by about one tenth of a standard deviation during each year of school."); Nancy E. Dowd, *What Men?: The Essentialist Error of the "End of Men"*, 93 B.U. L. REV. 1205, 1217 (2013) (observing that the racial achievement gap widens as children grow because minority schools have fewer resources).

99. JERRY WEST, KRISTIN DENTON & ELVIRA GERMINO-HAUSKEN, U.S. DEP'T OF EDUC., AMERICA'S KINDERGARTNERS 16, 22 tbl.6 (2000), http://nces.ed.gov/pubs2000/2000070.pdf.

100. PAUL E. BARTON & RICHARD J. COLEY, EDUC. TESTING SERV., WINDOWS ON ACHIEVEMENT AND INEQUALITY 9–11 (2008), http://www.ets.org/Media/Research/pdf/PICWINDOWS.pdf (reviewing achievement gap from child development to global comparisons); JAY MACLEOD, AIN'T NO MAKIN' IT: ASPIRATIONS & ATTAINMENT IN A LOW-INCOME NEIGHBORHOOD 13–16, 100 (3d ed. 2009) (discussing differences/impact).

101. *See* AMY RATHBUN, JERRY WEST & ELVIRA GERMINO-HAUSKEN, U.S. DEP'T OF EDUC., FROM KINDERGARTEN THROUGH THIRD GRADE:

ly skilled reader by the end of third grade is quite unlikely to graduate from high school."[102] The percentage of American Indian students reading below grade level at fourth grade is 53%; for African-American students, 51%; for Hispanic students, 49%; for White students, 22%; and for Asian Pacific Islanders (ASPI), 20%.[103] African-American and Latino 17-year-olds, on average, read at the same level as White 13-year-olds.[104] By twelfth grade, there is an almost 30-point difference in scale scores on the National Assessment of Education Progress (NAEP).[105]

These differences remain evident notwithstanding decades of varied strategies and interventions.[106] Summarizing the data on this intractable problem, leading literacy researchers conclude:

> Nationally reported data point to four conclusions: (1) There are differences in the emerging literacy knowledge and performance of young children entering kindergarten from various racial/ethnic and socioeconomic backgrounds; (2) the gap is greater for children who enter school with a combination of multiple risk factor (e.g., . . . whether the primary language spoken in the home is not English); (3) by

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CHILDREN'S BEGINNING SCHOOL EXPERIENCE 16 fig.5 (2004), http://nces.ed.gov/pubs2004/2004007.pdf.

102. NAT'L RESEARCH COUNCIL, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN 21 (Catherine E. Snow, M. Susan Burns & Peg Griffin eds., 1998); THE TRUST FOR EARLY EDUCATION, A POLICY PRIMER: QUALITY PRE-KINDERGARTEN 14 (2004).

103. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., READING 2011: NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS AT GRADES 4 AND 8, 15 fig.8 (2011), http://nces.ed.gov/nationsreportcard/pdf/main2011/2012457.pdf.

104. THOMAS D. SNYDER & SALLY A. DILLOW, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 2011, at 193 tbl.125 (2012), http://nces.ed.gov/pubs2012/2012001.pdf.

105. MARIANA HAYNES, ALLIANCE FOR EXCELLENT EDUC., CONFRONTING THE CRISIS: FEDERAL INVESTMENTS IN STATE BIRTH-THROUGH-GRADE-TWELVE LITERACY EDUCATION 4 (2012), http://www.all4ed.org/files/ConfrontingTheCrisis.pdf.

106. *See* SCHOTT FOUND. FOR PUB. EDUC., THE URGENCY OF NOW: THE SCHOTT 50 STATE REPORT ON PUBLIC EDUCATION AND BLACK MALES 43–48 (2012), http://blackboysreport.org/bbreport2012.pdf.

> grade 4, there is a significant discrepancy between the reading comprehension proficiency of European American, non-Hispanic students and their African American and Hispanic peers, and this discrepancy continues through grade 12; and (4) these gaps have been stable for more than a decade.[107]

Other subject areas show similar discrepancies.[108] This is hardly surprising considering that these same students have fewer engaging educational experiences,[109] fewer experienced highly qualified teachers,[110] less access to rigorous and high level course-work, and experience lower expectations from their teachers.[111]

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107. HANDBOOK OF RESEARCH ON LITERACY AND DIVERSITY 1 (Lesley Mandel Morrow, Robert Rueda & Diane Lapp, eds., 2009).

108. REDFIELD, DIVERSITY, *supra* note 30, at ch. 3 (2009) (summarizing gaps all along the educational pipeline).

109. *See, e.g.*, THE SILENT EPIDEMIC, *supra* note 42, at 3–4; *see also* REDFIELD, DIVERSITY, *supra* note 30, at 82–85 (reviewing the research).

110. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, THE TRANSFORMED CIVIL RIGHTS DATA COLLECTION (CRDC) (2012), http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf. Students with more teachers with at least five years' experience show more academic gains, but these are the very teachers that are lacking in high minority schools. THE EDUC. TRUST, THEIR FAIR SHARE: HOW TEXAS-SIZED GAPS IN TEACHER QUALITY SHORTCHANGE LOW-INCOME AND MINORITY STUDENTS 2 (2008), http://edtrust.org/wp-content/uploads/2013/10/TXTheirFairShare.pdf; SUSAN AUD ET AL., U.S. DEP'T OF EDUC., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 48 (2010), http://www.air.org/sites/default/files/downloads/report/AIR-NCESracial_stats__trends1_0.pdf (showing disparity in qualification in relationship to school population); ALLIANCE FOR EXCELLENT EDUC., IMPROVING THE DISTRIBUTION OF TEACHERS IN LOW-PERFORMING HIGH SCHOOLS 1 (2008), http://www.issuelab.org/resource/improving_the_distribution_of_teachers_in_low_performing_high_schools ("There are different ways of measuring teacher quality at the high school level . . ., but no matter what measurement is used, students in poorer high schools which primarily serve students of color are generally taught by lower-quality teachers. Teachers in these schools routinely lack experience, qualifications, and effectiveness . . . ." (internal citation omitted)).

111. *See generally Higher Education: Gaps in Access and Persistence Study*, NAT'L CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/pubs2012/2012046/chapter6.asp (last visited Oct. 30, 2016) (reviewing rigorous courses particularly math); JEANNIE OAKES, RAND CORP., MULTIPLYING INEQUALITIES: THE EFFECTS OF RACE, SOCIAL CLASS, AND

b. Students of color suffer disproportionately because of lower expectations and lack of engagement[112]

Engagement of a young person with his/her teachers or school or other adults is critical,[113] but many adults in these systems are not engaged. As discussed in the context section, many school officials and teachers who work with minority students living in poor neighborhoods have a stronger tendency to adopt a lower level of expectations for their students.[114] There is troubling empirical evidence suggesting that some teachers and school officials believe that some students, particularly African-American males, are "bound for jail" and "unsalvageable."[115]

c. Students of color are disproportionately retained in grade or excluded because of high stakes testing

In early years and beyond, minority students are disproportionately held back. For American Indian-Alaskan Native students, 7% are held back in kindergarten, for Native Hawaiian Pacific Islander students, 8%, as compared to African-American students at 5%, White and Hispanic students at 4%, and Asian stu-

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TRACKING ON OPPORTUNITIES TO LEARN MATHEMATICS AND SCIENCE (1990), http://www.rand.org/pubs/reports/2006/R3928.pdf; NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE NATION'S REPORT CARD 28 (2007), https://nces.ed.gov/nationsreportcard/pdf/studies/2007467.pdf (also showing curricular disparities); UNIV. OF CAL. UNDERGRADUATE WORK TEAM OF THE STUDY GROUP ON UNIV. DIVERSITY, RECOMMENDATIONS AND OBSERVATIONS 19 fig.6 (2007), http://ucop.edu/student-affairs/_files/07-diversity_report.pdf (California data).

112. *See supra* 29–35 and accompanying text; STEINBERG, ALLENWORTH & JOHNSON, STUDENT AND TEACHER SAFETY IN CHICAGO PUBLIC SCHOOLS, *supra* note 16, at 46 (maintaining that low-performing students are less likely to be engaged in school and more likely to be frustrated and misbehave); Steinberg, Allensworth, & Johnson, *What Conditions Support Safety in Urban Schools*, *supra* note 16, at 125 (explaining that low-achieving students are less likely to be engaged and more likely to act out).

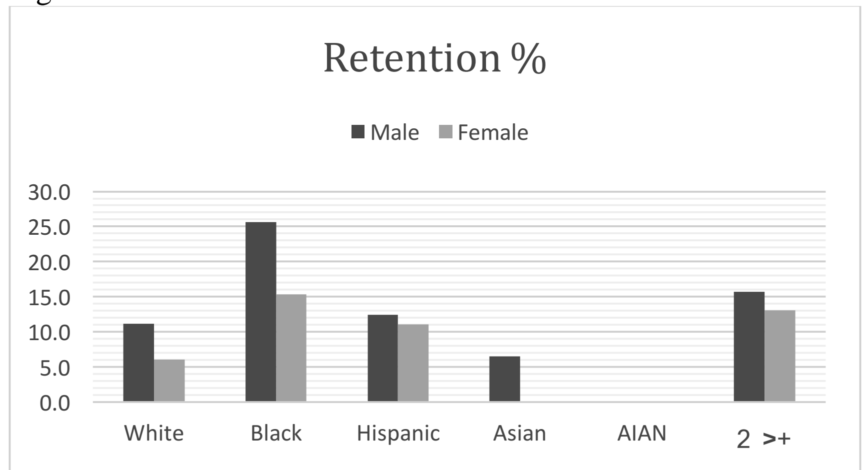
113. DAHLBERG, *supra* note 85, at 34 ("[T]he most critical factor in creating safe, orderly schools [is] not the presence of police, but the engagement of school administrators.").

114. REDFIELD, DIVERSITY, *supra* note 30, at 38–48, 70–74.

115. Paul J. Hirschfield, *Preparing for Prison? The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79, 92 (2008).

dents at 2%.[116] Similar patterns continue into later grades; for example, in sixth grade, American Indian-Alaskan Natives are still held back at twice the rate of Whites and African-American students at three times that rate; and twelve percent of African-American students are retained in ninth grade, which is nearly double the rate of all students retained.[117]

Figure 12. Retention rates [118]



High stakes testing exacerbates these concerns. Students are disproportionately impacted by high school exit exams.[119] Fur-

116. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: EARLY CHILDHOOD EDUCATION 5 (2014), https://www2.ed.gov/about/offices/list/ocr/docs/crdc-early-learning-snapshot.pdf; *see infra* Figure 12.

117. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION, CIVIL RIGHTS DATA COLLECTION, 2009-10 NATIONAL AND STATE ESTIMATIONS, http://ocrdata.ed.gov/StateNationalEstimations/Projections_2009_10 (follow "National total" hyperlink) (last visited Oct. 11, 2016); Catherine E. Lhamon, *Five New Facts from the Civil Rights Data Collection,* HOMEROOM: THE OFFICIAL BLOG OF THE U.S. DEP'T OF EDUC. (Mar. 21, 2014), http://blog.ed.gov/2014/03/five-new-facts-from-the-civil-rights-data-collection/. As discussed previously, retention is not a successful intervention strategy. HATTIE, *supra* note 29.

118. AUD ET AL., *supra* note 110, at 92 tbl.17a.

119. *See* ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 25, 27–28 (2010), http://b.3cdn.net/advancement/

ther, federal and state education accountability laws also may create a perverse incentive to push low-performing students out of school.[120] Federal and state accountability laws require students to regularly test students and impose consequences on schools that fail to meet certain standards.[121] Many fear that school officials sometimes suspend, expel, or refer low-performing students to the juvenile justice system to avoid having their low scores count against their schools.[122]

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d05cb2181a4545db07_r2im6caqe.pdf (discussing dehumanizing effects of testing).

120. Rachel F. Moran, *Sorting and Reforming: High-Stakes Testing in the Public Schools*, 34 AKRON L. REV. 107, 115 (2000) (maintaining that in a high-stakes testing context, low-performing students "are in danger of being pushed out" of schools).

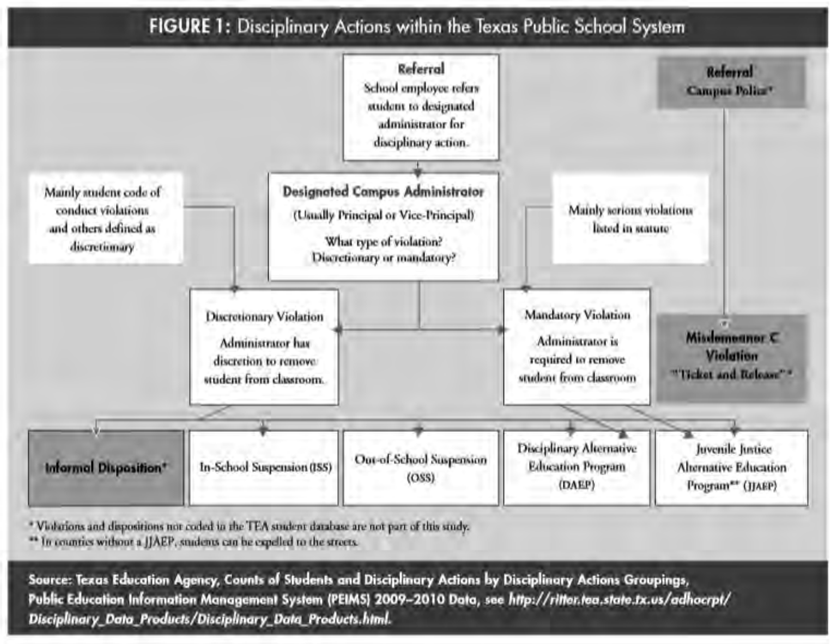
121. For example, the now-defunct No Child Left Behind Act required schools that received federal funds to administer various academic assessments to students at different stages during grades three through twelve and imposed sanctions on schools whose students failed to meet certain standards. *See Testing: Frequently Asked Questions*, U.S. DEP'T OF EDUC., http://www2.ed.gov/nclb/accountability/ayp/testing-faq.html (last modified Nov. 17, 2004); Torin Monahan & Rodolfo D. Torres, *Introduction*, *in* SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION 5 (Torin Monahan & Rodolfo D. Torres eds., 2009). The Every Student Succeeds Act, Pub. L. 114-95, which replaced the No Child Left Behind Act on December 10, 2015, also requires states receiving federal funds to implement student academic assessments in their public schools. *See* Every Student Succeeds Act, 114 Pub. L. No. 114-95, § 1111(b)(2), 129 Stat. 1802, 1825–29 (2015). However, one of the hallmarks of the Every Student Succeeds Act is that it prohibits the federal government from determining the weight of those assessments for accountability purposes. *See id.* at sec. 1111(e)(1)(B)(iii); *see also* SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS, THE EVERY CHILD ACHIEVES ACT OF 2015, at 1, http://www.help.senate.gov/imo/media/The_Every_Child_Achieves_Act_of_2015--summary.pdf (last visited Oct. 13, 2016).

122. *See, e.g.*, FED. ADVISORY COMM. ON JUVENILE JUSTICE, ANNUAL REPORT 2010 10 (2010); NAACP LEGAL DEF. & EDUC. FUND, DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 5 (2005), http://www.naacpldf.org/files/publications/Dismantling_the_School_to_Prison_Pipeline.pdf; Linda Darling-Hammond, *Race, Inequality and Educational Accountability: The Irony of 'No Child Left Behind'*, 10 RACE ETHNICITY & EDUC. 245, 252–55 (2007); Deborah Gordon Klehr, *Addressing the Unintended Consequences of No Child Left Behind and Zero Tolerance: Better Strategies for Safe Schools and Successful Students*, 16 GEO. J. ON POVERTY L. & POL'Y 585, 602–03 (2010); Michael P. Krezmien et al., *Juvenile Court Referrals and the Public Schools: Nature and*

d. Students of color are disproportionately subject to more frequent and harsher punishment

School discipline runs a continuum from in-class interventions, in-school suspensions, out-of-school suspensions, placement in disciplinary alternative education programs, to expulsions and on to the juvenile justice system and beyond.[123]

Figure 13. Discipline Approaches (TX)[124]



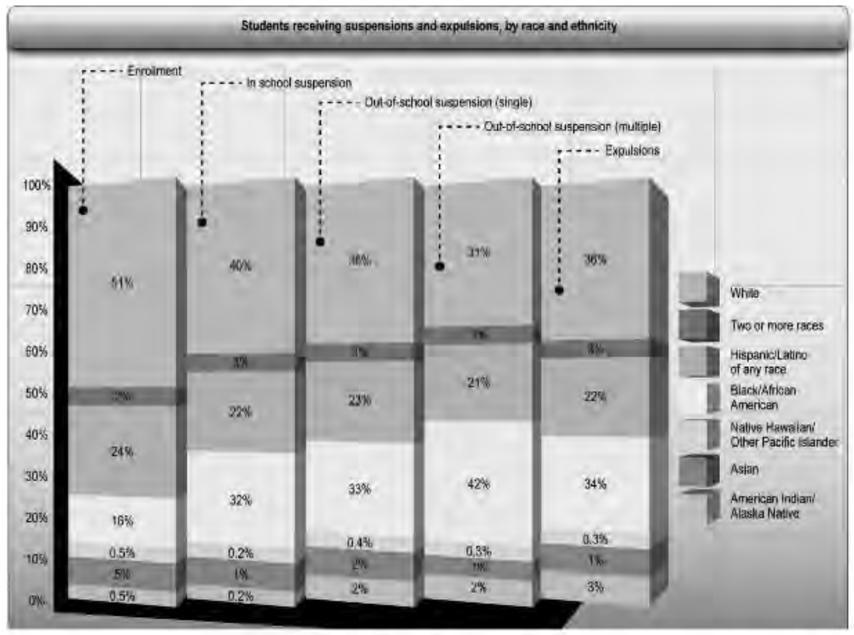
Extent of the Practice in Five States, 26 J. CONTEMP. CRIM. JUST. 273, 274 (2010); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 969–70 (2004); ADVANCEMENT PROJECT, *supra* note 119, at 28–33.

123. *See* ERICA TERRAZAS, TEXAS APPLESEED, WHEN MY CHILD IS DISCIPLINED AT SCHOOL: A GUIDE FOR FAMILIES 3–4 (2009), http://www.texascjc.org/sites/default/files/uploads/TX%20Appleseed%20-%20Guide%20for%20Families,%20When%20My%20Child%20is%20Disciplined%20at%20School%20(Jan%202009).pdf. *See generally* Wallace, Jr. et al., *supra* note 48, at 47.

124. FABELO ET AL., *supra* note 10, at 19.

The CRDC shows that African-American and American Indian-Alaskan Natives students are most disproportionately disciplined.

Figure 14. CRDC Discipline, by Race & Ethnicity: Suspension/Expulsion[125]



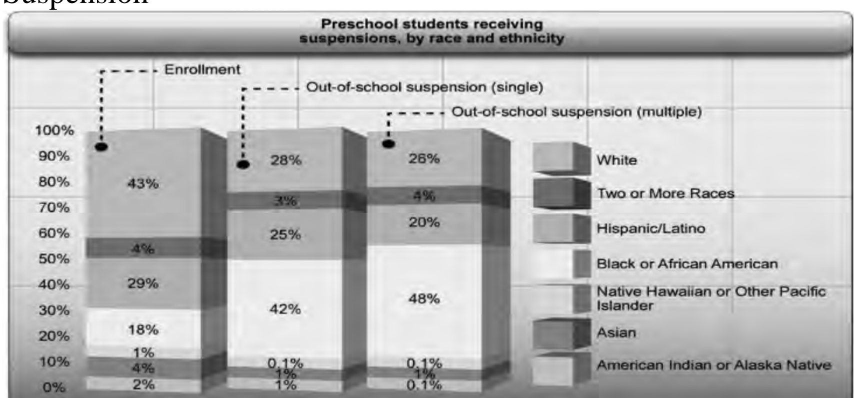
NOTE: Detail may not sum to 100% due to rounding. Totals: Enrollment is 49 million students, in-school suspension is 3.5 million students, single out-of-school suspension is 1.9 million students, multiple out-of-school suspension is 1.55 million students, and expulsion is 130,000 students. Data reported in this figure represents 99% of responding schools.
SOURCE: U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, 2011-12.

American Indian-Alaskan Natives were only 0.5% of the student population but accounted for 3% of expulsions, 2% of multiple out of school suspensions, 2% of single out of school suspensions, and 0.2% of in school suspensions. African-American students, who represented 16% of the student population in the CRDC data, are a much higher percentage of students suspended or expelled: 34% expelled, 42% subjected to multiple out of school suspensions, 33% to single out of school suspensions, and 32% to in school suspensions. In comparison, White students in the CRDC data showed a similar range between 31–40% of students suspend-

125. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 5, at 2.

ed or expelled, but from 51% base.[126] Similarly, African-American children are 18% of the preschool population, and they represent 48% of preschool children suspended (out of school) more than once; White students, who are 43% of the preschool population, are only 26% of the children so disciplined.[127] All other reported groups show preschool suspensions very close to their proportion of the population.

Figure 15. CRDC Discipline, by Race & Ethnicity: Preschool Suspension[128]



This kind of disproportionality is especially evident for offenses that are not serious and that call for subjective judgment.[129] Among students who were seriously disciplined—that is suspended for more than five days, removed from school with no services, or placed in disciplinary alternative education settings—only about 1% of the cases involved firearms or explosives.[130] By compari-

126. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 5, at 2.

127. Lhamon, *supra* note 117; Trymaine Lee, *Preschool to Prison: No Child too Young for Zero-Tolerance*, MSNBC (Mar. 21, 2014, 12:53 PM), http://www.msnbc.com/msnbc/preschool-prison-no-child-too-young; *see also* TEXAS APPLESEED, SUSPENDED CHILDHOOD: AN ANALYSIS OF EXCLUSIONARY DISCIPLINE OF TEXAS' PRE-K AND ELEMENTARY SCHOOL STUDENTS (2015), https://slate.adobe.com/a/6dvQB/ [hereinafter SUSPENDED CHILDHOOD] (concluding similarly for Texas' youngest students, where African-Americans are 13% of the school population but account for 42% of the students suspended).

128. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, *supra* note 5, at 7 (showing percent of all suspensions this grade).

129. *See supra* notes 24, 48–50 and accompanying text.

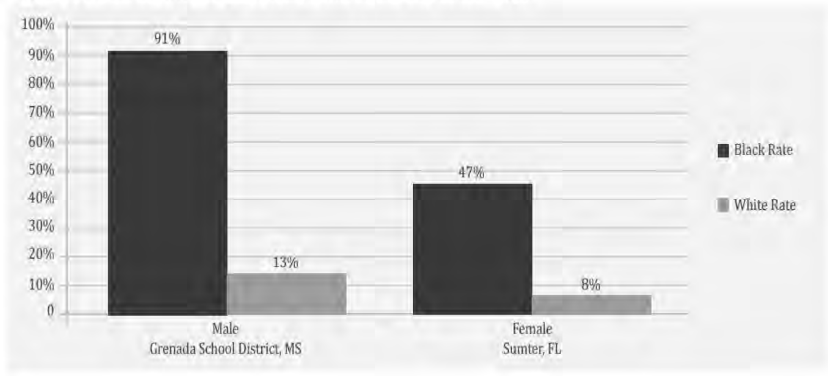
130. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 95, at 337 tbl.233.10.

son, insubordination accounted for 42.5% of the serious discipline cases.[131] For discipline with less serious consequences—particularly out of school suspension—the most common offenses also included insubordination together with disruption and physical or verbal aggression.[132]

Multnomah County, Oregon, data further illustrates this problem. With a population of 28,115 White students and 23,950 students of color, data show that in the categories that mostly involve discretion in identifying facts or interpretation of behavior, students of color (46% of population) accounted for 61% of the discipline incidents and White students (54% of population), 37%.[133] The relative rate of discipline incidents was 3.3 for African-American students, 1.88 for Latino, 2.13 for Native American, and 0.46 for Asian (with White equaling 1).[134] In this study, one of the most common bases for discipline for both groups was fighting at about the same proportion of discipline incidents for each group.[135] In another example, in the *Breaking Schools' Rules* study of disciplinary practice in Texas, researchers observed that almost 60% of the public school students studied were either suspended or expelled at least once from grade 7 to 12.[136] Controlling for other variables, researchers concluded that African-American students were 31% more likely to be disciplined for in school discretionary categories than their "otherwise identical" White and Hispanic peers.[137]

131. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 95, at 337 tbl.233.10.
132. OREGON, *supra* note 85, at 8–9.
133. *Id.* at 21, 22, 24.
134. *See* OREGON, *supra* note 85 at *Appendix C.*
135. *Id.* at 19.
136. FABELO ET AL., *supra* note 10, at ix.
137. *Id.* at 45.

Figure 16. Suspension Disproportionality by Race & Gender MS & FL examples.[138]



This kind of disproportionality is most commonly discussed for boys but is also evident among certain groups of girls. As the CRDC reported, "While boys receive more than two out of three suspensions, black girls are suspended at higher rates (12%) than girls of any other race or ethnicity and most boys; American Indian and Native-Alaskan girls (7%) are suspended at higher rates than White boys (6%) or girls (2%)."[139]

e. Students of color are disproportionately referred to law enforcement or subject to school-related arrest

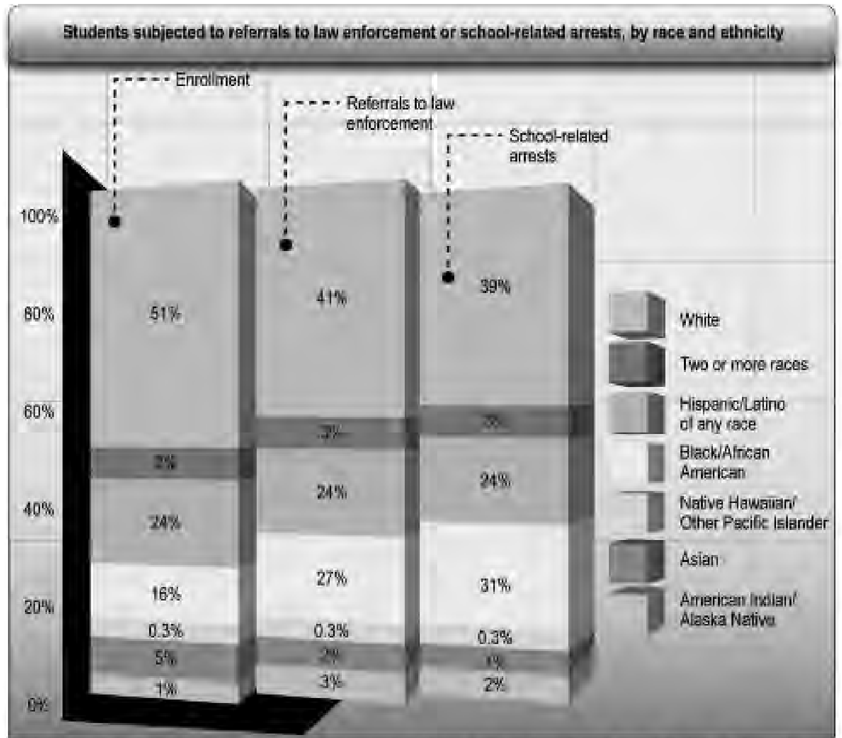
The CRDC also shows that African-American students (who are 16% of population reported in the CRDC sample) are 27% of students referred to law enforcement and 31% of students subject to school-related arrest. American Indian-Alaskan Native (AIAN) numbers are also out of proportion. Although AIAN students amount to 1% of the student population, they are 3% of students referred to law enforcement and 2% of students subject to school-related arrest. For White students, only 41% are referred to

138. ARE WE CLOSING, *supra* note 21, at 30.

139. U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5, at 1. Research also shows that suspensions are particularly high for girls with darker skin tones. *Id.*

law enforcement and 39% subject to school related arrest, both lower than their part of the population.[140]

Figure 17. CRDC Discipline, by Race & Ethnicity: Referral to Law Enforcement[141]



NOTE: Detail may not sum to 100% due to rounding. Totals are 49 million students for overall enrollment, 260,000 students referred to law enforcement, and 92,000 students subject to school-related arrests. Data on referrals to law enforcement represents 98% of schools and data on school related arrests represents 94% of schools in the CRDC universe.

SOURCE: U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, 2011–12.

f. Students of color are disproportionately placed in alternative schools

Originally conceived as a setting that could provide optimum environments for students not doing well academically or behaviorally in regular school settings, these schools now primari-

140. U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5, at 6.
141. *Id.* at 6.

ly serve students labeled as "disruptive or dangerous."[142] While alternative schools may be seen as an alternative to exclusion, they are both increasingly used and in demand and increasingly seen as punitive. In a study of Jefferson County, Kentucky, public schools, researchers found that "total cumulative proportion of students that experienced placement in a disciplinary school between 3rd and 12th grade is 9%, or nearly 1 in 10 students."[143] They also found that racial gaps were pronounced as 13% of all African-American students in the cohort experienced placement compared to 4% of the White students.[144]

g. Students of color disproportionately drop out of school and fail to graduate from high school

Graduation rates and comparative graduation rates have improved—indeed they are widely reported to have reached 80% in 2014[145]—but differences remain.[146] It is still the case that minority students as a group continue to lag behind.[147] Comparative

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142. Judi Vanderhaar et al., *Reconsidering the Alternatives: The Relationship Between Suspension, Disciplinary Alternative School Placement, Subsequent Juvenile Detention, and the Salience of Race*, 5 J. APPLIED RES. ON CHILD.: INFORMING POL'Y FOR CHILD. RISK 1, 1–3 (2014). *See generally* NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., ALTERNATIVE SCHOOLS AND PROGRAMS FOR PUBLIC SCHOOL STUDENTS AT RISK OF EDUCATIONAL FAILURE: 2007–08, at 8 tbl.4 (2010), http://nces.ed.gov/pubs2010/2010026.pdf.

143. Vanderhaar et al., *supra* note 142, at 10.

144. *Id.*

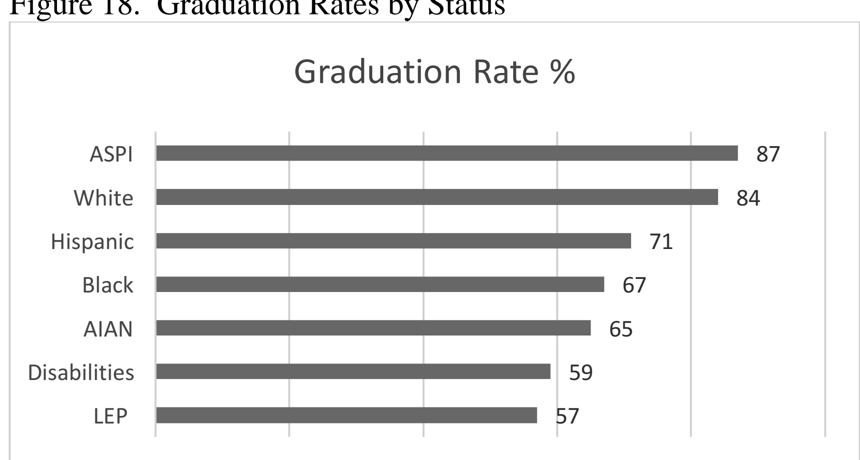
145. *US High School Graduation Rate Hits All-Time High, Per Report*, NPR (Apr. 29, 2014), http://www.npr.org/2014/04/29/307968835/us-high-school-graduation-rate-hits-all-time-high-per-report.

146. *See infra* Figure 18.

147. Lalita Clozel, *National High School Graduation Rate Exceeds 80% for the First Time*, L.A. TIMES (Apr. 28, 2014, 12:29 PM), http://www.latimes.com/nation/nationnow/la-na-nn-national-graduation-rate-record-20140428-story.html; *see also*, *e.g.*, Marchbanks III et al., *supra* note 73, at 59; THE URGENCY OF NOW, *supra* note 106, at 7–9 (summarizing that "at the current pace of progress for both, it would take nearly 50 years for Black males to secure the same high school graduation rates as their White male peers. . . . Educationally this represents the point at which Black males can secure a high school diploma on par with their White male peers; economically it represents the point at which they will be equally equipped to secure post-secondary educa-

graduation rates are 62% for African-American students, 51% for American Indian-Alaskan Native students, and 68% for Hispanic students; as compared to about 80% for White and 81% for Asian students.[148]

Figure 18. Graduation Rates by Status[149]



Like the graduation rate, the status dropout rate[150] (young people who are out of school without achieving a high school level

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tional and labor opportunities available as a result of possessing a high school diploma.").

148. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 99 tbl.18.1b. (2010), http://nces.ed.gov/pubs2010/2010015.pdf; *see also* GARY ORFIELD ET AL., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS (2004), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/410936-Losing-Our-Future.pdf.

149. MARIE C. STETSER & ROBERT STILLWELL, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., PUBLIC HIGH SCHOOL FOUR-YEAR ON-TIME GRADUATION RATES AND EVENT DROPOUT RATES: SCHOOL YEARS 2010-11 AND 2011-12, at 7 tbl.1 (2014), http://nces.ed.gov/pubs2014/2014391.pdf.

150. Dropout includes students who are pushed out, pulled out, or fall out. JONATHAN JACOB DOLL, ZOHREH ESLAMI & LYNNE WALTERS, UNDERSTANDING WHY STUDENTS DROP OUT OF HIGH SCHOOL, ACCORDING TO THEIR OWN REPORTS (2013), http://sgo.sagepub.com/content/3/4/2158244013503834; *see also* HILARY BURDGE, ZAMI T. HYEMINGWAY & ADELA C. LICONA, GAY-STRAIGHT ALLIANCE NETWORK, GENDER NONCONFORMING YOUTH: DISCIPLINE DISPARITIES, SCHOOL PUSH-OUT, AND THE SCHOOL-TO-PRISON PIPELINE 8 (2014), http://b.3cdn.net/advancement/

of educational attainment) is improving—now reported to be at 9.3% overall, though this still represents about five thousand students a day, over a million a year.[151] But like the graduation rate, despite general improvement, the dropout rate remains high for some groups, disproportionately so,[152] particularly for American Indian-Alaskan Native and Pacific Islanders: Asian, 3.0%; White, 6.1%; Hawaiian/Pacific Islander, 7.6%; African-American, 11.5%; Hispanic, 19.9%; American Indian-Alaskan Native, 5.3%.[153]

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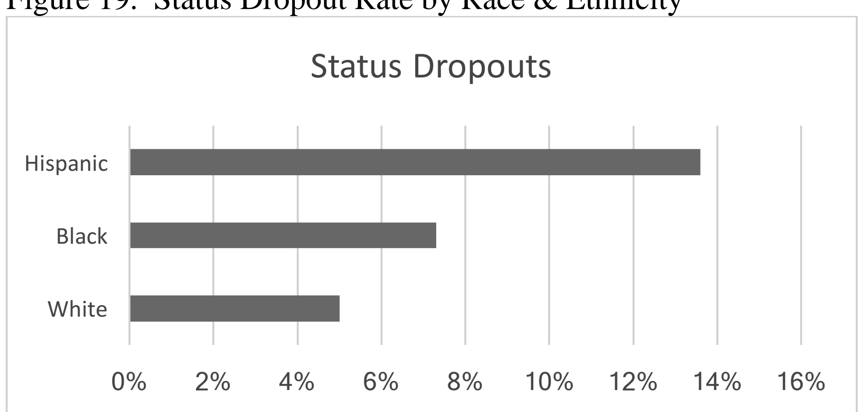
e2df7ec74f895dd5bb_86m6vosva.pdf (defining pushout as "a student being marginalized in school and/or driven out of school prior to graduation. It differs from the term 'drop-out' in that it acknowledges the multiple school-based conditions and forces at play in marginalizing students in the classroom and in school as well as pressuring students to leave school prematurely. Students who are pushed out of school stop going to school altogether, enroll in an alternative or disciplinary school, or enroll in a GED program").

151. *Economic Impacts*, ALLIANCE FOR EXCELLENT EDUC., http://all4ed.org/issues/economic-impacts/ (last visited Oct. 31, 2016).

152. *See* NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 148, at 95 tbl.18.1b.

153. *Status Dropout Rates*, NAT'L CTR. FOR EDUC. STATISTICS fig.2, http://nces.ed.gov/programs/coe/indicator_coj.asp (last updated May 2016); NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 95, at 217 tbl.219.70; *see also* Tobin & Vincent, *supra* note 68 (discussing Latino/a rates).

Figure 19. Status Dropout Rate by Race & Ethnicity[154]



Some researchers suggest that these rates are understated "by as much as 12.5 percent for young White men and by as much as 40 percent for young black men" because conventional sources for the data do not include incarcerated populations, so much so that when inmates are included the data on educational attainment suggests that "black men have experienced no improvement in high school completion rates since the early 1990s."[155]

Excluding a student from school also increases the likelihood that a student very soon will become involved in the juvenile justice system. The American Academy of Pediatrics Committee on School Health observed that when students are not monitored

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154. *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STATS. tbl.128, http://nces.ed.gov/programs/digest/d12/tables/dt12_128.asp (last visited Oct. 30, 2016).

> Status' dropouts are 16- to 24-year-olds who are not enrolled in school and who have not completed a high school program, regardless of when they left school. People who have received GED credentials are counted as high school completers. All data except for 1960 are based on October counts. Data are based on sample surveys of the civilian noninstitutionalized population, which excludes persons in prisons, persons in the military, and other persons not living in households. Race categories exclude persons of Hispanic ethnicity except where otherwise noted.

Id.

155. Stephanie Ewert et al., *The Degree of Disadvantage: Incarceration and Inequality in Education*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 39 (2014).

by trained professionals and are at home without parental supervision, they are far more likely to commit crimes, such as becoming involved in a physical altercation or carrying a weapon.[156] In their longitudinal study of Texas students, scholar Tony Fabelo and his colleagues found that when a school suspended or expelled a student for a discretionary offense, that student was approximately 2.85 times more likely to have contact with the juvenile justice system during the next academic year.[157] With each subsequent exclusionary punishment the student received, the odds of involvement with the juvenile justice system further increased.[158] Tracey Shollenberger's national longitudinal survey of youth also confirms that students are more likely to be arrested and incarcerated when they are suspended, and those odds increase as students receive more suspensions.[159]

This data directly relates to later life data. Dropouts are far more likely to be institutionalized in prisons and health care facilities, 45.9% compared to 8.8% in total for all racial categories.[160] More specifically, "schooling significantly reduces the probability of incarceration,"[161] more so for African-Americans than Whites, so much so that some researchers have found that different levels

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156. Am. Acad. of Pediatrics Comm. on Sch. Health, *Out-of-School Suspension and Expulsion*, 112 PEDIATRICS 1206, 1207 (2003).

157. *See* FABELO ET AL., *supra* note 10, at 70.

158. *Id.*

159. *Tracy L. Shollenberger, Racial Disparities in School Suspension and Subsequent Outcomes: Evidence from the National Longitudinal Survey of Youth*, *in* CLOSING THE SCHOOL DISCIPLINE GAP, supra note 16, at 31, 37.

160. AUD ET AL., *supra* note 110, at 100 tbl.18.1c.; THE SILENT EPIDEMIC, *supra* note 42, at i (explaining that not graduating from high school leads to many social ills such as future involvement in the criminal justice system, unemployment, bad health, and poverty); OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 15 (reporting that in 2009, 40% of all institutionalized individuals had dropped out of school). Status dropout rates are highest for institutionalized youth, with Hispanic highest among males and Hispanic and AIAN highest among females. OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 15.

161. Enrico Moretti, *Crime and the Costs of Criminal Justice*, *in* THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION 142, 146 (Clive R. Belfield & Henry M. Levin eds., The Brookings Institute 2007).

of "educational attainment between black and white men explain 23% of the black-white gap in male incarceration rates."[162]

h. Students of color disproportionately feel threatened at school and suffer consequences as victims

Hispanic, African-American, American Indian-Alaskan Native, and Native Hawaiian Pacific Islander (NHPI) students are more likely to report feeling threatened or being injured by weapons, more likely to perceive gang activity at school, and more likely to have been in a physical fight at school.[163] Hispanic, American Indian-Alaskan Native, and NHPI students are significantly more likely to report drug availability at school,[164] and Hispanic students are most likely to report avoiding certain areas of school because they fear being attacked or harmed.[165] African-American students report being among students who are victims of nonfatal crime at school more often than any other group.[166] In comparison, White students are more likely to report having access to a loaded gun.[167]

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162. Lance Lochner & Enrico Moretti, The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports 1 (2003), http://eml.berkeley.edu/~moretti/lm46.pdf (last visited Jan. 08, 2016).

163. SIMONE ROBERTS ET AL., NAT'L CTR. FOR EDUC. STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2012, at 19 fig.4.2, 37 figs.8.1 & 8.2, 57 figs.13.1 & 13.2 (2012), http://www.bjs.gov/content/pub/pdf/iscs12.pdf.

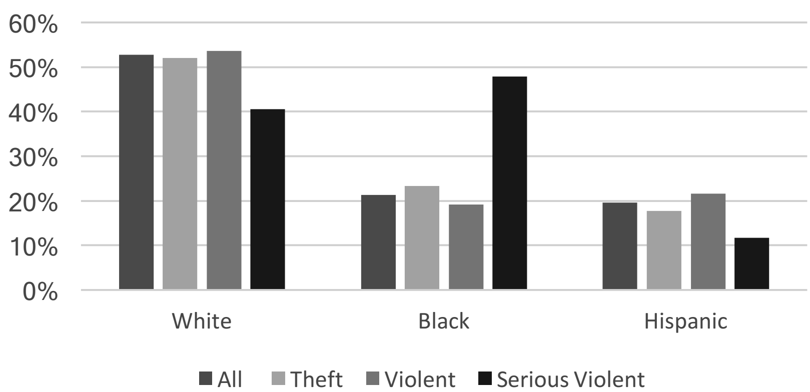
164. *Id.* at 39 figs.9.2.

165. *Id.* at 78 fig.18.2; *see also* Tobin & Vincent, *supra* note 68 (reporting that Latino/a students experience depression and anxiety disproportionately).

166. SIMONE ROBERTS ET AL., *supra* note 163, at 101 tbl.2.2.

167. *Id.*

Figure 20. Victimization by Race & Ethnicity[168]



As victims, these students suffer additional consequences. As the Bureau of Justice Statistics summarizes:

> Our nation's schools should be safe havens for teaching and learning free of crime and violence. Any instance of crime or violence at school not only affects the individuals involved but also may disrupt the educational process and affect bystanders, the school itself, and the surrounding community. For both students and teachers, victimization at school can have lasting effects. In addition to experiencing loneliness, depression, and adjustment difficulties, victimized children are more prone to truancy, poor academic performance, dropping out of school, and violent behaviors. For teachers, incidents of victimization may lead to professional disenchantment and even departure from the profession altogether.[169]

168. *Id.* at 154 tbl.14.4.
169. *Id.*at 2 (citations omitted).

2. For students with disabilities, disproportionality manifests itself all along the pipeline in areas similar to those outlined in the preceding section on students of color

a. Students with disabilities are disproportionately students of color, especially in discretionary categories and these categories compound

Especially in discretionary categories, students with disabilities are disproportionately students of color.[170] In 2011–12, about 13% of the school population received services under the Individuals with Disabilities Education Act (IDEA), Part B, special education;[171] this is almost 6.5 million students of whom 3.6 million of were White and Asian and 2.8 million students of color. As with regular education, some groups in the special education population differ from their representation in the juvenile population. In its annual report to Congress on IDEA, the Department of Education reported as to overall identification that differences existed based on race and ethnicity with the risk index being largest for American Indian-Alaskan Native students, followed by African-American and then Hispanic students. The 2011–12 data shows that, while American Indian-Alaskan Native students are 0.9% of the juvenile population, they are 1.4% of the special education population; Pacific Islanders are 0.2% of the juvenile population and 0.3% special education; African-American students, 15% of the juvenile population and 18.7% special education; all other groups have a smaller percentage in special education than in the juvenile population as a whole.[172]

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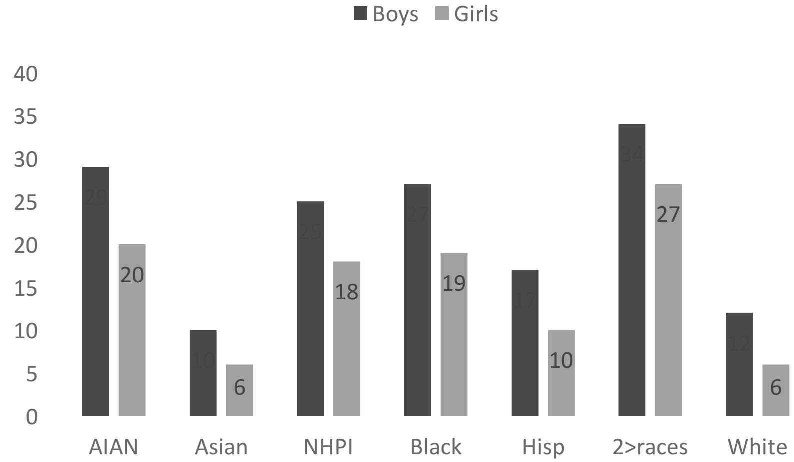
170. *See generally, e.g.*, BETH HARRY & JANETTE KLINGNER, WHY ARE SO MANY MINORITY STUDENTS IN SPECIAL EDUCATION? 76–79 (2005); Russell J. Skiba et al., *Achieving Equity in Special Education: History, Status, and Current Challenges*, REDORBIT (April 2, 2008), http://www.redorbit.com/news/education/1322341/achieving_equity_in_special_education_history_status_and_current_challenges; Beth Harry et al., *Of Rocks and Soft Places: Using Qualitative Methods to Investigate Disproportionality*, *in* RACIAL INEQUITY IN SPECIAL EDUCATION 84-85 (Daniel J. Losen & Gary Orfield eds., 2002).

171. *See generally* 20 U.S.C.A. § 1401 (West 2016).

172. Compiled numbers from 2011–12 data and census numbers cited previously; NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 95, at 107 tbl.204.50.

Figure 21. CRDC Students with Disabilities (IDEA) out of school suspensions by race/ethnicity and gender[173]



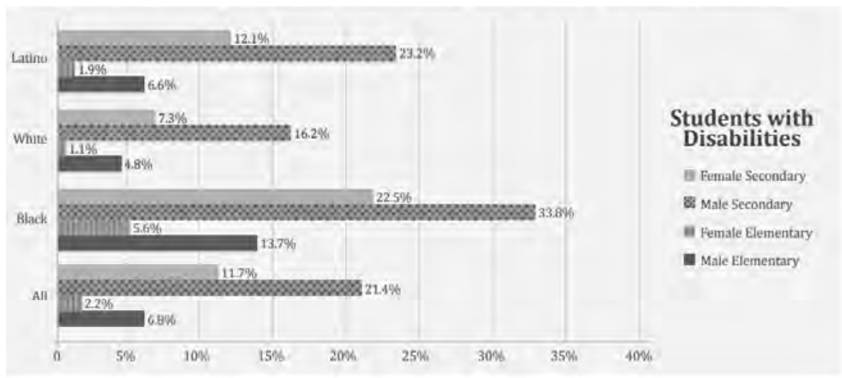
Some young people who are in more than one group are particularly negatively impacted. As the National Disabilities Rights Network puts it:

> Applying these three lenses together—race, gender and disability—yields a more disturbing image than any one of the categories alone. The group that consistently had the highest rate of suspension is African-American male students with disabilities. In some of the largest districts in the U.S., suspension rates for this group reached more than 70% of their enrollment.[174]

173. U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5, at 4.

174. NAT'L DISABILITIES RIGHTS NETWORK, *supra* note 27, at 16 (citations omitted)*; see* U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5, at 3–7; Kalman R. Hettleman, *The Road to Nowhere: The Illusion and Broken Promises of Special Education in the Baltimore City and Other Public School Systems*, 17 ABELL REPORT 1, 30 (2004); Purdie-Vaughns & Eibach, *supra* note 27, at 380.

Figure 22. Special Education Discipline Disproportionality Disaggregated by Race and Ethnicity, Gender, Grade[175]



Disproportionality also appears within certain categories within special education. Among high incidence disability categorizations, three in particular have been highlighted as showing disproportionate representation—Intellectual Disability (formerly mental retardation), Specific Learning Disability, and Emotional Disturbance. These are discretionary categories;[176] they are "soft" identifications[177] which depend on judgment, not just medical or biological testing.[178] Unlike, for example, hearing impairment

175. ARE WE CLOSING, *supra* note 21, at 6.

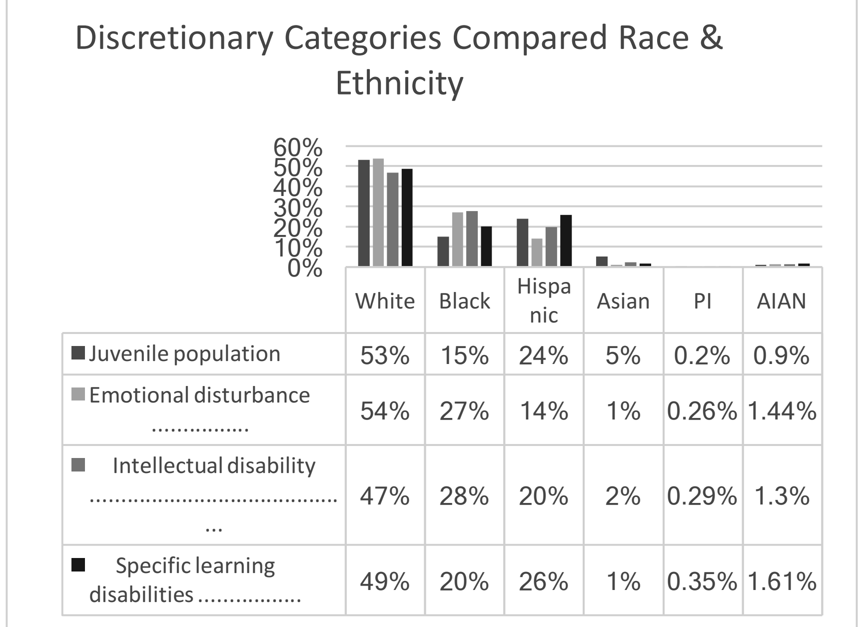
176. *See* COMM. ON MINORITY REPRESENTATION IN SPECIAL EDUCATION, NAT'L RESEARCH COUNCIL, MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION 37 (M. Suzanne Donovan & Christopher T. Cross eds., 2002) [hereinafter NAT'L RESEARCH COUNCIL 2002].

177. HARRY & KLINGNER, *supra* note 170, at 8; Skiba et al., *supra* note 170 (describing how these disabilities stand on the "soft" side of science).

178. *See, e.g.*, Thomas Parrish, *Disparities in the Identification, Funding, and Provision of Special Education*, *in* RACIAL INEQUITY IN SPECIAL EDUCATION 15 (Daniel J. Losen & Gary Orfield eds., 2002); Angela A. Ciolfi & James E. Ryan, *Race and Response-to-Intervention in Special Education*, 54 HOW. L.J. 303, 304 (2011) (discussing over representation in soft disability categories); Robert A. Garda, Jr., *The New Idea: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1072–73 (2005); Daniel J. Reschly, *Identification and Assessment of Students with Disabilities*, 6 THE FUTURE OF CHILDREN 40, 43 (1996) (providing a comparison chart of factors in medical and social models); Rebecca Vallas, *The Disproportionality Problem: The Overrepresentation of Black Students in Special Education and Recommendations for Reform*, 17 VA. J. SOC. POL'Y & L.

which is subject to expert testing, the softer categories involve children who "typically do not exhibit readily observable distinguishing features," meaning that the "authoritative diagnosis of medical professionals, which is common in assessment of many of the low-incidence disabilities, is absent."[179] In a pattern like special education classification overall, American Indian-Alaskan Native and African-American students are categorized as intellectually disabled in greater percentages than their representation in the juvenile population, 1.3% compared to 0.9% for the American Indian-Alaskan Native students and 28% compared to 15% for African-American students. For other groups the proportions are equal or less; for example, 47% of students classified as intellectually disabled are White, while White students are 53% of the juvenile population as a whole.

Figure 23. Special Education by Discretionary Category[180]



	White	Black	Hispa nic	Asian	PI	AIAN
Juvenile population	53%	15%	24%	5%	0.2%	0.9%
Emotional disturbance	54%	27%	14%	1%	0.26%	1.44%
Intellectual disability	47%	28%	20%	2%	0.29%	1.3%
Specific learning disabilities	49%	20%	26%	1%	0.35%	1.61%

181, 184–85 (2009) (focusing on disproportionality involving African-Americans); Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 145 (2009).

179. NAT'L RESEARCH COUNCIL 2002, *supra* note 176, at 37.

180. *Id.*at 107 tbl.204.50.

b. Students with disabilities are disproportionately less likely to be academically proficient

The achievement gap between students with disabilities and students without disabilities is longstanding and deep.[181] In "virtually every case, special education students have the lowest average proficiency level on standardized tests and are unable to close the achievement gap over time."[182] Based on the limited results available, at the fourth grade level, students with disabilities consistently score forty-five points lower than students without disabilities score in reading.[183] At eighth grade, the difference was forty-three points and at twelfth grade forty-two.[184] At fourth grade, 65% of

181. *See, e.g.*, KATHERINE KERSTEN, OUR IMMENSE ACHIEVEMENT GAP 1–2 (2012), https://www.scribd.com/document/93114965/Our-Immense-Achievement-Gap-WEB (observing about Minnesota, but broadly applicable, that closing the achievement gap has involved moving "figurative mountains" and invested "billions of dollars—in an unsuccessful attempt to significantly boost minority achievement."); NORM FRUCHTER ET AL., ANNENBERG INST. FOR SCH. REFORM, IS DEMOGRAPHY STILL DESTINY? NEIGHBORHOOD DEMOGRAPHICS AND PUBLIC HIGH SCHOOL STUDENTS' READINESS FOR COLLEGE IN NEW YORK CITY 1 (Margaret Balch-Gonzalez ed. 2012), http://annenberginstitute.org/sites/default/files/Demography%20is%20Destiny.pdf (concluding that despite massive initiatives, college readiness still predicted by residence); IMPROVING THE ODDS FOR AMERICA'S CHILDREN: FUTURE DIRECTIONS IN POLICY AND PRACTICE ch. 7 (Kathleen McCartney, Hirokazu Yoshikawa & Laurie B. Forcier eds., 2014).

182. Suzanne Eckes & Julie Swando, *Special Education Subgroups under NCLB: Issues to Consider*, 111 TCHRS. C. REC. 2479, 2483 (2009), http://www.tcrecord.org/Content.asp?ContentID=15437.

183. *See NAEP Data Explorer*, NAT'L CTR. FOR EDUC. STATS., http://nces.ed.gov/nationsreportcard/naepdata/dataset.aspx (last visited Sept. 11, 2016) (select "Reading" and "Grade 4"; highlight "2013," "deselect 2015," and select "National" under "Jurisdiction"; click "Select Variables"; select "Disability status of student, excluding those with 504 plan" and "Disability status of student, including those with 504 plan"; select "Edit Reports"; select "Build Reports").

184. *Id.* (select "Reading" and either "Grade 8 or Grade 12"; highlight "2013," "deselect 2015," and select "National" under "Jurisdiction"; click "Select Variables"; select "Disability status of student, excluding those with 504 plan" and "Disability status of student, including those with 504 plan"; select "Edit Reports"; select "Build Reports").

students with disabilities scored below basic levels and in the eighth grade, 62%.[185]

c. Students with disabilities are disproportionately disciplined

The IDEA requires that students with disabilities be in the "least restrictive environment"[186] and also limits suspension from school or change of placement for behavior that violates the school's code of conduct but was caused by or substantially related to the students' disabilities.[187] These provisions would suggest that students with disabilities would be less likely to be suspended or expelled; however, this is not the case.[188] Special education students are far more likely to be suspended from school and expelled with and without services than other students.[189] For all racial groups, over 13% percent of students with disabilities were subject to out of school suspension compared to 6% of students without

185. *National Assessment of Educational Progress (NAEP): What Is It and Why Should We Care?*, THE ADVOC. INST., http://www.advocacyinstitute.org/advocacyinaction/NAEP_SWDs.shtml (last visited Nov. 6, 2016).

186. 20 U.S.C.A. § 1412(a)(5) (2016).

187. 20 U.S.C.A. § 1415(k) (West 2016). *See generally* Lynn M. Daggett, *Student Rights*: *Book 'em?: Navigating Student Privacy, Disability, and Civil Rights and School Safety in the Context of School-Police Cooperation*, 45 URB. LAW. REP. 203 (2013) (discussing legal issues limits on schools' reporting to law enforcement regarding students with disabilities).

188. ARE WE CLOSING, *supra* note 21, at 21 ("As with the elementary school analysis, at the secondary level we observe tremendous disciplinary gaps between students with and without disabilities, which holds for each racial group. Typically, students with disabilities at this level are twice as likely to be suspended as their non-disabled peers, which raises serious questions as to whether schools are denying students with disabilities a free appropriate public education (FAPE), and whether they are unlawfully suspending students because of behavior caused by their disability or that results from the district's failure to meet their special education needs.").

189. *Suspended Childhood*, *supra* note 127 (concluding similarly for Texas' special education students who "are 9% of the student population . . . but they account for 22% of all pre-K−5th grade out of school suspensions.").

disabilities,[190] and the largest racial disparities occur among these students.[191]

Further disaggregation of the data among these students, American Indian-Alaskan Native and African-American students, together with students identifying as two or more races, were most likely to be suspended. For example, with respect to boys with disabilities, 29% of those students receiving out of school suspensions were American Indian-Alaskan Native, 27% African-American, and 34% two or more races; with respect to girls with disabilities, these groups are 20%, 19%, and 27% respectively. By comparison, White boys and girls, who, again, are a much larger part of the population, were reported at 12% and 6% of the out of school suspensions.[192]

State reports on this issue show similar patterns. For example, the Texas *Breaking Schools' Rules* study showed high levels of discipline for special education students, finding that almost three-quarters of this group were suspended or expelled at least once during the period of the study; some categories, such as Emotional Disturbance, were more prominent in this group.[193] The Oregon study showed special education suspensions (out-of-school) 3.6 times higher than those of other students in elementary school and 2.2–2.3 times higher in middle and high school.[194]

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190. *See supra* Figure 18. Graduation Rates by Status; *supra* Figure 19. Status Dropout Rate by Race & Ethnicity: *supra* Figure 20. Victimization by Race and Ethnicity.

191. DANIEL J. LOSEN & TIA ELENA MARTINEZ, CTR. FOR CIVIL RIGHTS REMEDIES, THE CIVIL RIGHTS PROJECT, OUT OF SCHOOL & OFF TRACK: THE USE OF SUSPENSIONS IN AMERICAN MIDDLE AND HIGH SCHOOLS 10 (2013), hhttp://files.eric.ed.gov/fulltext/ED541735.pdf.

192. U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5; *see also supra* Figure 19. Status Dropout Rate by Race & Ethnicity.

193. FABELO ET AL., *supra* note 10, at 47; *see also* Metze, *supra* note 74, at 241–42 (describing special education students' overrepresentation in Texas in Disciplinary Alternative Education programs or in or out-of-school suspensions); Vanderhaar et al., *supra* note 142, at 7 (summarizing as to disparity in students identified with the disability of Emotional Disturbance, "With respect to EBD, there was a race gap as 2.3% of the Black students were identified as EBD, while less than 1% (0.8%) of White students were labeled EBD.").

194. OREGON, *supra* note 85, at 8, 19.

d. Students with disabilities are disproportionately retained in grade but still dropping and out failing to graduate

Students with disabilities are retained in grade more than their percentage of the student population might suggest. The CRDC reports that IDEA students are 12% of high school enrollment but 19% of students retained.[195] Overall, only 57% of students with disabilities graduate. Only 39.2% of African-American (not Hispanic) special education students graduate with regular diplomas, with 35.1% dropping out; for Hispanics, the numbers are 47.1% graduating with regular diplomas, with 34.9% dropping out.[196]

e. Students with disabilities are disproportionately likely to spend time out of the regular classroom, to be secluded, restrained or placed in alternative schools

IDEA imposes a requirement that special education students be mainstreamed in the "least restrictive environment" wherever possible.[197] Notwithstanding the statutory requirement, special education students are often out of the regular school environment. Students with disabilities are 75% of students restrained at school and 58% of students who are secluded (though only 12% of the CRDC student population).[198] As a whole, students with disabilities spend between 40 and 52 percent of their time outside their regular classrooms.[199] In particular, students in high incidence, high discretion special education categories are out of their class-

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195. Lhamon, *supra* note 117.

196. U.S. DEP'T OF EDUC., 29TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 83 tbl.1-17 (2007).

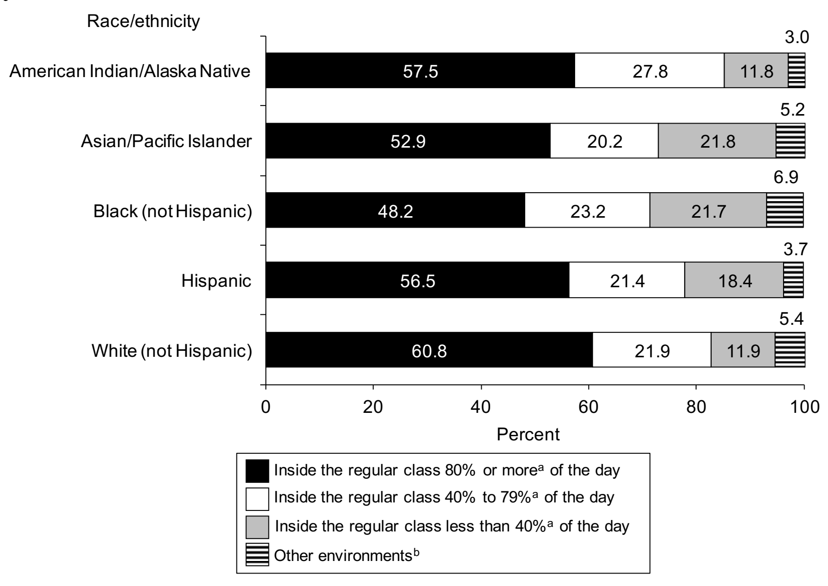
197. 20 U.S.C.A. § 1412(a)(5) (West 2016); SCOTT JOHNSON & SARAH REDFIELD, EDUCATION LAW: A PROBLEM-BASED APPROACH Ch. 12 (LexisNexis 2d ed., 2012); MARK WEBER, RALPH MAWDSLEY & SARAH REDFIELD, SPECIAL EDUCATION LAW: CASES AND MATERIALS Ch. 6 (LexisNexis 3d ed., 2010).

198. U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS, *supra* note 5.

199. U.S. DEP'T OF EDUC., 30TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT xxi (2008), http://www2.ed.gov/about/reports/annual/osep/2008/parts-b-c/30th-idea-arc.pdf.

rooms; for example, 48% of students labeled "intellectually disabled" spend less than 40% of their time in regular classrooms, and 74% of those students spend less than 80% in regular classrooms.[200] Given what we know about the racial and ethnic special education population, this means more minority students are likely to spend more time outside of regular classrooms.

Figure 24. Special Ed, Education Environment by Race & Ethnicity[201]



Percentage of students ages 6 through 21 served under IDEA, Part B, within racial/ethnic groups, by educational environment: Fall 2007

As is the case with students of color, many students with disabilities are placed in alternative schools.[202] Research suggests that this strategy has exacerbated inequities.[203]

200. *Table 50*, NAT'L CTR. FOR EDUC. STAT. tbl.50, https://nces.ed.gov/programs/digest/d12/tables/dt12_050.asp (last visited Nov. 6, 2016).

201. U.S. DEP'T OF EDUC., *supra* note 199, at 61.

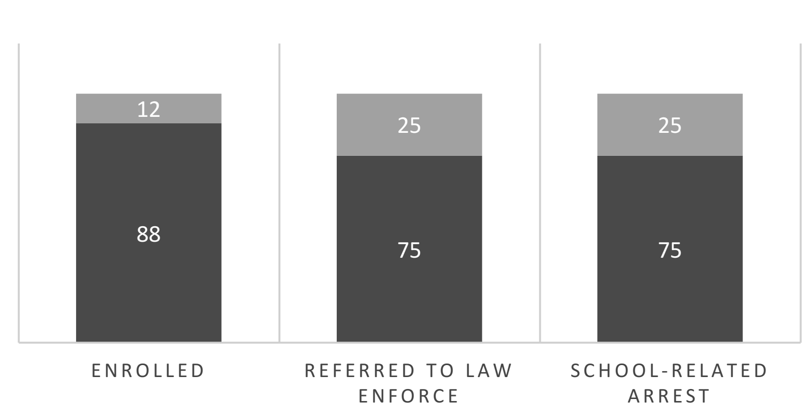
202. Vanderhaar et al., *supra* note 142, at 12–13.

203. *Id.*

f. Students with disabilities are disproportionately referred to law enforcement or subject to school-related arrest and incarceration

Special education students are 25% of students referred to law enforcement, and 25% of those subject to school-related arrest, over twice their representation in the student population.[204]

Figure 25. CRDC Discipline, % Special Education Students Referred to Law Enforcement & Subject to School-related Arrest[205]



Not surprisingly, we have long known that students with disabilities are disproportionately represented in the correctional system.[206] It is estimated that 65% the youth in juvenile or adult criminal justice systems meet the criteria for disability.[207] Almost

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204. U.S. DEP'T OF EDUC. OFF. FOR CIVIL RIGHTS , *supra* note 5.

205. *Id.*at 7.

206. ROBERT B. RUTHERFORD JR. ET AL., YOUTH WITH DISABILITIES IN THE CORRECTIONAL SYSTEM: PREVALENCE RATES AND IDENTIFICATION ISSUES 19 (2002), http://cecp.air.org/juvenilejustice/docs/Youth%20with%20Disabilities.pdf (last visited Nov. 8, 2016) (discussing disproportionality and difficulty in identification in incarcerated settings); *see also* SUE BURRELL & LOREN WARBOYS, U.S. DEP'T OF JUST., OFF. OF JUV. JUST. AND DELINQUENCY PROGRAMS, SPECIAL EDUCATION AND THE JUVENILE JUSTICE SYSTEM (2000), https://www.ncjrs.gov/pdffiles1/ojjdp/179359.pdf (reporting data and reviewing IDEA requirements).

207. NAT'L DISABILITIES RIGHTS NETWORK, *supra* note 27, at 7; Elizabeth Cate, *Teach Your Children Well: Proposed Challenges to Inadequacies of Correctional Special Education for Juvenile Inmates*, 34 N.Y.U. REV. L. & SOC.

1 in 3 of young people who are incarcerated are identified as having or needing special education.[208] These students are incarcerated at rates four times higher than young people attending regular schools.[209]

The 2005 report under the auspices of the Coordinating Council on Juvenile Justice and Delinquency Prevention showed that most of the students who are incarcerated are categorized as "emotionally disturbed" (47.7%); the next highest category is "specific learning disability" (38.6%), then "mental retardation" (9.7%), followed by "other health impaired" (2.9%) and "multiple disabilities" (0.8%).[210] Although their numbers are significant and disproportionate, the education provided to these students is limited at best.[211]

CHANGE 1, 10, 53 (2010) (noting that the rate of juvenile offenders qualifying for special education services almost quadruples the rate among students in the same age range nationally).

208. LOCKED OUT, *supra* note 76, at 1; *see also* THE NAT'L EVALUATION AND TECH. ASSISTANCE CTR. FOR THE EDUC. OF CHILDREN AND YOUTH WHO ARE NEGLECTED, DELINQUENT, OR AT-RISK, FACT SHEET 1 (2014), http://www.neglected-delinquent.org/sites/default/files/NDTAC_Special_Ed_FS_508.pdf.

209. LOCKED OUT, *supra* note 76, at 1.

210. Mary Magee Quinn et al., *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 EXCEPTIONAL CHILD. 339, 342 (2005).

211. PETER LEONE & LOIS WEINBERG, ADDRESSING THE UNMET EDUCATIONAL NEEDS OF CHILDREN AND YOUTH IN THE JUVENILE JUSTICE AND CHILD WELFARE SYSTEMS 1 (2012), http://cjjr.georgetown.edu/wp-content/uploads/2015/03/EducationalNeedsofChildrenandYouth_May2010.pdf; *see also* ANGELINA INESIA-FORDE, THE PRESENCE OF LEARNING DISABLED YOUTH IN OUR JUVENILE INSTITUTIONS (May 2005) (unpublished graduate thesis, The University of Tennessee, Chattanooga), https://www.ncjrs.gov/pdffiles1/nij/grants/213894.pdf; LOCKED OUT, *supra* note 76, at 12–13 (suggesting steps to improve educational experiences for incarcerated and transitional youths).

g. Students with disabilities are disproportionately bullied and victimized

Like students of color, students with disabilities are highly likely to be bullied or victimized, both by other students and by teachers;[212] and they suffer the related psychological distress.[213]

3. Similar disproportionalities and difficulties impact LGBTQ and GNC young people

Data on Lesbian, Gay, Bisexual, Transgender, Questioning (LGBTQ) and Gender Nonconforming (GNC) students is more difficult to cumulate than data on other groups,[214] but the data available shows that they suffer many of the same negative distinctions as other groups reviewed in this report, if not more.[215] They also are likely to suffer the compounding problem that occurs when they are part of two such groups.[216]

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212. Michael T. Hartley et al., *Comparative Study of Bullying Victimization Among Students in General and Special Education*, 81 EXCEPTIONAL CHILD. 176, 187 (2015) (reporting that "adult [teachers and staff] were more likely to verbally, relationally, and physically bully students with disabilities," according to student self-reports); *see also* DEAR COLLEAGUE LETTER, *supra* note 4 (discussing the impact of race-based discrimination in schools).

213. Hartley et al., *supra* note 212, at 189.

214. JASON CIANCIOTTO & SEAN CAHILL, LGBT YOUTH IN AMERICA'S SCHOOLS 9–11 (2012); ADVANCEMENT PROJECT, POWER IN PARTNERSHIPS: BUILDING CONNECTIONS AT THE INTERSECTIONS OF RACIAL JUSTICE AND LGBTQ MOVEMENTS TO END THE SCHOOL-TO-PRISON PIPELINE 4 (2015) [hereinafter ADVANCEMENT POWER], http://b.3cdn.net/advancement/85066c4a18d249e72b_r23m68j37.pdf.

215. JOSEPH G. KOSCIW ET AL., GAY, LESBIAN & STRAIGHT EDUC. NETWORK ("GLSEN"), THE 2013 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 23–24 (2014), http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.pdf.

216. CIANCIOTTO & CAHILL, *supra* note 214, at 21–22 (discussing tricultural experience). *See generally* M. SOMJEN FRAZER & HARLAN PRUDEN, RECLAIMING OUR VOICES: TWO SPIRIT HEALTH & HUMAN SERVICE NEEDS IN NEW YORK STATE (2010), http://www.health.ny.gov/diseases/aids/providers/reports/native_people/docs/reclaiming_our_voices.pdf (discussing Native and LGBT health issues).

a. LGBTQ youth suffer in a disproportionately difficult school climate

LGBTQ and GNC youth are subject to hostile school climates with attendant negative consequences.[217] As the Gay, Lesbian & Straight Education Network (GLESN) explains, "Schools nationwide are hostile environments for a distressing number of LGBTQ students, the overwhelming majority of whom routinely hear anti-LGBTQ language and experience victimization and discrimination at school."[218] Because of their sexual orientation or gender expression, these students do not feel safe at school,[219] where they are more often victimized and often blamed even while they are victims.[220] These students are far less likely to find support for stopping the harassing or assaultive behavior.[221] As one student put it, "The time I did report, the process of being heard was more demeaning than the harassment."[222] Another student observed, "Almost all of the time, I would end up being the one in trouble because it's 'my fault for drawing negative attention to myself.'"[223]

As GLESN reports, in these conditions, LGBTQ students are far more likely to miss school or avoid certain parts of the

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217. *See* PRESTON MITCHUM & AISHA C. MOODIE-MILLS, CTR. FOR AM. PROGRESS, BEYOND BULLYING: HOW HOSTILE SCHOOL CLIMATE PERPETUATES THE SCHOOL-TO-PRISON PIPELINE FOR LGBT YOUTH 1 (2014), https://cdn.americanprogress.org/wp-content/uploads/2014/02/BeyondBullying.pdf.

218. KOSCIW ET AL., *supra* note 215, at xvi.

219. *Id.*, at 12 (summarizing that 55.5% reported feeling unsafe because of their sexual orientation, 38.7% because gender expression, and 20.0% because of their academic achievement).

220. BURDGE, HYEMINGWAY, & LICONA, *supra* note 150, at 6; ADVANCEMENT POWER, *supra* note 214, at 4 ("Phrases like 'if they'd just pull up their pants,' and 'if they didn't flaunt it' reemphasize the culture of victim blaming when it comes to school discipline. Instead of responding in respectful and culturally competent ways, administrators penalize young people for this minor misbehavior.").

221. *See* KOSCIW ET AL., *supra* note 215, at 27–35 (describing reasons why such students do not report harassment, as well as their emotional experiences of that harassment).

222. *Id.* at 33.

223. *Id.* at 32.

school facilities or activities.[224] They are also more likely to have lower GPAs, lower expectations for post-secondary education, lower levels of self-esteem, and higher levels of depression.[225]

b. LGBTQ and GNC youth are disciplined more severely in school and juvenile justice

Recognizing that LGBTQ juveniles have higher health risks, a longitudinal study published in Journal of the American Academy of Pediatrics found that, controlling for other variables, non-heterosexual youth were disproportionately subject to sanctions including school expulsion, police stops and arrests, and juvenile convictions, with girls more likely to suffer these differences than boys.[226]

LGBTQ young people who are also students of color are also harshly penalized.[227] Treated unfairly, these young people "learn to mistrust not just school police, but all school administration and staff."[228]

4. These same disproportionalities experienced in school plague the juvenile justice system

Students enter and stay in the juvenile justice system following a variety of paths.[229]

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224. KOSCIW ET AL., *supra* note 215, at xvi.

225. *Id.*, at xviii.

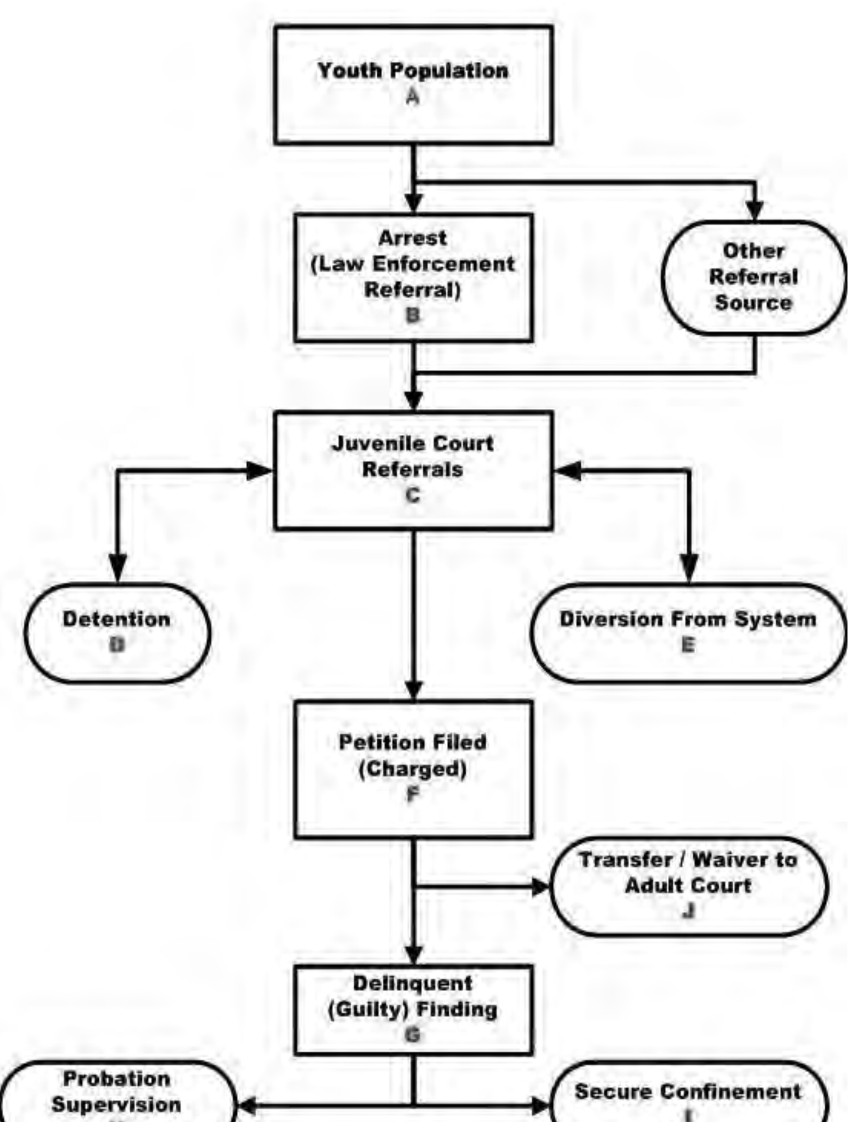
226. Kathryn E. W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions against Nonheterosexual Youth*, 127 PEDIATRICS 49, 49 (2011); BURDGE, HYEMINGWAY, & LICONA, *supra* note 150, at 4.

227. *See* ADVANCEMENT POWER, *supra* note 214, at 4 (noting the similar negative impacts of harsher discipline for both groups).

228. *Id.* (noting the lack of training many officers receive regarding how to work with LGBTQ students).

229. *See infra* Figure 26. Contact Points Juvenile Justice.

Figure 26. Contact Points Juvenile Justice[230]



230. WILLIAM FEYERHERM ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DISPROPORTIONATE MINORITY CONTACT TECHNICAL ASSISTANCE MANUAL 1-5 fig.1 (4th ed. 2009), http://www.ojjdp.gov/compliance/dmc_ta_manual.pdf.

While the numbers of young people detained have declined, the numbers of students who find themselves in court—juvenile courts and municipal or justice courts with authority to impose criminal sanctions—because of behavior at school has dramatically increased.[231] The Juvenile Section of the Texas bar writing in 2010 described this as a "paradigm shift" where student behavior that previously resulted in "trips to the principal's office, corporal punishment, or extra laps under the supervision of a middle school or high school coach," now result in criminal prosecution and records for children ages 10 through 16.[232] On any given day, some 20,000 young people are in juvenile detention centers;[233] 54,000 in youth prisons or other confinement;[234] 4,200 in adult jails;[235] and 1,200 in adult prisons.[236] Eighty-seven percent of these young people are incarcerated for nonviolent offenses, and the "majority (66 percent) were youth of color."[237] These young people are all too often mistreated and increasingly abused.[238]

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231. *See, e.g.*, Christopher A. Mallett, *The School-to-Prison Pipeline: A Critical Review of the Punitive Paradigm Shift*, 33 CHILD ADOLESCENT SOC. WORK J. 15, 16 (2015) (describing changing attitudes in disciplinary methods over the last several decades in schools and courts).

232. Ryan Kellus Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children's Criminal Cases*, 24 JUV. L. 13, 13 (2010).

233. MENDEL, *supra* note 58 at 2.

234. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, THE NUMBER OF JUVENILES IN RESIDENTIAL PLACEMENT CONTINUED TO DECLINE IN 2013, http://www.ojjdp.gov/ojstatbb/snapshots/DataSnapshot_CJRP2013.pdf.

235. BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2014 3 (2014), http://www.bjs.gov/content/pub/pdf/jim14.pdf.

236. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 19 (2013), http://www.bjs.gov/content/pub/pdf/p13.pdf.

237. *Unbalanced Juvenile Justice*, THE W. HAYWOOD BURNS INST., http://data.burnsinstitute.org/about (last visited Nov. 12, 2016) (providing data sets for state by state comparative analysis at various juvenile justice decision points); *see supra* Figure 7. Discipline Disproportionality Girls, Figure 23. Special Education by Discretionary Category & Figure 24. Special Ed, Education Environment by Race & Ethnicity; *see also* SOUTH DAKOTA JUVENILE JUSTICE REINVESTMENT INITIATIVE WORK GROUP, FINAL REPORT 1–2 (2014), http://jjri.sd.gov/docs/JJRI%20WG%20Report_Final.pdf (reporting similarly for youth in South Dakota).

238. THE ANNIE E. CASEY FOUND., MALTREATMENT OF YOUTH IN U.S. JUVENILE CORRECTIONAL FACILITIES 2 (2015), http://www.aecf.org/m/ resourcedoc/aecf-maltreatmentyouthuscorrections-2015.pdf; THE ANNIE E. CASEY

"With few exceptions, data consistently show that youth of color have been overrepresented at every stage of the juvenile justice system."[239] Specific groups in specific situations show particular disproportionalities. For example, while Native American youth are not generally disproportionately arrested, in South Dakota they are very much so, 9% of the population and 40% of the arrests.[240] Overall, minority youth are disproportionately represented in this system.[241] As the recent National Academy of Science report on *Reforming Juvenile Justice* summarized: "There is evidence that

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FOUND., NO PLACE FOR KIDS (2011), http://www.aecf.org/ m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf; *see, e.g.*, Jennifer Gonnerman, *Kalief Browder: 1993-2015*, NEW YORKER (June 7, 2015), http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015; Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), http://www.newyorker.com/magazine/2014/10/06/before-the-law (cataloguing the story of Kalief Browder, arrested for stealing a backup, incarcerated at Rikers); Bruce Selcraig, *Camp Fear*, MOTHER JONES, Nov./Dec. 2000, http://www.motherjones.com/politics/2000/11/camp-fear (recounting death of 14 year old Native American Gina Score in state custody in a boot camp for teenage girls). *But see* Christina Rose, *Lock 'Em Up With a Hug: Native Detention Programs Connect Youth to Community,* INDIAN COUNTRY TODAY MEDIA NETWORK (Oct. 28, 2015), http://indiancountrytodaymedianetwork.com/2015/10/28/lock-em-hug-native-detention-programs-connect-youth-community-162232.

239. REFORMING JUVENILE JUSTICE, *supra* note 86, at 3; *see supra* Figure 23. Special Education by Discretionary Category; THE SENTENCING PROJECT, POLICY BRIEF: DISPROPORTIONATE MINORITY CONTACT 1 (2014), http://sentencingproject.org/doc/publications/jj_Disproportionate%20Minority%20Contact.pdf [hereinafter THE SENTENCING PROJECT]. *See generally* JJDP, *Easy Access*, *supra* note 1 (providing access to detailed information on juvenile crime and the juvenile justice system).

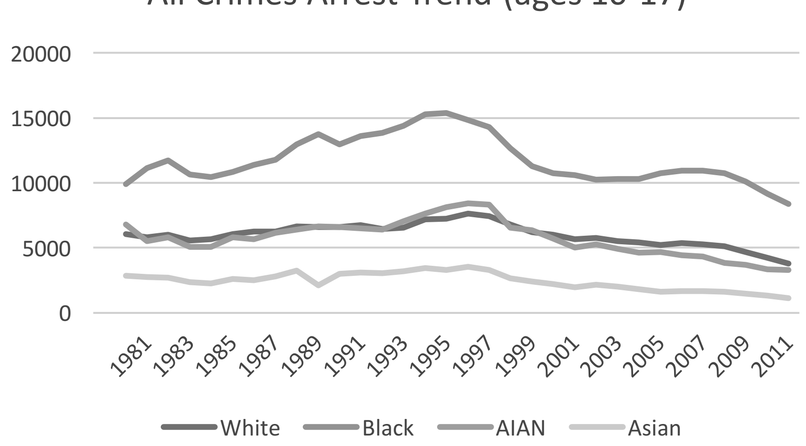
240. *See* Christina Rose, '*Terrible Racial Disparities' Not Fixed with SD Juvenile Justice Reform*, INDIAN COUNTRY TODAY MEDIA NETWORK (June 24, 2015), https://indiancountrytodaymedianetwork.com/2015/06/24/terrible-racial-disparities-not-fixed-sd-juvenile-justice-reform-160831.

241. The Office of Juvenile Justice Delinquency Prevention lists nine points of contact in the juvenile justice system: arrest, referral, diversion (handled without formal complaint), detention, petitioned (charge filing), delinquent findings (adjudication), probation, confinement in secure correctional facilities, transferred to adult court. *Evaluation Data*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, http://www.ojjdp.gov/dmc/evaluationdata.html (last visited Nov. 12, 2016).

'race matters' above and beyond the characteristics of an offense."[242]

a. Youth of color are disproportionately arrested[243]

Figure 27. Juveniles Arrested by Race[244]



Arrest[245] is the decision that is most significant to the total level of disproportionality in the juvenile justice system.[246] While

242. REFORMING JUVENILE JUSTICE, *supra* note 86, at 3.

243. The juvenile justice literature refers to arrest as "when law enforcement agencies apprehend, stop, or otherwise contact [youth] and suspect them of having committed a delinquent act." WILLIAM FEYERHERM ET AL., *supra* note 230, at 1–7 tbl.1. Delinquent acts are defined as acts that "if an adult commits them, would be criminal, including crimes against persons, crimes against property, drug offenses, and crimes against the public order." WILLIAM FEYERHERM ET AL., *supra* note 230, at 1–7 tbl.1.

244. NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE ARREST RATES BY OFFENSE, SEX, AND RACE: 1980–2011 (2014), http://www.ojjdp.gov/ ojstatbb/crime/excel/JAR_2011.xls (Hispanics not included in this data set).

245. WILLIAM FEYERHERM ET AL., *supra* note 230, at 1–7 tbl.1.

246. *Interpretation of the National DMC Relative Rate Indices for Juvenile Justice System Processing in 2010: Delinquency Offenses*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION http://www.ojjdp.gov/ojstatbb/ dmcdb/asp/offensedef.asp?offense=1 (last visited Nov. 12, 2016) [hereinafter *Delinquency Offenses*]; see OJJDP 2014 NATIONAL REPORT, *supra* note 24, at

arrest rates have declined considerably, those under eighteen still represent 12.5% of those arrested,[247] and there is still a significant gap among juveniles of different races with African-American and American Indian rates remaining higher than White and Asian.[248] The Office of Juvenile Justice and Delinquency Prevention (OJJDP) uses Relative Rate Indices (RRI) to describe disproportionality between treatment of White youth and those of other races;[249] for minorities, the RRI is 1.7 at the arrest decision point showing a minority youth arrest rate 70% more than the arrest rate of White youth.[250] The RRI for African-Americans is 2.2.

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115 ("Once a juvenile is apprehended for a law violation, it is the police officer who first determines if the juvenile will move deeper into the justice system or will be diverted."); Cynthia Conward, *There is No Justice: There is "Just Us": A Look at Overrepresentation of Minority Youth in the Juvenile and Criminal Justice System,* 4 WHITTIER J. OF CHILD & FAM. ADVOC. 35, 44–47 (2004), http://heinonline.org/HOL/Page?handle=hein.journals/wjcfad4&div=6&g_sent=1&collection=journals ("[Youth arrest] disparit[ities] [are] most pronounced at the beginning stages of the criminal justice system.").

247. Samantha A. Goodrich et al., *Evaluation of a Program Designed to Promote Positive Police and Youth Interactions*, 3 J. JUV. JUST. 55, 55 (2014) http://www.journalofjuvjustice.org/JOJJ0302/JOJJ0302.pdf#page=60;___OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 120, 125 (noting a decrease in juvenile arrests for violent crimes in recent years).

248. NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE ARREST RATES BY OFFENSE, SEX, AND RACE (1980-2011) (2014), http://www.ojjdp.gov/ojstatbb/crime/excel/JAR_2011.xls; *National Disproportionate Minority Contact Databook*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION http://www.ojjdp.gov/ojstatbb/dmcdb/asp/display.asp?display_in=1 (last visited Nov. 12, 2016); *supra* Figure 24. Special Ed, Education by Race & Ethnicity. *See generally*, *Statistical Briefing Book*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION http://www.ojjdp.gov/ojstatbb/default.asp (last visited Nov. 12, 2016) (providing annual overview of data).

249. FEYERHERM ET AL., *supra* note 230, at 1-2, 1-3.

250. DELINQUENCY OFFENSE*s*, *supra* note 246.

Figure 28. Relative Rates for JJ Contact[251]

RELATIVE RATES	Minority	Black	AIAN*	AHPI**
Arrest	1.7	2.2	0.9	0.3
Referral	1.1	1.1	1.2	1
Diversion	0.7	0.7	0.8	0.9
Detention	1.2	1.2	1.4	1.1
Petitioned	1.2	1.2	1.1	1.1
Adjudicated	0.9	0.9	1.1	0.9
Probation	1.2	1.2	1	0.9
Placement	0.9	0.9	1	1.1
Waiver	1.2	1.2	1.3	0.4

These rates have remained essentially stable since 1990.[252] Recent research suggests that while the risk of arrest is generally disproportionate for African-American youth, this is particularly so in communities that are predominantly non-Black.[253]

Arrest is an especially worrisome point given its impact on subsequent points in the juvenile justice system.[254] "[B]ias, either

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251. *See* FEYERHERM ET AL., *supra* note 230.

252. *See* OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 177–78; THE SENTENCING PROJECT, *supra* note 239, at 2.

253. Tia Stevens Andersen, *Race, Ethnicity, and Structural Variations in Youth Risk of Arrest: Evidence from a National Longitudinal Sample*, 42 CRIM. JUST. & BEHAV. 900, 910–11 (2015), http://cjb.sagepub.com/content/42/9/900; *cf.* Shaun A. Thomas et al., *The Contingent Effect of Race in Juvenile Court Detention Decisions: The Role of Racial and Symbolic Threat*, 3 RACE & JUST. 239, 258 (2012) (finding that Black youths' risk of detention decreased when the relative size of the Black population in a community increased).

254. Akiva M. Liberman et al., *Labeling Effects of First Juvenile Arrests: Secondary Deviance and Secondary Sanctioning*, 53 CRIMINOLOGY 345, 354–57 (2014); *see also* Antonis Katsiyannis et al., *Juvenile Offenders with Disabilities:*

overt or covert (also known as selection bias), that is introduced by the police is very likely to affect outcomes at later stages, even if no bias occurs at later stages."[255] When minority youth are more likely to be arrested and formally processed than their White peers who have engaged in like behavior, then those youth will obviously "more readily accumulate offense histories and dispositions from which inferences are drawn about their character and capacity for reform"—which will influence later outcomes.[256]

b. Youth of color are disproportionately referred, detained (longer), charged, and held

Once arrested, the rate of referral to juvenile court further increases disparities. For example, for 2010, "even after controlling for possible disparities up to the arrest decision, minority youth were more likely than white youth to be referred to juvenile court for a delinquent offense."[257] Youth of color are then detained disproportionately: "In 2010, the likelihood of detention was greatest for [B]lack youth for all but public order offenses—American Indian and Asian youth had slightly greater proportions

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Challenges and Promises, *in* HANDBOOK OF JUV. FORENSIC PSYCHOL. AND PSYCHIATRY 521, 525 (Elena Grigorenko ed., 2012) ("Age at first arrest has been generally found to be one of the strongest predictors of recidivism.").

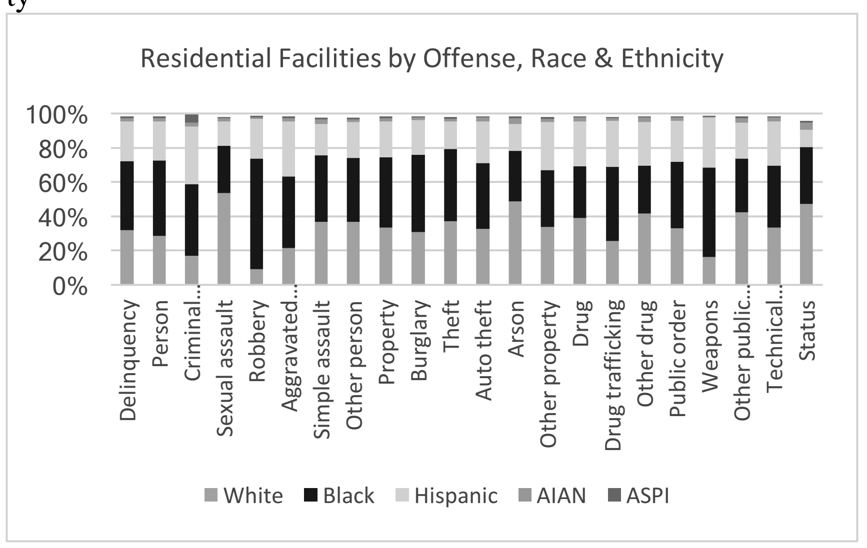
255. Leiber & Peck, *supra* note 60, at 348.

256. Leiber & Peck, *supra* note 60, at 355; Donna Bishop & Michael Leiber, *Racial and Ethnic Differences in Delinquency and Justice System Responses*, *in* THE OXFORD HANDBOOK OF JUV. CRIME AND JUV. JUST. 445–84 (Barry C. Feld & Donna M. Bishop eds., 2012); *see* Himmelstein & Brückner, *supra* note 226.

257. *Delinquency Offenses*, *supra* note 246; *see also* OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 164 (finding racial disparities in detention constant after controlling for gender). *See generally* Mark Soler, *Missed Opportunity: Waiver, Race, Data, and Policy Reform*, 71 LA. L. REV. 17, 22–23 (2010) (finding that minority youth are 99% of transfers); JUVENILE JUSTICE INITIATIVE, AUTOMATIC ADULT PROSECUTION OF CHILDREN IN COOK COUNTY, ILLINOIS 2010-2012 7–8 (2014), http://jjustice.org/wordpress/wp-content/uploads/Automatic-Adult-Prosecution-of-Children-in-Cook-County-IL.pdf (last visited Nov. 12, 2016); THE SENTENCING PROJECT, *supra* note 239, at 7 (noting that minority youths make up a disparate proportion of youths in confinement)..

of public order cases detained (30% and 29%, respectively) than black youth (26%).”[258]

Figure 29. Juveniles in Residential Facilities by Race & Ethnicity[259]



Once detained, minority youth are more likely to stay in the system longer than their White peers and more likely to be locked up.[260] Some analysts have concluded that youth detention “is [the] most significant” stage of the juvenile justice process “for the rest of a young person’s life” because “[a]n adolescent who has spent

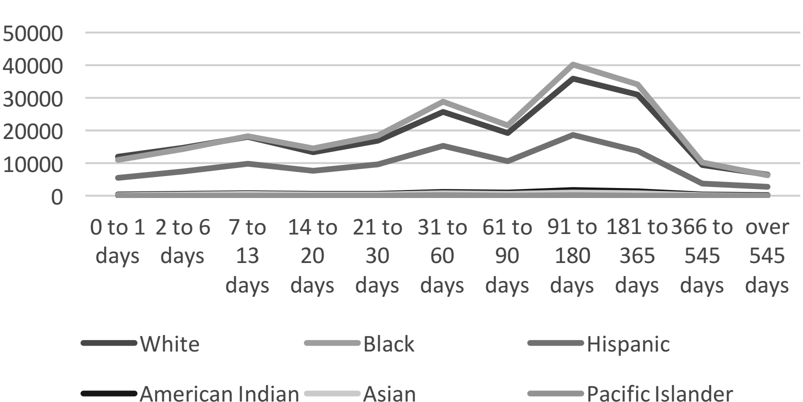
258. OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 163; NAT’L COUNCIL ON CRIME AND DELINQUENCY, JUSTICE FOR SOME 2 (2007), http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf; *see also* Soler, *supra* note 257, at 23; Leiber & Peck, *supra* note 60, at 333; JJDP, *Easy Access*, *supra* note 1 (select “Race” and “Most Serious Offense General”; click “Show Table”). The greatest disparity exists in drug offenses, for which Black youth are two times more likely to be detained than White youth. OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 164; *see supra* Figure 7. Discipline Disproportionality Girls & Figure 25. CRDS Discipline, % Special Education Students Referred to Law Enforcement & Subject to School-related Arrest.

259. *Statistical Briefing Book: Juveniles in Corrections*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION http://ojjdp.gov/ojstatbb/corrections/qa08205.asp?qaDate=2011 (last visited Nov. 12, 2016).

260. *Id.*

time in secure detention is far less likely to attain a high school diploma or consistently participate in the labor force in the future."[261]

Figure 30. Time Detained by Race & Ethnicity[262]



Massachusetts data is illustrative at the state level. Although the number of detained/committed youth has decreased, minority youth remain disproportionately represented in the system. Minority youth who represent about 20% of the juvenile population are "nearly 60% of the young people securely detained after arraignment and before adjudication, and 60% of those committed to the Commonwealth's Department of Youth Services (DYS) after an adjudication of delinquency."[263]

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261. THE SENTENCING PROJECT, *supra* note 239, at 7 (citing J.H. Keeley, *Will Adjudicated Youth Return to School After Residential Placement? Results of a Predictive Variable Study*, J. CORRECT. EDUC. 57, 65–85 (2006)); *see also* BARRY HOLMAN & JASON ZIEDENBERG, THE DANGERS OF DETENTION 2 (2006), http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf.

262. JJDP, *Easy Access*, *supra* note 1 (select "Days Since Admission" and "Race"; click "Show Table").

263. ROBIN L. DAHLBERG, AM. CIVIL LIBERTIES UNION, LOCKING UP OUR CHILDREN: THE SECURE DETENTION OF MASSACHUSETTS YOUTH AFTER ARRAIGNMENT AND BEFORE ADJUDICATION 5 (2008), https://aclum.org/app/uploads/2015/06/reports-locking-up-our-children.pdf.

Once in the system, there are various disproportionalities. Black youth have been found to be "more likely than white youth or youth of other races to receive formal delinquency petitions, although they were less likely to be adjudicated delinquent."[264] However, "Black youth [are] more likely than White youth to be prosecuted for serious crimes."[265] Then they are disproportionately confined as compared to being placed on probation[266] and more likely to be transferred to adult facilities for detention.[267]

c. Youth with disabilities show the same disproportionalities and experiences in juvenile justice as well

Statistics on disabled youth in the juvenile justice system are less precise than data disaggregated by race, ethnicity, class, and other demographic categories because not all studies define disability in the same way,[268] and few jurisdictions maintain con-

264. Emily R. Cabaniss et al., *Reducing Disproportionate Minority Contact in the Juvenile Justice System: Promising Practices*, 12 AGGRESSION & VIOLENT BEHAV. 393, 394 (2007); *see also* OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 167 ("Black youth were less likely to be adjudicated [delinquent] than were youth of other races.").

265. David E. Barrett & Antonis Katsiyannis, *Juvenile Delinquency Recidivism: Are Black and White Youth Vulnerable to the Same Risk Factors?*, 40 BEHAV. DISORDERS 184, 184 (2015).

266. OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 169; SARAH HOCKENBERRY, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE IN RESIDENTIAL PLACEMENT, 2011 1 (2014), http://www.ojjdp.gov/pubs/246826.pdf; *see also* Cabaniss et al., *supra* note 264, at 394; Barrett & Katsiyannis, *supra* note 265, at 184–85.

267. Barrett & Katsiyannis, *supra* note 265, at 184; *see also* BENJAMIN ADAMS & SEAN ADDIE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PROGRAMS, OJJDP FACT SHEET: DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 2008 4 (2011), http://www.ojjdp.gov/pubs/236481.pdf ("Racial differences in case waivers stem primarily from differences in person and drug offense cases.").

268. CHRISTOPHER A. MALLETT, NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, SEVEN THINGS JUVENILE COURTS SHOULD KNOW ABOUT LEARNING DISABILITIES 5 (2011) [hereinafter SEVEN THINGS]; Connie L. Kvarfordt et al., *Youth with Learning Disabilities in the Juvenile Justice System: A Training Needs Assessment of Detention and Courts Services Personnel*, 34 CHILD & YOUTH CARE FORUM 27, 28 (2005); Christopher A. Mallett, *Youthful Offending and Delinquency: The Comorbid Treatment of Maltreatment, Mental*

sistent and comprehensive databases regarding youth with disabilities being processed through the system.[269] However, there is wide agreement that disabled youth are overrepresented in the juvenile justice system, especially with regard to detention.[270] Estimates of the percentage of incarcerated youth offenders with learning disabilities range from 28-50%,[271] although disabled youth make up only 4-9% of the adolescent population.[272]

Health Problems, and Learning Disabilities, 31 CHILD & ADOLESCENT SOCIAL WORK J. 369, 375 (2014) [hereinafter *Youthful Offending*] ("A lack of consistent definitions across systems that address some of the special education disability impairments of at-risk children and adolescents further complicates an already difficult situation."); *see* Julie C. Duvall & Richard J. Morris, *Assessing Mental Retardation in Death Penalty Cases: Critical Issues for Psychology and Psychological Practice*, 37 PROF. PSYCHOL.: RES. & PRAC. 658, 664 (2006), http://www.iapsych.com/iqmr/duvall2006.pdf (noting that definitions vary by state and within the same field of practice).

269. NAT'L COUNCIL ON DISABILITY, ADDRESSING THE NEEDS OF YOUTH WITH DISABILITIES IN THE JUVENILE JUSTICE SYSTEM: THE CURRENT STATUS OF EVIDENCE-BASED RESEARCH 49 (2003), https://www.ncd.gov/rawmedia_repository/381fe89a_6565_446b_ba18_bad024a59476.pdf.

270. DANIEL P. MEARS & LAUDAN Y. ARON, URBAN INST., ADDRESSING THE NEEDS OF YOUTH WITH DISABILITIES IN THE JUVENILE JUSTICE SYSTEM: THE CURRENT STATE OF KNOWLEDGE v (2003), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/410885-Addressing-the-Needs-of-Youth-with-Disabilities-in-the-Juvenile-Justice-System.PDF (noting that despite a lack of empirical support for some aspects of disabled juveniles' interactions with the justice system, "research consistently suggests that youth with disabilities are overrepresented in [long-term] correctional settings").

271. SEVEN THINGS, *supra* note 268, at 5 (estimating 28-43%); David E. Barrett et al., *Delinquency and Recidivism: A Multicohort, Matched-Control Study of the Role of Early Adverse Experiences, Mental Health Problems, and Disabilities*, 22 J. EMOTIONAL & BEHAV. DISORDERS 3, 4 (2014) (estimating that 30-50% of incarcerated youth have "documented disabilities"); Kvarfordt et al., *supra* note 268, at 28 (estimating 35.6-46% with learning disabilities); *Youthful Offending*, *supra* note 268, at 372 (estimating 28-45% with special education disabilities). *But see* Antonis Katsiyannis et al., *Juvenile Offenders with Disabilities: Challenges and Promises*, *in* HANDBOOK OF JUV. FORENSIC PSYCHOL. AND PSYCHIATRY 521, 521 (2012), (stating in prevalence of disabilities among incarcerated youth may be "as high as 90%").

272. *Youthful Offending*, *supra* note 268, at 372; *see also* Christopher A. Mallett, *The 'Learning Disabilities to Juvenile Detention' Pipeline: A Case Study*, 36 CHILD. & SCHS. 147, 147 (2014) [hereinafter *Learning Disabilities*]

Recent studies have shown that disabilities are predictive both of delinquency and of recidivism.[273] Research focusing on arrest rates for minors with serious emotional disabilities shows a predictably broad range, reported by one researcher as 21–58%.[274] Beyond the initial offense, there is more substantial evidence that juveniles with learning disabilities are at greater risk of recidivism and may face difficulty reentering a school environment in which they are already at a disadvantage.[275] The precise causes of this higher rate of recidivism, however, represent an unresolved topic of scholarly debate.[276]

The intersection between race and disability in juvenile justice has not been extensively researched. However, a recent study examining the combination of race and disability as a predictor of recidivism found that disability status increases the likelihood of repeat offending for both Black and White adolescents.[277] Interestingly, a mental health diagnosis (but not a learning disability) "relating to aggression or impulse control" was the strongest predictor of recidivism for both groups, but a school-classified learning disability increased the risk for Black youth more than for White youth.[278]

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273. *See e.g.*, Barrett et al., *supra* note 271, at 10; *'Learning Disabilities*, *supra* note 272, at 149–50; *see* Barrett & Katsiyannis, *supra* note 265, at 190; Katsiyannis et al., *supra* note 271, at 525–26.

274. Maryann Davis, *Arrest Patterns into Adulthood of Adolescents with Serious Emotional Disability*, *in* 14TH ANNUAL CONFERENCE PROCEEDINGS: A SYSTEM OF CARE FOR CHILDREN'S MENTAL HEALTH: EXPANDING THE RESEARCH BASE 150 (2001), https://www.gpo.gov/fdsys/pkg/ERIC-ED465248/pdf/ERIC-ED465248.pdf.

275. *See* HOLMAN & ZIEDENBERG, *supra* note 261, at 2, 9; Katsiyannis et al., *supra* note 271, at 525–26; *Learning Disabilities*, *supra* note 272, at 148 ("[M]any detained adolescents with learning disabilities fail to return to school.").

276. *See* Barrett et al., *supra* note 271, at 4; *Learning Disabilities*, *supra* note 272, at 148–49.

277. Barrett & Katsiyannis, *supra* note 265, at 190.

278. *Id.* at 190–91.

d. LGBTQ youth are also disproportionately represented in juvenile settings

While LGBTQ youth are thought to be about 7% of the overall youth population,[279] they represent 13–15% of those in the juvenile justice system.[280] Consistent with this, youths who have self-identified have been significantly more likely to be stopped by police than their peers identifying as heterosexual.[281] They are twice as likely to be detained and held in secure facilities for "truancy, warrants, probation violations, running away, and prostitution" compared with their heterosexual and gender-normative peers, though they are on a par for more violent offenses.[282] While youth who do continue with education in juvenile justice are less likely to be recidivists, education within juvenile justice settings is lacking.[283] It is difficult to return to school for youths coming from alternative schools or juvenile justice settings.[284]

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279. *See* ROBERT P. JONES & DANIEL COX, PUB. RELIGION RESEARCH INST., HOW RACE AND RELIGION SHAPE MILLENNIAL ATTITUDES ON SEXUAL AND REPRODUCTIVE HEALTH 46, http://publicreligion.org/site/wp-content/uploads/2015/03/PRRI-Millennials-Web-FINAL.pdf (finding this percent among 18-35 year olds and also finding that "[t]here are no significant differences across races in LGBT identity, but there are modest religious and political differences.").

280. DEV. SERVS. GRP., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, LGBTQ YOUTHS IN THE JUVENILE JUSTICE SYSTEM 2 (2014), http://www.ojjdp.gov/mpg/litreviews/LGBTQYouthsintheJuvenileJusticeSystem.pdf; KATAYOON MAJD ET AL., THE EQUITY PROJECT, HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS 1–2 (2009), http://web.archive.org/web/20160401085258/http://www.equityproject.org/wp-content/uploads/2014/08/hidden_injustice.pdf.

281. Himmelstein & Brückner, *supra* note 226.

282. Angela Irvine, *"We've Had Three of Them": Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-conforming Youths in the Juvenile Justice System*, 19 COLUM. J. GENDER & L. 675, 689 (2010).

283. NELLIS, *supra* note 91, at 67.

284. *See, e.g.*, Elizabeth Lamura, *Our Children, Ourselves: Ensuring the Education of America's At-Risk Youth*, 31 BUFF. PUB. INT. L.J. 117, 150-154 (2013) (discussing difficulty at reentry).

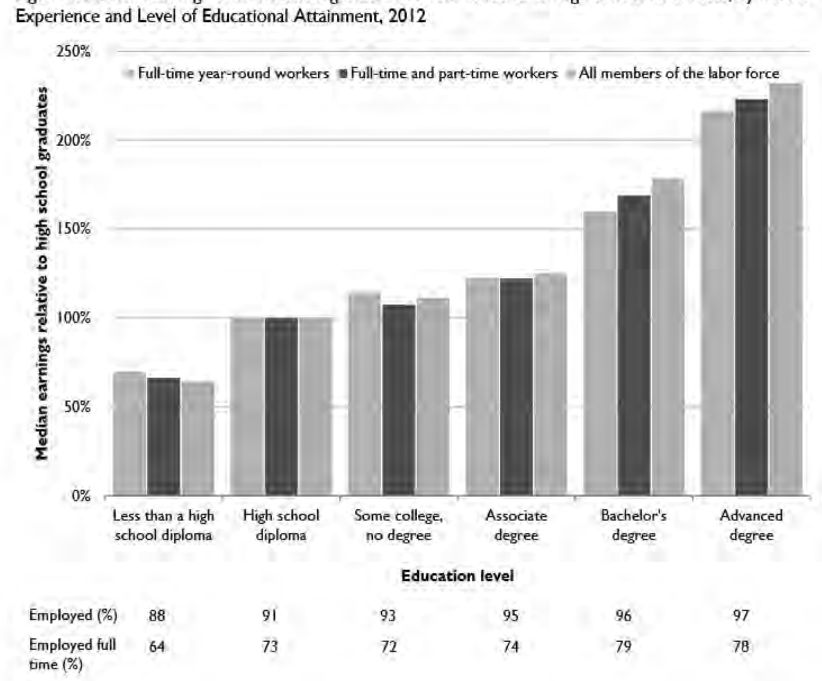
II. SOCIETAL CONSEQUENCES FOR IMPRISONING YOUTH

> [T]he total exclusion from the education process for more than a trivial period . . . is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses . . . .[285]

The costs of maintaining the status quo are extraordinarily high for individual students, their families, their communities, and the economy as a whole. Individuals in the school-to-prison-pipeline lose the chance for educational achievement and related life opportunities.

285. Goss v. Lopez, 419 U.S. 565, 576 (1975).

Figure 31. Earnings by Status[286]



They are lost to the workforce and costly.[287] Estimates vary on exactly how costly, depending on what is being counted, e.g., dropout v. juvenile detainee, but by all accounts they are staggering in terms of lost wages and taxes and extra medical, increased crime-related expenditures, and other costs:

286. SANDY BAUM, URBAN INST., HIGHER EDUC. EARNINGS PREMIUM: VALUE, VARIATION, AND TRENDS 2, tbl.1 (2014).

287. *See The Graduation Effect: The Economic Impact of a High School Diploma,* ALL. FOR EXCELLENT EDUC. (Dec. 15, 2015), http://all4ed.org/webinar-event/dec-15-2015-2/ ("Nationally, increasing the high school graduation rate to 90 percent for just one high school class – the class of 2013 for instance, or now 2015 – increasing the high school graduation rate to 90 percent for just one class would create more than 65,000 jobs."); *see also U.S. Graduation Rate, Unemployment Compared to Other Nations in Infographic*, HUFFINGTON POST (June 26, 2012, 3:31 PM), http://www.huffingtonpost.com/2012/06/26/infographic-shows-how-us-_n_1628187.html.

> The Center for Labor Market Studies estimates the social and economic costs of dropouts as a consequence of lower earning power and job opportunities, unemployment, incarceration, and government assistance. High school dropouts are estimated to earn $400,000 less than high school graduates across their working lives. The lifetime earning loss for males can exceed $500,000. In addition, because of lower lifetime earnings, dropouts contribute far less in federal, state, and local taxes than they receive in cash benefits, in-kind transfer costs, and incarceration costs as compared to typical high school graduates.[288]

Figure 32. Annual Costs per Inmate/Student[289]

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288. OJJDP 2014 NATIONAL REPORT, *supra* note 24, at 15; *see also* HENRY LEVIN ET AL., THE COSTS AND BENEFITS OF AN EXCELLENT EDUCATION FOR ALL OF AMERICA'S CHILDREN 18 (2006), http://www3.nd.edu/~jwarlick/documents/Levin_Belfield_Muennig_Rouse.pdf ("The fiscal consequence is $148 billion in lost tax revenues and additional public expenditures over the lifetime.").

289. *See* Christian HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 10 fig.4 (2012), http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf; *Total and Current Expenditures Per Pupil in Fall Enrollment in Public Elementary and Secondary Education, by Function and State or Jurisdiction: 2009–10*, NAT'L CTR. FOR EDUC. STATS. tbl.215, http://nces.ed.gov/programs/digest/d12/tables/dt12_215.asp (last visited Oct. 25, 2016).

In contrast, students who do not drop out and who are not incarcerated,[290] but continue their education and graduate from high school and beyond are more likely to be employed and enjoy more earning power over their lifetimes.[291] Empirical research demonstrates that they suffer additional long-term detrimental effects, including reinforcement of violent attitudes and behaviors[292] and heightened mental health concerns.[293] They are "more likely than their peers who graduate to be unemployed, living in poverty, receiving public assistance, in prison, on death row, unhealthy, divorced, and ultimately single parents with children who drop out from high school themselves."[294]

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290. *See* HOLMAN & ZIEDENBERG, *supra* note 261 (explaining that formerly detained youth have less success finding employment). It is also important to recognize that once incarcerated, juveniles often do not have access to adequate education services or, worse, cannot complete their education and develop career skills to obtain employment once released. *See* Peter E. Leone, *Doing Things Differently: Education as a Vehicle for Youth Transformation and Finland as a Model for Juvenile Justice Reform*, *in* A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 86, 91 (Nancy E. Dowd ed., 2015).

291. PEW RESEARCH CTR., THE RISING COST OF *NOT* GOING TO COLLEGE 6 (2014), http://www.pewsocialtrends.org/files/2014/02/SDT-higher-ed-FINAL-02-11-2014.pdf. ("For example, among those ages 25 to 32, fully 22% with only a high school diploma are living in poverty, compared with 6% of today's college-educated young adults. In contrast, only 7% of Baby Boomers who had only a high school diploma were in poverty in 1979 when they were in their late 20s and early 30s.").

292. *See* Hobbs et al., *supra* note 75, at 81; Mark J. Van Ryzin & Thomas J. Dishion, *From Antisocial Behavior to Violence: A Model for the Amplifying Role of Coercive Joining in Adolescent Friendships*, 54 J. OF CHILD PSYCH. 661, 661 (2013) (finding that coercive friendships at age 16–17 predicted early-adulthood violent behavior).

293. HOLMAN & ZIEDENBERG, *supra* note 261, at 8; Javid H. Kashani et al., *Depression Among Incarcerated Delinquents*, 3 PSYCH. RES. 185, 190–91 (1980) (demonstrating that mental health issues such as depression increased among incarcerated youth); Christopher B. Forrest et al., *The Health Profile of Incarcerated Male Youths*, 105 PEDIATRICS 286, 288–89 (2000) (finding that incarcerated males suffered from significant mental health concerns).

294. THE SILENT EPIDEMIC, *supra* note 42, at 2 (citation omitted); *see also* DON BEZRUKI, DAVID VARANA, AND CHERRY HILL, AN EVALUATION: SECURE JUVENILE DETENTION 4 (1999) (finding that detaining youth does not deter most juveniles and does not reduce the likelihood of recidivism); THE CAMPAIGN FOR EDUC. EQUITY & TEACHERS COLL., COLUMBIA UNIV., THE SOCIAL COSTS OF

In this context, some have described increasing the high school graduation rate as the nation's best economic *stimulus*.[295] As the Alliance for Excellent Education summarizes:

> Lower local, state, and national tax revenues are the most obvious consequences of higher dropout rates; even when dropouts are employed, they earn, on average, $8,000 less annually than high school graduates and they pay less in taxes. State and local economies suffer further when they have less-educated populaces, as they find it more difficult to attract new business investments. Simultaneously, these entities must spend more on social programs when they have lower educational levels.[296]

Noting that two-thirds of the U.S. economy is driven by consumer spending, some researchers point out that raising individuals' education levels will boost their purchasing power and increase the national economy.[297]

There are also more direct costs. Staying in the education pipeline and out of the prison pipeline is a huge cost savings to society.[298] The Alliance for Excellent Education, for example, has

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INADEQUATE EDUCATION (2005), http://www.tc.columbia.edu/i/a/3082_ SocialCostsofinadequateeducation.pdf; HOLMAN & ZIEDENBERG, *supra* note 261, at 4; Brent B. Benda & Connie L. Tollett, *A Study of Recidivism of Serious and Persistent Offenders Among Adolescents*, 27 J. OF CRIM. JUST. 111, 119 (1999) (demonstrating that prior incarceration was a stronger predictor of recidivism than being neglected or abused by parents, gang membership, being with peers at the time the offense was committed, or carrying a weapon); *supra* Figure 31. Earnings by Status.

295. ALL. FOR EXCELLENT EDUC., INSEPARABLE IMPERATIVES: EQUITY IN EDUCATION AND THE FUTURE OF THE AMERICAN ECONOMY (2012), [hereinafter EQUITY IN EDUCATION], http://all4ed.org/reports-factsheets/inseparable-imperatives-equity-in-education-and-the-future-of-the-american-economy/.

296. *Economic Impacts*, *supra* note 151; *see also* David Leonhardt, *A Link Between Fidgety Boys and a Sputtering Economy*, N.Y. TIMES, April 29, 2014, at A3.

297. EQUITY IN EDUCATION, *supra* note 295.

298. *See* ALL. FOR EXCELLENT EDUC., SAVING FUTURES, SAVING DOLLARS: THE IMPACT OF EDUCATION ON CRIME REDUCTION AND EARNINGS (2013) [hereinafter SAVING FUTURES], http://all4ed.org/wp-content/uploads/2013/09/SavingFutures.pdf; JUSTICE POLICY INST., THE COSTS

calculated that $18.5 billion in crime costs could be saved annually if the male high school graduation rate increased by 5 percent.[299] More directly, juvenile detention costs are extremely high, averaging $148,767 per juvenile per year and ranging as high as $352,663 in the state of New York.[300] This extraordinary expense dwarfs the amount that on average our nation spends to educate one youth per year in our public schools ($12,296 in 2014–2015).[301] And incarceration beyond juvenile years just adds to these expenditures; for New York City, the cost of an inmate is higher than Harvard tuition.[302]

OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE 2 (2009) [hereinafter COSTS OF CONFINEMENT], http://www.justicepolicy.org/images/upload/09_05_rep_costsofconfinement_jj_ps.pdf (last visited Oct. 25, 2016); *see also* NAT'L JUVENILE JUSTICE NETWORK & TEX. PUB. POLICY FOUND., THE COMEBACK STATES: REDUCING YOUTH INCARCERATION IN THE UNITED STATES 2 [hereinafter COMEBACK STATES], http://www.njjn.org/uploads/digital-library/Comeback-States-Report_FINAL.pdf (discussing states that have been successful in reducing confinement, California, Connecticut, Illinois, Ohio; Mississippi, New York, Texas, Washington, and Wisconsin); NAT'L JUVENILE JUSTICE NETWORK & THE TEX. PUB. POLICY FOUND., THE COMEBACK AND COMING-FROM-BEHIND STATES: AN UPDATE ON YOUTH INCARCERATION IN THE UNITED STATES (2013) [hereinafter COMING-FROM-BEHIND STATES], http://www.njjn.org/uploads/digital-library/The-Comeback-and-Coming-from-Behind-States.pdf.

299. SAVING FUTURES, *supra* note 298.

300. *See* JUSTICE POLICY INST., STICKER SHOCK: CALCULATING THE FULL PRICE TAG FOR YOUTH INCARCERATION 11 (2014) [hereinafter STICKER SHOCK], http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf.

301. *See Fast Facts: Expenditures*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/fastfacts/display.asp?id=66 (last visited on Oct. 25, 2016).

302. *See NYC's Yearly Cost Per Inmate Almost as Expensive as Ivy League Tuition*, FOX NEWS (Sept. 20, 2013), http://www.foxnews.com/us/2013/09/30/nyc-cost-per-inmate-almost-equals-ivy-league-education-expenses-tied-to-rikers/; Marc Santora, *City's Annual Cost Per Inmate Is $168,000, Study Finds*, N.Y. TIMES, Aug. 23, 2013, at A16; *see supra* Figure 32. Annual Costs per Inmate/Student.

Figure 33. Reducing the Number of Youth in Juvenile Facilities[303]

Top 10 States that lowered the number of youth in juvenile justice facilities from 1997 to 2006. Seven of the 10 states that reduced the number of youth in juvenile justice facilities saw drops in the total number of violent offenses reported to law enforcement.

State	Percent change in number of youth in juvenile facilities	Percent change in total number of violent offenses reported	Percent change in number of property offenses reported
Louisiana	-57%	-20%	-30%
Mississippi	-41%	-32%	-18%
New Mexico	-39%	-15%	-27%
Washington	-34%	-11%	-7%
Maine	-34%	2%	-11%
Wisconsin	-33%	13%	-11%
Tennessee	-33%	8%	-2%
Georgia	-27%	-3%	-6%
Connecticut	-27%	-23%	-25%
Maryland	-26%	-12%	-20%
Average	*-35%*	*-9%*	*-16%*
US Total	**-12%**	**-13%**	**-14%**

These numbers, which far too often serve to achieve their intended purpose, lead to the conclusions, "[w]e cannot afford the financial or the societal costs of unnecessary juvenile incarceration. By shifting our focus—and our investments—to the front end of the system, we will save not only money, but also lives."[304]

III. CAUSES OF THE SCHOOL-TO-PRISON PIPELINE

As previously described, causes of the school-to-prison pipeline are many and complex. Here we discuss in some detail three, which relate particularly to work of the American Bar Association on this issue: criminalization of school discipline; the presence and role of School Resource Officers; and the role implicit bias plays in disproportionality. Other law-related causes discussed in somewhat less detail include the impact of zero tolerance policies,[305] the limited constitutional rights of students in school,[306] low academic achievement,[307] and high stakes testing.[308]

303. COSTS OF CONFINEMENT, *supra* note 298, at 10.

304. STICKER SHOCK, *supra* note 300, at 3 (quoting Rick Scott, *Governor's OpEds*, (Jan. 2012)).

305. The ABA has opposed these policies. *See also* Am. Psychol. Ass'n Zero Tolerance Task Force, *supra* note 10, at 852 (explaining that a ten-year-old

A. Criminalization of School Discipline

Over the last three decades, there has been a distinct shift among many lawmakers, school officials, and teachers regarding how to discipline children for violations of school rules. While at one time it was common for educators to send students involved in a fight to the principal's office for assessment and discipline, in too many schools today it is just as common to refer those students to law enforcement for arrest and prosecution.[309] Several scholars

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girl was expelled because her mother put a small knife in her lunchbox to cut up an apple and describing that another student was expelled for talking on a cell phone to his mother who was on deployment as a solider to Iraq and with whom he had not spoken to for thirty days). Nor is there evidence that zero tolerance policies have made schools safer. *See* ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 17 (2000) [hereinafter OPPORTUNITIES SUSPENDED], http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf (stating that after four years of implementation, schools that used zero tolerance policies were less safe than those that did not use them); ARRESTING DEVELOPMENT, *supra* note 7, at 10; Am. Psychol. Ass'n Zero Tolerance Task Force, *supra* note 10, at 857 (finding that "zero tolerance policies have not provided evidence that such approaches can guarantee safe and productive school climates"); Krezmien et al., *supra* note 122, at 274. These policies have pushed more students out of schools and into the juvenile justice system. *See* KIM ET AL., *supra* note 94, at 78.

306. *See Schools, Police*, *supra* note 2.

307. *See* discussion *supra* starting at note 94 regarding disproportionality in academic achievements.

308. According to Professor James Ryan, "the temptation to exclude low-performing students, enhanced by the NCLBA, can hardly be denied: One less student performing below the proficiency level increases the overall percentage of students who have hit that benchmark." Ryan, *supra* note 122, at 969; *see also* NAACP LEGAL DEFENSE & EDUC. FUND, *supra* note 122, at 5 (explaining that accountability laws encourage schools to exclude students from school whom school officials believe may bring down the school's test scores); Darling-Hammond, *supra* note 122, at 252 ("Perhaps the most adverse, unintended consequence of NCLB's accountability strategy is that it undermines safety nets for struggling students rather than expanding them.").

309. *See, e.g.*, FED. ADVISORY COMM. ON JUVENILE JUSTICE, *supra* note 122, at 10; ARRESTING DEVELOPMENT, *supra* note 7, at 10; EDUCATION UNDER ARREST, *supra* note 7, at 15 (stating that during the 2007–2008 school year in Jefferson County, Alabama, ninety-six percent of students referred to juvenile

have referred to this shift as the "criminalization of school discipline."[310]

The reasons behind the criminalization of school discipline are complex. Several scholars have observed that the criminalization of school discipline has emerged parallel to and in connection with the criminalization of social problems generally in the United States.[311] When violent crime rates for juveniles increased from the mid-1980s to 1994, particularly among minority youth in the inner cities, elected officials felt political pressure to respond in the same fashion that they responded to the increase in adult crime.[312]

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court were for misdemeanors that included disorderly conduct and fighting without a weapon); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 410 (2013) ("Whereas schoolteachers, principals, and school counselors once handled school-based incidents such as fighting, disorderly conduct, and destruction of property in school, school officials now rely on local police or in-house SROs to handle even the most minor of school infractions.").

310. *See* Kathleen Nolan & Jean Anyon, *Learning to Do Time: Willis's Model of Cultural Reproduction in an Era of Postindustrialism, Globalization, and Mass Incarceration*, *in* LEARNING TO LABOR IN NEW TIMES 133, 136 (Nadine Dolby et al. eds., 2004); Henry A. Giroux, *Racial Injustice and Disposable Youth in the Age of Zero Tolerance*, 16 INT'L J. QUALITATIVE STUD. 553, 562 (2003); Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. OF CRIM. JUST. 280, 282 (2009); Kerrin C. Wolf, *Arrest Decision Making by School Resource Officers*, 12 YOUTH VIOLENCE AND JUV. JUST. 136, 137 (2013).

311. *See, e.g.*, Donna M. Bishop & Barry C. Feld, *Juvenile Justice in the Get Tough Era*, *in* ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 2766, 2770 (Gerben Bruinsma & Davis Weisburd eds., 2014); KATHLEEN NOLAN, POLICE IN THE HALLWAYS: DISCIPLINE IN AN URBAN HIGH SCHOOL 22–24 (2011); Giroux, *supra* note 310, at 557–58 (2010); Hirschfield, *supra* note 115, at 88 (2008); Nolan & Anyon, *supra* note 310, at 136.

312. *See* BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 14 (1999) (explaining as youth crime rates increased, especially among urban African-Americans, public fear of social disorder also increased, leading to a denouncement of coddling youth criminals); Giroux, *supra* note 310, at 561 (observing that the zero tolerance policies in schools were modeled on minimum sentencing and "three strikes" laws); Hirschfield, *supra* note 115, at 89–90; Pedro A. Noguera, *The Trouble with Black Boys: The Role and Influence of Environmental and Cultural Factors on the Academic Performance of African American Males*, 38 URBAN EDUC. 431 (2003). As Donna Bishop and Barry Feld describe, these violent incidents received an ex-

Moreover, although juvenile crime rates have steadily declined since 1994,[313] a series of high-profile school shootings further propelled lawmakers to respond in this manner.[314] Consequently, lawmakers passed a series of harsh laws designed to deter juvenile crime on the streets and in schools.[315] At the same time, many school officials, also facing pressure to respond to high-profile incidents of school violence,[316] began embracing strict, heavy-handed disciplinary methods to maintain order and control in their buildings.[317] The end result is a series of laws, policies, and prac-

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traordinary amount of media attention, resulting in a "moral panic," in which "the media, politicians, and the public reinforce each other in an escalating alarmist response that exaggerates the magnitude of the threat and produces urgent calls to 'do something.'" Bishop & Feld, *supra* note 311, at 2770; *see also* Elizabeth S. Scott, *"Children are Different": Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 94 (2013) ("The hostility and fear that characterized attitudes toward young offenders in the 1990s resulted in policies and decisions driven primarily by immediate public safety concerns and the goal of punishing young criminals.").

313. *See* JEFFREY A. BUTTS, JOHN JAY COLL. OF CRIM. JUST., VIOLENT YOUTH CRIME PLUMMETS TO A 30-YEAR LOW (2012), http://johnjayresearch.org/rec/files/2012/11/databit201211.pdf; KANG-BROWN ET AL., *supra* note 8, at 2.

314. *See* Monahan & Torres, *supra* note 121, at 1, 2–3 ("[T]he threat of 'another Columbine' (or Virginia Tech, and so on) haunts the social imaginary, leading parents, policy makers, and others to the sober conclusion that any security measure is worth whatever trade-offs are involved in order to ensure safety."); Elizabeth S. Scott, Miller v. Alabama *and the (Past and) Future of Juvenile Crime Regulation*, 31 L. & INEQ. 535, 541 (2013) (observing that although serious acts of school violence are rare events, after the Columbine shootings "legislatures across the country rushed to pass strict zero tolerance laws, making it a crime to threaten violence in school").

315. *See* PATRICIA TORBET ET AL., NAT'L CTR. FOR JUVENILE JUSTICE, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME: RESEARCH REPORT xi (1996) (documenting states' legislative and executive action that shifted towards the goal of punishing criminal behavior rather than rehabilitating the offenders in response to increases in juvenile crime).

316. *See* Kevin P. Brady et al., *School-Police Partnership Effectiveness in Urban Schools*, 39 EDUC. & URBAN SOC. 455, 456 (2007) ("An increasing fear of school violence coupled with the public's misperceptions of the actual degree of violence in our nation's schools has caused school officials, especially those located in urban areas, to implement more punitive-based school discipline policies and practices for responding to and preventing student crime and violence.").

317. Hirschfield, *supra* note 115, at 91.

tices that have pushed more students out of school and into the justice system.

Many of the laws, policies, practices, and trends that have converged over the last three decades, resulting in the creation of a pathway from school-to-prison for too many students. Some of these laws, policies, practices, and trends stem directly from the "tough on crime," punitive mindset described above. Others are less related to that mindset but still contribute to the pipeline in other ways.

B. The Increased Presence of Law Enforcement Officers in Schools

A key component of the pipeline is the increased presence of law enforcement officers in schools. Law enforcement officers have interacted with and provided services to schools for decades.[318] However, the practice of having law enforcement officers, or school resource officers (SROs),[319] regularly present in schools on a large scale is a relatively new phenomenon, part of the larger

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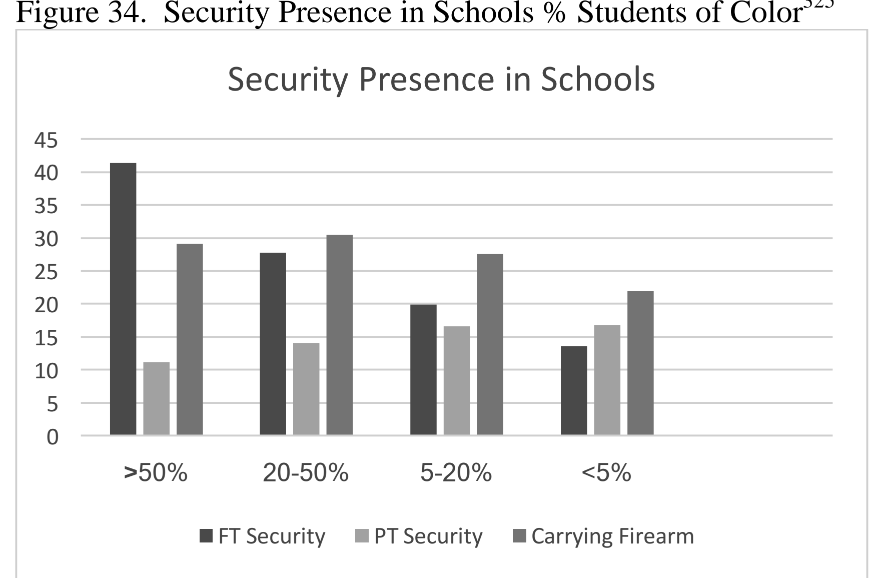
318. *See* NATHAN JAMES & GAIL MCCALLION, CONG. RESEARCH SERV., SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 2 (2013), https://www.fas.org/sgp/crs/misc/R43126.pdf; Paul J. Hirschfield & Katarzyna Celinska, *Beyond Fear: Sociological Perspectives on the Criminalization of School Discipline*, 5 SOC. COMPASS 1, 1 (2011). These traditional services include visible patrols, criminal investigations, and responses to calls for service. BARBARA RAYMOND, OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, ASSIGNING POLICE OFFICERS TO SCHOOLS 1 (2010), http://www.popcenter.org/Responses/pdfs/school_police.pdf.

319. According to the Community Oriented Policing Services (COPS) program and the Safe and Drug Free Schools and Community Act, a SRO is a "career law enforcement officer, with sworn authority, deployed in community-oriented policing, and assigned by the employing police department or agency to work in collaboration with schools and community-based organizations." 42 U.S.C. § 3796dd-8(4) (2012); 20 U.S.C. § 7161 (2012) (repealed 2015). SROs typically are sworn police officers employed by the police department and assigned to work in schools full-time, but in larger jurisdictions such as Los Angeles or Houston, SROs might be employed by the school districts. *See* CATHERINE Y. KIM & INDIA GERONIMO, ACLU, POLICING IN SCHOOLS: DEVELOPING A GOVERNANCE DOCUMENT FOR SCHOOL RESOURCE OFFICERS IN K–12 SCHOOLS 5 (2009).

overall movement towards criminalizing school discipline.[320] In the late 1970s there were fewer than one hundred police officers in our public schools,[321] but this number grew significantly in the years that followed. According to the Bureau of Justice Statistics' Law Enforcement Management and Administrative Statistics survey, in 1997 there were approximately 12,300 SROs employed by local law enforcement agencies nationwide.[322] In 2003, the number of full time SROs jumped to a high of 19,900.[323] In 2007, the number of SROs dropped slightly to 19,088.[324]

Figure 34. Security Presence in Schools % Students of Color[325]



*Students of color = combined Black, Hispanic, ASPI AIAN

320. *See* JAMES & MCCALLION, *supra* note 318, at 21–22; RAYMOND, *supra* note 318, at 1; Krezmien et al., *supra* note 122, at 275; Theriot, *supra* note 310, at 281.

321. *See* Brady et al., *supra* note 316, at 457; Hirschfield & Celinska, *supra* note 318, at 1.

322. JAMES & MCCALLION, *supra* note 318, at 19.

323. *Id.*; *see also* Theriot, *supra* note 310, at 281 ("While it is difficult to know the exact number of school resource officers, it is estimated that there might be more than 20,000 law enforcement officers patrolling schools in the United States.").

324. JAMES & MCCALLION, *supra* note 318, at 5 fig.1.

325. SIMONE ROBERS ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF EDUC., INDICATORS OF SCHOOL CRIME AND SAFETY: 2014, at 162 tbl.20.3 (2014), http://nces.ed.gov/pubs2015/2015072.pdf.

Security = security guard, security personnel, School Resource Officers (SROs), or sworn law enforcement officers who are not SROs

SRO programs vary from state to state, county to county, and even district to district.[326] In some states and counties, police agencies assign SROs to schools, either by request of school district officials or by the police agencies.[327] In a handful of states, school districts have the authority to create school district-run police departments.[328] SRO programs are very expensive.[329] A rough estimate of the cost of employing 19,088 full time SROs is almost $619 million a year.[330] To put an SRO in every public school, as some recommend, would cost approximately $3.2 billion each year.[331] Despite this high cost, federal and state governments have encouraged the use of law enforcement and other strict security measures in schools by passing laws granting money for these purposes. For example, the U.S. Department of Justice Community Oriented Policing Services (COPS) program and the Safe and Drug-Free Schools and Communities Act have provided millions of dollars for law enforcement, metal detectors, surveillance cameras, and other deterrent and security measures in schools.[332] Several states also have their own programs to fund

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326. *See* Ben Brown, *Understanding and Assessing School Police Officers: A Conceptual and Methodological Comment*, 34 J. CRIM. JUST. 591, 592 (2006); THE COUNCIL OF STATE GOV'TS JUSTICE CTR., OFFICERS IN SCHOOLS: A SNAPSHOT OF LEGISLATIVE ACTION 1 (2014) [hereinafter A SNAPSHOT OF LEGISLATIVE ACTION], http://csgjusticecenter.org/wp-content/uploads/2014/03/NCSL-School-Police-Brief.pdf.

327. *See* Brown, *supra* note 326, at 592; A SNAPSHOT OF LEGISLATIVE ACTION, *supra* note 326, at 1–2.

328. *See* Brown, *supra* note 326, at 592; A SNAPSHOT OF LEGISLATIVE ACTION, *supra* note 326, at 1–2; *see also* KIM & GERONIMO, *supra* note 319, at 5 (explaining that SROs are sworn police officers typically employed by the police department and assigned to work in schools full-time, but in larger jurisdictions such as Los Angeles or Houston, SROs might be employed by the school districts).

329. JAMES & MCCALLION, *supra* note 318, at 20.

330. *Id.*

331. *Id.* The average minimum salary for an entry-level police officer is $32,412. *Id.*

332. *See* 20 U.S.C. §§ 7115(b)(2)(E)(ii), (vi) (2012) (authorizing funding for metal detectors, electronic locks, surveillance cameras, and SROs); JAMES &

these strict measures in schools, even prior to the Newtown shootings.[333]

Although lawmakers, police departments, and school officials expanded SRO programs to enhance school safety in the wake of rising juvenile crime rates and high-profile school shootings,[334] the programs were largely unevaluated and may have the opposite effect.[335] According to a recent Congressional Research Service Report,

> The body of research on the effectiveness of SRO programs is limited, both in terms of the number of studies published and the methodological rigor of the studies conducted. The research that is available draws conflicting conclusions about whether SRO programs are effective at reducing school violence. In addition, the research does not address

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MCCALLION, *supra* note 318, at 7–8; OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUST., 2011 SECURE OUR SCHOOLS PROGRAM 1, http://www.cops.usdoj.gov/pdf/2011AwardDocs/CSPP-SOS-CHP/SOSMethodology.pdf.

333. *See, e.g.*, ALA. CODE § 41-15B-2.2(b)(2)(a) (2012); GA. CODE ANN. § 20-2-1185(b) (West 2012); 24 PA. STAT. § 13-1302-A(c) (West 2012).

334. *See* JAMES & MCCALLION, *supra* note 318, at 10–11; RAYMOND, *supra* note 318, at 5; Brown, *supra* note 326, at 591; Theriot, *supra* note 310, at 280. In 2002, the U.S. Department of Justice sponsored a survey of school principals nationwide to ascertain the reasons why schools established SRO programs. *See* LAWRENCE F. TRAVIS III & JULIE K. COON, CTR. FOR CRIMINAL JUSTICE RESEARCH, THE ROLE OF LAW ENFORCEMENT IN PUBLIC SCHOOL SAFETY: A NATIONAL SURVEY (2005), https://www.ncjrs.gov/pdffiles1/nij/grants/211676.pdf. The responses were mixed. Principals indicated that "national media attention about school violence" (24.5%) and "disorder problems (e.g., rowdiness, vandalism)" (17.5%) were the reasons behind establishing the program. *Id.* at 85 tbl.6.1. Interestingly, the most common response was "other," which included reasons such as receiving a grant, "part of community policing," "part of a drug awareness program," "to improve school safety," and "to build relationships with students." *Id.* at 84. Only 3.7% of respondents indicated that the level of violence in the school was the reason for establishing an SRO program. *Id.* at 85.

335. *See* JAMES & MCCALLION, *supra* note 318, at 9; Brown, *supra* note 326, at 592 (observing that despite the enormous expense associated with SRO programs, it is not clear whether SROs enhance student safety); Theriot, *supra* note 310, at 280.

> whether SRO programs deter school shootings, one of the key reasons for renewed congressional interest in these programs.[336]

Absent evaluation, lawmakers and school officials expanded SRO programs despite the potentially harmful effects that SROs may have on the educational setting.[337] For example, strict security measures in and of themselves can harm the educational climate by alienating students and generating mistrust,[338] which, paradoxically, may lead to even more disorder and violence.[339]

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336. JAMES & MCCALLION, *supra* note 318, at 10–11; Theriot, *supra* note 310, at 280 ("Empirical evaluations of these various security strategies are limited, have varying levels of methodological rigor, and often report conflicting findings." (internal citations omitted)). Another summary of the research on the effectiveness of SRO programs states: "Studies of SRO effectiveness that have measured actual safety outcomes have mixed results. Some show an improvement in safety and a reduction in crime; others show no change. Typically, studies that report positive results from SRO programs rely on participants' perceptions of the effectiveness of the program rather than on objective evidence. Other studies fail to isolate incidents of crime and violence, so it is impossible to know whether the positive results stem from the presence of SRO programs or are the results of other factors." RAYMOND, *supra* note 318, at 8; *see also* Benjamin W. Fisher & Emily A. Hennessy, *School Resource Officers and Exclusionary Discipline in U.S. High Schools: A Systematic Review and Meta-analysis*, ADOLESCENT RES. REV., June 2015, at 217 (presenting results of meta-analyses on impact of SROs).

337. *See* Brown, *supra* note 326, at 592 (lamenting that such little attention has been devoted to measuring the impact SROs have on the school environment); Theriot, *supra* note 310, at 281 (observing that the research on SROs rarely discusses criminalization of school discipline or provided data about arrests).

338. *See* Paul Hirschfield, *School Surveillance in America*, *in* SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION 38, 46 (observing that strict security measures are "a frequent cause of disunity or discord within the school community"); Randall R. Beger, *The "Worst of Both Worlds": School Security and the Disappearing Fourth Amendment Rights of Students*, 28 CRIM. JUST. REV. 336, 340 (2003) (concluding that "aggressive security measures produce alienation and mistrust among students); *Ending the School-to-Prison Pipeline: Hearing Before the Subcomm. on the Constitution, Civil Rights & Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 1–4 (2012) (testimony of Edward Ward, Blocks Together, Dignity in Schools Campaign) (describing his school environment as "very tense," "antagonizing," and "dishearten[ing]," where "the halls were full with school security officers whose

Further, several empirical studies demonstrate that putting more SROs in school is associated with involving more students in the criminal justice system, even for low-level violations of school behavioral codes.[340] For example, examining restricted data from the U.S. Department of Education, Jason Nance found that a police officer's regular presence at a school significantly increased the odds that schools referred students to law enforcement for several lower-level offenses.[341] These findings held true even after taking into account other variables that might influence whether schools refer students to law enforcement such as general levels of criminal activity and disorder in the schools and neighborhood crime.[342] Matthew Theriot took advantage of a natural experiment in which

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only purpose seemed to be to serve students with detentions or suspensions"); *cf.* Tom R. Tyler & Lindsay E. Rankin, *Legal Socialization and Delinquency*, *in* THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE, *supra* note 256, at 361 (observing that "surveillance systems have deleterious effects on the social climate of groups because their use implies distrust, which decreases people's ability to feel positively about themselves, their groups, and the system itself").

339. *See* Clifford H. Edwards, *Student Violence and the Moral Dimensions of Education*, 38 PSYCHOL. SCHS. 249, 250 (2001) (stating that "intrusive strategies are likely to undermine the trust needed to build cooperative school communities capable of really preventing violence"); Pedro A. Noguera, *Preventing and Producing Violence: A Critical Analysis of Responses to School Violence*, 65 HARV. EDUC. REV. 189, 190–91 (1995) (observing that the "get tough" approach undermines school safety because coercive measures create mistrust and resistance among students); Matthew J. Mayer & Peter E. Leone, *A Structural Analysis of School Violence and Disruption: Implications for Creating Safer Schools*, 22 EDUC. & TREATMENT CHILD. 333, 350, 352 (1999) (finding that student disorder and student victimization were higher in schools using strict security measures); Steinberg, Allensworth, & Johnson, *What Conditions Support Safety in Urban Schools*, *supra* note 16, at 127–29 (finding that students and teachers reported lower levels of perceived safety in schools that had higher suspension rates, even after controlling for community and contextual variables).

340. *See* U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 37–38 (2015) [hereinafter DOJ FERGUSON], http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (finding that the Ferguson Missouri Police treated "routine discipline issues as criminal matters").

341. *See* Nance, *supra* note 82, at 35–47.

342. *See id.* (describing and analyzing this empirical study).

a school district in the southeastern United States assigned full-time SROs to schools residing within the city limits, but not to those outside the city limits.[343] Theriot found that schools with SROs were more likely to arrest students for lower-level offenses such as disorderly conduct than schools without SROs but not for more serious crimes.[344] In a very recent study, Emily Owens discovered that police jurisdictions that received federal grants to hire more SROs in schools learned about more crimes taking place in schools, and those law enforcement agencies were more likely to arrest students who commit crimes in schools.[345]

Perhaps the most significant challenge of having SROs in schools is that while SROs may be in schools primarily to enhance school safety, many SROs also become involved in student disciplinary matters that educators traditionally have handled and should continue to handle.[346] It is easy to see how this happens. Most SROs spend their time each day patrolling buildings and grounds, investigating complaints, minimizing disruptions, and maintaining order.[347] When SROs observe students being disruptive and disorderly, they intervene because they view this as one of their duties, even when those duties overlap with the traditional

343. *See* Theriot, *supra* note 310, at 282.

344. *Id.* at 284–85.

345. Emily G. Owens, *Testing the School-to-Prison Pipeline* 3–4 (Univ. of Pa. Dep't of Criminology, Working Paper No. 2015-5.1, 2015), https://crim.sas.upenn.edu/working-papers/police.

346. *See* Brown, *supra* note 326, at 591; *see also* DOJ FERGUSON, *supra* note 340, at 37–38.

347. *See* Theriot, *supra* note 310, at 281; JAMES & MCCALLION, *supra* note 318, at 2. According to the COPS program an SRO's duties include the following:

> (A) to address crime and disorder problems, gangs, and drug activities affecting or occurring in or around an elementary or secondary school; (B) to develop or expand crime prevention efforts for students; (C) to educate likely school-age victims in crime prevention and safety; (D) to develop or expand community justice initiatives for students; (E) to train students in conflict resolution, restorative justice, and crime awareness; (F) to assist in the identification of physical changes in the environment that may reduce crime in or around the school; and (G) to assist in developing school policy that addresses crime and to recommend procedural changes.

42 U.S.C. § 3796dd-8(4) (2012).

duties of school officials.[348] Furthermore, SROs apparently have the legal authority to intervene in almost all student disciplinary matters. For example, most states have criminal laws that prohibit assault, disorderly conduct, larceny, and disturbing the peace,[349] and several states have passed statutes that explicitly criminalize the disruption of school activities[350] or talking back to teachers.[351] Accordingly, if a student is involved in a scuffle with another student, talks back to a teacher, yells at another student, steals another student's pencil, or exhibits other types of poor behavior, SROs have legal authority to arrest that student, even a six-year old student who is throwing a temper tantrum.[352] Thus, in many schools, SROs have become the "new authoritative agents" of discipline.[353]

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348. Interestingly, the SRO handbook developed by COPS provides an example of an SRO who "once had to threaten to arrest a principal for interfering with a police officer in the performance of his duty when the administrator was physically barring [the SRO] from arresting a student," reminding SROs that they have the power to arrest students over the objections of school officials. PETER FINN ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., A GUIDE TO DEVELOPING, MAINTAINING, AND SUCCEEDING WITH YOUR SCHOOL RESOURCE OFFICER PROGRAM 51 (2005), http://www.popcenter.org/Responses/school_police/PDFs/Finn_et_al_2005.pdf.

349. *See, e.g.*, CAL. PENAL CODE § 241.1 (West 2014) (prohibiting assault); FLA. STAT. ANN. § 877.03 (West 2014) (prohibiting acts that breach the peace and disorderly conduct); N.Y. PENAL LAW § 155.05 (McKinney 2014) (prohibiting larceny); VA. CODE ANN. § 18.2-415 (West 2014) (prohibiting disorderly conduct).

350. *See* ARIZ. REV. STAT. ANN. § 13-2911 (West, Westlaw through 2016 Sess.); CAL. PENAL CODE § 415.5 (West 2010); FLA. STAT. ANN. § 871.01 (West 2014); MASS. GEN. LAWS ch. 272, § 40 (2014); NEV. REV. STAT. ANN. § 392.910 (West, Westlaw through 2015 Sess.); S.C. CODE ANN. § 16-17-420 (West, Westlaw through 2016 Sess.); S.D. CODIFIED LAWS § 13-32-6 (2014); TEX. EDUC. CODE ANN. § 37.123 (West 2014); WASH. REV. CODE ANN. § 28A.635.030 (West 2014); W. VA. CODE ANN. § 61-6-14 (West 2014).

351. *See* ARIZ. REV. STAT. ANN. § 15-507 (West 2009 & Supp. 2012); ARK. CODE ANN. § 6-17-106(a)(1)(A)–(C) (LexisNexis 2013); IDAHO CODE ANN. § 18-916 (West 2016); MONT. CODE ANN. § 20-4-303 (2011); N.D. CENT. CODE § 15.1-06-16 (2003).

352. *See* Bob Herbert, *6-Year-Olds Under Arrest*, N.Y. TIMES, Apr. 9, 2007, at A17 (reporting the arrest of a six-year-old student for throwing a temper tantrum at school).

353. Brown, *supra* note 326, at 591.

The problems with SROs handling student disciplinary issues are multifaceted. Whereas teachers and school officials have advanced academic credentials, receive training in child psychology, discipline, pedagogy, educational theory and practice, and are accountable to local school boards,[354] SROs are trained in law enforcement, have little or no training in developmental psychology or pedagogy, and may not be accountable to school boards.[355] Thus, an SRO's decision to arrest a student may be based on criteria that are wholly distinct from and even anathema to the best interests of the student or the school as a whole.[356] The anecdotal evidence of SROs mishandling student discipline problems abounds.[357] In its investigation of the Ferguson Missouri Police

354. This does not imply that teachers and school officials do not need more training in these areas. In fact, as previously noted, too many school officials and teachers rely too heavily on overly-punitive disciplinary methods. It is critical for school officials and teachers to become aware of and support using alternative methods to create safe, supportive learning environments. *See* Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, *supra* note 2.

355. Brown, *supra* note 326, at 591.

356. *Id.*; DOJ FERGUSON, *supra* note 340, at 8. Of course, this does not imply that educators or school officials always use their training well. In fact, over the last few decades many teachers and school officials have adopted a punitive mindset to discipline children that may also contribute to the Pipeline. *See supra* text and discussion at note 309.

357. *See* Kaitlin Banner, *Breaking the School-to-Prison Pipeline: New Models for School Discipline and Community Accountable Schools*, *in* A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 302–03 (describing events of SROs mishandling student disciplinary issues); SHAKTI BELWAY, S. POVERTY LAW CTR., ACCESS DENIED: NEW ORLEANS STUDENTS AND PARENTS IDENTIFY BARRIERS TO PUBLIC EDUCATION 4, 6 (2010), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC_report_Access_Denied.pdf; Nancy A. Heitzeg, *Criminalizing Education: Zero Tolerance Policies, Police in the Hallways, and the School-to-Prison Pipeline*, *in* FROM EDUCATION TO INCARCERATION: DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 11, 22 (Anthony J. Nocella II, Priya Parmar & David Stovall eds., 2014) (describing various incidents where students were arrested for minor offenses); ELORA MUKHERJEE, N.Y. CIVIL LIBERTIES UNION, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS 6, 14 (Phyllis Eckaus et al. eds., 2007), http://www.nyclu.org/pdfs/criminalizing_the_classroom_report.pdf (describing the arrests of students resulting from bringing cell phones to school and being late to class); DOJ FERGUSON, *supra* note 340, at 37–38; Sharif Durhams, *Tosa East Student Ar-*

Department, the United States Department of Justice recently determined the following:

> SROs' propensity for arresting students demonstrates a lack of understanding of the negative consequences associated with such arrests. In fact, SROs told us that they viewed increased arrests in the schools as a positive result of their work. This perspective suggests a failure of training (including training in mental health, counseling, and the development of the teenage brain); a lack of priority given to de-escalation and conflict resolution; and insufficient appreciation for the negative educational and long-term outcomes that can result from treating disciplinary concerns as crimes and using force on students.[358]

rested, Fined After Repeated Texting, MILWAUKEE J. SENTINEL, Feb. 18, 2009, at B8; Herbert, *supra* note 352, at A17; Ann M. Simmons, *High School Scuffle Exposes a Racial Rift*, L.A. TIMES (Oct. 11, 2007), http://articles.latimes.com/2007/oct/11/local/me-palmdale11; *Student Arrested for 'Passing Gas' at Fla. School*, NBCNEWS.COM, http://www.nbcnews.com/id/27898395/ns/us_news-weird_news/t/student-arrested-passing-gas-fla-school/#.VFlEEPnF98E (last updated Nov. 24, 2008); Thomas C. Tobin, *Video Shows Police Handcuffing 5-Year-Old*, TAMPA BAY TIMES (Apr. 22, 2005), http://www.sptimes.com/2005/04/22/Southpinellas/Video_shows_police_ha.shtml.

358. DOJ FERGUSON, *supra* note 340, at 38.

C. The Role of Implicit Bias and Related Unconscious Associations/Decisions[359]

A particularly alarming aspect of the school-to-prison pipeline is that certain groups of students, especially minority students, are disproportionately affected. At each juncture of the pipeline—from failing to receive a quality education, failing to graduate, being suspended or expelled, or being referred to law enforcement for violating a school rule and then on into the juvenile justice system—there are differences along group lines that are not readily explicable. The differences and disproportionalities discussed in this report are so well documented, so large, and so well known that one must question why the pattern has not yielded to change.

When one considers the statistical overview from a high level, it may sometimes be difficult to remember that these appalling numbers represent decision after decision point in the lives of individual students. Many—if not most—of the critical decisions impacting young people along the educational pipeline are discretionary individual decisions.[360] For the most part, these decisions will have been made by people acting in good faith—a teacher who recommends a student to take advanced courses in mathematics or science (or not); the school official who decided to suspend a student for disruptive behavior (or not); the special education team that classifies a child as emotionally disturbed (or not); the police officer who decides to arrest (or not); the prosecutor who decides to prosecute (or not); the judge who decides divert or detain; and so on. In these instances, it is hardly likely that the teacher explicitly thought, "Oh, J won't make it in school, he's Black;" or "Oh,

359. Some of this part is taken from Professor Redfield's work on the American Bar Association's *Achieving an Impartial Jury: Addressing Bias in Voir Dire and Deliberations* project, which can be viewed at http://www.americanbar.org/groups/criminal_justice/voir_dire.html, and from various of her presentations, all on file with the author. *See, e.g.*, Sarah E. Redfield, Professor of Law, Presentation to the Nebraska State Bar Association: Understanding Implicit Bias to Gain Justice & Equal Opportunity (Oct. 2015); Sarah E. Redfield & Bernice B. Donald, Joint Training to the Warren County Department of Human Services: Implicit Bias & the School-to-Prison Pipeline (May 2015); Sarah E. Redfield & Jason Nance, Joint Training to the Warren County Department of Human Services: Implicit Bias & the School-to-Prison Pipeline (May 2015).

360. *See supra* text and discussion accompanying notes 29–35.

let's call the police about K, he's ADHD and his family are Hispanic so we might as well get some help getting him out of here." It is unlikely that the police officer thought similarly and explicitly decided on these bases to arrest rather than call J or K's parents; it is even less likely that the judge was so motivated. It is hardly likely that any of these decision makers would consciously agree with these sentiments, in fact, the opposite.

If these explicit biases are not the reasons underlying the seemingly intractable data on disparity, then what are the reasons?[361] While there are several factors that may contribute to these disparities, if we accept as given that most educators and juvenile justice decision makers are acting in good faith when they *explicitly* exercise their discretion, then a possible explanation lies with *implicit associations* that influence their discretionary decisions. That is, as many researchers now agree, a primary cause of differential treatment is the implicit bias of decision makers.[362] This part of the report discusses the issues from this perspective.

Explicit bias is a preference deliberately generated and consciously experienced as one's own; implicit bias is an association or preference that is unconscious and experienced without awareness.[363] Implicit biases may well be dissociated from what we ac-

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361. This is not to say that explicitly held views are not part of the problem.

362. *See, e.g.*, van den Bergh et al., *supra* note 40, at 518; McIntosh et al., *supra* note 35, at 6 (explaining that conscious or unconscious bias is an important factor in the discipline gap); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1146–47 (2012) (explaining that individuals have nonconscious reactions to others that negatively influences their decisions and behaviors to those individuals); *see also* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1570 (2013) ("Despite our largely egalitarian attitudes and beliefs, social science research over the past decade has shown that a majority of Americans are implicitly biased against Blacks.").

363. *See* JERRY KANG, NAT'L CTR. FOR STATE COURTS, IMPLICIT BIAS: A PRIMER FOR COURTS 1 (2009), http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf. *See generally* NEUROSCIENCE OF PREJUDICE AND INTERGROUP RELATIONS 175 (Belle Derks, Daan Scheepers & Naomi Ellemers eds., 2013) ("Stereotypes are cognitive structures stored in memory that represent attributes associated with a social group.") (citation omitted). We use the implicit bias/association vocabulary here, but the vocabulary describing the brain's dual response mechanisms

tively and honestly believe.[364] When a teacher says that the boys will be better choices for the math team than the girls, that teacher is displaying an explicit bias; but when that teacher asserts he is selecting students for the team equitably, yet the team repeatedly is disproportionately male dominated, that teacher is likely displaying an implicit bias in selecting members.[365] When Jennifer Mendoza made baseball history as the first woman to call a nationally televised game, and a fan that "[n]o one wants to hear a women in the booth . . . [sic] I will not listen or watch those games she is on," that fan is expressing an explicit bias.[366] When an employer selects men over women based on names or pictures making gender clear, that employer is likely responding with implicit bias.[367]

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does vary. *See* Matthew D. Lieberman, *Reflective and Reflexive Judgment Processes: A Social Cognitive Neuroscience Approach*, *in* SOCIAL JUDGMENTS: IMPLICIT AND EXPLICIT PROCESSES 44 (Joseph P. Forgas et al. eds., 2003) (using reflexive/reflective or x/c); DANIEL KAHNEMAN, THINKING, FAST AND SLOW 13 (2011) (using fast/slow and System1/System 2); Matthew D. Lieberman, *Research*, UCLA SOC. COGNITIVE NEUROSCIENCE LABORATORIES http://www.scn.ucla.edu/research.html (last visited Nov. 5, 2016). *See generally* PAMELA CASEY ET AL., AM. JUDGES ASS'N, MINDING THE COURT: ENHANCING THE DECISION-MAKING PROCESS (2012), http://aja.ncsc.dni.us/pdfs/Minding-the-Court.pdf (discussing terminology and approach).

364. *See* Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5–6, 15 (1989); Brian A. Nosek & Rachel G. Riskind, *Policy Implications of Implicit Social Cognition*, 6 SOC. ISSUES & POL'Y REV. 113, 128–29 (2012); Kate A. Ratliff & Brian A. Nosek, *Negativity and Outgroup Biases in Attitude Formation and Transfer*, 37 PERSONALITY & SOC. PSYCHOL. BULL. 1692, 1692 (2011); *see also* PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION app. B at B9–B14 (2012), http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx (cumulating references).

365. *See* Ernesto Reuben et al., *How Stereotypes Impair Women's Careers in Science*, 111 PROC. NAT'L ACAD. SCI. 4403, 4403 (2014) (showing that employers will choose a male employee over a female employee for a job requiring arithmetic skills even where actual task results show the female with better test scores).

366. Dominique Mosberger, *Jessica Mendoza Makes Baseball History, Prompting Sexist Backlash*, HUFFINGTON POST (Oct. 7, 2015, 5:57 AM), http://www.huffingtonpost.com/entry/jessica-mendoza-playoffs_5614d906e4b0cf9984d7a353.

367. *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Mar-*

It used to be the case that if we wanted to know a person's bias, we asked.[368] Not surprisingly, the answers, particularly in socially sensitive situations,[369] were often less than accurate, whether because we believe we are not biased, because we do not want those around us to know we think we may be biased, or because we do not know ourselves.[370]

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ket Discrimination, 94 AM. ECON. REV. 991, 991 (2004) ("White names receive 50 percent more callbacks for interviews."); Rhea E. Steinpreis, Katie A. Anders & Dawn Ritzke, *The Impact of Gender on the Review of the Curricula Vitae of Job Applicants and Tenure Candidates: A National Empirical Study*, 41 SEX ROLES 509, 509 (1999) ("Both men and women were more likely to vote to hire a male job applicant than a female job applicant with an identical record. Similarly, both sexes reported that the male job applicant had done adequate teaching, research, and service experience compared to the female job applicant with an identical record."); *see also* ARIN N. REEVES, COLORED BY RACE: BIAS IN THE EVALUATION OF CANDIDATES OF COLOR BY LAW FIRM HIRING COMMITTEES: THE 2015 UPDATE & SUMMARY OF DATA FROM 2005 (2015), http://www.nextions.com/wp-content/files_mf/144793674920151115ColoredbyRaceYPS.pdf ("Racial/ethnic minority candidates are also more likely to receive negative comments about their names, the lack of 'polish' in their overall appearance, and their 'comfort levels' in talking with people in the firm."); ARIN N. REEVES, WRITTEN IN BLACK & WHITE: EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS (2014), http://www.nextions.com/wp-content/files_mf/1446822647201404011 4WritteninBlackandWhiteYPS.pdf (discussing significant evaluation differences with blind evaluation of White names and African-American names on writing samples).

368. *See, e.g.*, John B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 91 (John Dovidio et al. eds., 1986); YO JACKSON, ENCYCLOPEDIA OF MULTICULTURAL PSYCHOLOGY 294 (2006) (discussing the Modern Racism Scale).

369. *See* David M. Amodio & Patricia G. Devine, *On the Interpersonal Functions of Implicit Stereotyping and Evaluative Race Bias: Insights from Social Neuroscience*, *in* ATTITUDES: INSIGHTS FROM THE NEW IMPLICIT MEASURES 193 (Richard E. Petty et al. eds., 2009); Adam R. Pearson et al., *The Nature of Contemporary Racial Prejudice*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 314, 324 (2009).

370. Willhem Hoffman et al., *A Meta-Analysis on the Correlation Between the Implicit Association Test and Explicit Self-Report Measures*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1369, 1376 (2005); Brian A. Nosek et al., *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, *in* SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES 265 (John A. Bargh ed., 2007) [hereinafter *IAT at Age 7*].

Asking measured explicit bias. Over the past twenty years, we have developed new approaches that can measure bias without asking directly. Now rather than ask, we measure bias by measuring reaction time (response latency) to paired stimuli, such as matching the word *male* with the name *Greg*, or *female* with *Emily*, as compared to *male* with *Emily*. These are automatic associations,[371] and they exist in many domains. The underlying theory in the research is that we will respond more accurately and quickly to associations that fit with our pre-formed mental templates or schemas, *female* with *Emily;*[372] that is, we respond more quickly to acquired associations that are largely involuntary.[373]

These automatic associations or implicit biases can now be reliably tested at an unconscious level.[374] The Implicit Association Test (IAT)[375] is the leading social science measure of this type of unconscious response.[376] There is a wealth of literature, including meta-analyses, on the IAT generally and on its relationship to ex-

371. *See, e.g.*, MAZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (2013).

372. PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/ (last visited Nov. 5, 2016). There are other implicit association tests available online such as fat/thin, elderly/young, skin color. *See About the IAT*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/iatdetails.html (last visited Nov. 5, 2016); Leslie Ashburn-Nardo, Presentation, The Implicit Association Test: Its Uses (and Potential Misuses) in Organizations, http://slideplayer.com/slide/4281514/ (last visited Nov. 5, 2016).

373. *See, e.g.*, Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 948 (2006); Brian Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes,* 18 EUR. REV. SOC. PSYCHOL. 36, 45 (2007) [hereinafter *Pervasiveness and Correlates*].

374. *See* Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 18–19 (2009); *Pervasiveness and Correlates*, supra note 373, at 36; STAATS, *supra* note 40, at 26 (summarizing review of reliability and validity).

375. *See* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464 (1998); Anthony G. Greenwald, *The Psychology of Blink: Understanding How Our Minds Work Unconsciously*, *Part 1 - 2008*, YOUTUBE (Nov. 26, 2013), https://www.youtube.com/watch?v=wA01Viu-P4U; PROJECT IMPLICIT, *supra* note 372.

376. *See generally* STAATS, *supra* note 40, at 24–26 (providing an overview of the IAT approach).

plicit bias and its value as a predictor of the same.[377] While most researchers support the IAT as an accurate measure of implicit bias,[378] the research is not unanimous.[379] Nevertheless, as the use of the IAT has increased, there has been an explosion of research in both social and neuroscience arenas concerning implicit bias,[380]

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377. *See, e.g.*, Amodio & Devine, *supra* note 369, at 193; Anthony G. Greenwald, Mazarin R. Banaji & Brian A. Nosek, *Statistically Small Effects of the Implicit Association Test Can Have Societally Large Effects*, 108 J. PERSONALITY & SOC. PSYCHOL. 553, 557 (2015); Greenwald et al., *supra* note 374, at 17; John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 39 (2009); *IAT at Age 7*, *supra* note 370, at 265; Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751, 751 (2006). *But see* H. Anna Han et al., *Malleability of Attitudes or Malleability of the IAT?*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 286, 298 (2010) (questioning influence of perspective on IAT results); Frederick L. Oswald et al., *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of IAT Criterion Studies*, 105 J. PERSONALITY & SOC. PSYCHOL. 171, 171 (2013) ("IATs were poor predictors of every criterion category other than brain activity, and the IATs performed no better than simple explicit measures."); Philip E. Tetlock & Gregory Mitchell, *Implicit Bias and Accountability Systems: What Must Organizations Do to Prevent Discrimination?*, 29 RES. ORGANIZATIONAL BEHAV. 3, 3 (2009) (questioning construct validity and reliability). *See generally* STAATS, *supra* note 40, at 24 (discussing the IAT approach).

378. *See, e.g.*, Emily L. Fisher & Eugene Borgida, *Intergroup Disparities and Implicit Bias: A Commentary*, 68 J. SOC. ISSUES 385, 396 (2012) ("Taken together, the research included in this terrific special issue represents a strong body of evidence in support of the claim that implicit biases are contributing to an understanding of ongoing real-world disparities. As such, we believe that implicit bias research will continue to play a crucial role in understanding and hopefully reducing these aggregate-level disparities as they surface in employment, legal, and health care domains.").

379. *See, e.g.*, *id.* at 393 (summarizing criticism and response to criticism and noting that "[r]egardless of any debate over IAT validity, the broader point that is often lost amidst the methodological and ideological cacophony is that considerable implicit bias research goes beyond the IAT and uses methods that have been regarded with less criticism. . . . [U]sing these types of techniques also finds that implicit bias predicts a variety of behavioral outcomes in intergroup domains"); Justine E. Tinkler, *Controversies in Implicit Race Bias Research*, 6 SOC. COMPASS 987, 987 (2012).

380. *See* Nancy Hopkins, Amgen, Inc. Professor of Biology at MIT, Baccalaureate Address at Boston University: Invisible Barriers and Social Change

and the social science is increasingly confirmed by neuroscience research.[381] For example, functional magnetic resonance imaging (fMRI) (evidenced by the higher blood oxygenation level throughout the brain)[382] of the amygdala (the part of the brain identified as involved with emotional reactions) has found activation response to be predictive of race bias when measured indirectly by the IAT even if not shown when measured explicitly by (self-reported) responses to the Modern Racism Scale.[383]

IAT results can be surprising and disturbing, perhaps particularly so for those who consider themselves egalitarian but whose IAT results show the typical American preferences for European American as compared to African-American, the abled as compared to the disabled, and for women with families as com-

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(May 18, 2014), http://www.bu.edu/news/2014/05/19/boston-universitys-141st-commencement-baccalaureate-address-nancy-hopkins/ (describing discovery of unconscious bias as one of greatest scientific discoveries of the past 50 years); Johanna Wald, Director of Strategic Planning, Charles Hamilton Houston Inst., Presentation at the Restorative Justice Conference: Implicit Racial Bias and the School-to-Prison Pipeline (Nov. 3, 2012) (using the explosion descriptor).

381. *See* Jennifer T. Kubota et al., *The Neuroscience of Race*, 15 NATURE NEUROSCIENCE 940, 944 (2012) (reviewing and cumulating the research finding "[a] network of interacting brain regions" including the Amygdala, dorsal anterior cingulate cortex (ACC), and fusiform gyrus, to be "important in the unintentional, implicit expression of racial attitudes and its control"); Lieberman, *Reflective and Reflexive Judgment Processes*, *supra* note 363, at 44; Damian Stanley et al., *The Neural Basis of Implicit Attitudes*, 17 CURRENT DIRECTIONS IN PSYCHOL. SCI. 164, 164–68 (2008) (summarizing the research to date on the function of the amygdala in relation to implicit automatic response); *see also* David M. Amodio et al., *Individual Differences in the Activation and Control of Affective Race Bias as Assessed by the Startle-Eyeblink Responses and Self-Report*, 84 J. PERSONALITY & SOC. PSYCHOL. 738, 738 (2003).

382. *See generally* Owen D. Jones et al., *Brain Imaging for Legal Thinkers: A Guide for the Perplexed*, 2009 STAN. TECH. L. REV. 5, ¶¶ 16, 18, 27, 31 (2009) (describing fMRI); Brian A. Nosek, *Implicit Social Cognition: From Measures to Mechanisms*, 15 TRENDS COGNITIVE SCI. 152, 152 (2011) [hereinafter *Measures to Mechanisms*] (describing Age of Measurement and various techniques).

383. David M. Amodio, *The Social Neuroscience of Prejudice: Then, Now, and What's to Come*, *in* STEREOTYPING AND PREJUDICE 1 (Charles Stangor & Christian S. Crandall eds., 2013) (discussing amygdala/fear response in relation to overriding implicit bias); Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729, 729 (2000).

pared to women with careers.[384] Surprising or not, these results can be connected with real world response: "Notably, implicit attitudes show predicative validity; the magnitude of preference exhibited on the test predicts a host of discriminative behaviors, from nonverbal avoidance to evaluating an individual's work."[385]

1. Acknowledging that prior intervention has not proven sufficient

Decades of study and calls for action have not removed concerns about disproportionality along the educational pipeline and in juvenile justice. The Coleman Report in 1966 on educational opportunity,[386] the two National Research Council reports on special education in 1982 and 2002,[387] and the National Coalition of State Juvenile Justice Advisory Groups Report on the Delicate Balance to the President, the Congress, and the Administrator of the Office of Juvenile Justice and Delinquency Prevention in 1989,[388] all identified the issue. These studies have been followed by study after study and call after call for action as disproportionality is identified and decried all along the school-to-prison pipeline.

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384. *See* discussion *infra* notes 400–403 and accompanying text.

385. Kubota et al., *supra* note 381, at 942; *see also* Allen R. McConnell & Jill M. Liebold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435, 440 (2001) ("[R]esearchers can be confident that attitudes assessed by the IAT do relate to intergroup behavior."); ANTHONY G. GREENWALD, IAT STUDIES SHOWING VALIDITY WITH "REAL-WORLD" SUBJECT POPULATIONS 5–6 (2012), http://faculty.washington.edu/agg/pdf/Real-world_samples.pdf; PROJECT IMPLICIT, *supra* note 372.

386. *Equality of Educational Opportunity Study*, *supra* note 96.

387. *See* NAT'L RESEARCH COUNCIL, PLACING CHILDREN IN SPECIAL EDUCATION: A STRATEGY FOR EQUITY ix–xii (Kirby A. Heller, Wayne H. Holtzman & Samuel Messick eds., 1982); NAT'L RESEARCH COUNCIL 2002, *supra* note 176, at 56; Lloyd M. Dunn, *Special Education for the Mildly Retarded, Is Much of It Justifiable?*, 35 EXCEPTIONAL CHILD. 5, 5 (1968); *see also, e.g.*, CHILDREN'S DEF. FUND OF THE WASH. RESEARCH PROJECT, SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN? 1 (1975), http://diglib.lib.utk.edu/cdf/data/0116_000050_000205/0116_000050_000205.pdf.

388. NAT'L COAL. OF STATE JUVENILE JUSTICE ADVISORY GRPS., A DELICATE BALANCE (1989), http://www.juvjustice.org/sites/default/files/resource-files/A%20Delicate%20Balance.compressed.pdf.

There have been legislative and regulatory responses. Discrimination on the basis of sex,[389] race,[390] or disability[391] is unlawful. Specific Congressional mandates define and address disproportionality concerns. IDEA[392] and the Juvenile Justice and Delinquency Prevention Act[393] specifically require monitoring and reporting on this very point; and NCLB's mandate on disaggregated data serves a similar purpose.[394] Although the nation stands publicly committed to equality and equity in educational opportunity

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389. *See* Title IX of the Education Amendments of 1972, 20 U.S.C.S. §§ 1681–88 (LexisNexis 2013) (prohibiting discrimination on the basis of sex under education programs or activities receiving Federal financial assistance); U.S. DEP'T OF JUSTICE, TITLE IX LEGAL MANUAL 5–6 (2001), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/ixlegal.pdf.

390. Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. §§ 2000d–2000d-7 (LexisNexis 2013) (prohibiting discrimination on the basis of race, color, or national origin under any programs or activities receiving Federal financial assistance); *see also* 28 C.F.R. § 50.3 (2014); 34 C.F.R. §§ 100.1–13 (2014). *See generally* U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL 1–2 (2001), https://www.justice.gov/sites/default/files/crt/legacy/2011/06/23/vimanual.pdf (describing relationship among the antidiscrimination provisions).

391. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.S. § 794 (LexisNexis 2013) (prohibiting discrimination against any "otherwise qualified individual with a disability" under Federal grants and programs); Title II of the Americans with Disabilities Act of 1990, 42 U.S.C.S. §§ 12131–12134 (LexisNexis 2013) (prohibiting discrimination on the basis of disability by public entities); *see also* 28 C.F.R. §§ 35.101, 39.101 (2014); 34 C.F.R. Part 104.1-61 (2014).

392. 20 U.S.C.S. § 1412(24) (LexisNexis 2014); 20 U.S.C.S. § 1416(a)(3)(C) (LexisNexis 2014); 20 U.S.C.S § 1418(d) (LexisNexis 2014). "The State [must have] in effect, consistent with the purposes of this title . . . policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment . . . ." 20 U.S.C.S. § 1412(24).

393. 42 U.S.C.S. § 5633(a)(22) (LexisNexis 2014) (requiring state plans to "address juvenile delinquency prevention efforts and system improvement efforts designed to reduce, without establishing or requiring numerical standards or quotas, the disproportionate number of juvenile members of minority groups, who come into contact with the juvenile justice system").

394. *See* 20 U.S.C.S. § 6301 (LexisNexis 2014).

and juvenile justice,[395] such government interventions, including related regulatory enforcement, have yielded change, but these approaches remain limited, costly, and, in some cases, controversial.[396]

Similarly, the extensive work of many public interest groups has proved extremely valuable. Still, that the data and research continues to show sustained and substantial inequality suggests that past explanations are inadequate and approaches insufficient.[397] A quick internet search on school improvement strategies to close the seemingly intransigent achievement gap[398] easily yields well over four million results including entries from leaders such as the NEA, the NAACP, and other organizations committed deeply and historically to these efforts.[399] A similar search for var-

395. *See generally* KIM ET AL., *supra* note 94, at 34–50 (providing an overview of unlawful discrimination); SAMUEL WALKER ET AL., THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA 26–29 (5th ed. 2011) (discussing continuum disparity to discrimination); Arne Duncan, Secretary, U.S. Dep't of Educ., Remarks on the 45th Anniversary of "Bloody Sunday" at the Edmund Pettus Bridge, Selma, Alabama (Mar. 8, 2010), http://www2.ed.gov/news/speeches/2010/03/03082010.html.

396. *See* DEAR COLLEAGUE LETTER, *supra* note 4; Comm. on Educ. and the Workforce, U.S. House of Representatives, Letter to Arne Duncan, Secretary, U.S. Dep't of Educ. & Eric Holder, Attorney Gen., U.S. Dep't of Justice (Feb. 12, 2014) (on file with author) (criticizing the Department's Dear Colleague Letter and preferring local interventions).

397. *See* Elizabeth N. Jones, *Disproportionate Representation of Minority Youth in the Juvenile Justice System: A Lack of Clarity and Too Much Disparity among States "Addressing" the Issue*, 16 U.C. DAVIS J. JUV. L. & POL'Y 155, 159 (2012) ("Interestingly, of the four 'core' areas of JJDPA concern, it is this section – the only one implicating race as a concerning factor – that has not produced results of consequence."); *see also* REFORMING JUVENILE JUSTICE, *supra* note 86, at 130, 205 (emphasizing the importance of fairness and perceived fairness).

398. *See, e.g.*, *Student Achievement in California: Statement on 2013 STAR Data*, EDUC. TRUST—WEST (Aug. 8, 2013), https://west.edtrust.org/press_release/student-achievement-in-california-ed-trust-west-statement-on-2013-star-data-2/ (finding no change in California scores).

399. Indeed, each of us knows of at least one school that beat the odds, one student who became a poster child for beating the odds; one program that can show results in terms of student success. The search also reveals an interesting trend toward programs that are focused not only on closing the achievement gap (academic) but also on closing cultural gaps.

ious aspects of the school-to-prison pipeline garners similar results. Reviewing the scope and history of these seemingly intransigent differences—setting after setting, decision after decision, outcome after outcome—is important background for offering a new approach to answer the question why change remains *so slow?*[400]

2. Summary of implicit bias research and its implications for the school-to-prison pipeline

The following summary of concepts of implicit bias research suggests how an understanding of implicit bias and its implications might offer a new approach for understanding and decreasing disproportionality in education and juvenile justice decisions:

- Implicit biases are measurable by social psychology and neuroimaging.[401]
- Implicit biases are "pervasive."[402]
- Implicit biases are different from what we self-report.[403]
- IAT results show high levels of implicit bias against the disabled *(*78% of the sample show a pro-abled implicit preference, 9% pro-disabled*)*.[404]
- IAT results show that women are more strongly associated with family and men more strongly with careers (75% of the

400. VIRGINIA VALIAN, WHY SO SLOW?: THE ADVANCEMENT OF WOMEN xi–xii (1999) (asking this very question and discussing women in academia but equally applicable to other settings).

401. *See* discussion *supra* notes 377, 381, and 383 and accompanying text.

402. PROJECT IMPLICIT, *supra* note 372.

403. *See* discussion *supra* note 370 and accompanying text.

404. PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/takeatest.html (click "I wish to proceed"; click "Disability IAT"; then proceed with test to see statistics) (last visited Nov. 5, 2016) (testing available that shows one's implicit biases against the disabled relative to others, with the statistics cited). While research concerning implicit bias in favor of the abled and against the disabled is less developed than the research on race, this is one of the strongest and widely held of biases. *See Pervasiveness and Correlates*, *supra* note 373, at 36; *see also* Mark E. Archambault et al., *Utilizing Implicit Association Testing to Promote Awareness of Biases Regarding Age and Disability*, 19 J. PHYSICIAN ASSISTANT EDUC. 20, 20–23 (2008) (discussing health care providers and suggesting a link between implicit bias and clinical decision making including IAT results for medical students biased toward abled).

sample show women-family preference, 9% women career preference).[405]

- IAT results shows that women are more strongly associated with liberal arts, and men more strongly with science (70% show men-science preference, 11%, a women-science preference).[406]
- IAT results show high levels of implicit bias against African-Americans (68% of the sample show a pro-White implicit preference, 14% pro-African-American).[407]

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405. PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/takeatest.html (click "I wish to proceed"; click "Gender-Career IAT"; then proceed with test to see statistics) (last visited Nov. 5, 2016) (testing available that shows one's implicit biases on gender relative to others, with the statistics cited).

406. PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/takeatest.html (click "I wish to proceed"; click "Gender-Science IAT"; then proceed with test to see statistics) (last visited Nov. 5, 2016) (testing available that shows one's implicit biases on gender relative to others, with the statistics cited). And these associations have impact on women's career pathways. *See* JOANN MOODY, RISING ABOVE COGNITIVE ERRORS: IMPROVING SEARCHES, EVALUATIONS, AND DECISION-MAKING (2010), http://huadvanceit.howard.edu/wp-content/uploads/2015/01/Moody-Article.pdf [http://web.archive.org/web/20150910050012/http:/huadvanceit.howard.edu/wp-content/uploads/2015/01/Moody-Article.pdf]; Sarah Redfield, Professor, Univ. of N.H., Presentation at UNH New Faculty Seminar: What You Don't Know Does(n't) Hurt You? (Feb. 2013); Lyneka Little, *Women Studying Science Face Gender Bias, Study Finds*, ABC NEWS (Sep 27, 2012), http://abcnews.go.com/blogs/business/2012/09/women-studying-science-face-gender-bias-study-finds/.

407. PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/takeatest.html (click "I wish to proceed"; click "Race IAT"; then proceed with test to see statistics) (last visited Nov. 5, 2016) (testing available that shows one's implicit biases on gender relative to others, with the statistics cited). The remaining percent score shows preference in neither direction. The bias is more dominant in White test takers, but some Blacks also show pro-White results, though in a more nuanced way. Project Implicit reports that:

> Data collected from this website consistently reveal approximately even numbers of Black respondents showing a pro-White bias as show a pro-Black bias. Part of this might be understood as Black respondents experiencing the similar negative associations about their group from experience in their cultural environments, and also experiencing competing positive associations about their group based on their own group membership and that of close relations.

FAQs, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/demo/

- Implicit biases are sensitive to being primed.[408]
- Implicit biases may "become activated automatically, without a person's awareness or intention, and can meaningfully influence people's evaluations and judgments."[409]
- Implicit biases are often dissociated from what a person actively and honestly believes or endorses.[410]
- But are not necessarily dissociated from—indeed often predictive of—explicit action or decisions.[411]
- Implicit bias may cause some youth to seem more threatening than others.[412]
- Implicit biases are more prevalent in ambiguous situations.[413]
- Implicit biases can cause anxiety.[414]

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background/faqs.html#faq19 (last visited Nov. 5, 2016); *see also* Elizabeth A. Phelps, Julius Silver Professor of Psychology and Neural Science, N.Y. Univ., Presentation at the Macarthur Neuroscience and the Law Conference: Race Bias, Decisions, and the Brain (Apr. 27, 2013).

408. *See* Laurie A. Rudman, *Sources of Implicit Attitudes*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 79 (2004); *see also* Danielle M. Young et al., *Innocent until Primed: Mock Jurors' Racially Biased Response to the Presumption of Innocence*, PLOS ONE (Mar. 18, 2014), http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0092365. To better understand the concept of "priming," see KANEMAN, *supra* note 363, at 52–58.

409. *See generally* MASON D. BURNS ET AL., SELF-REGULATION STRATEGIES FOR COMBATTING PREJUDICE 3 (2016) (on file with author).

410. *See* discussion *supra* note 364 and accompanying text.

411. *See, e.g.*, *Measures to Mechanisms*, *supra* note 382, at 152.

412. Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1314 (2002) ("[M]ildly aggressive behavior [may be seen as more threatening] when it is performed by an African-American than when it is performed by a White person."). *See generally* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (describing the existence of an African-American/criminal stereotype as well-documented).

413. Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640, 640 (2003) (showing White observers are quicker to observe anger in ambiguously hostile African-American faces than in White); *see also* Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization*, 15 PSYCHOL. SCI. 342 (2004) (finding that hostility influences categorization of racially ambiguous faces).

414. Jacoby-Senghor et al., *supra* note 31, at 53.

- Implicit biases can cause misremembering.[415]

These errors are related not to consciously racist attitudes or preferences but to participants "systematically and implicitly mak[ing] stereotype-driven memory errors." (Levinson, Forgotten Racial Equality)

- Implicit bias reduces student academic performance.[416]
- Implicit bias is at play in discretionary situations and influences disciplinary and other youth related decisions.[417]

3. Summary of group dynamics research and its implications for the school-to-prison pipeline

415. *See* Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 596–97 (1976) (describing research involving viewing a video of an ambiguous shove where White observers were much quicker to call the shove violent where performed by a Black than by a White); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 394, 399–401 (2007) (finding that when participants read two short stories, with some participants assigned to the story with the protagonist with a typically African-American name, Tyronne, some to stories with a typically Hawaiian name, Kawika, and some to stories with typically White name, William, they recalled facts from the stories such that Tyronne and Kawika were more aggressive with fewer mitigating factors than William); *see also* Charles Ogletree et al., *Criminal Law: Coloring Punishment: Implicit Social Cognition and Criminal Justice*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 45 (Justin D. Levinson & Robert J. Smith eds., 2012).

416. *See* discussion *infra* notes 441–466 and accompanying text.

417. *See* discussion *supra* notes 28–35, 362 and accompanying text.

"[M]ere classification of people into social groups allows people to understand others with regard to one or a few main characteristics, such as their age, gender, social role, physical appearance, or relation to the self. One should not confuse the process of categorization, which facilitates the ability to think clearly, with the "cultural baggage" associated with these categories." (Eberhardt, Confronting Racism)

The findings on implicit bias are augmented by a second area of social science research, which considers group dynamics. We all are part of cultural groups, and cultural groups are one of the major categorization mechanisms that all humans use to process information.[418] Traits that define cultural groups include race, ethnicity, religion, gender, sexual orientation, national origin, family, or professional status.[419]

The following summary of concepts of group-oriented research suggests how an understanding of group dynamics and in-group preference might offer a new approach for understanding and decreasing disproportionality in special education and other education and juvenile justice decisions:

- Categorization of and preference for people based on group identity is a normal, fundamental process of the human brain.[420]
- Culture and cultural groups link to decision-making.[421]

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418. *See* ABA CRIMINAL JUSTICE SECTION, BUILDING COMMUNITY TRUST IMPROVING CROSS-CULTURAL COMMUNICATION IN THE CRIMINAL JUSTICE SYSTEM 12–25 (2010), http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/bctext.authcheckdam.pdf.

419. Culture is also described as shared meanings and shared language or representational communications. *See id.*

420. Galen V. Bodenhausen et al., *Social Categorization and the Perception of Social Groups*, *in* SAGE HANDBOOK OF SOCIAL COGNITION 311 (Susan T. Fiske & C. Neil Macrae eds., 2012).

421. Merlin Donald, *How Culture and Brain Mechanisms Interact in Decision Making*, *in* BETTER THAN CONSCIOUS? DECISION MAKING, THE HUMAN MIND, AND IMPLICATIONS FOR INSTITUTIONS 191, 191 (Christoph Engel & Wolf Singer eds., 2008) ("The human brain does not acquire language, symbolic skills, or any form of symbolic cognition without the pedagogical guidance of

- Our automatic group identification is significant.[422]
- We make connections when someone appears or is labeled a certain way.[423]
- We tend to prefer our own, no matter how we define our own.[424]
- Our response is influenced by our self-concept, which transfers to others like ourselves. Without conscious attention, we start with this assumption: If I am good and I am White, then White is good[425] . . . and you are White, then you are also good.[426]

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culture and, as a result, most decisions made in modern society engage learned algorithms of thought that are imported from culture.").

422. *See* Anthony G. Greenwald & Thomas F. Pettigrew, *With Malice Toward None and Charity for Some: Ingroup Favoritism Enables Discrimination*, 69 AM. PSYCHOLOGIST 669 (2014); Pettigrew & Tropp, *supra* note 377, at 751.

423. *See* HATTIE, *supra* note 29, at 291; Nayeli Y. Chavez-Dueña et al., *Skin-Color Prejudice and Within-Group Racial Discrimination: Historical and Current Impact on Latino/a Populations*, 36 HISP. J. BEHAV. SCI. 3 (2014); Thierry Devos & Mahzarin Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCHOL. 447 (2005); Charles W. Perdue et al., *Us and Them: Social Categorization and the Process of Intergroup Bias*, 59 J. PERSONALITY & SOC. PSYCHOL. 475, 478–79, 482–84 (1990).

424. Henri Tajfel, *Experiments in Intergroup Discrimination*, SCI. AM., Nov. 1970, at 96 (showing that group loyalty occurs even if factors that put you in a group are random and arbitrary, that is, the very act of categorization may be enough to create an in-group preference).

425. *See* Bertram Gawronski et al., *I Like It, Because I Like Myself: Associative Self-Anchoring and Post-Decisional Change of Implicit Attitudes*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 221 (2007); Laurie A. Rudman, *Social Justice in Our Minds, Homes, and Society: The Nature, Causes, and Consequences of Implicit Bias*, 17 SOC. JUSTICE RES. 129, 137 (2004).

426. It is not always thus. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 n.11 (1954) (referencing Dr. K. B. Clark's work studying the response of African-American children to White dolls about which he testified,

> [t]he conclusion which I was forced to reach was that these children in Clarendon County, like other human beings who are subjected to an obviously inferior status in the society in which they live, have been definitely harmed in the development of their personalities; that the signs of instability in their personalities are clear, and I think that every psychologist would accept and interpret these signs as such.

RICHARD KLUEGER, SIMPLE JUSTICE (1976)); Gordon J. Beggs, *Novel Expert Evidence in Federal Civil Rights Litigation*, 45 AM. U. L. REV. 1 (1995) (dis-

- In-group members (however defined) enjoy a presumptive advantage as to expectations and response.[427]
- Differences between groups are exaggerated and those in the out-group are viewed as worse, not as competent or warm as the in-group, more threatening.[428]
- The attitudes of one's group influence an individual group member's attitudes.[429] For example, if our fellow teachers have an association regarding certain groups of students, then we will likely follow suit.
- Group identification, or mismatch,[430] can impact a wide range of behaviors and decisions—placement, class participation, en-

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cussing social science evidence of African-American children's preference for White dolls); *see also* Emily Falk & Matthew B. Lieberman, *The Neural Bases of Attitudes, Evaluation, and Behavior Change*, *in* THE NEURAL BASIS OF HUMAN BELIEF SYSTEMS 71 (Frank Krueger & Jordan Grafman eds., 2013).

427. *See* Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143 (2004); Charles W. Perdue et al., *supra* note 423, at 478–79, 482–84 (explaining that we view in-group members as more competent, cooperative, confident, independent, intelligent, warmer, more affirming, tolerant, good-natured, sincere, and more concerned with group goals); Pettigrew & Tropp, *supra* note 377, at 751; *see also* Croft & Schmader, *supra* note 32, at 1143 (suggesting that differing in-category standards may result in higher grades from the out-group).

428. *See* Bodenhausen et al., *supra* note 420, at 317; Bernadette Park & Myron Rothbart, *Perception of Out-Group Homogeneity and Levels of Social Categorization: Memory for the Subordinate Attributes of In-Group and Out-Group Members*, 42 J. PERSONALITY AND SOC. PSYCHOL. 1051 (1982); *see also* Yael Granot et al., *Justice Is Not Blind: Visual Attention Exaggerates Effects of Group Identification on Legal Punishment*, 143 J. EXPERIMENTAL PSYCHOL. 2196 (2014).

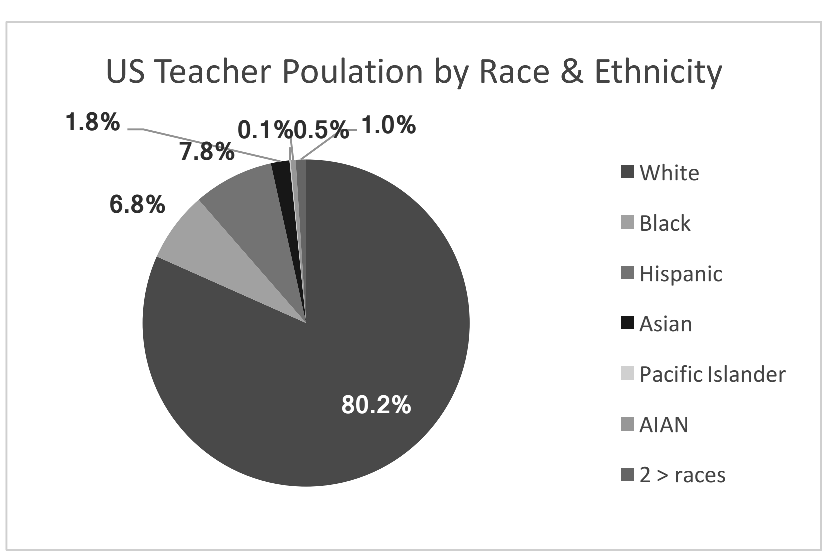
429. *See, e.g.*, *IAT at Age 7*, *supra* note 370, at 265.

430. *Compare* Littisha A. Bates & Jennifer E. Glick, *Does It Matter If Teachers and Schools Match the Student? Racial and Ethnic Disparities in Problem Behaviors*, 42 SOC. SCI. RES. 1180, 1182, 1187 (2013) (answering in the affirmative whether "teacher-student racial/ethnic matches result in evaluations of student behaviors that are different from instances in which children are taught and assessed by a teacher from outside their racial or ethnic group"), *with* Geert Driessen, *Teacher Ethnicity, Student Ethnicity, and Student Outcomes*, 26 INTERCULTURAL EDUC. 179, 188 (2015) ("The conclusion seems justified that there is as yet little unambiguous empirical evidence that a stronger degree of ethnic match be it in the form of a one-to-one coupling of teachers to students with the same ethnic background, or a larger share of minority teachers at an ethnically mixed school, leads to predominantly positive results. Insofar favora-

gagement, evaluation, referral for special education, discipline, and on along the pipeline.[431]

- There is particular significance in school and juvenile justice settings where the teaching and administrative force remains largely White and the population increasingly of color.[432]

Figure 35. U.S. Teacher Population by Race & Ethnicity[433]



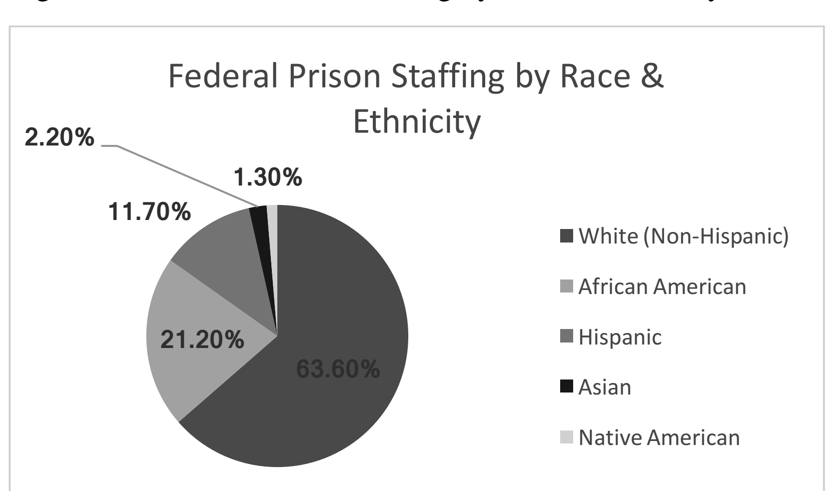
ble effects were found, they apply to a greater extent to subjective teacher evaluations than to objective achievement outcome measures.").

431. *See generally, e.g.*, WRITTEN IN BLACK & WHITE, *supra* note 367 (showing implicit bias in evaluation of law associate writing); Chris C. Goodman & Sarah E. Redfield, *A Teacher Who Looks Like Me*, 27 J. C.R. & ECON. DEV. 105 (2013) (discussing issues where teaching force differs from student body); Sarah E. Redfield & Theresa Kraft, *What Color is Special Education*, 41 J. L. & EDUC. 129 (2012).

432. *See* Bates & Glick, *supra* note 430, at 1188; Charles W. Perdue et al., *supra* note 423, at 478–79, 482–84; *see also* WILLIAM PETERS, A CLASS DIVIDED: THEN AND NOW (1987).

433. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 95, at 134 tbl.209.10.

Figure 36. Federal Prison Staffing by Race & Ethnicity[434]



4. Summary of micromessaging research and its implications for the school-to-prison pipeline

Group dynamics are reinforced then again by what we know about micromessaging. Like implicit bias and group dynamics, micromessages can involve implicit unconscious communications and results.[435] The following summary of micromessaging suggests how an understanding of these concepts might offer a new approach for understanding and decreasing disproportionality:

- Micromessages can be either affirming (conveying inclusion and respect, for example having your class contribution meaningfully acknowledged) or negative (conveying disrespect, for

434. *Staff Ethnicity/Race*, FED. BUREAU OF PRISONS (Aug. 27, 2016), http://www.bop.gov/about/statistics/statistics_staff_ethnicity_race.jsp.

435. They may also be explicitly racist. *See, e.g.*, Julio Cammarota, *Misspoken in Arizona: Latina/o Students Document the Articulations of Racism*, 47 EQUITY & EXCELLENCE EDUC. 321, 324 (citing as examples of explicit addressing an "African American young male by calling him 'boy,' or telling a student that he or she derives from a racial background in which 'intelligence' is an uncommon trait.").

example being ignored when you volunteer an answer in class).[436]

- If you are in my in-group, you are more likely to be the recipient of micro-affirmations than microinequities.[437]
- Once received, positive or negative, micromessages accumulate and influence behavior.[438]
- These messages can have power for the recipient and others. For example, when a person with higher status acknowledges someone, that acknowledgement influences others to also think better of the acknowledged person; the reverse is also true.[439]
- Micromessages can influence learning dynamics and interactions of youth with teachers and juvenile justice personnel.[440]

5. Putting Implicit together to understand the pipeline

Implicit bias, group dynamics, and micromessaging have obvious implications for teachers and others who deal with young people and the messages they send day in and day out, and for the students who receive them, also day in and day out. For example, consider a teacher who decides that a student's name is too hard to learn to pronounce so calls that student "Frank" (which is the

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436. *See, e.g.*, STEPHEN YOUNG, MICROMESSAGING: WHY GREAT LEADERSHIP IS BEYOND WORDS (2007); Dávila, *supra* note 27, at 458 (describing "disregard" as a microaggression).

437. *See* MOODY, *supra* note 406; Mary Rowe, *Micro-affirmations & Micro-inequities*, 1 J. INT'L OMBUDSMAN ASS'N 45 (2008); Mary Rowe, *The Saturn's Rings Phenomenon*, 50 HARV. MED. ALUMNI BULL. 14 (1975).

438. *See* Jennifer Wang, Janxin Leu & Yuichi Shoda, *When the Seemingly Innocuous "Stings": Racial Microaggressions and Their Emotional Consequences*, 37 PERSONALITY & SOC. PSYCHOL. BULL. 1666, 1666 (2011) (conflating microaggression and race bias); Caroline E. Simpson, Professor at Fla. Int'l Univ., Presentation Entitled: Accumulation of Advantage and Disadvantage or Nibbled to Death by Ducks (June 1, 2010), http://www.aas.org/cswa/MAY10/Simpson_UncBias.pdf; Alexandra Svokos, *College Campuses Are Full of Subtle Racism and Sexism, Study Says*, HUFFINGTON POST (Jan. 12, 2015, 5:22 PM), http://www.huffingtonpost.com/2015/01/12/microaggressions-college-racism-sexism_n_6457106.html ("[D]iscrimination, often manifested in what are called 'microaggressions,' creates unwelcoming environments and can be detrimental to academic performance . . . .").

439. VALIAN, *supra* note 400, at 4.

440. *See* discussion *infra* starting at note 442.

teacher's name) to the amusement of the rest of the class.[441] Or a teacher who only calls on certain students, or only continues a dialogue with certain students, and disregards others—sending a message both to those students who are engaged and to the rest of the class.[442]

When implicit bias and its correlates in group dynamics and messaging are read together with what we know about the delivery of public education and juvenile justice overall, the ramifications are obvious.[443] The teaching force, which is at least 83.5% White and 56% female (*in Special Education, 83.9% White and 72.5% female)*,[444] will *most likely* share the implicit biases shown by other Americans for White, abled, and women-and-families.

There is evidence[445] that these perceptions—again, albeit unintentional—will directly influence student outcomes,[446] particu-

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441. Rita Kohlia & Daniel G. Solórzano, *Teachers, Please Learn Our Names!: Racial Microaggressions and the K-12 Classroom*, 15 RACE ETHNICITY & EDUC. 441, 451 (2012).

442. *See, e.g.*, STACY A. HARWOOD ET AL., RACIAL MICROAGGRESSIONS AT THE UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN: VOICES OF STUDENTS OF COLOR IN THE CLASSROOM 1 (2015), http://www.racialmicroaggressions.illinois.edu/files/2015/03/RMA-Classroom-Report.pdf ("Over half of participants (51 percent) reported experiences of stereotyping in the classroom. About a third (27 percent) of the students of color reported feeling that their contributions in different learning contexts were minimized and that they were made to feel inferior because of the way they spoke. Additionally, a quarter (25 percent) of students of color reported feeling that they were not taken seriously in class because of their race."); Dávila, *supra* note 27, at 455 (describing low expectations as a form of microaggression); Goodman & Redfield, *supra* note 431, at 133–34 (discussing cumulative messaging).

443. *See* Chris C. Goodman, *Retaining Diversity in the Classroom: Strategies for Maximizing the Benefits that Flow from a Diverse Student Body*, 35 PEPP. L. REV. 663 (2008). *See generally* discussion *supra* notes 431–443 and accompanying text.

444. Snyder & Dillow, *supra* note 104, at 117 tbl.75.

445. *See* HARRY & KLINGNER, *supra* note 170, at 75–81; Skiba et al., *supra* note 170, at 264; Alvin Y. So, *Hispanic Teachers and the Labeling of Hispanic Students*, 71 HIGH SCH. J. 5, 7 (1987) (reviewing the High School and Beyond Study, U.S. Dep't of Educ. National Education Longitudinal Studies (NELS), and identifying both a differential attitude and differential treatment of Hispanic students by Anglo compared to Hispanic teachers).

446. *See, e.g.*, MARCOS PIZZARO, CHICANAS AND CHICANOS IN SCHOOL RACIAL PROFILING, IDENTITY BATTLES, AND EMPOWERMENT 240 (2005) ("Just

larly so for students of color and students with disabilities.[447] For example, Russell Skiba and his colleagues have found that "when the teacher thought the child was either black or Hispanic, he or she more often judged special education placement as appropriate compared with when the teacher believed the child was white."[448] Beth Harry and her colleagues found similarly that negative beliefs about African-American families are pervasive among educators and influenced special education evaluation in harmful ways.[449] A recent study by Drew Jacoby-Senghora, Stacey Sinclair, and Nicole Shelton demonstrated that increased anxiety and reduced student learning in White instructor/Black student situations are such that "instructors' implicit bias affects their lessons and their students' subsequent performance irrespective of instructors' explicit prejudice."[450] Another study by Linda van den Bergh and her colleagues in the Netherlands documents these very concerns and confirms, in an education setting, the significance of comparisons of implicit and explicit measures of bias.[451] This study of teachers and elementary students found that differential teacher expectations were related to the size of the ethnic achievement gap and to teachers' implicit prejudice, as measured on an IAT. Teachers showing greater biases "appeared more predisposed to evaluate their ethnic minority students as being less intelligent and having less promising prospects for their school careers."[452]

The teacher and societal perceptions highlighted by Jacoby-Senghor, van den Bergh, and others also have an indirect negative impact as a foundation for stereotypes turned inward as stereotype

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as the police often use racial profiles to determine who are potential criminals and who do not need to be pulled over, teachers use racial profiles to determine who will and who will not excel in school.").

447. LOSEN & GILLESPIE, *supra* note 12, at 35. *See generally* Jeffrey Stone & Gordon B. Moskowitz, *Non-Conscious Bias in Medical Decision Making: What Can Be Done to Reduce It?*, 45 MED. EDUC. 768 (describing underlying biased attitudes "leaking" to patients); STAATS, *supra* note 40, at 30–32 (reviewing and summarizing the relevant literature).

448. Skiba et al., *supra* note 170, at 264.

449. HARRY & KLINGER, *supra* note 170, at 75–81.

450. Jacoby-Senghor et al., *supra* note 31, at 53.

451. *See* van den Bergh et al., *supra* note 40, at 518.

452. *Id.*

threats.[453] Students know how they are perceived and labeled.[454] Young people perceive the unfairness inherent in these labels;[455] they understand the societal perceptions that create them and turn them inward in what is described as stereotype threat (or stereotype consciousness), a threat which can further negatively impact student performance.[456] A phenomenon first identified by psychologist Claude Steele and now well documented across a wide variety of groups,[457] stereotype threat describes the anxiety students expe-

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453. *See, e.g.*, Jacoby-Senghor et al., *supra* note 31, at 54 ("When anxiety and poorer lesson quality associated with instructors' implicit bias cause black students to perform worse, their relatively poor performance may trigger identity threats and belonging concerns that further diminish performance.").

454. *See* Michelle Fine et al., *Civics Lessons: The Color and Class of Betrayal*, 106 TCHRS. C. REC. 2193, 2204–05 (2004) (finding that students believed that their teachers considered them to be "animals," "inmates," or "killers"); Paul J. Hirschfield, *supra* note 115, at 92 ("Owing to a dominant image of black males as criminals and prisoners, many school authorities view chronically disobedient black boys as 'bound for jail' and 'unsalvageable.'"); Noguera, *supra* note 312, at 448 fig.1 (observing that African-American students were less inclined than White students to believe that their teachers were concerned about and supported them); *see also* EDUC. ALLIANCE, STUDENT VOICE: WEST VIRGINIA STUDENTS SPEAK OUT ABOUT THE ACHIEVEMENT GAP 62 (2004); EDUC. ALLIANCE, THROUGH DIFFERENT LENSES: WEST VIRGINIA SCHOOL STAFF AND STUDENTS REACT TO SCHOOL CLIMATE 39 (2006), http://www.academia.edu/290024/Through_Different_Lenses_West_Virginia_School_Staff_and_Students_React_to_School_Climate.

455. *See* discussion *supra* note 37 and accompanying text; *see also* Gregory et al., *supra* note 56, at 59; Sherry Marx, *Not Blending In: Latino Students in a Predominantly White School*, 30 HISP. J. BEHAV. SCI. 69, 69 (2008).

456. *See* CLAUDE M. STEELE, WHISTLING VIVALDI AND OTHER CLUES TO HOW STEREOTYPES AFFECT US (2010); Clark McKown & Rhona S. Weinstein, *The Development and Consequences of Stereotype Consciousness in Middle Childhood*, 74 CHILD DEV. 498, 498 (2003); PIZZARO, *supra* note 446; Barbara Schneider et al., *Barriers to Educational Opportunities for Hispanics in the United States*, *in* HISPANICS AND THE FUTURE OF AMERICA 188–89 (Marta. Tienda & Faith Mitchell eds., 2006); Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 614 (1997); Claude M. Steele, *Stereotyping and Its Threat Are Real*, 53 AM. PSYCHOLOGIST 680, 680–81 (1998).

457. *See, e.g.*, STEELE, *supra* note 456; Matt McGlone, *Stereotype Threat* (Oct. 14, 2008), https://itunes.apple.com/us/podcast/stereotype-threat-by-matt/id295430869 (summarizing research).

rience because of societal stereotypes (girls aren't good at math),[458] even where students do not believe the stereotype.[459] Girls' performance lessens as they worry about confirming the stereotypes about their group: *I am a girl, girls are not expected to be good at math, and this is a difficult math test*.[460] Like other aspects of disengagement, stereotype threat demonstrably lowers student achievement,[461] and may reduce student interest in a particular domain of study.[462] While research specifically on this point for special education remains to be developed, one can readily imagine the impact of race/ethnicity connections with the label of seriously emotionally disturbed or intellectually disabled.

De-biasing is possible and necessary; new training, debiasing tools, and system monitoring is called for.[463] Research continues to mount as to effective approaches to interrupt and suppress

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458. *See Laurel School's Center for Research on Girls*, LAUREL SCHOOL, https://www.laurelschool.org/page.cfm?p=625&LockSSL=true, (last visited Jan. 11, 2016).

459. *See, e.g.*, *id.*; McGlone, *supra* note 457.

460. *See What is Stereotype Threat?*, REDUCINGSTEREOTYPETHREAT.ORG, http://www.reducingstereotypethreat.org/definition.html (last visited Nov. 7, 2016).

461. *See* Nancy H. Murri et al., *Reducing Disproportionate Minority Representation in Special Education Programs for Students With Emotional Disturbances: Toward a Culturally Responsive Response To Intervention Model*, 29 EDUC. & TREATMENT CHILD. 779 (2006); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 808 (1995).

462. FREDERICK L. SMYTH ET AL., IMPLICIT GENDER-SCIENCE STEREOTYPE OUTPERFORMS MATH SCHOLASTIC APTITUDE IN IDENTIFYING SCIENCE MAJORS 1, 10 (2009), http://projectimplicit.net/nosek/papers/SGN2010gensci.pdf (reporting that "implicit stereotyping was more strongly related to majoring in STEM than was SAT-math performance," showing a "potent link between implicit stereotyping and scientific self-concept"). Perhaps even more concerning is their conclusion: "Remarkably, the negative correlation of implicit stereotyping with women's choices of STEM majors was as powerful for the most mathematically-able women as for the least." *Id.* at 8.

463. *See generally, e.g.*, BURNS ET AL., *supra* note 409, at 21–22; Patricia G. Devine et al., *Long-Term Reduction in Implicit Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267 (2012) (describing successful training).

reflexive responses in appropriate situations—de-biasing.[464] The research supports initiatives that train us to engage in more intentional and mindful reflection to avoid implicit biases at critical decision points.[465] This report recommends this training for decision makers all along the education and school-to-prison pipeline. Once de-biased, it is likely that our education system will look very different from the disproportional picture it presents today.

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464. *See, e.g.*, Devine et al., *supra* note 463, at 1267; Patricia G. Devine et al., *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations To Respond Without Prejudice*, 82 J. PERSONALITY & SOC. PSYCHOL. 835 (2002); Kerry Kawakami et al., *The Impact of Counterstereotypic Training and Related Correction Processes on the Application of Stereotypes,* 10 GROUP PROCESSES & INTERGROUP RELATIONS 139, 147 (2007) ("In general, the results of the present research support the hypothesis that correction is a deliberate and calibrated process that people use strategically to compensate for undesired external influence."). The research is still coming in on what may or may not be effective. For example, there is caution about potential "backlash" from use of the IAT. *See, e.g.*, Jacquie D. Vorauer, *Completing the Implicit Association Test Reduces Positive Intergroup Interaction Behavior*, 23 PSYCHOL. SCI. 1168 (2012) (finding that White participants' taking race-based IAT led to their non-White (Aboriginal) partners feeling less well regarded than after interactions after a non-race-based IAT); Jennifer K. Elek & Paula Hannaford-Agor, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making*, 49 CT. REV. 190 (2013) (suggesting that mock jurors who were given the implicit bias instruction responded to it in subtle ways although the instruction did not produce any backfire or harmful effect); Margo J. Monteith et al., *Schooling the Cognitive Monster: The Role of Motivation in the Regulation and Control of Prejudice*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 211 (2009) (discussing motivation); Jessi L. Smith, et al., *Now Hiring! Empirically Testing a Three-Step Intervention to Increase Faculty Gender Diversity in STEM*, 65 BIOSCI. 1084 (2015) (describing successful training regarding faculty STEM hiring).

465. *See, e.g.*, Smith et al., *supra* note 464; Tom R. Tyler et al., *The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement*, 16 PSYCHOL. SCI. PUB. INT. 75 (2015); Lorie Fridell & Sandra Brown, *Fair and Impartial Policing: A Science Based Approach*, POLICE CHIEF, June 2015, at 20–25; Jason P. Nance & Sarah E. Redfield, Clark County Training Presentation: Reversing the School-to-Prison Pipeline, (Dec. 10, 2015) (on file with authors); Jason P. Nance & Sarah E. Redfield, Warren County Training Presentation: Reversing the School-to-Prison Pipeline (May 29, 2015) (on file with authors).

What is needed is a commitment of resources to appropriate training to this end.[466]

6. New Response to the School-to-Prison Pipeline: A Focus on Implicit

Previous sections of the report reviewed implicit bias, group dynamics and micromessaging, all unconscious responses that often influence decisions in unintended ways and result in unintended results, thought by many to account in part for the disproportionalities identified. The differences in expectations and results previously discussed play out in specific arenas and cry out for individuation rather than group-triggered response.

It is easy to conceptualize how a White female educator or decision-maker, facing a decision involving disciplining a twelve year old African-American boy who was involved in a shoving incident finds herself in a context where race has been shown to matter (at least implicitly).[467] That White educator is more likely to implicitly respond negatively to him (than to a similarly situated White boy) based on implicit associations and group identification.[468] If she is in a poor, urban school with a majority of students of color, there are more likely to be School Resource Officers present.[469] She is more likely to call for help from the SRO than to send the boy to the principal's office or some lesser intervention.[470] When the SRO arrives he/she is likely to view the scene less favorably than he/she might for a White student, especially if the teacher

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466. *See, e.g.*, BURKE & NISHIOKA, *supra* note 85.

467. *See, e.g.*, discussion *supra* notes 415–417 and accompanying text; Eberhardt et al., *supra* note 412, at 876; Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526 (2014).

468. Michael J. Bernstein et al., *The Cross-Category Effect: Mere Social Categorization Is Sufficient To Elicit an Own-Group Bias in Face Recognition*, 18 PSYCHOL. SCI. 706, 706 (2007); *see also, e.g.*, 2 HANDBOOK OF SOCIAL PSYCHOLOGY (Susan T. Fiske et al. eds., 5th ed. 2010).

469. *See supra* Figure 34.

470. *See, e.g.*, discussion *supra* notes 38–39 and accompanying text; *see also* Granot et al., *supra* note 428, at 2196 (finding that where study participants "fixated frequently on outgroup targets, prior identification influenced punishment decisions").

labels the *offender* as a *troublemaker*.[471] As the incident proceeds along, it is also easy to see how misremembering might come into play and the behavior of the Black boy remembered as more aggressive.[472] And these first decisions will carry on along the pipeline, where this young student will more likely find himself arrested and detained.[473]

When these implicit dynamics are viewed in the context of the tremendous discretion at play along the pipeline, in decisions like this one and in so many others, including *discretionary* special education decisions, *discretionary* referral to law enforcement, *discretionary* arrest and detention, the critical role of the decision maker is obvious.[474] As one of the recent supplementary papers issued by the Disparity Collaborative summarizes:

> [T]here is clear evidence that children of color are punished more severely than White children for relatively minor, subjective offenses in schools. These are the very types of behaviors that require judgment and discretion by the decision-maker in determining punishment. There is also research that illustrates how the implicit biases or assumptions held by adults with decision-making authority lead to harsher treatment of Blacks than Whites for similar behaviors. Considered in tandem, these two sets of studies strongly suggest that implicit racial bias contributes to the differential treatment of children of color—particularly Black boys—in school settings.[475]

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471. *See* discussion *supra* note 423 and accompanying text.

472. *See, e.g.*, discussion *supra* note 415 and accompanying text.

473. *See* discussion *supra* pp. 48–49; *see also* Dara Lind, *Why Having Police in Schools Is a Problem, in 3 Charts*, VOX (Oct. 28, 2015, 12:10 PM), http://www.vox.com/2015/10/28/9626820/police-school-resource-officers.

474. *See, e.g.*, Decoteau J. Irby, *Net-Deepening of School Discipline*, 45 URB. REV. 197 (2013) (summarizing research); Kelly Welch & Allison Ann Payne, *Exclusionary School Punishment: The Effect of Racial Threat on Expulsion and Suspension*, 10 YOUTH VIOLENCE & JUV. JUST. 155, 165 (2012).

475. JOHANNA WALD, CAN "DE-BIASING" STRATEGIES HELP TO REDUCE RACIAL DISPARITIES IN SCHOOL DISCIPLINE?: A SUMMARY OF THE LITERATURE

That is, what we know about implicit associations and biases call for a pause in the process. Not every decision is one that calls for a stare not a blink, but some are. That the decision maker needs to be deciding without bias, explicit or implicit, is also critical. In its recent report on *Reforming Juvenile Justice*, the National Academies of Science highlighted the importance of addressing bias in discretionary decision-making for juvenile justice, though their conclusion is equally important to decisions further back on the school-to-prison pipeline:

> Because bias (whether conscious or unconscious) also plays some role, albeit of unknown magnitude, juvenile justice officials should embrace activities designed to increase awareness of unconscious biases and to counteract them, as well as to detect and respond to overt instances of discrimination. Although the juvenile justice system itself cannot alter the underlying structural causes of racial/ethnic disparities in juvenile justice, many conventional practices in enforcement and administration magnify these underlying disparities, and these contributors *are* within the reach of justice system policy makers.[476]

As the Academy suggests, it is in reach of decision makers to bring about change by becoming aware of the implicit aspects of their decisions and responding with conscious attention to the individual. One can now imagine a context where the decision makers have become aware of their implicit biases, where before the teacher calls for the School Resource Officer, she quickly asks herself, *Would I be doing this if this were Emily, a twelve-year-old white girl in my class?* Or where the SRO presence is minimal or not existent and the student is sent to the principal, who asks him/herself the same type of questions. Or if an SRO is called, he/she has been trained with a quick checklist of points to consider.

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2 (2014), http://www.indiana.edu/~atlantic/wp-content/uploads/2014/03/Implicit-Bias_031214.pdf.

476. REFORMING JUVENILE JUSTICE, *supra* note 86, at 7.

Or if the student is to be suspended, a lawyer or law student is present to represent him and so on down the line.

IV. OVERVIEW OF TOWN HALL MEETINGS

A. Background Information Provided for 2014-15 Town Halls

The issue: For too many of our young people, particularly those who are Black, Hispanic, American Indian, disabled, LGBTQ, and/or low-income, the education pipeline stands broken, and the doors to meaningful education remain closed. The problem is particularly acute in regard to students being pushed or dropping out of school, often into the juvenile or prison system—the so-called school-to-prison pipeline. Disproportionality—where certain racial or other groups are represented out of proportion to their student numbers—remains virtually unchecked in regard to academic achievement, discipline, suspension, and expulsion and in regard to certain special education categorizations and placements. The disproportionate minority contact in juvenile justice and delinquency matters is equally troubling. While the availability and visibility of data on pipeline issues is increasing, the problems have been known for decades and have been resistant to change.

The issues posed by the school-to-prison pipeline are a civil rights challenge for our society. The economics alone are enough reason to address it: students who drop out or are pushed out of school are disengaged first as students and then as citizens; they lose earning capacity; they become more dependent on welfare or join the expensive prison population. The U.S. spends an average of $12,296 per year per student while states' average per inmate cost is over twice that, $31,286;[477] and juvenile detention even higher, an estimated $88,000 per year.[478]

The goals: The Town Halls use the convening power of the ABA to host a series of national gatherings of key individuals and

477. *Fast Facts: Expenditures*, *supra* note 301; HENRICHSON & DELANEY, *supra* note 289, at 10 fig.4 (providing the average of the forty states reporting in the Vera Survey).

478. COSTS OF CONFINEMENT, *supra* note 298, at 4; *see also* DETENTION REFORM: A COST-SAVING APPROACH, ANNIE E. CASEY FOUND. (2007), http://www.aecf.org/work/juvenile-justice/jdai/ (estimating costs between $32,000 and $65,000).

organizations 1) to call particular attention to the role of the legal community in addressing pipeline issues; 2) to direct focus to the role implicit bias may play in these issues; 3) to recognize ongoing research and programmatic intervention and allow opportunity for networking to support replication of successful efforts; and 4) to develop an action plan to address the components of the school-to-prison pipeline dilemma.

The typical format: The Town Halls follow a proven format for engagement for change. The first hour features an expert panel drawn largely from the local area and led by two experienced ABA moderators. The panelists speak to the designated topic area and to their experience with pipeline programs and interventions. The second hour opens the program to the audience for questions, comments, and discussion. The formal program is followed by an informal networking opportunity, and, where possible, a reception hosted by local participants.

Within this framework, the Task Force held eight Town Hall meetings and a roundtable discussion during 2014 and 2015. The purpose of these meetings was to understand the causes and effects of the school-to-prison pipeline at different regions of the country, connect constituencies and individuals interested in reversing these negative trends, recognize ongoing research, discuss potential solutions, and showcase successful local programmatic interventions.

Introductory Note: Because we did not have court reporters at each Town Hall, we are unable to reproduce full testimony here, though all was considered in formulating the report's recommendations. The materials that follow provide a glimpse of what the expert panels offered during the Town Halls, but cannot begin to reflect the depth and breadth of knowledge experts brought to the sessions.

B. Chicago Town Hall Meeting – February 7, 2014

The inaugural Town Hall was convened at the ABA midyear meeting in Chicago to discuss issues posed by the school-to-prison pipeline. Entitled, "The School-to-Prison Pipeline: What Are the Problems? What Are the Solutions?" the Town Hall offered expert information on the nature of the problem, together with presentations of local Chicago leaders who have programs on the ground to help find solutions. Speakers provided an overview

of the problems associated with the school-to-prison pipeline; discussed the role that implicit bias plays in producing disparities relating to disciplining students; and discussed the role that lawyers can take to prevent more students from becoming involved in the justice system.

The first Town Hall aptly illustrated the convening power of the ABA and brought together an expert panel and an extraordinary audience (a standing room only crowd, almost all of whom stayed for the entire program). Those commenting and writing about the session[479] uniformly lauded the ABA's ability to connect people from different perspectives who came armed with varying solutions; they also praised the Town Hall emphasis on facilitating taking action and implementing real solutions at all levels. One example illustrates the potential here: Three law students traveled from New Orleans (sponsored by their deans at Tulane and Loyola) to talk about Stand Up For Each Other ("SUFEO"), where New Orleans law students represent K-12 students in suspension hearings; Chicago area law students attended as well, took these young people out for lunch, and started a conversation about replicating SUFEO in Chicago (which they did).

Speakers included:

- Julie Biehl, Professor, Children and Family Justice Center, Bluhm Legal Clinic, Northwestern University School of Law, Chicago, Illinois
- Nancy Hietzeg, Professor, Sociology and Critical Studies of Race and Ethnicity, St. Catherine University, St. Paul, Minnesota
- Justice Michael Hyman, Chair of the ABA Coalition on Racial and Ethnic Justice
- Mariame Kaba, Project NIA, Chicago, Illinois
- Sarah Redfield, Professor of Law Emerita, University of New Hampshire School of Law

479. *See* Monica Llorente, *Help Us Dismantle the School-to-Prison Pipeline*, ABA CHILDREN'S RIGHTS LITIG. (Apr. 10, 2014), https://apps.americanbar.org/litigation/committees/childrights/content/articles/spring2014-0414-dismantle-school-to-prison-pipeline.html.

- Robert Saunooke, Law Offices of Robert Saunooke, Miramar, Florida, and legal and policy advisor to the chairman, Seminole Tribe of Florida
- Wesley Sunu, Tribler Orpett & Meyer
- Dr. Artika Tyner, Community Justice Project, Clinical Faculty, Director of Diversity, University of St. Thomas Law School, Minneapolis, Minnesota
- Rev. Janette Wilson, National Rainbow PUSH Coalition, Chicago, Illinois

Selected points from the testimony:

- The problem is "our" fault, the fault of all adults in our community.
- The problem is a complex web of mass incarcerations, which is extremely difficult to exit.
- That children enter the web through an interaction with a police officer, which commonly occurs at school, is an improper role for police officers in Chicago schools.
- Currently in Chicago, two police officers are stationed within each Chicago school, and eighty-four percent of arrests occurring in these schools are for misdemeanor offenses.
- Reframing policing in schools is absolutely necessary.
- Reverend Wilson discussed the punitive environment that permeates many schools and maintained that we are "feeding bodies to the criminal system."
- Dr. Tyner maintained that we are depriving too many youth "of meaningful opportunities for education, future employment, and participation in our democracy."
- Ms. Kaba reminded participants that the school-to-prison pipeline is "almost a misnomer in some cases;" "we should really be talking about a community-to-prison pipeline or a cradle-to-prison pipeline. It starts even before young people enter the school building." She also observed that matters that school principals and counselors should handle are being handled by police.
- Professor Heitzeg observed that students are indirectly funneled into the justice system through suspension and expulsion

policies and directly routed through the growing number of police in schools.

- Mr. Saunooke pointed out that the lack of funding for education contributes the pipeline and observed that teachers, especially in schools that serve high concentrations of Native American students, rarely stay more than two or three years.
- Professor Biehl emphasized that students need to remain in school and that we should not revoke parole for students because they were not in school and incarcerate them, which inhibits their ability to obtain an education. Professor Biehl also debunked the myth that a juvenile's record is confidential. She maintained that a young person's record can be significant barrier to school reentry, employment, financial aid for college, and housing.
- Participants observed that to successfully interrupt the pipeline, schools must focus on ideas of community and cultural understanding.
- Participants identified numerous factors that pose a challenge to dismantling the school to prison pipeline, including implicit bias, funding, and related trends in education, but collective action beyond the dialogue is needed to achieve change.

"Before we push children into a criminal system, we need to push them into a loving setting that allows them to understand the consequence of negative behavior." Reverend Wilson.

C. Boston Town Hall Meeting – August 8, 2014

The second Town Hall was held at the annual ABA meeting in Boston. Speakers provided an overview of the problems and consequences of the school-to-prison pipeline. Again, it was an extraordinary panel of experts and an extraordinary audience. The panel and audience focused on the excellent on-the-ground programs in Massachusetts (including legislation and class action litigation on point); discussed the role implicit bias plays in producing disparities along racial lines; discussed the disproportionate effect that schools' current punitive policies and actions have on students

with disabilities, and discussed certain initiatives that organizations and schools in Massachusetts are taking to reverse these trends. As was the case in Chicago, after the Town Hall, speakers continued to engage in extended networking conversations on next steps.

Speakers included:

- Robert Fleischner, Assistant Director, Center for Public Representation, Northampton, Massachusetts
- Damon Hewitt, Senior Advisor, U.S. Programs, Open Society Foundations, New York, New York
- Mike Ortiz, Staff Counsel, Student Services, Lowell Public Schools, Lowell, Massachusetts
- Sarah Redfield, Professor of Law Emerita, University of New Hampshire School of Law
- Marlies Spanjaard, Director of Education Advocacy, The Ed-Law Project – Children's Law Center of Massachusetts and the Committee for Public Counsel Services, Boston, Massachusetts
- Wesley Sunu, General Counsel, Sentry Insurance a Mutual Company
- Judge Gloria Y. Tan, Middlesex County Juvenile Court, Massachusetts

Selected points from the testimony:

- While there has been some traction on aspects of school-based discipline, the conversation has to be more comprehensive and include discussions on class and race.
- Mike Ortiz, Staff Counsel for Lowell Public Schools, stated that the phrase "school-to-prison pipeline" is too narrow and argued that "community-to-prison pipeline" more accurately reflects the scope of the problem. Based on a high poverty level in a community, schools in that community will often encounter students with more emotional and learning disability issues than wealthier schools. As a result, poorer communities become further burdened when their schools are asked to do more but with less resources.
- Judge Tan, Middlesex County Juvenile Court, stated that when children are removed from their home, efforts must be made to

ensure they are able to attend and stay in their school of origin unless it is shown it is not in their best interest.

- Damon Hewitt, Senior Advisor for U.S. Programs, Open Society Foundations, articulated the depth and intransigency of the problem and highlighted that more school resource officers in schools are not the solution.
- Marlies Spanjaard, Director of Education Advocacy for The Edlaw Project, stated that of the districts where people found resource officers helpful, it was not in their arresting function but in their function as additional adults in school buildings. Since schools actually desire more adult presence in their buildings, the better choice is to hire more school counselors and fewer school resource officers.
- Robert Fleischner, Assistant Director for the Center for Public Representation, discussed the federal class action lawsuit against the city of Springfield, Massachusetts and the city's school system. The lawsuit raises concerns over the school system's public day programs, which are supposed to provide alternate pathways for students with disabilities. Bob added that the case claims that students are facing segregation in violation of the Americans with Disabilities Act. Because the ADA requires that public schools provide services in integrated environments, this segregated setting denies them equal educational opportunity.

D. Houston Town Hall Meeting – February 6, 2015

The third Town Hall meeting took place in Houston, Texas, in connection with the ABA's 2014 mid-year meeting. Speakers discussed the issues and consequences of the school-to-prison pipeline and local initiatives to reverse these trends.

Speakers included:

- Marilyn Armour, Director, The Institute for Restorative Justice and Restorative Dialogue, University of Texas, Austin, Texas
- Cynthia D. Mares, President, Hispanic National Bar Association
- Miner "Trey" P. Marchbanks, Texas A&M University, Public Policy Research Institute

- Wykisha McKinney, Child Health Outreach Program Manager, Children's Defense Fund Texas
- Pamela Meanes, President of the National Bar Association
- Mary Schmid Mergler, Director, School-to-Prison Pipeline Project, Texas Appleseed
- Sarah Redfield, Professor of Law Emerita, University of New Hampshire School of Law
- Wesley Sunu, General Counsel, Sentry Insurance a Mutual Company

Selected points from the testimony:

- Pamela Meanes, President of the National Bar Association, identified the school to prison pipeline as one of the many reasons for achievement gaps between black and white students. Ms. Meanes stated that it is in our collective interest to educate schools on how to fix this issue and discussed programs, such as the use of classical academies, which are schools that students have the option to attend as an alternative to jail. Unlike an alternative school, this is a "regular" school where students are engaged and educated. Additionally, the role of mentors in all fifty states, as well as programs conducted by Alpha Kappa Alpha, for example, have played a role in diverting students away from the justice system at an early age.
- Methods that schools can use to better handle disciplinary matters need to be identified to avoid the streamlined path into prison caused by swift referral of students to school police officers and the juvenile justice systems for catch-all offenses/Class C crimes.
- Dr. Armour, the Director of the Institute of Restorative Justice and Restorative Dialogue discussed the vast improvement that the "RJ Project" has produced in specific school districts. Ms. Armour stated that this new technique has reduced eighty-four percent of out of school discipline, as well as dropped tardiness by thirty-nine percent. By changing the school climate and shifting the focus on altering the punitive model, Ms. Armour explained that shifting the focus to building relationships, rather than punishing students, will halt the school to prison pipeline.
- Dr. Marchbanks, of the Public Policy Research Institute at Texas A&M, discussed the "Breaking School Rules" study,

which looked to individual, school level data for every student in the state of Texas in grades seven through twelve. Mr. Marchbanks explained that if a student is suspended in Texas, the state must be notified of the occurrence of, and reason for, the suspension. Further, school data was linked to the justice system, because each time a student was referred to the justice system, the state was made aware. The study found that sixty percent of students in Texas were suspended at least once, and while discrepancies were bad, even white students experienced a fifty percent suspension rate. Therefore, proper leadership and school policies are needed to mitigate the negative academic outcomes and increased social costs associated with suspensions.

- Cynthia Mares, President of the Hispanic National Bar Association, reported additional statistics on the school to prison pipeline. While discussing what is being done to solve this problem, Ms. Mares talked about groups that have come together to advocate as a community. Once such group is "Law School Sí Se Puede," which helps students gain acceptance into the law school of their choice by providing mentoring and funding for the LSAT.
- Wykisha McKinney, Child Health Outreach Program Manager of the Children's Defense Fund – Texas, further discussed the importance of sending students to counseling instead of funneling them straight to the juvenile justice system, which can be achieved through the creation of new codes, greater parental involvement in the classroom, and continued advocacy.
- Additionally, in her discussion of how to reduce the number of students who are entering into the school to prison pipeline, Mary Schmid Mergler, Director of the School to Prison Pipeline Project (Texas Appleseed), stated that internal drivers, as well as direct referrals to the juvenile justice system by school police, are forcing students into the pipeline. Ms. Mergler stated that school policing must be altered to decrease school arrests.
- This should not be the last discussion on how to solve the school to prison pipeline, as continued help with advocacy is needed to solve this problem in all states and school districts.

E. Washington, D.C. Town Hall Meeting—February 26, 2015

The fourth Town Hall occurred in the District of Columbia at Jones Day, in conjunction with the Criminal Justice Sections Collateral Consequences Summit. Speakers discussed issues of the pipeline from a national perspective, focusing on the disproportionate effects of disciplinary policies on students of color and students with disabilities and the role of federal policy and interventions.

Speakers included:

- The Honorable Bernice Donald, 6th Circuit Court of Appeals & incoming Chair Criminal Justice Section of the ABA
- Renee Wolenhaus, Deputy Chief, Educational Opportunities Section, Civil Rights Division, Department of Justice
- Lara Kaufmann, Senior Counsel & Director of Education Policy for At-Risk Students, National Women's Law Center
- Dawn Sturdevant Baum, Senior Attorney Department of the Interior, Indian Education Team Leader, Division of Indian Affairs, Office of the Solicitor
- William Alvarado Rivera, past President of the Hispanic Bar of the District of Columbia and Deputy Chief Counsel, U.S. Department of Health and Human Services
- Barbara R. Arnwine, President & Executive Director of the National Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee)
- Kristin Harper, Special Assistant, Office of Special Education and Rehabilitative Services, U.S. Department of Education
- Sarah Redfield, Professor of Law Emerita, University of New Hampshire School of Law, Moderator

Selected points from the testimony:

- Highly punitive measures do not improve safety nor do they improve performance.
- Lara Kaufmann observed that our failure to address issues in students such as trauma leads to students acting out and that we need to train educators better to understand the role implicit bias plays in disproportionalities associated with student discipline.
- William Rivera, Deputy Chief Counsel of the Office of General Counsel at the U.S. Department of Health and Human Services,

provided data indicating that the disproportionate use of discipline starts early in pre-schools. As a solution to pre-school expulsion, he recommended that pre-schools use Positive Behavioral Intervention & Supports (PBIS) instead of expelling these students.

- Barbara Arnwine reminded participants that Minneapolis School District dramatically reduced its student suspension rate by placing a moratorium on suspending students in early grades, having higher-level school administrators review suspensions and expulsions of students, and reducing the police presence in the schools.
- Kristen Harper maintained that when students are incarcerated, that we must educate them better, focusing on improving their reading skills. This will ease the transition back into society upon their release.

F. Arizona State University Town Hall Meeting – March 27, 2015

The fifth Town Hall meeting occurred at the Arizona State University Sandra Day O'Connor College of Law. It was held in connection with a symposium hosted by the Arizona State Law Journal and had a special focus on school-to-prison pipeline problems in Indian Country. This convening included both a Town Hall session and a research symposium, the papers from which will be published in the Arizona State Law Review.

Speakers included:

- Denise E. Bates, Interdisciplinary Studies and Organizational Leadership Faculty, College of Letters and Sciences, Arizona State University
- Bryan McKinley Jones Brayboy, Special Advisor to the President, Professor of Justice and Social Inquiry; Director, Center for Indian Education, School of Social Transformation, Arizona State University
- Nicholas Bustamante, M.S. student in Justice Studies and Social Inquiry
- Jeremiah Chin, Ph.D. and J.D. candidate, Research Associate, Center for Indian Education, Arizona State University
- Tiffani Darden, Associate Professor of Law, Michigan State University College of Law; Chair, AALS Education Law
- Philip S. (Sam) Deloria, Director, American Indian Graduate Center

- Patty Ferguson-Bohnee, Faculty Director, Indian Legal Program, Sandra Day O'Connor College of Law
- Sheri Freemont, Director, Family Advocacy Center, Salt River Pima-Maricopa Indian Community
- Leonard Gorman, Director, Navajo Nation Human Rights Commission
- Jenifer Kasten, Director of Public Policy, Decoding Dyslexia Arizona
- John Lewis, Former Executive Director, Inter Tribal Council of Arizona
- Dr. Laura McNeal, Assistant Professor of Law, Brandeis School of Law, University of Louisville
- Jason Nance, Associate Professor of Law, Associate Director of Education Law and Policy for the Center on Children and Families, University of Florida Levin College of Law
- Guenevere Nelson-Melby, Assistant Juvenile Public Defender, Pima County Juvenile Court
- Stephen Pevar, Senior Staff Attorney, American Civil Liberties Union, Racial Justice Program
- Claire Raj, Assistant Professor, Clinical Program, University of South Carolina School of Law
- Sarah E. Redfield, ABA Coalition on Racial and Ethnic Justice, University of New Hampshire School of Law
- Dr. Charles "Monty" Roessel, Director, Bureau of Indian Education
- Kenneth G. Standard, Board of Governors, American Bar Association
- Dr. Sabina E. Vaught, Associate Professor of Urban Education, Tufts University
- Malia Villegas, Director, Policy and Research, National Congress of American Indians
- Vanessa Walsh, J.D. candidate, S.J. Quinney College of Law
- Ron J. Whitener, Associate Judge, Tulalip Tribal Court; Affiliated Assistant Professor of Law, University of Washington School of Law
- Dorothy (Dottie) Wodraska, Director of Juvenile Transition, Maricopa County Education Services Agency.

Selected points from the testimony:

- As a result of their rural geography and concentration in medically underserved areas, Native students face unique health issues. Among these issues is toxic stress, a condition caused by adverse experiences in childhood that occur without the buffer of supportive relationships. To help address the effects of toxic stress, the panelists proposed federal policies that aim at fostering resilience.
- Native students are more likely to experience poverty.
- All these factors have led to a lack of academic achievement among Native students.
- Dr. Bryan Brayboy, President's Professor and Borderlands Professor of Indigenous Education and Justice in the School of Social Transformation at Arizona State University, made several recommendations, including preparing all teachers to work in, with, and for Native communities, re-prioritizing the school process for Native children, connecting Native languages and cultures in both curriculum and pedagogy, and funding these efforts at the same level we fund prisons.
- Guenevere Nelson-Melby, Assistant Juvenile Public Defender for Pima County Juvenile Court, discussed her participation in a taskforce that created a rubric to minimize law enforcement calls by schools. This rubric uses objective criteria in the form of a checklist model to determine when police involvement is necessary and seeks to reduce disproportionate minority contact throughout the juvenile criminal system. Based on preliminary numbers, this rubric has significantly decreased arrests throughout several school systems in Pima County.
- Dr. Charles Roessel, Director of the Bureau of Indian Education, discussed his undertaking of a major reform endeavor of the Bureau of Indian Education to create a school improvement agency.
- Sheri Freemont, Director of the Salt River Pima-Maricopa Indian Community Family Advocacy Center, discussed the SRPMIC Multi-Disciplinary Team (MDT) Model. She credits the model's success to the fact that it is applied to all incidents regardless of the severity of the incident. The MDT consists of core and secondary team members who meet biweekly for updates, training, and challenges, and meet at any time as needed for immediate needs.

G. New Orleans Town Hall Meeting – April 14, 2015

The sixth Town Hall meeting was held in conjunction with the Section of Litigation Annual Conference 2015 at Loyola University New Orleans College of Law. Speakers discussed the problems and consequences of the school-to-prison pipeline generally; specific problems associated with charter schools; and local initiatives that schools and organizations are taking to reverse these trends.

Speakers included:

- Christopher Bowman, Counselor to the District Attorney, Orleans Parish District Attorney's Office
- Nancy Degan, Chair, ABA Section of Litigation
- Robert Garda, Professor, Loyola University New Orleans College of Law, Moderator
- Meghan Garvey, Managing Director, Louisiana Center for Children's Rights
- The Honorable Ernestine S. Gray, Judge, Orleans Parish Juvenile Court
- Eden Heilman, Director, Southern Poverty Law Center
- Rosa K. Hirji, Attorney & Co-Chair, ABA Section of Litigation, Children's Rights Litigation Committee
- Diane Holt, Attorney, Columbia, South Carolina
- Rahsaan Ishon, Families and Friends of Louisiana's Incarcerated Children
- María Pabón López, Dean, Loyola University New Orleans College of Law
- Jason P. Nance, Levin College of Law, University of Florida
- Devan Petersen, Foster Youth Advocate, New Orleans
- Dana Peterson, Deputy Superintendent of External Affairs, Recovery School District, New Orleans
- Sarah Redfield, Professor of Law, Co-Chair, ABA Joint Task Force Reversing the School-to-Prison Pipeline, Moderator
- Student Leaders and Students, SUFEO, Stand Up For Each Other, New Orleans
- Rosie Washington, Executive Director, Micah Project, New Orleans
- Gina Womack, Families and Friends of Louisiana's Incarcerated Children, invited

Selected points from the testimony:

- Meghan Garvey, Managing Director of the Louisiana Center for Children's Rights, described the Louisiana Charter School System as a fractured system, citing lack of detailed oversight as one of the chief problems facing educators in Louisiana. Moreover, no centralized education office exists that is able to provide resources, such as mental health resources, to all the different schools.
- Eden Heilman, Managing Attorney from the Southern Poverty Law Center, outlined the various entry points into the pipeline and the factors that keep children trapped in the system. To address these issues, she suggested both legal and political strategies including individual client representation, filing administrative complaints to federal agencies, looking at the Individuals with Disabilities Education Act to address issues on a larger systems level, class action litigation, and using legislation and policy to effect change.
- Judge Ernestine S. Gray strongly believes students should get the full experience of being meaningfully engaged in school. She stated that if communities want to keep children from becoming arrested or becoming homeless, communities have to work harder to afford these children an education.

H. Honolulu Town Hall Meeting – April 18, 2015

The seventh Town Hall meeting took place in Honolulu, Hawai'i in conjunction with the ABA's Solo, Small Firm, and General Practice Division and the National Asian Pacific American Bar Association. Speakers discussed the school-to-prison pipeline program in Hawai'i, particularly with respect to native Hawaiians, specific programs in Hawai'i designed to reverse the negative trends, and sought to develop an action plan to address the unique components of this issue.

Speakers included:

- Carl Ackerman, Director, Clarence T.C. Ching PUEO Program, Punahou School
- Nancy J. Budd, Attorney, State of Hawai'i Board of Education
- Beth Bulgeron, Academic Performance Manager, Hawai'i State Public Charter Commission

- Kim Greeley, Attorney, COREJ, Honolulu, Hawai'i, Moderator
- Jenny Lee, Staff Attorney, Hawai'i Appleseed Center for Law and Economic Justice
- Justin D. Levinson, Professor, William S. Richardson School of Law, University of Hawai'i
- Kamaile Maldonado, Office of Hawaiian Affairs
- Mark Patterson, Warden, Hawai'i Youth Correctional Facility
- The Honorable Karen M. Radius, Founding Judge, Hawai'i Girl's Court
- Dr. Karen Umemoto Ph.D., Professor, University of Hawai'i at Manoa

Selected points from the testimony:

- Too many young people are having the doors to meaningful education closed because they are being pushed out of school and into the juvenile justice system.
- Consequently, these young people are being disengaged as citizens, thus creating a serious civil rights challenge for Hawaiian school districts and society as a whole.
- The shift toward punitive approaches to school discipline does not focus on the root of the problem, which for many native Hawaiians likely relates back to elements of colonialism and intergenerational trauma that has yet to cease.
- Statistics show severe disproportionate treatment of native Hawaiians in schools.
- Turning to the police for educational infractions compounds the problems. This gives a student a criminal mindset before that student ever has the chance to rehabilitate.
- Hawaiian law provides school administrators with a high level of discretion to assess disciplinary situations and impose punishment, which could be a positive factor in eliminating the school to prison pipeline if administrators are educated to use suspension as a last resort disciplinary tactic.
- Professor Levinson stated that the role of implicit biases and stereotype threat will always pose an issue, unless specific measures are taken to resolve these issues. Therefore, as Mr. Levinson discussed, it is necessary for us to understand how teachers and other students perceive students at a young age, and how these perceptions affect behavior.

- Judge Radius, referencing the Girl's Court, which she founded, emphasized the importance of gender-specific understanding re: delinquency. The Girl's Court provides open courtroom sessions and gender-specific programming for girls and their families. Her court has experienced great success in reducing runaways and arrests, as well as helped girls to receive diplomas, enroll in community college, obtain vocational training, become drug free, obtain employment, and mend troubled relationships with family.
- All panelists agreed that to best help students, each department must work together to provide comprehensive mental health care, family involvement, trauma informed care, culturally specific care, and gender specific care.

I. Miami Town Hall Meeting – May 14, 2015

The last Town Hall meeting for 2015 was held in Miami, Florida and hosted by the Wilkie D. Ferguson, Jr. Bar Association and The Law Center at Miami Dade College. Speakers discussed the problems associated with the school-to-prison pipeline generally; and issues and programs unique to Miami school districts.

Speakers included:

- Colleen Adams, Founder & Executive Director, Empowered Youth
- Leigh-Ann A. Buchanan, President, Wilkie D. Ferguson, Jr. Bar Association, Moderator
- Dwight Bullard, Florida State Senate
- Norman Hemming III, Special Counsel, Office of the United States Attorney, Southern District of Florida
- Ruth Jeannoel, Lead Organizer, Power U Center for Social Change
- Christopher Lomax, Associate, Jones Day
- Carlos Martinez, Public Defender, Miami-Dade County Office of the Public Defender
- Marvelle McIntyre-Hall, Law Center Director, Miami Dade College Wolfson Campus
- Arnold R. Montgomery, Administrative Director, Office of Educational Equity, Access, and Diversity, Miami Dade Public Schools

- Jason P. Nance, Associate Professor of Law & Associate Director for Education Law and Policy, Center on Children and Families, University of Florida Levin College of Law, Moderator
- The Honorable Orlando Prescott, Senior Administrative Judge, Eleventh Judicial Circuit Juvenile Division, Miami-Dade County
- Maurice Sikes, Sergeant, Coral Gables Police Department

Selected points from the testimony:

- A call to action is needed to reverse the school to prison pipeline.
- Miami is a unique educational environment, which ultimately calls for unique solutions to eliminate the school to prison pipeline. The role of community programs, such as Empowered Youth, is critical. Empowered Youth first enforces character and skill building, and second focuses on job development.
- The focus should be on programs that can give students the opportunity to be cared for and believed in, instead of on zero tolerance.
- Arnold Montgomery, Administrative Director of the Education Transformation Office of the Miami-Dade school system, maintained that zero tolerance policies in schools are not effective in deterring student misbehavior, as they "limit or remove access to experience opportunities to achieve success." Mr. Montgomery proposed that the solution to dismantling the school to prison pipeline includes three steps. First, schools must have codes of conduct that establish consequences, not punishment, which will balance the need for student safety while optimizing student success. Second, students and their families must be provided with learning opportunities that foster academic excellence, career pathways, and real world learning. Finally, the school district must "create a system of oversight, and build collaborative working relationships between municipal law enforcement agencies, and also juvenile justice systems."

J. Chicago Roundtable Discussion – July 31, 2015

This interactive roundtable discussion was presented via the American Bar Association Coalition on Racial and Ethnic Justice,

the Council for Racial and Ethnic Diversity in the Educational Pipeline and the ABA Criminal Justice Section. This program was part of the American Bar Association's 2015 Annual Meeting. The roundtable highlighted what we learned from the Town Hall meetings and focused on solutions that the ABA could support to reverse the negative trends.

Speakers included:

- Paulette Brown, President-Elect, American Bar Association 2014–2015
- Leigh-Ann Buchanan, Business Litigation Attorney; Incoming Chair, COREJ
- Patty Ferguson-Bohnee, Faculty Director, Indian Legal Program; Director, Indian Legal Clinic
- Dr. Nancy Heitzeg, Professor of Sociology, St. Catherine University; Co-Director, Interdisciplinary Critical Studies of Race/Ethnicity Program
- Craig Holden, President, California State Bar
- Sarah E. Redfield, Professor Emeritus, University of New Hampshire School of Law, Moderator
- Jessica Schneider, Staff Attorney, Educational Equity and Fair Housing Projects, Chicago Lawyers' Committee for Civil Rights Under Law
- Rev. Dr. Janette C. Wilson, Senior Advisor, Operation PUSH, Chicago, IL

APPENDIX A. SELECTED CURRENT LEGISLATIVE INITIATIVES

Legislation eliminating criminalizing student misbehavior that does not endanger others

Several states have undertaken reforms to reduce the severity of punishments for non-violent infractions. These measures have generally been enacted as part of repealing zero-tolerance policies that mandated suspension or expulsion for certain offenses. In 2013, **Oregon** repealed its zero-tolerance policy[480] and replaced it with a set of guidelines[481] that limit expulsions to "con-

480. H.B. 2192, 77th Leg., 2013 Reg. Sess. § 5 (Or. 2013).
481. *Id.* § 5(2)(a).

duct that poses a threat to the health and safety of students or school employees."[482] In 2009, **Florida** significantly amended its zero-tolerance policy[483] to clarify that the provision is "not intended to be rigorously applied to petty acts of misconduct."[484] The amendment also requires school boards to "[d]efine acts that pose a serious threat to school safety" and thus warrant the application of zero-tolerance.[485]

More sweeping legislation goes beyond the repeal of harsh punishment and prescribes alternative methods of discipline for student behavior that does not endanger others. Legislators in **Tennessee** and **Texas** are currently debating bills that would mandate alternative punishments and graduated disciplinary models for truancy offenses.[486] The **Florida** Senate is considering broader legislation that would prohibit schools from referring students to the criminal justice system for "petty acts of misconduct."[487] It would also require law enforcement officials to notify a school's administration of student arrests, thereby creating a barrier between student misconduct and the criminal justice system.[488]

Legislation eliminating the use of suspensions, expulsions, and referrals to law enforcement for lower-level offenses

Three states have taken concrete steps to reduce the use of suspensions and expulsions as a discipline strategy. In September 2014, **California** signed Assembly Bill 420, which eliminated "willful defiance" and "disruption of school activities" as a basis to

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482. *Id.* § 5(2)(b)(A).

483. S.B. 1540, 2009 Leg., 111th Reg. Sess. (Fla. 2009) (amending FLA. STAT. § 1006.13 (2015)).

484. FLA. STAT. § 1006.13(1) (2015).

485. *Id.* § 1006.13(2)(b).

486. H.B. 1349, 190th Gen. Assemb., Reg. Sess. (Tenn. 2015) ("As an alternative to criminal prosecution for education neglect, a school district shall adopt progressive truancy interventions . . . . [to] [m]inimize the need for referral to juvenile court."); H.B. 1490, 84th Legis., Reg. Sess (Tex. 2015) (introducing a "Progressive Truancy Intervention System" and requiring that systems adopted by school districts "must include at least three tiers of interventions").

487. S.B. 490, 2016 Leg., 118th Reg. Sess. (Fla. 2015). Existing law allows school boards to define "petty acts of misconduct." *See* FLA. STAT. § 1006.13(2)(c).

488. *See* S.B. 490, 2016 Leg., 118th Reg. Sess. (Fla. 2015).

expel students.[489] Further, Assembly Bill 420 also prohibits schools from using those reasons as a basis to suspend students enrolled in kindergarten through the third grade.[490] **Connecticut**,[491] **Louisiana**,[492] **and the District of Columbia**[493] have passed similar laws prohibiting the suspension or expulsion of young students. **Georgia**[494] and **Minnesota**[495] are considering such legislation during the current session. **Maryland** now requires school districts to adopt policies that impose certain requirements on schools before they can suspend or expel a student. For example, regarding suspensions of ten days or more or expulsion, the superintendent (or his designated representative) must investigate and approve the suspension and meet with the student's parents.[496] **Illinois** also passed significant reforms. Under a new law passed in 2015, suspensions of three days or less are allowed only if a student poses a threat to others or "substantially disrupts, impedes, or interferes with the operation of the school."[497] Suspensions longer than three days, expulsions, or transfers to alternative schools are only permitted if the student poses a threat or significantly disrupts

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489. *See* Assemb. B. 420, 2014 Leg., Reg. Sess. (Cal. 2014) (amending CAL. EDUC. CODE § 48900 (2015)); *see also* Susan Frey, *New Law Limits Student Discipline Measure*, EDSOURCE (Sept. 28, 2014), http://edsource.org/2014/new-law-limits-student-discipline-measure/67836.

490. *See* Cal. Assemb. B. 420.

491. Act of June 22, 2015, Pub. Act No. 15-96, 2015 Conn. Pub. Acts 96 (Conn. 2015) (prohibiting expulsion and out-of-school suspensions for students in grades pre-kindergarten through two).

492. S.B. 54, 2015 Leg., Reg. Sess. (La. 2015) (prohibiting the suspension or expulsion of students in grades pre-kindergarten through five).

493. Act of May 6, 2015, D.C. Act No. 21-50, 2015 D.C. Sess. Leg. Serv. 21-12 (D.C. 2015) (prohibiting the suspension or expulsion of pre-kindergarten students).

494. Too Young to Suspend Act, H.B. 135, 153rd Gen. Assemb., Reg. Sess. (Ga. 2015) (prohibiting the suspension or expulsion of pre-kindergarten and kindergarten students for most offenses).

495. S.F. 1001, 2015 Leg., 89th Sess. (Minn. 2015) (prohibiting the suspension, exclusion, or expulsion of students in grades pre-kindergarten through three).

496. MD. CODE ANN., EDUC. § 7-305(a)-(d) (West 2015).

497. 105 ILL. COMP. STAT. ANN. 5/10-22.6(b-20) (West 2015).

the learning environment, but only after other disciplinary options have been exhausted.[498]

Legislation to Support school policy and agreements that clarify the distinction between educator discipline and law enforcement discipline

State legislatures should require schools that rely on SROs to enter into written agreements or memorandums of understandings (MOUs), ideally before establishing an SRO program, to ensure that SROs and school officials understand that SROs and other law enforcement should not become involved in routine-discipline matters. There may be philosophical differences between school officials and SROs that must be addressed before SROs begin working inside schools.[499] This MOU should clearly delineate all actors' roles and responsibilities.[500] A report that evaluated nineteen SRO programs stated that "[w]hen SRO programs fail to define the SROs' roles and responsibilities in detail before—or even after—the officers take up the posts in the schools, problems are often rampant—and often last for months and even years."[501] The U.S. Department of Education, the American Civil Liberties Union, the Congressional Research Service, the National Association for School Resource Officers, and the United States Department of Justice.[502] Several states support the

498. *See id.*; *see also* Evie Blad, *New Illinois Law to Prompt Changes in Discipline Policies*, EDUC. WEEK (Sept. 8, 2015), http://www.edweek.org/ew/articles/2015/09/09/new-illinois-law-to-prompt-changes-in.html.

499. *See* JAMES & MCCALLION, *supra* note 318, at 11.

500. *Id.*; *see also* DOJ FERGUSON, *supra* note 340, at 37.

501. PETER FINN ET AL., NAT'L INST. OF JUSTICE, COMPARISON OF PROGRAM ACTIVITIES AND LESSONS LEARNED AMONG 19 SCHOOL RESOURCE OFFICER (SRO) PROGRAMS 2 (2005), http://files.eric.ed.gov/fulltext/ED486266.pdf.

502. *See* JAMES & MCCALLION, *supra* note 318, at 11; KIM & GERONIMO, *supra* note 319, at 5; RAYMOND, *supra* note 318, at 30; U.S. DEP'T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE 9–10 (2014), http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf; Lisa H. Thurau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y. L. SCH. L. REV. 977, 991 (2010).

use of MOUs if schools use SROs, including **Indiana**, **Texas**, **Maryland**, and **Pennsylvania**.[503]

Legislation requiring and providing financial support for training of SROs and police dealing with youth on appropriate strategies for LGBTQ students and students with disabilities.

In June 2015, **Texas** passed a law requiring the state's education commission to create a model training curriculum for SROs.[504] The legislature left the details of the training program to the commission, but it listed several objectives the curriculum must incorporate.[505] These objectives include "positive behavioral interventions and supports"[506] (PBIS), "restorative justice techniques,"[507] "de-escalation techniques and techniques for the limited use of force."[508]

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503. *See* IND. CODE § 20-26-18.2 (2013); MD. CODE ANN., EDUC. § 26-102 (West 2014); TEX. EDUC. CODE ANN. § 37.0021 (West 2013). Pennsylvania has several fairly thorough regulations in regard to memorandums of understanding between police departments and schools. *See* 22 PA. CODE § 10.1 (2012) (setting forth the state's intent to "maintain a cooperative relationship between school entities and local police departments"); 22 PA. CODE § 10.2 (2012) (defining memorandum of understanding); 22 PA. CODE § 10.11 (2012) (requiring each school administrator to "execute and update, on a biennial basis, a memorandum of understanding with each local police department having jurisdiction over school property of the school entity."); 22 PA. CODE § 10 app. A (2012) (providing a model memorandum of understanding).

504. Act of June 20, 2015, ch. 2684 (Tex. 2015) (codified as TEX. OCC. CODE ANN. § 1701.262 (West 2015)). The curriculum will also apply to "school district peace officers," defined by TEX. EDUC. CODE ANN. § 37.081 (West 2015). TEX. OCC. CODE ANN. § 1701.262(a)(3) (West 2015).

505. TEX. OCC. CODE ANN. § 1701.262(c) (West 2015).

506. *Id.* § 1701.262(c)(2).

507. *Id.*; *see* The Institute for Restorative Justice and Restorative Dialogue, *Restorative Discipline in Schools*, http://www.utexas.edu/research/cswr/rji/rdinschools.html (explaining the philosophy of restorative justice); *see also* Thalia N.C. González & Benjamin Cairns, *Moving Beyond Exclusion: Integrating Restorative Practices and Impacting School Culture in Denver Public Schools*, *in* JUSTICE FOR KIDS: KEEPING KINDS *OUT* OF THE JUVENILE JUSTICE SYSTEM 241, 241 (Nancy E. Dowd ed., 2011); González, *supra* note 92 (discussing use of restorative justice to repair harm and change behavior, enhance school safety, and improve graduation rates).

508. *Id.* § 1701.262(c)(3).

Proposed legislation in several states is also attempting to rectify uncertainty about the role of SROs. **Massachusetts** House Bill 335 would create a fund to train SROs in de-escalation strategies—"strategies such as restorative justice."[509] Similarly, **New Hampshire** House Bill 527 seeks to establish guidelines for SRO education, including at least forty hours of training in techniques like PBIS and restorative justice.[510] Additionally, a bill under consideration in the **Florida** Senate would both limit SROs' authority to arrest students and direct police and school authorities to develop minimum qualifications for the selection of SROs.[511]

Legislation supporting alternative strategies to address student misbehavior, including Restorative Justice

In May 2015, **Indiana** passed a law[512] to amend the parameters of the state's "Safe Schools Fund," which was created in 1995 with a focus on detecting crime with methods such as drug-sniffing dogs.[513] This year's amendment, in contrast, provides grants for programs designed "to improve school climate and professional development and training" through the development of "alternatives to suspension and expulsion; and . . . evidence based practices . . . [including] positive behavioral intervention and support, restorative practices, and social emotional learning."[514]

New education provisions in **Colorado**,[515] **Georgia**,[516] **Louisiana**,[517] **Maryland**,[518] and **Pennsylvania**[519] also recognize

509. H.B. 335, 2015 Leg., 189th Gen. Ct. (Mass. 2015).

510. H.B. 527, 2015 Leg., Gen. Ct. (N.H. 2015).

511. S.B. 490, 2016 Legis., 118th Reg. Sess. (Fla. 2015).

512. Act of July 1, 2015, Pub. L. No. 220, 2015 Ind. Acts. 220 (amending IND. CODE § 5-2-10.1-2 (2015)).

513. Act of July 1, 1995, Pub. L. No. 61, 1995 Ind. Acts 61; *see also* IND. CODE § 5-2-10.1-2(a)(1)(A) (2015).

514. IND. CODE § 5-2-10.1-2(a)(7). *See generally* OWEN ET AL. , *supra* note 46.

515. COLO. REV. STAT. ANN. § 22-32-144 (West 2015) ("Restorative justice practices—legislative declaration.").

516. GA. CODE ANN. § 20-2-741 (West 2015) ("Positive behavioral interventions and supports and response to intervention.").

517. LA. STAT. ANN. §§ 17:252(A)(2)(g), (D)(1) (2015).

518. MD. CODE ANN., EDUC. § 7-304.1 (West 2015) ("Positive Behavioral Interventions and Support Program").

the need to implement alternative strategies like PBIS and restorative justice techniques. However, prescriptions for change have not always been explicitly linked to state resources.

Alternative discipline is gaining support in other states as well. **Massachusetts**, for example, is considering a bill to create a three-year pilot "dropout prevention and recovery program" that would incentivize schools, through a competitive grant process, to implement "evidence-based" strategies, including "restorative justice and social service referrals."[520] Similarly, a **South Carolina** bill would create a "Restorative Justice Study Committee" with the aim of developing a pilot program much like the one being debated in **Massachusetts**.[521] **California** may also require schools to adopt "one or more research-based, whole school approaches, including . . . positive behavior intervention and support, restorative justice . . . [and] social-emotional learning."[522]

Washington seems likely to pass Senate Bill 5688, which would allow school districts to use existing funds to develop "multitiered systems of support frameworks [including] . . . positive behavior interventions and supports and social emotional learning."[523]

Legislation supporting continued and more detailed data reporting relating to school discipline and juvenile detention and disproportionality

Maintaining and reporting data about each aspect of the school-to-prison pipeline is a basic necessity for reform. This data need be sufficiently disaggregated as to reflect specific state or area conditions as well as national trends. As part of initiatives aimed at reducing exclusionary discipline and criminalization, states have started to require school districts and schools to report

519. PA. STAT. AND CONS. STAT. ANN. §§ 13-1302-A(c)(1), (c)(3) (West 2015).

520. H.B. 453, 2015 Leg., 189th Gen. Ct. (Mass. 2015).

521. H.B. 3239, 2015 Gen. Assemb., 121st Sess. (S.C. 2015) (Stop the School House to Jail House Pipeline Act).

522. S.B. 527, 2015 Leg., Reg. Sess. (Cal. 2015).

523. S.B. 5688, 64th Leg., Reg. Sess. (Wash. 2015) (as passed by S. Rules Comm. on Mar. 6, 2015); *see also* H.B. 2149, 64th Leg., Reg. Sess. (Wash. 2015).

detailed information about their disciplinary practices and outcomes.

A recent **Connecticut** law reining in the authority of SROs, discussed above, requires school boards to submit detailed disciplinary data, which the state department of education will examine and report annually.[524]

Several states are pushing for more comprehensive reviews of their schools' disciplinary outcomes. A proposed **Pennsylvania** resolution would initiate a thorough study of disciplinary policies at state schools and a review of other states' policies, ultimately establishing an advisory committee to recommend new legislation.[525] Likewise, an Indiana bill would repeal and replace the state's existing data reporting requirement with a more detailed one.[526] Based on the data collected under this new requirement, **Indiana**'s department of education would develop "a model evidence based plan for improving behavior and discipline within schools."[527] Additionally, in Louisiana, the state senate passed a resolution calling for the state's Board of Elementary and Secondary Education to study the effectiveness of PBIS programs as a means of reducing suspensions and expulsions.[528]

Connecticut has directed its department of education to disaggregate disciplinary data "by school, race, ethnicity, gender, age, students with disabilities, English language learners" and other categories.[529] In 2013, **Arkansas** amended its education code to provide for the collection of data on the "rate of disciplinary disparity" in its schools and to require school boards to implement corrective measures, including restorative justice techniques.[530] In the current session, a house bill under consideration in **North Carolina** would update the state board of education's reporting re-

524. H.B. 6834, 2015 Gen. Assemb., Jan. Sess., 2015 Conn. Pub. Acts 96 (Conn. 2015).

525. H.R. 540, 2015 Gen. Assemb., Reg. Sess. (Pa. 2015).

526. H.B. 1558, 2015 Gen. Assemb., Reg. Sess. (Ind. 2015).

527. *Id.*

528. S.R. 130, 2015 Leg., Reg. Sess. (La. 2015).

529. Act of July 1, 2015, Pub. Act No. 15-168, 2015 Conn. Pub. Acts 168.

530. ARK. CODE ANN. §§ 6-18-516(a)(3), (b), (e)(1)(B) (West 2015).

quirements to include data disaggregated by similar categories, with the express purpose of examining disproportionalities.[531]

Proposed legislation in other states would go further by mandating reductions in disciplinary disparities or by linking positive changes to funding incentives. For example, **Indiana**'s House Bill 1558, discussed previously,[532] would require the state's department of education to "develop criteria and guidelines for determining the existence of disproportionality in discipline."[533] It would also create "the positive discipline practices fund," under which schools could apply for grants "to assist in the reduction of disproportionality in discipline and to establish positive disciplinary practices."[534] Similarly, a **Washington** bill designed to implement "strategies to close the educational opportunity gap" would create a task force to investigate disproportionalities, design model disciplinary practices, and adapt faculty and staff training to incorporate those practices.[535]

531. H.B. 819, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015).
532. *See supra* note 526 and accompanying text.
533. H.B. 1558, 119th Gen. Assemb., Reg. Sess. (Ind. 2015).
534. *Id.*
535. H.B. 1541, 64th Leg., Reg. Sess. (Wash. 2015).

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TERM	REASONING
A:	
Aggravated Assault	Call law enforcement. This is a mandated report.
Alcohol	Call police unless the alcohol was not consumed, shared or sold if your security can handle the situation. There is no legal distinction between possession, consumption, sharing and selling. If there is more than one student involved, then liability concerns lead most schools to make a police report. An online report can be made to document the incident, but not require police to come on site. Many schools also refer to community counseling programs, but some do not have the resources or information to do so.
Armed Robbery	Call law enforcement. This is a mandated report.
Arson, of an occupied structure	Call law enforcement. This is a mandated report.
Arson, of a structure or property(not occupied)	Call unless it causes little or no damage, there are no safety concerns and no intent to cause harm.
Assault	*Defined as unwanted physical contact with injury.* This term would not be used for a mutual conflict without injury, but if there is injury, it is a mandated report.
B:	
Bomb Threat	Call law enforcement. This is a mandated report.
Bullying	Bullying is not a legal term, but can represent a range of offenses. The response should be based on the actual offense. If there was a threat, harassment, intimidation, an assault or the behavior is persistent then administrators should call law enforcement. If a crime was not committed, then do not call law enforcement.
Burglary/ Breaking & Entering (2nd & 3rd Degree)	Call law enforcement. The definition for burglary does not consider the value of the items*; it is about being in a place you are not supposed to be with intent to do something you are not supposed to do.* Value and the amount of damage is important but the act of burglary is enough to call.
Burglary (1st Degree)	Call law enforcement. This is a mandated report. *The definition of 1st degree is that it is burglary committed with a deadly weapon or dangerous instrument.*
C:	

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Cheating	Do not call law enforcement
Chemical or Biological Threat	Call law enforcement. This is a mandated report. These could be household items that can be mixed together to be explosive.
Computer and Telecommunications Device	Do not call unless the student commits another violation with a computer or telecommunication device. A computer violation alone would not require law enforcement contact.
Contraband	Be specific and list the violation under the type of contraband it is. If the student has illegal drugs, it should be documented as a drug violation. If an item is against school policy but legal, then *law enforcement should not be called.*
D:	
Dangerous Items (Air Soft Gun, BB Gun, Knife with blade less than 2.5 inches, Laser pointer, Letter Opener, Mace, Paintball Gun, Pellet Gun, Taser or Stun Gun)	Do not call law enforcement unless the items are used, or there is immediate danger that they will be used. These items are not illegal to possess, but are against school policy. They should be confiscated, and the school should give consequences for possessing them at school, but police should not be contacted.
Defiance, Disrespect of Authority, and Non-Compliance	Do not call unless there is a specified clear threat to the safety of students, staff or self. If the situation escalates, the violation should be classified as a higher offense.
Disruption	Do not call law enforcement.
Dress Code Violation	Do not call law enforcement.
Drug Paraphernalia	Call law enforcement if there is residue or if there is paraphernalia that is associated with narcotics. The residue is what makes the paraphernalia illegal to possess.
E:	
Endangerment	Using the term endangerment implies that it is a significant event that endangers someone's life, e.g. a large rock thrown at a moving car, or a bullet going through a wall. If this term is used, then the violation is significant enough to involve the police.
F:	
Fighting^	Do not call law enforcement for mutual combat, although it must be reported to ADE. If there was injury, or it was not mutual, use the term assault or aggravated assault depending on who was

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	assaulted, the severity and whether a weapon was used.
Fire Alarm Misuse	Call law enforcement. This is a mandated report.
Firearms	Call law enforcement. This is a mandated report.
Forgery	Do not call law enforcement.
G:	
Gambling	Do not call law enforcement.
Graffiti or Tagging	Do not call unless there are at least $250 in damages, which is classified as vandalism, or if any hate speech or threats are communicated in the tags / graffiti. Schools should document the graffiti with dates and pictures as they occur. This will help law enforcement if the graffiti becomes a larger problem and needs to be reported. Gang affiliation and symbols were purposefully omitted as factors because assumptions can be made about a student and this may contribute to disproportionate minority contact.
H:	
Harassment, Nonsexual	Do not call law enforcement, unless behavior is persistent.
Hazing	Do not use this term. Classify the violation based on the actual offense. Do not call law enforcement unless it is determined that a crime was committed. Like bullying, hazing can include a wide range of offenses and it is important to base the consequence on the actual violation.
Homicide	Call law enforcement. This is a mandated report.
I:	
Illicit / Illegal Drugs	Call law enforcement. Even small amounts are illegal for the school administrators to possess or dispose of, and it is a mandated report.
Indecent Exposure or Public Sexual Indecency	Call law enforcement if there is a victim. Consult with appropriate school personnel to assess the situation.
Inhalants	Do not call law enforcement unless there is some proof that the student used the inhalant (e.g. caught using, can see paint marks on the nose or other direct signs of use). TPD informed the group that it is not illegal for youth to have possession of inhalants. It is a felony for them to use them.

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TERM	REASONING
Inappropriate Language	Do not call law enforcement.
K:	
Kidnapping	Call law enforcement. This is a mandated report.
L:	
Leave School Grounds without permission	Do not call law enforcement unless it is coupled with another violation or there is concern for the student's safety.
Lying	Do not call law enforcement.
M:	
Minor Aggressive Act	Do not call law enforcement if the violation fits within this classification. If the situation escalates to assault and there is injury, then call law enforcement.
N:	
Negative Group Affiliation	Do not call law enforcement.
Network Infraction	Do not call unless the network was hacked to access sensitive information.
O:	
Over the Counter Drugs	Do not call law enforcement for personal use, sharing or selling. These items are not illegal, and the minor cannot be charged with any crime. If there is an emergency then call 911 for emergency assistance.
P:	
Parking Lot Violations	Do not call law enforcement.
Plagiarism	Do not call law enforcement.
Pornography	Do not call unless the student is distributing pornographic material, any of the materials contain someone who is known to the student (e.g. another student, a relative, etc), or the pornography is of a minor.
Prescription Drugs	Do not call law enforcement for personal use with a current prescription in the student's name. Parents should always be called to inform them of school policy regarding any prescription drugs.

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TERM	REASONING
Theft, Petty	Do not call law enforcement unless the value of the items is more than $100. Then it is classified as theft, not petty theft.
Threat or Intimidation	Call law enforcement if there is intent to harm or behavior is persistent.
Tobacco	Do not call law enforcement.
Trespassing	Do not call law enforcement unless it is a student who was expelled or suspended for a serious violation, if the person has already been warned and will not leave, or if there is a specified, clear threat.
Truancy	Do not call law enforcement.
U:	
Unexcused Absence	Do not call law enforcement.
V:	
Vandalism of Personal Property	Do not call the police because the victim must make the report, not the school.
Vandalism of School Property	Call unless the damage is under $250. The threshold can be higher if the school or district chooses. However, it cannot be lower; this is based on the criminal damage statute.
Verbal Provocation	Do not call law enforcement.
W:	
Weapons (Billy Club, Brass Knuckles, Knife with blade of at least 2.5 inches, & Nunchakus)	This is a mandated report, and it needs to be reported. However, there are times that administrators take something like a knife from a student who did not intend to bring it to campus, does not plan to use it, and has reason to be in possession of that type of weapon (for work or recreational purposes). Law Enforcement agencies as well as the County Attorney do suggest considering intent. For these situations, an online report can be completed to document the incident, but it will not trigger police response to the school. The school can then give school based consequences and law enforcement will not come to campus for a situation that was never intended to be dangerous. If there is any doubt about the intent police should be called for police presence.

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APPENDIX B. RECOMMENDED PROGRAMS

From the Town Halls held to date, the RStPP Task Force has selected four approaches showing proven experience and promise, which it finds likely to be readily replicable. In selecting these, the Task Force does not intend to diminish other work being done by colleagues in law offices, courts, schools, and juvenile justice locales across the country, but rather to highlight possible starting points for further work. This preliminary report provides a summary listing; more detail will be provided in the final report and in further Town Halls and training sessions to follow. The final report will also include an expanded listing of other programs discussed by Town Hall participants.

1. Implicit Bias Training (All)

Implicit bias and its impact on the school to prison pipeline were discussed at all of the Town Halls. The research on implicit bias continues to grow. As discussed in this report, the research is increasingly clear that implicit bias is part of being human, that such bias can be measured by both social and neuroscience, and that such bias may, without intent, contribute to the kinds of disproportionality discussed in the report.

Implicit bias is an unconscious response that often is disassociated from our consciously held beliefs. Because so many decisions that impact young people along the school to prison pipeline are discretionary, openings for implicit bias to influence those decisions, albeit decisions made in all good faith, are many.

As discussed previously, research now shows that motivation to change implicit biases can help bring about change. But to be motivated, we have to first be aware of what implicit bias is and how it might operate in decisions about young people in education and juvenile justice. Training can bring about this awareness and offer possible de-biasing techniques.

More information: Professor Sarah Redfield, sarah.redfield@gmail.com, or 207-752-1721.

2. Checklist Implementation (Pima County, Arizona)

In Pima County, Arizona, under the direction of Guenevere Nelson-Melby, various stakeholders formed the Court, School, and Law Enforcement Collaborative Task Force to discuss reducing the number student referrals to law enforcement. The Task Force de-

veloped guidelines for schools and law enforcement to implement that are aimed at (a) discouraging schools from referring students to law enforcement for offenses that educators can and should handle on their own and (b) reducing ambiguity in school conduct codes that can often times lead to racial disparities.

More information: Natalie Carrillo, Research & Evaluation Assistant, Pima County Juvenile Court Center, Tucson, AZ, natalie.carrillo@pcjcc.pima.gov; Guenevere Nelson-Melby, Pima County Public Defender, Nelsonmelby@yahoo.com

3. Law Student/Lawyer Intervention (Sufeo, Massachusetts Model)

Massachusetts

The Massachusetts legal community has undertaken a broad approach to the issues. It is described briefly here. More information is available from Marlies Spanjaard, Director of Education Advocacy, The EdLaw Project, mspanjaard@publiccounsel.net, 617-910-5841.

THE EDLAW PROJECT

Every year, the school-to-prison pipeline continues to ensnare more of our youth. This national trend of criminalizing rather than educating our nation's children is reaching a crisis point. Thousands of young people in Massachusetts become entangled in this dead-end process annually due to inadequate educational programs and zero tolerance policies and practices. Lack of educational equity can start children on a downward spiral that ends in court, or prison, and has a crippling economic effect on their families and our communities.

The EdLaw Project, a partnership between the Children's Law Center of Massachusetts and the Committee for Public Counsel Services – Children and Family & Youth Advocacy Divisions has spent the last 15 years developing expertise in providing excellent education advocacy for Massachusetts highest-risk youth. Since its formal inception in January 2000, the EdLaw Project staff of four attorneys has directly advocated for over 1,800 low-income children to receive the education they need to succeed.

The EdLaw Project is currently focusing our expertise on training, empowering, and supporting the statewide juvenile indigent defense bar to engage in effective education advocacy for court-involved youth. Long-term positive legal outcomes are difficult to achieve without a solid educational foundation and therefore we believe that representation of children on child welfare, delinquency and youthful offender cases requires effective education advocacy. We are actively building the knowledge and skills of nearly one thousand attorneys, already expert child advocates in their own right, to permanently transform the standard of practice for child advocacy in Massachusetts. This approach will dramatically improve educational and life outcomes for thousands of poor children annually. Our proposed model focuses on promoting healthy child and adolescent development as a means to divert highly vulnerable children from the school-to-prison pipeline, while improving public safety and saving taxpayers millions of dollars. Our three to five year plan includes the creation of a sustainable state-funded education advocacy unit within the public defender agency to ensure ongoing leadership, training, and support of education advocacy provided by the juvenile indigent defense bar.

The school to prison pipeline cannot be shut down unless schools educate all their students. Many Massachusetts public schools are unwitting feeder systems for the courts, the Department of Children and Families (DCF), the Department of Youth Services (DYS), and adult prisons. Ill-conceived school disciplinary policies are a serious problem and there is an endemic failure to meet the academic needs of poor children, especially children of color.

Consider these statistics:

- Eighty-five percent of all juveniles who interface with the juvenile court system are functionally illiterate.
- Two thirds of children who cannot read proficiently by the end of fourth grade, will end up in jail or on welfare.
- African-American students are 3.5 times more likely than their white classmates to be suspended or expelled. Black children constitute 18 percent of students, but they account for 46 percent of those suspended more than once.
- For secondary school children, the suspension rate for black male students with disabilities is 34%, compared to 16.2% for white male students with disabilities. Black female students with disabilities have a suspension rate of 26%, while white female students with disabilities are at 7.3%.

Failing to provide young people with an adequate education has serious long-term consequences for the individual, the family, the community, and the Commonwealth, including low-wage jobs, lack of income, and prison. Undereducated parents struggle to support their families economically and struggle to advocate for the academic development of their own children. Neighborhoods with high concentrations of undereducated, chronically court-involved individuals also can be toxic environments with high rates of domestic violence, substance abuse, mental health concerns, and the resulting over-policing and over-incarceration. In Massachusetts, a high school dropout costs taxpayers an average of nearly $275,000 over his or her lifetime. Sending a young person to a correctional facility costs taxpayers upwards of $60,000 annually, and it is estimated that each youth who grows up to be ensnared in the criminal justice system will cost the taxpayer $2 to $4 million dollars.

Research shows that school success is one of the most cost effective strategies for preventing lifelong court involvement. Expert child advocates working to help parents and schools identify and access the appropriate educational services for court involved kids is not just a moral imperative; it is also a far more effective approach to issues of systemic poverty, public safety and state budget deficits, than ignoring the source of the problem and building more prisons. **With the support of the education law experts at the EdLaw Project, this dedicated and skilled juvenile bar can have a profound impact on the educational, legal, and life success of thousands of poor court-involved children and youth every year and in turn, help to address economic and social disparities affecting multiple communities throughout the Commonwealth.**

Court, School and Law Enforcement Collaborative Task Force: Guidelines for Schools in Contacting Law Enforcement

Violation	Guidelines			Explanations and Exceptions
	Call for Law Enforcement Presence	File Police Report (Online)	School based Consequence / Intervention	
A:				
Aggravated Assaults**	☑			
Air Soft Gun^ (dangerous item)			☑	Do not call law enforcement unless they use or threaten someone with it.
Alcohol Violation^	☑			Call law enforcement unless: • The alcohol was not consumed, and • The alcohol was not shared or sold, and • You have school security/personnel to handle the situation
Armed Robbery**	☑			
Arson, of a structure or property^	☑			Call law enforcement unless: • It does not cause damage, and • There are no safety concerns, and • There was no intent to cause harm
Arson, of an occupied structure**	☑			
Assault^	☑			If defined as **unwanted physical contact with injury,** then call for police presence. A violation that schools classify as sexual harassment with contact, law enforcement would classify as an assault. If the violation meets the guidelines for sexual harassment with contact, law enforcement should be contacted. (See Appendix A)
B:				
BB Gun^ (dangerous item)			☑	Do not call law enforcement unless they use or threaten someone with it.
Billy Club** (weapon)		☑		Always report, but place online report if police presence is not needed based on the intent and culpability.

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Court, School and Law Enforcement Collaborative Task Force:
Guidelines for Schools in Contacting Law Enforcement

Violation	Guidelines: Call for Law Enforcement Presence	Guidelines: File Police Report (Online)	Guidelines: School based Consequence / Intervention	Explanations and Exceptions
Bomb Threat**	☑			
Brass Knuckles** (weapon)		☑		Always report, but place online report if police presence is not needed based on the intent and culpability.
Bullying^				Bullying is not a legal term. Call law enforcement if there was a threat, harassment, intimidation, an assault or if the behavior is persistent. See notes in appendix A
Burglary/Breaking & Entering (2nd & 3rd Degree)^	☑			Explanation: • Being in a place you are not supposed to be • With intent of doing something you are not supposed to do See Appendix A or the definitions for more explanation
Burglary (1st Degree, with a deadly weapon or dangerous instrument)**	☑			See Appendix A
C:				
Cheating			☑	
Chemical or Biological Threat**	☑			
Combustible			☑	Do not call for possession, but if it is lit, the violation then becomes a higher offense depending upon which type of combustible it was.
Computer and Telecommunications Device			☑	Do not call unless they commit another violation with the computer or telecommunications device. (e.g. bullying, pornography, threats, etc.) If so, document violation as the other offense.
Contraband			☑	If it is illegal contraband then it should be listed under the violation that corresponds (e.g. drugs, weapons, etc.). If it is legal but against school policy, list specifically what it is, but do not call law enforcement.

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Court, School and Law Enforcement Collaborative Task Force: Guidelines for Schools in Contacting Law Enforcement

Violation	Guidelines: Call for Law Enforcement Presence	Guidelines: File Police Report (Online)	Guidelines: School based Consequence / Intervention	Explanations and Exceptions
D:				
Defiance, Disrespect toward Authority, and Non-Compliance			☑	Do not call unless there is a specified, clear threat to the safety of students, staff or self.
Disorderly Conduct			☑	Do not call law enforcement unless there is a specified clear threat to the safety of students, staff or self.
Disruption			☑	
Dress Code Violation			☑	
Drug Paraphernalia	☑			Call law enforcement if the paraphernalia has residue.
E:				
Endangerment^	☑			Call law enforcement unless: • Nobody was hurt, and • There was no intention to hurt anybody else Then the violation should be classified as recklessness.
Extortion			☑	Do not call law enforcement unless there is repeated threat or intimidation.
F:				
Fighting^				Do not call law enforcement for mutual combat, although it must be reported to ADE. If there was injury or it was not mutual, then classify as assault or aggravated assault.
Fire Alarm Misuse**	☑			
Firearms** (weapon)	☑			
Forgery			☑	

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Court, School and Law Enforcement Collaborative Task Force: Guidelines for Schools in Contacting Law Enforcement

Violation	Guidelines			Explanations and Exceptions
G:				
Gambling			☑	
Graffiti or Tagging			☑	Do not call law enforcement unless: • Damage exceeds $250, then classify it as vandalism; or • If it contains hate speech or threats
H:				
Harassment, Nonsexual			☑	Do not call law enforcement unless behavior is persistent.
Hazing^				Do not call law enforcement unless it is determined that a crime has been committed. See notes in Appendix A for further explanation.
Homicide**	☑			
I:				
Indecent Exposure or Public Sexual Indecency^	☑			Call law enforcement if there is a victim. Consult with appropriate school personnel to assess the situation.
Illicit/Illegal Drugs** Including: Ecstasy, cocaine, crack, hallucinogens, heroin, marijuana, methamphetamines, etc	☑			
Inappropriate Language			☑	
Inhalants^			☑	Do not call unless they have used the inhalant.
K:				
Kidnapping**	☑			
Knife with blades of less than 2.5 inches^ (dangerous item)			☑	Do not call law enforcement unless they use or threaten someone with it.
Knife with blade length of at least 2.5 inches** (weapon)		☑		Always report, but place online report if police presence is not needed based on the intent and culpability.

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	Call for Law Enforcement Presence	File Police Report (Online)	School based Consequence / Intervention	
L:				
Laser pointer^ (dangerous item)			☑	Do not call law enforcement unless they use or threaten someone with it.
Leaving School Grounds without Permission			☑	Do not call unless there is a safety concern for the student or it is coupled with other violations that require police contact.
Letter Opener^ (dangerous item)			☑	Do not call unless they use it or threaten someone with it.
Lying			☑	
M:				
Mace^ (dangerous item)			☑	Do not call law enforcement unless they use or threaten someone with it.
Minor Aggressive Act (hitting)			☑	Do not call law enforcement; unless it causes injury, then it should be classified as assault.
N:				
Negative Group Affiliation			☑	
Network Infraction			☑	Do not call unless the student hacks into the network with intent to access sensitive information.
Nunchakus** (weapon)		☑		Always report, but place online report if police presence is not needed based on the intent and culpability.
O:				
Other Dangerous Item^			☑	Do not call law enforcement unless they use or threaten someone with it.
Over the Counter Drugs (Inappropriate Use of)			☑	Do not call for possession. It is not illegal to possess. If it is a medical emergency, then call 911. See Appendix
P:				
Paintball Gun^ (dangerous			☑	Do not call law enforcement unless they use or threaten someone

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Violation	Call for Law Enforcement Presence	File Police Report (Online)	School based Consequence / Intervention	Explanations and Exceptions
item)				with it.
Parking Lot Violation			☑	
Pellet Gun^ (dangerous item)			☑	Do not call law enforcement unless they use or threaten someone with it.
Plagiarism			☑	
Pornography^			☑	Do not call law enforcement unless: • The student is distributing pornographic material • Any of the people in the pornographic material are known to the student • The pornography is of a minor

Violation	Guidelines			Explanations and Exceptions
	Call for Law Enforcement Presence	File Police Report (Online)	School based Consequence / Intervention	
Prescription Drugs ** (Inappropriate Use of)	☑			Call law enforcement unless: • The student has a prescription in their name and • Prescription is current.
Public Display of Affection			☑	
R:				
Recklessness			☑	Do not call law enforcement. If the violation is serious enough to call police, then the violation should be classified as endangerment.
Robbery^	☑			Call law enforcement unless there is a low level of threat and force.
S:				
Sexual Abuse/Sexual Conduct with a Minor/Child Molestation**	☑			

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Court, School and Law Enforcement Collaborative Task Force: Guidelines for Schools in Contacting Law Enforcement

Violation	Guidelines: Call for Law Enforcement Presence	Guidelines: File Police Report (Online)	Guidelines: School based Consequence / Intervention	Exceptions
Sexual Harassment ^			☑	Do not call law enforcement unless: • Behavior is persistent, or • The victim feels threatened by the behavior
Sexual Harassment with Contact^	☑			See Appendix A
Sexual Assault (Rape)**	☑			
Simulated Firearm			☑	Do not call law enforcement unless: • They were using it to threaten others, and • It cannot be discerned whether it is real or not.
Substance Represented as Illicit Drug	☑			Call law enforcement, unless it can be determined that the substance is legal
T:				
Tardy			☑	
Taser or Stun Gun^ (dangerous item)			☑	Do not call law enforcement unless they use or threaten someone with it.
Tear Gas^ (dangerous item)	☑			It is not available for purchase, so law enforcement agencies want to be notified if anyone is in possession of it.
Theft (Petty)			☑	Do not call if items are valued at less than $100.
Theft	☑			Call law enforcement if value of the items is more than $100. If it is personal property, the owner needs to make the report, not the school.
Threat or Intimidation^	☑			Call law enforcement unless there is no intent of harm.
Tobacco Violation^			☑	

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Court, School and Law Enforcement Collaborative Task Force: Guidelines for Schools in Contacting Law Enforcement

Trespassing			☑	Do not call law enforcement unless: • It is a student who was expelled or suspended for a serious violation, or • The person has already been warned and will not leave, or • There is a specified, clear threat.
Truancy			☑	
U:				
Unexcused Absence			☑	
Unknown Drug**	☑			Call law enforcement if substance cannot be identified.
V:				
Vandalism of Personal Property^			☑	Victim must call the police, the school should not call for them.
Vandalism of School Property^	☑	☑		Call law enforcement unless damage is under $250. If no suspect, place an online report.
Verbal Provocation			☑	

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SUFEO Stand Up For Each Other

This program was introduced at the first Town Hall and reviewed again at the New Orleans Town Hall. It is a program that has also been adopted in Chicago.

Stand Up for Each Other! (SUFEO) is an advocacy group led by law students at Tulane University Law School and Loyola University Law School in New Orleans, with an additional project at Loyola School of Law in Chicago. The New Orleans and Chicago groups collaborate with each other but operate separately. They are united by the goal of reducing suspensions and keeping students in school and out of the criminal justice system.

For students appealing a suspension or expulsion, SUFEO advocates assist with each step of the process. They advise parents and students on how to initiate an appeal of disciplinary action, conduct an investigation into the actions taken against students, and represent students in administrative hearings. Also, both sites operate an around-the-clock hotline for youth and parents who have questions or need assistance defending against school suspensions and expulsions.

The law students that run the SUFEO groups are aided by attorneys from organizations like the Louisiana Center for Children's Rights, which collaborates with the New Orleans SUFEO. The Center reports that SUFEO has worked with over 100 students in approximately fifty cases, most of which it says were successfully appealed. In addition to directly assisting students and parents, SUFEO's advocacy has drawn media attention to the staggering rates of suspension and expulsion at Louisiana schools and has brought the harsh effects of state legislation into the political conversation.

For references as quoted and more information, see STAND UP FOR EACH OTHER!, http://sufeo.org/ *Suspension Advocacy Project*, LOY. U. CHI. SCH. L.: CIVITAS CHILDLAW CTR. http://www.luc.edu/law/centers/childlaw/institutes/child_education/suspensionadvocacyproject/

Tavis Smiley, *The "Community" Element of Education*, PBS: TAVIS SMILEY REP. (last modified Apr. 11, 2013), http://www.pbs.org/wnet/tavissmiley/tsr/education-under-arrest/the-community-element-of-education/.

4. Restorative Justice (Texas)

In 2012, Institute for Restorative Justice and Restorative Dialogue (IRJRD), led by Dr, Marilyn Armour, partnered with Ed H. White Middle School in San Antonio, Texas, to implement a *Restorative Discipline* program aimed at reducing the use of exclusionary practices like suspension and expulsion to discipline sixth, seventh, and eighth grade students. Total student suspensions at the White Middle School dropped by 44% during the first year of the program and by 57% the second year. Teachers' and administrators' experience with, and training in, restorative practices seems positively correlated with lower suspension rates. Dr. Armour described the program as a "relational approach to building school climate and addressing student behavior that fosters belonging over exclusion, social engagement over control, and meaningful accountability over punishment." An evaluation of Restorative Discipline at White Middle School authored by Dr. Armour also reported "substantial gains" in academic performance; "African American students, in particular" showed improvement in both math and reading.

For the points quoted here and further information see MARILYN ARMOUR, ED WHITE MIDDLE SCHOOL RESTORATIVE DISCIPLINE EVALUATION: IMPLEMENTATION AND IMPACT 12 (2014), http://www.utexas.edu/research/cswr/rji/pdf/Year2-Final-EW-Report.pdf; *Texas Schools Restorative Discipline Project*, U. TEX. AUSTIN: SCH. SOC. WORK, https://socialwork.utexas.edu/projects/texas-schools-restorative-discipline-project.

Dr. Armour can be reached at marmour@utexas.edu.

APPENDIX C. ADDITIONAL PROGRAMMATIC RESOURCES

ACES CONNECTION, http://www.acesconnection.com/; CDC-KAISER PERMANENTE ADVERSE CHILDHOOD EXPERIENCES (ACE) STUDY, http://www.cdc.gov/violenceprevention/acestudy/ (information on adverse childhood experience research and approaches)

PIPELINE TO PROSPERITY, VALLEJO UNIFIED SCHOOL DISTRICT, http://www.vallejo.k12.ca.us/cms/page_view?d=x&piid=&vpid=1308906523308 (YEAR) (for more information contact Patricia Lee, State Bar of California, Patricia.Lee@calbar.ca.gov).

It's My Stock and I'll Vote If I Want to: Conflicted Voting by Shareholders in (Hostile) M&A Deals

MATTEO GATTI*

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ABSTRACT

This article fills a vacuum in current takeover literature by organically analyzing instances in which shareholders' conflicts might lead to inefficient acquisition outcomes. While outside of the takeover field, Delaware courts have been wary of the perils for shareholder wealth maximization of misalignments in shareholder incentives, and while almost all jurisdictions that require a shareholder referendum as a precondition to conduct a hostile transaction have implemented disinterested shares regimes, Delaware takeover law has been silent. This article presents three possible approaches to address conflicted voting in acquisitions: a rule-based approach, a standard-based approach, and an unengaged approach. This article argues that none of these approaches can be expected to work better than the others under all circumstances—they each carry positives and negatives. A system of balanced bright-line rules (that is, applicable to both bidder and target incumbents) would contain conflicted voting in a series of circumstances, but its potential over-deterrence can put at risk a subset of deals in which the universe of disinterested shareholders might not get it right. Standards have the advantage that, if well adjudicated, only the prohibited, conflicted conduct will be detected and sanctioned, with no problems stemming from over- or under-deterrence. But the worrying aspect of a standard approach is judicial discretion and potential error: the policy would call for the judge to establish the inherent long-term value of the target as an independent entity. While the advantage of the unengaged approach is preserving the status quo, its clear problem is not offering protection when a conflicted vote distorts the voting and acquisition outcomes. This article suggests a combination of a rule-based approach and a standard-based one: the bidder and the incumbents would vote, but their shares would be presumed conflicted and thus not counted for determining the outcome of the vote/acquisition (rule-based element); however, each group could rebut the presumption by proving that its votes are not conflicted because they are directed to an outcome that maximizes shareholder value (standard-based element). This would constitute a less harsh version of a pure disinterested shares regime because a group initially labeled as interested could actually demonstrate the opposite: entrenchment-seeking directors and management will have to convince a judge they are casting their vote because rejecting the

bid is the best course of action, while bidders will have to prove their offer is not a "low baller."

I. INTRODUCTION

Takeovers have historically kept corporate lawyers very busy. Some have recently argued that "the allocation of authority between shareholders and the board of directors to determine whether a hostile takeover bid would go forward" is "the most intense corporate law debate of the last thirty years and perhaps the entire history of corporate law."[1] Yet, surprisingly, some stones have been left unturned: this article makes the first attempt to organically address the thorny issue of conflicted voting by shareholders in connection with a hostile acquisition, an issue that few scholars have dealt with (and tangentially at best).

To be sure, shareholder voting comes in many forms in the M&A context: mergers and sales of assets are the traditional transactional structures requiring a shareholders' vote.[2] Since the mid-1980s, it became apparent that hostile takeovers could also require a vote. How so? In the 1980s, back when classic Delaware takeover law was crafted, the policy dilemma rested on whom to select as the appropriate actor to determine the success or demise of a hostile acquisition attempt. Policymakers had three high-level approaches to choose from: shareholder choice, board centrality, or courts.[3] Albeit the initial impression was that board actions would be subject to some higher standard than routine

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1. Ronald J. Gilson & Jeffrey N. Gordon, *Agency Capitalism: Further Implications of Equity Intermediation* 21 (Eur. Corp. Governance Inst., Law Working Paper No. 239/2014), http://ssrn.com/abstract=2359690.

2. *See infra* Section II.A.1.

3. *See* Ronald J. Gilson, *Unocal Fifteen Years Later (And What We Can Do About It)*, 26 DEL. J. CORP. L. 491, 494–95 (2001).

business judgment, directors eventually won and won big.[4] Soon enough, their supremacy and discretion became broader: directors could defend against virtually all hostile deals;[5] the idea being that they know better than shareholders about the inherent, hidden value of a target company.[6] However, this power was never absolute, as courts left a caveat: if shareholders do not like how directors are responding to the given offer, they have, and cannot be taken away, the ability to vote to oust the board and get rid of the defense[7] (the so-called ballot box route).[8] Pure hostile deals remained possible only through such ballot box route in the form of joint tender offers and proxy fights.[9]

This compromise left many dissatisfied. Some criticized it because of an unmotivated preference for elections as opposed to pure tender offers.[10] Others pointed out that "[s]hareholder ability to elect new directors emerges as an uneasy compromise between the logic of hidden value and the need to limit agency costs":[11] it is quite contradictory to give directors the power to defend because shareholders are prone to valuation mistakes, but then allowing shareholders to decide "in the related proxy battle presenting the

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4. In other words, the first impression was that Delaware courts gave themselves a policing role, which was ultimately de facto abdicated. *See* Gilson & Gordon, *supra* note 1, at 22–23.

5. *See* Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1154–55 (Del. 1989) (endorsing a just say no response from directors).

6. *See* Bernard Black & Reinier Kraakman, *Delaware's Takeover Law: The Uncertain Search for Hidden Value*, 96 NW. U. L. REV. 521, 522–23 (2002) (criticizing the policy).

7. This nowadays means redeeming a poison pill. *See infra* notes 33–34 and accompanying text.

8. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 959 (Del. 1985) ("If the stockholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out.").

9. *See infra* notes 38–40 and accompanying text.

10. Ronald J. Gilson & Alan Schwartz, *Sales and Elections as Methods for Transferring Corporate Control*, 2 THEORETICAL INQUIRIES L. 783, 788 (2001) ("[A]n outcome as significant as privileging elections over markets should at least come with an explanation. Providing a reason for an outcome at least imposes the discipline of logic on the range of alternatives available to the court."); Gilson, *supra* note 3, at 500–01 (criticizing the choice by Delaware judges to prefer elections over market dynamics).

11. Black & Kraakman, *supra* note 6, at 538 (2002).

same issue."[12] Others believe that shareholder choice in the ballot box compromise can at times be more apparent than real:[13] as I explained in earlier work, shareholders may lack the actual power to determine the outcome of a takeover bid because of corporate law rules, principles, and/or practices acting as barriers to the power to oust the board.[14] In this regard, scholars, practitioners, and market players have identified staggered boards as the main culprit.[15] But staggered boards are hardly alone in altering the odds of a bidder's prevailing via the ballot box route: other factors include shareholders' inability to call special meetings or to act by written consent, supermajority rules, proxy rules, and—the topic of this article—the conflict of interest regime.[16]

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12. Jeffrey N. Gordon, *"Just Say Never?" Poison Pills, Deadhand Pills, and Shareholder-Adopted Bylaws: An Essay for Warren Buffet*, 19 CARDOZO L. REV. 511, 530 (1997).

13. *See, e.g.*, Randall S. Thomas, *Judicial Review of Defensive Tactics in Proxy Contests: When Is Using a Rights Plan Right?*, 46 VAND. L. REV. 503, 506–07 (1993).

14. Matteo Gatti, *The Power to Decide on Takeovers: Directors or Shareholders, What Difference Does It Make?*, 20 FORDHAM J. CORP. & FIN. L. 73, 109–21 (2014).

15. Staggered boards received a lot of attention in the aftermath of an influential study by Bebchuk, Coates, and Subramanian, in which they showed that the combined use of poison pills and staggered boards make unsolicited deals virtually impossible. When a target has a staggered board in place, because only one-third of its members are up for election every year, it takes two board elections, and hence at least twelve full months, to gain a majority of directors. At the first election, bidders would effectively give target shareholders a put option exercisable a year later: if between the two elections the stock has gone down, the bidder will have to close an acquisition where it is likely overpaying (the stock has gone down while the bidder cannot run the company because it only controls one third of the board); if, however, the target stock has gone up, shareholders would likely not vote for the bidder nominees unless the bidder increases the initial offer. Lucian Arye Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, & Policy*, 54 STAN. L. REV. 887, 890, 928 (2002) (finding that not a single hostile bid won a ballot box victory against an effective staggered board in the five-year period from 1996–2000).

16. *See* Gatti, *supra* note 14, at 109–24.

So, in the first place, the judges' idea that bidders and shareholders might find solace via a proxy fight safety valve[17] cannot apply squarely to a big chunk of companies in the market for corporate control, as some pre-planning on the target's end would impair, to varying degrees, the shareholders' ability to effectively use "the powers of corporate democracy."[18] Second, and moving to the main focus of this article, even in the absence of explicit anti-takeover devices, such as staggered boards, the mechanics of shareholder voting might present two additional types of distortions preventing the vote from representing a true expression of corporate democracy: on the one hand, proxy rules are notoriously tilted in favor of incumbents,[19] and on the other hand, the voting (and therefore the deal) outcome can be tainted by a conflict of interests carried by one or more shareholders.

This article focuses on the latter problem: how does, and how should, the law address conflicts of interest by shareholders when they vote in hostile deals? Basic questions that ought to be considered, but have yet to be explored in the literature, are, at a minimum, the following: Are we comfortable from a policy perspective that the bidder freely votes its shares? What about directors and management—can they vote their shares? In the tender offer structure, the bidder is the contractual counterpart to the target shareholders and is thus in *potential* conflict with them: put simply, buyers want to spend less, while sellers want to receive more. Additionally, because of the well-known desire to maintain their respective roles, the votes cast by directors and management of the target, together with persons affiliated with them, are *potentially* in conflict with the interests of the other shareholders.

As shareholder voting is a key factor in determining the success of an acquisition, it is of paramount importance that conflicted voting does not alter the collective decision of shareholders. In fact, as the Delaware Supreme Court pointed out in a relatively recent case on vote buying, a misalignment of interests puts at risk the very ability of such collective decision to determine an out-

17. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 959 (Del. 1985).

18. *Id.* at 958–59.

19. Yair Listokin, *Corporate Voting vs. Market Price Setting*, 11 AM. L. ECON. REV. 608, 610–11 (2009).

come that is efficient for shareholders.[20] Such a concern was promptly echoed by the Chancery Court in a freeze-out case: "[e]conomic incentives matter, particularly for the effectiveness of a legitimizing mechanism like . . . a stockholder vote."[21]

This article takes the view that the negative influence of shareholders' conflicts of interest is circumstantial: the mere possibility of a conflict is not sufficient to taint the vote. The pathology, I argue, is pursuing a personal interest and casting a pivotal vote against the interests of the other shareholders: to make such determination, there is no way other than looking at facts and circumstances arising from the actual offer on the table. To simplify, if the offer is value maximizing, directors and managers voting against it (that is, voting to maintain the board and leave the pill in place) will be in conflict, but the bidder voting in favor will not. Conversely, if the offer is not value maximizing, the bidder voting in favor (that is, voting to replace the board and redeem the pill) will be in conflict, while directors and managers voting against will not. These conflicts are not exclusive to hostile acquisitions: all similar "final period" situations, for instance friendly deals, present similar risk (in such setting, the conflict is "shared" by the bidder and the target board who might collude to offer a lower price to shareholders).

Conflicted voting is no small issue even when compared to other well-known problems of the current regime, such as staggered boards: because the direction of whom the conflict is going to favor—whether the bidder or the incumbents—is not predictable ex ante when investing a given company (because the advantage can be determined only after the offer is presented and the vote takes place), conflicted voting can introduce a noisy element in the accuracy of pricing a given stock. This is not the same for most takeover defenses (staggered boards for instance), whose presence means there is less likelihood ex ante of a hostile deal: something

20. Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377, 388 (Del. 2010) ("[W]hat legitimizes the stockholder vote as a decision-making mechanism is the premise that stockholders with economic ownership are expressing their collective view as to whether a particular course of action serves the corporate goal of stockholder wealth maximization.") (citation omitted).

21. *In re* CNX Gas Corp. S'holders Litig., 4 A.3d 397, 416 (Del. Ch. 2010).

that market participants can anticipate and incorporate in the stock price accordingly.

After scoping how existing Delaware law addresses the issue,[22] this article investigates how to go about it from a normative perspective, and it does so through the angle of comparing the strengths and weaknesses of three strategies: a rule-based approach, a standard-based approach, and an unengaged approach. The first approach consists of bright-line rules that, because of the potential risk of a conflict, specifically disqualify ex ante certain shareholders by requiring that the resolution be approved by a majority of disinterested shares. The second standard-based approach would seek to invalidate ex post all votes that are actually cast in conflict and that are pivotal for the outcome of the election (I call this approach a "no-conflict standard"). Under the third unengaged approach, shareholders would have complete freedom to decide how to cast their votes.

This article argues that none of the approaches can be expected to work better than the others in all circumstances, and that they each carry positives and negatives. The advantage of the unengaged approach is leaving things as they (probably)[23] are now, meaning no additional litigation. The obvious problem is that it offers no protection when a conflicted vote distorts the voting and acquisition outcome. Not only is this dangerous because such an approach puts at risk the overall efficiency of the market for corporate control (in all deals that are determined by the pivoting vote of the conflicted party, efficiency would have called for the exact opposite outcome), but it also sends a sobering signal that the legal system, especially *this* legal system, whereby the ballot box route is considered the safety valve for the correct functioning of the market for corporate control, is structurally incapable of screening out inefficient outcomes for acquisitions (e.g., a bad acquisition not being defeated and a good acquisition not succeeding). Otherwise, if we surrender to the idea that legislating or enforcing conflicts would either be too cumbersome or create too much uncertainty, then we must once and for all accept that the ballot box route, which is considered a safety valve that supposedly keeps the effi-

22. *See infra* Part III.
23. *See infra* Section IV.A.4.

ciency of the market for corporate control in check, simply does not work or works in a potentially distorted way.

If the idea is to intervene, we have to choose between rules, standards, or, what this article suggests as the most promising option, a combination of the two. A system of balanced bright-line rules would contain conflicted voting in a series of circumstances, but its potential over-deterrence can put at risk a subset of deals in which the universe of disinterested shareholders might not get it right.[24] Standards have the advantage that, if well adjudicated, only the prohibited conflicted conduct will be detected and sanctioned, with no problems stemming from over- or under-deterrence. In a standard-based regime, target incumbents would be able to vote and only subsequently would takeover contenders have to litigate whether the vote was conflicted. But the complex element in a standard approach is judicial discretion and potential error: the policy would ultimately call for the judge to establish the inherent long-term value of the target as an independent entity.[25]

This article suggests to combine a rule-based approach with a standard-based one: the bidder and the incumbents would vote, but their shares would be presumed conflicted and thus not counted for determining the outcome of the proxy fight/acquisition (rule-based element); however, each group could rebut the presumption by proving that in fact its votes are not conflicted because they are directed to an outcome that maximizes shareholder value (standard-based element). This would constitute a less harsh version of a pure disinterested shares regime because a group initially labeled as interested could actually demonstrate the opposite: entrenchment-seeking directors and management will have to convince a judge they are casting their vote because rejecting the bid is the best course of action, while bidders will have to prove their offer is not a "low baller."

A couple of qualifications are in order. First, this article purposely moves within the boundaries of existing understandings of Delaware law on takeover defenses. It is beyond the scope of my work to endorse or criticize views as to whether it might make better economic sense to adopt other policies, such as a more shareholder-centric approach that is not based on hidden value or

24. *See infra* Section IV.A.1.
25. *See infra* Section IV.A.2.

substantive coercion (i.e., the underlying assumptions used by Delaware judges to justify the existing system),[26] or an opposite, more director-centric approach (for instance, validating a broader "just say no" defense to aggressively thwart proxy fights).[27]

Second, this article does not necessarily call for a policy reform. Rather, it illustrates what the implications are for the Delaware system of embracing any of the main policy avenues that are analyzed here, especially what are (a) the assumptions for each of the described solutions and (b) the implications of relaxing such assumptions. One of the main traits of this article is underscoring the partial nature of the current debate (which ignores the issue of conflicted voting) in the aim of fostering a new area of research.

This article is structured as follows. Part II surveys when (II.A) and why (II.B) shareholder voting is necessary in acquisitions, emphasizes the importance of voting sincerity from an efficiency standpoint (II.C), and describes how conflicted voting can

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26. This is the critical view on Delaware takeover law recently expressed by Gilson & Gordon, *supra* note 1, at 21–24, noting that the system emerged in the market environment of the 1960–80 period, which differs significantly from our current age of "agency capitalism" that is characterized by large institutional ownership and diversification.

27. Such harsher types of defenses are currently considered not available to Delaware targets. The outer limits of the legitimacy of defenses tampering with the proxy machinery are laid out in Blasius Indus. v. Atlas Corp., 564 A.2d 651, 661 (Del. Ch. 1988) (stating that if the board acts "for the primary purpose of preventing or impeding [the exercise of stockholder voting power], . . . the board bears the heavy burden of demonstrating a compelling justification for such action.") and Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1388–89 (Del. 1995) (determining that takeover defenses are legitimate so long as the bidder's chances to win an election to replace the board are not "mathematically impossible or realistically unattainable."). Note, incidentally, that Delaware Courts have progressively eroded the boundaries in which *Blasius's* higher standard applies in favor of some other tests. *See* Keyser v. Curtis, C.A. No. 7109-VCN, 2012 WL 3115453, at *12–14 (Del. Ch. July 31, 2012) (applying the less onerous duty of loyalty standard rather than the *Blasius* standard where both were implicated when a corporation's sole director issued super voting shares of stock to himself at a bargain price to prevent his own removal from office); Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 806–07 (Del. Ch. 2007) (applying the *Blasius* standard to a board decision not to delay a merger vote by twenty-five days when it became clear there were not enough votes in favor of the merger on the original meeting date but holding that such standard must be consistent with the *Unocal* framework).

alter efficient outcomes in acquisitions (II.C.1 and 2). Part III contains the positive law analysis: it focuses on tools available to the interpreter to tackle conflicted voting in acquisitions, concludes there is no easy answer (III.C.1), and highlights the most complex key questions (III.C.2). In Part IV, the article analyzes some policy initiatives that could be contemplated to address conflicted voting. In Section IV.A, I lay out three potential policy options: a rule-based, a standard-based, and an unengaged approach. In Section IV.B, I then compare each such approach by testing it with hypotheticals of acquisition attempts. In Section IV.B.5, I describe the assumptions under which one approach can be expected to fare better than the others. In Section IV.C, I evaluate such assumptions and formulate policy remarks while taking into account some potential objections to a reform. Part V concludes.

II. Framing the Issue: Conflicted Voting in Acquisitions

A. Shareholder Voting in Acquisitions

1. Voting as a Statutory Requirement

Shareholder approval is often a requirement for the consummation of corporate acquisitions. In the context of statutory mergers, this is almost always true for shareholders of target companies;[28] sometimes shareholders of acquiring companies get to vote as well.[29] Shareholder approval is also a prerequisite of asset

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28. *See* Section 251(c) of the Delaware General Corporation Law ("DGCL"). DEL. CODE ANN. tit. 8, § 251(c) (2016). *But see* § 251(h) (stating that a shareholder vote is not necessary for a merger that follows a tender or exchange offer if, among other things, the acquirer owns at least the number of shares that would be sufficient to approve the merger); § 253(a) (stating that a shareholder vote is not necessary if the acquiring corporation already owns at least 90% of the shares of each class of stock of the target company).

29. Under Section 251(f) of the DGCL, a shareholder vote is not necessary if the certificate of incorporation of the surviving corporation is not changed and the number of shares does not increase more than twenty percent, meaning that cash mergers and medium-to-small mergers never trigger a shareholder vote in the acquirer. *See* Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 140–41 (2009) (noting that, given the wide degree of freedom in structuring an M&A transaction, shareholder voting at the level of acquiring corporations is basically optional). For analysis, see also Afra Afsharipour, *A Shareholders' Put Option: Counteracting the Acquirer*

deals involving a sale of all or substantially all the assets of a company.[30]

Target shareholders can also be called to vote in the context of tender offers—even if such a deal structure does per se not "naturally" require a shareholder resolution. Outside of Delaware, several states have enacted control share acquisition statutes,[31] which require a shareholder vote to authorize a tender offer or an acquirer to cross certain thresholds of stock ownership and therefore to obtain control of a corporation—such a vote, a prerequisite condition for the deal to go through, works as a referendum on the

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Overpayment Problem, 96 MINN. L. REV. 1018, 1044–49 (2012) (detailing the various ways to structure transactions in order to bypass voting of the acquirer shareholders of Delaware corporations); Marco Becht, Andrea Polo & Stefano Rossi, *Does Mandatory Shareholder Voting Prevent Bad Acquisitions?* 3 (Eur. Corp. Governance Inst., Finance Working Paper No. 422/2014), http://ssrn.com/abstract=2443792 (noting that shareholders of U.S. companies vote in limited circumstances and observing evidence supporting the proposition that value-reducing deals are more likely to be associated with acquisition structures designed to avoid shareholder approval).

30. Delaware courts have held different views with respect to determining what "substantially all the assets" means: one doctrine requires that certain quantitative thresholds are met, such as determining the percentage of total income the assets in question generate as well as their proportion to the company's overall size, while another doctrine focuses more on qualitative criteria by examining if the assets being sold represent a significant portion of the company's income or a deviation from its core business, even if the assets do not represent a large fraction of the company's total assets. *Compare* Gimbel v. Signal Cos., 316 A.2d 599, 606 (Del. Ch. 1974) (endorsing the quantitative approach, holding that a sale of 26% of assets generating 15% of income was insufficient to trigger a shareholder vote under DGCL § 271), *with* Katz v. Bregman, 431 A.2d 1274, 1276 (Del. Ch. 1981) (endorsing the qualitative approach, holding that a sale of assets triggered a shareholder vote under DGCL § 271 where the company would depart from its historically successful line of business by changing from steel drum to plastic drum manufacturing after the proposed sale). *See also* Hollinger, Inc. v. Hollinger Int'l, Inc., 858 A.2d 342, 377–78 (Del. Ch. 2004) (holding that the sale of an indirect subsidiary comprising approximately half of a company's total assets and revenues did not trigger DGCL § 271, reasoning that the company would still continue as a profitable entity in its historically successful line of business).

31. *See* Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111, 115–16 (1987). For a list of states that adopted such legislation, along with statutory references, *see infra* Appendix I.

acquirer.[32] More importantly, as the immediately following subsection shows, voting is a frequent feature in connection with hostile deals for Delaware target companies.

2. Tender Offers and Proxy Fights: Voting as a Safety Valve for Hostile Deals

In the mid 1980s, the evolution of the law governing tender offers and hostile deals in Delaware led to a system in which, if a bidder does not want to or cannot come to terms with the target board, the only way to override a target's resistance through various defensive devices (most notably, a poison pill)[33] became launching a proxy fight in order to replace the incumbent board of

32. *See* Lucian Arye Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973, 985 (2002).

33. In short, a poison pill in its "flip-in" form gives subscription rights to purchase stock at a considerable discount if any person (alone or acting as a group) acquires a stake in the company in excess of a given threshold (normally, ranging from fifteen to twenty percent): such rights can be exercised by all shareholders with the exception of the person or group crossing the applicable threshold. Hence, a flip-in plan threatens a potential acquirer with significant economic and voting dilution unless the target's board redeems such subscription rights. *See* Jeffrey N. Gordon, *An American Perspective on Anti-takeover Laws in the EU: The German Example*, *in* REFORMING COMPANY AND TAKEOVER LAW IN EUROPE 541, 549 (Guido Ferrarini, Klaus J. Hopt, Jaap Winter & Eddy Wymeersch eds., 2004) ("[T]he flip-in pill operates through a discriminatory issuance of cheap shares that would massively dilute the hostile bidder's stake."). For the mechanics of the pill, see Wachtell, Lipton, Rosen & Katz, *The Share Purchase Rights Plan*, *in* RONALD J. GILSON & BERNARD S. BLACK, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 741–42 (2d ed. 1995). The pill is effective for two reasons. First, no shareholder action is needed either for its adoption (so long as the charter, as it always does, authorizes, essentially without any substantial limits, directors to issue shares of blank-check preferred stock, as well as common stock) or for its redemption. Second, the pill really works as a deterrent: the threat of dilution for an unsolicited acquirer is so effective that the triggering of the pill is virtually never needed. The mere fact that the pill is in place compels an acquirer to either try to negotiate a friendly deal with the board or to replace the board through a proxy contest to get rid of the pill. *See* John C. Coates IV, *Ownership, Takeovers and EU Law: How Contestable Should EU Corporations Be?*, *in* REFORMING COMPANY AND TAKEOVER LAW IN EUROPE, *supra*, at 677, 681 n.18; Jordan M. Barry & John William Hatfield, *Pills and Partisans: Understanding Takeover Defenses*, 160 U. PA. L. REV. 633, 643–44 (2012).

directors with new directors nominated by the insurgent/bidder who would in turn repeal the defenses (hence, redeem the poison pill).[34] Such a parallel structure[35] is the result of a series of pro-target decisions throughout the 1980s and 1990s, which clarified on many occasions the wide array of discretion a board has in rejecting a takeover proposal.[36] It was the Delaware Supreme Court itself that, after granting targets the power to defend, suggested bidders could still use the proxy fight avenue: as the Delaware judges pointed out in *Unocal*, no defensive device implemented by

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34. Bear in mind that a board can always eliminate the effects of the pill ("redeem the pill") by canceling the rights plan to consent to a desirable acquisition by a friendly buyer. *Id*. at 643. However, the power to redeem gives hostile bidders a path to reversing a board's decision to resist precisely by ousting the incumbent board through a proxy fight and redeeming the pill.

35. One of the most important aspects of pills is that because they can be adopted very easily—in a matter of hours—by the board, all companies have a "shadow" poison pill plan to be approved quickly if and when circumstances so require. *See* John C. Coates IV, *Takeover Defenses in the Shadow of the Pill: A Critique of the Scientific Evidence*, 79 TEX. L. REV 271, 289 (2000) [hereinafter Coates, *Takeover Defenses*]. This means that *ex ante* a hostile bidder will—for any given target, whether it has a pill in place—*always* anticipate that if no agreement with the target management is realistically achievable, the only viable option to succeed in a hostile deal is to launch a proxy fight.

36. Delaware judges allow directors to adopt defensive measures so long as they can meet a two-prong test introduced in *Unocal Corp. v. Mesa Petroleum Co.* that requires that: (i) there are "reasonable grounds for believing that a danger [or a threat] to corporate policy . . . exist[s]" and (ii) the response taken by the company is "reasonable in relation to the threat posed" (the latter is often referred to as the *Unocal* proportionality test). Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985). With the crucial decision in *Unocal*, the Delaware Supreme Court established an intermediate standard of review between the entire fairness test (the rigorous standard for duty of loyalty cases) and the business judgment rule, which, according to Delaware judges, cannot apply in its pure form in takeover cases "[b]ecause of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders." *Id.* at 954 (footnote omitted). The most important practical implication of the *Unocal* decision was on poison pills: in a subsequent case, the Delaware Supreme Court used the *Unocal* test to validate the pill. *See* Moran v. Household Int'l, Inc., 500 A.2d 1346, 1351, 1353 (Del. 1985) (adopting a rights plan by the board of directors of a target as a prospective takeover defense meets the *Unocal* proportionality test, but the use of the pill in an actual takeover may be subject to specific scrutiny); *see also infra* note 44.

a target can be considered definitive because, "[i]f the stockholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out."[37] Ultimately, the judges put director elections at the center of attention, which, under existing law, work as a safety valve for the market for corporate control: in the words of the Delaware Supreme Court, "the emergence of the 'poison pill' as an effective takeover device has resulted in such a remarkable transformation in the market for corporate control that hostile bidders who proceed when such defenses are in place will usually 'have to couple proxy contests with tender offers.'"[38] Where tender offers

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37. *Unocal*, 493 A.2d at 959; s*ee also Moran*, 500 A.2d at 1357 (upholding the validity of the pill because, among other things, it does not "fundamentally restrict[] proxy contests."). The availability of the ballot-box route and director elections are often cited as the safety valve for hostile deals in the presence of a pill. *See, e.g.*, Michal Barzuza, *The State of State Antitakeover Law,* 95 VA. L. REV. 1973, 2005 (2009) (arguing that such safety valve is actually protected by the heightened standard of *Blasius*, which requires a "compelling justification" for directors who seek to thwart the shareholder franchise); Paul H. Edelman & Randall S. Thomas, *Corporate Voting and the Takeover Debate*, 58 VAND. L. REV. 453, 459–61 (2005); Barry & Hatfield, *supra* note 33, at 644; Bebchuk, Coates & Subramanian, *supra* note 15, at 907–09. *But see* Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 58 (Del. Ch. 2011) (holding that *Unocal* is not breached if an effective staggered board refuses to redeem a pill after an incumbent slate lost the first election).

38. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1379 (Del. 1995) (citation omitted). *See generally* William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 26 DEL. J. CORP. L 859, 887 (2001) (noting that, particularly after Paramount Communications, Inc. v. Time, Inc. 571 A.2d 1140 (Del. 1989), "[r]eplacing the board became an essential part of a hostile offeror's strategy, because that was the only way to circumvent the otherwise preclusive effect of the poison pill that the target board would typically refuse to redeem.") (footnote omitted); Lucian Arye Bebchuk & Marcel Kahan, *A Framework For Analyzing Legal Policy Towards Proxy Contests*, 78 CALIF. L. REV. 1073, 1082 (1990) (acknowledging, in the aftermath of the mid-1980s Delaware decisions, that "proxy contests have reemerged as an important tool for acquiring control."); Gordon, *supra* note 12, at 522–23; Joseph A. Grundfest, *Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the Gates*, 45 STAN. L. REV. 857, 858 (1993) ("Hostile bidders who proceed despite the[] heightened [legal and financial] barriers will likely have to couple proxy contests with tender offers. . . ."); Thomas, *supra* note 13, at 509, 524 ("[T]he target company board can force dissidents to rely completely on the pure proxy contest as a

alone do not allow going over directors' heads to remove inefficient management, a proxy fight would do.[39] Again, *if* a deal escalates to the level of a proxy fight to redeem a pill, the vote to replace directors becomes a de facto prerequisite for the deal to go through.[40] It is no coincidence that most of the action moved to the

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means of pressuring the incumbent board to negotiate a transaction or to push through a change of control."). *But see* Gilson, *supra* note 3, at 500–01 (criticizing the choice by Delaware judges to prefer elections over market dynamics); Gilson & Schwartz, *supra* note 10, at 788 ("[A]n outcome as significant as privileging elections over markets should at least come with an explanation. Providing a reason for an outcome at least imposes the discipline of logic on the range of alternatives available to the court.").

39. It is important to qualify the acquisition pattern I have described so far, that is, hostile deals that can (only) be completed by launching (and, if the incumbent board does not capitulate earlier, winning) a proxy fight. In practical terms, such a pattern cannot be pursued by a hostile bidder when certain factors are at work that constrain its ability to vote the target board out: as I explained elsewhere, shareholders may lack the power to determine the outcome of a takeover bid because of corporate law rules, principles, and/or practices acting as barriers to the power to oust the board (think of staggered boards, limits to director removability, shareholders' inability to call special meetings or to act by written consent, supermajority rules, proxy, and, what is the topic of this article, conflict of interest regimes). Gatti, *supra* note 14, at 109–21. Of all the above factors, the presence of an effective staggered board can be easily considered the most potent and the one that has gotten the most attention by commentators. When a target has a staggered board in place, because only one-third of its members are up for election every year, it takes two board elections, and, hence, at least twelve full months to gain a majority of directors. See Bebchuk, Coates & Subramanian, *supra* note 15, at 890, who first highlighted the powerful effect of combining poison pills with staggered boards. At the first election, bidders would effectively give target shareholders a put option exercisable a year later: if between the two elections the stock has gone down, the bidder will have to close an acquisition where it is likely overpaying (the stock has gone down while the bidder cannot run the company because it only controls one third of the board); if, however, the target stock has gone up, shareholders (M&A arbitrageurs) would likely not vote for the bidder nominees unless the bidder increases the initial offer.

40. In his discussion on this topic, Lucian Bebchuck states:

> Because directors usually can maintain a pill as long as they are in office, a hostile takeover would require that the bidder first replace the directors through a ballot box victory with directors that would redeem the pill. The voting, again, would not be formally on the offer but rather on the election of directors. But the vote would be practically a referendum on the

ballot box: Delaware case law on the legitimacy of takeover defenses has evolved, reflecting a tension between the idea that hostile bidders should be able, at least in theory, to resort to the weapon of the proxy fight[41] and the fact that "[m]anagers and their lawyers have sought . . . to neutralize the power of the shareholder vote."[42] In doing that, the Delaware judiciary has unsurprisingly been more responsive to management worries than bidders' aspirations:[43] today, a takeover defense would pass the *Unocal* standard so long as the target's response does not make "a bidder's ability to wage a successful proxy contest and gain control [of the board] . . . 'realistically unattainable[,]'"[44] which is arguably a pretty low bar.

> offer; the voting on directors would decide the fate of the offer, would be understood as such, and would be determined by shareholders' judgments concerning the offer.

Bebchuk, *supra* note 32, at 985.

41. See Gilson & Schwartz, *supra* note 10, at 787–88, for a critique ("Without confronting the issue directly, the Delaware Supreme Court appears to have assumed that the availability of a proxy fight renders the poison pill non-preclusive, thereby shifting attention to the circumstances under which the proxy fight could be conducted.").

42. Dale A. Oesterle & Alan R. Palmiter, *Judicial Schizophrenia in Shareholder Voting Cases*, 79 IOWA L. REV. 485, 493 (1994); *see also* Gordon, *supra* note 12, at 531 ("[R]elying solely on shareholder suffrage gives the board incentives to take various measures to evade elections."); Thomas, *supra* note 13, at 505.

43. See Steven M. Davidoff, *A Case Study*: Air Products v. Airgas *and the Value of Strategic Judicial Decision-Making*, 2012 COLUM. BUS. L. REV. 502, 505–07 (2012), for an account of interest group pressures faced by Delaware judges in the takeover field.

44. Versata Enters., Inc. v. Selectica, Inc., 5 A.3d 586, 601 (Del. 2010) (citing Carmody v. Toll Bros., Inc., 723 A.2d 1180, 1195 (Del. Ch. 1998)); *see also* Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 113 (Del. Ch. 2011) (following the *Versata* instructions). In *Versata*, the Delaware Supreme Court confirmed how courts should interpret the *Unocal* proportionality requirement. *Versata*, 5 A.3d at 605. Such requirement had been initially clarified, in terms of preclusiveness, by *Unitrin*. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1367 (Del. 1995). Under *Unitrin*, in order to fail the second prong under *Unocal*, that is, the proportionality test, the board's actions must be "draconian, by being either preclusive or coercive[,]" and, "[i]f the . . . response [is] not draconian, the Court must then determine whether it [falls] 'within a range of reasonable responses to the threat' posed." *Airgas*, 16 A.3d at 92–93 (quoting *Unitrin*, 651 A.2d at 1367). The *Versata* Court explained that there is no impermissible preclusion if a successful proxy fight is still realistically attainable. *Versata*, 5

B. The Rationales for Voting in Acquisitions

All in all, shareholders of Delaware companies often get to vote in the context of corporate acquisitions: as some commentators put it, "shareholder voting's most important contribution in the corporate governance area is in the takeover arena."[45] This is in countertrend with the otherwise scarce instances of matters on which they generally vote under the DGCL.[46] The reasons behind the right to vote vary depending on whether the transaction is sell-side (where they generally have such a right)[47] or buy-side (where they rarely get it)[48] and, of course, depending on the actual structure of the transaction (merger, asset sale or tender offer).

From an historical and structural perspective, shareholder voting in mergers derives from the old rules channeling the principle of "inviolability of contract[,]" which required a unanimous approval to alter the initial terms of the investment made by the shareholders.[49] Over the 1800s, unanimity went out of favor because it promoted strategic hold-outs at the expense of consolidations that were considered necessary for technological innovation:[50] it first turned into supermajority and subsequently into ma-

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A.3d at 604. It was the *Unitrin* decision itself that first introduced the concept that takeover defenses are legitimate so long as the bidder's chances to win an election to replace the board are not "mathematically impossible or realistically unattainable." *Unitrin,* 651 A.2d at 1388–89.

45. Edelman & Thomas, *supra* note 37, at 460 (citing FRANK H EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 70 (1991)).

46. *See generally* Thompson & Edelman, *supra* note 29, at 130 ("Voting plays a limited role in corporate decisionmaking, much more limited than in the public sphere. Shareholders have binding votes on only two things: the election of directors and ratifying fundamental corporate changes such as mergers."). *See also* Oesterle & Palmiter, *supra* note 42, at 501 ("[S]hareholder suffrage in American public corporations is limited and largely perfunctory.").

47. *See supra* note 28.

48. *See supra* note 29.

49. William Carney, *Fundamental Corporate Changes, Minority Shareholders, and Business Purposes*, 1980 AM. B. FOUND. RES. J. 69, 79–92 (describing the evolution of rules governing fundamental changes and noting that the more liberal approach towards asset sales was progressively extended to consolidations).

50. *Id.* at 79 (citing, in particular, technological change to develop the long-line railroad).

jority of the shares outstanding.[51] Note, however, that one cannot read too much into the decisional powers by shareholders in a merger for the simple fact that the entire process depends for the largest part on directors' initiative.[52] In fact, the whole gatekeeper power rests on the board: "[i]f [the board] does not wish for a merger to happen, it is not obligated to put the matter before the shareholders, hardly an indication of shareholder primacy."[53] In any event, as Black and Kraakman point out, the "law supports bilateral decision-making by shareholders and the board on decisions that are fundamental to the corporation's identity and existence, especially decisions that place managers and directors in a final period problem, where agency costs are likely to be high."[54]

Voting in tender offers, when it happens, simply flows from the governance structure of a corporation in which shareholders have extremely limited decisional power, which nonetheless includes the right to remove and elect directors[55]—a power that

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51. As stated by Gilson and Black:

> Prior to the 1960s, the great majority of states required a two-thirds vote. This pattern was broken in 1962 when the Model Business Corporation Act reduced the required percentage approval to a majority. . . . Delaware reduc[ed] the vote requirement in its statute from two-thirds to a majority in 1967.

GILSON & BLACK, *supra* note 33, at 642–43 (footnotes omitted). *See* Carney, *supra* note 49, at 95. The ease for approving mergers was counterbalanced with the added protection of appraisal rights. *Id.* at 70–71, 94–95. *See also* Robert B. Thompson, *Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law*, 84 GEO. L.J. 1, 3–4 (1995).

52. Thompson & Edelman, *supra* note 29, at 139.

53. *Id.*

54. Black & Kraakman, *supra* note 6, at 559 (noting that "[a] mandatory shareholder vote on mergers and sales of all or substantially all assets, and the appraisal remedy for mergers, belie the assumption that the law should always presume that the board knows best."); *see* WILLIAM T. ALLEN, REINIER KRAAKMAN & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 462 (2012) (mentioning special agency problems when incumbents potentially face a final period).

55. Delaware law requires a shareholder vote only for certain types of acquisitions, namely mergers (subject to some exceptions), *see* DEL. CODE ANN. tit. 8, § 215(c) (West 2010), and sales of all or substantially all of the assets, *see* DEL. CODE ANN. tit. 8, § 271 (West 2010). As mentioned earlier, a shareholder vote *can* be triggered in the tender offer context, but not as an automatic requirement; rather it would naturally flow from basic corporate law rules on di-

Delaware judges exalted to show the non-definitive nature of takeover defenses and ultimately justify them.[56] So, when we answer the question as to why the lawmaker conferred voting power to shareholders in the context of acquisitions, we have all but a unitary explanation.

Still, if we look at shareholder voting in the context of acquisitions from a functional perspective, we observe something different and quite interesting. When shareholders vote in an acquisition, especially when they vote from a sell-side standpoint, the aggregation of their preferences works, either de jure[57] or de facto,[58] as a requisite approval for the transaction to go through. Such an approval is value-based: each shareholder has to determine whether he or she would be better off with or without the transaction. To that end, they compare the per-share consideration under the transaction with their own reservation price based on what they think the long-term value of the target will be if the transaction does not get approved.[59]

In the context of hostile deals, some scholars believe that shareholder voting is an effective way to solve the so-called pressure-to-tender problem affecting tender offers: the concern that shareholders might decide whether to tender their shares not on the basis of the merits of the offer but rather because they want to

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rector removability and election, *see* DEL. CODE ANN. tit. 8, §§ 141(k), 211(b), 216, which, to be sure, are subject to a whole host of bells and whistles, depending whether directors may be removed without cause, an effective staggered board is in place, shareholders can call special meetings or act by written consent, and so forth. *See* Gatti, *supra* note 14, at 109–21. Bear in mind that the inverse can also be true: there are tender offers that do not entail any vote, yet they share the same functional result of the transactions that do entail one. Just like many other major business and financial decisions, tender offers can happen without getting any shareholders' approval.

56. *See supra* notes 37–40 and accompanying text.

57. That is the case for mergers and asset sales. *See supra* notes 28 and 30 and accompanying text.

58. In hostile deals, sometimes winning the proxy fight to replace the board and redeem the poison pill is the only strategy a bidder can pursue. *See supra* notes 38–44 and accompanying text.

59. *See, e.g.*, Lucian Arye Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 HARV. L. REV. 1695, 1700–01 (1985) [hereinafter Bebchuk, *Undistorted Choice*]; Barry & Hatfield, *supra* note 33, at 661–62.

avoid failing to tender to an offer that is ultimately successful, in which case they would get stuck with minority shares that would trade at a much lower price.[60] By way of voting, the argument goes, shareholders are able to decide cohesively, as if they were a "sole owner."[61] The decision reached by shareholders is considered the best tool to obtain a statistical approximation[62] of what a

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60. Lucian Bebchuk is the most prominent advocate of shareholder voting in connection with tender offers. *See* Lucian Arye Bebchuk, *The Sole Owner Standard for Takeover Policy*, 17 J. LEGAL STUD. 197, 198 (1988) [hereinafter Bebchuk, *Sole Owner*]; Bebchuk, *Undistorted Choice*, *supra* note 59, at 1747–54.

61. Lucian Arye Bebchuk, *A Model of the Outcome of Takeover Bids* 16, 22 (Harvard Law Sch., John M. Olin Ctr. Law, Econ. & Bus., Discussion Paper No. 11, 1985) (on file with author); *see also* Zohar Goshen, *Voting (Insincerely) in Corporate Law*, 2 THEORETICAL INQUIRIES IN L. 815, 835 (2001) [hereinafter Goshen, *Voting (Insincerely)*] ("These restrictions [including shareholder voting] allow security holders to arrive at the group preference by forcing people who wish to transact with the group to acquire its consent.").

62. *See* Zohar Goshen, *The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality*, 91 CALIF. L. REV. 393, 399 (2003) [hereinafter Goshen, *Controlling Corporate Self-Dealing*]. On majority voting as the best approximation to determine a group preference, with particular regards to corporate law, Goshen states that "[t]he voting mechanism is based on the assumption that the majority opinion expresses the 'group preference,' that is, the optimal choice for the group as a whole. *Id.* Goshen also states:

> Voting is most commonly accepted as the best method for extracting the group preference from among the disparate and diverging subjective opinions of the group of security holders. The majority view of the security holders reflects the optimal choice for the group as a whole, providing the best approximation of the choice that would be implemented if a single individual, rather than a group, were making the decision. The presumed correlation between the group preference and the majority view rests on a statistical proposition: assuming each security holder is more likely to be correct than mistaken, the choice made by the largest number of voters will most probably be the "correct" one. Hence, it is certainly in the minority's interest, *ex ante*, that the majority view prevail.

Goshen, *Voting (Insincerely)*, *supra* note 61, at 817–18 (citations omitted); *see also* GILSON & BLACK, *supra* note 33, at 643 ("[T]he majority requirement . . . [is] based on the simple assumption that if more shareholders favor a transaction than oppose it, the gains to those favoring it will exceed the losses to those opposing it and, therefore, the transaction will result in a net gain."). Clearly, majority voting in the corporate context has a pretty different meaning than the

sole owner would have done in a two-person, buyer and seller negotiation.[63] In the absence of a vote, shareholders would fail to coordinate and might likely decide to tender because of pressure to do so. Since shareholders are able to tender their shares even if they voted against the bid, through a vote they can express their genuine opinion of the bid based on how they view the offer price versus the expected value of the target if it were to stay independent. Notably, the U.S. Supreme Court endorsed this rationale in the *CTS Corp. v. Dynamics Corp. of America* decision when it upheld the constitutionality of the Indiana anti-takeover statute, a control share acquisition statute.[64]

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numerical majority we are accustomed to in regular political elections. Here, "majority" means majority of shares cast in favor or against a given resolution: as each share generally carries one vote, larger shareholdings can carry more votes than shareholders that only won a few shares. But the validity of a majority proposition is assured by the fact that those who own more shares are deemed to have better incentives to make the right decision since they can reap the benefits (or alternatively bear the bad consequences) of their choice. *See* Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 408–09 (1983); Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 612–13 (2006).

63. *See* Lucian Arye Bebchuk, *Pressure to Tender: An Analysis and a Proposed Remedy*, 12 DEL. J. CORP. L. 911, 915–17 (1987) (discussing the actions of a sole owner in the sale of his or her assets and why the shareholder vote is the best mechanism to ensure undistorted choice and efficient allocation of assets in a tender offer); Goshen, *Controlling Corporate Self-Dealing*, *supra* note 62, at 399–400.

64. The United States Supreme Court in *CTS Corp. v. Dynamics Corp. of America* stated:

> The Indiana Act operates on the assumption, implicit in the Williams Act, that independent shareholders faced with tender offers often are at a disadvantage. By allowing such shareholders to vote as a group, the Act protects them from the coercive aspects of some tender offers. If, for example, shareholders believe that a successful tender offer will be followed by a purchase of nontendering shares at a depressed price, individual shareholders may tender their shares—even if they doubt the tender offer is in the corporation's best interest—to protect themselves from being forced to sell their shares at a depressed price. As the SEC explains: "The alternative of not accepting the tender offer is virtual assurance that, if the offer is successful, the shares will have to be sold in the lower priced, second step." Two-Tier Tender Offer Pricing and Non-

A system of shareholder referendums for takeovers is not without its critics, who come from opposite sides of the takeover debate. On the one hand, takeover champions like Gilson and Schwartz believe that tender offers combined with director elections (i.e., the byproduct of *Unocal*, *Unitrin*, and their progeny) perform worse than pure buyer/seller market transactions like stand-alone tender offers. One reason is because tender offers are cheaper to run and quicker, while "target managers have an incentive and the opportunity to pervert an election process."[65] Similarly, Gordon questions the overall logic of giving directors ample powers to say no to a deal in the aim of helping shareholders not make valuation mistakes[66] but then offer shareholders the ballot box route: "[i]f shareholders are prone to mistakes in evaluating a hostile bid, why are they suddenly wiser in deciding how to vote in the related proxy battle presenting the same issue?"[67] On the other hand, management advocates and takeover critics like Stephen Bainbridge and Martin Lipton believe that shareholders' final say on a takeover is a dangerous policy because, among other things, it would foster short termism and give arbitrageurs pivoting power

> Tender Offer Purchase Programs, SEC Exchange Act Rel. No. 21079 (June 21, 1984), [1984 Transfer Binder] CCH Fed.Sec.L.Rep. ¶ 83,637, p. 86,916 (footnote omitted) . . . . *See* Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation*, 83 COLUM. L. REV. 249, 307–309 (1983). In such a situation under the Indiana Act, the shareholders as a group, acting in the corporation's best interest, could reject the offer, although individual shareholders might be inclined to accept it. The desire of the Indiana Legislature to protect shareholders of Indiana corporations from this type of coercive offer does not conflict with the Williams Act. Rather, it furthers the federal policy of investor protection.

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 82–83 (1987).

65. Gilson & Schwartz, *supra* note 10, at 791 (conceding that the issue is ultimately an empirical matter, yet in their theoretical model "transfer by vote appears . . . to be a less efficient mode than transfer by sale.").

66. This, in short, is the concern the court in *Unitrin* raised to justify the use of defensive measures. *See* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1385 (Del. 1995) (discussing how substantive coercion, that is, the showing that shareholders could accept an inadequate offer because of "ignorance or mistaken belief[,]" is sufficient for directors to show the existence of a threat under *Unocal*).

67. Gordon, *supra* note 12, at 530.

over acquisitions.[68] For purposes of this article, there is no need to take a position on this issue: I treat shareholder voting in hostile deals as a given.

In sum, albeit shareholder voting generally has a limited role in corporate governance, its gating importance in acquisitions cannot be understated. Put simply, without a shareholder vote, mergers and sales of all the assets cannot happen.[69] Even hostile takeovers require a vote, whether actual or operating in the shadow—that is, simply feared by the target because it is either threatened or launched and withdrawn following a target's decision to capitulate.[70]

C. "Sincerity" as a Basic Element of Majority Voting

Whether or not the right policy choice,[71] shareholders are entrusted with the power to determine the fate of an M&A deal, either by statute or the way the law of the market for corporate control has evolved.[72] To support shareholder choice, both state and federal law provide safeguards and protections of a various nature. These include mandatory disclosure, procedural rules for the meeting (including the applicable quorum and approval requirements),[73] as well as subjecting directors to extensive fiduciary

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68. Short-term oriented investing as represented by event-driven, merger arbitrageurs is central to understanding pro-target advocates' support for anti-takeover measures like poison pills, staggered boards, and delayed shareholder elections. Since the inception of the 1980s takeover boom, Martin Lipton, the most prominent voice in management advocacy, has been citing investors' short-termism as a primary justification for empowering directors with veto power in the context of hostile acquisitions. Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW 101, 104–05 (1979) (insulating boards of directors from shareholder pressure best serves the long-term interests of the corporation and its long-term shareholders); *see also* Stephen M. Bainbridge, *Response to Increasing Shareholder Power: Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1744–51 (2006).

69. Unless it is a short-form merger or a tender offer combined with a merger under Section 251(h) of the DGCL. *See supra* notes 28 and 30 and accompanying text.

70. *See* Gatti, *supra* note 14, at 85 n.26.; *infra* note 242 and accompanying text (providing accounts where proxy fights operated "in the shadows").

71. *See supra* notes 65 and 68 and accompanying text.

72. *See supra* Section II.A.

73. *Cf.* DEL. CODE ANN. tit. 8, § 141(k) (West 2016) (detailing procedures for removing directors or an entire board); DEL. CODE ANN. tit. 8, § 251(c)

duties in order to bolster the disclosure apparatus and the effectiveness of the franchise.

My focus is to establish whether in the context of M&A deals the majority rule is effective in aggregating shareholders preferences: in particular, I analyze whether the majority vote should be sincere, that is, not tainted by conflicts of interests by some shareholders. Sincerity is indeed considered a precondition for the efficiency of a majority vote, [74] and efficiency is a proxy

(West 2016) (laying out the notice requirements as well as the procedure for signing a merger agreement); DEL. CODE ANN. tit. 8, § 271(a) (West 2010) (noting that stockholders or members with the right to vote must approve a sale, lease, or exchange of assets at a meeting); DEL. CODE ANN. tit. 8, § 211(b) (West 2009); DEL. CODE ANN. tit. 8, § 216(3) (West 2007) (noting that directors must be elected by a plurality of those present at a board meeting); *see also* Janet Fischer & Mary Alcock, *Voting at Annual Meetings*, *in* CLEARLY GOTTLIEB MERGERS & ACQUISITIONS REPORT CORPORATE GOVERNANCE REPORT 14, 16–17 (June/September 2007), http://web.archive.org/web/20151203063914/http:/www.cgsh.com/files/Publication/589d153f-cf1b-4ee0-ba93-d653470caa99/Presentation/PublicationAttachment/052f619c-f3dc-4af3-b36e-d7423556e6e0/CG%20M%26A%20and%20Corporate%20Governance%20Report.pdf (discussing "whether the quorum requirement is met and whether the proposal received enough 'for' votes to pass"); Richard W. Barrett, Note, *Elephant in the Boardroom?: Counting the Vote in Corporate Elections*, 44 VAL. U. L. REV. 125, 158–64 (2009) (for the account that understanding vote tabulating rules can be tricky and ministerial mistakes are not that rare).

74. Several works by Zohar Goshen study the interplay between majority voting and conflicts of interests under U.S. corporate law:

> [I]f the shareholders of a target company have a common interest—increasing share value—but differ on the question of whether or not they will benefit from a proposed reorganization, the proposed solution will allow us to ascertain the group preference. The majority opinion will be the best measure because majority choice is the most efficient alternative. On the other hand, the proposed solution will not be appropriate in cases where the parties have conflicting interests and differ not only regarding their judgment about the preferred alternative but also regarding the desired result . . . . When such a conflict of interest exists between voters, the majority's opinion is not necessarily the most efficient choice for the group.

Zohar Goshen, *Controlling Strategic Voting: Property Rule or Liability Rule?*, 70 S. CAL. L. REV. 741, 797 (1997) [hereinafter Goshen, *Controlling Strategic Voting*]; *see also* Goshen, *Controlling Corporate Self-Dealing*, *supra* note 62, at 399–400; Goshen, *Voting (Insincerely), supra* note 61, at 815. *Cf.* Iman Anab-

that corporate scholars, by looking at any marginal improvement of aggregate shareholder wealth, have used to assess a voting system's effectiveness.[75] My work looks into whether shareholder voting in M&A deals can be considered to effectively and efficiently aggregate shareholder preferences. Does the system care if the vote is sincere? By sincerity, I mean that the vote be cast by an interested shareholder with the purpose of satisfying his or her own private preference[76] against the common preference of fostering

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tawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 575 (2006) ("Shareholders with private interests . . . might prefer the firm to pursue those interests at the expense of the interests they have in common with other shareholders."); Michael C. Schouten, *The Mechanisms of Voting Efficiency*, 2010 COLUM. BUS. L. REV. 763, 773, 802–03 ("When shareholders have heterogeneous preferences and some vote with a view to maximizing their private interests rather than their pro-rata share of the firm's future cash flows, the probability that a majority of the shares is voted for the correct option decreases dramatically.") (discussing conflicted insincere voting); Thompson & Edelman, *supra* note 29, at 174 (relying on votes to determine the decision of the group requires that voters' interest be aligned with the collective interest).

75. *See, e.g.*, Bebchuk, *Sole Owner*, *supra* note 60, at 203; Goshen, *Voting (Insincerely)*, *supra* note 61, at 816–17; Schouten, *supra* note 74, at 774–75. Although I am well aware that, as a principle to guide director actions, shareholder wealth maximization is far from being a settled concept, see *infra* Section III.C.2.b, using it for purposes of testing the effectiveness of a voting system is the correct methodological approach. When the corporate law system entrusts the very group of shareholder-principals with the power to make certain decisions and essentially allows the aggregated preferences of the majority to bind the dissenters and select the course of action for the corporation and/or the outcome of the deal (as in the case of a joint takeover and proxy fight), it only appears normal to expect (i) shareholders to pursue an improvement in their wealth and (ii) that the underlying voting procedure to serve as instrument for such quest and to thus reflect adequately and with fidelity such aggregated preferences. Now, few can dispute that shareholders invest in corporations to make money and increase their wealth, hence the choice to use shareholder value as a metric—what can be and is disputed with respect to shareholder preferences is that they may very well not be homogeneous because of diverse attitudes towards risk, liquidity constraints, investment strategy, investment horizon, and so forth. But as a starting point, it is safe and useful to establish that certain procedural preconditions need to be in place to ensure that through the vote shareholders can improve their wealth.

76. *See* GILSON & BLACK, *supra* note 33, at 649 ("[T]he term 'interested' is a shorthand for the fact that the shareholder is disproportionately affected by the proposed action."); *see also* Anabtawi, *supra* note 74, at 564 n.9 ("By 'pri-

the corporation's interests;[77] this is something that makes economic sense for the given shareholder whenever the private benefit is greater than the pro-rata loss *qua* shareholder.[78] Imagine, for instance, a given transaction with a negative net effect for a corporation (say a sale of assets at less than fair market value), in which the potential pro-rata loss that a shareholder might suffer is offset by the gain such shareholder would otherwise make because of her conflicting interest in the transaction (assume she is the acquirer of the asset at the below market price) and the vote cast by such shareholder is *pivotal* to approve the transaction.[79]

Delaware case law has shown sensitivity over the issue of misalignments of shareholder interests in general: not long ago, in 2010, quoting Professors Thompson and Edelman, in a vote-buying case the Delaware Supreme Court cautioned that a disconnect between voting rights and the economic interests of shares "'compromises the ability of voting to perform its assigned role'" as "a decisionmaking system that relies on votes to determine the decision of the group necessarily requires that *the voters' interest be aligned with the collective interest*."[80] However, as the subsec-

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vate' interests, I mean those interests of a shareholder that are not shared by shareholders generally.").

77. *See* Goshen, *Voting (Insincerely)*, *supra* note 61, at 815. Goshen believes that "the proper functioning of the voting mechanism is often endangered due to *insincere voting*" and that "[t]he mechanism cannot operate properly unless every security holder votes sincerely, that is, in accordance with his or her personal belief regarding the value of the transaction to the corporation as a whole." *Id.* Note that, in Goshen's view, insincere voting means two things: strategic voting and conflict of interest voting. The former occurs "[w]henever voters take into account how other members of the group will vote," while the latter, the topic of this article, is when shareholders "vote according to their assessment of the transaction's value to them personally outside of the group." *Id*. at 818. *See also* Goshen, *Controlling Corporate Self-Dealing*, *supra* note 62, at 400; Schouten, *supra* note 74, at 802.

78. *See* Anabtawi, *supra* note 74, at 575.

79. If it is not pivotal, the lack of sincerity would not alter the outcome and would thus be irrelevant. With respect to vote-buying, see Crown Emak Partners, LLC v. Kurz, 992 A.2d 377, 387 (2010) ("[V]ote buying merits judicial review if it is disenfranchising, *i.e.*, if it actually affects the outcome of the vote.") (citation omitted).

80. *Id*. at 388 (quoting Thompson & Edelman, *supra* note 29, at 153, 174) (emphasis added); *see* Goshen, *Voting (Insincerely)*, *supra* note 61, at 818 ("[C]onflict of interests voting undermines the voting system's ability to ascer-

tions that immediately follow can tell, while M&A law has addressed the issue in certain situations such as freeze-out transactions, it has been silent on others such as proxy fights in connection with tender offers.

1. Sincerity of Shareholder Votes in Freeze-Out Transactions

Lack of sincerity due to a shareholder conflict can therefore trigger deviations from what would have otherwise been the optimal outcome of the vote for the corporation. The most discernible scenario is of course a parent/subsidiary freeze-out merger, in which the parent company, with sufficient votes to approve the merger at the shareholder meeting of the subsidiary, has a clear interest in saving costs in the buy-out transaction and not paying a sizeable price to shareholders.[81] The fact that a parent has enough votes to push the transaction arguably makes the voting exercise potentially futile; that is why the law does not seek to simply curb the conflicted vote but goes on to expand the breadth of fiduciary duties both directors of the subsidiary and the controlling shareholder are subject to. Indeed, under Delaware law this situation triggers an enhanced level of scrutiny of the underlying transaction, which goes under the name of entire fairness and requires the defendant directors and controlling shareholder to show both "fair dealing" and "fair price." [82] Subsequent case law clarified that the

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tain the group preference by shifting the focus away from the transaction's value to the group as a whole towards the voters' personal stakes in the deal.").

81. *See generally* Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2, 8–9 (2005) (noting that the levels of freeze-outs activity increased in the 1960s and 1970s when stock markets were not performing well and controlling shareholders took advantage of fire-sale prices for the subsidiary stock). S*ee also* Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785, 796 (2003) (A "method by which a controlling shareholder can extract private benefits of control is through freezing out minority shareholders at a market price that reflects a discount equivalent to the private benefits of control available from operating the controlled corporation.").

82. In *Weinberger v. UOP, Inc.*, the Delaware Supreme Court stated:

> [Fair dealing] embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. . . . [Fair price] relates to the economic and financial considerations of the proposed merger,

burden of proving that the transaction meets such criteria, which the entire fairness standard initially puts on the defendants because of the conflicted nature of the transaction, can be shifted back to the plaintiff if certain procedural safeguards are followed: namely, that the transaction is either negotiated by an independent committee with broad negotiating powers (inclusive of the power to appoint separate counsel and financial advisor, as well as to say no to the transaction)[83] or that the transaction is approved by the majority of the minority of the subsidiary shareholders.[84]

Note again that the entire fairness scrutiny does not necessarily entail a limitation on the parent's voting rights at the shareholders' meeting of the subsidiary: *Rosenblatt* specified that approval by a majority of the minority is not "a legal prerequisite"[85]

> including all relevant factors . . . . However, the test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness.

Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (footnotes omitted.).

83. The independent committee was actually a suggestion by the *Weinberger* court:

> Although perfection is not possible, or expected, the result here could have been entirely different if UOP had appointed an independent negotiating committee of its outside directors to deal with Signal at arm's length. Since fairness in this context can be equated to conduct by a theoretical, wholly independent, board of directors acting upon the matter before them, it is unfortunate that this course apparently was neither considered nor pursued. Particularly in a parent-subsidiary context, a showing that the action taken was as though each of the contending parties had in fact exerted its bargaining power against the other at arm's length is strong evidence that the transaction meets the test of fairness.

Id. at 709 n.7 (citations omitted).

84. *Compare* Kahn v. Lynch Commc'ns Sys., 638 A.2d 1110, 1117 (Del. 1994) (clarifying that an effective independent committee would only shift the burden of proof, which in the specific case did not happen because the independent committee faced a retributive threat by parent—to launch a tender offer at a lower price if the committee kept rejecting it terms—, thus impairing its judgment and negotiating abilities), *with* Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937 (Del. 1985) ("[A]pproval of a merger . . . by an informed vote of a majority of the minority shareholders, while not a legal prerequisite, shifts the burden of proving the unfairness of the merger entirely to the plaintiffs.").

85. *Rosenblatt*, 493 A.2d at 937.

and so parent companies can get away with not subjecting the deal to a majority of the minority provision if they entrusted a well-functioning independent committee with broad negotiating powers.[86] Also, even if a voting limitation is put in place on a voluntary basis by way of subjecting the deal to a majority-of-the-minority condition, under some circumstances such a safeguard might not be enough to escape liability in the presence of procedural or disclosure flaws:[87] all the minority vote does is shift the burden of proof, but entire fairness remains the standard, [88] unless the transaction meets the recent and more onerous procedural requirements of the *MFW* safe harbor (in a nutshell, approval of the transaction by *both* an independent committee of directors and a majority of the minority of shareholders), in which case the transaction will be subject to simple business judgment review.[89]

All in all, the conflict in a parent/subsidiary freeze-merger is a well-known and amply explored issue in case law and legal literature—while this article does not purport to investigate it further, I note that, first, the law acknowledges the issue by regulating the transaction through, among other things, limiting the voting

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86. *See* Subramanian, *supra* note 81, at 16 (showing evidence that transactions planners prefer independent committees to majority-of-the-minority approvals).

87. This is what happened in *Weinberger* when the Court held that the minority vote was insufficient because "[m]aterial information, necessary to acquaint those shareholders with the bargaining positions of Signal and UOP, was withheld under circumstances amounting to a breach of fiduciary duty." *Weinberger*, 457 A.2d, at 703–08 (using proprietary information of the subsidiary, two of its directors—who were also directors of the parent—conducted a study to determine the fair price to offer in acquiring the remaining stock, but they only shared the results with inside directors, and shareholders were never informed).

88. *See supra* note 84.

89. Kahn v. M & F Worldwide Corp., 88 A.3d 635, 645–55 (Del. 2014) (explaining that the business judgment standard of review applies if the controlling stockholder subjects the merger to the necessary approval of: (i) a special committee of independent directors with separate financial and legal advisors, fully empowered to reject the transaction and negotiating a fair price with due care and (ii) a majority of the unaffiliated stockholders, fully informed and not coerced).

rights of the controlling shareholder and, second, one of the devices the law uses is the majority-of-the-minority condition.[90]

2. Sincerity of Shareholder Votes in Deals for Contestable Companies

A less obvious, yet equally critical scenario occurs in connection with transactions for companies with control contestable in the market, especially in hostile deals. As mentioned earlier, if a bidder cannot come to terms with target management over an acquisition proposal, the only way to override anti-takeover devices is to mount a proxy fight and repeal them.[91] In other words, buyers in pure hostile deals (that is, deals that start and finish with the two sides antagonizing) must make use of a shareholder vote to replace directors, with the vote being a de facto prerequisite for the deal success.[92]

Now, similar to the parent in a freeze-out transaction, the bidder does sit opposite to the target shareholders and thus is in *potential* conflict with them. Still, it is not expected that a bidder will refrain from voting in the proxy fight since replacing the board of directors is ultimately the last resort a bidder has in order to succeed in a hostile deal.[93] And of course that is not the only conflict

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90. Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227, 1232 (2008) ("Delaware case law, while not requiring shareholder approval of self-dealing transactions . . . provides a variety of inducements for it."). See Goshen, *Controlling Corporate Self-Dealing*, *supra* note 62, at 402, for a discussion on the majority-of-the-minority vote as a device to solve self-dealing problems.

91. *See supra* note 34 and accompanying text.

92. As noted *infra* note 242 and accompanying text, I reckon that not *all* hostile deals end up in an actual vote because many times the target or, as the case may be, the bidder will capitulate before even continuing with the vote: that happens whenever management or bidder believe they have little chance to prevail.

93. That bidders may and actually have to vote to win a proxy fight to redeem a pill is considered as a given in the literature, and it clearly happens in practice. For example:

> For a dissident shareholder group to win a proxy contest for corporate control, the shareholder group must either purchase enough voting shares to vote itself into office, or persuade enough other shareholders to vote for the dissident slate so that it obtains a majority of the votes cast in the election.

that might alter the voting outcome: because of the desire to maintain their respective roles, the votes cast by directors and management of the target, together with persons affiliated with them, are also *potentially* in conflict with the interests of the other shareholders.[94]

To be sure, as I explain further in Part IV,[95] shareholders' conflicts of interest are circumstantial: the mere possibility of a conflict (that is, the simple, positional conflict of bidders sitting on the other side of the transaction or the desire to stay in power for target directors and managers) is not per se sufficient to taint the

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Thomas, *supra* note 13, at 512.

94. With particular regard to director elections in the context of an acquisition, see Gilson & Schwartz, *supra* note 10, at 792, for an argument that "a minority composed of target management and its associates may have sufficient intensity of preference to defeat an efficient takeover because the manager group will have a large, private stake in the outcome." *See also* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (mentioning "the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders . . . ."). The literature on directors' conflicts in tender offers is vast, to say the least. *See, e.g.*, ROBERT C. CLARK, CORPORATE LAW 588 (1986) ("*[I]n no other context is the conflict of interest as serious as in the takeover situation*.") (emphasis in original); Allen, Jacobs & Strine, *supra* note 38, at 862 ("[T]he directors have no direct pecuniary interest in the transaction but have an 'entrenchment' interest, i.e., an interest in protecting their existing control of the corporation."); Black & Kraakman, *supra* note 6, at 557–58 ("If the possibility that a controlling shareholder might cash out minority shareholders without sharing hidden value with them disqualifies the hidden value model in change-of-control transactions, why does the risk that a target's board will be either disloyal or simply wrong in its claim of hidden value not have the same effect?"). Additionally, it is argued that:

> The lower stock price . . . is not . . . a moderate deterrent to board misbehavior in control contests. To entrenched managers, it is better to have a job with a capital-poor company than no job at all. The proxy fight changes their calculus, forcing managers to factor in the prospect of unemployment, even if they can mount successful tender offer defenses. Courts crafted the standards for tender offer defenses assuming the backstop of a proxy contest. To now absorb the proxy contest defenses into the forgiving judicial regime for tender offer defenses is conceptually and practically mistaken."

Oesterle & Palmiter, *supra* note 42, at 580.

95. For particular examples, see *infra* Sections IV.B.1, IV.B.2, and IV.B.4.a.

vote. It is in fact pursuing a personal interest and voting in the given resolution against the interests of the other shareholders that amounts to a pathology; determining what the interests of the other shareholders are depends on facts and circumstances arising from the actual offer on the table. In other words, assuming conflicts need to be analyzed under a shareholder wealth maximization norm,[96] if the offer is value maximizing, directors and managers voting against it (that is, voting to maintain the board and leave the pill in place) will be in conflict, but the bidder voting in favor will not. Conversely, if the offer is not value maximizing, the bidder voting in favor (that is, voting to replace the board and redeem the pill) will be in conflict, while directors and managers voting against will not. Interestingly, outside of Delaware, jurisdictions that have adopted a control share acquisition statute, and have therefore made hostile deals subject to a shareholder referendum,[97] have actually acknowledged and addressed the issue of conflicted voting through specific rules, which I come back to in Part III.[98]

All such potential conflicts are not peculiar to hostile acquisitions but appear in all similar "final period" situations. They can in fact be exacerbated in negotiated deals whereby acquirer and target management—in its aim to be "employed" by the former as future controlling shareholder or to otherwise get other favors[99]—might collude by agreeing to a subpar premium for the shareholders and have the merger approved thanks to their con-

96. *See supra* Section II.C and *infra* Section III.C.2.b.

97. *See supra* note 32 and accompanying text.

98. *See infra* notes 111–115 and accompanying text.

99. The Chancery Court in *Paramount Communications, Inc. v. Time, Inc.* noted:

> There may be at work [in a friendly deal] a force more subtle than a desire to maintain a title or office in order to assure continued salary or prerequisites. Many people commit a huge portion of their lives to a single large-scale business organization. They derive their identity in part from that organization and feel that they contribute to the identity of the firm. The mission of the firm is not seen by those involved with it as wholly economic, nor the continued existence of its distinctive identity as a matter of indifference.

Paramount Commc'ns, Inc. v. Time, Inc., Nos. 10866, 10670, 10935, 1989 WL 79880, at *7 (Del. Ch. July 14,1989), *aff'd*, 571 A.2d 1140 (Del. 1989).

flicted votes.[100] While in a hostile deal the position of target management and bidder is adversarial (and therefore, depending on whether the bid on the table is value maximizing or not, only one of the two sides can be in actual conflict with its fellow shareholders),[101] in a friendly deal, whenever the merger consideration is not value maximizing, *both* target management and the acquirer will be conflicted.[102] Moreover, in a friendly deal, if the merger requires a shareholders vote at the acquiring company as well,[103] conflicts of interests may also influence that vote.[104] In Part III, I

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100. For an account of the many conflicts that may arise in friendly deals, see John C. Coates, IV, *Mergers, Acquisitions and Restructuring: Types, Regulation, and Patterns of Practice* 11 (European Corp. Governance Inst., Law Working Paper No. 260/2014), http://ssrn.com/abstract_id=2463251 (mentioning, among other things, that "[f]iduciaries may favor one bidder over another, not in return for an explicit quid pro quo (e.g., in the form of a payment) but to curry good will in the hope of obtaining post-deal employment, or perhaps out of malice towards a bidder or gratitude for some past favor."). Coates adds that "[f]iduciaries may seek to sell their company 'too early' or 'too cheaply' to trigger 'golden parachutes' or vesting under option plans or retirement plans, or in return for benefits from the buyer." *Id.*; *see also* STEPHEN M. BAINBRIDGE, MERGERS AND ACQUISITIONS 58–59 (3d ed. 2012):

> Although the tension between shareholders and managers is perhaps most obvious in hostile takeovers, . . . similar conflicts of interest arise in negotiated acquisitions . . . . To purchase the board's cooperation the bidder may offer side payments to management, such as an equity stake in the surviving entity, employment or non-competition contracts, substantial severance payments, continuation of existing fringe benefits or other compensation arrangements. Although it is undoubtedly rare for side payments to be so large as to materially affect the price the bidder would otherwise be able to pay target shareholders, side payments may affect management's decision making by causing them to agree to an acquisition price lower than that which could be obtained from hard bargaining or open bidding.

Id. (footnotes omitted).

101. See *supra* note 95 and accompanying text.

102. For a discussion of how conflicts are ultimately circumstantial, see *infra* Section IV.A.2.

103. *See supra* note 29.

104. A case in point is the failed acquisition of King Pharmaceuticals by Mylan Pharmaceuticals, which was subject to shareholder approval of both companies. Ianthe Jeanne Dugan, *Hedge Funds Draw Scrutiny Over Merger Play*, WALL ST. J. (Jan. 11, 2006), http://www.wsj.com/articles/

SB113695140652343511. With its sizeable premium, the transaction would have benefited the hedge fund Perry Corp., owner of about 4.3 million King shares. *Id.* However, the market view of the deal was that Mylan was overpaying and vocal investors like Carl Icahn campaigned against the deal to hinder Mylan shareholder approval. *Id.* To ensure that the deal would not fall through, Perry accumulated 9.9% of Mylan shares to vote in favor of the merger. *Id.* But it did so, via a hedging transaction: while buying all the stock, a brokerage firm working for Perry was shorting the same amount of stock and Perry had a right to sell its shares back to the brokerage firm, which in turn had a right to call the stock back to Perry thus generating a wash (the end result of this strategy is what Hu and Black call "empty voting," that is, holding greater voting power than the underlying economic ownership). *Id.*; Henry T. C. Hu & Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions*, 156 U. PA. L. REV. 625, 626 (2008) [hereinafter Hu & Black, *Equity and Debt Decoupling*]. So the practical effect of this transaction was for Perry to obtain voting rights at Mylan, without bearing any economic interest or risk associated with a decrease in the price of such shares. *See* Dugan, *supra*. The ensuing lawsuit to challenge Perry's voting strategy was eventually dropped after the Mylan/King merger agreement was terminated—however, the SEC subsequently sanctioned Perry for failure to make disclosures under Section 13(d) of the Exchange Act and Rule 13d-1 thereunder. *In the Matter of Perry Corp. Respondent*, Exchange Act Release No. 60351 (July 21, 2009).

Another case to consider in this regard is the merger between Hewlett-Packard and Compaq, which was approved by the Hewlett-Packard shareholders with a mere 51.4% of the votes and with allegations of vote-buying by Hewlett-Packard: four days before the Hewlett-Packard shareholder meeting, Deutsche Bank submitted its proxy, voting its shares against the merger. Kahan & Rock, *supra* note 90, at 1229. On that same date, Hewlett-Packard closed a credit facility to which Deutsche Bank was added as a co-arranger. *Id.* Allegedly, on the morning of the shareholder meeting, at the demand of Hewlett-Packard management, a telephone conference was held between Deutsche Bank and Hewlett-Packard, after which the bank changed most of its votes in support of the proposed merger. In the ensuing litigation, during the motion to dismiss phase, the court emphasized that it will maintain its focus on the "possible deleterious effects of a challenged vote-buying agreement on shareholders[,]" especially whether a vote-buying agreement was "sufficient to change the result of a vote," and shareholders were "defrauded or disenfranchised." Hewlett v. Hewlett–Packard Co., No. CIV.A. 19513–NC, 2002 WL 549137, at *5 (Del. Ch. Apr. 8, 2002). The case was eventually dismissed on the merits for the plaintiff's failure to prove that management improperly enticed or coerced Deutsche Bank into voting in its favor. Hewlett v. Hewlett-Packard Co., No. CIV.A. 19513–NC, 2002 WL 818091 (Del. Ch. Apr. 30, 2002).

briefly mention some recent developments in Delaware case law that have in fact addressed conflicted voting in friendly deals.[105]

Given the importance of voting sincerity, which is regarded as a prerequisite to the effectiveness and efficiency of shareholder voting overall, leaving the issue unaddressed can, in the long run, generate market failures in how corporate control ultimately gets allocated in all those instances in which the acquisition outcome is decided through a shareholder vote that is tainted by a conflict.[106] Additionally, if shareholders' conflicts having a determinant impact on the outcome of a vote were left undetected, using shareholder approval as a proxy to reflect what is best for the company (irrespective of whether we want to frame the issue in profitability, efficiency, fairness, or any other terms) would simply cease to work because a tainted vote cannot clearly operate as a device to reflect an aggregation of preferences.[107] True, as Part III will show, in parent/subsidiary mergers, conflicts are well recognized and receive a detailed and multifaceted legal treatment. However, Part III will also indicate how shareholder conflicts in deals concerning companies with control contestable in the market have in fact largely lacked attention from policymakers and legal commentators.

III. POLICING SHAREHOLDER CONFLICTS IN ACQUISITIONS: THE LAW OF THE LAND, IF ANY

A. *Introduction*

Part III focuses on the tools available to the interpreter to tackle conflicted voting in acquisitions. While the main focus of this article lies in how conflicted votes can affect proxy fights in connection with hostile acquisitions, this Part also broadens the

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105. *See infra* notes 122 –124 and accompanying text.

106. On the importance that corporate control is allocated efficiently, see, for example, Bebchuk, *Sole Owner*, *supra* note 60, at 198, noting that "secur[ing] the efficient outcome of acquisition attempts . . . would provide appropriate incentives to investment in . . . companies."

107. For the long-term effects of conflicted voting on shareholder value, see Anabtawi, *supra* note 74, at 575, noting a "diminution in shareholder value that results whenever the rent seeker succeeds in persuading the firm's managers to make a decision that is privately beneficial to the rent seeker but detrimental to the common interests of shareholders."

spectrum to assess, on the one hand, instances of shareholder conflicts in connection with acquisitions that are not necessarily hostile and, on the other hand, situations in which the judiciary has intervened (or calls for a judicial intervention or statutory reform have been made) to address situations tainted by a shareholder conflict, such as vote buying and empty voting. Section B shows how, in Delaware, no specific regime for hostile deals exists but mentions specific "disinterested shares" regimes in some related fields, especially in the context of control share acquisition statutes in other states. Section C tackles the main question starting with the few indications we can grasp from existing scholarship (C.1) and then tentatively surveys all the complex interpretative questions a judge would likely face (C.2).

A preliminary qualification is in order. This article does not purport to identify the correct interpretative solution to existing law in Delaware: the many variables and contours that can emerge in a specific case would make such a task very hard, possibly naïve, and ultimately not useful given the wide discretion entrusted in equity courts like the Delaware Chancery Court and the Delaware Supreme Court.[108] However, this article will still seek to shed light on certain critical areas of the positive law of corporate voting not only to help facilitate any future interpretational effort but also to elucidate the possible policy approaches a system can adopt.

B. Lack of a Specific Regime (But Some Regimes in Related Areas Deal with the Issue Somehow)

The DGCL does not address the issue of shareholder conflicts in general terms: similar to the rest of corporate law codes in America, there is no regime to sanction conflicted voting in shareholder resolutions.[109] Also, with the exception of a portion of its

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108. *See generally* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?,* 44 UCLA L. REV. 1009, 1016–17, 1101–02 (1997) (analyzing the inner mechanics of how Delaware cases are adjudicated). Rock states that "the process that leads to reasonably precise standards proceeds through the elaboration of the concepts of independence, good faith, and due care through richly detailed narratives of good and bad behavior, of positive and negative examples, that are not reducible to rules or algorithms." *Id.* at 1017.

109. Some jurisdictions around the world actually do provide for regimes to generally address conflicted voting: for example, the Italian corporate law system provides that any resolution adopted with the pivotal vote of a share-

business combination statute,[110] Delaware statutory law does not provide for any ad hoc regime for conflicted voting in acquisitions. This does not mean that domestic corporate laws completely refrain from dealing with the issue.

On the one hand, specific regimes for certain type of acquisitions do tackle conflicted voting. As far as hostile deals are concerned, all states that have adopted control share acquisition statutes ("CSAS"), which essentially require unsolicited acquirers of significant stakes to obtain a prior authorization before crossing certain ownership thresholds, contemplate bright-line rules restricting voting by certain shareholders. Such authorizations must be passed by a majority (sometimes a supermajority) of disinterested shareholders.[111] In the absence of such authorization, shareholders crossing the applicable threshold cannot generally exercise the voting rights attached to their shares exceeding the applicable threshold.[112] All existing CSAS disqualify the acquirer from voting in such referendums.[113] Almost all the statutes also disqualify officers and employees,[114] and a few disqualify directors who are nei-

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holder carrying an interest (on his or her behalf, or as instructed by a third party) in conflict with the corporation's interest can be annulled if the resolution may potentially damage the corporation. *See* CODE CIVIL [C.c.] [CIVIL CODE], art. 2373 (It.).

110. Compare section 203(a) of the DGCL, which prohibits a public company from entering into certain business combinations with a stockholder owning 15% or more of the corporation's voting stock (or with any of its affiliates or associates) for a three-year period following the crossing of the 15% threshold, unless, among other exceptions, the business combination is "approved by the board of directors and authorized at an annual or special meeting of stockholders, and not by written consent, by the affirmative vote of at least 66 2/3% of the outstanding voting stock *which is not owned by the interested stockholder*." DEL. CODE ANN. tit. 8, § 203(a) (2007) (emphasis added).

111. For references to statutory provisions, see *infra* Chart, Appendix I.

112. Each state has its own peculiar remedies regime. *See infra* Appendix I. For instance, while Hawaii denies the voting rights of an acquirer for one year should the acquisition not be approved by a majority of disinterested shares, other states disallow an acquirer to vote in shareholder matters if the acquirer has more than 20 percent of the voting rights. *Id.* Wisconsin restricts the voting power of an acquirer which holds over 20 percent of the voting power to one-tenth of the acquirer's shares. *Id.*

113. *See infra* Appendix I.

114. The only jurisdictions that have adopted a CSAS not limiting votes by officers and employees are Hawaii, Nebraska, and Pennsylvania. HAW. REV.

ther officers nor employees.[115] I will refer to these bright-line rules as "disinterested shares" regimes.

Similarly, as noted earlier,[116] analogous disqualifying provisions are present in the context of freeze-out mergers, whereby subjecting on a voluntary basis the shareholder vote to a majority-of-the-minority condition would either: (i) generally switch the burden of proof on the entire fairness of the transaction back to the plaintiff;[117] or (ii) together with the additional safeguard of the approval by a fully empowered independent committee, switch the standard of review to the much more lenient business judgment review as laid out by the Delaware Supreme Court in the recent *MFW* case.[118]

On the other hand, under Delaware case law there can be restrictions for votes cast as a result of a vote-buying transaction; a relatively recent Delaware Supreme Court decision actually puts conflict of interests at the center of the analysis on the validity of vote-buying: while generally not illegal, vote-buying is not permitted when the economic interests and the voting interests of the shares do not remain aligned.[119] In that decision, the Delaware

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STAT. § 414E-2 (2008); NEB. REV. STAT. § 21-2441 (2012); 15 PA. STAT. AND CONS. STAT. ANN. § 2562 (West 2012).

115. *See* ARIZ. REV. STAT. ANN. § 10-2725(B) (2013); IDAHO CODE § 30-1601(11) (2013); NEV. REV. STAT. ANN. § 78.3787 (LexisNexis 2010).

116. *See supra* Section II.C.1.

117. *See supra* notes 82–88 and accompanying text.

118. *See supra* note 89.

119. Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377, 387–90 (Del. 2010). Vote-buying at one time was per se illegal. Joe Pavelich, Note, *The Shareholder Judgment Rule: Delaware's Permissive Response to Corporate Vote-Buying*, 31 IOWA J. CORP. L. 247, 248 (2005). Many courts adopted the principle that reciprocal obligations among shareholders required each to use their independent judgment in determining how to vote their shares: as a consequence, it was held that the receipt by a shareholder of some personal consideration in return for the exercise of his or her powers as a shareholder operated as a fraud on other shareholders or otherwise violated public policy. *See id.* at 251−55 In 1982, the Delaware Chancery Court altered this line of thought in *Schreiber v. Carney* by generally permitting vote-buying, subject to certain exceptions on a case-by-case basis: the court determined that vote-buying agreements are to be invalidated on an individual basis if the purpose of the act is to defraud or disenfranchise other stockholders or if the agreement is against public policy. 447 A.2d 17, 25 (Del. Ch. 1982); Pavelich, *supra* note 119, at 251. This approach did not dissipate the debate on vote-buying, specifically on how vote-

Supreme Court echoed the concerns of then Vice–Chancellor Steele that "a shareholder who divorces property interest from voting interest[ ] fails to serve the 'community of interest' among all shareholders, since the 'bought' shareholder votes may not reflect rational, economic self-interest arguably common to all shareholders."[120] In the closely related field of empty voting (that is, holding greater voting power than the underlying economic ownership), some of the literature has suggested that certain vote decoupling transactions be scrutinized through the misalignment lens and screened out if the underlying motives of the empty voter are in conflict with the interests of the other shareholders.[121]

Moreover, a recent line of cases in M&A litigation originated by the Delaware Supreme Court decision in *Corwin v. KKR Financial Holdings LLC*[122] has established that under Delaware

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buying might potentially disenfranchise shareholders. *See* Thompson & Edelman, *supra* note 29, at 153 (noting that a disconnect between voting rights and the economic interests of shares "compromises the ability of voting to perform its assigned role"). In *Crown EMAK Partners*, while on the one hand the Delaware Supreme Court conceded that vote-buying needs close judicial scrutiny when the votes bought will swing the vote in the buyer's favor, potentially disenfranchising other shareholders, on the other hand, it held that there was no improper vote-buying in the specific case because the economic interest and the voting interest remained aligned (more precisely, no improper vote buying was found in obtaining votes from another shareholder to remove certain directors, because even though the acquiring shareholder did not obtain title to the shares, both the voting and economic interests were transferred from one shareholder to another under a purchase agreement). *Crown EMAK Partners*, 992 A.2d at 390.

120. *Crown Emak Partners*, 992 A.2d at 388 (quoting IXC Commc'ns, Inc. S'holders Litig. v. Cincinnati Bell, No. C.A. 17324, 1999 WL 1009174, at *8 (Del. Ch. Oct. 27, 1999)).

121. For more detail, see *infra* note 155 and accompanying text.

122. 125 A.3d 304 (Del. 2015). In Chief Justice Strine's words:

> When the real parties in interest—the disinterested equity owners—can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them.

Id. at 313. Subsequent pronouncements by Delaware courts have expanded the boundaries of the *Corwin* decision. *Compare* Singh v. Attenborough, 137 A.3d 151 (Del. 2016) (finding when the business judgment rule applies, the only instance in which directors might be liable for damages is under the waste doctrine), *with In re* Volcano Corp. S'holder Litig., 143 A.3d 727, 747 (Del. Ch.

law the fully informed, uncoerced vote of a majority of the *disinterested* stockholders of a corporation approving an M&A transaction that is not subject to entire fairness restores the presumption of the business judgment rule in lieu of any other enhanced type of scrutiny.[123] While the absence of a conflict of interest in the majority approving the transaction is a necessary element in order to qualify for an easy dismissal of the litigation under the benevolent business judgment rule, none of the decisions rendered by the Delaware judiciary thus far has analyzed how a scrutiny over whether shareholders are conflicted or not will work in practice;[124] in particular, it is not clear whether plaintiffs can actually prove that certain shareholders (say directors, managers, or the acquirer) voting in favor in the specific resolution are in fact conflicted and as a result their vote must be disregarded.

All in all, conflicted voting does receive *some* legal treatment for *some* types of acquisitions: it is disregarded under unsolicited deals in jurisdictions adopting a CSAS, and it is discouraged in both freeze-out transactions and, more recently, in friendly deals in which directors seek an early dismissal of litigation under the business judgment rule. In addition, Delaware law distinguishes vote-buying cases on the basis of conflict of interests: so long as there is such a conflict in the specific case, the vote-buying transaction is illegal and sanctioned, otherwise vote-buying is generally permissible.

However, for a large chunk of M&A transactions, conflicted voting receives no statutory treatment; absent a vote-buying arrangement or the aim to qualify for the *Corwin* safe harbor to

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2016) (extending the ruling of *Corwin* to two-step mergers under Section 251(h) of the DGCL: the acceptance of a first-step tender offer by a majority fully informed, disinterested, uncoerced shareholders has the same cleansing effect of a fully informed, uncoerced vote by disinterested shareholders in connection with a merger). Note that the emphasis on the absence of conflicts by the voting majority for the resolution to be effective is not a novelty. *See* Lewis v. Vogelstein, 699 A.2d 327, 335 (Del. Ch. 1997) (discussing ratification law in the context of director conflict transactions and mentioning that ratification may at times be "ineffectual . . . because a majority of those affirming the transaction had a conflicting interest with respect to it").

123. *Corwin v. KKR*, 125 A.3d at 308–11.

124. The presence of a conflict of interest of shareholders was not in dispute under any of the cases mentioned, see *supra* note 122.

have a deal scrutinized under the more lenient business judgment rule, there should be little expectation that the vote will be second guessed. Hence, there is a risk that deals can get approved or rejected not because the underlying decision is in the best interests of the corporation, but because of the votes cast by shareholders whose interest are in conflict with the corporation's. Traditionally, two main categories of transactions come to mind: (i) friendly deals for companies whose control is contestable in the market (which to be sure are now subject to the tenets of *Corwin* and its progeny); and (ii) hostile deals in which the target board refuses to redeem a poison pill and that escalate to a proxy fight to replace the sitting board and redeem the pill.[125]

This article mainly deals with the latter category. The reason for paying greater attention to hostile deals is that their analysis reveals more. Not only do bidders sit opposite to target shareholders at the acquisition table, but in hostile deals, bidders are also in an adversarial position with target management: hostile deals structurally come with two different layers of conflicts and thus provide a unique viewpoint to understand how shareholder conflicts inherently work (and, as I investigate in Part IV, how they can be impacted by bright-line rules, such as disinterested shares regimes, and by no-conflict standards). In the end, much of the analysis will nevertheless be useful to show how conflicts can appear in any type of deal, including negotiated ones where conflicts can in fact be exacerbated by the collusion of target management with its (presumably) new future boss, that is, the bidder.[126]

C. Elements for a Positive Law Analysis

The positive law question is pretty straightforward: absent vote-buying, in which a conflict is admittedly problematic, are shareholders completely free to cast their votes in M&A transactions even when they pursue interests that are not aligned with those of the corporation and of their fellow shareholders? In other words, can they vote given the risk that their "votes may not reflect rational, economic self-interest arguably common to all sharehold-

125. *See supra* Section II.A.2.
126. *See supra* notes 99–104 and accompanying text.

ers?"[127] The answer is not straightforward. The core tension is between the principle that shareholders can vote in whichever way they like (*especially* in the context of director elections)[128] and the idea that sincerity is a prerequisite for majority voting to work: if an electoral outcome is tainted by a pivotal vote of a shareholder pursuing his or her conflicting interest, shareholder voting would not reflect a genuine aggregation of preferences and the underlying result would lead to an inefficient outcome.

1. No Case Law, Very Little Scholarship

Not only is case law lacking, meaning no contested election that I am aware of resulted in a losing party legally challenging on grounds of an alleged conflict of interests the legitimacy of the votes cast by the winning proxy contender (whether insurgent or incumbent), but the issue has also drawn very little interest from scholars, none of whom, as far as I know, have expressly dealt with shareholder conflicts in the context of proxy fights to replace a target board and redeem a pill.

Further, the legal literature on shareholders conflicts in M&A deals is pretty limited. Among the few exceptions, there is a contribution by Lucian Bebchuk some thirty years ago: in advocating a policy to promote undistorted choice in corporate takeovers pursuant to which shareholders would hold a separate referendum on whether the offer should succeed,[129] Bebchuk warned that,

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127. Crown Emak Partners LLC v. Kurz, 992 A.2d 377, 388 (Del. 2010); *In re* IXC Commc'ns, Inc. S'holders Litig. v. Cincinnati Bell, No. C.A. 17324, 1999 WL 1009174, at *8 (Del. Ch. Oct. 27, 1999); *cf. supra* notes 119 and 120 and accompanying text.

128. *See, e.g.*, BAINBRIDGE, *supra* note 100, at 118 ("As a general matter, it remains the law that shareholders qua shareholders are allowed to act selfishly in deciding how to vote their shares."); Roberta S. Karmel, *Should a Duty to the Corporation Be Imposed on Institutional Shareholders?*, 60 BUS. LAW. 1, 13 (2004) ("[S]hareholders do not represent anyone but themselves and do not have any duties to either the corporation or other shareholders.").

129. Bebchuk proposed a referendum system whereby each shareholder would be allowed to tender either approvingly or disapprovingly; in case the latter tenders were more than the former, the acquisition would not be approved and would not take place. This way, pressure to tender would not play a role in takeovers because shareholders would not have to think in second-best terms

for such a referendum to truly reflect the aggregate of each shareholder's preference on the bid, only disinterested votes should be counted, i.e., votes that are cast "solely by the effect that a takeover would have on the value of his shareholdings."[130] In fact, he acknowledges that some shareholders, including of course the bidder, can become interested whenever their preference is shaped by considerations other than the price on the table—the bidder's interest, for instance, would of course not be paying too much, which in some instances can lead to a subpar acquisition getting approved.[131]

More recently, Zohar Goshen addressed in general terms the issue of conflicted voting by shareholders, noting that while "the voting system is an acceptable mechanism for determining the group preference, it only functions as an indicator of transaction efficiency when every individual in the group 'votes sincerely.'"[132] Because it "distorts the voting mechanism by shifting the focus away from what is best for the group as a whole to what is best for each individual member[,]" conflicted voting "undermines the voting mechanism's ability to determine the group preference."[133] However, Goshen mostly focused on typical conflict situations, such as freeze-out mergers, dual-class recapitalizations, and interested directors.[134] He touched upon takeovers rather briefly without clarifying if his attention was on shareholder or director voting, but just admonished the complexity of a policy that would have to deal with a positional[135] conflict of interest where "it is hard to

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when considering whether or not to tender. Bebchuk, *Undistorted Choice*, *supra* note 59, at 1754–57.

130. *Id.* at 1760.

131. *Id.* at 1761 (characterizing target managers as a group of inevitably interested shareholders who, in order to maintain their private benefits of control in place, would resist acquisitions even when they are in the best interests of the other shareholders).

132. Goshen, *Voting (Insincerely)*, *supra* note 61, at 818.

133. *Id.* at 828.

134. *Id.* at 828–30.

135. A positional conflict of interest occurs "when a director acts to preserve her own position in the company, while her self-serving action could be construed as promoting a different legitimate motive." *Id.* at 830.

ascertain which motive is the true one standing behind the action."[136]

Note incidentally that in the Seventh Circuit decision that ruled on the unconstitutionality of the Indiana control share acquisition statute,[137] a decision subsequently reversed by the U.S. Supreme Court in the famous *CTS* case,[138] Judge Posner criticized the disinterested shares referendum mechanism contemplated by the Indiana legislature,[139] although it is not clear on the face of his dicta whether it was the "disinterested shares" portion of the regime that Posner disliked or the referendum itself.

Aside from these contributions, there is nothing of particular relevance in the American literature. Even the formal literature on tender offers combined with a proxy fight, which includes economic models that aim at anticipating shareholders' strategies and pay-offs in such deals, does not address the possibility that some of the actors might be conflicted: those models stipulate that management and dissidents always cast their votes freely.[140]

To be sure, the situation does not improve significantly if one looks at shareholder conflicts that do not necessarily involve M&A cases.[141] Aside from considering those conflicts when ana-

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136. *Id.* ("[W]hen resisting a takeover, directors could be guarding their own positions or protecting the corporation against exploitation or looting.").

137. IND. CODE §§ 23-1-42-1 to 23-1-42-11 (1986).

138. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987).

139. Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250, 262–63 (7th Cir. 1986) ("[T]he Indiana statute . . . puts the acquirer at the tenderer mercies of the 'disinterested' shareholders . . . . The Indiana statute is a lethal dose. . . .").

140. *See, e.g.*, Barry & Hatfield, *supra* note 33, at 646–55; Edelman & Thomas, *supra* note 37, at 465, 474; Lucian Bebchuk & Oliver Hart, *Takeover Bids vs. Proxy Fights in Contests for Corporate Control* 22–26 (European Corp. Governance Inst., Working Paper No. 04/2002, 2001), http://ssrn.com/abstract=290584. *But see* Gilson & Schwartz, *supra* note 10, at 792–99.

141. In fact, this should not surprise much if one considers the very few instances in which shareholders are called to vote under Delaware law. *See, e.g.*, D. Gordon Smith, Matthew Wright & Marcus Kai Hintze, *Private Ordering with Shareholder Bylaws*, 80 FORDHAM L. REV. 125, 128, 186–88 (2011) (noting that under the current system, shareholders participate only on the margins and recommending changes to broaden shareholders' ability to participate in monitoring the corporation); Robert B. Thompson, *Defining the Shareholder's Role, Defining A Role for State Law: Folk at 40*, 33 DEL. J. CORP. L. 771, 778 (2008) ("Delaware's statute mandates that shareholders vote on only two sub-

lyzing such issues as cleansing statutes for interested directors,[142] vote-buying,[143] and, more recently, empty voting,[144] the academic literature has remained silent on the very issue.

2. Some Key Questions

All in all, without any specifics from a case, it is extremely difficult to predict in a vacuum how a Delaware court would approach the issue, that is, under what circumstances an acquirer or, as the case may be, target management and directors can be considered conflicted and should be restricted from, or somehow limited in, voting their shares in a proxy fight in connection with a hostile deal. As mentioned earlier, the issue is essentially unexplored. Therefore, rather than seeking to predict an interpretative outcome, I address some of the core questions and conceptual hurdles a judge would likely have to face under current law.

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jects: election of directors and fundamental corporate changes such as mergers.") (footnotes omitted); Paul H. Edelman, Randall S. Thomas, & Robert B. Thompson, *Shareholder Voting in an Age of Intermediary Capitalism*, 87 S. CAL. L. REV. 1359, 1365–69 (2014) (noting that under current law shareholders play a subordinate governance role and state corporate law reflects this by limiting the areas shareholders can vote to electing directors, sometimes amending the bylaws, and approving certain fundamental changes, but only after directors have consented to the action.); *cf.* Edelman & Thomas, *supra* note 37, at 458 (noting that, before the surge in hostile deals in the 1980s and with the exception of the wave of proxy fights in the 1950s and 1960s, "[h]istorically, shareholder voting rarely attracted much attention.").

142. *See generally* FRANKLIN A. GEVURTZ, CORPORATION LAW 361–66 (2000) (discussing whether Delaware requires that shareholders approving a transaction whereby one or more directors have a conflicting interest be disinterested or not); *see also* Claire Hill & Brett McDonnell, *Sanitizing Interested Transactions*, 36 DEL. J. CORP. L. 903, 910–14 (2011) (describing different ways by which interested transactions could survive a legal challenge as well as the procedure and scrutiny applicable to such transactions); Craig W. Palm & Mark A. Kearney, *A Primer on the Basics of Directors' Duties in Delaware: The Rules of the Game (Part II)*, 42 VILL. L. REV. 1043, 1098–1106 (1997) (detailing the level of judicial scrutiny given to interested transactions and how the burden on interested directors can be reduced or shifted to the party challenging he transaction).

143. *See supra* notes 119 and 120 and accompanying text.

144. *See infra* note 155 and accompanying text.

a. On What Basis Could Judges Limit the Freedom to Cast Votes?

Absent any express statutory provisions, on what grounds could Delaware judges intervene, either at a preliminary injunction phase or subsequently, to prevent or invalidate resolutions passed because of votes cast by shareholders that are in conflict? Delaware judges are not a priori reluctant to intervene on a voting outcome if not doing so would lead to an inequitable setting for the franchise: an indication in this direction can be drawn by judicial decisions on situations where the shareholder franchise is endangered, including vote-buying cases.[145] Judges have done so since the foundational *Schnell v. Chris-Craft*[146] to the more recent *Hewlett-Packard*[147] via *Blasius*,[148] which still is the leading case

145. *See supra* notes 119 and 120 and accompanying text.

146. Schnell v. Chris-Craft Industries, Inc., 285 A.2d 437 (Del. 1971) (invalidating a director action, on its face permitted by the DGCL, which anticipated the date of the annual meeting and moved its location in order to dampen turnout and fend-off an insurgent campaign). The Delaware Supreme Court stressed that "inequitable action does not become permissible simply because it is legally possible." *Id.* at 439. Effectively, *Schnell* treated tampering with the voting process by incumbents as inequitable and presumably a violation of fiduciary duties. *See generally* Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable To Take That Action: The Implicit Corollary to the Rule of* Schnell v. Chris-Craft, 60 BUS. LAW. 877, 881 (2005) (noting that "the Delaware Supreme Court emphatically rejected the proposition that compliance with the DGCL was all that was required of directors to satisfy their obligations to the corporation and its stockholders"). However, the Delaware judiciary has, over the years, interpreted the boundaries of the *Schnell* heightened review quite narrowly. For a critical analysis, see Oesterle & Palmiter, *supra* note 42, at 494–95.

147. Hewlett v. Hewlett-Packard Co., No. CIV.A. 19513–NC, 2002 WL 549137 (Del. Ch. Apr. 8, 2002). The Delaware Chancery Court stated:

> Shareholders are free to do whatever they want with their votes, including selling them to the highest bidder. Management, on the other hand, may not use corporate assets to buy votes in a hotly contested proxy contest about an extraordinary transaction that would significantly transform the corporation, unless it can be demonstrated, as it was in *Schreiber*, that *management's vote-buying activity does not have a deleterious effect on the corporate franchise*.

Id. at *4 (emphasis added) (footnotes omitted).

148. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 661 (Del. Ch. 1988) (stating if the board acts "for the primary purpose of impeding the exercise of

for protecting shareholder voting power in connection with acquisitions.

Now, there is one conceptual issue that judges would need to overcome in legal challenges to director elections that run parallel to a hostile deal: unlike in *Schnell* and in the *Blasius* lines of cases in which judges have resorted to fiduciary duties to sanction any directorial attempt to hamper the franchise,[149] there can be circumstances in which fiduciary duties would probably not seem viable, at least prima facie. Consider cases in which the allegedly conflicted voter is the bidder:[150] by definition, someone who is not (yet) a controlling shareholder, let alone a director or an officer, is, according to the leading view, not subject to fiduciary duties towards other shareholders.[151] In such cases, the judiciary would have to find, within its array of equitable powers, some devices to provide protection to shareholders.

This, however, should not pose an insurmountable task. On the one hand, there are sufficient indications under case law that fiduciary duties are not the only devices a judge can adopt to constrain the actions of corporate players for purposes of shareholder protection. Consider, for instance, that judges have been policing

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stockholder voting power . . . the board bears the heavy burden of demonstrating a compelling justification for such action"). But see Allen, Jacobs & Strine, *supra* note 38, at 884–90 for a reductionist read of *Blasius* on grounds that the *Unocal*/*Unitrin* standards are sufficient to protect the franchise.

149. *Cf.* MM Cos., Inc. v. Liquid Audio, Inc., 813 A.2d 1118, 1127 (Del. 2003). *MM Companies* seems to suggest that in the eyes of the court that judicial protection of the franchise only runs one-way, which is to punish attempts perpetrated by management: "This Court and the Court of Chancery have remained assiduous in carefully reviewing any board actions designed to interfere with or impede the effective exercise of corporate democracy by shareholders, especially in an election of directors." *Id.* (footnote omitted).

150. Compare, for example, the hypotheticals laid out in Sections IV.B.1 and IV.B.4.a.

151. *See, e.g.*, Weinstein Enters., Inc. v. Orloff, 870 A.2d 499, 507–08 (Del. 2005) (noting that while non-controlling shareholders may vote as they please, controlling shareholders are subjected to fiduciary duties). *But see* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1269–72 (2008) (criticizing conventional shareholder fiduciary duties that are only applied to a shareholder with stable control and proposing an extension to minority shareholders who carry swing votes in specific resolutions).

vote-buying via disenfranchisement and public policy theories, not fiduciary duties.[152] On the other hand, judges have enough equity powers to extend fiduciary duties in certain circumstances.[153] This is something scholars have proposed to address challenges coming from abuses in shareholder activism and empty voting: to contain potential abuses by activist investors, Iman Anabtawi and Lynn Stout have suggested extending fiduciary duties to *any* shareholder whenever he or she can influence the outcome of a particular decision because of a personal conflict of interest;[154] similarly, accord-

152. *See* Schreiber v. Carney, 447 A.2d 17, 24 (Del. Ch. 1982) ("[V]ote-buying is illegal *per se* if its object or purpose is to defraud or disenfranchise the other stockholders."). Because the agreement in *Schreiber* benefited the public shareholders, the court decided there was no fraud or disenfranchisement. *Id.* at 25–26. *See also* Hewlett v. Hewlett-Packard Co., Civ. A. No. 19513-NC, 2002 WL 818091, at *15 (Del. Ch. Apr. 30, 2002) (failing to find vote buying where management convinced an institutional shareholder to vote for a proposed merger on a promise of future business.); Weinberger v. Bankston, Civ. A. No. 6336, 1987 WL 20182, at *2–4 (Del. Ch. Nov. 19, 1987) (failing to find impermissible vote buying where an out of court settlement to calm an insurgent where the corporation agreed to pay the insurgent's proxy expenses in exchange for the insurgent granting an irrevocable proxy to management because the purpose was to benefit the public shareholders); Kass v. E. Airlines, Inc., Civ. A. Nos. 8700, 8701, 8711, 1986 WL 13008, at *4 (Del. Ch. Nov. 14, 1986) (finding that an agreement to vote was not contrary to public policy where an agreement was made to an entire class and was fully disclosed); *cf.* Flaa v. Montano, Civ. A. No. 9146-VCG, 2014 WL 2212019, at *8–9 (Del. Ch. May 29, 2014) (discussing vote buying but not deciding if the agreement disenfranchised other shareholders, thereby making it impermissible. Instead, the court sidestepped the question and struck down the agreement for failing to make proper disclosure on proxy materials).

153. One might also wonder to what extent the equity powers of the judiciary are (or should be) ultimately constrained by the boundaries of a fiduciary relationship. In other words, why should fiduciary duty theories represent the only options to protect stakeholders? Otherwise, if such theories are all we have to fight corporate abuses, in situations like conflicted voting in acquisitions fiduciary duties would show their inadequacy as a protective device: indeed, it does not take a controlling position (whether de jure or de facto) for a shareholder to harm other shareholders. *See* Anabtawi & Stout, *supra* note151, at 1269–72.

154. *See id.* at 1295–96; *see also* Anabtawi, *supra* note 74, at 593–97; Andrea Zanoni, *Hedge Funds' Empty Voting in Mergers and Acquisitions: A Fiduciary Duties Perspective* 3–4 (2009), http://ssrn.com/abstract=1285589 (arguing that M&A deals approved through empty voting devices should carry

ing to Hu and Black, existing equitable powers entrusted to courts could be used to tackle the most egregious empty voting practices, such as voting with negative economic ownership, that is, when the decoupling of voting and economic rights is done in a way that creates economic incentives for voting against the interests of other shareholders:[155] "even without a legislative amendment, one can imagine courts using their equitable powers to disallow voting by shareholders with negative economic ownership."[156]

All in all, whilst not straightforward conceptually, the scope of equity powers of the Delaware judiciary appears to be wide enough to contain, one way or another, conflicted voting in acquisitions.[157]

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the approval by a majority of disinterested shareholders and be subject to fiduciary duty review).

155. Hu & Black, *Equity and Debt Decoupling*, *supra* note 104, at 703. More specifically, negative economic ownership occurs whenever a shareholder creates a net short position (i) through equity derivatives, (ii) by "soft parking" (where one party holds shares that are fully hedged but agrees to vote those shares according to instructions received from another party with a negative economic interest in the company), or (iii) by acquiring shares before the record date and subsequently selling them after the record date but before the shareholder meeting. *See id.* at 637–38. In all such cases, economic ownership goes in "the opposite direction from the return on shares." *Id.* at 637. To be sure, disallowing votes by empty voters is not the only solution proposed address the issue. Some authors call for an outright ban on the practice. *See* Shaun Martin & Frank Partnoy, *Encumbered Shares*, 2005 U. ILL. L. REV. 775, 787–804 (2005). Some others call for "enhanced disclosure." *See* Henry T. C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811, 819 (2006) [hereinafter Hu & Black, *New Vote Buying*]; Kahan & Rock, *supra* note 90, at 1277–78.

156. Hu & Black, *Equity and Debt Decoupling*, supra note 104, at 703.

157. The formal distinction that the shareholders vote on a director election and not on the outcome of the acquisition should not be overstated. True, one might in theory argue that the conflict really relates to the actual redemption or non-redemption of the pill and not the director election in itself. However, this overly formalistic approach would short-circuit the *Unitrin* line of cases that does not engage in any substantive review of the director refusal to redeem a pill so long as (and precisely because) the ballot box route remains "realistically attainable." Indeed, if judges refuse to look not only at the lack of redemption by the board but also at how the ballot box route works (especially when it is in no position to work properly as a result of a conflict), we would be left with no effective legal safeguards against corporate actors trying to exploit the system. *See* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1381, 1388–89 (Del. 1995)

b. What Are We Talking about When We Talk about Interests?

To understand what one means with expressions such as conflict of interests and misalignment of interests, it is crucial to have a clear sense of what interests are being put at risk by the conflicted shareholder. Generally, Delaware courts refer somewhat loosely to the concept of the "interests of the corporation and its stockholders" as the primary goals directors need to pursue and protect,[158] and mainstream law and economics literature in the cor-

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(holding that the board's refusal to redeem a poison pill is not preclusive under *Unocal* unless a proxy fight is "mathematically impossible or realistically unattainable"); *see also* Versata Enters., Inc. v. Selectica, Inc., 5 A.3d 586, 601–04 (Del. 2010) (noting that although a combination of defensive measures makes it more difficult for an acquirer to obtain control of a board, it does not make such measures "realistically unattainable" because there is still the availability of a shareholder vote); Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 111–13 (Del. Ch. 2011) (holding that a poison pill with a 15% trigger, a staggered board, continued protection of Delaware's anti-takeover statute, and supermajority merger approval provisions was permitted under *Unocal* because a successful proxy contest was still "realistically attainable").

158. In the seminal case of Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 181–82 (Del. 1986), the Delaware Supreme Court established an enhanced standard of conduct that compels directors to maximize value for the benefit of shareholders in the sale of the company above the protection of interests of other stakeholders, including maintaining the independence of the corporate entity. Specifically, under *Revlon* the role of directors was transformed "from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company." *Id.* at 182. *Revlon* duties are triggered in certain limited circumstances (e.g., if a company is put on sale [either in a stock or in an asset deal] or if a break-up is inevitable). *Id.* In the words of Justice Moore, "[a]lthough such considerations [those of other constituencies] may be permissible, there are fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders." *Id.* (citation omitted); *cf.* Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1345 (Del. 1987) ("[The board of directors duty of loyalty] embodies not only an affirmative duty to protect the interests of the corporation, but also an obligation to refrain from conduct which would injure the corporation and its stockholders or deprive them of profit or advantage."); *In re* Fort Howard Corp. S'holders Litig., CIV.A. No. 9991, 1988 WL 83147, at *14 (Del. Ch. Aug. 8, 1988) (noting that courts must review the board's adherence to its fiduciary duties with an eye toward promoting shareholder interests, the court then turned to the scope of these duties and stated that

porate field embrace the shareholder primacy norm,[159] even though some scholars disagree.[160] Delaware courts themselves, in the *Unocal* line of hostile takeover cases (but outside of *Revlon*),[161] took the view that directors may pursue interests of corporate constituencies other than shareholders when resisting an unsolicited deal.[162]

"the validity of the agreement itself cannot be made to turn upon how accurately the board did foresee the future").

159. Shareholder primacy dictates that corporate management's decision making should focus on the advancement of shareholder interests, even if those interests are in conflict with the interests of non-shareholder constituencies and represents an idea of corporate governance which allows for significant shareholder influence. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 282 (1998). *Compare* Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1913, 1921 (1996) (arguing that the principal goal of corporations should be to provide governance rules that maximize value for investors), *with* Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423–25 (1993) (arguing that corporations should be committed to the shareholder wealth maximization norm).

160. *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 253 (1999) (observing that boards should not only serve shareholders but also the enterprise-specific investments such as managers, rank and file employees, creditors, and the local communities); *see also* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 745 (2005) (stating that managers should have some "discretion to temper" their duty to make profits "to comply with social and moral norms").

161. Delaware law mandates that when a sale, break-up, or change of control of the company is imminent, the board of directors has a duty to maximize shareholder value. Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 38–39, 48 (Del. 1994). The Court in *Revlon* states, "concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder." *Revlon*, 506 A.2d at 182

162. *See* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1369 (Del. 1995) (accepting that the effect on constituencies other than shareholders is an acceptable factor in considering defensive measures); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (stating that while reviewing the reasonableness of a target's defensive measures against a hostile bidder, the courts may consider such concerns as the "inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)"). *But see* Roberta Romano, *The States as a Laboratory:*

Of course, one thing is what (and whose) corporate interests directors must pursue and protect and another thing is how the common interests of shareholders might limit one or more shareholders' free exercise of the right to vote. The two issues are and must be kept distinct. Because only the second one is relevant for the purposes of this article, and because it is safe to assume that in the context of shareholders resolutions shareholders cannot be expected to pursue interests other than theirs, I will not consider interests of other constituencies.[163]

Legal Innovation and State Competition for Corporate Charters, 23 YALE J. ON REG. 209, 235 (2006) (arguing that other stakeholders' interests can never trump those of the shareholders: "Delaware . . . has rejected the broad discretion accorded directors under other constituency statutes, by requiring any consideration of non-shareholder interests to provide a benefit to the shareholders, and by rejecting the propriety of such considerations in a takeover auction."). *See generally* Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 702 (2004) (discussing constituency statutes and noting that more than half of all states have statutes that permit directors and officers to consider the interests of other constituencies); Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 26 (1992) (observing that some states have statutes allowing directors of public corporations to consider other interests and constituencies when making decisions.); Barzuza, *supra* note 37, at 1989, stating:

> Thirty-five states have adopted directors' duties statutes, also known as "other constituency" statutes. Typically, these statutes allow directors to take into account the interests of constituencies other than shareholders and/or the long-term value of the firm. Sometimes, in addition, they apply weaker fiduciary duties on managers' use of defensive tactics.

Id.

163. I do not consider the interests of other constituencies: neither for current purposes nor where I address normative aspects of conflicted voting *infra* in Part IV. Note incidentally that it is quite common in the takeover literature to consider only the interests of shareholders. *See, e.g.*, Luca Enriques, Ronald J. Gilson & Alessio M. Pacces, *The Case for an Unbiased Takeover Law (with an Application to the European Union)*, 4 HARV. BUS. L. REV. 85, 91 (2014):

> [T]akeovers are merely one way in which corporations respond to changes in economic conditions . . . . [T]he scope and the features of the safety net protecting individuals and communities against the effects of economic and regulatory change are only relevant to the takeover debate if takeover regulation is the best (or the only) protection tool available.

Now, even if focusing *just* on shareholder interests, the interpreter would still have to deal with complex conceptual issues: Are the interests of the corporation and those of its shareholders distinct or the same?[164] If they are the same, do they coincide with the maximization of shareholder value? But if they are distinct, can *they* be in conflict with each other? How do we interpret when we relate such interests to the interests of the conflicted shareholder? But most importantly, shareholders' interests qua shareholders are not necessarily homogeneous: different investment strategies and different investment horizon can hardly be reconciled into one all-encompassing interest that suits the entirety of the shareholder population.[165] In particular, the takeover arena intensifies the heterogeneity of shareholder interests because of the evident opportunity to cash in the takeover premium, whether or not such a premium truly reflects the potential value of the target. Such a short-term opportunity is the basis for investment strategies carried out by merger arbitrageurs who, after the announcement of a transaction, proceed to buy a huge portion of the shares of the target betting on the fact that the deal will eventually close so they will be able to tender the shares and profit from the difference between the tender offer price and the price they paid on the market right after the deal was announced. In such a scenario, holding out in the hope of capturing an even higher price resulting from the long term value of the target is too volatile and makes no sense for such type of investors.[166] Unsurprisingly, merger arbitrageurs normally constitute a significant chunk of the shareholder base once a transac-

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> Because we have not seen that position carefully presented in the takeover debate, our discussion of takeover regulation in the following does not further consider it.

Id. (footnote omitted.)

164. *Cf.* Martin Gelter & Geneviève Helleringer, *Lift Not the Painted Veil! To Whom Are Directors' Duties Really Owed?*, 2015 U. ILL. L. REV. 1069, 1098–99 (2015).

165. *See, e.g.*, Edelman & Thomas, *supra* note 37, at 463 ("Different shareholders may hold different views about . . . how to cast their votes on different issues.").

166. As the Delaware Chancery Court put it in the *Airgas* case, short-term arbitrageurs are "happy to tender their shares at [the offer] price regardless of the potential long-term value of the company." Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 111 (Del. Ch. 2011).

tion is announced[167]—a judge would face the tough job of factoring in the arbitrageurs' interests and reconciling them with the interests of those who pursue a long-term investment proposition.

c. *Do Specific Regimes in Similar Areas Have Any Bearing?*

Specific regimes to police conflicted voting already exist. On the one hand, in deals subject to entire fairness, majority-of-the-minority clauses can either help defendants shift the burden of proof on entire fairness back to the plaintiff (in the *Weinberger* and *Kahn v. Lynch* line of cases)[168] or make the whole transaction subject to the more lenient business judgment review if other precon-

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167. A notable case can be traced in the *Airgas* transaction. Following the announcement of the takeover by Air Products, arbitrageurs and other event-driven investors started to purchase significant stakes in the target stock that ultimately allowed them to own approximately 46% of the company. *Id.* at 118. Such dramatic change in the shareholder base had an impact in the actions undertaken by management and was an important factor in the ultimate decision:

> Airgas's board members testified that the concepts of coercion, threat, and the decision whether or not to redeem the pill were nonetheless "implicit" in the board's discussions due to their knowledge that a large percentage of Airgas's stock is held by merger arbitrageurs who have short-term interests and would be willing to tender into an inadequate offer.

Id. at 105; *see also* Mark J. Roe, *Corporate Short-Termism—In the Boardroom and in the Courtroom*, 68 BUS. LAW. 977, 990 (2013) (detailing then-Chancellor Chandler's analysis regarding the role of short-termism and deal arbitrageurs in *Airgas*). Note incidentally that the decision by the Airgas board to resist the Air Products offer (which the Chancery Court permitted) eventually proved to be a correct one from a long-term value perspective, according to Martin Lipton who states:

> [I]n vindication of the Airgas board's judgment and confirmation of the wisdom of the Delaware case law (particularly the Delaware Chancery Court's 2011 *Airgas* opinion validating the use of the poison pill), Airgas agreed to be sold to Air Liquide at a price of $143 per share, in cash, nearly 2.4x Air Products' original $60 offer and more than double the final $70 offer, in each case *before* considering the more than $9 per share of dividends received by Airgas shareholders in the intervening years.

Martin Lipton, *The Long Term Value of the Poison Pill*, HARV. L. SCH. F. ON GOVERNANCE & FIN. REG. (Dec. 18, 2015), https://corpgov.law.harvard.edu/2015/12/18/the-long-term-value-of-the-poison-pill/#more-72224.

168. *See supra* notes 82–88 and accompanying text.

ditions to the *MFW* safe harbor are met.[169] Similarly, an informed, uncoerced vote by *disinterested* shareholders is a precondition to apply the business judgment rule under the *Corwin* line of cases.[170] On the other hand, CSAS have all implemented rules requiring approval from a majority of disinterested shares, excluding from the count the votes of bidders, officers, and employees (and sometimes outside directors).[171] Delaware itself has implemented a "disinterested shares" regime in the context of its business combination statute.[172]

Make no mistake: these regimes are not likely to be applied by mere extension anytime soon. For starters, the most relevant regime for our purposes, disinterested shares in the context of a CSAS, is clearly not applicable in Delaware: it is the law in other states. Moreover, Delaware judges are generally reluctant in M&A cases to extend statutory regimes to promote substance-over-form justice. In fact, in several instances, including cases with plaintiffs challenging transactions on the basis of de facto mergers theories (in the context of asset deals structured as to avoid appraisal rights),[173] cases in which plaintiffs allege de facto liquidation theories (in the context of cash-out mergers whereby preferred stock is retired at a price below the liquidating preference)[174] or de facto amendments to the charter (in the context of mergers denying a class vote to the preferred stockholders),[175]

169. *See supra* note 84.

170. *See supra* notes 122–25 and accompanying text.

171. *See supra* notes 111–15 and accompanying text.

172. *See supra* note 110; *infra* text accompanying note 197.

173. *See generally* Hariton v. Arco Elecs., Inc., 188 A.2d 123, 125 (Del. 1963) (noting that although an asset sale has achieved the same result as a merger, the asset sale rules have equal dignity under the DGCL as the merger rules and the former should apply).

174. *See generally* Rothschild Int'l Corp. v. Liggett Grp., Inc., 474 A.2d 133, 1236–37 (Del. 1984) (explaining that the right to be paid the liquidating preference is triggered only in the event specified under the preferred stock terms and a merger does not constitute a liquidation).

175. Warner Commc'ns, Inc. v. Chris-Craft Indus., Inc., 583 A.2d 962, 970 (Del. Ch. 1989) (explaining that because under independent legal significance, "satisfaction of the requirements of Section 251 is all that is required legally to effectuate a merger[,] . . . the language of Section 242(b)(2)" of the DGCL alone, which in the specific case was paralleled by the charter of the corporation, "does not entitle the holders of a class of preferred stock to a class

judges have embraced the exact opposite doctrine of independent legal significance, according to which "action taken under one section of the [DGCL] is legally independent, and its validity is not dependent upon, nor to be tested by the requirements of other unrelated sections under which the same final result might be attained by different means."[176] According to independent legal significance, which a Delaware court once labeled as a "bedrock doctrine" in the state,[177] each statutory acquisition method has equal dignity and a court cannot "gainsay the legislative decisions to provide different acquisition forms carrying different levels of shareholder protection."[178] Similarly, the tortured evolution of freeze-out law also shows that Delaware courts for quite some time had used a formalistic approach that applied different standards of review to going private transactions depending on how a freeze-out is structured: before the *CNX* and *MFW* decisions introduced a unified standard,[179] a negotiated merger between a controlling stockholder and its subsidiary was reviewed for entire fairness,[180] while under *In re Siliconix Inc. Shareholders Litigation*,[181] a parent/subsidiary unilateral tender offer followed by a short-form

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vote in a merger, even if . . . the interests of the class will be adversely affected by the merger").

176. Orzeck v. Englehart, 195 A.2d 375, 378 (Del. 1963).

177. *Warner*, 583 A.2d at 970.

178. BAINBRIDGE, *supra* note 100, at 112; *see also* Strine, *supra* note 146, at 879 n.10 ("The courts have long respected th[e] ability to choose among the various methods for accomplishing a business transaction through judicial recognition of the doctrine of independent legal significance."). *But see* D. Gordon Smith, *Independent Legal Significance, Good Faith, and the Interpretation of Venture Capital Contracts*, 40 WILLAMETTE L. REV. 825 (2004) (criticizing the doctrine).

179. *See* Kahn v. M & F Worldwide Corp., 88 A.3d 635, 645–54 (Del. 2014) (explaining that the business judgment standard of review applies if the controlling stockholder subjects the merger to the necessary approval of: (i) a special committee of independent directors with separate financial and legal advisors, fully empowered to reject the transaction and negotiating a fair price with due care and (ii) a majority of the unaffiliated stockholders, fully informed and not coerced); *In re* CNX Gas Corp. S'holders Litig., 4 A.3d 397, 400 (Del. Ch. 2010).

180. Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1115 (Del. 1994).

181. *In re* Siliconix Inc. S'holder Litig., No. CIV.A. 18700, 2001 WL 716787 (Del. Ch. June 19, 2001).

merger was reviewed under a standard less demanding than entire fairness.

Still, even without formally applying any disinterested shares or majority of the minority regime by extension, such regimes contain indicators of the perils raised by conflicted voting and offer a judge, especially when using his or her equity powers, some substantive support to justify an intervention on the basis of a conflict. Moreover, aside from such regimes, the principles stemming from the *Corwin* line of cases,[182] from case law on vote buying (most notably, *Crown Emak Partners*),[183] as well as indications from the empty voting literature, could make a judge eager to use some of their implications in a challenge to alleged conflicted votes in the context of a takeover deal. In the context of conflicted voting, this has in fact already occurred for challenges to freeze-out transactions: in the *CNX* case, a pivotal shareholder had stock ownership in both the bidder-parent and the target-subsidiary and Vice-Chancellor Laster, quoting a passage from the vote buying decision *Crown Emak Partners* on the importance of economic incentives when casting votes, questioned the effectiveness of the majority-of-the-minority clause.[184] Similarly, in the context of the

182. *See supra* notes 122–25 and accompanying text.

183. *Cf. supra* notes 119– 20 and accompanying text.

184. As Vice-Chancellor Laster stated:

> [T]he plaintiffs have raised sufficient questions about the role of T. Rowe Price to undercut the effectiveness of the majority-of-the-minority tender condition. Economic incentives matter, particularly for the effectiveness of a legitimizing mechanism like a majority-of-the-minority tender condition or a stockholder vote. *See Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 388 (Del.2010) ("[W]hat legitimizes the stockholder vote as a decision-making mechanism is the premise that stockholders with economic ownership are expressing their collective view as to whether a particular course of action serves the corporate goal of stockholder wealth maximization.") (citation and internal quotation omitted). In *Pure Resources*, the holders of shares subject to put agreements were excluded from the majority-of-the-minority calculation because "it is clear that the Put Agreements can create materially different incentives for the holders than if they were simply holders of Pure common stock." 808 A.2d at 426. . . . T. Rowe Price's has materially different incentives than a holder

Zale merger litigation, the Chancery Court discussed, yet based on facts dismissed, whether a shareholder, which stood to earn an additional $3.2 million in prepayment fees on a loan they had previously made to the target Zale, was conflicted in casting its 23.3% stake (amounting to approximately $225 million in value at the merger consideration) in favor of the merger.[185]

IV. ASSESSING POLICY APPROACHES AND THEIR POSSIBLE OBJECTIONS

While Part III suggests that current law is all but easy to grasp, in this Part IV, I analyze some policy initiatives to address conflicted voting. In Section IV.A, I lay out three approaches: a rule-based, a standard-based, and an unengaged approach. In Section IV.B, I compare each such approach by testing it with hypotheticals of acquisition attempts. I then describe the assumptions under which one approach can be expected to fare better than the others (Section IV.B.5). In Section IV.C, I evaluate such assumptions and formulate policy remarks while taking into account some potential objections to reform.

A. Possible Policy Approaches

In this Section IV.A, I analyze three approaches that can be conceived to address conflicted voting in the context of hostile

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> of CNX Gas common stock, thereby calling into question the effectiveness of the majority-of-the-minority condition. . . . This case is not about "holdings in competitor corporations" or "directional sector bets." It is about a direct economic conflict that at best renders T. Rowe Price indifferent to the allocation of value between [the parent] CONSOL and [the subsidiary] CNX Gas and at worst gives T. Rowe Price reason to favor CONSOL.

In re CNX Gas Corp. S'holders Litig., 4 A.3d 397, 400, 416−17 (Del. Ch. 2010).

185. *In re* Zale Corporation Stockholders Litigation, C.A. No. 9388-VCP, 2015 WL 5853693 (Del. Ch. Oct. 1, 2015). The alleged conflict was based on the fact that the merger triggered the $3.2 million payment, which the Court ultimately did not consider material because it only amounted to less than 1.5% of the payment the shareholder was expecting from its consideration under the merger. *Id.* at *9 (noting that under Delaware law "there are cases in which a plaintiff's allegations of a large stockholder's need for liquidity have been sufficient to defeat a motion to dismiss").

acquisitions: first, a rule-based reform, similar to the disinterested shares regimes applicable in the context of control share acquisition statutes consisting of bright-line rules that, because of the abstract risk of a conflict, *ex ante* specifically disqualify certain shareholders—say the bidder and target directors and management—by requiring that the resolution be approved by a majority of disinterested shares (IV.A.1); second, a standard-based reform that would seek to invalidate *ex post* all votes that are actually cast in conflict and that are pivotal for the outcome of the election—I label this approach the "no-conflict standard" (IV.A.2); [186] third, an unengaged approach, in which the system, expressly or by inertia, whether deliberate or not,[187] does not intervene in any way—I label this as "unengaged approach" (IV.A.3). In Section IV.A.4, I mention briefly how each of these approaches fit, or would fit, within Delaware law.

1. Bright-Line Rules: Approval by a Majority of "Disinterested Shares"

A familiar bright-line rule approach to address shareholder conflicts consists of requiring the relevant resolution to be approved by a majority of disinterested shares. Such a rule would explicitly exclude from the count votes by certain categories of shareholders who are presumptively considered conflicted: the bidder, or directors and managers of the target (hereinafter target incumbents), or both categories.[188] This represents an ex ante ap-

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186. Note that these first two approaches are not too different from those suggested by Zohar Goshen in his works on conflicts of interest, see *supra* notes 61 and 74 and accompanying text, which analyze solutions based on the well-known property versus liability distinction. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Similar to his methodology is the ex ante versus ex post lens that obviously also comes with a rule versus standard analysis. *See infra* note 189. However, instead of relying on the more remedy-focused property/liability dichotomy, I prefer to frame the policy discussion in terms of trade-offs between certainty and under-inclusiveness, which is typical of a rules/standards comparison.

187. That could occur deliberately or as a consequence of insufficient enforcement of general standards, because the judiciary may be reluctant to second-guess the resolution, especially in less than clear-cut situations.

188. For more detail, see *infra* Section IV.B.1.a.

proach that has the advantage of clarity and thus of limiting litigation costs and uncertainty.[189] However, like any other rule-based approach, it would come with two main problems. First, it would likely be over- or under-inclusive depending on the circumstances:[190] sometimes a shareholder that is not conflicted may be prevented from voting (e.g., a bidder wishing to vote in favor of a value-increasing transaction or target incumbents wishing to vote against a value-decreasing transaction), and, other times, a conflicted shareholder may cast its vote (e.g., any person who is not picked by the rule but is an ally of one of the excluded catego-

189. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 562–63 (1992) ("Rules are more costly to promulgate than standards because rules involve advance determinations of the law's content, whereas standards are more costly for legal advisors to predict or enforcement authorities to apply because they require later determinations of the law's content."); *see also* Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation,* 104 COLUM. L. REV. 496, 515 (2004) ("[R]ules and procedures are more formalistic, and thus provide more certainty and protection at lower cost, than those that would be applied by generalist courts . . . ."); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1690 (1976) ("[A] regime of general rules should reduce to a minimum the occasions of judicial lawmaking."); Prasad Krishnamurthy, *Rules, Standards, and Complexity in Capital Regulation*, 43 J. LEGAL STUD. S273, S276 (2014) ("The presence of aggregate risks, regulatory uncertainty, and agency costs each imply the superiority of rules over standards . . . ."). For a recent account that uses a rules versus standards taxonomy for framing a general corporate law reform, see Ronald J. Gilson, *A Model Company Act and a Model Company Court* 6-11 (Stan. L. Sch., Working Paper No. 489, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2750256.

190. On over- and under-inclusiveness of rules, see generally Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Rulemaking*, 3 J. LEGAL STUD. 257, 268 (1974); Frederick Schauer*, Rules and the Rule of Law,* 14 HARV. J.L. & PUB. POL'Y 645, 647–51 (1991); *see also* Gilson, *supra* note189, at 7 ("A single rule applying to all companies regardless of industry or circumstances will lack context and flexibility. Nor is there an easy way to make the *ex ante* rule more context-related. Precisely because drafters cannot predict a company's future circumstances, rough categorization . . . is about the best that can be done *ex ante*."). *But see* Kaplow, *supra* note189, at 565 (noting that "the suggestion is misleading because typically it implicitly compares a complex standard and a relatively simple rule, whereas both rules and standards can in fact be quite simple or highly detailed in their operation.").

ries).[191] Second, this rule-based approach would create the potential for circumvention—smart lawyers would quickly grasp the rule and know how to avoid it, which would, of course, exacerbate the risk of under-inclusiveness.[192]

Such rules might also generate disincentives to blockholding: if shares owned by the bidder and/or target directors and management were never to be counted in the outcome of a vote to determine the fate of a heated battle for corporate control, accumulating significant levels of ownership in a target company would matter less than it does currently—at the very least, the contending

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191. To be effective, a rule-based regime has to avoid easy evasion: it must have some ability to capture votes cast by shareholders who are not formally disqualified yet act on behalf of a disqualified one. One well-known way to extend the reach of a prohibition that would otherwise apply solely to one person is to use expansive definitional tools; for example, the group definition under the Williams Act, see Rule 13(d)-3 of the Securities Exchange Act of 1934, § 16(b) (codified at 15 U.S.C. § 78p(b) (2012) [hereinafter the Securities Exchange Act], or the acting in concert concept under the EU Directive on Takeover Bids, see Article 1(d) Directive 2004/25/EC, of the European Parliament and of the Council of 21 April 2004 on Takeover Bids, 2004 O.J. (L 142) 19:

> '[P]ersons acting in concert' shall mean natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid . . . .

Id. For a description of how, in the current market environment, the group definition under the Securities Exchange Act has become incapable of aggregating purchases by hedge funds acting via wolf packs, see John C. Coffee Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance* 28–39 (Colum. L. and Econ., Working Paper No. 521, 2015), http://ssrn.com/abstract=2656325, which suggests that companies might consider adopting a poison pill that "could broadly define its coverage so as to apply to any persons 'acting in concert' or 'in conscious parallelism' with the leader of the 'wolf pack'"; such a pill would require "defin[ing] 'group' for purpose of the poison pill much more broadly than the case law under the Williams Act." *Id.* at 97.

192. *Cf.* Luca Enriques, *The Mandatory Bid Rule in the Takeover Directive: Harmonization Without Foundation?*, 1 EUR. CO. & FIN. L. REV. 440, 445–46, 452 (2004) (noting how, in order to avoid onerous bright-line rules, like the mandatory bid rule in the European Union, corporate lawyers are often prompted to figure out alternative acquisition structures that do not fall squarely under the legal command).

parties would presumably not make extra purchases of stock right before a record date if such stock were not to be counted for voting purposes.[193]

As noted earlier, bright-line rules to contain conflicted voting in connections with acquisitions already exist in the corporate laws of several states.[194] The most salient cases are in the context of CSAS, which require a shareholder vote to authorize a tender offer or an acquirer to cross certain thresholds of stock ownership and therefore to obtain control of a corporation.[195] All existing statutes disqualify the acquirer from voting in such referendum, almost all the statutes also disqualify officers and employees who are directors of the target corporation and some disqualify outside directors as well.[196] Even Delaware, which of course has never enacted a control share acquisition statute, is no stranger to similar disqualifying rules in its anti-takeover statute: if we look at the exemptions under Section 203 of the DGCL, the three-year moratorium for entering into a business combination with an interested stockholder does not apply if, among other things, such combination is authorized by "at least 66 2/3% of the outstanding voting stock *which is not owned by the interested stockholder*" (emphasis added).[197]

2. No-Conflict Standard

A no-conflict standard is an ex post command in which "efforts to give content to the law are undertaken . . . after individuals

193. However, holding a significant stake would still matter for purposes other than casting the vote: for instance, having a significant stake would be relevant for purposes of (i) both the bidder and the target directors and managers, tendering to the winning bidder and making a substantial return; (ii) the bidder, reaching the minimum thresholds for the tender offer to be effective; and (iii) the target directors and managers, to accumulate a large enough level of shares for holdout purposes.

194. *See supra* notes 111–15 and accompanying text.

195. *See* Bebchuk, *supra* note 32, at 985 (labeling such shareholder vote "a referendum on the offer"). For a description of such statutes, see generally GILSON & BLACK, *supra* note 33, at 1333–58.

196. *See supra* notes 111–15 and accompanying text.

197. DEL. CODE ANN. tit. 8, § 203(a)(3) (2007).

act."[198] Consider a standard that would (i) generally prohibit any shareholder to cast a vote if, given all the circumstances, his or her vote happens to be in conflict with the common interests of the other shareholders and (ii) provide for sanctions if such conflicted vote is pivotal for determining the outcome of the resolution. In this example, the actual legal command can only be formulated ex post after a judge considers all the specifics of the resolution. In other words, the standard nature of the command stems from the open-endedness of the factual and legal determinations of when, in the specific case, a vote by a shareholder is in actual conflict with the other shareholders' interests: the details of the conflict can only be analyzed after the vote is cast and in light of several circumstances, such as whether or not the pivotal vote by the given shareholder was directed toward pursuing the common interests of shareholders, which also requires determination in light of all the circumstances. For example, a standard in the context of a resolution deciding the outcome of an acquisition can (be either formulated or interpreted to) reflect that, if the offer is in the best interests of the shareholders (imagine an offer of $100 per share when the expected value of the target under current management is in the $70 to $80 range), *potentially* conflicted shareholders such as directors and managers voting against the acquisition (i.e., voting to maintain the board and the pill in place) will be in *actual* conflict, but other potentially conflicted shareholders such as a bidder voting in favor will not. Conversely, if the offer is not beneficial (imagine an offer of $60 per share when the expected value of the target under current management is in the $70 to $80 range), a bidder voting in favor of the acquisition (i.e., voting to replace the board and redeem the pill) will be in actual conflict, while directors and managers voting against will not.[199]

Standards have the advantage that only the prohibited, conflicted conduct will be detected and sanctioned, with no problems stemming from over- or under-deterrence. That however assumes that standards are well enforced and adjudicated. In other words,

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198. Kaplow, *supra* note189, at 560*; see* also Gilson, *supra* note 189, at 7 ("[E]*x post* review of the terms of a particular . . . transaction by reference to a standard has the obvious advantage of being contextual.") (footnote omitted).

199. This of course assumes conflicts need to be analyzed under a shareholder wealth maximization norm. S*ee supra* Section III.C.2.b.

standards get it right . . . but only when they get it right. The approach has two main drawbacks: on the one hand, uncertainty and the ensuing costs of obtaining legal advice, especially when the standard is a complex one,[200] because who may or may not vote is not specified ex ante, and, on the other hand, possibly insufficient or misguided enforcement because the judiciary may be reluctant to second-guess the resolution, especially in less than clear-cut situations, and because judicial error is easier when courts' discretion is wide.[201]

As mentioned earlier, based on today's Delaware case law, absent any statutory hint, precise adjudication would be quite difficult (and extremely difficult to predict). The hardest issue would be establishing when a shareholder is actually in conflict with the other shareholders. In that regard, policymakers and/or judges would have several issues to clarify: (i) whether shareholders are required to pursue any specific corporate interest when voting (put differently, whether there are limits to their freedom to cast their vote in director elections); (ii) what level of misalignment is necessary to trigger a response from the judiciary (after all, shareholders pursue different investment strategies); (iii) whether there is anything peculiar in director elections aimed at removing a takeover defense to help an acquisition go through;[202] (iv) on remedies, if an injunction is not granted, whether the resolution is voidable or damages are the only route. But of all these complexities, the big-

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200. Kaplow, *supra* note 189, at 566, 569.

201. *See, e.g.*, Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 38–39 (2000) ("[B]ecause of unsystematic imperfection or rational concern with the cost of adjudication, adjudicators might fail to apply a standard precisely in particular cases. Consequently, standards can be over- or under inclusive as applied."); Gilson, *supra* note 189, at 8 ("[T]he standard cannot be more effective than the courts that enforce it and the underlying procedural rules through which enforcement takes place."); Troy A. Paredes, *A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn't the Answer*, 45 WM. & MARY L. REV. 1055, 1133 (2004) ("[B]right-line rules generally are more straightforward and clearer than standards and are therefore more predictable.").

202. In a vacuum, electing a given director instead of another can hardly be considered in conflict (the election per se is a preparatory event to future managerial decisions), so a judge would have to consider the election, the imminent pill redemption, and the underlying price offered in the acquisition as a unitary action. *See supra* note 157.

gest hurdle is probably the following:[203] to establish an actual misalignment of interests between the bidder or the target directors or managers, on the one hand, and the best interests of all their fellow shareholders, on the other hand, a judge would ultimately need to perform a *valuation exercise* to ascertain whether the inherent value of the target company is higher or lower than the price of the bid on the table.[204]

All in all, who is and who is not conflicted depends on the specifics of the case, which in turn calls for establishing the underlying value of the target company; case law and scholarship on appraisal rights remind us that ascribing a precise value to a company is far from being an easy task: some would in fact consider it impossible, if not even pointless,[205] and a recent trend of the Chan-

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203. In this suggested policy approach, going through a valuation exercise represents the most sensible way to ascertain when a shareholder is in conflict with the others' interests: first, it is in line with commonly accepted shareholder primacy principles, see *supra* note 159; second, although admittedly not easy, it is the only quantitatively verifiable way to make a no-conflict standard work (absent an independent value reference, it is not clear how a judge can ascribe a conflict of interest to a shareholder).

204. In other words, if the inherent per share value of the company is lower than the bid price, managers voting to perpetuate the current board would be conflicted (whereas a bidder trying to unseat them would not). If vice-versa, the inherent value were higher than the bid price, a bidder would be in conflict when trying to replace the board and get rid of the pill; in such a case, the incumbents vote to maintain the board in power would be aligned to the other shareholders' best interests.

205. Indeed, some of the most skeptical views on the judicial valuation exercises come from Delaware judges. Here are Vice-Chancellor Strine's views on the task, as he put it in *Andaloro v. PFPC Worldwide, Inc*.,:

> The real world nitty-gritty use of [corporate finance] principles brings to the fore problems of measurement and theory that academics, and frankly, even real world business people, have no rational reason to solve because they seek to use [such] principles to reach a reliable approximation of a range of values from which rational investment decisions can be made. The process of appraisal calling for the court to derive a single best estimate of value based on the "expert input" of finance professionals paid to achieve diametrically opposite objectives tends, regrettably, to surface minor, granular issues of this kind, which are not well addressed in the academic literature. The trial record in this case has more than its share of these minute disputes and the literature cited to me has done

cery Court has been to solely rely on the actual merger price under certain circumstances.[206] I address this and a few additional objections to a non-conflict standard in Section IV.C.

3. Unengaged Approach

Finally, given the complexity of the issue and the potentially unsatisfying solutions discussed above, a jurisdiction might simply decide to not intervene. This can happen explicitly, by clarifying that no limits are posed to a shareholder right to vote in replacing directors or, more likely, by simply not enforcing a plausibly dormant no-conflict standard—for example, judges may be uncomfortable to enter the unchartered territory of second-

> little to convince me that there are clear-cut answers to most of them.

No. CIV.A. 20336, 2005 WL 2045640, at *2 (Del. Ch. Aug. 19, 2005); *see also* Chancellor Chandler's view in *Cede & Co. v. Technicolor, Inc.*:

> Experience in the adversarial, battle of the experts' appraisal process under Delaware law teaches one lesson very clearly: valuation decisions are impossible to make with anything approaching complete confidence. Valuing an entity is a difficult intellectual exercise, especially when business and financial experts are able to organize data in support of wildly divergent valuations for the same entity. For a judge who is not an expert in corporate finance, one can do little more than try to detect gross distortions in the experts' opinions. This effort should, therefore, not be understood, as a matter of intellectual honesty, as resulting in *the* fair value of a corporation on a given date. The value of a corporation is not a point on a line, but a range of reasonable values, and the judge's task is to assign one particular value within this range as the most reasonable value in light of all of the relevant evidence and based on considerations of fairness.

No. Civ.A. 7129, 2003 WL 23700218, at *2 (Del. Ch. Dec. 31, 2003).

206. *See* Jason M. Halper, *Fair Price and Process in Delaware Appraisals*, HARV. L. SCH. F. ON GOVERNANCE & FIN. REG. (Nov. 6, 2015), http://corpgov.law.harvard.edu/2015/11/06/fair-price-and-process-in-delaware-appraisals/ (commenting on Merion Capital LP v. BMC Software, Inc., No. 8900-VCG, 2015 WL 6164771 (Del. Ch. Oct. 21, 2015) and mentioning that the case is one of many decisions by the Chancery Court in 2015 "finding that merger price (following an arm's length, thorough and informed sales process) represented the most reliable indicator of fair value in the context of an appraisal proceeding.").

guessing an election and/or entertaining a valuation exercise, especially in less than clear-cut situations. This unengaged approach has the advantage of leaving unaltered the current understanding of the legal landscape by M&A players and therefore of not creating additional lawsuits in the already litigation-clogged takeover field—but the advantages end here. In fact, the risk of an unengaged approach is that a lack of protections for non-conflicted shareholders might lead, depending on the circumstances, to inefficient acquisitions or to the unfair demise of efficient ones.

4. Fitting the Three Approaches within Existing Delaware Law

Given the lack of ad hoc statutory provisions, even in the absence of actual case law on conflicted voting in proxy fights to repeal poison pills, it is safe to guess that today's Delaware law is positioned somewhere in between the second approach of a no-conflict standard (potentially looming but yet to apply to a specific case) and the third, an unengaged approach.

B. Testing the Approaches

I now test each of the three approaches with some hypothetical scenarios. First, I address some scenarios in which the misalignment of interests is sharp: a clearly bad acquisition and a clearly good acquisition, each adopted with the pivotal vote of a conflicted party (the bidder and the incumbents, respectively). I then assess less apparent cases, therefore not as "easy" for an adjudicator to rule on, which I label somewhat bad acquisitions and somewhat good acquisitions.

By bad acquisition, I mean an acquisition whereby the offer price is lower than the per-share price of the target if it stayed independent.[207] As Lucian Bebchuk illustrated, rejecting such an

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207. *See* Bebchuk, *Undistorted Choice*, *supra* note 59, at 1701 ("When the shareholders judge the offered acquisition price to be lower than the independent target's value . . . then the acquisition offer should be rejected; in such a case, efficiency would likely be served by having the target remain independent.").

I am well aware of some influential views in the literature according to which, for purposes of assessing the efficiency of an acquisition, one should not look solely at the value of the target, but at the value of both bidder and target post-acquisition: if they are worth more combined rather than separate, the acquisition is efficient, regardless of the fact that sometimes some acquisition gains are

redistributive in nature as they come at the expense of target shareholders. The underlying intuition is that shareholders hold or at least can hold diversified portfolios and do not care losing some pennies from one position (their stake in the target) if they can make more pennies with the other position (their stake in the bidder). *See generally* Frank H. Easterbrook & Daniel R. Fischel, *Auctions and Sunk Costs in Tender Offers*, 35 STAN. L. REV. 1, 7–9 (1982) (stating that because shareholders can diversify their securities portfolios, they are expected to own both bidder and target stock: as a result, shareholders should prefer a policy that maximizes the combined gains, with no regard as to how those gains are being shared between bidder and target). But see Lucian Arye Bebchuk, *The Case for Facilitating Competing Tender Offers: A Reply and Extension*, 35 STAN. L. REV. 23, 29–30 (1982), noting that (i) "many shareholders do not own portfolios, or at least not portfolios sufficiently diversified for the argument to hold" and (ii):

> Shareholders who hold only the shares of a company that is more likely to be a target than an acquirer do value an increase in expected takeover premiums. That these shareholders could have diversified and that their view would then have changed is of little relevance when one considers which rule is desirable from their perspective.

Id.; John C. Coffee Jr., *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1145, 1217–21 (1984) [hereinafter Coffee, *Regulating the Market*] (noting that Easterbrook and Fischel's argument proves too much, as they "come dangerously close to claiming that directors cannot pursue a gain whenever its realization would also impose greater costs on society . . . . Their rule means that a potential gain should be foregone when it would come simply from [the bidder's] shareholders.").

Even though the diversification argument has some bite, I prefer testing the desirability of an acquisition just by looking at the target value. From a positive law angle, there are no indications that current Delaware law would protect anything other than the best interests of the target: the *Unocal* line of cases steers away from considering the bidder's interest or the interest of greater society generally. While this reasoning might be doctrinal, it in fact represents a sensible way to approach the issue from a system-coherence standpoint, if only we consider that, through the proxy fight safety valve, it is solely the target shareholders who get a say on the ultimate outcome of the deal. Therefore, the desirability of the deal will have to be looked at from the perspective of the group who gets to vote. Otherwise, we would have an inconsistent system that, on the one hand, empowers directors to resist takeovers in the name of the best interests of the corporation (whatever that means—but clearly *not* the interests of the bidder or of efficiency generally) and, on the other hand, gives shareholders a say where their counterpart's influence could swing the outcome in their favor if conflicted votes remained undetected. More importantly, even from a wider normative perspective, the value of the target alone represents the optimal

acquisition is a desirable outcome from an allocational-efficiency standpoint because a lower-valuing user would otherwise acquire the firm.[208] However, if a bidder is left free to vote, it could force an inefficient acquisition to go through if it has enough shares to cast a pivotal vote, replace the board, and redeem the poison pill. Conversely, by good acquisition, I mean an acquisition whereby the offer price is greater than the per share price of the target as an independent company. The desirable outcome of such a value-creating transaction is that it succeeds; any obstacle to it, such as a conflicted (and pivotal) vote by the target incumbents to maintain the pill in place would therefore be detrimental. In each of these scenarios, I will thus hypothesize that passing the resolution leads to an inefficient outcome, which would not have otherwise occurred but for the pivotal vote by a shareholder whose interest is contrary to the other shareholders' common interest (that is, the replacement of the board in the bad acquisition and the defeat of the insurgent slate in the good acquisition).

While this is hardly the first contribution in the M&A literature that analyzes the law and suggests exploring new policy avenues by looking at how the law can, to quote Professor Coffee, "encourage efficient transactions while chilling inefficient

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benchmark. First, as Bebchuk pointed out, there are few elements to believe that investors are in general sufficiently diversified for the opposite argument to hold: in some circumstances, there is just no way for them to diversify. Bebchuk, *supra*, at 29–30. Consider for instance when the acquirer is a private equity firm, a hedge fund or a closely held competitor—all plausible scenarios. Moreover, market participants take long positions on stocks they think are more likely to become subject to an acquisition: their expectation is to grab a large premium and their market activity is propaedeutic to capturing such premium; introducing the interests of the bidder and its shareholders into the equation, would penalize such expectations and propaedeutic activity. Further, the diversification argument might just prove too much: absent a workable proxy to establish if the offer is value-increasing or not, exploitative low ball offers could get a pass in the name of diversification even when the combined entity is worth less. *See* Coffee, *Regulating the Market, supra*, at 1218–19.

208. Bebchuk, *Undistorted Choice*, *supra* note 59, at 1765 ("While the acquisition of some companies might produce efficiency gains, there are many other companies whose assets are employed most efficiently under their existing, independent mode of operation.").

ones,"[209] nobody to my knowledge has applied this lens when analyzing conflicted voting by shareholders in hostile deals.

1. Clearly Bad Acquisition Going Through with the Pivotal Vote of the Bidder

Assume an $80 offer with a small premium (say 10–15%) that target management is resisting on the grounds that it significantly undervalues the target. Assume the market consensus is that the target will have a long term $110 to $130 trading range. Assume further that the bidder has accumulated a significant stake that would allow it to win a vote to replace the incumbent board of directors and redeem the poison pill, in which case the offer is expected to succeed. However, without counting the bidder shares, the incumbent board would not be unseated, the pill would not be redeemed, and the offer would not go through. Just to make an admittedly simplistic numerical example, the bidder wins 53% vs. 47% after voting 9.99%[210] of the shares; without such conflicted votes, incumbents would prevail 52.2% vs. 47.7%. In the former case, an inefficient deal goes through, while in the latter it does not.

In this hypothetical, the defeat of the offer is a socially desirable outcome, which would not be achieved if the bidder were left free to cast its conflicted votes to support a low premium acquisition. Below, I assess how each of the three approaches would address the issue.

a. Bright-Line Rules and Clearly Bad Acquisitions

What would happen if a regime expressly limited certain shareholders in casting their votes in the context of acquisitions, including of course in proxy contexts aimed at redeeming a poison

209. John C. Coffee Jr., *Transfers of Control and the Quest for Efficiency: Can Delaware Law Encourage Efficient Transactions while Chilling Inefficient Ones?*, 21 DEL. J. CORP. L. 359, 395 (1996) [hereinafter Coffee, *Transfers of Control*]; *see also* Lucian Arye Bebchuk, *Efficient and Inefficient Sales of Corporate Control*, 109 Q.J. ECON. 957 (1994; Bebchuk, *Undistorted Choice*, *supra* note 59, at 1701); Einer Elhauge, *The Triggering Function of Sale of Control Doctrine*, 59 U. CHI. L. REV. 1465 (1992).

210. *See infra* note 221 and accompanying text.

pill? Such rules could be shaped in different ways, which for sake of clarity I will just condense into three main types: (i) rules limiting[211] a bidder's right to vote its shares ("bidder-disqualifying rules"),[212] (ii) rules limiting the right to vote of the shares held by directors and managers of the target ("target-disqualifying rules"), and (iii) rules limiting voting rights in shares held by the bidder and in shares held by the target directors and managers ("balanced rules").[213]

Bidder-disqualifying rules would help fend off low-value offers that would otherwise go through with the pivotal vote of the bidder. In dealing with these types of acquisitions, target-disqualifying rules would instead be irrelevant unless the voting limitation itself would help the bidder win the vote in the first place, in which case they would actually represent bad policy.[214] If bright-line rules were balanced, both the votes of both bidder *and* target incumbents would be disregarded.

Whether such balanced rules could help in our hypothetical would depend on the actual ownership structure of the given target:[215] what happens after we *also* disregard the shares voted by target incumbents so that the remaining, disinterested shareholders ultimately make the decision? One would guess that, given the wide gap between the offer price and the potential value of the tar-

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211. By limiting a shareholder's right to vote, I mean a system whereby such shareholder's vote is either not counted (because, for instance, the law calls for an approval by a majority of disinterested shares) or, if counted, the resolution may be subsequently voided.

212. Hawaii, Nebraska and Pennsylvania are examples of control share acquisition statutes where only an acquirer is disqualified from voting. *See supra* note 114.

213. In CSAS, that is the most common rule, but see the exceptions mentioned *supra* note 212.

214. Imagine a situation in which, if *all* shareholders voted, a low-ball offer would be rejected, but because only the votes of the target incumbents are disqualified, a bidder actually prevails with its inefficient acquisition.

215. Of course, M&A activity itself (including its planning and execution) is shaped by the uniqueness of each company's stock ownership; some scholars consider the actual ownership pattern of the company as one of the most important variables in the field. *See generally* John C. Coates IV, *The Powerful and Pervasive Effects of Ownership on M&A* (Harv. L & Econ., Discussion Paper No. 669, 2010), http://ssrn.com/abstract=1544500. *See also* Edelman & Thomas, *supra* note 37, at 464.

get, a majority of such shareholders should be able to identify that their value-maximizing course of action is a vote to confirm the incumbent board in office and therefore reject the acquisition.[216] However, there can be no assurance that this type of inefficient acquisition—passed because of the conflicted and pivotal vote of the bidder—would be screened out through balanced bright-line rules because there might be circumstances in which the (non-conflicted)[217] votes of the incumbents are necessary to determine the efficient outcome. To use the initial numerical example (a 53% vs. 47% vote in favor of bidder, which becomes a 52.22% vs. 47.8% vote in favor of target after disregarding the bidder's 10% stake), if the stake held by incumbents were greater than 2.22%, a bidder would manage to win even if its offer was not value maximizing. So the question thus turns to the determinants of a "correct" voting outcome by the disinterested shareholders, which is something that depends on the underlying ownership structure and on how easy it is for disinterested shareholders to understand what is the right course of action: all else being equal, the greater the pool of disinterested shareholders[218] and the wider the gap between the offer price and the value of the target as an independent company, the more likely that a disinterested shares regime consisting of balanced rules will result in the correct outcome.

In sum, a clearly bad acquisition would call for either bidder-disqualifying rules or balanced rules (assuming in this latter case that rejecting the offer does not depend on the votes by target incumbents) but never for target-disqualifying rules. However, because we are about to see that bidder-disqualifying rules would not work in the context of good acquisitions (for reasons that mirror why target-disqualifying rules do not work here) and because it

216. This largely depends on management's ability to convince enough shareholders that the offer undervalues the company. If management fails in delivering such message, the outcome of the deal will be an inefficient one, irrespective of the rules to contain conflicted voting: the remaining shareholders would just get the decision wrong, which is something no policy solution on conflicted voting, whether rule- or standard-based, can help fixing.

217. Because of the circumstantial nature of conflicts, see *supra* Section IV.A.2, the votes of the incumbents are not conflicted in the specific case because they seek to fend-off an acquisition that is not value-maximizing.

218. *See infra* note 234.

is obviously not realistic to anticipate that only bad acquisitions will emerge,[219] we are left with balanced rules.

Note incidentally that a disinterested shares regime would contribute to level the playing field between bidders and target directors and management—something that is arguably not happening at the moment because bidders are constrained by poison pill thresholds (normally ranging from 10 to 20 percent), the 15 percent threshold contained in Section 203 of the DGCL,[220] and the 10 percent limit to toehold accumulation of Section 16(b) of the Securities and Exchange Act.[221]

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219. *See, e.g.*, Sandra Betton, B. Espen Eckbo & Karin S. Thorburn, *Corporate Takeovers, in* HANDBOOK OF CORPORATE FINANCE: EMPIRICAL CORPORATE FINANCE 291, 356–72 (B. Espen Eckbo ed., 2d ed. 2008) (finding that the combined returns of target and acquiring companies are positive on average); Michael Bradley, Anand Desai & E. Han Kim, *Synergistic Gains from Corporate Acquisitions and Their Division Between the Stockholders of Target and Acquiring Firms*, 21 J. FIN. ECON. 3, 39 (1988) (arguing that premiums paid in takeovers reflect real efficiency gains); *see also* Bernard S. Black, *Bidder Overpayment in Takeovers*, 41 STAN. L. REV. 597, 599–601 (1989) (confirming that generally target shareholders gain value from takeovers and noting that many takeovers lead to efficiency gains while exploring the reasons behind such gains). *Cf.* Afsharipour, *supra* note 29, 1027–34 (2012) (discussing the development of empirical literature in merger returns and noting the ongoing debate stemming from numerous studies on whether acquiring companies generally benefit from mergers); Ulrike Malmendier, Enrico Moretti & Florian Peters, *Winning by Losing: Evidence on the Long-Run Effects of Mergers* 1–2 (April 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1787409 (discussing the difficulties in measuring if a merger has led to value creation or destruction). *But see* Klaus Gugler, Dennis C. Mueller, Michael Weichselbaumer & B. Burcin Yurtoglu, *Market Optimism and Merger Waves,* 33 MANAGERIAL & DECISION ECON. 159 (2012) (providing evidence that the long-term effects of takeovers are negative on average).

220. *See supra* note 110.

221. Under Section 16(b) of the Securities Exchange Act any shareholder may sue to recover "short swing" profits for the corporation that are based, among other things, on a purchase and sale of the stock of a reporting company within a 6-month period. Securities Exchange Act of 1934, § 16(b) (codified at 15 U.S.C. § 78p(b) (2012)). For the view that 10% is generally a threshold large investors do not want to cross to avoid being subject to short-swing profits limitations, see Coffee & Palia, *supra* note 191, at 30, noting that the "typical activist will not cross the 10% threshold, probably because at that point it will become subject to Section 16(b) of the Securities Exchange Act, which may force

b. No-Conflict Standards and Clearly Bad Acquisitions

A no-conflict standard is more malleable in dealing with the peculiarities of the case, such as the economics of the deal (how the offer price compares with the expected value of the target as an independent entity that determines who is in conflict and who is not), and the actual ownership structure of the target (a standard that would only disallow votes if they are *both* conflicted *and* pivotal).

If well adjudicated, such an approach has the advantage that a judge can determine the legal command after the voting conduct has taken place and in light of all the circumstances:[222] in the hypothetical scenario of a clearly bad acquisition, a judge should detect the misalignment between the interest of the bidder to pay a low premium with its $80 offer and the interests of the other shareholders to reject the offer and capture the long-term value of the target (in the example, ranging from $110 to $130).

However, this is obviously based on important assumptions relating to adjudication. For starters, a judge is more likely to get to the right result if, as is stipulated in the hypothetical, the discrepancy between offer price and long-term value of the target as an independent company is significant: in other words, less clear-cut cases might be trickier. Second, adjudication costs have to be manageable: a standard would likely result in more litigation in the field, which might well mean more uncertainty; also, judges themselves might not be too eager to entertain valuation exercises to establish what would be the value of the target as an independent entity.[223] Third, standards work well in the presence of several cases generating decisions that over time get fine-tuned to an identifiable, easy to grasp command: confusion and uncertainty might otherwise ensue "when there are too few cases from which to triangulate the norm . . . ."[224] Available data on shareholder voting in

it to surrender any 'short swing' profits to the corporation on shares acquired in excess of 10%."

222. *See supra* Section IV.A.2.

223. *See supra* note 205.

224. Rock, *supra* note 108, at 1063. *Cf. also* Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55, 85 (1991) ("As few suits produce a legal rule (only two in this sample), this [public

hostile acquisitions, which derives from a FactSet SharkRepellent database listing the universe of attempted hostile deals with a Delaware target from 2003 to July 2015,[225] suggests that, currently, there are probably not enough cases to establish a solid norm (but this would not necessarily be the case for voting in friendly deals).[226]

c. Unengaged Approach and Clearly Bad Acquisitions

The analysis so far suggests that adopting any of the two main approaches to a clearly bad acquisition that is about to succeed because of the conflicted vote of the bidder—a hypothetical that, because of the staggering difference between the offer price and the much higher long term value of the target on a stand-alone basis, one may well consider an "easy case"—raises several practical questions. In this type of acquisition, rules are over-inclusive when they prohibit target incumbents from voting and may well be under-inclusive if they do not extend the prohibition to somebody voting on behalf of the bidder, thus a standard looks somewhat hard to administer. The complexity of the policy choices could lead a jurisdiction to decide to not intervene after all. As mentioned earlier, such a decision can be either silent (i.e., prior to any litigation, a refusal to intervene), or express. In the latter case, it can be embedded in the legislation or, more realistically, stem from case law.[227]

However, an unengaged approach might turn out to be ill-fated when dealing with a clearly bad acquisition because an undetected conflicted vote would end up determining the success of a

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goods] explanation of lawsuit efficacy turns on the need for a large number of lawsuits in order to obtain a ruling.").

225. *Fact Set*, SHARKREPELLENT.NET (July 29, 2015) (on file with author).

226. In such a period there were a total of 60 attempted hostile takeovers targeting Delaware companies. While twenty-eight of these attempts went through the ballot box route, in that the bidder formally launched a proxy fight, only seven deals resulted in an actual vote: in all other cases the proxy fight was abandoned because either the bidder or the target determined to cease the fight before going to the vote count. *Id. But see infra* note 242 and accompanying text.

227. *See supra* Section IV.A.4.

suboptimal acquisition, which would go through even if it is not beneficial to other shareholders. In the long run, this could mean an undue presence of suboptimal acquisitions.

2. Clearly Good Acquisition Rejected with the Pivotal Vote of the Target Directors and Management

I now assume an opposite scenario: a $120 offer with a sizeable premium (say 25–35%) that target management resists by incorrectly alleging that it undervalues the company significantly. Assume here that the market consensus is that with current management the target will have a long term trading range not to exceed $100. Assume, further, that the level of ownership of target directors and managers is such that they are in a position to reject a vote to replace the incumbent board of directors: with the veto power of the pill unaffected, the offer is then expected to fail. Assume finally that without counting the vote from directors and managers of the target, the incumbent board would be unseated, the pill would be redeemed and the offer would go through. In this hypothetical, the success of the offer is a socially desirable outcome, which cannot be achieved because of the incumbents' voting to reject the acquisition.[228] Again, I assess below how each of the three approaches would address the departure from the socially desirable outcome. Unsurprisingly, the results mirror the remarks made for clearly bad acquisitions that go through with the pivotal vote of the bidder.

a. Bright-Line Rules and Clearly Good Acquisitions

I apply to this hypothetical the three types of voting prohibitions I analyzed earlier, namely bidder-disqualifying rules, target-disqualifying rules and balanced rules. Bidder-disqualifying rules either would not matter or have a negative impact, in that they may help the target directors and managers win the vote. Target-disqualifying rules would be beneficial here because they would preclude incumbents from determining the defeat of a good acquisition. Whether balanced rules would work in this hypothet-

228. *See* Thomas, *supra* note 13, at 526 ("Who controls the corporation is important both to its shareholders and to society because the value of its assets depends significantly on the skill with which they are managed.").

ical would again depend on the voting outcome after disregarding the votes from both the target directors and managers and from the bidder. Still, because in the market for corporate control there can be both good and bad acquisitions, unilateral approaches are too rigid and likely to over-deter (consider bidder-limiting rules in good acquisitions) or under-deter (consider target-limiting rules in bad acquisitions), balanced rules would be the only sensible option if the policymaker opted for a rule-based approach.

b. No-Conflict Standards and Clearly Good Acquisitions

Similar to clearly bad acquisitions, in the hypothetical scenario of a clearly good acquisition, a judge should not find it too hard to detect the misalignment between the interest of the directors and managers to fend-off a high premium offer ($120 versus $100 of long term value of the target if it stays independent) and the interests of the other shareholders to capture such value by replacing the incumbent directors with appointed new ones who would redeem the poison pill. Again, a standard would work well if it can rely on the same critical assumptions I laid out earlier in Section IV.B.1.b, namely that (i) the discrepancy between offer price and long-term value of the target as an independent company is sizeable and (ii) because of a potential increase of litigation in the field and therefore more uncertainty, the adjudication costs are manageable (including a judiciary not reluctant to second guess a resolution by entertaining a valuation exercise).

c. Unengaged Approach and Clearly Good Acquisitions

If a jurisdiction decided to pull away from tackling conflicted voting, an undetected conflicted vote would end up determining the defeat of an acquisition that would have been clearly beneficial to other shareholders. In the long run, this could stifle an efficient market for corporate control.

3. Preliminary Remarks

Thus far, a few insights can be drawn from the opposite hypotheticals I have described. First, as far as bright-line rules are concerned, they work only if balanced, that is, if they neutralize votes from both the bidder and the target's directors and managers:

without any proof that attempted hostile bids tend to systematically be only clearly bad or clearly good, it would be a mistake to inhibit voting from one side only.[229] However, even when balanced, rules carry the flaws of one-size-fits-all inflexibility (that is, over- and under-deterrence, depending on the specifics of the case), which also creates potential for circumvention as those whose votes are not counted will try to find ways to put shares in the hands of allies to whom the voting limitation is not directed.[230] Not to mention that, from a public choice angle, limiting the right of shareholders to vote can be considered a hard sell for policymakers: especially because the suggested rules would equally inhibit the voting prerogatives of both insurgents and incumbents, the legislative measure cannot be expected to receive support from either side (given that ex ante, each side is equally likely to win or lose because of the limitation). Finally, a rule-based approach assumes that unaffiliated shareholders are not only capable of understanding what they should vote for, but that they are also of a sample size that would lead to an outcome adequately reflecting the aggregation of the underlying preferences by shareholders.

Second, a no-conflict standard can be quite an effective response assuming good enforcement and low adjudication costs, which for "easy cases" like a clearly bad acquisition or a clearly good acquisition may well be negligible: this approach would have the advantage of getting it right without being over- or under-inclusive. But since there is no assurance that judges will hear only "easy cases" (quite the contrary actually), one needs to reassess the soundness of the approach after considering less clear-cut cases.

Third, the decision to not engage in regulating conflicted voting (either by the legislative or the judiciary branch) in cases with a wide discrepancy (in one direction or the other) between the offer price and the value of the target as an independent entity is unsound because it would encourage unfair voting practices and leave market failures potentially undetected. This could result in negative ripple effects in the long term, especially in a system that

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229. That would represent a big advantage for the side who is not prohibited from voting, which may well from time to time exploit the remaining shareholders by forcing the outcome of the deal in its favor.

230. *See supra* note 191.

elevates shareholder voting to a safety valve for the overall functioning of the market for corporate control.[231]

In any event, the preliminary insight stemming from these hypotheticals, which I labeled as "easy cases," should be taken with a grain of salt. On the one hand, these cases are conceivably not too worrisome from a practical standpoint, especially clearly bad acquisitions, which might have been common in the era of two-tier tender offers of the 1970s and early 1980s, but not so much today because of all the regulatory and private law constraints bidders have become subject to over the years: consider the Williams Act and related SEC regulations, Section 203 of the DGCL and of course *Unocal* and its progeny, which made the poison pill possible.[232] On the other hand, unless the stake held by the conflicted shareholder is truly substantial, which, of course, depends on the very ownership structure of the target, it is less likely that a conflicted vote will be pivotal because the remaining shareholders can be expected to identify the correct voting strategy.

4. Less Clear-Cut Hypotheticals: Somewhat Bad Acquisitions and Somewhat Good Acquisitions

Moving from these relatively "easy cases," I now focus on other, not so clear-cut hypotheticals, such as what I call a somewhat bad acquisition and a somewhat good acquisition.

As to the former, I assume a $100 offer with a mid-size premium (say 15–20%) that target management is resisting on grounds that it undervalues the target and further assume the market consensus for long-term value is somewhere around $110 to $115. A vote by the bidder can again determine the outcome in its

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231. *See supra* note 37; *see also* Marilyn B. Cane, *The Revised SEC Shareholder Proxy Proposal System: Attitudes, Results and Perspectives*, 11 J. CORP. L. 57, 79 (1985) (discussing the role of shareholders in corporate governance, the centralized management system that authorizes board influence necessitates shareholder voting that acts as a "safety valve"); Thomas, *supra* note 13, at 526–32 (discussing the wide recognition by corporate law theorists of the importance of shareholder voting in change-of-control situations).

232. *See generally* Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168, 1177–80 (1999).

favor.[233] For a somewhat good acquisition, I assume a $120 offer with a 15–20% mid-size premium that target management is resisting because it allegedly undervalues the company. I assume here that the market consensus is that with current management the target will have a long term trading range not to exceed $110 to $115 and that, with their ownership level, directors and managers can reject a vote to replace the incumbent board and therefore can make the offer fail.

a. Bright-line Rules

The prior analysis on the impact of bright-line rules on "easy cases" (clearly good and clearly bad acquisitions) remains essentially valid for more ambiguous cases as well. Again, bidder-disqualifying rules would help fend-off a suboptimal acquisition,

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233. A fact pattern similar to this hypothetical has emerged under case law in *Stahl v. Apple Bancorp Inc.*, 579 A.2d 1115 (Del. Ch. 1990). Stahl, a 30% stockholder of Apple Bancorp, launched a joint tender offer and proxy fight with a mere 17% premium, which the target board considered, based on an opinion by its financial advisor, unfair to the stockholders from a financial point of view. *Id.* at 1118–19. After being advised that adequate exploration of alternatives would require more time than was available before the scheduled meeting, the board determined to withdraw the record date in order to pursue alternatives to the offer (no date for the actual meeting had been set). *Id.* at 1119–20. Litigation ensued based on an alleged violation of the *Blasius* standard whereby the board is required to present a compelling justification for withdrawing a record date, see *supra* note 37, to which the company replied that its rescission of the record date was not a response to a proxy contest by Stahl, but rather as a response to Stahl's tender offer (and as such its actions fell under the *Unocal* proportional standard of review, compare *supra* note 36). *Id.* at 1120. Ultimately, Chancellor Allen dismissed the lawsuit on grounds that the directors' action did not constitute a breach of the standards of review of either *Blasius* (which did not apply because the directors' primary purpose was not to hamper the franchise) or *Unocal* (postponing the meeting was a mild, proportional response to the threat that target shareholders would not be sufficiently informed with respect to the pending transaction). *Id.* at 1124. The interesting takeaway is that with a system that leaves open the ballot box route for joint tender offers and proxy fights *and* apparently leaves all shareholders free to cast their vote in the proxy fight (including a 30% stockholder who launches a low-ball bid), targets face the risk of succumbing to value-decreasing transactions and hence need to resort to disruptive defenses in the aim of avoiding the shareholder vote in the first place.

yet they would either be irrelevant or dangerous (if screening out the bidder votes help the target incumbents win) in the context of the somewhat good offer. Similarly, target-disqualifying rules would, with respect to somewhat bad offers, either be irrelevant for changing the outcome or, if such voting restriction itself helps the bidder win the vote in the first place, represent bad policy. Because target incumbents and the bidder may or may not be conflicted depending on the very circumstances surrounding the actual offer, namely its price as compared to the expected long-term value of the target if it stays independent, a viable route to mitigate the risk that bright-line rules are either an over- or under-deterrent is again to introduce balanced rules. In other words, voting limitations applying to *both* bidders, on the one hand, and target management and directors, on the other hand, seem the only sensible way to introduce an ex ante, one-size-fits-all body of rules. Such parallel limitations would quite probably determine, with respect to a somewhat bad acquisition, a vote that confirms the incumbent board in office and fends-off the acquisition, and, with respect to a somewhat good acquisition, a vote that elects the insurgent slate, which in turn redeems the pill for the acquisition to go through.

However, this obviously does not imply that balanced rules will *always* help reach the efficient outcome; that would in fact depend on how the remaining, non-affiliated shareholders will actually vote. Indeed, the end result is contingent on some additional factors, including, most notably, on the one hand, the actual ownership structure of the target company, the sample size of the remaining, unaffiliated shareholders,[234] and whether there are allies

234. *Cf.* Goshen, *Controlling Corporate Self-Dealing*, *supra* note 62, at 402 (noting that "when the minority is composed of a small group, the threat of strategic voting increases."). On the risks of non-consummation because of strategic voting by arbitrageurs and hedge funds in deals that are subject to majority-of-the-minority provisions, see Sunjeela Jain, Ethan Klingsberg & Neil Whoriskey, *Examining Data Points in Minority Buy-Outs: A Practitioners' Report*, 36 DEL. J. CORP. L. 939, 950 (2011), noting that even after *CNX*, companies involved in going private transactions did not take advantage of the safe harbor, the application of the business judgment rule, because of risks that a majority-of-the-minority provision would give some investors incentives to build a position and threaten to veto the deal. *See also* Leonard Chazen, *Did the Dell Minority-of-the-Majority Clause Go Too Far?*, LAW360 (July 22, 2013, 6:41 PM), http://www.law360.com/articles/459110 (warning on risks of non-

to either side that the bright-line rule does not disqualify from voting, and, on the other hand, the ability of the two contending groups to convince, and attract the votes of, the non-affiliated shareholders, which might ultimately be less a "what would a rational investor do" issue than a PR one.[235] Note that a no-conflict standard, which I address immediately below, could help obviate only the first of those factors, that is, over- or under-inclusiveness based on ownership structure (as it would identify and inhibit ex post only the conflicted votes). The latter problem of unaffiliated shareholders sometimes getting it wrong because they do not believe management's—factually correct—story that the offer is low (or, as the case may be, the bidder's story that the target is grossly mismanaged by the incumbent group) is something no policy solution can fix.

b. No-Conflict Standard

The advantage of this approach is to provide a legal command after the voting conduct has taken place and in light of all the circumstances of the case. If enforcement is good and adjudication costs are low, a standard does a better job at tackling only resolutions that are actually affected by a conflicted vote, while leaving all other resolution out of the law's reach—thus letting the parties freely cast their votes.

However, if well conducted, a conflict analysis for a somewhat bad acquisition (or a somewhat good acquisition) should

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consummation when majority-of-the-minority clauses are drafted in an over-inclusive manner: "[t]he type of majority-of-minority clause used in the Dell agreement, which requires approval by a majority of the outstanding unaffiliated shares, instead of a majority of those voting on the transaction, makes the failure to cast a vote the equivalent of a vote against the deal."); Sharon Terlep, *Dell Buyout Group Calls for Change in Voting Rules*, WALL ST. J. (July 24, 2013, 7:28 PM), http://online.wsj.com/article/SB10001424127887323610704578625550322614778.html.

235. For instance, for targets with a bad track record in terms of governance and sensitivity with shareholder concerns, one would expect institutions to not trust management and to rather side with a bidder, even when rejecting the offer is the efficient thing to do. *See generally* Lee Harris, *The Politics of Shareholder Voting*, 86 N.Y.U. L. REV. 1761, 1763 (2011) ("[T]he process of shareholder voting in corporate elections is not dissimilar to citizen voting in elections for public office.").

result in a judicial valuation of the target that is much closer to the price offered by the bidder: a close call on valuation means a more troubling decision for a judge to make. In other words, the main uncertainty surrounding a standard applied to a "not so easy" case, such as the hypothetical scenario of a somewhat bad acquisition, is how likely a judge would be to identify the conflict and intervene. If the misalignment between bidder and other shareholders is not quite as obvious as in the case of a clearly bad acquisition ($80 offer versus $110 to $130 long term value), then it is legitimate to doubt a judge would be keen on detecting the conflict between the interest of the bidder to pay a low premium and the interests of the other shareholders to capture the long-term value (in the new example, a $100 offer versus $110 to $115 long term value). A similar question would of course arise in the opposite case of a somewhat good acquisition that directors and managers could defeat with their votes. To be sure, lack of intervention would not be the sole issue here—judicial error can, of course, be more likely in close calls.

In sum, while bright-line rules might at times be too rigid and be either over- or under-inclusive, adopting a standard-based approach runs the risk that in non-clear-cut cases the judiciary would at times make valuation mistakes or ultimately take a hands-off approach and not intervene. All this would create uncertainty and more litigation in the M&A market.

c. Unengaged Approach

Not engaging at all to detect a conflicted vote in a somewhat bad or somewhat good acquisition that determines the distorted outcome of the vote and thus of the acquisition is dangerous. Not only is it dangerous because such an approach puts at risk the overall efficiency of the market for corporate control (in all deals that are determined by the pivotal vote of the conflicted party, efficiency would have called for the exact opposite outcome), but it also sends a sobering signal that the legal system, especially *this* legal system whereby the ballot box route is considered the safety valve for the correct functioning of the market for corporate control, is structurally incapable of screening out inefficient outcomes for acquisitions (e.g., a bad acquisition not being defeated and a good acquisition not succeeding). True, the overall effects on society of such an unengaged approach would be less severe than

with respect to distorted outcomes in clearly bad or clearly good acquisitions. Nevertheless, since an unengaged approach would affect all deals across the board (that is, also the clear-cut hypotheticals), such a policy would leave conflicted shareholders free to cast their vote on all occasions, thus potentially creating incentives for parties to taint voting outcomes even in the most extreme situations. In other words, with such an approach in place, there may well be more clearly bad acquisitions going through and clearly good acquisitions being rejected than there otherwise would be if the legal system sought to tackle conflicted voting.

5. Relaxing the Assumptions

Tables I and II summarize how the different approaches (and related assumptions) address the four hypotheticals described thus far. Given the stipulated assumptions described below, the expected outcomes for clear-cut cases and for more difficult cases match—this is why I paired the two types of bad acquisitions and good acquisitions.

Table I

<table>
<tr><td colspan="5">Clearly Bad Acquisition
$80 Offer v. $110–30 Target Value under Current Management
Somewhat Bad Acquisition
$100 Offer v. $110–15 Target Value under Current Management

Assumptions: (i) bidder vote is pivotal, (ii) majority of unaffiliated shareholders can identify, and vote according to, best course of action, (iii) trivial enforcement/adjudication costs (judge can determine target value as independent company and hence that bidder is conflicted).</td></tr>
<tr><td></td><td>Bidder Votes/ Vote Counted</td><td>Incumbents Vote/Vote Counted</td><td>Outcome</td><td>Efficient</td></tr>
<tr><td>A1) Bidder Disqualifying Rules</td><td>No</td><td>Yes</td><td>Board and Pill Stay</td><td>Yes</td></tr>
<tr><td>A2) Target Disqualifying Rules</td><td>Yes</td><td>No</td><td>Board Ousted and Pill Redeemed</td><td>No</td></tr>
<tr><td>A3) Balanced Rules</td><td>No</td><td>No</td><td>Board and Pill Stay</td><td>Yes</td></tr>
<tr><td>B) No-conflict Standard</td><td>No</td><td>Yes</td><td>Board and Pill Stay</td><td>Yes</td></tr>
<tr><td>C) Unengaged Approach</td><td>Yes</td><td>Yes</td><td>Board Ousted and Pill Redeemed</td><td>No</td></tr>
</table>

Table II

Clearly Good Acquisition $120 Offer v. $100 Target Value under Current Management **Somewhat Good Acquisition** $120 Offer v. $110–15 Target Value under Current Management Assumptions: (i) incumbents' vote is pivotal, (ii) majority of unaffiliated shareholders can identify, and vote according to, best course of action, (iii) trivial enforcement/adjudication costs (judge can determine target value as independent company and hence that incumbents are conflicted).				
	Bidder Votes / Vote Counted	*Incumbents Vote / Vote Counted*	*Outcome*	*Efficient*
A1) Bidder Disqualifying Rules	No	Yes	Board and Pill Stay	No
A2) Target Disqualifying Rules	Yes	No	Board Ousted and Pill Redeemed	Yes
A3) Balanced Rules	No	No	Board and Pill Stay	No
B) No-conflict Standard	Yes	No	Board Ousted and Pill Redeemed	Yes
C) Unengaged Approach	Yes	Yes	Board and Pill Stay	No

The above tables show how different approaches can determine efficient or inefficient outcomes, based on a set of factual assumptions: (i) the bidder's or the incumbents' vote is pivotal (as the case may be); (ii) a majority of unaffiliated shareholders can identify, and vote according to, the best course of action (that is, towards the efficient outcome); and (iii) enforcement/adjudication costs are trivial. The judge can determine target value as independent company and hence that the bidder or the incumbents, as the case may be, are in fact conflicted.

Table III summarizes the interrelations between the various approaches and their underlying assumptions (when present and when relaxed). An explanation and various implications ensue.

Table III

	Vote PIVOTAL (Conflict Is an Issue)	Vote NOT PIVOTAL (Conflict Is Not an Issue)
Both Disinterested Shareholders (DSHs) and Adjudicator *right*	(*All assumptions are met*) Rules and standard work, unengaged approach does not.	All approaches work.
Both DSHs and Adjudicator *wrong*	No approach works, yet rules are either counterproductive (if over-inclusive in the specific) or irrelevant (if all shareholders are wrong).	(*No assumptions are met*) Unengaged approach works, standard does not. Rules are either counterproductive (if over-inclusive in the specific) or irrelevant (if all shareholders are wrong).
DSHs *right* Adjudicator *wrong*	Rules work, standard and unengaged approach do not.	Rules and unengaged approach work, standard does not.
DSHs *wrong* Adjudicator *right*	Standard works, unengaged approach does not. Rules are either counterproductive (if over-inclusive in the specific) or irrelevant (if all shareholders are wrong).	Standards and unengaged approach work. Rules are either counterproductive (if over-inclusive in the specific) or irrelevant (if all shareholders are wrong).

a) When all assumptions are met, the unengaged approach does not work, while all the other approaches (rules and standard) do. More importantly, if *any* of the assumptions under (ii) (disinterested shareholders are right) or (iii) (adjudicator is right) hold, an unengaged approach is never warranted (its only advantage is doing nothing in cases in which nothing needs to be done).

b) When a conflicted vote is pivotal, the unengaged approach never works. When it is not pivotal, the unengaged approach always works because there is no need to intervene; but if the adjudicator is right, also a standard-based approach works because the adjudicator does not intervene when it is not neces-

sary.[236] In any event, the assumption that the conflicted vote is pivotal is based on both the ownership structure of the company on the record date and the voting outcome (that is, how the other shareholders vote). But since there is no reliable way to predict how frequently a conflicted vote might become pivotal (because it is something that can be ascertained only after the resolution takes place),[237] this peculiar strength of the unengaged approach is hard to test. However, it is safe to believe that potentially conflicted votes are more likely to become pivotal when the voting outcome is close.[238]

c) When disinterested shareholders are right, rules always work, irrespective of all other assumptions.[239] When they are wrong, rules are either: (x) counterproductive if, *because* of the

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236. If there is no pivotal vote by the potentially conflicted actor, the outcome of the deal is not affected by a conflicted vote. In all such cases, no regime would be necessary because there is no issue to address. When the votes by the potentially conflicted actor are not pivotal, an unengaged approach would actually work: it would not show its typical defect of under-deterrence (because there is nothing to deter here). If the potentially conflicted vote is not pivotal, a no-conflict standard would not even be triggered and therefore would be harmless: in other words, the risk of uncertainty and of excessive litigation that is peculiar of a standard-based regime might not arise whenever the vote cast does not determine the outcome. So an advantage of the unengaged regime could also be an advantage of the no-conflict standard but only to the extent that the potentially conflicted shareholder has not instructed allies to vote in its favor (think of the Deutsche Bank vote in the HP/Compaq merger): because this latter point depends on additional facts, uncertainty and litigation might indeed not disappear with a standard.

237. Even assuming past empirical data were available (currently it is extremely scarce, see *infra* notes 241 and accompanying text), its implications to spot future trends are dubious since such data combines elements deriving from the merits of actual offer on the table and the underlying ownership structure, which are both peculiar to the given deal.

238. *See* Kahan & Rock, *supra* note 90, at 1229 (mentioning a couple of mergers of the mid-2000s (the AXA/MONY and the Transkaryotic mergers) that were "closely fought," with voting outcomes nearing the 50/50 split).

239. However, though easier to grasp and naturally less prone to generate disputes, even rules can carry a litigation risk because of evasion attempts by the relevant players. Shareholders who are disqualified by the bright-line rules might in fact enter into arrangements with complacent allies (who are not formally disqualified) to have the latter cast a vote in their favor. This is of course an enforcement issue, arising out of bright-line rules that are clear to understand and hence easy to avoid. *See supra* note 191.

voting prohibition, a potentially (yet not actually) conflicted vote that is not counted would have determined a different, efficient outcome; or (y) irrelevant, when even without the rules in place, the same inefficient voting outcome would have been reached anyway. In other words, if disinterested shareholders cannot tell whether the offer is good or bad and a majority of their votes are cast against their interests, but a majority of *all* shareholders, thus including the potentially conflicted ones, could have steered towards the efficient outcome, then a balanced disinterested shares regime would be over-inclusive. But note that the likelihood that a potentially conflicted shareholder might correct the error of the disinterested shareholders and determine the efficient outcome depends again on the actual voting outcome and on the underlying ownership structure. The issue therefore boils down to what system we are better off with. Under one, we give a key voice to disinterested shareholders who might make mistakes (but never because of a conflict, which by definition they are not affected by). Under the other, a *potentially* conflicted stockholder may well sometimes fix the error that would otherwise be made by the disinterested stockholder; however, in other circumstances that same shareholder might *actually* be conflicted and skew (inefficient) outcomes in his or her favor (because in a standard he or she would not be automatically disqualified from voting). So the question is, how likely is it that a majority of disinterested shareholders will approve the wrong outcome?

d) When the adjudicator is right, a standard always works, irrespective of all other assumptions (either because it steers the outcome to an efficient one or because it does not intervene when it is not necessary). However, if adjudication does not work properly, a standard-based approach would suffer: a judge might err and alter the outcome of an election if he or she (x) erroneously sanctions a vote that would have otherwise been determinant in reaching an efficient outcome or (y) fails to detect a vote that determines the inefficient one. In the former scenario (x), an unengaged approach (and maybe even a rule-based approach if the assumption that the disinterested shareholders are right holds) would fare better, whereas in the latter (y), only a rule-based approach would (again, provided that the said assumption holds).

C. Policy Remarks

What emerges from the above analysis is that none of the approaches can be expected to work better than the others under all circumstances: each carries positives and negatives.

1. The Uneasy Case for an Unengaged Approach

The unengaged approach means no new regulation and no additional litigation. Both can be considered to come at a premium, especially the latter given the ever-litigious M&A world.[240] But this is where its advantages end. The downside of the unengaged approach is that it offers no protection in situations in which a distorted outcome might arise. The gating, overarching policy

240. M&A activity is already clogged with litigation, see, for example, ROBERT M. DAINES & OLGA KOUMRIAN, SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS 1 (2013) (noting that ninety-three percent of M&A deals valued over $100 million were the subject of a shareholder challenge), https://www.cornerstone.com/Publications/Reports/2012-Shareholder-Litigation-Involving-M-and-A; Gideon Mark, *Multijurisdictional M&A Litigation*, 40 IOWA J. CORP. L. 291, 292 (2015), stating that:

> In 1999–2000, 11.9% of announced M&A offers with a value of at least $80 million generated litigation. In 2005, approximately 39.3% of deals with a minimum value of $100 million attracted a lawsuit. In 2013, shareholders challenged 97.5% of all M&A transactions with a value greater than $100 million involving U.S. public company targets.

Id. (footnotes omitted); Matthew D. Cain & Steven M. Davidoff, *Takeover Litigation in 2012* 1, 2 (Feb. 1, 2013) (noting continued increase of litigation over takeovers, with lawsuits brought in 92% of all transactions in 2012), http:// papers.ssrn.com/sol3/papers.cfm?abstract_id=2216727; Oesterle & Palmiter, *supra* note 42, at 494. *But see* C.N.V. Krishnan, Ronald W. Masulis, Randall S. Thomas & Robert B. Thompson, *Shareholder Litigation in Mergers and Acquisitions*, 18 J. CORP. FIN. 1248, 1264 (2012) (noting that while M&A deals that are litigated suffer an increased risk of non-completion, the premiums associated with such deals are much higher and offset such a risk); Randall S. Thomas, *What Should We Do About Multijurisdictional Litigation in M&A Deals?*, 66 VAND. L. REV. 1925, 1948 (2013) ("[S]hareholder litigation has an important monitoring function to play in detecting and punishing parties that violate their fiduciary and contractual duties to target company shareholders."); Anabtawi & Stout, *supra* note 151, at 1303–04 (noting that enforcement and adjudication costs in connection with an increased policing of self-dealing "are more than worthwhile, even though the result is more litigation than if there were no such [fiduciary] duties.").

question is thus how many undetected conflicts can yield inefficient acquisitions or block inefficient ones. The answer is that, unfortunately, we do not know. Available data on proxy fights combined with hostile tender offers for Delaware companies is completely inconclusive because of the extremely low number of contested elections that resulted in an actual vote: only seven in the 2003–2015 period.[241] However, this low number should not suggest the overall issue is moot. As I noted elsewhere, a bidder does not necessarily have to launch *and* win a proxy fight to complete a hostile deal: proxy fights can operate "in the shadow."[242] If the ownership structure of the given target is such that its directors can anticipate that they will lose a proxy fight, it is not uncommon that they would let the acquisition go through if a bidder's threat to start a proxy fight and replace the board is credible.[243] The opposite scenario of a bidder launching and withdrawing a proxy fight when it realizes that it has no chance to prevail is also true. This explains the meager number of recent cases in which the proxy contenders ultimately went to a vote count. Needless to say, outcomes (and possibly the overall number of proxy fights) might very well pan out differently if conflicts were policed by any of the above regimes: to make a blatantly simple (and unrealistic) example, if a disinterested share regime restricting only target incumbents were put in place, one can expect more hostile deals, possibly via tender offer combined with a proxy fight. In

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241. Out of 60 hostile deals for a Delaware target announced between 2003 and July 2015, while a total of 28 proxy fights were launched, only seven cases ended with an actual vote (a mere 11.6 percent of all hostile deals and 25 percent of deals where a proxy fight was launched). *Fact Set*, SHARKREPELLENT.NET (July 29, 2015) (on file with author).

242. *See* Gatti, *supra* note 14, at 85 n.26.

243. This is, for instance, what happened in 2012 with the GlaxoSmithKline's acquisition of Human Genome Sciences and in the Cypress Semiconductor's acquisition of Ramtron International (for more detail and references, see Gatti, *supra* note 14, at 85 n.26); *see also* Bebchuk, Coates & Subramanian, *supra* note 15, at 927 ("[O]nce a bidder is fairly certain to gain control of the board in an imminent vote, managers might well choose to make a graceful exit, possibly extracting some benefit for themselves, which would not be possible after the vote has occurred."). This is in line with the empirical literature finding that companies and CEOs would rather let go or significantly amend certain deals than face the risk of a defeat at a shareholder meeting. *See* Becht, Polo & Rossi, *supra* note 29.

any event, future research should be addressed to investigate friendly deals, which represent a significantly larger pool, to see what portion of deals are approved with the pivotal votes of the acquirer and the target incumbents.[244] In other words, how many M&A deals would have generated a different outcome had disinterested shareholders alone been pivotal?[245]

But all things considered, doing nothing to address the issue should warrant more skepticism towards the ballot box route as a safety valve for the correct functioning of the market for corporate control. If we do believe in the importance of the shareholders' using "the powers of corporate democracy . . . to turn the board out"[246] and select the preferred outcome (either because it is good policy or because it is what we are left with anyway after takeover defenses eroded the market for corporate control), we should ensure that voting occurs in an orderly way that enables shareholders to express their preferences effectively: that implies the outcome is an aggregation of sincere preferences that are not affected by some particular interests going against the common interest.

Otherwise, if we surrender to the idea that legislating or enforcing conflicts would either be too cumbersome or create too much uncertainty, then we have once and for all accepted that, in a set of circumstances, the ballot box route, which is supposedly keeping the efficiency of the market for corporate control in check, may work in a potentially distorted way (and thus, in some cases, may ultimately not work). True, we cannot know ex ante if the

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244. For an account of a relatively recent merger potentially tainted by a conflicted vote, even though the vote was not cast by an acquirer or a target incumbent, compare the 2014 cash-out merger of Zale Corporation, which was approved by 53.1% of the outstanding shares with the pivotal vote in favor by an allegedly conflicted 23.3% shareholder. However, on that occasion the Chancery Court dismissed the claim that the shareholder was in fact conflicted. *See supra* note 185 and accompanying text.

245. In any event, because of the difficulty in collecting data on the market consensus about the expected value of the target as a standalone entity, we will never know for sure whether voting against a specific deal would in fact have been a better course of action for shareholders.

246. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 959 (Del. 1985).

distortions play in favor of targets or bidders[247] and that is probably why nobody has taken steps to make improvements: as conflicts are circumstantial and depend on whether the vote fosters shareholder wealth maximization or not, this is an issue for which interest groups do not necessarily have a clear agenda because they cannot anticipate the specifics of the conflict situation in a future deal (will they or their adversaries be actually conflicted in such a scenario?). In other words, because it is impossible to anticipate which end of the stick a takeover player will hold on deals, this is not an "us versus them" issue like staggered boards, which always favor incumbents and are opposed by proxy advisors and activists,[248] and so this is not an area in which lobbying efforts are activated to move things in some interest group's favor. But this is precisely why the issue can be considered even thornier than staggered boards. While the (low) likelihood that a company with a staggered board will ever become a target in a hostile deal is already priced into stock and so everyone, from any would-be bidder to market participants, can operate and trade with a given set of expectations (that is, investors will pay less because of the low probability of a battle for control),[249] the direction of whom the conflict is going to favor—whether the bidder or the incumbents—is not predictable ex ante,[250] and conflicted voting can introduce a noisy element in the pricing accuracy a given stock.

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247. As I mentioned earlier (see *supra* note 94 and accompanying text, as well *infra* the examples in Sections IV.B.1, IV.B.2, and IV.B.4.a.), whether a shareholder is in conflict or not with respect to a given acquisition depends entirely on the offer price and the consensus, if any, on the long-term value of the target if it stays independent.

248. *See generally* Lucian Arye Bebchuk, Scott Hirst, & June Rhee, *Towards the Declassification of S&P 500 Boards*, 3 HARV. BUS. L. REV. 157 (2013).

249. *Cf.* Marcel Kahan & Edward B. Rock, *Corporate Constitutionalism: Antitakeover Charter Provisions as Precommitment*, 152 U. PA. L. REV. 473, 491 ("Investors need not buy shares of a company in an IPO or secondary market if they do not like the charter. . . . [D]issatisfied shareholders . . . individually . . . can sell their shares, and collectively, such selling can exert pressure for change by depressing the share price. As a result . . . exit imposes . . . significant constraints on managers . . . .").

250. This is because the advantage can be determined only after the offer is presented and the vote takes place.

2. Rules or Standard?

If policymakers decided not to surrender to a system of hostile deals tainted by potential conflicts at the ballot box level, we would have to choose between rules, standards, or, and this is possibly the most promising option, a combination of the two. Consider each of the two approaches in light of their respective appeal and flaws. A system of balanced rules would contain conflicted voting in a series of circumstances, but its potential over-deterrence can put at risk a subset of deals in which the universe of disinterested shareholders might not get it right or might be polarized by some shareholders who, while formally not disallowed to vote, might vote strategically to extract benefits of various sorts: the experience of majority-of-the-minority provisions in freeze-out mergers tells us that deal planners are very wary of putting the deal in jeopardy for the risk of some strategic vetoing by a blocking minority.[251] In addition, applying a disinterested shares regime plain and simple might have quite severe repercussions on certain existing ownership structures.[252] What if, for example, incumbents

251. *See supra* note 234. Note, however, that the larger pool of shares available in a hostile tender offer for a contestable public company should make these strategic vetoes less problematic for deal planners as compared with how such vetoes play out in the context of a parent/subsidiary merger, in which the size of the float in the market is normally smaller and makes it easier for investors to accumulate stakes that are sufficient to exert veto powers.

252. Another question is whether a disinterested shares regime would, to some extent, create a disincentive to pre-bid accumulation by a bidder if its shares cannot be counted for determining the acquisition outcome at the relevant vote. While exploring the issue is beyond the scope of this article, I would mention that the most obvious observation point is represented by patterns of stake accumulation in CSAS jurisdictions (which already have disinterested shares regimes in place). However, it is unlikely that available data can give us sufficient guidance if we consider the scarcity of hostile deals in such jurisdictions: according to FactSet/SharkRepellent sources, only in seven instances has a shareholder or hostile bidder formally gone through a CSAS referendum process. *Cf. Fact Set*, SHARKREPELLENT.NET (August 5, 2015) (on file with author). For an account that the relevance of CSAS has been de facto absorbed by the advent of poison pills (which call for a joint tender offer and proxy fight, rather than passing the CSASreferendum), see Emiliano Catan & Marcel Kahan, *The Law and Finance of Anti-Takeover Statutes*, 10 n.40 (N.Y.U. Ctr. L. Econ. & Org., Working Paper No. 14-30, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2517594.

held a sizeable stake, say 30% of the voting stock? In the absence of a disinterested shares regime, everyone would assume incumbents can resist future hostile deals and thus no bidder could realistically consider that company up for grabs. However, with a regime in place and incumbents not being able to vote, a bidder could oust the board with a decent offer (whether the bidder could also obtain the majority of the shares in the tender offer, with incumbents already owning 30%, would be more uncertain but definitely possible). In a system with disinterested shares type-rules, sizeable stakes of "interested shares" would count very little, as a bidder can possibly oust a board even when the board has a 30% ownership base by offering some premium (even a low-ball one) and convincing enough shareholders to approve the acquisition. Not only would this potentially harsh byproduct of a one-size-fits-all regime present concerns with respect to the efficiency of voting and acquisitions generally (i.e., the risk that a low-ball bidder takes advantage of the regime and succeeds in a value decreasing transaction), but it can also be considered as politically unattainable if one frames such effects under a public choice lens: Delaware policymakers are wary of the negative consequences for their state's primacy in corporate law of reforms penalizing incumbents and are thus quite reticent to pass them.[253]

None of this would happen in a standard-based regime, as target incumbents would be able to vote and only subsequently would takeover contenders have a dispute over whether the vote was conflicted or not. In other words, rigid bright-line rules may impact ownership structures and assumptions on the market for corporate control, whereas standards would not. However, the complex element in a standard-based approach is establishing the

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253. *See generally* Mark J. Roe, *Takeover Politics*, *in* THE DEAL DECADE: WHAT TAKEOVERS AND LEVERAGED BUYOUTS MEAN FOR CORPORATE GOVERNANCE 321, 340–41, 353 (Margaret M. Blair ed., 1993) (worried about the potential loss of primacy in the market for corporate charters, 1980s Delaware policymakers ruled for targets); Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 625–26 (2003) (mentioning the November 1988 Wachtell Lipton client alert memo, which was sent in the wake of the pro-bidder decision in *Interco* and advised its clients to consider reincorporating outside of Delaware should Delaware continue to rule against targets, which in fact did not happen); Romano, *supra* note 31, at 120–22 (hypothesizing that not just target companies but a broader coalition has favored takeover regulation statutes).

inherent long-term value of the target as an independent entity, an exercise that judges seem quite uneasy to perform: if appraisal rights case law is any lesson, valuation never coincides with a point but rather falls within a range of estimates[254] and parties would have a hard time convincing a judge that the other's position is misaligned with the interests of shareholders.

3. Rules and Standard? The Case for a Combined Approach

A more promising way to address this policy dilemma is to *actually combine a rule-based approach with a standard-based one*. The idea is that the system relies on balanced bright-line rules establishing a *rebuttable presumption that both contenders* (i.e., bidder and target incumbents) *are conflicted*: each group would vote, but their shares would not be counted for determining the outcome of the proxy fight/deal. However, *each group can prove that in fact its votes are not conflicted because they are directed to achieve an outcome that maximizes shareholder value*. Thus, instead of having a plaintiff challenge the voting outcome by showing that a pivotal vote was cast in conflict (as in a plain vanilla standard-approach), this policy would initially disregard certain votes but would nonetheless give shareholders the opportunity to prove they should actually be counted in that they are not conflicted.[255]

This combined approach would be a less harsh version of a pure disinterested shares regime, because a group initially labeled as interested could actually demonstrate the opposite and avoid what would otherwise be a false positive: this way, entrenchment-seeking directors and management will have to convince a judge they are casting their votes because rejecting the bid is the best

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254. Cede & Co. v. Technicolor, Inc., No. Civ.A. 7129, 2003 WL 23700218, at *2 (Del. Ch. Dec. 31, 2003) ("The value of a corporation is not a point on a line, but a range of reasonable values, and the judge's task is to assign one particular value within this range as the most reasonable value in light of all of the relevant evidence and based on considerations of fairness."); *see supra* note 205.

255. Obviously, if none of the disregarded votes were pivotal (that is, the outcome of the voting procedure would not change had some or all of the votes been counted), there would be no chance to challenge the resolution.

course of action, while bidders will have to prove their offer is not a "low baller."

One might counter that this policy is no different than having a standard in the first place: after all, parties would end up litigating over value before a judge who would have to pick a figure. I beg to differ.

First and foremost, the potential adjudication flaws would be less severe under this combined approach than in a plain vanilla standard-based regime. In the latter regime, the concern is that judges would be uneasy, if not reluctant, to make a valuation inquiry as to whether the bid price is higher than the target's long-term independent value.[256] In the typical standard-based regime, every vote would be counted and a plaintiff would have to prove that a shareholder (say the bidder) is in conflict: ultimately, a reluctant judge could avoid coming up with any valuation exercise just by saying he or she is not impressed with the pleading record—that way, the voting outcome would be left as is. Conversely, in the combined approach, those votes would be initially disregarded. So in rendering the opinion, a judge who is reluctant to change the outcome of the actual vote would still have to make, at least implicitly, a valuation decision—by rejecting the bidder's pleading, on grounds that there has been a failure to produce enough evidence to warrant a determination that the party is not conflicted, a judge would be implicitly establishing that the offer price is actually lower than the target's long-term independent value. But then it safe to say that, once a judge is placed into that situation, he or she might as well look into the record in more depth, come up with a valuation and actually determine who is and is not conflicted. In other words, the combined approach would compel the judge to conduct a valuation exercise no matter what, whereas under a standard-based approach the burden of proof could help a non-interventionist judge leave the outcome, as it resulted from the initial vote count. True, a combined approach would not cure all enforcement-related problems—the risk of judicial error, a typical problem of any standard-based regime, would not disappear with it—but a judge's reluctance to intervene would be reduced.

Turning to the potential appeal of this policy, not only would this type of reform draw a line and show the legal system is

256. *See supra* notes 205 and 254.

wary of potential conflicts and offer protection in conflicted voting situations, but, more importantly, the expected cost of litigation would generate pressure against undue entrenchment (for target incumbents) and low balling (for bidders).[257] In other words, this system would ex ante help to "keep honest" both the groups involved. First, the aim to avoid the risk of being subject to a disinterested shares regime should induce both groups of potentially conflicted shareholders to "do the right thing." Incumbents will have to be specific as to why the offer is not in the best interests of the shareholders—something akin to "specify[ing] the metric by which their performance going forward should be measured if the offer were defeated."[258] The bidder will have to offer what a ma-

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257. Supporters of an active and vibrant market for corporate control are likely to object that any limitation to a bidder's ability to freely run a proxy contest with the aim to redeem a poison pill would represent an additional restraint in a regulatory landscape that is already quite unsympathetic to buyers, both at the federal (for a pro-bidder critique to the Williams Act, see, for example, Daniel R. Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1 (1978)) and state level, see Gilson, *supra* note 3. More constraints to bidders, the argument would go, mean less hostile takeovers at moment in history when this type of deal is not occurring in significant numbers (only 60 in the 2003–2015 period. *See supra* note 241 and accompanying text.

The problem with this objection is that it only focuses on one side of the regulatory intervention, while neglecting the other one. When discussing a rule-based regime, I in fact made it clear that the only way a "disinterested shares" type of reform would work is through balanced rules, that is, rules disqualifying both bidders *and* target directors and management. This type of reform would hardly represent a worsening of the landscape for bidders. Quite the contrary, this would likely tilt the balance in the opposite direction, as one would expect that if the votes of both contending groups were actually neutralized, target incumbents would likely feel more endangered. And, if instead of a rule-based regime, we were to pick a standard-based one, its very own adaptability to the specific circumstances of the given case would sanction a bidder's votes only if such votes were in actual conflict with the other shareholders' interests, that is, only when a bidder is making a low offer: something a system should not encourage. In sum, the objection that a reform would penalize bidders would either (i) mistakenly forget that a disinterested shares regime penalizes both bidders and targets: leaving the last word to disinterested shareholders or (ii) enable conflicts of interests by wrongfully lamenting that bidders cannot vote when they make inefficient offers.

258. Gilson & Gordon, *supra* note 1, at 22–23. In channeling the famous article by Ronald J. Gilson & Reiner Kraakman, *Delaware's Intermediate*

jority of unaffiliated recipients would consider above their reservation price. In other words, low-ball bidders might be dissuaded from not offering what is fair value to the shareholders if they know they cannot count on their votes to get rid of takeover defenses. Second, such pressure would of course be bolstered by each group's interest in avoiding the litigation route to start with.[259] That can be achieved by being extremely convincing with their fellow shareholders in the context of a proxy campaign: because a landslide outcome would make either group's vote not pivotal, there would no need to go to court to have their respective votes counted.

All in all, this suggested approach would utilize procedural tools, such as burden shifting and requiring the parties to factor in expected litigation costs in order to shape their actions in connec-

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Standard for Defensive Tactics: Is There Substance to Proportionality Review?, 44 BUS. LAW. 247, 268 (1989), Gilson and Gordon explain:

> To make a claim of substantive coercion credible, [Gilson & Kraakman] called for a good deal more than just management's predictable assertion that the market price undervalued the company's shares. The board also would have to state clearly the source of the mispricing and the management's plans for correcting it. The thought was that requiring discipline in demonstrating the presence of substantive coercion would require management to specify the metric by which their performance going forward should be measured if the offer were defeated.

Id. at 22–23, 23 n.49. In their article, Gilson and Kraakman introduced the concept of "substantive coercion" to describe a situation where (i) management actually believes the offer price is inadequate, and (ii) shareholders do not trust management's ability either to assess the circumstances objectively or to deliver on the expected long-term value. Gilson & Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW 247, 260. Note that, to the authors' dismay, the concept was loosely adopted later on by Delaware judges starting with *Paramount Communications, Inc. v. Time, Inc*., 571 A.2d 1140, 1153 n.17 (Del. 1989).

259. As a stick to avoid abuses of the litigation avenue, it should be considered to prohibit the company from reimbursing any losing party in the related litigation: this would represent a disincentive system to push incumbents to litigate only if they believe they are in a position to prove the bidder is effectively low-balling (and, conversely, a bidder will litigate only if it can prove its offer is truly value-maximizing). This suggestion follows the spirit of the sanctions system set forth in the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 11(c).

tion with the underlying M&A transaction and thus help achieve the substantive policy goal of curbing conflicted voting to avoid suboptimal deals and promote desirable ones.[260]

260. It is common to use procedural tools for purposes of shaping substantive policy in corporate law: the rules on burden shifting in the context of corporate freeze-outs are clearly a case in point. *See supra* note 84. The pendulum between the standards of review under the duty of care and duty of loyalty is another. *See* Allen, Jacobs & Strine, *supra* note 38, at 874–78. Takeover law itself uses burden shifting abundantly. *See, e.g.*, Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1367 (Del. 1995) (noting that in order to fail the second prong under *Unocal*, that is, the proportionality test, directors must prove their actions are not "draconian, by being either preclusive or coercive[,]" and, if the "[response is] not draconian, the Court must then determine whether it [falls] within a range of reasonable responses to the threat . . . posed," at which point it is the plaintiff who has to prove unreasonableness); Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 45 (Del. 1994). The Court in *Paramount Communications* discussed the scope of enhanced judicial scrutiny under *Revlon*:

> The key features of an enhanced scrutiny test are: (a) a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing. The directors have the burden of proving that they were adequately informed and acted reasonably.

Id; see also Blasius Indus. v. Atlas Corp., 564 A.2d 651, 661 (Del. Ch. 1988) (stating that if the board acts "for the primary purpose of impeding the exercise of stockholder voting power[,] . . . . the board bears the heavy burden of demonstrating a compelling justification for such action"); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (stating that directors have to prove there are "reasonable grounds for believing that a danger or a threat to corporate policy and effectiveness exists" and the response taken by the company is "reasonable in relation to the threat posed"; if they satisfy such a burden, the transaction is then reviewed under the deferential business judgment review, but if directors are unable to satisfy the enhanced scrutiny under Unocal, the defenses measures are not valid unless directors can show that the transaction was entirely fair). On burden shifting, see generally Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738 (2012) and, with respect to corporate law, Charles M. Yablon, *On the Allocation of Burdens of Proof in Corporate Law: An Essay on Fairness and Fuzzy Sets*, 13 CARDOZO L. REV. 497 (1991).

V. CONCLUSION

In this article, I have identified conflicted voting by shareholders of Delaware companies as a worrisome factor that can negatively distort voting and acquisitions outcomes, something that prior analysis in the takeover field has not satisfactorily explored. While conceding there is no easy policy fix, this article analyzes different approaches to minimize the efficiency costs of such distorted outcomes. This article does not necessarily call for a reform. Rather, it illustrates the implications of embracing one or more of the policy avenues that I have analyzed on the current Delaware system. Crucially, if the issue is dismissed, there is no way to reconcile the policy behind introducing proxy fights as a safety valve for the efficient functioning of the market for corporate control.[261] Future theoretical and empirical research is necessary to better understand the phenomenon and evaluate additional, complex policy dilemmas, such as whether a mandatory or an optional regime is better suited, whether friendly deals require a different solution, as well as the repercussions that policing conflicted voting might have on empty voting and shareholder activism.

261. Virtually all jurisdictions that vested shareholder referendums with the power to determine the outcome of hostile acquisitions have dealt with the issue and adopted a disinterested shares regime.

APPENDIX I

There are currently twenty-five states that somehow restrict the voting power of an acquirer via a control share acquisition statute.[i] These restriction statutes are the default option in twenty-four of the twenty-five states,[ii] with a possibility for companies to opt out of the statute, subject to the certain procedures under the relevant statute.[iii]

These control share acquisition statutes have two main characteristics: the type of restriction which is placed upon the acquirer's voting rights and the manner in which the acquirer is able to regain the affected voting rights. Within these twenty-five control share acquisition statutes, there are six different methods whereby acquirer's voting rights may be affected. The majority of control share acquisition states (eighteen) provide that an acquirer has no voting rights, unless a specific resolution has been passed by the applicable majority (this varies as to if the acquirers shares are entitled to vote on the resolution or not, as discussed below).[iv] Two states[v] allow an entity making a control share acquisition vote for directors but not on any other matters without a shareholder resolution authorizing the voting rights of the acquirer. Hawaii denies the voting rights of an acquirer for one year should the acquisition not be approved by a majority of disinterested shares.[vi] Two states disallow an acquirer to vote in shareholder matters if the acquirer has more than 20% percent of the voting rights.[vii] Wisconsin restricts the voting power of an acquirer, which holds over 20% of the voting power to one-tenth of the acquirer's shares (thus a 20% percent stake will have only 2% of the voting power, or one vote for every ten shares).[viii] Finally, Ohio does not specifically mention voting restrictions or restoration of voting rights; however, it requires a majority of the uninterested shares to approve any acquisition.[ix]

Among control share acquisition state statutes, there are primarily four separate methods used by the various states in which an acquirer can either have their voting rights restored or acquisition approved. A slight majority of the control acquisition states (thirteen of twenty-five) require a majority of the outstanding disinterested shares approve a resolution of acquisition or restoration of voting rights.[x] The second most popular regime (nine of twenty-five States) requires both a majority of outstanding disinterested shares, as well as a majority of all outstanding shares to approve a

resolution.[xi] Next, two states (Idaho and Maryland) require a two-third majority of outstanding disinterested shares to approve a resolution of acquisition or restoration of voting rights.[xii] Finally, Wisconsin requires a majority of the adjusted shares (i.e. where any 20% or greater voting power is reduced to one-tenth of the power), which are voted at the meeting to approve a restoration of voting rights or approval of an acquisition.[xiii]

State	Voting Restrictions as Default	Company may change Default	Acquirer may vote in director elections without shareholder resolution	Acquirer may vote only if allowed by resolution	Denied Voting Rights for 1 Year	More than 20% is disallowed a vote	More than 20% of voting power is limited to 10% of voting power	No discussion of voting restrictions, only matters which may be voted on, (not director votes)	Needs Majority of disinterested shares to allow acquirer to vote	Needs Both Majority of Disinterested and Majority of all outstanding	Needs 2/3 of Disinterested Shares	Needs Majority of adjusted shares present at meeting	Defines Interested Shareholder as Acquirer, Officer or Inside Director of target	Defines Interested Shareholder otherwise (see footnotes)
Arizona	Yes[xiv]	Yes[xv]	X[xvi]						X[xvii]					**X**[xviii]
Florida	Yes[xix]	Yes[xx]		X[xxi]					X[xxii]				**X**[xxiii]	
Hawaii	Yes[xxiv]	Yes[xxv]			X[xxvi]				X[xxvii]					**X**[xxviii]
Idaho	Yes[xxix]	Yes[xxx]		X[xxxi]							X[xxxii]			**X**[xxxiii]
Indiana	Yes[xxxiv]	Yes[xxxv]		X[xxxvi]						X[xxxvii]			**X**[xxxviii]	
Kansas	Yes[xxxix]	Yes[xl]		X[xli]						X[xlii]			**X**[xliii]	
Maryland	Yes[xliv]	Yes[xlv]		X[xlvi]							X[xlvii]		**X**[xlviii]	
Massachusetts	Yes[xlix]	Yes[l]		X[li]					X[lii]				**X**[liii]	
Minnesota	Yes[liv]	Yes[lv]		X[lvi]						X[lvii]			**X**[lviii]	
Mississippi	Yes[lix]	Yes[lx]				X[lxi]			X[lxii]				**X**[lxiii]	
Missouri	Yes[lxiv]	Yes[lxv]		X[lxvi]						X[lxvii]			**X**[lxviii]	
Nebraska	Yes[lxix]	Yes[lxx]	X[lxxi]						X[lxxii]					**X**[lxxiii]
Nevada	Yes[lxxiv]	Yes[lxxv]		X[lxxvi]					X[lxxvii]					**X**[lxxviii]
North Carolina	Yes[lxxix]	Yes[lxxx]		X[lxxxi]					X[lxxxii]				**X**[lxxxiii]	
Ohio	Yes[lxxxiv]	Yes[lxxxv]						X[lxxxvi]	X[lxxxvii]					**X**[lxxxviii]
Oklahoma	Yes[lxxxix]	Yes[xc]				X[xci]			X[xcii]				**X**[xciii]	
Oregon	Yes[xciv]	Yes[xcv]		X[xcvi]						X[xcvii]			**X**[xcviii]	
Pennsylvania	Yes[xcix]	Yes[c]		X[ci]						X[cii]				**X**[ciii]
South Carolina	Yes[civ]	Yes[cv]		X[cvi]					X[cvii]				**X**[cviii]	
South Dakota	Yes[cix]	Yes[cx]		X[cxi]						X[cxii]			**X**[cxiii]	
Tennessee	No[cxiv]	Yes[cxv]		X[cxvi]					X[cxvii]				**X**[cxviii]	
Utah	Yes[cxix]	Yes[cxx]		X[cxxi]					X[cxxii]				**X**[cxxiii]	
Virginia	Yes[cxxiv]	Yes[cxxv]		X[cxxvi]					X[cxxvii]				**X**[cxxviii]	
Wisconsin	Yes[cxxix]	Yes[cxxx]					X[cxxxi]					X[cxxxii]		X[cxxxiii]
Wyoming	Yes[cxxxiv]	Yes[cxxxv]		X[cxxxvi]						X[cxxxvii]			X[cxxxviii]	

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i. Louisiana and Michigan repealed their controlled share acquisition statutes. *See infra* Chart.

ii. Tennessee is the exception. *See* TENN. CODE ANN. § 48-103-310(a) (2002) ("This part shall be applicable to any corporation as defined in § 48-103-302 whose charter or bylaws contain an express declaration that control share acquisitions respecting the shares of the corporation are governed by and subject to the provisions of this part.").

iii. *See infra* Chart.

iv. *See id.*; *see also, e.g.*, KAN. STAT. ANN. § 17-1294(a) (2007) ("Control shares acquired in a control share acquisition have the same voting rights as were accorded the shares before the control share acquisition only to the extent granted by resolution approved by the shareholders of the issuing public corporation."); VA. CODE ANN. § 13.1-728.3(A) (2011). This provision states:

> Notwithstanding any contrary provision of this chapter, shares acquired in a control share acquisition have no voting rights unless voting rights are granted by resolution adopted by the shareholders of the public corporation. If such a resolution is adopted, such shares shall thereafter have the voting rights they would have had in the absence of this article.

Id.

v. *See* Chart. For example, see ARIZ. REV. STAT. § 10-2725(A) (2013), which states:

> Shares of an issuing public corporation that are acquired by an acquiring person in a control share acquisition and that exceed the threshold of voting power of any of the ranges prescribed in section 10-2722, subsection A, paragraph 4 have the same voting rights as other shares of the same class or series for all elections of directors but do not have the right to vote on other matters unless approved by a resolution of shareholders of the issuing public corporation at a special or annual meeting of shareholders pursuant to section 10-2723.

Id. For another example, see NEB. REV. STAT. § 21-2451 (2012), which states:

> Shares acquired in a control-share acquisition shall have the same voting rights as other shares of the same class or series in all elections of directors but shall have voting rights on all other matters only if approved by a vote of shareholders of the issuing public corporation at a special or annual meeting of shareholders pursuant to the Shareholders Protection Act and, to the extent so approved, shall have the same voting rights as other shares of the same class or series.

Id.

vi. HAW. REV. STAT. § 414E-2(b) (LexisNexis 2008) ("All shares acquired by an acquiring person in violation of subsection (e) shall be denied voting rights for one year after acquisition.").

vii. *See* Chart. For an example, see MISS. CODE ANN. § 79-27-7(2)–(3) (2013), which reads:

> (2) Subject to subsections (3) through (5) of this section, the voting power of control shares having voting power of one-

> fifth (1/5) or more of all voting power is reduced to zero unless the shareholders of the issuing public corporation approve a resolution pursuant to the procedure set forth in Section 79-27-9 according the shares the same voting rights as they had before they became control shares.
> (3) Except as provided in Section 79-27-9(6), the voting power of control shares representing voting power of less than one-fifth (1/5) of all voting power is not affected by this chapter.

Id. For another example, see OKLA. STAT. ANN. § 18-1149(1)–(2) (West 2012), which states:

> (1) Subject to the provisions of paragraphs 2 through 4 of this section, the voting power of control shares having voting power of one-fifth (1/5) or more of all voting power is reduced to zero unless the shareholders of the issuing public corporation approve a resolution pursuant to the procedure set forth in Section 1153 of this title according the shares the same voting rights as they had before they became control shares.
> (2) Except as provided in subsection A of Section 1153 of this title, the voting power of control shares representing voting power of less than one-fifth (1/5) of all voting power is not affected by Sections 1145 through 1155 of this title.

Id.

viii. WIS. STAT. § 180.1150(2) (Westlaw through 2015 Act 392) ("Unless otherwise provided in the articles of incorporation of a resident domestic corporation or otherwise specified by the board of directors of the resident domestic corporation in accordance with s. 180.0824(3), and except as provided in sub. (3) or as restored under sub. (5), the voting power of shares of a resident domestic corporation held by any person, including shares issuable upon conversion of convertible securities or upon exercise of options or warrants, in excess of 20% of the voting power in the election of directors shall be limited to 10% of the full voting power of those shares.").

ix. OHIO REV. CODE ANN. § 1701.831(E)(1) (LexisNexis 2009) ("The shareholders of the issuing public corporation who hold shares as of the record date of such corporation entitling them to vote in the election of directors authorize the acquisition at the special meeting held for that purpose at which a quorum is present by an affirmative vote of a majority of the voting power of such corporation in the election of directors represented at the meeting in person or by proxy, and a majority of the portion of the voting power excluding the voting power of interested shares represented at the meeting in person or by proxy. A quorum shall be deemed to be present at the special meeting if at least a majority of the voting power of the issuing public corporation in the election of directors is represented at the meeting in person or by proxy.").

x. *See infra* Chart.

xi. *See id.*

xii. *See id.*

xiii. WIS. STAT. § 180.1150(5)(c) (Westlaw through 2015 Act 392) ("Regular voting power is restored if at the meeting called under par. (a) at which a quorum is present a majority of the voting power of shares represented at the meeting and entitled to vote on the subject matter approve the resolution.").

xiv. ARIZ. REV. STAT. ANN. § 10-2721 (2013).

xv. *Id.*

xvi. *Id.* § 10-2725.

xvii. *Id.*

xviii. *Id.* § 10-2725(B) (excluding shares owned by any director, not a director which is also an employee).

xix. FLA. STAT. § 607.0902(5) (2016).

xx. *Id.*

xxi. *Id.* § 607.0902(5)(a).

xxii. *Id.* § 607.0902(9)(b).

xxiii. *Id.* § 607.0902(3).

xxiv. HAW. REV. STAT. ANN. § 414E-2 (LexisNexis 2008).

xxv. *Id.*

xxvi. *Id.* § 414E-2(b).

xxvii. *Id.* § 414E-2(e).

xxviii. *Id.* § (stating that only the acquirers' shares are considered interested).

xxix. IDAHO CODE § 30-1603 (2013).

xxx. *Id.*

xxxi. *Id.* § 30-1607.

xxxii. *Id.*

xxxiii. *Id.* § 30-1601(11) (excluding shares owned by any director, not a director which is also an employee).

xxxiv. IND. CODE ANN. § 23-1-42-5 (LexisNexis 2010).

xxxv. *Id.*

xxxvi. *Id.* § 23-1-42-9.

xxxvii. *Id.*

xxxviii. *Id.* § 23-1-42-3.

xxxix. KAN. STAT. ANN. § 17-1290 (2007).

xl. *Id.*

xli. *Id.* § 17-1294.

xlii. *Id.*

xliii. *Id.* § 17-1288.

xliv. MD. CODE ANN., CORPS. & ASS'NS § 3-702 (Westlaw through all legislation from the 2016 Regular Session of the General Assembly).

xlv. *Id.*

xlvi. *Id.*

xlvii. *Id.*

xlviii. *Id.* § 3-701(g) (Westlaw).

xlix. MASS. GEN. LAWS ANN. ch.110D, § 2 (West 2011).

l. *Id.*

li. *Id.* § 5.
lii. *Id.*
liii. *Id.* § 1(d).
liv. MINN. STAT. ANN. § 302A.671 (West 2011).
lv. *Id.*
lvi. *Id.*
lvii. *Id.*
lviii. *Id.* § 302A.011(42).
lix. MISS. CODE ANN. § 79-27-7 (2013).
lx. *Id.*
lxi. *Id.* § 79-27-9.
lxii. *Id.*
lxiii. *Id.* § 79-27-5(f).
lxiv. MO. REV. STAT. § 351.407.1 (2001).
lxv. *Id.*
lxvi. *Id.* § 351.407.5.
lxvii. *Id.*
lxviii. *Id.* § 351.015(9).
lxix. NEB. REV. STAT. § 21-2453 (2012).
lxx. *Id.*
lxxi. *Id.* § 21-2451.
lxxii. *Id.*
lxxiii. *Id.* § 21-2441 ("Interested shares shall mean the voting stock of an issuing public corporation owned by an acquiring person.").
lxxiv. NEV. REV. STAT. ANN. § 78.378 (LexisNexis 2010).
lxxv. *Id.*
lxxvi. *Id.* § 78.379.
lxxvii. *Id.* § 78.3791.
lxxviii. *Id.* § 78.3787 (including an acquirer, an officer or director, or an employee of the target).
lxxix. N.C. GEN. STAT. ANN. § 55-9A-09 (West, Westlaw through Chapters 93, 95 to 101 of the 2016 Regular Session of the General Assembly, pending changes received from the Revisor of Statutes).
lxxx. *Id.*
lxxxi. *Id.* § 55-9A-05 (Westlaw).
lxxxii. *Id.*
lxxxiii. *Id.* § 55-9A-01(b)(4) (Westlaw).
lxxxiv. OHIO REV. CODE ANN. § 1701.831 (LexisNexis 2009).
lxxxv. *Id.*
lxxxvi. *Id.*
lxxxvii. *Id.*
lxxxviii. Only the acquirers' shares are considered interested. *See id.* § 1701.831(E)(2).
lxxxix. OKLA. STAT. ANN. tit. 18, § 1148 (West 2012).
xc. *Id.*
xci. *Id.* tit. 18, § 1149.

xcii. *Id.* tit. 18, § 1153.
xciii. *Id.* tit. 18, § 1147.
xciv. OR. REV. STAT. § 60.804 (2011).
xcv. *Id.*
xcvi. *Id.* § 60.807.
xcvii. *Id.*
xcviii. *Id.* § 60.801(7).
xcix. 15 PA. STAT. AND CONS. STAT. ANN. § 2561(a) (West 2013).
c. *Id.* § 2561(b).
ci. *Id.* § 2564(a).
cii. *Id.* § 2564.
ciii. See id. §§ 2562, 2564(a) (allowing only disinterested shares to vote).
civ. S.C. CODE ANN. § 35-2-105 (West, Westlaw through 2016 session, subject to technical revisions by the Code Commissioner as authorized by law before official publication).
cv. *Id.*
cvi. *Id.* § 35-2-109(a) (Westlaw).
cvii. *Id.* § 35-2-109(b)(2) (Westlaw).
cviii. *Id.* § 35-2-103(A) (Westlaw).
cix. S.D. CODIFIED LAWS § 47-33-17 (2007).
cx. *Id.* § 47-33-19(1)(a).
cxi. *Id.* § 47-33-12.
cxii. *Id.*
cxiii. *Id.* § 47-33-3(1)(r).
cxiv. TENN. CODE ANN. § 48-103-310 (2002).
cxv. *Id.*
cxvi. *Id.* § 48-103-303.
cxvii. *Id.* § 48-103-307.
cxviii. *Id.* § 48-103-302(6).
cxix. UTAH CODE ANN. §§ 61-6-6, -10 (West, Westlaw through 2016 Third Special Session).
cxx. *Id.* § 61-6-6 (Westlaw).
cxxi. *Id.* § 61-6-10 (Westlaw).
cxxii. *Id.*
cxxiii. *Id.* § 61-6-4 (Westlaw).
cxxiv. VA. CODE ANN. § 13.1-728.2 (2011).
cxxv. *Id.*
cxxvi. *Id.* § 13.1-728.3.
cxxvii. *Id.*
cxxviii. *Id.* § 13.1-728.1 (referring specifically to the definition of "interested shares").
cxxix. WIS. STAT. ANN. § 180.1150(2) (West, Westlaw through 2015 Act 392, published 4/27/2016).
cxxx. *Id.*
cxxxi. *Id.*
cxxxii. *Id.* § 180.1150(5)(c) (Westlaw).

cxxxiii. *Id.* § 180.1150(2) (Westlaw).
cxxxiv. WYO. STAT. ANN. § 17-18-309(a) (2013).
cxxxv. *Id.* § 17-18-309(b).
cxxxvi. *Id.* §§ 17-18-302(a), -306.
cxxxvii. *Id.* § 17-18-306(b).
cxxxviii. *Id.* § 17-18-301(a)(iv).

"To Return the Funds at All": Global Anticorruption, Forfeiture, and Legal Frameworks for Asset Return

PABLO J. DAVIS*

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I. INTRODUCTION

Down went the U.S. district judge's gavel—and a home valued at nearly three quarters of a million dollars in the Maryland suburbs of Washington, D.C., no longer belonged to the Honorable Diepreye Solomon Peter Alamieyeseigha ("DSP"), former governor of oil-rich Bayelsa State in Nigeria.[1] The court held that full legal title to that residence passed to the United States Government ("USG").[2] In another courtroom, down went the gavel of another district judge, who ordered over $115 million in a frozen Swiss bank account belonging to the Government of Kazakhstan to be disbursed to an independent foundation to benefit the people of that country.[3] In yet another courtroom, down went the gavel, and Teodoro Nguema Obiang ("Teodorín"), son of the president of Equatorial Guinea and holder of the office of "second vice president," agreed to the USG's seizure of a set of life-sized Michael Jackson statues originally from the entertainer's Neverland Ranch, their sale at auction, and the depositing of the proceeds into a USG account where they would become fully vested property of the United States.[4]

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1. DOJ 13-628 (2013), 2013 WL 2366183; *DSP Alamieyeseigha Steals $700,000 Bayelsa State Money*, NIGERIA STANDARD (June 19, 2013), http://nigeriastandardnewspaper.com/ng/fugitive-dsp-alamieyeseigha-steals-700000-bayelsa-state-money-united-states-govt-says-ex-gov-used-corruption-proceeds-to-purchase-properties-in-america-accumu/.

2. DOJ 13-628, *supra* note 1.

3. DOJ 15-1509 (2015), 2015 WL 8289228.

4. Stipulation and Settlement Agreement at 15–19, United States v. One Michael Jackson Signed Thriller Jacket and Other Michael Jackson Memorabilia, No. CV 13-9169-GW-SS, (C.D. Cal. 2014); Julia Edwards, *Equatorial Guinea VP Loses Michael Jackson Statues in U.S. Settlement*, REUTERS (Oct. 10,

These seemingly disparate cases, involving a former governor, a national government, and a vice-president who was also the son of a head of state, led to loss of title to real estate and cash and other personal property. None included a criminal conviction. All were outcomes of prosecutions brought by the U.S. Department of Justice ("USDOJ") as part of a new venture, the Kleptocracy Asset Recovery Initiative ("Kleptocracy Initiative," "USDOJ-KI," or "KI").[5]

What exactly is the Kleptocracy Initiative? It can best be viewed as a policy initiative and ongoing program of prosecutorial activity operating within the Asset Forfeiture and Money Laundering Section ("AFMLS") of the USDOJ's Criminal Division since July 2010.[6] Its stated objectives are "to identify the proceeds of foreign official corruption, forfeit them, and repatriate the recouped funds for the benefit of the people harmed."[7] The typical target is a prominent public official or ex-official or a close relative—"politically exposed persons" in international anticorruption parlance.[8] The chief methodology for prosecutions begins with intensive investigation, almost always jointly with the FBI or other

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2014, 4:39 PM), http://www.reuters.com/article/us-usa-equatorial-idUSKCN0HZ1TA20141010. Regarding vesting of full title to the property in the USG, *see infra* note 240.

5. *See Asset Forfeiture and Money Laundering Section*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/criminal-afmls (last visited Nov. 12, 2016).

6. That the KI procedurally effectuates civil forfeiture, yet is housed in the USDOJ's Criminal Division, highlights the actual hybrid nature of the civil-criminal-administrative forfeiture regime in operation. One of the main objectives of this Note is to problematize this apparent tension from an American legal realist perspective, seeking to reconcile the KI "law on the books" with the KI's "law in action." THE CANON OF AMERICAN LEGAL THOUGHT Part I (David Kennedy & William W. Fisher III, eds., 2006).

7. Lanny Breuer, Assistant Attorney General, Address at the Franz-Hermann Brüner Memorial Lecture at the World Bank (May 25, 2011) (transcript available at http://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-criminal-division-speaks-franz-hermann-br-ner). For an overview of mechanisms available to USDOJ prosecutors under the Kleptocracy Initiative, see U.S. DEP'T OF JUSTICE & U.S. DEP'T OF STATE, U.S. ASSET RECOVERY TOOLS AND PROCEDURES: A PRACTICAL GUIDE FOR INTERNATIONAL COOPERATION (2012) [hereinafter ASSET RECOVERY TOOLS], http://www.state.gov/documents/organization/190690.pdf.

8. THEODORE S. GREENBERG ET AL., POLITICALLY EXPOSED PERSONS 25 (2010), http://star.worldbank.org/star/publication/politically-exposed-persons.

federal agency, and often in cooperation with a foreign investigative body.[9] Next comes identification of assets within the U.S. believed to be proceeds of foreign corruption. This lays the groundwork for a federal *in rem* civil forfeiture action. Procedurally, the main basis for these prosecutions is the federal civil asset forfeiture statute, 18 U.S.C. Section 981; the typical substantive legal foundation is based on the money laundering statutes, 18 U.S.C. Sections 1956 and 1957.[10]

Successfully forfeited assets then become USG property.[11] The forfeiture of over $1 million in assets from DSP was its first success, but it is far from the largest prize netted by the USDOJ-KI. In its biggest monetary seizure to date, the Kleptocracy Initiative forfeited over $458 million in funds traceable to General Sani Abacha, Nigeria's *de facto* ruler for much of the 1990s and of whose regime DSP was an ally.[12] Other successful forfeitures have ranged from the hundreds of thousands of dollars to over $100 million.[13]

The Kleptocracy Initiative, then, is an attempt to systematize and institutionalize an innovative, hybrid practice in which the USG asserts jurisdiction over property located within the United States,[14] but the underlying criminal activity giving rise to the civil asset forfeiture proceedings occurred outside of the United States. Thus, USDOJ-KI seems to embody the vigorous exercise of a novel form of extraterritoriality—where enforcement is hyper-local,

9. ASSET RECOVERY TOOLS, *supra* note 7, at 3–5.

10. *See id.*

11. *See infra* note 240 and corresponding text.

12. DOJ 14-230 (2014), 2014 WL 844298. In an even larger action, the USDOJ recently announced the filing of civil forfeiture complaints against Malaysian officials alleged to have embezzled over three billion dollars in funds from the 1Malaysia Development Berhad, an economic-development entity of the Government of Malaysia; the complaints sought the forfeiture of over one billion dollars laundered. DOJ 16-839 (2016), 2016 WL 3913897.

13. *See* DOJ 14-1114 (2014), 2014 WL 5073696; DOJ 15-1509 (2015), 2015 WL 8289228; DOJ 15-266 (2015), 2015 WL 910102.

14. As the procedural posture in the Kazakhstan case study shows, the assets are not always located in the United States; there, the assets were frozen by Swiss authorities in Swiss banks, presumably following an exercise of "mutual legal assistance" on anticorruption matters between U.S. and Swiss law enforcement. *See* DOJ 15-1509, *supra* note 3; *see also infra* note 34.

but the underlying offense was committed abroad.[15] Due to its procedural framework, it also represents the transnational side of the dramatically growing practice of domestic civil asset forfeiture. It stands squarely within the international legal movement, also of the past two decades, to go beyond the "supply side" of international corruption as addressed by the Foreign Corrupt Practices Act of 1977 to pursue the "*demand* side"—those on the receiving end of bribes and other forms of corruption.[16]

What happens to the forfeited assets? The Initiative's ultimate objective, often declared, is to return such funds to the people from whom they were stolen.[17] The Initiative's first chief, Jennifer Shasky,[18] was quoted in 2011 as saying "there is no legal requirement to return the funds at all . . . . Nonetheless, we are committed to working to [find] ways to repatriate or otherwise use the funds for [the] benefit [of] the people of a victim country."[19] The

15. For an excellent overview of issues raised by expanding extraterritorial enforcement, see Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880 (1989).

16. *See infra* notes 25–26 and corresponding text.

17. Lanny A. Breuer, Assistant Attorney General, Keynote Address at Money Laundering Enforcement Conference (Oct. 19, 2010), (transcript available at https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-delivers-keynote-address-money-laundering).

18. Now Jennifer Shasky Calvery. Ms. Shasky Calvery spent fifteen years with the USDOJ, including, approximately two as the inaugural head of the Kleptocracy Asset Recovery Initiative; she left in 2012 to become Director of the Financial Crimes Enforcement Network (FinCEN) in the Department of the Treasury—her position at the time of this writing. DEP'T OF THE TREASURY, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/about_fincen/pdf/bio_director.pdf (last visited Nov. 12, 2016).

19. Christopher M. Matthews, *Fledgling Kleptocracy Initiative Faces Challenges, Expectations*, JUST ANTI-CORRUPTION: FOREIGN CORRUPT PRACTICES ACT NEWS (Sep. 19, 2011 11:36 AM), https://web.archive.org/web/20151122051202/http://www.mainjustice.com/justanticorruption/2011/09/19/fledgling-kleptocracy-initiative-face-challenges-expectations/. Shasky's phrasing furnishes the opening part of the title of this Note. Alexander W. Sierck, an attorney representing the Socio-Economic Rights and Accountability Project (SERAP) of Nigeria, paraphrases Ms. Shasky's statement as follows:

> SERAP notes that in a September 19, 2011 interview with the Main Justice blog, Jennifer Shasky, speaking on behalf of the Department's Kleptocracy Initiative, stated that: [t]he De-

USDOJ's practice handbook for asset recovery itself devotes a single paragraph to repatriation or other post-forfeiture remedies.[20] In light of this, the robust statutory underpinnings for USDOJ-KI investigation, pursuit, and forfeiture of corruptly-acquired assets appear asymmetrical with the basically voluntary and discretionary nature of post-forfeiture disposition. Put differently, there is a solid legal framework for the Initiative's means (seizure of assets) but not for its stated policy ends (return of assets).

This Note, in attempting to understand and address that tension, essays a preliminary mapping of forfeiture and return of assets in the global anticorruption context. In support of the Initiative's goals of denying kleptocrats a safe haven for their ill-gotten gains, punishing past and deterring future kleptocratic conduct, and, especially, returning assets to populations blighted by corruption, this Note will explore the novel, hybrid nature of actions brought under the Kleptocracy Initiative and potential ways to bridge the current statutory gap.

The Note will proceed in five parts. Part II examines the origins and operation of the Kleptocracy Initiative, the legal authorities under which its prosecutions unfold, some representative prosecutions, and a preliminary assessment of the Initiative. Part III presents a series of possible analogues for the return of ill-gotten assets, exploring the potential of each as a conceptual model for bridging the gap between forfeiture and return. Part IV sketches a possible statutory framework for the disposition of forfeited assets consisting of "four R's"— repatriation, restitution, repara-

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> partment has no [legal] obligation to repatriate assets subject to civil forfeiture, but that [t]he Department is committed to finding ways to repatriate or otherwise use such funds for the benefit of the victim country.

Letter from Alexander Sierck & Nicholai Diamond to Eric Holder, Jr., Attorney General (Mar. 18, 2014), https://www.icij.org/sites/icij/files/content/letter_to_attorney_general_holder_on_behalf_of_serap.pdf.

20. ASSET RECOVERY TOOLS, *supra* note 7 at 10. 18 U.S.C. § 981(i)(1) gives the Attorney General or the Secretary of the Treasury the discretion to transfer forfeited assets "to any foreign country which participated . . . in the . . . forfeiture of the property." 18 U.S.C. § 981(i)(1) (2013). Notably, the agreement of the Secretary of State is required, and such a decision to transfer is not subject to review. *Id.*

tions, and reimbursement—within a "derivative constructive trust" framework. Part V offers some brief concluding reflections.

II. The US Department of Justice's Kleptocracy Initiative

A. An Overview

Over nearly a half century, corruption has become a major target of both national and transnational legal regimes, with considerable growth since the turn of the 21st century.[21] Traditionally, the history of operational global anticorruption efforts begins with the U.S. Congress's enactment of the Foreign Corrupt Practices Act[22] ("FCPA") in 1977, after nearly a decade of revelations of widespread bribe payments from U.S. corporations to governments and officials in countries where the corporations conducted or sought to do business.[23] Of course, the USG had prosecuted numerous corruption cases prior to the enactment of the FCPA, but the FCPA's passage did signal a watershed moment in global anticorruption efforts—not least because it elevated the rhetoric and suggested an end to impunity. The FCPA was, and remains, fraught with limitations, the most notorious of which is the "facilitating payments" exception.[24] A larger limitation is the statute's

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21. Elena Helmer & Stuart H. Deming, *Non-Governmental Organizations: Anticorruption Compliance Challenges and Risks*, 45 INT'L LAW. 597, 598 (2011) ("Over the course of the past decade, enforcement of the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA), prohibiting the bribery of foreign officials, has experienced tremendous growth.") (citations omitted).

22. 15 U.S.C. § 78dd–1, et seq. (2013).

23. *See* U.S. SEC. AND EXCHANGE COMM'N, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (1976), https://www.sec.gov/spotlight/fcpa/sec-report-questionable-illegal-corporate-payments-practices-1976.pdf.

24. This provision, also known as the "grease payment" exception, has since the 1988 FCPA amendment been located in 15 U.S.C. § 78dd–1(b), which reads:

> Subsections (a) and (g) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

15 U.S.C. § 78dd–1(b) (2013). Thus, a corporate gift to a cabinet minister in an attempt to win a government contract would be criminalized by the FCPA. In contrast, a small payment to speed up issuance of a driver's license probably

deliberate failure to reach the conduct of those on the receiving end of bribery, a gap symbolized by the Fifth Circuit case of *United States v. Castle*.[25] The *Castle* court held "foreign officials may not be prosecuted under 18 U.S.C. § 371 for conspiring to violate the FCPA."[26]

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would not be. However, even the sort of conduct that falls within the FCPA carve-out is sternly criticized by one critic:

> [T]he demand for "grease payments" suggests a willingness on the part of a public official (agent) to withhold or delay services which the public (government representing people as the principal) has mandated to be provided without discrimination. Thus, the act of extortion creates injury to the extent that services are withheld or delayed.

Niles C. Logue, *Cultural Relativism or Ethical Imperialism? Dealing with Bribery Across Cultures*, at 13 n.20 (2005), http://www.cbfa.org/Logue.pdf. The "grease payments" exception has come under increasing fire, and the OECD has formally asked Congress to repeal it. *OECD Calls for an End to Facilitating Payments Exception,* JONESDAY (Dec., 2009), http://www.jonesday.com/oecd_calls/. At the other extreme, President-Elect Donald Trump has called the FCPA a "horrible law" that puts U.S. companies at a competitive disadvantage and urged its repeal. Ed Silverstein, *Donald Trump Has Called the FCPA a "Horrible" Law,* INSIDECOUNSEL (Aug. 17, 2015), http://www.insidecounsel.com/2015/08/17/donald-trump-has-called-the-fcpa-a-horrible-law.

25. United States v. Castle, 925 F.2d 831 (5th Cir. 1991).

26. *Id.* 18 U.S.C. § 371 is the general criminal statute covering conspiracy against the United States. Comparing the FCPA with the Mann Act, also known as the White-Slave Trade Act, 18 U.S.C. §§ 2421–2424, originally enacted in 1910 and criminalizing the transportation of people across state lines for prostitution or sex crimes, the Castle court held:

> Congress intended in both the FCPA and the Mann Act to deter and punish certain activities which necessarily involved the agreement of at least two people, but Congress chose in both statutes to punish only one party to the agreement. In *Gebardi* the Supreme Court refused to disregard Congress' intention to exempt one party by allowing the Executive to prosecute that party under the general conspiracy statute for precisely the same conduct. Congress made the same choice in drafting the FCPA, and by the same analysis, this Court may not allow the Executive to override the Congressional intent not to prosecute foreign officials for their participation in the prohibited acts.

Id. at 833 (referencing Gebardi v. United States, 287 U.S. 112 (1932)). Regarding the better-known carve-out in the FCPA for "facilitating payments," see *supra* note 24 and corresponding text.

1. Normative Overview

In an increasingly globalized world, awareness of the asymmetry of prosecuting only one side of the bribery transaction continues to grow among both policymakers and the public. Decades of the war on drugs and the post-9/11/2001 focus on international terrorism have led to a growing focus on the role of illicit international transfers of funds. Under President George W. Bush, foreign public corruption began to receive prominent attention as a criminal and economic matter—but also one with major national-security implications. In 2004, Presidential Proclamation 7750 addressed corruption in relation to immigration, giving the president the power to bar entry into the country of individual corrupt aliens or classes of corrupt aliens in order to protect national security.[27] Two years later, the Bush Administration announced that battling ¨large-scale corruption by high-level foreign public officials and target[ing] the fruits of their ill-gotten gains"[28] was part of "our freedom agenda" and of a "National Strategy to Internationalize Efforts Against Kleptocracy."[29]

A decade into the twenty-first century, under the presidential administration of Barack Obama, the battle against foreign corruption had assumed pride of place as a national policy concern. Even before his presidency, then-Senator Obama framed the issue as central. "The struggle against corruption," he said in an address in Kenya, "is one of the great struggles of our time."[30] During the first year of the Obama Administration, Attorney General Eric Holder cast the worldwide anticorruption fight as a matter of human rights and welfare: "When kleptocrats loot their nations'

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27. Proclamation No. 7750, 69 Fed. Reg. 2287 (Jan. 12, 2004).

28. Fact Sheet: National Strategy to Internationalize Efforts Against Kleptocracy (Aug. 10, 2006), https://georgewbush-whitehouse.archives.gov/news/releases/2006/08/text/20060810-1.html.

29. President's Statement on Kleptocracy (Aug. 10, 2006), https://georgewbush-whitehouse.archives.gov/news/releases/2006/08/text/20060810.html.

30. President Barack Obama, An Honest Government, A Hopeful Future (August 28, 2006), http://obamaspeeches.com/088-An-Honest-Government-A-Hopeful-Future-Obama-Speech.htm.

treasuries, steal natural resources, and embezzle development aid, they condemn their nations' children to starvation and disease."[31]

2. Jurisdictional Overview

The normative genesis of the Kleptocracy Initiative can be discerned in Attorney General Holder's vision of bribe-takers dooming children to the scourges of poverty,[32] or in presidential pronouncements framing corruption in national security terms, but what is the KI's jurisdictional basis? The answer is not completely clear. In its most distilled form, KI jurisdiction appears to be basic *in rem*. U.S. courts have held that, even if a financial transaction's origin and ultimate destination are both outside the United States, the fact that the funds pass through any part of the U.S. financial system is enough to satisfy the jurisdictional aspects of the money laundering statute, 18 U.S.C. § 1956(a)(2).[33] Thus, the vigorous assertion of extraterritoriality in foreign-corruption-based civil forfeiture actions under the Kleptocracy Initiative is based, in part, on what might be termed a sort of "tag" jurisdiction *over the assets*—once assets "set foot in" the U.S. financial system, even if immediately transferred abroad, they fall within the scope of 18 U.S.C. § 981.[34] Surveying broader bases of jurisdiction under customary

31. Attorney General Eric Holder, Address to the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity (Nov. 7, 2009) [hereinafter Address to the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity], http://www.justice.gov/opa/speech/attorney-general-eric-holder-opening-plenary-vi-ministerial-global-forum-fighting.

32. *Id.*

33. United States v. All Assets Held at Bank Julius Baer & Co., 571 F. Supp. 2d 1, 13 (D.D.C. 2008). The main actor in the case, which has still not reached its conclusion, is Pavlo Lazarenko, former prime minister of Ukraine; *see also* United States v. All Assets Held in Account Number XXXXXXXX, 83 F. Supp. 3d 360, 368 (D.D.C. 2015) ("Use of the United States banking system . . . provides sufficient contact between property and the United States for a civil forfeiture action *in rem*.") (emphasis added).

34. *See All Assets Held at Bank Julius Baer*, 571 F. Supp. 2d at 13. The court rejected the argument that when a fund transfer originated in Poland, then went to a U.S. financial institution only as a brief intermediate stop, and from there went to Switzerland, the transfer should be viewed as a single Poland-to-Switzerland transfer. Rather, "[w]ith each EFT [electronic funds transfer] at least two separate transactions occurred: first, funds moved from the originating

and conventional international law, one could make a number of other arguments in support of prescriptive, adjudicative, and enforcement jurisdiction in anticorruption cases.[35]

The most settled form of jurisdiction, based on nationality, posits that the U.S. can seize assets of individuals who are "citizens of the United States or domiciled therein" through an appropriate exercise of judicial fiat.[36] These principles were elaborated in a case that arose from Teapot Dome, the biggest American political scandal before Watergate. There, one Harry M. Blackmer bribed Albert Fall, then-Secretary of the Interior, to convey leaseholds over USG land in Wyoming and California to private oil companies without competitive bidding.[37] The Interior Secretary's

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bank to the intermediary bank; then the intermediary bank was to transfer the funds to the destination bank . . . . While the two transactions can occur almost instantaneously, sometimes they are separated by several days." *Id.* (quoting United States v. Daccarett, 6 F.3d 37, 54 (2d Cir. 1993)). The Daccarett court cited 18 U.S.C. § 981(a)(1)(A). It can be inferred from the district court's holding in *All Assets Held at Bank Julius Baer* that the "several days" language was only meant to underline the fact that each transaction was separate and distinct, and would still be so even where funds were in the U.S. intermediary institution only for a few seconds.

35. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402–04 (1987) (hereinafter "R3FR"); UNITED NATIONS, OFFICE ON DRUGS AND CRIME, UNITED NATIONS CONVENTION AGAINST CORRUPTION 28 art. 42 (2004), https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf. *United Nations Convention Against Corruption* permits jurisdiction for the following: Article 42(1)(a) (if corruption or money-laundering offenses occurred on the territory of a state party); Article 42(2) (if corruption "offense is committed *against a national of that State Party*") (emphasis added); Article 42(2)(d) (if corruption is committed "*against the State Party*") (emphasis added); Article 42(6) (permitting residual jurisdiction: "Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.").

36. *See, e.g.*, Blackmer v. United States, 284 U.S. 421, 434 (1932); *see also* Hans Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1048–49 (1961) (discussing whether an alien's residence or domicile in the U.S. provides a reasonable basis for the assertion of legislative jurisdiction with regard to an act committed outside the United States); R3FR § 402 (Nationality).

37. *See* Phil Roberts, *The Teapot Dome Scandal,* WYOHISTORY.ORG, http://www.wyohistory.org/encyclopedia/teapot-dome-scandal (last visited Nov. 13, 2016).

fall from grace resulted in prison time, while Blackmer fled to Paris with ten million dollars and a Norwegian opera singer paramour, continuing to challenge the legality of subpoenas and asset seizure orders against him.[38] The Court held that, following a contempt order, a court "may direct that property belonging to a witness and within the United States may be seized and held to satisfy any judgment which may be rendered against him in the proceeding."[39] So long as reasonable notice was provided to the property owner, jurisdiction *in personam* was proper even though the individual never appeared in court.[40]

In the contemporary view that poverty, corruption, and even climate change can act as powerful destabilizing forces,[41] the evocation of images of dying children also points to a strong, if implicit, assertion of jurisdiction based on a vicarious and inchoate "protective principle."[42] Further, under the "objective territorial

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38. *Blackmer, from Paris Refuge, Sues to Void $60,000 Teapot Fine*, CHICAGO DAILY TRIB., September 3, 1930, at 8.

39. *Blackmer*, 284 U.S. at 435–36.

40. *Id.* at 439 ("The efficacy of an attempt to provide constructive service in this country would rest upon the presumption that the notice would be given in a manner calculated to reach the witness abroad."). The Court upheld a lower court order of $60,000 in fines ($30,000 in each of two cases) and seizure of assets to pay those fines even in the owner's absence. *Id.* at 443. The Blackmer saga stretched on for decades. In 1942, after the revocation of his U.S. passport and indictment on various counts, including income tax evasion and perjury, a "ghost fund" of $10,000,000 in cash and securities was discovered in New York banks and seized by the Office of Foreign Funds Control of the Treasury Department. *Freeze Fortune of Teapot Dome Trial Fugitive: Reveal Blackmer Holds $10,000,000* in U.S. CHICAGO DAILY TRIB., June 23, 1942, at 8, ("The freezing order, which was issued [by the Secretary of the Treasury] on the theory that Blackmer is a 'national' of France altho [sic] a United States citizen, means that the accounts cannot be drawn on without [T]reasury permission.").

41. *See, e.g.*, THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 12 (2015), https://www.whitehouse.gov/sites/default/files/docs/2015_national_security_strategy.pdf ("Climate change is an urgent and growing threat to our national security, contributing to increased natural disasters, refugee flows, and conflicts over basic resources like food and water."). *See also infra* notes 98–99.

42. U.N. Secretary General Kofi Annan, speaking of the "evil" of corruption, raised the specter of its pernicious effects on human rights and its spreading of misery among developing populations; these pronouncements dovetail with the U.S. invocation of the duty to protect. *See infra* note 96 and accompanying

principle," closely linked to the "substantial effects" doctrine, if the corrupt behavior by foreign officials can be said to negatively affect U.S. interests, then jurisdiction may be proper.[43] Lastly, it is even conceivable that universality principles[44] can serve as a basis for KI enforcement: that is, corruption anywhere is a threat to the rule of law everywhere. For all of the linking of the anticorruption movement to national security (via the argument that international money laundering is a key financing mechanism for terrorism) and to substantial-effects arguments (the destabilizing impact of money laundering of corrupt assets on the U.S. financial and monetary systems, on the one hand, and the furtherance of crime through such mechanisms, on the other), ultimately the invocation of a hybrid "duty to protect" seems the most compelling argument for the Initiative—particularly in light of the broadly protective argumentative frames wielded by the past two U.S. presidential administrations.[45]

The jurisdictional themes raised above—including judicial fiat, extraterritoriality, and various inchoate "protective" justifications—inform and constrain the actual operational reach of the KI. Yet if the KI's goal is to strengthen and/or harmonize the doctrinal and normative link between anticorruption enforcement and related global law enforcement aims like combating terrorism, tax evasion, and money laundering, then the USDOJ must be mindful of the

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text; *see also supra* note 31; R3FR §§ 402–404 (setting forth bases of jurisdiction under customary international law).

43. *See* United States v. Yousef, 327 F.3d 56 (2d Cir. 2003); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) (holding that extraterritorial jurisdiction under antitrust law applies where the conduct by a foreign actor in foreign territory had substantial effects on the territory of the United States.).

44. *See* Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323 (2001).

45. Assistant Attorney General Leslie Caldwell termed U.S. anticorruption work "not a service . . . to the global community, but rather . . . enforcement action to protect our own national security interests . . . ." Leslie R. Caldwell, Assistant Att'y Gen., Address at Duke University School of Law (Oct. 23, 2014) https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-duke-university-school-law. The core argument seems to be: corruption weakens and destabilizes states, making them breeding grounds for terrorism, piracy, and other destabilizing unlawful activity. *Id.*

optics of selective long-arm reach.[46] We must recall that explicit public announcement of the Kleptocracy Initiative came in July 2010 with Attorney General Holder's address at the African Union Summit in Uganda.[47] It is noteworthy that both the key rhetorical preparation for the Initiative and its actual unveiling occurred where they did—the Initiative's targets have overwhelmingly been in Africa and Asia, and in significant, though lesser, measure in Latin America. Also significantly, the official making both statements was Holder, then head of the USDOJ. Thus, unlike anti-terrorism, which is overwhelmingly framed as a military and intelligence matter—with the asserted need for legal flexibility in addressing these rapidly evolving challenges[48]—anticorruption's

46. "Selective long-arm reach" does not refer solely to the traditional bounds of prosecutorial discretion in individual cases. It also implies an agency's broadly permissive interpretation of its enabling statutes' long arm provisions in certain contexts, alongside far more formalistic, circumspect, and/or limited interpretations of jurisdictional language in related contexts, or as pertaining to certain classes of likely targets of prosecutorial activity *in the same context*. For example, the KI's enabling statutes do not limit KI's reach solely to foreign officials engaged in foreign corruption. *See infra* Section II.B.1. In fact, as the "Kazakhgate" prosecution demonstrates, U.S. citizens may be central figures in a given *foreign* corruption scheme. *See infra* Section II.C.2. In light of the above, an agency's interpretation and implementation of its enabling statutes in a way that aggressively targets foreign corruption, while simultaneously showing lax enforcement of corrupt domestic actors, may threaten the perceived credibility of the otherwise legitimate foreign-oriented efforts.

47. Attorney General Eric Holder, Address at the African Union Summit (Jul. 25, 2010), http://www.justice.gov/opa/speech/attorney-general-holder-african-union-summit. The program's full, formal name is: Kleptocracy Asset Recovery Initiative. The unveiling of the Kleptocracy Initiative is sometimes dated to November 2009. On November 7, 2009, at the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity in Doha, Qatar, Holder spoke of anticorruption and asset recovery as a major USDOJ priority but did not formally announce the Kleptocracy Initiative. Address to the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity, *supra* note 31. Assistant Attorney General Lanny Breuer announced the Initiative's first cases targeting Alamieyeseigha in a May 2011 address at the World Bank. Breuer, *supra* note 7.

48. Of course, anti-terrorism efforts also rest on their own elaborate legal foundations, which continue to proliferate without an apparent overarching policy to harmonize the disparate statutory and enforcement schemes. *See, e.g.*, Jordan J. Paust, *Terrorism's Proscription and Core Elements of an Objective Definition*, 8 SANTA CLARA J. INT'L L. 51, 54 (2010); Naomi Norb-

framework seems to be an exclusively legal one. Because of this, clear jurisdictional rules become essential prerequisites for an effective law enforcement mandate.[49] To clarify this jurisdictional scope, the KI must explicitly reach domestic corruption with foreign overtones, including corruption occurring exclusively in "developed" (North–North) contexts;[50] and this will require a far more refined understanding of the principles of concurrent jurisdiction, conflicts jurisprudence, comity, and complementary, all from a

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erg, *Terrorism and International Criminal Justice: Dim Prospects for a Future Together*, 8 SANTA CLARA J. INT'L L. 11, 13–14 (2010); Nicolas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 251 (2004).

49. The decades-long saga of Blackmer is instructive. In *Blackmer*, the nationality and *in rem* bases of jurisdiction bases were far less controversial than the hybrid extraterritoriality underpinning the KI. *See supra* notes 36–39 and corresponding text. Yet in *Blackmer*, the jurisdictional fight rose all the way to the Supreme Court. *See* Blackmer v. United States, 284 U.S. 421 (1932). Such jurisdictional challenges in the kleptocracy context could arguably bog down the KI in jurisdictional battles, draining time and resources from investigation, prosecution, forfeiture, and disposition of assets. One can imagine multiple novel due process or jurisdictional challenges to KI asset forfeiture regimes. Without explicit statements of congressional intent, courts could apply any number of canons to limit jurisdictional reach, resulting in dissonance: some courts upholding assertions of jurisdiction and corresponding asset forfeitures, others not. *See* Morrison v. National Australia Bank Ltd., 561 U.S. 247, 255, 265 (2010) (reaffirming the presumption against extraterritoriality—absent explicit congressional authorization to apply U.S. law abroad, courts will interpret statutes as concerned solely with domestic affairs); E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 258 (1991) (reaffirming the presumption against extraterritoriality absent explicit congressional mandate to the contrary); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 409–11, 439 (1964) (upholding and clarifying the "act of state doctrine" that a U.S. court should not sit in judgment of a foreign state's activities in that state); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (holding that conflicts between a domestic statute and international law must be resolved so as to avoid conflicts with international law).

50. A parallel theme can be observed in the ongoing critiques of the International Criminal Court (an international adjudicative body chiefly promoted by the U.S.) prosecutions of predominantly African and other global South ex-leaders. *See, e.g.*, Asaid Kiyani, *A TWAIL Critique of the International Criminal Court: Contestations from the Global South*, CANADIAN POLITICAL SCIENCE ASSOCIATION, https://www.cpsa-acsp.ca/papers-2011/Kiyani.pdf (last visited Nov. 13, 2016).

multi-jurisdictional, comparative perspective—no simple task. However, the payoff of this effort would be commensurately heightened legitimacy, not only for the KI, but also for U.S. law enforcement efforts. Ultimately, the KI's efficacy and legitimacy hinge on implementation of a coherent normative, jurisdictional, and doctrinal vision.

3. Conceptual or Semiotic Mapping

As with its rich plurality of possible jurisdictional bases, the KI exists within, and in relation to, background anticorruption norms that show significant conceptual variability. The choice of "kleptocracy" as an official term for the USDOJ-KI is significant. First, it is a recent neologism.[51] A typical definition: "a government or state in which those in power exploit national resources and steal; rule by a thief or thieves."[52] But its novelty is not the most striking feature of the term "kleptocracy": while the Initiative pursues corruptly-acquired assets of particular *individuals* whom USDOJ-KI and national leaders often refer to as "kleptocrats," the Initiative's name, semantically, refers to a corrupt *system*—a State whose very structure is built on systemic theft of public resources.

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51. "Kleptocracy" was one of six hundred words that debuted in Random House Webster's College Dictionary in 1996. Jennifer M. Hartman, Note, *Government by Thieves: Revealing the Monsters Behind the Kleptocratic Masks*, 24 SYRACUSE J. INT'L L. & COM. 157, 157 (1997) (citation omitted).

52. *Id.* The word is of Greek origin and means "rule by thieves." *Kleptocracy*, ONLINE ETYMOLOGY DICTIONARY, http://www.etymonline.com/ index.php?term=kleptocracy (last visited Nov. 13, 2016); *see also -cracy*, ONLINE ETYMOLOGY DICTIONARY, http://www.etymonline.com/index. php?term=-cracy&allowed_in_frame=0 (last visited Oct. 20, 2016) (describing the Greek origin of "*kratia*"); *Kleptomania*, ONLINE ETYMOLOGY DICTIONARY, http://www.etymonline.com/index.php?term=kleptomania&allowed_in_frame=0 (last visited Oct. 20, 2016) (discussing the Greek origin of "*kleptes*"). It has been attested as early as 1819 in Spain. *Kleptocracy*, *supra* note 52. "Kleptocrat" is a derivative coinage formed from "kleptocracy," analogous to the back-formation of "bureaucrat" from "bureaucracy."

TABLE 1. CORRUPTION AND KLEPTOCRACY: SELECTED TERMINOLOGY	
TERM & DEFINITION	SOURCE
Corruption. "A fiduciary's or official's use of a station or office to procure some benefit either personally or for someone else, contrary to the rights of others; an act carried out with the intent of giving some advantage inconsistent with official duty or the rights of others."	Black's Law Dictionary 423 (10th ed. 2014)
Corruption. "[A]n insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish."	Secretary-General Kofi Annan, Foreword to UNCAC, iii
Corruption. N/A [Convention contains no definition.]	United Nations Convention Against Corruption
Grand Corruption. The "steal[ing] or extort[ion]" of "public assets . . . by prominent public office holders," then "mostly laundered through financial institutions," especially banks.	Theodore S. Greenberg, et al., *Stolen Asset Recovery* (World Bank and UNODS, StAR, 2012)
Indigenous Spoliation. "[T]he destruction of the sum total of a state's endowment, the laying waste of the wealth & resources belonging by right to her citizens, & the denial of their heritage."	Ndiva Kofele-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation* (1995) 58
Kleptocracy. "[L]arge-scale corruption by high-level foreign public officials."	President George W. Bush, Statement on Kleptocracy, Aug. 10, 2006
Kleptocracy. "Rule by thieves; a government in which the officials are thieves . . . [I[t arises if the holders of office take office in order to use its authority for their personal ends, or, after taking their offices, they use them to benefit themselves and their political and personal	Steven Michael Sheppard, Bouvier Law Dictionary, 2012

allies rather than to the benefit of the governed."	
Kleptocracy. "Kleptocrat is usually defined as a ruler whose primary goal is personal enrichment. . . Similar to corruption, kleptocracy refers to the rent-seeking activities of the government. However, although the literature of corruption usually studies low or medium rank government officials, the literature of kleptocracy focuses on sovereign rulers."	C. Simon Fan, *Kleptocracy and Corruption*, 34 J. COMPAR. ECON. 57 n.1
Kleptocrats. "When kleptocrats loot their nations' treasuries, steal natural resources, and embezzle development aid, they condemn their nations' children to starvation and disease."	Eric Holder, Address to Global Forum, Doha, Qatar, Nov. 7, 2009
Patrimonicide. "The word . . . seems appropriate for this new international economic crime. The word comes from . . . the Latin words 'patrimonium,' meaning 'the estate or property belonging by ancient right to an institution, corporation, or class' . . . ; and 'cide,' meaning killing."	Kofele-Kale, *Patrimonicide* at 57–58
Politically Exposed Persons. "[I]ndividuals who are, or have been, entrusted with prominent public functions, such as heads of state or government. [F]inancial institutions [are] also expect[ed] to treat a prominent public official's family and close associates as PEP's." (at 25; n.36 & n.37 cite to FATF Glossary; Article 52(1), UNCAC)	Greenberg et al., *Stolen Asset Recovery*
Presidential Graft. [Used more or less synonymously with "indigenous spoliation" and "patrimonicide."]	Kofele-Kale, *Patrimonicide* (1995) 1
Specified Unlawful Activity. [Includes] "bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official."	18 U.S.C. § 1956(c)(7)(B)(iv)
Stolen Assets. N/A [No definition provided]	Stolen Asset Recovery Initiative (StAR)

The Initiative's name thus implies an invidious characterization of an entire system of government, evoking the specter of a "failed" or even "outlaw" State.[53]

Its political-rhetorical character notwithstanding, the term "kleptocracy" has begun to find its way into case law. The Ninth Circuit, in a 1988 immigration case, held that beatings and other mistreatment by government security forces to extort money from a person "may constitute persecution on account of political opinion" pursuant to the Immigration and Nationality Act.[54] In so holding, the court explained: "The record also contains substantial evidence that the Haitian government under Duvalier operated as a 'kleptocracy,' or government by thievery" at all levels.[55]

Black's Law Dictionary defines "corruption" as "[a] fiduciary's or official's use of a station or office to procure some benefit either personally or for someone else, contrary to the rights of others; an act carried out with the intent of giving some advantage inconsistent with official duty or the rights of others."[56] "Kleptocracy" has been defined as "Rule by thieves" and "a government in which the officials are thieves."[57] The related term, "grand cor-

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53. *See, e.g.*, GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL ORDER (2004).

54. Desir v. Ilchert, 840 F.2d 723, 724 (9th Cir. 1988).

55. *Id.* at 727. The Ninth Circuit further noted that ordinary agents of the Ton Ton Macoutes security forces often went unpaid, a situation ripe for pervasive violent extortion. *Id.* The court also noted an earlier federal district court decision that recognized the political nature of virtually any interaction between a citizen and the security forces: "To challenge the extortion by which the Macoutes exist is to challenge the underpinnings of the political system. Accordingly, to resist extortion is to become an enemy of the government." *Id.* (quoting Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442, 498–500 (S.D. Fla. 1980)).

56. *Corruption*, BLACK'S LAW DICTIONARY (10th ed. 2014).

57. *Kleptocracy*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Stephen Michael Sheppard ed. 2012). The definition continues: "[I]t arises if the holders of office take office in order to use its authority for their personal ends, or, after taking their offices, they use them to benefit themselves and their political or personal allies rather than to the benefit of the governed." *Id.* It is not difficult to see just how overbroad this definition may be. Interestingly, the leading legal dictionary has not, as of its tenth edition, yet registered the terms "kleptocracy" or "kleptocrat," although there is an entry for "kleptomania," defined as "[a] compulsive urge to steal, esp[ecially] without economic motive." *Kleptomania*, BLACK'S LAW DICTIONARY (10th ed. 2014). The lack of econom-

ruption," has been defined as "st[ealing] or extort[ion]" of "public assets . . . by prominent public office holders," then "mostly laundered through financial institutions," especially banks.[58] Kleptocratic corruption is also known as "indigenous spoliation" or, in the coinage of Cameroonian-born legal scholar Ndiva Kofele-Kale, "patrimonicide"—terms that evoke the vast scale of this form of corruption involving "stupendous . . . amounts of wealth."[59] "Indigenous spoliation," in Kofele-Kale's usage, is "the illegitimate use of power for private ends by . . . heads of states . . . and other *high-ranking*[] leaders."[60] Table 1, an overview of definitions of key anticorruption terms, highlights the terminological and conceptual difficulties in this emerging area of the law.

4. Institutional/Prosecutorial Overview

The Initiative has its administrative home in the Asset Forfeiture and Money Laundering Section of the USDOJ's Criminal Division. The principal procedural arrow in its quiver is civil asset forfeiture, sometimes referred to as "non-conviction based" forfeiture.[61] Following intensive investigation, usually in partnership with another agency such as the FBI, USDOJ-KI prosecutors bring a civil forfeiture action in federal court.[62]

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ic motive or an institutional context puts this definition in the realm of psychological disorders and clearly has little to do with the notion of kleptocracy as used in the anticorruption realm.

58. GREENBERG, ET AL., *supra* note 8, at xiii.

59. Ndiva Kofele-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation,* 28 VAND. J. TRANSNAT'L L. 45, 48, 58–59 (1995).

60. *Id.* at 60 (emphasis added).

61. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF STATE*, supra* note 7, at 5.

62. USDOJ-KI typically enter into a collaborative relationship with (1) Department of Justice, Criminal Division, Office of International Affairs; (2) Department of Justice, Federal Bureau of Investigation (FBI); or (3) Department of Homeland Security, Immigration and Customs Enforcement (ICE) Homeland Security Investigation. The investigative partner can also be foreign (an agency of a government abroad) or international (a treaty body such as the United Nations or the World Bank). Where the partner is foreign, the USDOJ Office of International Affairs receives and handle such requests. Drawing on the investigative work conducted, USDOJ-KI prosecutors then bring a civil forfeiture action in federal court, asserting *in rem* jurisdiction over assets believed by the prosecutors to be traceable to foreign corruption. Given that jurisdiction is *in*

USDOJ-KI began with over $1 million in twin forfeitures against DSP, its first target.[63] Other forfeitures have included $115 million in an action involving the regime of Kazakhstan; $30 million from "Teodorín" Obiang of Equatorial Guinea; $28.7 million from former South Korean president Chun Doo Hwan.[64] In just over a half-decade of activity, the Initiative has forfeited several billions of dollars in corruptly acquired assets.[65] The substantial volume of assets obtained (even if a tiny fraction of the total volume of corruption) underlines a striking procedural characteristic of the USDOJ-KI's activity: unlike conventional civil litigation, where collecting on a judgment is the final (often extremely difficult) procedural step, here, prosecution *begins* with the funds—over which the law enforcement bodies and federal court exercise jurisdiction.

After forfeiture, the destination of assets presents an unclear picture. Some funds have been repatriated, as for instance just under $30 million to the government of South Korea.[66] Some funds have been returned in less conventional, more innovative ways, as for instance some $115 million in the Kazakhstan forfeiture given to needy populations in that country through an NGO created expressly for that purpose. Problematically, however, the majority of the funds remain in USG accounts, unrepatriated or otherwise unrestored to their source countries.

B. Legal Authorities

The USDOJ-KI operates in a complex landscape of anticorruption statutes, treaties, agencies, and practices that have arisen

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rem, the defendant in such cases is typically the property. The very first USDOJ-KI case, against Nigeria's DSP, was *United States v. The Contents of Account Number Z44-343021 Held at Fidelity Brokerage Services, L.L.C., Boston, Massachusetts In the Name of Nicholas Aiyegbemi D/B/A Inadinov and Co. OAO and All Assets Traceable Thereto*, No. 1:11-cv-10606-RWZ (D. Mass. 2012).

63. DOJ 13-628 (2013), 2013 WL 2366183; DOJ 12-827 (2012), 2012 WL 2454717. *See also supra* note 1 and corresponding text.

64. DOJ 15-266 (2015), 2015 WL 910102; DOJ 15-1509 (2015), 2015 WL 8289228; DOJ 14-1114 (2014), 2014 WL 5073696.

65. FIN. CRIMES ENF'T NETWORK, *supra* note 18. The website refers to "the annual forfeiture of more than $1.5 billion in criminal assets . . . ." *Id.*

66. DOJ 15-266 (2015), 2015 WL 910102.

mostly in the past two decades. It also stands at the intersection of multiple law-enforcement policies, among them the war on drugs, prosecution of organized crime, anti-terrorism, and the fight against bribery and other official corruption. A brief overview of the domestic, international, and foreign legal regimes affecting the Initiative follows.

1. U.S. Federal Statutory Framework

The domestic statutory framework for the USDOJ-KI has both procedural and substantive components; further layers of complexity are added by its hybrid use of both criminal and civil actions and its interaction with foreign law. Procedurally, USDOJ-KI prosecutors rely mainly on 18 U.S.C. Section 981, the civil forfeiture statute. This statute provides a civil remedy even where the predicate offense giving rise to forfeiture is criminal.[67] Furthermore, the substantive provisions themselves, in turn, have underlying predicates, as will be seen below. Thus the statutory scheme is marked by both the relative ease and simplicity of civil forfeiture and by the complexity and interlocking nature of two separate levels of predicate substantive offenses. Section 981 was originally enacted in 1986 as Public Law 99-570 Subsection (a)(1)(A), which broadly subjects to forfeiture "[a]ny property, real or personal, involved in a transaction or attempted transaction in violation of section 1956, 1957, or 1960 of this title, or any property traceable to such property."[68] Where the underlying criminal conduct occurred outside of the United States, subsection (a)(1)(C) makes civil forfeiture applicable to "any offense constituting 'specified unlawful activity' (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense."[69]

67. Note, too, the codification of civil asset forfeiture within Title 18, governing criminal offenses.

68. 18 U.S.C. § 981(a)(1)(A) (2013).

69. *Id.* § 981(a)(1)(C).

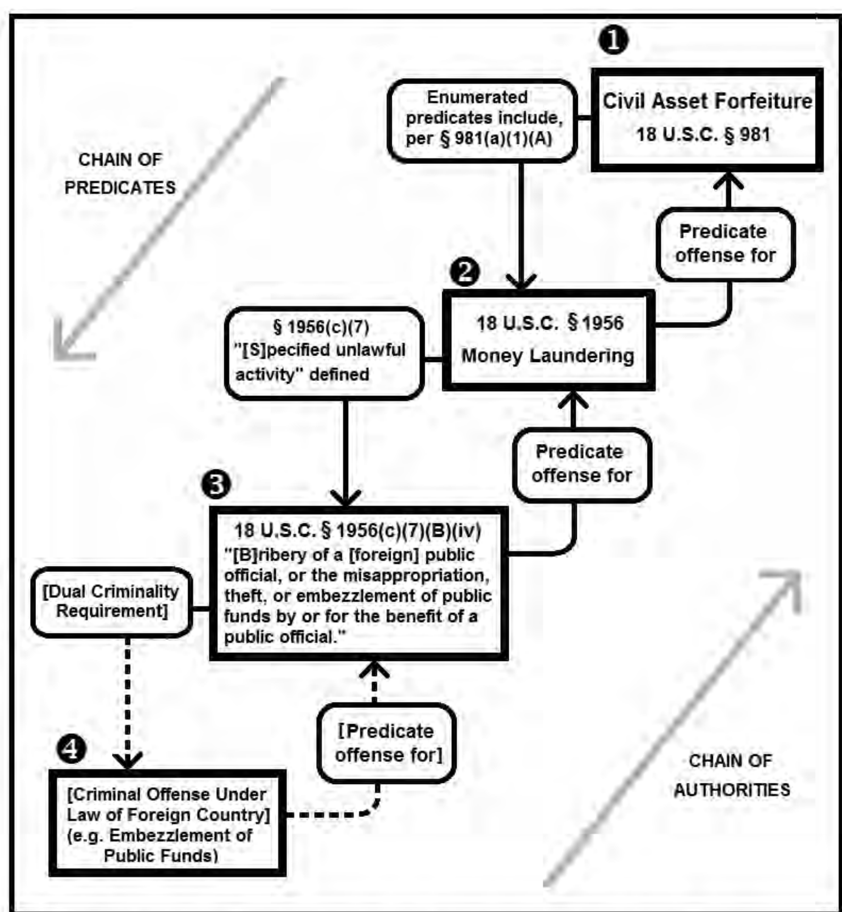

Fig. 1. Typical predicate–offense structure for Kleptocracy Initiative actions. The procedural nature of the USDOJ-KI action is (1), whose predicate offense is (2), which, in turn, has an underlying predicate of (3). Where dual criminality is required, or at least asserted, the foreign offense is (4). *Diagram created by the author.*

The "specified unlawful activity" provision of subsection 1956(c)(7) acts as a key unlocking the door to forfeiture prosecutions under literally hundreds of separate statutes. As of 2015, these ultimate predicate offenses numbered 236, any one of which may serve as a basis to trigger civil asset forfeiture proceedings connected with money-laundering offenses.[70] The key predicate

70. U.S. DEP'T OF JUSTICE, ASSET FORFEITURE AND MONEY LAUNDERING STATUTES app. A (2015), http://www.justice.gov/sites/default/files/criminal-afmls/legacy/2015/04/24/statutes2015.pdf. The overwhelming majority of the underlying offenses are located within Title 18, governing criminal offenses; a

offenses, from a USDOJ-KI perspective, are enumerated in subsection (a)(1)(A): Title 18, Sections 1956, 1957, and 1960.[71] Section 1956 defines money laundering as a financial transaction with property that "represents the proceeds of some form of unlawful activity."[72] A money launderer "conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate," technical skills that can be crucial to the success of criminal enterprises.[73]

The most potent provision of section 1956 for USDOJ-KI prosecutors defines "specified unlawful activity . . . with respect to a financial transaction occurring in whole or in part in the United States," as, *inter alia*, "bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official."[74] The latter is one of seven enumerated types of predicate "offense[s] against a foreign nation" "with respect to a financial transaction occurring in whole or in part in the United States."[75] Thus, section 1956, the chief predicate for section 981 civil forfeiture, in defining and criminalizing money laundering, derives the prohibited nature of the conduct from a further predicate—essentially, foreign corruption.

What is not entirely clear, however, is whether, for the sort of forfeiture actions undertaken by USDOJ-KI to succeed, a dual-criminality requirement applies. Under such a requirement, the underlying predicate offense must be a crime under both the law of the United States and of the foreign State in which the illicit en-

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significant number are in Title 21, governing food and drugs; nine state-law felonies including murder, robbery, and kidnapping are covered as well.

71. 18 U.S.C. § 1956 concerns money laundering, § 1957 engaging in monetary transactions in property derived from specified unlawful activity, and § 1960 prohibits unlicensed money transmitting business.

72. 18 U.S.C. § 1956(a)(1) (2013).

73. PRESIDENT'S COMM'N ON ORG. CRIME, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING 7 (1984), https://www.ncjrs.gov/pdffiles1/Digitization/166517NCJRS.pdf.

74. 18 U.S.C. § 1956(c)(7)(B)(iv) (2013).

75. *Id.* § 1956(c)(7)(B)(i)–(iii), (v)–(vii), broadly, deal with (i) controlled substances; (ii) murder, kidnapping, and other violent crimes; (iii) fraud against a foreign bank; (v) smuggling or export-control violation involving items subject to the U.S. Munitions List or Export Administration Regulations control; (vi) an extraditable offense under applicable treaty; and (vii) trafficking in persons, selling or buying of children, and transporting persons for commercial sex acts.

richment occurred.[76] Government pleadings in USDOJ-KI actions appear to proceed on the assumption that there is indeed a dual-criminality requirement; for instance, the "Basis for Forfeiture" section of the Abacha complaint begins:

> At all times relevant to this complaint, conduct constituting theft; conversion; fraud; extortion; and the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official were criminal offenses under Nigerian law, as enumerated in the Nigerian Criminal and Penal Codes, including but not limited to Nigerian Criminal Code Act 1990, CAP. 77[sic], Part 3, Chapters 12 and 34, and the Nigerian Penal Code Law 1963, CAP. 89 (1987), Chapters X, and XIX.[77]

The complaint then appends Attachment A, "Selected Excerpts of Applicable Nigerian Law."[78]

Moreover, case law supports the proposition that where a forfeiture action is brought in relation to section 1956, the underlying conduct must be a violation of law in the country where it occurred.[79] The violation must also be equivalent to a felony under U.S. law.[80]

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76. UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 35, at 30 art. 43 ¶ 2 addresses the dual-criminality requirement, imposing a flexible test for satisfying the requirement. See *infra* note 95 and corresponding text.

77. Complaint for Forfeiture *In Rem* at 33–34, United States v. All Assets Held in Account Number 80020796, No. 1:13-cv-01832-JDB (D.D.C. Nov. 18, 2013), https://www.justice.gov/iso/opa/resources/765201435135920471922.pdf.

78. *Id.* at Attachment A: Select Excerpts of Applicable Nigerian Law.

79. United States v. 2291 Ferndown Lane, No. 3:10–CV–0037, 2011 WL 2441254, at *4 (W.D. Va. June 14, 2011). The district court specified that "[f]or all presently relevant purposes, 'specified unlawful activity' requires an 'offense against a foreign nation.'" *Id.* (quoting 18 U.S.C. § 1956(c)(7)(B)(iv). . . .")

80. *Id.* (citing 18 U.S.C. § 981(a)(1)(B)(ii)).

TABLE 2. COMPARISON OF CRIMINAL FORFEITURE AND CIVIL ASSET FORFEITURE

	Criminal Forfeiture	**Civil Asset Forfeiture**
Type of jurisdiction	In personam	In rem
Criminal conviction required?	Yes	No
Burden of proof	Beyond a reasonable doubt	Preponderance of the evidence *or* Probable cause (“Customs carve-out”)
Substitution of assets allowed?	Yes	No
Money judgments allowed?	Yes	No

Civil forfeiture *in rem* offers prosecutorial and judicial efficiencies. First, personal jurisdiction over a defendant is not needed; *in rem* jurisdiction suffices—the court exercises control over the property.[81] Since the property is treated as guilty through its link to the predicate offense, as established by a preponderance of the evidence, actions can go forward even when a wrongdoer is a fugitive, refuses to appear, or is deceased.[82] A notable advantage of criminal forfeiture is that the defendant’s assets are considered fungible: the government can forfeit the defendant’s legitimate property if the illicit assets cannot be located.[83] In civil forfeiture, jurisdiction is *in rem* and only reaches the particular assets. Thus *in rem* proceedings adjudicate the “guilt” of the property; *sensu stricto*, such proceedings are not a forum to adjudicate the underlying corrupt act, with the punitive, educational, and spotlight effects such prosecution could offer. Complicating matters further, courts’ apparent insistence that, to justify civil asset forfeiture, the

81. Benjamin B. Wagner, *Asset Forfeiture and International Cooperation*, U.S. DEP’T OF JUSTICE, http://www.americanbar.org/content/dam/aba/directories/roli/raca/asia_raca_apec_asset_forfeiture.authcheckdam.pdf (last visited Nov. 13, 2016).

82. *Id.* at 13; *see also supra* Section II.A.2.

83. Wagner, *supra* note 81.

offense against the foreign nation be equivalent to a U.S. felony opens the possibility of due process challenges based on the discrepancies in respective evidentiary burdens and procedural protections between civil and criminal prosecutions.[84] Table 2 charts several key differences between civil and criminal forfeiture in this regard.[85]

2. Complementary International or Foreign Legal Frameworks[86]

The first international convention on corruption came from Latin America, the Inter-American Convention Against Corruption (IACAC), adopted in March 1996, and entered into force in March 1997.[87] The United States is one of 34 IACAC signatory states.[88] Almost immediately after, the Organization for Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was signed in December 1997, entering into force in February 1999.[89] The United States is one of 41 signatory states.[90]

However, the most important international legal regime in the anticorruption fight is the United Nations Convention Against Corruption ("UNCAC"), which on entering into force in 2005 became the most ambitious multilateral effort to date to combat grand

84. *See supra* notes 80–82 and accompanying text; *infra* Section III.G.

85. *See infra* Section III.G, for further elaboration.

86. This Note's focus on U.S. and related common law legal structures precludes a comprehensive treatment of international or comparative anticorruption efforts, which lie far outside its scope.

87. Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996, O.A.S.T.S. No. B-58.

88. For a list of the signatory states, see ORGANIZATION OF AMERICAN STATES, *Signatories and Ratifications*, http://www.oas.org/juridico/english/Sigs/b-58.html (last visited Nov. 13, 2016).

89. ORG. FOR ECON. CO-OPERATION AND DEV., CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 6–19 (Nov. 21, 1997), http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

90. All 35 OECD member states, and 6 non-member states, are signatories for a total of 41. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, ORG. FOR ECON. CO-OPERATION AND DEV., http://www.oecd.org/corruption/oecdantibribery convention.htm (last visited Nov. 13, 2016).

corruption and the first global, legally binding framework to that end. Of particular importance under the UNCAC are Article 31, obligating each state party to take necessary measures to enable tracing, freezing, and confiscation of the proceeds of corruption; Article 57, governing return of confiscated assets; [91] and Articles 54 and 55, establishing an international regime of state-to-state mutual legal assistance ("MLA"). MLA can involve enforcement of foreign orders relating to corrupt assets as well as the initiation of freezing, seizure, and other proceedings against the proceeds of crimes of corruption by means of judicial processes in the requested State. The UNCAC framework is even influential in the U.S. domestic legal context. For instance, when Congresswoman Sheila Jackson Lee introduced a House Resolution to use the Abacha forfeiture assets to create a fund for Boko Haram terror victims in Nigeria, the draft legislation began by invoking the Convention.[92] The USDOJ-KI also prominently features the UNCAC as its basic international framework.[93]

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91. Article 31 obligates State Parties to take these steps "to the greatest extent possible," a standard that arguably renders this and other UNCAC measures more aspirational than prescriptive. UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 35, at 24–25 art. 31; *see also* UNITED NATIONS, OFFICE ON DRUGS AND CRIME, TECHNICAL GUIDE TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION 66–67 (2009), http://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf ("Most countries have already established regulatory and supervisory bodies with the responsibility of imposing standards of conduct on financial institutions, such as banks, insurance companies, securities firms and currency exchanges. . . . [Therefore, to effectuate the aims of UNCAC] an organizational model must be carefully designed to avoid the danger of conflicting instructions to institutions, and duplication of the examination of capacity and propriety, corporate governance controls and records.").

92. "Whereas the United Nations Convention Against Corruption (UNAC) [sic] obliges state parties to implement a wide and detailed range of anticorruption measures affecting their laws, institutions and practices." Expressing the Sense of the House of Representatives Regarding the Victims of the Terror Protection Fund, H.R. Res. 528, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-resolution/528/text. The resolution also cites "UNCAC's asset recovery provision[, which] is robust and delineates a global asset recovery framework and strategy . . . ." *Id.* On the Abacha forfeiture, *see infra* Section II.C.1.

93. This is visible in USDOJ-KI public materials, such as an entire page featuring USDOJ-KI activities under the heading, "U.S. Support for Asset Re-

One UNCAC provision particularly significant to the USDOJ-KI comes at the start of Chapter IV (International Cooperation): Article 43, Section 2 addresses dual criminality—that is, that predicate offenses which are crimes in the State Party requesting assistance also be crimes in the State Party of whom assistance is requested.[94] Where dual criminality is required, Section 2 deems the requirement fulfilled as long as the conduct underlying the offense is criminal in both State Parties, even if categorized or named differently in each State Party.[95]

The UNCAC print edition includes this call to arms by then Secretary-General Kofi Annan:

> Corruption is an insidious plague . . . . This evil phenomenon is found in all countries . . . but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment.[96]

Notably, no definition of corruption appears in this foreword, nor the UN General Assembly Resolution "[a]dopt[ing]" the Convention,[97] nor the Convention's Preamble, nor even the defini-

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covery and the Implementation of Chapter V of the UNCAC." U.S. DEP'T OF JUSTICE & U.S. DEP'T OF STATE, *supra* note 7, at 5.

94. UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 35, at 30.

95. *Id.* On whether a dual-criminality requirement applies to USDOJ-KI actions, see *supra* Section II.B.1.

96. UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 35, at iii.

97. *Id.* at 2 ("The General Assembly . . . *Adopts* the United Nations Convention against Corruption annexed to the present resolution, and opens it for signature at the High-level Political Signing Conference to be held in Merida, Mexico, from 9 to 11 December 2003, in accordance with resolution 57/169[.]"). While the legal effect of U.N. General Assembly resolutions is the subject of some scholarly and diplomatic controversy, for the most part such resolutions (unlike those of the U.N. Security Council) are not understood to have binding force. LORI F. DAMROSCH, ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 265 (5th ed. 2009).

tional provisions of Article 2.[98] The general UNCAC stance of deferring to (and facilitating enforcement of) the statutory schemes of member states helps mitigate the omission. Yet the absence is still glaring, exemplifying the legal indeterminacy affecting anticorruption legal regimes.

Jointly with The World Bank, the United Nations created an administrative entity to serve the anticorruption work of all State Parties pursuant to the UNCAC: the Stolen Asset Recovery Initiative ("StAR").[99] StAR serves in some senses as both a multilateral equivalent and as an aid and resource to such national enforcement mechanisms as the Kleptocracy Initiative in the United States. The Financial Action Task Force ("FATF"), "an intergovernmental body established in 1989," aims "to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system."[100] FATF's formal recommendations are influential in shaping national policies against money laundering and other, related crimes.[101]

In addition to multilateral legal frameworks for international anticorruption action, foreign law is also part of the anticorruption landscape. Indeed, the U.S. is far from alone in creating a legal regime targeting the financial proceeds of criminal activity. In

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98. UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 35, at iii–iv, 1–3, 5–8.

99. *Stolen Asset Recovery Initiative*, WORLD BANK & UNITED NATIONS OFFICE ON DRUGS AND CRIME, http://star.worldbank.org/star (last visited Nov. 14, 2016).

100. *Who We Are*, FATF, http://www.fatf-gafi.org/about/ (last visited Nov. 14, 2016).

101. *Id.* The Recommendations were originally issued in 1990 and amended in 1996, 2001, 2003 and 2012.

> The FATF monitors the progress of its members in implementing necessary measures, reviews money laundering and terrorist financing techniques and counter-measures, and promotes the adoption and implementation of appropriate measures globally. In collaboration with other international stakeholders, the FATF works to identify national-level vulnerabilities with the aim of protecting the international financial system from misuse.

Id.

the United Kingdom, whose legal system is most closely aligned with that of the U.S., the Proceeds of Crime Act 2002 ("POCA") placed a sweeping array of new tools in government hands, including anti-money laundering measures and non-conviction based (i.e. civil) forfeiture, among others.[102]

The references to foreign law in USDOJ-KI prosecutions also evidence the proliferation of foreign legal mandates against corruption. For instance, in one of the DSP forfeiture actions, the government's affidavit in support of its verified complaint *in rem* cites Nigerian law with thoroughness and specificity.[103] Given the numerically small number of prosecutions under the KI, there is insufficient empirical data from which to draw conclusions regarding comparative advantages or deficiencies in other State anticorruption laws. But the need seems apparent for a workable complementary regime cognizant of the interrelationships between multiple vertical (domestic–international) and horizontal (domestic–foreign) enforcement vectors.

C. Three Representative USDOJ-KI Prosecutions

What does a USDOJ-KI prosecution look like in the real world? Key characteristics and issues in the operation of the Kleptocracy Initiative emerge from a brief overview of actual forfeiture actions targeting corruption in Nigeria, Kazakhstan, and Equatorial Guinea—showing success in obtaining forfeiture of assets but disparities in the later disposition of the assets.[104] The discrepancy in post-forfeiture disposition of funds is significant because it can

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102. COLIN KING & CLIVE WALKER, DIRTY ASSETS: EMERGING ISSUES IN THE REGULATION OF CRIMINAL AND TERRORIST ASSETS 3 (Colin King & Clive Walker eds., 2014). The UNDOC "TRACK" portal allows one to examine the national legislation of over 100 countries regarding corruption-related offenses. News of the portal's debut can be found at https://www.unodc.org/unodc/en/corruption/news-track.html. The actual link to the TRACK portal is http://www.track.unodc.org/Pages/home.aspx.

103. Affidavit of Cynthia Coutts, Special Agent, Immigration and Customs Enforcement (ICE), United States v. The Contents of Account Number Z44-343021 Held at Fidelity Brokerage Services, LLC, No. 11-10606-RWZ, 4–5 (D. Mass. Apr. 8, 2011). Cited law included the Nigerian Constitution; the Code of Conduct for Public Officers, contained in a schedule to the Constitution; and various criminal statutes.

104. *See infra* Sections II.C.1, II.C.2, II.C.3.

undermine the legitimacy and long-term viability of the USDOJ-KI as a global legal enforcement mechanism.

1. Nigeria: Oil Riches in Africa's Giant

The West African country of Nigeria is the continent's giant; its population of some 182 million is the eighth largest in the world.[105] The Niger Delta, a region not unlike Louisiana on the Gulf of Mexico, contains considerable oil wealth.[106] Nigeria is emblematic of what some observers have called the "resource curse."[107] The concept was originally used by political-economy scholars to highlight a paradox that countries endowed with such resources tend to be poorer than countries that lack them—but it is now widely used in connection with risk factors for corruption.[108] One scholar notes, "Mineral dependence turns out to be a curse not just in terms of economic growth, but also in terms of risks of violent conflict, greater inequality, less democracy and more corruption."[109]

DSP was elected governor of Bayelsa State, Nigeria in 1999 and reelected in 2003.[110] Midway into his second term, he was impeached and was arrested in London in September 2005 on money-laundering charges; police found some $1.5 million in unaccounted cash among his personal effects.[111] In the following

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105. *Nigeria*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html (last visited Nov. 15, 2016) (click on "People and Society :: NIGERIA" drop down menu).

106. *Nigeria*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html (last visited Nov. 15, 2016) (click on "Economy :: NIGERIA" drop down menu).

107. Nicholas Shaxson, *Oil, Corruption, and the Resource Curse,* 83 INT'L AFFAIRS 1123–40 (2007); *see also* Carlos Leite & Jens Weidmann, *Does Mother Nature Corrupt? Natural Resources, Corruption, and Economic Growth* 9 (1999), https://www.imf.org/external/pubs/ft/wp/1999/wp9985.pdf.

108. *See* RICHARD M. AUTY, SUSTAINING DEVELOPMENT IN MINERAL ECONOMIES: THE RESOURCE CURSE THESIS 1–3 (1994); TERRY LYNN KARL, THE PARADOX OF PLENTY: OIL BOOMS AND PETRO-STATES 3–5, 241–42 (1997).

109. Shaxson, *supra* note 107, at 1123.

110. Anayo Onukwugha & Osa Okhomina, *Goodnight Alamieyeseigha,* LEADERSHIP (Oct. 11, 2015, 3:47 AM), http://leadership.ng/news/466258/goodnight-alamieyeseigha.

111. *Id.*

decade, DSP would become the USDOJ-KI's first target. USDOJ-KI prosecutors lodged a forfeiture action in federal district court in Massachusetts, and in June 2012 obtained a motion for default judgment and a forfeiture order authorizing the seizure of just over $400,000 in assets in Fidelity Investment brokerage accounts traceable to DSP.[112] The next step in the Kleptocracy Initiative's prosecution of DSP occurred the following year, in May 2013, in the federal district court in Maryland. There, the court ordered the forfeiture of a home in Rockville, Maryland, valued at $700,000 and which had been purchased with funds allegedly traced to corrupt conduct by DSP.[113] The proceeds of these twin forfeitures, valued at over 1 million dollars, apparently still sit in USDOJ accounts, unrepatriated and otherwise unreturned.[114]

Far greater in scale was the USDOJ-KI prosecution launched against funds originating in corruption by Nigeria's former dictator, Gen. Sani Abacha, ultimately leading to forfeiture of over $458 million.[115] In October 2015, Congresswoman Sheila Jackson Lee (D-Tex.) proposed legislation to turn the Abacha forfeiture into a fund to benefit victims of terror in Nigeria, in particular those victimized by Boko Haram.[116] The ultimate destination of these funds remains uncertain. A Nigerian NGO, through its U.S. counsel, wrote to Attorney General Holder in 2014 "respectfully request[ing] that the [USDOJ] establish a general process for the repatriation of assets seized as part of its Kleptocracy Initiative"—eloquently expressing the gap this Note addresses.[117]

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112. Press Release, U.S. Dep't of Justice, Department of Justice Forfeits More Than $400,000 in Corruption Proceeds Linked to Former Nigerian Governor (June 28, 2012), http://www.justice.gov/opa/pr/2012/June/12-crm-827.html.

113. Christopher M. Matthews, *U.S. Seizes House of Allegedly Corrupt Nigerian Official*, WALL ST. J. (May 31, 2013, 4:11 PM), http://on.wsj.com/143RQZI.

114. *Diepreye Alamieyeseigha,* WORLD BANK & UNITED NATIONS OFF. ON DRUGS AND CRIME, STAR DATABASES, http://star.worldbank.org/corruption-cases/node/18493 (last visited Nov. 15, 2016).

115. DOJ 14-230 (2014), 2014 WL 844298.

116. Expressing the Sense of the House of Representatives Regarding the Victims of the Terror Protection Fund, H.R. Res. 528, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-resolution/528/text

117. Letter from Alexander W. Sierck & Nicholai Diamond to Att'y Gen. Eric Holder, *supra* note 19.

2. Kazakhstan: Oil and Power in Post-Soviet Central Asia

Kazakhstan, formerly one of the Central Asian republics within the Soviet Union, is a territorial giant with a population of 18.1 million, of whom some 70% are Muslim.[118] The combination of petroleum resources and extensive cattle-raising lands makes for a poetic analogy to Texas and the American "Wild West." Kazakhstan was the last of the former Soviet republics to gain independence, doing so in December 1991.[119] President Nursultan Nazarbayev has been Kazakhstan's only head of state in the 25 years since independence.[120]

American businessman James Giffen had been active in Kazakhstan since 1992 and in the former Soviet Union for over two decades prior.[121] Giffen eventually became an adviser, and chief oil negotiator, to President Nazarbayev.[122] Giffen was arrested and prosecuted in 2003 in a case that became known as "Ka-

118. *Kazakhstan Physiographic Map*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/resources/cia-maps-publications/map-downloads/Kazakhstan_physiography.pdf (last visited Nov. 14, 2016); *see also Kazakhstan*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/kz.html (last visited Nov. 14, 2016). At just over 1 million square miles, it has the largest territory of any of the former Soviet republics besides Russia and ranks ninth among all states in the world. *Id.*

119. *Kazakhstan*, ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/place/Kazakhstan/Cultural-life#toc214566 (last visited Nov. 15, 2016).

120. *Kazakhstan*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html (last visited Nov. 20, 2016) (click on "Government :: KAZAKHSTAN" drop down menu).

121. Robert Winnett, *George Clooney Film Inspiration 'Mr Kazakhstan' Finally Brought to Justice*, THE TELEGRAPH (Aug. 13, 2010, 9:00 PM), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/7943201/George-Clooney-film-inspiration-Mr-Kazakhstan-finally-brought-to-justice.html. The 2005 feature film SYRIANA, starring George Clooney, is based on the account of Giffen by an ex-intelligence officer. ROBERT BAER, SEE NO EVIL: THE TRUE STORY OF A GROUND SOLDIER IN THE CIA'S WAR AGAINST TERRORISM (2003); SYRIANA (Warner Bros. 2005).

122. *See* Winnett, *supra* note 121.

zakhgate."[123] The criminal charges were violations of (1) the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-2; (2) the wire fraud statute, 18 U.S.C. § 1343; and (3) U.S. money laundering laws, 18 U.S.C. §§ 1956 and 1957.[124] The heart of the case was the charge that Giffen had made some $80 million in bribe payments on behalf of U.S. oil companies to the Kazakh government and officials in return for oil concessions.

Giffen fought back doggedly over the course of a lengthy prosecution that stretched out for over seven years, witnessed multiple changes in prosecutors, and involved dozens of court appearances.[125] From the outset, his defense was that his conduct was known and approved at the highest levels of the USG, including the CIA.[126] His defense sought disclosure of documents he said would corroborate his claims. The documents were never publicly disclosed, but the judge saw them and stated they showed Giffen had "advanced the strategic interests of the United States and American businesses in Central Asia."[127] Seemingly vindicating Giffen's heroic self-portrait, the judge stated, "How does Mr. Giffen reclaim his reputation? This court begins by acknowledging his service."[128] In the words of one observer, "The biggest [FCPA] prosecution of all time . . . just fizzled out."[129] Finally, Giffen

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123. *Id.*; Government's Notice of Final Release of Settlement Funds and Motion to Dismiss, United States v. Approximately $84 Million on Deposit in Account No. T-94025 in the Name of the Treasury of the Ministry of Finance of the Republic of Kazakhstan at Pictet & Cie, Geneva, Switzerland, Formerly on Deposit in Account No. 1017789e at Cai Indosuez, Geneva, Switzerland, and All Interest, Income, Benefits, and Other Proceeds Traceable Thereto, No. 2:07-cv-03559-LAP (S.D. N.Y. 2015) [hereinafter Kazakhstan Settlement].

124. Kazakhstan Settlement, *supra* note 123.

125. *See* Richard L. Cassin, *No Punishment for 'Hero' Giffen*, FCPA BLOG (Nov. 22, 2010, 1:13 AM), http://www.fcpablog.com/blog/2010/11/22/no-punishment-for-hero-giffen.html.

126. *See* Steve Levine, *The Giffen Strategy: Waiting Out the CIA, Hoping Prosecutors Lose Heart or Interest*, FOREIGN POLICY (June 4, 2010), http://foreignpolicy.com/2010/06/04/the-giffen-strategy-waiting-out-the-cia-hoping-prosecutors-lose-heart-or-interest/.

127. Cassin, *supra* note 125. The judge further said Giffen had served as a valuable go-between with Soviet leadership during the Cold War. *Id.*

128. *Id.*

129. Scott Horton, *Kazakhgate Ends With a Whimper*, BROWSINGS: THE HARPER'S BLOG (AUG. 9, 2010, 10:01 AM), http://harpers.org/blog/

pled guilty to a misdemeanor tax charge and one count of unlawful payment to a Kazakh official; he received no fine or prison time.[130]

The forfeiture proceeding, however, was successful, and its resolution had a unique twist: an innovative non-profit entity, the BOTA Foundation, was created on the basis of $115 million ($80 million plus interest accrued) in funds forfeited by USDOJ.[131] In 2007, the governments of the United States, Kazakhstan, and the Swiss Confederation agreed to the Memorandum of Understanding creating the Foundation.[132] This agency ran three programs: (1) a conditional cash transfer ("CCT") program, (2) a grants program called the Social Service Program ("SSP"), and (3) a scholarship program known as the Tuition Assistance Program ("TAP").[133] The BOTA Foundation claims to have benefited over 200,000 individuals by dispensing the Kazakhstan forfeiture, and the effort

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2010/08/kazakhgate-ends-with-a-whimper/. Horton notes that when the CIA revealed it had not turned over all relevant documents, the prosecution's legs were cut out from under it. *Id.* He also characterized Giffen's CIA defense as "graymail." *Id.*

130. U.S. Attorney's Office, Southern District of New York, *New York Merchant Bank Pleads Guilty to FCPA Violation; Bank Chairman Pleads Guilty to Failing to Disclose Control of Foreign Bank Account*, FED. BUREAU OF INVESTIGATION (Aug. 6, 2010), https://archives.fbi.gov/archives/newyork/press-releases/2010/nyfo080610a.htm; Steve Levine, *Was Giffen Telling The Truth?*, FOREIGN POLICY (Nov. 19, 2010), http://foreignpolicy.com/2010/11/19/was-james-giffen-telling-the-truth; Cassin, *supra* note 125.

131. *The BOTA Foundation: Final Report Executive Summary*, IREX (Feb. 12, 2015), https://www.irex.org/resource/bota-foundation-final-report (click on "Executive summary" link); Aaron Bornstein, *The BOTA Foundation Explained (Part Two): Where Did BOTA Get Its Money?*, FCPA BLOG (Apr. 7, 2015 7:02 AM), http://www.fcpablog.com/blog/2015/4/7/the-bota-foundation-explained-part-two-where-did-bota-get-it.html; *see also The BOTA Foundation: Innovative Asset Return*, IREX, https://www.irex.org/projects/bota-foundation [https://web.archive.org/web/20150922024426/https:/www.irex.org/projects/bota-foundation] (last visited Nov. 16, 2016).

132. Aaron Bornstein, *The BOTA Foundation Explained (Part Six): How Was BOTA Set Up?*, FCPA BLOG (Apr. 15, 2015, 7:08 AM), http://www.fcpablog.com/blog/2015/4/15/the-bota-foundation-explained-part-six-how-was-bota-set-up.html. The government's final release of settlement funds and dismissal motion in the case were accompanied by final reports on the activities of the BOTA Foundation issued by both IREX and The World Bank. *Id.*

133. *Id.*

appears to have been well administered without any taint of corruption.[134] It has been cited as an example of what can be accomplished by dispensing forfeited assets innovatively and prioritizing service to vulnerable populations.[135]

3. Equatorial Guinea: Paradise and Plunder on the Rio Muni

The former Spanish colony of Equatorial Guinea, in Central Africa, has some 750,000 inhabitants.[136] Since independence in 1968, it has had two heads of state: Francisco Macías Nguema, who ruled from 1968 until a 1979 coup, and his nephew Teodoro Obiang Nguema Mbasogo ("Obiang") who rose to power via the coup.[137] Obiang has now ruled for 37 years.[138] The country began major petroleum and natural gas production in the 1990s, and is now sub-Saharan Africa's third largest petroleum producer.[139] According to the World Bank, the country's per-capita GDP of $18,389 ranked 41st out of 183 countries, well in the top quarter worldwide and ahead of such countries as Uruguay, Chile, and

134. *Id.*

135. For instance, Congresswoman Sheila Jackson Lee cites the outcome of the Kazakhstan forfeiture as a model for what could be done with the funds forfeited from Gen. Abacha of Nigeria. *See* Press Release, Congresswoman Sheila Jackson Lee Introduces Bipartisan Legislation Urging the Creation of a $458 Million Victims of Terror Protection Fund Utilizing the Abacha Forfeited Funds, United States Congresswoman Sheila Jackson Lee (Oct. 27, 2015), https://jacksonlee.house.gov/media-center/press-releases/congresswoman-sheila-jackson-lee-introduces-bipartisan-legislation-0.

136. *Equatorial Guinea*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ek.html (click on "Population and Society :: EQUATORIAL GUINEA" drop down menu).

137. *Equatorial Guinea*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ek.html (click on "Government :: EQUATORIAL GUINEA" drop down menu).

138. *Equatorial Guinea*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ek.html (click on "Energy :: EQUATORIAL GUINEA" drop down menu).

139. *Equatorial Guinea*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ek.html (click on "Population and Society :: EQUATORIAL GUINEA" drop down menu).

Hungary.[140] Yet, on various public-health metrics, Equatorial Guinea is desperately poor.[141] The horrific gap between the country's high-middle income and its grim health indices seem to indicate a harsh case of the "resource curse."[142]

Teodoro Nguema Obiang ("Teodorín"), the president's son and holder of the office of "second vice president," was the target of corruption investigations for years.[143] In 2010, the U.S. Senate Permanent Subcommittee on Investigations exhaustively documented his schemes using shell companies, kickbacks, and other corrupt means to amass and transfer tens of millions of dollars into the U.S. financial system.[144] Some funds were used to purchase big-ticket real property such as a $30 million residence in Malibu, California, and a $38.5 million jet aircraft.[145] The Senate investigation also detailed 61 separate wire transfers through two U.S. banks between 2006 and 2008, totaling $110.4 million.[146] After a

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140. GDP Per Capita for Equatorial Guinea, THE WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.PCAP.CD (scroll down and click on "Equatorial Guinea" hyperlink).

141. The 58-year life expectancy ranks 167th out of 196 countries. *Equatorial Guinea,* WORLD HEALTH RANKINGS, http://www.worldlifeexpectancy.com/equatorial-guinea-life-expectancy (last visited Nov. 16, 2016). On another crucial public-health yardstick, infant mortality, the rate of 71 per 1,000 live births ranks 187th out of 202 in the world according to the United Nations. *See Infant Mortality Rate for Equatorial Guinea*, UNITED NATIONS, http://esa.un.org/unpd/wpp/DataQuery/ (click on "Infant mortality rate, 1q0, for both sexes combined (infant deaths per 1,000 live births); then type "Equatorial Guinea" into the search box above and click on "Next" button twice").

142. *Supra* notes 107–08 and corresponding text.

143. Leslie Wayne, *Wanted by U.S.: The Stolen Millions of Despots and Crooked Elites*, N.Y. TIMES (Feb. 16, 2016), http://www.nytimes.com/2016/02/17/business/wanted-by-the-us-the-stolen-millions-of-despots-and-crooked-elites.html.

144. STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 111th Cong., REP. ON KEEPING FOREIGN CORRUPTION OUT OF THE UNITED STATES: FOUR CASE HISTORIES 16–107 (Comm. Print 2010).

145. *Id.* at 98.

146. *Id.* at 99–106. The USDOJ calculated Teodorín's total fortune at $300 million. *Second Vice President of Equatorial Guinea Agrees to Relinquish More than $30 Million of Assets Purchased with Corruption Proceeds*, U.S. DEP'T OF JUSTICE: OFFICE OF PUBLIC AFFAIRS (Oct. 10, 2014) [hereinafter *Second Vice President of Equatorial Guinea*],

prosecution lasting years, the Teodorín kleptocracy action took a startling turn. USDOJ began negotiations with Teodorín in June 2014 and reached a settlement in October: The Equatoguinean official agreed to liquidate his Malibu mansion, a Ferrari sports car, and his Michael Jackson memorabilia, forfeiting some $30 million in proceeds to the U.S.[147] He would also have to "contribut[e]" $1 million to a special fund set up by the USDOJ.[148]

In absolute terms, the Teodorín settlement yielded a large dollar amount that doubtless qualified it as a major USDOJ-KI success. On the other hand, as a proportion of Teodorín's corrupt gains, it was dishearteningly small: according to the USDOJ's announcement, Teodorín's corruptly amassed wealth totaled some $300 million.[149] He got to keep his Gulfstream jet and Michael Jackson's crystal-studded glove—symbolic of what was only a partial USDOJ-KI victory.[150] The outcome can thus be viewed from two distinct vantage points. Some observers question the implications of the USG allowing a kleptocrat to keep a large percentage of what had been proven in court to be "ill-gotten gains."[151] Others emphasize a partial victory is still a victory, and that substantial resources looted from the people of Equatorial

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http://www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agrees-relinquish-more-30-million-assets-purchased

147. Stipulation and Settlement Agreement, *supra* note 4. The style of the case hints at both the high life beloved of the second vice-president, and some of the ways kleptocrats convert misappropriated funds into assets abroad. *See also Second Vice President of Equatorial Guinea*, *supra* note 146.

148. Stipulation and Settlement Agreement, *supra* note 4.

149. *Second Vice President of Equatorial Guinea*, *supra* note 146.

150. Kara Scannell, *Corruption: Moving Money out of Purgatory*, FIN. TIMES (Jul. 5, 2016, 5:41 PM), http://www.ft.com/cms/s/0/10d8679c-228b-11e6-9d4d-c11776a5124d.html.

151. Robert Packer, *Settlements in Asset Recovery Cases—Neither Ethical Nor Effective*, GLOBAL ANTICORRUPTION BLOG (Jun. 30, 2015), http://globalanticorruptionblog.com/2015/06/30/guest-post-settlements-in-asset-recovery-cases-neither-ethical-nor-effective. Packer argues that settlements such as the one reached with Teodorín encourage kleptocrats to think of asset forfeiture as a mere "business expense"; "a conviction and seizure of *all* illicit assets is the best way to help achieve" improvements in the lives of corruption's victims. *Id.*

Guinea would soon be returned via some as yet unspecified mechanism.[152]

The language of one of the Settlement Agreement provisions underlines the uncertainty over the ultimate fate of the forfeited assets: "The United States represents that, where practicable and consistent with law, and after deducting its usual case-related costs and expenses, it intends to utilize the net Settlement Amount for the benefit of the people of the Republic of Equatorial Guinea."[153] As a statement, it reflects U.S. policy, but it raises two questions: first, what legal force, if any, does the "representation" by the United States have? Second, is there a way that this "inten[tion]," here and in other USDOJ-KI actions, could be placed on a more solid legal footing?

D. USDOJ-KI: Strengths and Weaknesses

Half a decade later, and on the edge of a change in presidential administrations, the leaders and staff of the USDOJ's Kleptocracy Initiative can point to some remarkable successes and a track record in which substantial experience has been built in the pursuit of tainted fruits of grand corruption abroad. The successful confiscation of nearly half a billion dollars in the Abacha action, over $100 million in the Kazakhstan action, and $30 million from Teodorín Obiang of Equatorial Guinea, among other forfeitures, represent undeniable achievements. Nevertheless, the overall picture is not uniformly rosy. A more complex depiction of success, challenges, and critiques emerges from our examination of the USDOJ-KI.

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152. Richard L. Cassin, *'Shameless' Kleptocrat Teddy Obiang Forfeits $30 Million in DOJ Settlement*, FCPA BLOG (Oct. 13, 2014, 1:38 AM), http://www.fcpablog.com/blog/2014/10/13/shameless-kleptocrat-teddy-obiang-forfeits-30-million-in-doj.html. Matthew Stephenson suggests that recoveries expressed as a percentage of the total assets originally sought is not necessarily the best metric for success since USDOJ-KI prosecutors may start out with the most ambitious goal possible. Matthew Stephenson, *Is the Kleptocracy Initiative Worth It? A Tentative Yes,* GLOBAL ANTICORRUPTION BLOG (Feb. 23, 2016), https://globalanticorruptionblog.com/2016/02/23/is-the-kleptocracy-initiative-worth-it-a-tentative-yes/#more-5525; *see also* Martin Kenney, *Kleptocracy Stinks. The DOJ Fights Back "With Impact,"* FCPA BLOG (Mar. 22, 2016, 9:28 AM), http://www.fcpablog.com/blog/2016/3/22/martin-kenney-kleptocracy-stinks-the-doj-fights-back-with-im.html.

153. Stipulation and Settlement Agreement, *supra* note 4, at 23–24.

In nearly six years of operation, the Kleptocracy Initiative has done much more than simply carry out over a dozen successful forfeiture actions. It has amassed a body of practical experience in investigative cooperation (domestically and internationally), mutual legal assistance, invocation of foreign statutes and multilateral treaties and conventions, and, in more limited cases, repatriation or (in at least one case) more innovative ways of restoring forfeited assets to the countries from which they were stolen. The deterrent effect on existing or aspiring kleptocrats ought not be scorned—nor should the encouragement to citizens and NGOs in countries battling corruption.[154]

On the other hand, the USDOJ-KI has faced considerable challenges and is subject to a range of critiques. First, prosecutions are extraordinarily labor-intensive in the investigative phase; kleptocrats have very deep pockets and can foot the bill for top-notch legal representation, drawing forfeiture actions out for years.[155] This leads to pressure to settle, and the USDOJ-KI attorneys and staff may be supposed to reach a point where they may be eager—or at least willing—to obtain a positive (if only partial)

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154. The KI's deterrent effect must also be assessed in light of similar, ongoing U.S.-led investigative and law enforcement efforts against entities like FIFA. Rebecca R. Ruiz, *FIFA Official Plans to Fight Conspiracy Charges*, N.Y. TIMES (Mar. 29, 2016), http://www.nytimes.com/2016/03/30/sports/soccer/fifa-official-plans-to-fight-court-charges.html?_r=0. IRS prosecutions of U.S. tax evaders who arguably concealed income in Swiss banks led to historic settlement agreements with Swiss banking giants like UBS whereby the Swiss banks waived their centuries-long secrecy conventions. *Unsettling Settlements: More Wrongdoing at Banks, More Swingeing Fines, No Prosecutions*, THE ECONOMIST (May 23, 2015), http://www.economist.com/news/finance-and-economics/21651885-more-wrongdoing-banks-more-swingeing-fines-no-prosecutions-unsettling. The point worth emphasizing is that every successful prosecution or record-breaking settlement in these spheres adds to the overall "snowball effect" in enforceability in each individual sphere. By the same token, as expressed throughout this Note, one should pay careful attention to the optics or perception of so-called hegemonic enforcement, where U.S. enforcement actions in disparate fields of regulated activity are taken as further corroboration of the dangerously simplistic narrative of the U.S. as "the world's policeman." It seems manifest that to achieve a legitimate deterrent effect, enforcement measures must be balanced against various countervailing interests and rooted in well-settled doctrinal ground.

155. James Giffen is a case in point; see *supra* notes 121–130. Pavlo Lazarenko is another; see *supra* note 33.

result.[156] Where such settlements are reached and USDOJ-KI prosecutors are only able to forfeit a fraction of the targeted corrupt assets, an unintended message may be sent to corrupt officials and a perverse incentive established: kleptocratic wrongdoers may be inspired to misappropriate as much money as possible from their national treasuries so as to increase the value of a potential eventual settlement. Some observers have expressed serious misgivings about such arrangements.[157] Teodorín Obiang, the beneficiary of one such "golden handshake"[158] reportedly told the media he was "happy to 'continue the charitable work I have sponsored for many years in Equatorial Guinea.'"[159] A settlement—particularly where there is no admission of wrongdoing—may thus enable a wrongdoer to reframe the forfeiture as a voluntary charitable donation.

Second, the USDOJ-KI's broad, protective justifications with ethical and humanitarian overtones stand in tension with the perception of unilateralism in the Initiative's actions. While USDOJ-KI practice is often highly collaborative with foreign states and/or citizens, making the criticism unfair in many cases, the rhetoric of American exceptionalism helps feed it. Advocacy of international cooperation around broad principles of justice can sometimes fit uneasily with the unilateral-sounding rhetoric of American exceptionalism—as with President George W. Bush's 2006 characterization of anticorruption work as "a critical component of *our* freedom agenda" that would "extend America's transformational democratic values to all free and open societies."[160]

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156. *See, e.g.*, Equatorial Guinea kleptocracy prosecution, *supra* Section II.C.3.

157. Mohamed Moussa, *The Golden Handshake: Background Rules and the Choice of Restoring Money or Doing Justice*, GLOBAL ANTICORRUPTION BLOG (Apr. 13, 2015), http://globalanticorruptionblog.com/2015/04/13/the-golden-handshake-background-rules-and-the-choice-of-restoring-money-or-doing-justice; s*ee also* Packer, *supra* note 151.

158. Moussa, *supra* note 157.

159. Packer, *supra* note 151.

160. President George W. Bush, President's Statement on Kleptocracy (August 10, 2006), http://georgewbush-whitehouse.archives.gov/news/releases/2006/08/20060810.html (emphasis added). Rhetorically, it is also unclear how societies that are already "free and open" require, or would benefit, from having "America's transformational values [extended]" to them. Such rhetoric, perhaps, encourages criticism of an "ethical imperialism" that rides roughshod over

Third, until now the USDOJ-KI has mostly targeted activity in Africa and Asia, and, to a more limited extent, Latin America. The shape of USDOJ-KI operations bears an uncomfortable resemblance to the North/South, developed/underdeveloped global divide.[161] The fact that U.S. anticorruption efforts are not only directed at those regions, and even in some cases target conduct within the U.S. by domestic actors, helps mitigate this perception but does not dispel it entirely.[162] Two scholars note the targeting of corruption in the global "South" and "East," and find "Orientalist overtones" in the anticorruption movement.[163]

Fourth, similar concerns to those raised by civil asset forfeiture domestically arise regarding the USDOJ-KI. In principle the government, like local police departments, has an incentive to take legal shortcuts in order to forfeit and obtain title to substantial sums of money, which the government is under no affirmative duty to return.[164] Of course, even some critics acknowledge significant

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a wide range of cultural practices, not all of which deserve broad-brush condemnation as "corruption." The FCPA's "facilitating payment" exception, of course, already makes allowances for this view. *See supra* note 24 and corresponding text. Both conceptual and empirical difficulties in distinguishing corruption from the other, culturally-rooted phenomena alluded to form a key theme running through several of the contributions to CORRUPTION AND THE SECRET OF LAW: A LEGAL ANTHROPOLOGICAL PERSPECTIVE (MONIQUE NUIJTEN & GERHARD ANDERS EDS., 2007). S*ee*, *e.g.*, Andrew MacNaughton & Kam Bill Wong, *Corruption Judgments in Pre-War Japan: Locating the Influence of Tradition, Morality, and Trust on Criminal Justice*, *in* CORRUPTION AND THE SECRET OF LAW 77–80 (2007).

161. *See, e.g.*, B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L COMTY. L. REV. 3, 3 (2006).

162. *See, e.g.*, Richard C. Smith et al., *Anti-Corruption Enforcement Is Escalating Worldwide*, LAW 360 (May 27, 2015, 8:17 AM), http://www.law360.com/articles/659365/anti-corruption-enforcement-is-escalating-worldwide. The article mentions the indictment of U.S. Senator Robert Menendez (D-NJ). *Id.* *See also* Kazakhstan kleptocracy case, *supra* Section II.C.2.

163. Nuijten & Anders, *Corruption and the Secret of Law: An Introduction*, *in* CORRUPTION AND THE SECRET OF LAW: A LEGAL ANTHROPOLOGICAL PERSPECTIVE 1, 3 (asserting that "[e]ndemic corruption . . . represents the evil and primitive Other [in] global rhetoric about transparency and good governance" whereas corruption in the wealthier countries is treated as "incidental, . . . a few rotten apples."). *Id.*

164. *See supra* note 19 and corresponding text.

differences between the two situations.[165] The ability of a local police department to expand its resources substantially through forfeitures finds little parallel in the USDOJ—the budgets involved differ by many orders of magnitude; and, unlike the situation in a local police department that may be chronically understaffed, the USDOJ-KI is carried out by highly trained, experienced legal professionals. Additionally, USDOJ-KI forfeiture actions are tested in the rigorous forum of a federal court. However, even in the highly professionalized USDOJ context, matters of institutional prestige, advancement incentives, and the use of forfeiture amounts as a metric for administrative efficacy and budgetary claims, may make the analogy a little less far-fetched.

Finally, the "discretion to return" and the accompanying incentives are vexing. The gap pointed out at the outset of this Note—between the firm statutory underpinnings of the Kleptocracy Initiative's means (forfeiture) and the voluntary, discretionary framework for the ends (return)—likely does more than anything else to undermine the legitimacy of the Initiative in some eyes.[166]

Could it be that the USDOJ-KI would benefit from having *less* post-forfeiture discretion over assets? Initially, assets forfeited through Kleptocracy Initiative actions belonged to the people of the States that were hosts to the corruption in question. Logically, that ought to be their ultimate destination. That is the fundamental political, rhetorical, and moral underpinning for the legal doctrines used by the USDOJ-KI; and it is linked to the principal jurisdictional assertion made for the USDOJ-KI at the highest levels of the USG: the protective principle.[167] Whatever can be done to increase the likelihood of asset return will strengthen the Initiative, bolstering its prestige and legitimacy in the eyes of the internation-

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165. Matthew Stephenson, *The StAR "Few and Far" Report, and (Conflicted) Reflections on Civil Forfeiture*, GLOBAL ANTICORRUPTION BLOG (Nov. 4, 2014), http://globalanticorruptionblog.com/2014/11/04/the-star-few-and-far-report-and-conflicted-reflections-on-civil-forfeiture/.

166. *See* Oluwafunmilayo Akinosi, *Asset Recovery and the Department of Justice's Discretion to Return*, GLOBAL ANTICORRUPTION BLOG (Aug. 31, 2015), https://globalanticorruptionblog.com/2015/08/31/asset-recovery-and-the-department-of-justices-discretion-to-return/. Akinosi argues that leaving the return of assets to the discretion of the USDOJ saddles the USDOJ with a degree of arbitrary power that is unfair and harms its overall effectiveness. *Id.*

167. *See supra* note 42 and corresponding text.

al community, the populations affected, and their allies and co-nationals within the U.S. At the same time, kleptocrats also have skilled lawyers capable of advancing novel theories for the return of assets—to their clients. The next section will attempt to find usable doctrinal analogues for the return of forfeited assets to their rightful owners compatible with the KI's existing legal authorities and sufficient to withstand legal counter-claims by the corrupt officials.

III. RETURN OF ILL-GOTTEN ASSETS: POSSIBLE ANALOGUES

Returning forfeited assets to their rightful owners under the USDOJ-KI is hampered both by the fact that it is discretionary and that it is difficult. Fig. 2 is an attempt to graphically express the problem: how is the dotted line to be accomplished; completing the circle by returning looted funds to their true owners? This section will look at a series of historical mechanisms or doctrines by which government takes control of property,[168] in search of promising analogues potentially adaptable into a more robust legal framework of asset return in the kleptocracy context.

168. *See Infra* note 213.

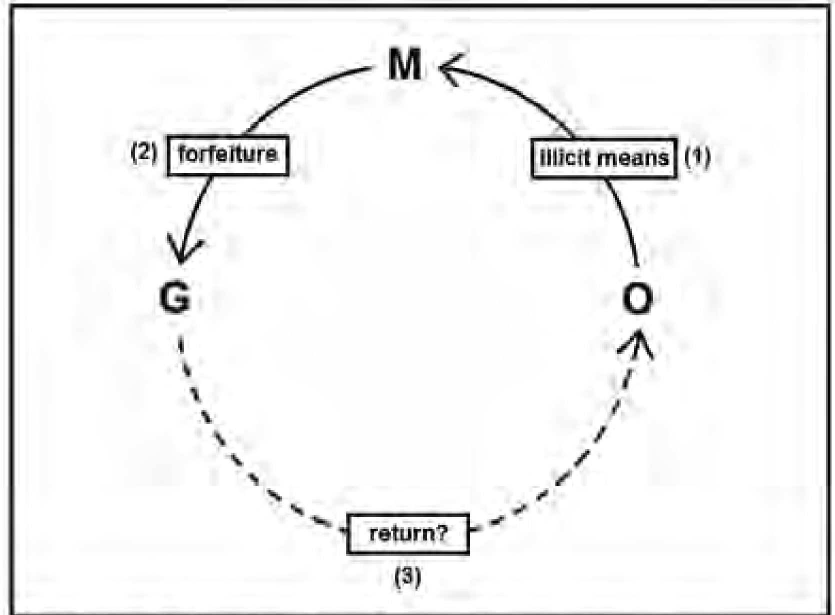

Fig. 2. Asset Forfeiture and Potential Return. (1) The original embezzlement, theft, or other illicit acquisition of assets by malfeasor M from true owner O. (2) The forfeiture of the assets by government G. (3) The possible return of assets by G to O. Solid lines show actual shifts in possession of the assets, dotted lines a potential shift. *Diagram created by the author.*

A. Deodand

The origins of deodand are ancient. Justice Holmes in THE COMMON LAW (1881) recalls the "well-known passage in Exodus [21:28] . . . : 'If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit.'"[169] The "deodand" was the forfeited beast or object, "'an accursed thing,' in the language of Blackstone."[170] Eventually, destruction gave way to confiscation: the deodand went to God by way of the king.[171] In a typical early-modern English case where "a falling tree kill[ed] a man," the jury found that the tree caused the man's death" and was deodand.[172]

169. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 7 (1881).

170. *Id.*

171. *Id.* at 24.

172. Anna Pervukhin, *Deodands: A Study in the Creation of Common Law Rules*, 47 AM. J. LEGAL HIST. 237, 242 (2005).

Gradually, deodand evolved as a common law rule, though with much fluctuation and variation in its application.[173]

Deodand later became a form of civil compensation for wrongful death, or pension to surviving dependents. An 18th century coroner's jury declared "a stack of timber which had fallen on a child to be forfeited as a deodand, it was ransomed for 30*s.*, . . . paid over to the child's father."[174] Juries often improvised and even manipulated the facts to achieve a desired result; like situations could be treated inconsistently from region to region or even jury to jury.[175]

Deodands also underwent evolution into a source of Crown revenue, justified as a penalty and deterrence to carelessness; the Crown even began to raise revenue by selling off the rights to all the deodands from a particular jurisdiction to lords and townships.[176] The Industrial Revolution brought with it a revival of the deodand, now expressly used to compensate survivors, such as the widows of workmen killed in factory or railway "misadventures."[177] Deodand was finally abolished in 1846, when Lord Campbell's Act created a cause of action for wrongful death in survivors.[178] Thus, deodand's twilight was the dawn of tort liability in English law.[179]

What recourse was available to the owner of chattels declared deodands? The records are not entirely clear, but there are grounds to infer that a property owner could appeal to the court to overturn the jury's verdict. Certainly the opposite could and did occur: in *Rex v. Cheyney*, a lord challenged the sufficiency of a jury verdict of deodand against the wheel of a wagon that had run

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173. *Id.* at 242–47.

174. J.W. CECIL TURNER, KENNY'S OUTLINES OF CRIMINAL LAW 8 (18th ed. 1962).

175. Pervukhin, *supra* note 172, at 239.

176. *Id.* at 237.

177. *Id.* at 249.

178. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 n.19; Harry Smith, *From Deodand to Dependency*, 11 AM. J. LEGAL HIST. 389, 397–99 (1967).

179. Smith, *supra* note 178, at 389.

over and killed a child; his appeal was denied.[180] Courts were generally highly deferential to jury findings of deodand; in a 1755 case, the court reasoned that a court "ought not to contradict the [factual] finding of a jury" even where it was "exceedingly improbable, if not altogether impossible."[181] It appears that challenges to deodand findings were possible but infrequent.[182]

Deodand has been a many-faceted, almost protean, legal doctrine meaning different things at different times: destruction of "guilty" property, forfeiture to God by way of king, transfer as compensation to victims of negligence, accident, or felony. Its absolute destruction of the original owner's title suggests strong parallels with the kleptocracy forfeiture regime. This, in combination with its evolution in a restitutionary direction, makes it an intriguing analogue for potential reforms aimed at bolstering the return of forfeited assets to their true owners by permanently extinguishing the corrupt individual's property rights, and therefore legal and equitable basis for challenging the seizure.

B. Piracy

Piracy was prosecuted at admiralty. Original title to the vessel as property was irrelevant to the proceedings. Rather, the vessel's association with the crime of piracy acted as an acid, dissolving the original title. Barnet analyzes the case as an example of "legal fictions" around forfeiture.[183] Here, the fiction is the personification of the ship as a moral agent capable of guilt. Such prosecutions involved a vigorous assertion of extraterritoriality—the target of the vessel's piracy can be "any vessel of the United States, or of the citizens thereof, or . . . any other vessel."[184]

In *The Palmyra*, 25 U.S. 1 (1827), the commander of a U.S. vessel of war boarded and captured, under suspicions of piracy, a Spanish vessel whose commander identified it as a privateer sail-

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180. Pervukhin, *supra* note 172, at 247 (quoting Rex v. Cheyney, 3 Keble 312, 84 ER 739 (1674)). The challenge failed; presumably, the lord would have become the owner of any deodands on his land. *Id.*

181. *Id.* at 247 (quoting Rex v. Grew, Sayer 249–50, 96 ER 869 (1755)).

182. *Id.* at 239.

183. Todd Barnet, *Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act*, 40 DUQ. L. REV. 77, 77 (2001).

184. The Palmyra, 25 U.S. 1, 7–8 (1827) (citing Act of Congress, 3 Mar. 1819, ch. 75, as continued in force by Act of Congress, 15 May 1820, ch. 112).

ing under a commission from the King of Spain.[185] The Spanish commander sued unsuccessfully for return of the vessel and for damages incurred pursuant to capture but was awarded damages on appeal.[186] On the government's appeal before the U.S. Supreme Court, the appellee argued that forfeiture was improper absent a criminal conviction.[187] The Court rejected the argument, differentiating statutory forfeiture actions from criminal forfeitures:

> It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach in rem; but . . . could [occur] only by the conviction of the offender . . . . But this doctrine never was applied to . . . forfeitures[] created by statute, in rem, cognizable on the revenue side of the Exchequer. The . . . offence is attached primarily to the thing . . . . The same principle applies to proceedings in rem, on seizures in the Admiralty . . . . In the judgment of this Court, no personal conviction of the offender is necessary to enforce a forfeiture in rem in cases of this nature.[188]

The Court's holding gives us a glimpse of the deodand origins of forfeiture.

Did owners of property stolen by pirates have any legal recourse? The British Bounty Legislation of 1825 Retroactive to 1820 contained a provision "requir[ing] the return of property in the possession of 'pirates' to its former owners or proprietors after *in rem* proceedings in Admiralty, and on the payment by owners of one eighth of the value of the property returned in lieu of salvage."[189] This seems to have been general practice by the U.S.: "[r]eturn of the vessel and cargo to its legal owners and payment by them of 'salvage.'"[190] Thus, where the owner of stolen property

185. *Id.* at 8.
186. *Id.* at 8–9.
187. *Id.* at 12.
188. *Id.* at 14–15.
189. ALFRED P. RUBIN, THE LAW OF PIRACY 205 (1988).
190. *Id.* at 165.

was known, admiralty courts in piracy prosecutions appear to have made return of property a key objective.

Like deodand's severing of title from the original owner, anti-piracy doctrine implies absolute dissolution of title in the pirate vessel. The strong legal and moral opprobrium attached to piracy—its infamy leading to ubiquitous condemnation and universal jurisdiction—is thus a compelling parallel with kleptocratic corruption. The focus on return of stolen property, too, makes the piracy regime, like deodand, a potentially relevant parallel.

C. Customs Offenses

Forfeiture could also be imposed for such offenses as fraudulently undervaluing a ship's cargo in order to avoid customs duties. Such seizures, coupled with the broad, general warrant known as the Writs of Assistance, were a major grievance leading to the American Revolution.[191]

Customs offenses present some interesting legal difficulties, one being that the identity of the person who shipped the goods was often difficult, or even impossible, to ascertain:

> If the seller has committed a customs offense, say by preparing invoices which understate the purchase price of the goods, forfeiture of the goods may be the only practical way to exact the equivalent of a civil or criminal fine from the seller, at least where the seller has retained title to the goods, as in a consignment sale.[192]

The leading admiralty treatise underscores the practicalities of seizure: "[I]n a great variety of . . . cases [involving violations of the laws of trade, navigation, and revenue committed on navigable

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191. James Otis, *Against the Writs of Assistance*, NATIONAL HUMANITIES INSTITUTE, http://www.nhinet.org/ccs/docs/writs.htm (last visited Nov. 20, 2016); Thomas K. Clancy, *The Importance of James Otis*, 82 MISS. L.J. 487 (2013).

192. Stefan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 MICH. L. REV. 1910, 1918 (1998). That the charge of "kleptocracy" should be hurled at law enforcement is ironic, but in the context of this Note, it underlines the care with which forfeiture actions need to be undertaken and prosecuted.

waters], the vessels and the goods alone are within the reach of the process of the courts; the individuals concerned are in other countries" and beyond reach.[193] Justice Holmes famously noted a ship may be "the only security available in dealing with foreigners, and rather than send one's own citizens to search for a remedy abroad in strange courts, it is easy to seize the vessel and satisfy the claim at home . . . ."[194]

In the influential Supreme Court case of *United States v. Twenty-Five Packages of Panama Hats*, 231 U.S. 358 (1913), the government initiated forfeiture proceedings against a shipment of Panama hats a consignee, Castillo, had unloaded at New York harbor with fraudulently undervalued invoices.[195] Castillo argued that the goods were not introduced into the commerce of the United States within the meaning of the Tariff Act of 1909 because they were stored in the General Order warehouse rather than formally entered through customs.[196] The Court held that storage in General Order *did* place the goods in "a channel of [U.S.] commerce."[197] More importantly, the fact that the consignor of the goods was beyond U.S. jurisdiction did not shield the goods from forfeiture.[198]

Forfeiture thus operated as a strict liability mechanism, enabling the U.S. to take title to goods in a way that avoided both prohibitively expensive factual inquiry to identify the culpable party and *in personam* jurisdictional barriers. In effect, forfeiture could serve as an expedient in the face of practical limits on extraterritorial jurisdiction to adjudicate.

The peculiar circumstances of this legal form, unlike the cases of deodand and piracy, tended to make forfeiture final—there was typically no move to restore property to its owner. Customs

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193. 4 Benedict on Admiralty 607, at 177 (6th ed. 1940), *quoted in* Herpel, *Toward a Constitutional Kleptocracy*, at 1919 n.31. United States v. 25 Packages of Panama Hats, 231 U.S. 358, 361–62 (1913).

194. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 28 (1881).

195. *Panama Hats*, 231 U.S. at 359.

196. *Id.* at 360.

197. *Id.* at 362.

198. Indeed, the Court made clear that the 1909 statute broadened liability for customs fraud to include consignors "beyond the seas" to close loopholes in the earlier statute. Castillo argued that it was not he but the consignor who made the valuation and did so while outside U.S. jurisdiction; to the Court, this was further reason why the goods were subject to forfeiture. *Id.* at 361–62.

offenses where true owners are unknown and the harmed party is the government are an inverted mirror-image of kleptocratic situations where it is the victims who are difficult to identify with particularity because the misappropriation harms numerous, anonymous individuals.[199] The relevance of customs forfeiture regimes to grand corruption cases lies in this core prudential consideration: where the evidence of the link between, say, judicially noticed corruption and the property at issue is so high that it results in a forfeiture order under the KI, the USDOJ's posture following the forfeiture resembles the administrative posture of customs officials with respect to post-forfeiture asset disposition obligations, if any. Absent a clear obligation to return the funds, and due to the lower evidentiary burden in both regimes, incentives for administrative overreach exist. The overall legitimacy of both customs and anti-corruption forfeiture schemes hinges on perceptions of even-handed application and objectively fair judicial review; Congress would do well to limit the discretionary scope of kleptocracy actions by harmonizing the conceptual definition of corruption, and clarifying evidentiary standards at each step of the forfeiture process (investigative findings, judicial notice of foreign grand corruption, and post-forfeiture asset return), and creating a statutory framework for asset return.[200]

D. Forfeiture of Estate

A harshly punitive mechanism at English common law was forfeiture of estate against convicted felons or traitors: the convict forfeited all his real property to a lord or the king and all chattels to

199. These numerous individuals could also pursue claims on the basis of potentially cognizable group or class interests. "Class" as used herein alludes to the *analogical* American procedural vehicle of a "class action," recognizing that a diffused group of individuals may form a class of affected persons capable of aggregating their claims against a defendant. *See* Fed. R. Civ. P. 23. This is not meant to suggest the existence of a class action right in kleptocracy contexts, especially in light of *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), which limited extraterritorial jurisdiction under the Securities Exchange Act in the securities class action context, and the Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), which limited extraterritorial jurisdiction under the Alien Tort Statute for "foreign cubed" claims arising from alleged gross violations of human rights.

200. *Infra* Section IV.

the king.[201] The doctrine of "corruption of blood" was harsher still: the felony or treason conviction led to the legal severing of the convict's blood line, that is, his ability to bequeath property to his heirs.[202] Convicted felons and heirs thus suffered the loss of estate.[203] However, the penalty's reach was limited by the common law's recognition of the rights of innocent third parties:

> The common law 'saved' to innocent parties all rights, title, uses, possession, . . . rents, leases, or other interests in the land. Moreover, if a felony statute specified that 'no corruption of blood' must occur or if the statute 'saved to the heirs' the offender's land, the offender's wife did not lose her dower rights and the offender's heirs could inherit the convicted offender's land interests.[204]

The law offered a remedy, then, not to the convicted felon but certainly to those who could prove their status as innocent third parties, or, in some cases, as heirs with rights safeguarded by law.

At first glance, forfeiture of estate seems to offer little of use to the kleptocracy asset context. Yet perhaps a poetic analogy can be made between the "corruption of blood" doctrine and the practical effects of non-return of forfeited assets. In the case of a decedent who was adjudicated "corrupt," the seizure of assets eliminates heirs' rights to the property; an unintended consequence of non-return is the denial of the forfeited resources to future generations in the country concerned.[205] As such, the accompanying doctrine of saving the rights of innocent third parties might be a metaphoric expression of the USDOJ-KI's stated, ultimate goal.

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201. Michael Paul Austern Cohen, *The Constitutional Infirmity of RICO Forfeiture*, 46 WASH. & LEE L. REV. 937, 937 (1989).

202. Cecil Greek, *Drug Control and Asset Seizures: A Review of the History of Forfeiture in England and Colonial America*, *in* DRUGS, CRIME AND SOCIAL POLICY 109, 112 (Thomas Mieczkowski, ed., 1992).

203. *Id.*

204. Cohen, *supra* note 201, at 937 n.2 (citation omitted).

205. Of course, nepotism often characterizes kleptocratic regimes, making it important that the property rights of corrupt individuals be taken away in an analogue to forfeiture of estate: Equatorial Guinea is a case in point; *see supra* Section II.C.3.

E. Criminal Forfeiture

Criminal forfeiture involves the seizure of property connected with the commission of a crime; historically, it bears some relation to the deodand. Underlying offenses could be many. Unlike forfeiture of estate, it involved the government's seizing of property linked to the commission of a crime, rather than all the property in the estate of the criminal. Two important contemporary cases underline the harshness of this type of forfeiture in providing no protection for innocent owners or co-owners. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), the owner-lessor of a yacht suffered forfeiture of the vessel by Puerto Rican police authorities when a marijuana cigarette was found, apparently belonging to the lessees. Despite the owner-lessor's lack of knowledge, much less consent, with regard to the use of illegal drugs on the yacht, the Supreme Court upheld the forfeiture.[206] The Court was guided largely by the lack of any mitigating provisions in the relevant Puerto Rican statute.[207]

An even harsher outcome came in *Bennis v. Michigan*, 516 U.S. 442 (1996). There, a man was convicted of gross indecency for an act with a prostitute and the government seized the automobile in which the act occurred.[208] The man's wife objected to the forfeiture of her interest in the motor vehicle; the Court rejected her innocent owner defense and upheld the forfeiture.[209]

Interestingly, legal history shows a series of attempts in the English common law "to mitigate the harshness of felony and deodand forfeitures" through the availability of "[t]he writ of restitution . . . to an individual whose goods were stolen by a thief and forfeited to the crown as a consequence of the thief's conviction."[210] Thus even the regime of criminal forfeiture afforded rightful owners some opportunity to recover.

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206. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

207. *Id.* at 686–87. The Puerto Rican statute authorizing forfeiture of the yacht was P.R. LAWS ANN. tit. § 2512(a)(4) (Supp. 1973). *Id.* at 665–66.

208. Bennis v. Michigan, 516 U.S. 442, 443–44 (1996).

209. *Id.* at 452–53. The legal authority under which both the husband's and wife's interests in the vehicle were taken by the State of Michigan was the nuisance abatement statute, MICH. COMP. LAWS ANN. § 600.3801 (West Supp. 1995). *Id.* at 444.

210. *Calero-Toledo*, 416 U.S. at 689 n.27.

The harshness of recent application of criminal forfeiture doctrine, with its effective indifference to the plight of innocent co-owners of tainted property, offers little in the way of useful parallels to the kleptocracy context. However, the historical provision for the writ of restitution provides an analogue that seems useful both in connection with a private right of action to claim ownership of forfeited assets, and as potentially adaptable to a claim for constructive return on behalf of a population affected by corruption.

F. Seizure of Stolen Property as Evidence

When the government takes possession without claiming title, as in a criminal proceeding where law enforcement seized allegedly stolen property, the Federal Rules of Criminal Procedure offer recourse through a motion to return property. The relevant rule states:

> A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.[211]

The federal rule, along with various state statutes,[212] provide for the return of property seized by the government in two

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211. FED. R. CRIM. PRO. 41(g).

212. States take a variety of approaches in dealing with the return of private property following seizure in criminal or other contexts. Under Wisconsin law, for example, "any person claiming the right to possession of property seized pursuant to [or without] a search warrant . . . may apply for its return to the circuit court for the county in which the property was seized . . . ." WIS. STAT. ANN. § 968.20(1) (Westlaw 2016). Tennessee law offers another perspective, Tenn. Code Ann. § 40-17-118 requires that stolen property confiscated by law enforcement be appraised, catalogued and photographed; that the prosecutor show cause to the court with jurisdiction over the property in order to impound it

sorts of cases: one where the property was wrongly seized and thus without actual taint of criminality, the other where the property was justly seized from a wrongdoer, but a third party to the seizure asserts her claim as rightful owner of the property.[213] The latter most closely matches the kleptocracy context, particularly where claims for the return of the property emanate from victim groups.

G. Civil Asset (or In Rem) Forfeiture[214]

Civil asset forfeiture, also known as *in rem* forfeiture, is based on ancient jurisprudence; but until 1970 its use in U.S. law

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beyond thirty days; and that the state or local authority holding the property return it to its lawful owner, with liability for damage or destruction caused by delay in the return. Persons asserting a claim to property in government possession can move for return of the property pursuant to the statute. *See, e.g.*, Maness v. Woods, No. W2000-01049-COA-R3-CV, 2001 WL 29457 (Tenn. Ct. App. Jan. 10, 2001). The additional circumstance that occurs when the government damages or loses seized property gives rise to no statutory claim for compensation, unlike the case of civil asset forfeiture. David B. Smith, *A Comparison of Federal Civil and Criminal Forfeiture Procedures: Which Provides More Protections for Property Owners?*, Legal Memorandum No. 158, HERITAGE FOUNDATION (Jul. 30, 2015), http://www.heritage.org/research/reports/2015/07/a-comparison-of-federal-civil-and-criminal-forfeiture-procedures-which-provides-more-protections-for-property-owners.

213. In describing a typology for asset seizure, forfeiture, and return, it must be borne in mind that we are inevitably dealing in heuristics. There is, of course, a large number of legal regimes governing forfeiture and the rights of innocent third-parties and/or victims. Some of the most elaborate arise in various criminal contexts which, in their essence, are mainly matters of state law. A detailed account of the full array of legal theories for the return of seized property lies well outside the scope of this Note. What is worth noting is that in the bribery context, the property notions are more complicated than in, say, embezzlement from the fisc—there is no warrant for the bald assertion that "the funds were stolen from the people" of the country in which the bribe was received. *See supra* Section II.C.2. Among the colorable claims in corruption cases, however, is that of "theft of honest services." *See* 18 U.S.C. § 1346 (the federal mail and wire fraud statute). One could continue cataloguing the various allied federal/state/foreign, statutory/administrative/common law, historical/contemporary/emerging doctrines, but while inherently useful, such a taxonomy lies, again, far outside the present scope.

214. *See supra* notes 81–85 and accompanying text & Table 2.

was limited mainly to maritime, revenue, and wartime contexts.[215] Two landmark pieces of legislation in 1970 ushered in a new era: the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 881, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968.[216] The scope of application of those statutes, as well as the total number of statutes that contemplate civil asset forfeiture, have both expanded dramatically in the nearly half-century since—now some 150 federal statutes (not to mention state laws) provide for the use of this enforcement mechanism.[217]

The distinctions between civil asset forfeiture and its criminal "cousin" are significant (see Table 2). Perhaps most important from a prosecutorial standpoint is that forfeiture requires no criminal conviction; indeed, the property owner need not even be present.[218] The lower burden of preponderance of the evidence is all that is required for a showing that the property is traceable to statutorily covered criminal conduct.[219] Formerly the even more modest standard of "probable cause" was all that was required in civil asset forfeiture prosecutions; the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), which aimed to put an end to the most abusive features of the civil forfeiture regime then in place, changed the standard to the higher one of "preponderance of the evidence." But even this reform had an exception in which the old, lower standard still prevailed: the so-called "customs carve-out," 18 U.S.C. § 983(i).[220]

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215. Herpel, *supra* note 192, at 1914–15. The wartime use was as a mechanism to seize enemy property. *Id.*

216. Mary M. Cheh, *Forfeiture*, ENCYCLOPEDIA OF CRIME AND JUSTICE (2002), http://www.encyclopedia.com/topic/Forfeiture.aspx.

217. *Id.*

218. WAGNER, *supra* note 81, at 8, 13, 14.

219. *Id.* Regarding other prosecutorial advantages to one or the other mechanism, *see supra* notes 81–85 and accompanying text.

220. Smith, *supra* note 212, at No. 7; U.S. DEP'T OF JUSTICE, *Policy Manual*: *Asset Forfeiture Policy Manual* 51, Chap. 1, Sec. II.C (2016), https://www.justice.gov/criminal-afmls/file/839521/download.. Though known as the "customs carve-out," the exception to the CAFRA reform provisions also applies to IRS and FDA forfeitures as well as seizures pursuant to the Trading With the Enemy Act. FORFEITURE ENDANGERS AM. RIGHTS FOUND, *How to Determine Whether Your Case is Governed by CAFRA or Falls in the 'Customs Carve Out' Exception*, FEAR.ORG (Jul. 20, 2014) http://fear.org/1/pages/law-

Return of assets to rightful owners does not even figure in most accounts of this forfeiture regime. On the contrary, the use of such assets by law enforcement itself is a major aspect of civil asset forfeiture practice, leading to considerable criticism of what some see as a perverse financial incentive for overreach by police and prosecutors.[221] Federal agencies, too, "share among themselves the proceeds of jointly conducted forfeiture" and "transfer hundreds of millions of dollars . . . to state, local, and foreign law enforcement . . . ."[222]

In spite of recent reforms, *in rem* civil forfeiture as a whole seems to offer little in the way of encouraging analogues for the

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library/federal-forfeiture-statutes/federal-forfeiture-procedure/customs-carve-out.php. The carve-out marks one of the limits of the reform drive's success. Another CAFRA reform "amended 28 U.S.C. § 2680(c), a provision of the Federal Tort Claims Act, to provide a damage remedy for property owners who prevail in a civil forfeiture case where the law enforcement agency has lost, destroyed, or damaged the property." Smith, *supra* note 212, at No. 9. However, even this remedy has been rendered almost meaningless by court holdings that the damage remedy is unavailable if the property was also seized as possible evidence of a crime. Smith, *supra* note 212, at No. 9.

221. Smith, *supra* note 212, at No. 9. A large and growing body of legal scholarship and popular political discourse from across the ideological spectrum subjects civil asset forfeiture by police to withering criticism. LEONARD LEVY, LICENSE TO STEAL: THE FORFEITURE OF PROPERTY (1996); for a review of Levy's book, see Herpel, *supra* note 192. A prominent recent instance of such critique: the Cato Institute, on the libertarian Right of the political spectrum, sponsored a 2010 public policy forum, "Policing for Profit: The Abuse of Civil Asset Forfeiture." The forum was linked to a book by the ideologically kindred Institute for Justice: MARIAN R. WILLIAMS, ET AL., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE (2010). Two decades earlier, Cato published REP. HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE? (1995). An instance from the left is Chloe Cockburn, *Easy Money: Civil Asset Forfeiture Abuse by Police*, ACLU SPEAKING FREELY BLOG (Feb. 3, 2010 1:16 PM), https://www.aclu.org/blog/easy-money-civil-asset-forfeiture-abuse-police. A scholarly critique of a famous forfeiture case is Charlena Toro, *From Piracy to Prostitution: State Forfeiture of an Innocent Owner's Property:* Bennis v. Michigan, 11 BYU J. PUB. L. 209 (1997). For a critique of civil asset forfeiture urging reforms to curtail abuses while preserving the process as an important law enforcement tool, see Eric Moores, Note, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777 (2009).

222. CHARLES DOYLE, CONG. RESEARCH SERV., CRIME AND FORFEITURE, (2015), https://www.fas.org/sgp/crs/misc/97-139.pdf.

kleptocracy asset context. The practice of civil forfeiture is a powerful mechanism for *taking* property, not for its *return.* The criticism of *in rem* civil forfeiture exposes potential dark sides of KI prosecutions and serve as illuminating reminders of how institutional legitimacy depends on judicious consideration and internalization of these critiques.

H. Constructive Trust

The equitable doctrine of constructive trust offers a mechanism for "a court [to] recognize[] that a claimant has a better right to certain property than the person who has legal title to it."[223] The doctrine has been described as a key "flexible restitutionary device that imposes an equitable duty . . . to convey property acquired under certain circumstances to the rightful owner."[224] The essence of the trust as a property-law doctrine is "separation of 'legal' and 'equitable' title. The trustee holds legal title to the trust property and manages that property for the benefit of the beneficiaries, who have the right of beneficial enjoyment of the property."[225]

Justice Cardozo, writing for the majority in *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378 (N.Y. 1919), stated the principle thus: "When property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest" equity converts him into a trustee.[226] The typical elements for an equitable trust were a confidential or fiduciary relation, a promise, a transfer in reliance thereon, and unjust enrichment.[227] The New York Court of Appeals later pulled back from such requirements, emphasizing that "[u]njust enrichment . . . does not require the performance of any wrongful act by the one enriched. Innocent parties may frequently be unjustly enriched."[228]

The constructive trust doctrine seems a promising way forward for the emerging forfeiture regime because it offers a frame-

223. *Constructive Trust*, BLACK'S LAW DICTIONARY (10th ed. 2014).

224. ELAINE SHOBEN, WILLIAM TABB, RACHEL JANUTIS, THOMAS MAIN, REMEDIES 917 (6th ed., 2016).

225. JESSE DUKEMINIER, ET AL., PROPERTY 295 (8th ed. 2014).

226. Sharp v. Kosmalski, 351 N.E.2d 721, 723 (N.Y. 1976) (quoting Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 380 (N.Y. 1919)).

227. *Id.*

228. Simonds v. Simonds, 380 N.E.2d 189, 194 (N.Y. 1978).

work for reconciling the finality of 18 U.S.C. § 981(f), resulting in full vesting of title to forfeited assets in the USG, with a variety of possible equitable and legal remedies. Objection to the constructive trust doctrine in the forfeiture regime might be framed in procedural or institutional terms—specifically, the concern that U.S. courts would be ill-equipped to effectuate constructive-trust remedies in the kleptocracy context given the vast sums involved and the breadth of jurisdictional coverage; however, one recent high-profile federal case showed that federal courts are adept at using the vehicle of constructive trusts in extremely complex, multi-jurisdictional cases involving corruption issues.[229] The next section will sketch the outlines of a possible statutory scheme within the overall embrace of a constructive trust approach.

IV. "FOUR R'S" IN A CONSTRUCTIVE TRUST FRAMEWORK

This Note suggests a series of possible reforms focusing on the post-forfeiture disposition of assets under the Kleptocracy Initiative built on the fundamental notion that the United States government, through the USDOJ, act as a fiduciary overseeing assets held in trust for the benefit of the people from whom they were stolen. Assaying the existing array of options USDOJ-KI has and exploring where those options can be enhanced and complemented, this Note sketches a possible statutory reform providing USDOJ-KI prosecutors with a post-forfeiture framework of "Four R's" to guide them in the disposition of assets. By providing guidance through an orderly decision-making process for the disposition of forfeited assets, Congress can free the USDOJ from the politically and diplomatically contentious "discretion to return."[230]

229. Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 640–41 (S.D.N.Y. 2014). For an approving view of the Second Circuit's employment of constructive-trust doctrine, see William E. Thomson et al., *Rule of Law Trumps Rhetoric in Chevron's 2nd Circ. Win*, LAW360 (Aug. 19, 2016, 12:50 PM), http://www.gibsondunn.com/publications/Documents/Thomson-Scolnick-Mefford-Rule-Of-Law-Trumps-Rhetoric-In-Chevrons-2nd-Circ-Win-Law360-8-19-16.pdf; for a critical view, see Brief of International Law Professors as Amici Curiae in Support of Reversal (filed Jul. 8, 2014), *Chevron v. Donziger*, No. 14-0826 (2d Cir. 2016).

230. *See* Oluwafunmilayo Akinosi, *Asset Recovery*, *supra* note 166; *see also supra* note 20. In addition to the discretionary nature of the return of for-

The four tools contained in this sketch for a possible reform scheme are (1) *Repatriation*, i.e. transferring the assets to the government of the country in question; (2) *Restitution*, i.e. the creation of a private right of action for individuals or groups seeking to recover assets stolen from them by the kleptocrat whose assets were the subject of the forfeiture action; (3) *Reparations*, i.e. constructive return of the assets to the people through an appropriate, responsible non-governmental organization ("NGO") or organizations; (4) *Reimbursement*, i.e. retention of funds by USDOJ to help defray some of its prosecution costs and for potential sharing with FBI or other investigative entity—domestic, foreign, or international—that aided the prosecution.

Repatriation of assets to the relevant national government is the first "R," to be done where practicable on both prudential and ethical grounds. "[H]ow . . . property [will] be returned to the state requesting it"[231] is the heart of the asset-recovery part of the UNCAC treaty framework that forms the underlying legal foundation for Kleptocracy Initiative work. Yet clearly, multiple real-world cases have presented themselves where returning funds to the government in question seems to defeat the very purposes of the Initiative by inviting a repeat of the original misappropriation.[232]

Where it is not possible or desirable to repatriate forfeited assets to the government currently in power in the relevant State, the statutory reform would allow for *restitution* to individuals with claims to forfeited assets, through the creation of a private right of action under the Initiative. Similar reforms have been proposed to other statutory schemes involving international corruption, most notably the FCPA.[233]

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feited assets, it is noteworthy that the statutory language authorizing such return makes use of the legally imprecise term "country." 18 U.S.C. § 981(i)(1) (20130. The ambiguity in the statutory language warrants legislative drafting review.

231. *United Nations Convention Against Corruption: Convention Highlights*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, https://www.unodc.org/unodc/en/treaties/CAC/convention-highlights.html (last visited Aug. 29, 2016).

232. *See supra* note 151 and corresponding text.

233. Nika Antonikova makes some partly analogous proposals with respect to private-sector corruption. She urges twin reforms of the FCPA, the first

A third option, *reparations*, is conceived of as a collective, constructive restoration of assets to the people through an appropriately chosen and monitored non-governmental organization ("NGO") or organizations.[234] The BOTA Foundation stands as the most solidly grounded, well executed exemplar of this solution.[235] The remarkable outcome to the Kazakhstan kleptocracy prosecution via creation of a charitable foundation inspires hope. However, the fact that it is the lone case where this has occurred underlines the difficulties facing this option. Most notably, the Equatorial Guinea forfeiture is one in which the absence of a BOTA-like solution has been most glaring. It is not clear, however, why the United Nations, World Health Organization, and other multilateral organizations with strong infrastructure and long experience have not also been considered as possible vehicles for constructive return of forfeited kleptocratic assets.[236]

Fourth, *reimbursement* would allow USDOJ to help defray some of its costs in bringing Kleptocracy Initiative actions, as well

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of which would create a private right of action for victims of private sector corruption to recover damages. Nika A. Antonikova, *Private Sector Corruption in International Trade: The Need for Heightened Reporting and a Private Right of Action in the Foreign Corrupt Practices Act*, 11 BYU INT'L L. & MGMT. REV. 93, 121–23 (2015). Delphia Lim et al. make a similar argument for the creation of a private right of action in *Access to Remedies for Transnational Public Bribery: A Governance Gap*, 28 CRIM. JUST. L. 35 (2013). A related proposal is to create mechanisms for redistributing FCPA penalties so as to benefit the populations harmed by the bribery in question. *Id.* at 43–44.

234. Lim et al. argue, in addition to a private right of action under the FCPA, for the creation of what they call a "public interest-based right of action" under the statute. Lim et al., *supra* note 233 at 44–45. Broadly, they advocate moving away from regarding the fines collected under the FCPA as U.S. federal revenue, instead shifting to a conceptualization of potential "remedies" aimed at providing public benefit in the countries affected. *Id.* Their suggestion is akin to what this Note refers to as "reparation," or a collective, constructive restoration of funds to the people of a national state affected by kleptocratic wrongdoing. It also has features in common with the notion of the USG holding forfeited assets *in trust*.

235. *See supra* Section II.C.2.

236. Such arrangements would comport with current calls for reforms in United Nations funding and practice, in the direction of partnerships with civil society, business, and other stakeholders. UNITED NATIONS GLOBAL COMPACT OFFICE, BUSINESS UNUSUAL: FACILITATING UNITED NATIONS REFORM THROUGH PARTNERSHIPS 1–3 (2005).

as to equitably share with cooperating law enforcement or investigative agencies; the reform would cap this option by statute so as to reduce the perception of self-interested agency behavior or prosecutorial overreach, and thereby enhance the legitimacy of the Initiative. The statutory cap, or limit, would be the smaller of 12.5% (one-eighth of the forfeited assets) or $50 million.[237] This fourth "R" would function similarly to the reasonable administrative fee courts will customarily permit a trustee to deduct from trust assets the trustee administers.[238] The one-eighth share also comports with the "salvage" amount in piracy-related seizure actions, dampening critiques based on arbitrariness.[239]

Perhaps most importantly, all four options would be placed within a framework that could be termed a "derivative constructive trust." The purpose of this overall framework is to place forfeited assets in a clearer legal status *as property*. This is necessary because the civil forfeiture statute that furnishes the procedural framework for USDOJ-KI actions provides that forfeited assets vest fully in the USG.[240] The trust framework enables us to uncouple *legal* title, held by the USG upon forfeiture, from *equitable* title, which could be asserted by victims' groups.[241]

Applying the constructive-trust doctrine to the sorts of ill-gotten assets forfeited by the USDOJ-KI, the "unjust enrichment" aspect of the mechanism would, in effect, "pass through" to the United States Government. The "pass-through" of the taint is the

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237. In other words, a 12.5% share capped at $50 million. The logic behind the proposed cap is this: the largest single forfeiture accomplished by the Kleptocracy Initiative as of the date of this writing, against former Nigerian dictator Gen. Sani Abacha, was for approximately $458 million; a one-eighth share of that forfeiture would be just over $50 million. The cap would play a further, legitimizing function; USDOJ would not be rewarded simply for the size of the forfeitures it achieves, beyond a certain point. Again, the perception of self-interested conduct would be reduced.

238. This "reimbursement" provision is also analogous to UNITED NATIONS CONVENTION AGAINST CORRUPTION, *supra* note 35, at 47–48, art. 57, para. 4, making it possible to "deduct reasonable expenses incurred in investigations, prosecutions, or . . . proceedings . . . ."

239. *See supra* note 189 and corresponding text.

240. "All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section." 18 U.S.C. § 981(f) (2013).

241. *See supra* note 199 and corresponding text.

derivative aspect of this form of constructive trust. In other words, while there is no assertion that the U.S. itself was guilty of malfeasance, there would be an analogy to the receipt of stolen property; the taint attaching to the assets would still be there. A court order mandating a trusteeship would constitute an institutionalized, judicially-overseen effort to return stolen property to its true owners.

Turning back to Justice Cardozo,[242] we could view the dubious acquisition of the property as effected, not by the United States, but by the defendant in the action giving rise to the original forfeiture. The phrase "has been acquired in such circumstances," therefore, need not refer to the acquisition by the United States; rather, it can refer to the prior link in the chain of title—the illegitimate acquisition yielding invalid title and exposing the acquirer to USDOJ-KI prosecution.

The first and fourth options already exist, and the third has been attempted at least once. The proposed statutory framework would offer a coherent, unified protocol for choosing and implementing the pertinent option or options in a given asset forfeiture.[243] Though the framework can be viewed as a set of constraints on the USDOJ, it can best be understood instead as liberating the agency from external critiques of selective prosecution and

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242. Sharp v. Kosmalski, 351 N.E.2d 721, 723 (N.Y. 1976) (quoting Beatty v. Guggenheim Exploration Co., 122 N.E. 378, 380 (N.Y. 1919)).

243. Like concerns are shared by a number of contemporary legal scholars. *See* Jorene Soto, *Show Me the Money: The Application of the Asset Forfeiture Provisions of the Trafficking Victims Protection Act and Suggestions for the Future*, 23 PENN. ST. INT'L L. REV. 365 (2004) (advocating more robust international cooperation to use the statute's forfeiture provisions in ways adapted to the particular characteristics of international sex trafficking and help undermine the trade's profitability); Amy M. Schaldenbrand, *The Constitutional and Jurisdictional Limitations of In Rem Jurisdiction in Forfeiture Actions: A Response to International Forfeiture and the Constitution: The Limits of Forfeiture Jurisdiction Over Foreign Assets Under 28 U.S.C. 1355(B)(2)*, 38 SYRACUSE J. INT'L L. & COM. 55 (2010) (urging caution on constitutionality and comity where U.S. courts assert jurisdiction over assets located in countries whose government is not cooperating with the U.S. court); Bruce Zagaris, *International Enforcement Law Trends for 2010 and Beyond: Can the Cops Keep Up with the Criminals?*, 34 SUFFOLK TRANSNAT'L L. REV. 1 (2011) (advocating creation of innovative tools to help face complex new challenges in international white-collar and related kinds of crime).

institutional self-interest and enabling a more transparent process of decision-making.

V. CONCLUSION

In its half-dozen years of operation, the USDOJ's Kleptocracy Initiative can point to some remarkable successes and a track record in which substantial experience has been built up on the complex global terrain of pursuing the proceeds of corrupt leaders. Yet, for all the immense investigative resources and legal acumen at its disposal, the KI often finds its targets to be formidable adversaries in the courts. The KI is also vulnerable to a range of critiques on issues ranging from the inevitably political framework in which it operates to perceived (and possibly real) unilaterality and arbitrariness. Perhaps most problematic is the destiny of funds after their forfeiture. Indeed, the widely varying post-forfeiture outcomes of USDOJ-KI prosecutions remain a continuing source of disquiet and mistrust.

At the same time, Voltaire's famous aphorism contains real-life wisdom: "Perfect is the enemy of good."[244] Samuel Johnson memorably expressed perfectionism in the context of scholarship as "prescrib[ing] to [oneself] such a degree of exactness as human diligence cannot attain."[245] The analogy between scholarship and policy is inexact, but the caution is invaluable. The challenge is to safeguard the good in the KI and shore up its weaknesses.

In reflecting on the future of the KI and possible reforms, we must also understand anticorruption efforts in a far longer *durée* than even the doctrinal sources surveyed here. Condemnation of corruption runs like a long thread through human civilization

244. The original French: "Le mieux est l'ennemi du bien." *Proverbes,* LINTERN@UTE, http://www.linternaute.com/proverbe/694/le-mieux-est-l-ennemi-du-bien/. The maxim is often cited in the negative: "Let perfect not be the enemy of good" or, more informally, "Don't let the perfect be the enemy of the good."

245. SAMUEL JOHNSON, NO. 65 FATE OF POSTHUMOUS WORKS., (1759), *reprinted in* THE IDLER, http://www.johnsonessays.com/the-idler/fate-posthumous-works/. Johnson further urged, "Let it always be remembered that life is short, that knowledge is endless, and that many doubts deserve not to be cleared." *Id.*

and appears to be universal.[246] Roman imperial law "forbade all enrichment by senatorial officials, allowing only certain specific exceptions[.]"[247] The Old Testament prophets railed against bribery, as in the admonition to judges in Deuteronomy: "Thou shalt not wrest judgment; thou shalt not respect persons, neither take a gift: for a gift doth blind the eyes of the wise, and pervert the words of the righteous."[248] Our most elaborate taxonomy (and hierarchy) of the despicable, Dante's *Inferno*, reserved the eighth and ninth circles of hell for the lowest of the low: those who, in committing "fraud, a form of malice . . . unique to human beings[,] . . . victimize someone with whom they share a special bond of trust."[249]

Against this backdrop of solemn, even pious censure of corruption, one tradition comes down to us as so jovial in its poetic justice, so comically rooted in the wicked reality of human appetite, as to prove irresistible. I have in mind the purported early English custom of the "weigh-in," where elected officials were weighed at the start and end of their time in office; to grow heavier over the term of office was taken as a sign and proxy for corrup-

246. JOHN T. NOONAN, JR., BRIBES 702–03 (1984). The cynical response is not long in coming: if the thread of condemnation is universal, so must be the corruption it condemns.

247. P.A. Brunt, *Charges of Provincial Maladministration under the Early Principate*, 10 HISTORIA: ZEITSCHRIFT FÜR ALTE GESCHICHTE 189, 191 (1961).

248. *Deuteronomy 16:19* (King James).

249. *Fraud: Pimping and Seducing (18), Flattery (18), Simony (19), Sorcery (20), Political Corruption (21-2), Hypocrisy (23)*, UNIV. OF TEXAS AT AUSTIN, http://danteworlds.laits.utexas.edu/circle8a.html#fraud (last visited Nov. 21, 2016). Many other cultural touchstones can be cited; just a few example include Martin Luther, who inveighed against the Roman Church's sale of indulgences, saying that "[t]here is no divine authority for preaching that so soon as the penny jingles into the money-box, the soul flies" out of purgatory, but that the ringing of the coin in the box surely signaled "gain and avarice," MARTIN LUTHER, 95 THESES, Nos. 27–28 (last updated Mar. 27, 2013), http://www.crivoice.org/creed95theses.html; Hugh Latimer, the destitute Anglican bishop, giving pungent expression to the Christian anticorruption tradition: "If a judge should ask me the way to hell, I would show him this way: First, . . . let his heart be poisoned with covetousness," NOONAN, *supra* note 246, at 315 (quoting Hugh Latimer, *Fifth Sermon* (April 5, 1549)); and Geoffrey Chaucer, who appears to have introduced "bribe" and related words into the English language, "although shaded more to extortion than to voluntary offering." NOONAN, *supra* note 246, at 315.

tion and led to the pelting of the offending officeholder with rotten fruit and other measures of crowd justice.[250]

Our world is unfathomably more complex than that of our ancestors, the levers of power and the schemes for its abuse intricate beyond the wildest imaginings of Dante Alighieri or the Hebrew prophets. But it may be there is nothing new under the sun. Today's kleptocrats spin novel variations on the oldest of themes; a new chapter is added, but the book is ancient. This long view of human venality and power's abuse of the weak may make today's prosecutors feel a bit like Sisyphus with his rock. Yet perhaps there is grandeur in this view of corruption, in situating the battle over kleptocracy within the annals of human culture—and nobility in working to ensure that high justice is administered justly.

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250. A weigh-in is still performed every May on brass scales in the middle of the town square of High Wycombe, near London. Kimiko de Freytas-Tamura, *A British Town Weighs Its Officials' Merits, With Scales*, N.Y. TIMES (May 18, 2016), http://www.nytimes.com/2016/05/19/world/what-in-the-world/high-wycombe-england-annual-weigh-in.html. Whether this ritual is a true survival of an ancient practice or just a bit of madcap humor, we have to say with the Italians, "*Se non è vero è ben trovato*" [Even if it is not true, it sounds awfully good].

Animal Abuse and Domestic Violence: Why the Connection Justifies Increased Protection

OLIVIA S. GARBER*

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I. INTRODUCTION

In 2015, Tennessee lawmakers enacted the Tennessee Animal Abuser Registration Act, creating the nation's first statewide animal abuse registry.[1] The registry, which was released on January 1, 2016, is a publicly accessible, online database of convicted animal cruelty offenders.[2] Upon a person's first conviction for an animal abuse offense, the person's photo, name, and any other identifying information deemed necessary by the Tennessee Bureau of Investigation ("TBI") will be listed on the state's public registry for two years.[3] A subsequent conviction will earn the offender five years on the registry.[4] The bill was initially proposed in order to "take a stand against animal cruelty" by deterring acts of animal abuse, but some Tennessee lawmakers feel that the registry will prove to be an effective tool for protecting human victims as well.[5]

Over the last few decades, research studies and statistics have revealed the connection between animal abuse and interpersonal violence, especially highlighting the relationship between animal abuse and domestic violence.[6] Against this backdrop, many states have enacted laws aimed at detecting, preventing, and treating these often-interrelated forms of familial abuse.[7] Tennessee's innovative registry has thrust the state into the spotlight, making it a trendsetter in the animal-law world.[8] Tennessee is now in position to serve as a working model for other states hoping to

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1. TENN. CODE ANN. §§ 40-39-101 to -103 (West 2016).
2. *See id.* § 40-39-103.
3. *Id.* § 40-39-103(d)(1) (Westlaw).
4. *Id.* § 40-39-103(d)(2) (Westlaw).
5. Arin Greenwood, *Tennessee Will Soon Have First Statewide Animal Abuse Registry*, HUFFINGTON POST (Nov. 4, 2015 3:34 PM), http://www.huffingtonpost.com/entry/tennessee-animal-abuse-registry_56392877e4b0411d306eaf90 (quoting Senator Jeff Yarbro).
6. *See* Angela Campbell, Note, *The Admissibility of Evidence of Animal Abuse in Criminal Trials for Child and Domestic Abuse*, 43 B.C. L. REV 463, 464–65 (2002).
7. *Id.* at 467–68.
8. *See New State Animal Abuser Registries Proposed in 2016*, NAT'L ANTI-VIVISECTION SOC'Y (Jan. 21, 2016), https://www.navs.org/news/new-state-animal-abuser-registries-proposed-in-2016.

bolster the strength and scope of protection of their animal cruelty laws.

This Note argues that Tennessee lawmakers should take this opportunity to improve the state's existing laws and increase protection for both animals and humans. Part II of this Note highlights the statistically proven link between animal abuse and domestic violence. Part III will discuss the nationwide, legislative response to this cyclical pattern of violence, focusing primarily on cross-reporting statutes and psychological evaluation and treatment provisions in animal cruelty laws. Part IV will examine the current status of Tennessee animal cruelty laws. Part IV will also propose two statutory measures that, if enacted, would increase protection of both animals and humans in Tennessee. First, Tennessee lawmakers should enact an inverse of the state's current cross-reporting statute, which requires health and human services agencies to report signs of animal abuse observed during the course of their employment, by imposing a reciprocal duty to report on animal welfare agents who encounter signs of domestic violence while acting in the scope of their employment. Second, Tennessee lawmakers should amend the penalty provisions in the state's current animal cruelty statutes to mandate—rather than merely allow—psychological evaluation and treatment both for juvenile offenders convicted of animal cruelty and for all offenders convicted of aggravated animal cruelty. Finally, Part V will conclude by urging Tennessee lawmakers to address the cyclical pattern of violence between animal abuse, child abuse, and intimate partner abuse by increasing the overall strength and comprehensiveness of the state's animal protection laws.

II. THE LINK BETWEEN ANIMAL ABUSE AND DOMESTIC VIOLENCE

The link between animal abuse and interpersonal violence has been discussed since the 14th Century, but it is only recently that law enforcement, courts, and mental health professionals have begun to acknowledge the connection.[9] Family violence and ani-

9. *Facts About the Link Between Violence to People and Violence to Animals*, AM. HUMANE, https://www.animalhumanesociety.org/webfm/574 (last visited Sept. 14, 2016).

mal abuse "go hand in hand" because the victims of domestic violence, child abuse, and animal abuse all share a common trait: their abusers are preying on the weak, vulnerable, and powerless.[10] Often, the relationship between the abuser and the victim is one of "economic dependence, strong emotional bonds, and an enduring sense of loyalty."[11] Where there is violence against a spouse, child, or animal within a home, the violence is rarely limited to just one form of abuse and one type of victim.[12] Detecting and deterring animal abuse in a home can lead to the discovery and prevention of other forms of violence against human family members in the home and vice versa.[13] Animal abuse may indicate the presence of other forms of abuse and types of victims within the home because, often, animal abuse is actually directed towards or linked to human family members.[14]

A. Animal Abuse and Children

The connection between animal abuse, child abuse, and interpersonal violence manifests itself through a continuous chain of events. Studies show that children who are exposed to animal abuse are likely to be victims of abuse themselves.[15] In turn, child abuse victims often harm animals in an attempt to release feelings of anger and aggression that stem from their own abuse.[16] Harming animals desensitizes children to violence and erodes their empathic development, which indicates a propensity to become increasingly violent towards fellow humans as the child progresses

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10. *Animal Abuse and Human Abuse: Partners in Crime*, PETA, http://www.peta.org/issues/companion-animal-issues/companion-animals-factsheets/animal-abuse-human-abuse-partners-crime/ (last visited Sept. 14, 2016) [hereinafter *Partners in Crime*].

11. Campbell, *supra* note 6, at 478.

12. *Id.*

13. Charlotte A. Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 ANIMAL L. 1, 4 (1998).

14. Campbell, *supra* note 6, at 478.

15. *Childhood Cruelty to Animals: Breaking the Cycle of Abuse*, HUMANE SOC'Y U.S., http://www.humanesociety.org/parents_educators/childhood_cruelty_breaking_cycle_abuse.html (last visited Sept. 14, 2016).

16. *See id.*

into adulthood.[17] Absent intervention, this sequential chain of events will continue to manifest itself in a cyclical pattern of abuse and violence.[18]

1. Childhood Exposure to Violence Leads to Childhood Animal Abuse

Parents who neglect or abuse family pets often subject children and other dependents in the home to similar treatment.[19] Particularly in cases of animal hoarding and neglect, it is common for authorities to also find children of the home living in extreme filth and unsanitary conditions.[20] When a person is unable to provide a baseline level of care for the family pet, children in the home are likely to experience the same neglect or abuse.[21] Animal abuse may also be used to exert psychological control over victimized children. Abusers frequently threaten or harm animals in order to coerce children to comply with or remain silent about their own abuse.[22] Children may be manipulated to keep the abuse a secret if they fear that disclosing the abuse will subject them to the same fate as the animal.[23]

Animal abuse is but one step in a continuous cycle of familial violence because children who are exposed to animal abuse "become desensitized to violence and the ability to empathize with victims."[24] Children who grow up in abusive homes—whether the abuse was directed towards the child, an animal in the home, or

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17. Charles Siebert, *The Animal-Cruelty Syndrome*, N.Y. TIMES MAG. (June 11, 2010), http://www.nytimes.com/2010/06/13/magazine/13dogfighting-t.html?_r=0.

18. *Id.*

19. *Partners in Crime*, *supra* note 10.

20. *Animal Cruelty and Human Violence: A Documented Connection*, HUMANE SOC'Y U.S., http://www.humanesociety.org/issues/abuse_neglect/qa/cruelty_violence_connection_faq.html?referrer=https://www.google.com/ (last visited Sept. 14, 2016) [hereinafter *A Documented Connection*].

21. *Id.*

22. Campbell, *supra* note 6, at 466.

23. *What is the Link*, NAT'L LINK COALITION, http://nationallinkcoalition.org/what-is-the-link (last visited Sept. 14, 2016) [hereinafter *What is the Link*].

24. *Id.*

both—often develop "abuse reactive" behavior,[25] mimicking the abuse against pets or other vulnerable humans.[26] If an animal in the home is the victim of the abuse, a child may experience pain stemming from his empathy towards the beloved pet's suffering.[27] In an attempt to destroy his affectionate bond with the pet and rid himself of the resulting pain, the child may actually mimic the witnessed animal abuse.[28] Some children may even "kill the pet themselves in order to at least have some control over what they see as the animal's inevitable fate."[29] Conversely, if the child himself is the victim of abuse, he may lash out and harm the family pet in an expression of his own anger at being abused.[30]

2. A Childhood History of Animal Abuse Leads to Violence Towards Humans

A childhood history of animal abuse has been associated with one's lack of empathy towards others and an inability to restrain impulsive aggression.[31] A child's abusive behavior can become increasingly violent as he progresses into adulthood, thus perpetuating the cycle of animal abuse and interpersonal violence towards humans.[32] Of course, not every juvenile animal abuser will go on to engage in violent conduct towards humans later in his adult life, but sociological research has shown that there is a statistically significant connection between childhood animal abuse and later violence towards humans in adulthood.[33]

Many infamous psychopaths and serial killers began their criminal careers by harming animals before graduating to human victims.[34] Albert DeSalvo—the "Boston Strangler"—admitted to having shot arrows through orange crates containing cats and dogs

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25. Siebert, *supra* note 17.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. Campbell, *supra* note 6, at 466.
31. *See* Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law's Role in Prevention*, 87 IOWA L. REV. 1, 44–45 (2001).
32. *Id.* at 45.
33. *Id.* at 49.
34. *Id.* at 43.

as a child, before he later went on to murder thirteen women from 1962–63.[35] David "Son of Sam" Berkowitz, who pled guilty to thirteen murders and attempted murders in 1978, had previously shot and killed his neighbor's Labrador Retriever after claiming the dog was directing him to kill others.[36] Jeffrey Dahmer, also known as the Milwaukee Cannibal, spent his childhood secretly capturing and torturing animals, once impaling a dog's head on a stick.[37] Dahmer went on to kill as many as seventeen people.[38] Columbine High School shooters Eric Harris and Dylan Klebold, who murdered fifteen people before turning their guns on themselves, had also previously maimed animals.[39] In 1997, sixteen-year old Luke Woodham shot and killed his own mother, as well as two students, in a Mississippi school.[40] In a diary entry dated five months before the shooting, Woodham recounted the death of his dog, Sparkle:

> I made my first kill today. It was a loved one . . . . I'll never forget the howl she made. It sounded almost human . . . . I'll never forget the sound of her bones breaking under my might. I hit her so hard I knocked the fur off her neck . . . . It was true beauty.[41]

The link between childhood animal cruelty and violence towards humans is so strong that the Federal Bureau of Investigation ("FBI") treats juvenile animal cruelty as a red flag indicating

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35. *Id.*

36. *Id.*

37. Campbell, *supra* note 6, at 467; Lorna Benson, *Animal Cruelty May Be Sign of Deeper Human Problems*, MPR NEWS (July 6, 2006), http://www.mprnews.org/story/2006/07/06/animalkillers.

38. Benson, *supra* note 37.

39. Debra L. Muller-Harris, *Animal Violence Court: A Therapeutic Jurisprudence-Based Problem-Solving Court for the Adjudication of Animal Cruelty Cases Involving Juvenile Offenders and Animal Hoarders*, 17 ANIMAL L. 313, 320 (2011).

40. Sherry Ramsey, *Cause for Concern: Juveniles and Crimes of Animal Cruelty*, JUV. & FAM. JUST. TODAY, Spring 2012, at 12–13.

41. *Id.* Note that Woodham referred to this act as simply his "first kill," which suggests he saw no distinction between his animal victim and his later human victims. *Id.*

habitually violent behavior.[42] The FBI also relies on prior reports of animal cruelty in assessing the potential threat an individual poses to society[43] and as part of its "serial killer triad which is used to profile suspects."[44] If a person commits violent acts against animals, the FBI recognizes that such behavior can signal a propensity to later abuse vulnerable human victims.[45] Because animal abuse is "prominently displayed in the histories of" violent criminals, the FBI treats "cruelty to animals and cruelty to humans as a continuum."[46]

B. Animal Abuse and Intimate Partner Abuse Victims

The relationship between animal abuse and intimate partner abuse is similar to that between animal abuse and child abuse because, in both scenarios, the abuser often uses the family pet as a pawn to manipulate and control his human victim.[47] The vast majority of U.S. pet owners consider their companion animals to be family members,[48] which supports the increasingly accepted classi-

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42. Campbell, *supra* note 6, at 468.

43. *See id.*

44. Kirsten E. Brimer, Comment, *Justice for Dusty: Implementing Mandatory Minimum Sentences for Animal Abusers*, 113 PENN. ST. L. REV. 649, 655 (2008) (quoting People v. Dyer, 115 Cal. Rptr. 2d 527, 532 (Cal. Ct. App. 2002)).

45. *See id.*

46. Campbell, *supra* note 6, at 468 (quoting DORIS DAY ANIMAL FOUNDATION., THE VIOLENCE CONNECTION: AN EXAMINATION OF THE LINK BETWEEN ANIMAL ABUSE AND OTHER VIOLENT CRIMES, 6 (2004)).

47. Statistics show that intimate partner abuse is predominantly a crime against women. *See Intimate Partner Violence, 1993–2010*, U.S. DEP'T OF JUST., http://www.bjs.gov/content/pub/pdf/ipv9310.pdf (last visited Sept. 14, 2016) (explaining that "From 1994 to 2010, about 4 in 5 victims of intimate partner violence were female."). Accordingly, this Note will use masculine pronouns when referring to domestic violence abusers and feminine pronouns when referring to domestic violence victims.

48. *More Than Ever, Pets Are Members of the Family*, THE HARRIS POLL (July 16, 2015, 1:00 PM), http://www.theharrispoll.com/health-and-life/Pets-are-Members-of-the-Family.html. "More than three in five Americans (62%) have at least one pet in their household," and 95% of "all pet owners . . . consider their pets to be members of the family." *Id.* U.S. pet owners treat their pets as if they were human family members, with 71% of pet owners "frequently or occasionally" letting their animals sleep in their bed with them and 64% of pet own-

fication of animal abuse as a form of domestic violence.[49] Intimate partner abuse victims in particular[50] tend to share close bonds with their pets because abusive partners often isolate their victims from emotionally supportive human relationships, leaving a pet as the victim's only source of affectionate interaction.[51] This bond, however, is a double-edged sword, as an especially close relationship between a battered woman and her animal may actually "increase the likelihood and severity of [the relationship's] exploitation."[52] Abusive partners use the animal as a coercive tool by threatening or actually harming the animal in order to control and inflict psychological trauma on the human victim.[53]

The physical vulnerability of the animal and the decreased risk of detection make this form of violence an especially appealing method of domestic abuse to abusive partners.[54] Abusive partners capitalize on the shortcomings of animal abuse detection and

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ers buying holiday gifts for their furry family members. *Id.* A smaller pool of pet owners (12%) have even taken out health insurance policies on their pets. *Id.*

49. *See* Vivek Upadhya, Comment, *The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization*, 63 EMORY L.J. 1163, 1175 (2014).

50. *Id.* "In interviews, abused women have described their companion animal as their 'baby,' 'child,' a part of the 'family,' and the 'center of our lives.'" *Id.* "Some victims have brought pictures of their animals to interviews, tearfully describing the relationship that they shared with their animal while simultaneously recounting the trauma of that same animal being threatened, harmed, or killed." *Id.*

51. *Id.* at 1175–76.

52. *Id.* at 1177; *see also* Clifton P. Flynn, *Woman's Best Friend: Pet Abuse and the Role of Companion Animals in the Lives of Battered Women*, 6 VIOLENCE AGAINST WOMEN 162, 169 (2000) (describing a study that found that "women whose pets were abused indicated stronger emotional attachment to their pets than women who did not report pet abuse."). Interestingly, the closeness of the bond between the women and their pets also correlated with whether the woman had children. *Id.* Of the women surveyed who had children, 37% said their pets were very important to them emotionally, but one third of the women said they were not at all important. *Id.* In contrast, 64.3% of the women with no children reported that their pets were very important sources of emotional support, and only 18.2% of women without children said their pets were not important. *Id.*

53. *See A Documented Connection*, *supra* note 20.

54. Upadhya, *supra* note 49, at 1178–79.

prosecution.[55] Animal abuse within the home is less likely to be detected, whereas traditional intimate partner violence may be self-reported by the battered spouse, noticed by friends, family, or medical professionals, or reported by neighbors after a domestic disturbance.[56] Even if the animal abuse is discovered, the legal ramifications pose little to no deterrent value because (1) animal cruelty laws are not strictly enforced, and (2) when they are, they involve only "paltry" sentences.[57]

The frequency and regularity with which animal abuse and intimate partner abuse co-occur is alarming. A pivotal 1997 study[58] surveyed the largest U.S. domestic violence shelter in forty-nine states and the District of Columbia,[59] questioning the overlap between intimate partner abuse, child abuse, and animal abuse. The study found that 85% of women and 63% of children entering the shelters also reported pet abuse within the home.[60] A similar study surveyed thirty-eight women at a domestic violence shelter in Utah and found that, of the women who owned animals, 71% reported that their partner had threatened to harm or had harmed the animal, and 57% reported that their partner actually harmed or killed the animal.[61]

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55. *See id.*

56. *Id.*

57. *Id.* at 1179.

58. Frank R. Ascione et al., *The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women Who Are Battered*, 5 SOC'Y & ANIMALS 205 (1997) [hereinafter *Survey of Shelters*].

59. Since this study only surveyed women in domestic violence shelters and did not provide comparison statistics of animal abuse reported by women in non-abusive relationships, Professor Ascione conducted a follow-up study in 2007 that surveyed 101 women residing at domestic violence shelters (the S group) and 120 women who had not experienced intimate partner abuse as an adult (the NS group). *See* Frank R. Ascione et al., *Battered Pets and Domestic Violence: Animal Abuse Reported by Women Experiencing Intimate Violence and by Nonabused Women*, 13 VIOLENCE AGAINST WOMEN 354 (2007) [hereinafter *Animal Abuse Reported by Women*]. From the S group, 52.5% of women had received threats to hurt or kill their pets and 54% of the women reported actual abuse or killing of the pets occurred. *Id.* at 361. In contrast, just 12.5% of women from the NS group received threats to hurt or kill their pets and only 5% reported actual abuse or killing of their pets. *Id.*

60. *Survey of Shelters*, *supra* note 58.

61. Frank R. Ascione, *Battered Women's Reports of Their Partners' and Their Children's Cruelty to Animals*, 1 J. EMOTIONAL ABUSE 119 (1998).

Individual stories provide compelling evidence of the link between animal abuse and domestic violence. In an act of retaliation against his ex-girlfriend for ending the relationship, one California man "killed, skinned, and cooked" the woman's pet rabbit.[62] He then ate the rabbit as he texted pictures to the woman and threatened to do the same to her.[63] In July 2015, a Texas man was charged with first-degree murder and animal cruelty for fatally beating his boyfriend and strangling his boyfriend's dog.[64] A witness to the incident told police he heard crashing, screaming, and Harlow—the victim's five-year-old Yorkshire Terrier—crying out in pain after the suspected murderer threatened to kill it.[65] Harlow survived the beating but her owner did not.[66] He later died from head trauma sustained during the beating.[67] In some cases, offenders even force their human victims to watch acts of bestiality.[68]

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62. Angel Jennings, *Man Eats Ex-Girlfriend's Pet Rabbit, Threatens Her, Prosecutors Say*, L.A. TIMES (Dec. 10, 2014, 1:05 PM), http://www.latimes.com/local/lanow/la-me-ln-north-hollywood-eats-exlover-pet-rabbit-20141210-story.html.

63. *Id.*

64. *Man Accused of Murdering His Boyfriend, Animal Cruelty*, THE LINK-LETTER (Nat'l Link Coal., Stratford, N.J.), Sept. 2015, at 13, http://nationallinkcoalition.org/wp-content/uploads/2015/09/LinkLetter-2015-September.pdf; Mariah Medina, *Texas Man Facing Murder Charges for the Beating Death of His Boyfriend in Austin*, SAN ANTONIO EXPRESS-NEWS (July 20, 2015, 3:11 PM), http://www.mysanantonio.com/news/local/article/19-year-old-Austin-resident-facing-murder-charges-6394840.php.

65. *Man Accused of Murdering his Boyfriend*, *Animal Cruelty*, *supra* note 64, at 13; Medina, *supra* note 64. When police arrived on the scene to investigate hours later, they found Harlow clinging to life and suffering from injuries consistent with strangulation, including "bloodshot eyes, hemorrhaging and difficulty swallowing." *Man Accused of Murdering his Boyfriend, Animal Cruelty*, *supra* note 64, at 13.

66. Medina, *supra* note 64.

67. *Id.*

68. ALLIE PHILLIPS, NAT'L DIST. ATT'YS' ASS'N, UNDERSTANDING THE LINK BETWEEN VIOLENCE TO ANIMALS AND PEOPLE: A GUIDEBOOK FOR CRIMINAL JUSTICE PROFESSIONALS 27 (2014), http://nationallinkcoalition.org/wp-content/uploads/2014/06/Allies-Link-Monograph-2014.pdf. In one case, an abusive husband forced his wife and three sons to watch as he sexually assaulted one of the family's dogs before he shot and killed the pet. *Id.* After this incident, the wife, her three sons, and the family's other dog were able to flee to a pet-friendly shelter. *Id.* The husband was later prosecuted for animal abuse. *Id.*

Animal abuse used as a method of psychological control within a home creates an environment of submission and terror, and may lead the human victim to delay or refrain from fleeing out of concern for her pet's welfare and safety.[69] Only 3% of domestic violence shelters in the nation offer some sort of housing for victims' pets.[70] Given the strong emotional attachment that domestic violence victims tend to feel towards their pets, it is no surprise that up to half of abused women[71] struggle with the idea of seeking safety if it means leaving their animal in the hands of their batterers.[72] The psychological trauma of animal abuse as a method of domestic violence may continue to have crippling effects on the human victim if she—but not her pet—manages to escape the abusive situation.[73] Her abuser may retaliate by harming or killing the animal as a form of revenge for her leaving or to coerce her into returning.[74] Some women feel such unbearable fear and guilt over leaving their pets behind that they return to the toxic environment for the animals' sake.[75] In one case, a domestic violence victim

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69. Frank R. Ascione, *Emerging Research on Animal Abuse as a Risk Factor for Intimate Partner Violence*, *in* INTIMATE PARTNER VIOLENCE [hereinafter *Emerging Research*], 3-9 (Kathleen A. Kendall-Tackett & Sarah M. Giacomoni eds., 2007). According to nine independent studies, a range of 18% to 48% percent of women in abusive relationships reported that their fear for their pets' safety either influenced their decision to stay with the abusive partners or delayed their fleeing for shelter. *Id.*

70. *Clark, Ros-Lehtinen Bill Protects Domestic Violence Victims and Pets*, HUMANE SOC'Y U.S. (Mar. 5, 2015), http://www.humanesociety.org/news/press_releases/2015/03/domestic-violence-and-pets-030515.html [hereinafter *Clark, Ros-Lehtinen Bill*].

71. *Emerging Research*, *supra* note 69, at 3–9.

72. Lori R. Kogan et al., *Crosstrails: A Unique Foster Program to Provide Safety for Pets of Women in Safehouses*, 10 VIOLENCE AGAINST WOMEN 418, 419 (2004). After fleeing from her abusive partner, one Colorado woman and her dogs lived in her car for four months until space became available at a pet-friendly shelter. *Id.* at 431–32.

73. *See* Jen Reeder, *Let's Discuss Pets During Domestic Violence Awareness Month*, HUFFINGTON POST (Jan. 28, 2015), http://www.huffingtonpost.com/jen-reeder/we-need-to-include-pets-w_b_6017762.html.

74. Carol J. Adams, *Woman-Battering and Harm to Animals*, *in* ANIMALS AND WOMEN: FEMINIST THEORETICAL EXPLANATIONS 69–70 (Carol J. Adams & Josephine Donovan eds., 1995).

75. *Id.* at 60.

sought safety at a local shelter, only to return to the abusive home after her batterer sent her pictures of him cutting her dog's ears off with garden shears.[76] He also sent the ears.[77]

The co-occurrence and intertwinement of animal abuse and intimate partner abuse is so prevalent that twenty-nine states, as well as the District of Columbia and Puerto Rico, have amended their laws to allow for judges to include companion animals in domestic orders of protection.[78] Members of Congress have also recognized the need for nationwide, increased protection for animal victims of domestic violence.[79] In 2015, "congresswoman Katherine Clark (D-MA) and congresswoman Ileana Ros-Lehtimen (R-FL) introduced the Pets and Women Safety Act" ("PAWS Act").[80] The bill calls for extended protection to pets under federal stalking laws and interstate violation of protection orders, and also urges all states to allow for the inclusion of companion animals in domestic violence orders of protection.[81]

III. LEGISLATIVE RESPONSE TO THE LINK

In light of the well-documented link between animal cruelty and interpersonal violence, many state legislatures have enacted laws to better detect, deter, treat, and prevent these often interrelated forms of abuse. An increasing number of states have enacted cross-reporting statutes, which permit or mandate the reporting of identified or suspected abuse between law enforcement officials

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76. *Emerging Research*, *supra* note 69, at 3-12 to 3-13 (citing Jane Ann Quinlisk, *Animal Abuse and Family Violence*, *in* CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE: LINKING THE CIRCLES OF COMPASSION AND INTERVENTION 168 (Frank R. Ascione & Phil Arkow eds., 1999)).

77. *Id.*

78. ANIMAL LEGAL DEF. FUND, 2015 U.S. ANIMAL PROTECTION LAWS RANKINGS, 2 (Dec. 2015), http://aldf.org/wp-content/uploads/2015/12/Rankings-Report-2015.pdf [hereinafter 2015 U.S. ANIMAL PROTECTION LAWS RANKINGS].

79. *Clark, Ros-Lehtinen Bill*, *supra* note 70. "We must have a national policy that safeguards the pets of abuse victims, and recognizes that domestic violence impacts all members of the family—including the four-legged." *Id.*

80. *Id.*

81. Pets and Women Safety Act of 2015, H.R. 1258, 114th Cong. (2015). The PAWS Act also aims to establish a federal grant program to assist shelters and other service providers in implementing care and housing options for the pets of domestic violence victims. *Id.*

and various animal and human welfare services.[82] In addition, thirty-two states' animal cruelty laws either allow or require court-ordered psychological evaluation and treatment for certain offenders.[83]

A. Cross-reporting Statutes

The relationship between animal cruelty and domestic violence supports the practicality of using one type of detected abuse within a home to indicate the possibility of other victims and forms of abuse in the home as well.[84] States that have cross-reporting laws recognize the added benefits of a multifaceted response to animal abuse, child abuse, and domestic violence. Animal abuse, child abuse, and intimate partner abuse typically occur behind closed doors and often go unreported.[85] Statistics show that these forms of household violence frequently co-occur, so cross-training and cross-reporting among the animal and human welfare services who interact with the victims of such abuse can lead to detection of additional, hidden abuse—directed at either humans or animals—within a home that may not have been discovered otherwise.[86]

Many U.S. communities encourage cross-training between law enforcement, animal welfare agencies, and human health and social services so that workers are able to recognize signs of animal abuse as potential indicators of child or intimate partner abuse and vice versa.[87]

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82. Siebert, *supra* note 17.

83. NAT'L DIST. ATT'YS' ASS'N, COUNSELING LAWS FOR CONVICTED ANIMAL ABUSERS, (2013), http://www.ndaa.org/pdf/Counseling%20Laws%20for%20Convicted%20Animal%20Abusers%20-%20February%202013.pdf [hereinafter COUNSELING LAWS FOR CONVICTED ANIMAL ABUSERS].

84. Sarah DeGue & David DiLillo, *Is Animal Cruelty a "Red Flag" for Family Violence?: Investigating Co-Occurring Violence Toward Children, Partners, and Pets*, 24 J. INTERPERSONAL VIOLENCE 1036, 1036–38 (2009).

85. *See* Suzanne Barnard, *Taking Animal Abuse Seriously: A Human Services Perspective*, *in* CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE: LINKING THE CIRCLES OF COMPASSION FOR PREVENTION AND INTERVENTION 101, 106–07 (Frank R. Ascione & Phil Arkow eds., Purdue U. Press 1999).

86. *See* Siebert, *supra* note 17.

87. *Id.* In addition to law enforcement, animal control, and human welfare services, some states also extend the duty to cross-report to veterinarians.

Cross-reporting statutes are a practical approach to identifying, deterring, and preventing animal abuse, child abuse, and intimate partner abuse because "[w]hen any form of family violence is suspected, the appropriate agency should be informed so its experienced personnel can evaluate whether a further investigation is warranted."[88] The goal of cross-training and cross-reporting is not to merge the individual and distinct forms of household abuse under one all-encompassing umbrella.[89] Rather, the goal of this multifaceted approach is simply to educate specialists on the connection and relationship between animal abuse, child abuse, and domestic violence so that they may familiarize themselves with each form of maltreatment, recognize red flags indicating the potential existence of abuse, and know to whom to report that information.[90] When animal and human health and social services come together to cross-report suspected or known forms of abuse that may not be detected otherwise, the result is a more efficient and effective response to families and animals in need.[91]

B. Psychological Treatment Provisions in Animal Cruelty Laws

Traditional types of punishment for criminal behavior—fines and imprisonment—have little to no deterrent value in the animal cruelty context because these punishments are "ineffective at reducing recidivism or preventing future acts of violence against animals and humans."[92] Animal abuse is often part of a cyclical pattern of violence, and the only way to break the cycle is through intervention and adequate treatment.[93] Simply requiring an animal abuser to pay a fine or serve minimal jail time does not address underlying "physiological deficits" that may have influenced the

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Id. However, the laws regarding cross-reporting and veterinarians greatly vary among states and, as such, are not included within the scope of this Note.

88. *What is the Link*, *supra* note 23.

89. Phillips, *supra* note 68, at 41.

90. *Id.*

91. *See id.*

92. Muller-Harris, *supra* note 39, at 315.

93. *See Children Abusing Animals*, NAT'L LINK COALITION, http://nationallinkcoalition.org/faqs/children-abusing-animals (last visited Oct. 7, 2016).

offender's behavior.[94] Such punishment is comparable to "an orthopedist telling someone with a broken arm to lift weights."[95]

It is widely accepted that violence towards animals signals more than just a slight personality flaw; it is an "indicator of potentially deeper psychological problems . . ., especially where the animal abuser is a child."[96] In 1987, the American Psychiatric Association ("APA") recognized the relationship between animal abuse and one's mental health by adding physical cruelty to animals as a diagnostic symptom for conduct disorder.[97] Conduct disorder is defined as a "persistent pattern of conduct in which the basic rights of others and major age-appropriate societal norms or rules are violated."[98] Committing acts of animal cruelty can also have detrimental effects on a person's social development as harming or killing a vulnerable animal erodes or distorts empathy.[99] "The inability to empathize with others" and a desensitized response to violence may harden one to the prospect of treating the lives of animals and humans alike "with callous disregard, and without feelings of regret or remorse."[100]

Neurologists are beginning to understand the physical implications and neurophysiology of empathy, or lack thereof. In a recent study, a research team at the University of Chicago performed functional MRI scans on a group of teenage boys diagnosed with aggressive-conduct disorder and a group of teenage boys who showed "no unusual signs of aggression."[101] The groups were "shown videos of people enduring both accidental pain, like stubbing a toe, and intentionally inflicted pain, like being punched

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94. Siebert, *supra* note 17.

95. *Id.*

96. Brimer, *supra* note 44, at 651–52.

97. Clifton P. Flynn, *Why Family Professionals Can No Longer Ignore Violence Toward Animals*, 49 FAM. REL. 87, 89 (2000). The APA explained that "the presence of cruel or abusive behavior toward animals may be a serious indicator of child psychopathology that deserves the attention of parents, researchers, and professionals alike." *Id.*

98. *Id.* (quoting AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 53 (3d rev ed. 1987)).

99. *See id.* at 90.

100. *Id.*

101. Siebert, *supra* note 17.

in the arm."[102] The study found that when watching intentionally inflicted pain, the boys with aggressive conduct disorder "displayed extremely heightened activity in the part of our brain known as the reward center, which is activated when we feel sensations of pleasure," and, unlike the boys who showed no unusual signs of aggression, they displayed "no activity at all in those neuronal regions involved in moral reasoning and self-regulation."[103] Yet, just as a person's empathy can be destroyed, it can also be learned and cultivated.[104] Researchers are confident that an individual's physiological inability to empathize can be rehabilitated with the proper treatment, especially with early detection and intervention.[105]

The three general diagnostic categories of animal abuse—criminogenic-based,[106] traumagenic-based,[107] and psychogenic-

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102. *Id.*

103. *Id.*

104. *Id.* In 2008, a group of researchers from the University of Wisconsin, Madison, released a study explaining their findings that "the mere act of thinking compassionate thoughts caused significant activity and physical changes in the brain's empathic pathways." *Id.*

105. *See id.*; *Children Abusing Animals*, *supra* note 93.

106. Philip Tedeschi, *Methods for Forensic Animal Maltreatment Evaluations*, *in* ANIMAL MALTREATMENT: FORENSIC MENTAL HEALTH ISSUES AND EVALUATIONS 309, 324 (Lacey Levitt, Gary Patronek, & Thomas Grisso eds., 2016). The following features are characteristic of an offender with criminogenic based treatment needs:

> 1. Presents as convincing or charming, with few indicators of vulnerability. 2. Presentation or history of manipulative or controlling behavior. 3. Displays jealousy, dislike, or animosity towards victims. 4. Has been physically cruel, or caused physical pain or injury to persons or animals. 5. Bullies, threatens, or intimidates others. 6. History of fights, aggression, or property destruction. 7. Family history of aggression, criminal conduct, and/or chemical dependency. 8. Has used a weapon against others. 9. Illegal drug use or abuse, or early use of alcohol. 10. Parental emotional and disciplinary inconsistencies (double messages).

Id.

107. *Id.* The following features are characteristic of an offender with traumagenic based treatment needs:

> 1. Has experienced, witnessed, or was confronted with an event or events that involves actual or threatened death or se-

based[108]—serve to diagnose the underlying causes in each case and to assess the best course of treatment for each offender. When animal abuse is criminogenic-based, appropriate treatment interventions might focus on personal accountability, cognitive behavior

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> rious injury, or threat to the physical or sexual integrity of self or others. 2. Reactive avoidance of stimuli that arouse recollections of trauma (e.g., thoughts, feelings, conversations, activities, places, people). [3]. Intense psychological distress and/or behavioral reactivity upon exposure to internal or external cues that symbolize or resemble an aspect of traumatic event. [4]. Noticeable regression from normally expected levels of personal, social, and intrapsychic stability and competencies, response to stimulation from trauma-related issues. [5]. Behavior may represent the reenactment or resolution of traumatic events. [6]. Youth reports images, thoughts, dreams, illusions, flash back episodes, or a sense of re-living the experience; or distress on exposure to reminders of the traumatic event. [7]. Youth demonstrate a reduction from normal levels or awareness and appropriate responsiveness to his or her surroundings (appears dazed or disorganized) when trauma issues are triggered. [8]. Youth shows elevated symptoms, when compared to his or her normal functioning, of anxiety or increased arousal (e.g., difficulty sleeping, irritability, poor concentration, hypervigilance, exaggerated startle response, motor restlessness). [9]. Difficulties with sleep or appetite (excess or avoidance).

Id.

108. *Id.* at 324–25. The following features are characteristic of an offender with psychogenic based treatment needs:

> 1. Low birth-weight or IQ relative to siblings or peers. 2. Diagnosis of developmental or autistic disorder. 3. Bizarre or inappropriate affect (not including flat affect, or elective withdrawal/avoidance). 4. Present or past intervention with psychotropic medications. 5. History of psychiatric-hospitalization. 6. Family history of mental illness or psychiatric hospitalization. 7. History of unusually difficult pregnancy or childbirth. 8. Inability to develop stable relationships due to perceptual inaccuracies around relationships and interactions with others (difficulties not due to emotional/traumatic resistance, or hostility). 9. Social role as a scapegoat or outcast). 10. The youth is displaying significant difficult or impairment in social, educational, family, or other important areas of functioning.

Id.

strategies, and victim empathy development.[109] Criminogenic-based treatment will likely include "criminal justice oversight and supervision."[110] On the other hand, appropriate treatment interventions for traumagenic-based and psychogenic-based animal abuse will consist of specialized therapy and psychiatric management and medication, and will likely include therapeutic and psycho-medical oversight.[111]

Against this backdrop, many states have amended their animal cruelty laws to include psychological evaluation[112] and treat-

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109. *Treatment Interventions*, COLORADO LINK PROJECT, http://coloradolinkproject.com/treatment-and-supervision/ (last visited Oct. 7, 2016).

110. *Id.*

111. *Id.*

112. The following states *require* offenders convicted of animal cruelty to undergo psychological evaluation: Arkansas (ARK. CODE ANN. § 5-62-103(c)(3)(A)(i) (Supp. 2013)); Colorado (COLO. REV. STAT. ANN. §18-9-202(2)(a.5)(III) (2012)); Delaware (DEL. CODE ANN. tit. 11, § 4362(b) (2007) (for pardon or commutation of sentence)); Illinois (510 ILL. COMP. STAT. ANN. 70/3.03(c) (West, Westlaw current through P.A. 99-904 of the 2016 Reg. Sess.)) (for torture); Iowa (IOWA CODE ANN. § 717B.3A(3)(a)(1) (West 2013)) (for torture)) and (IOWA CODE ANN. § 717C.1(3) (West 2013)) (for bestiality); Kansas (KAN. STAT. ANN. § 21-6412(b)(1) (Supp. 2012)); Nevada (NEV. REV. STAT. ANN. § 62E.680(1) (LexisNexis 2012)) (for juvenile offenders); West Virginia (W. VA. CODE ANN. § 61-8-19(h)(1) (LexisNexis 2010)) (for probation). The following states *permit* offenders convicted of animal cruelty to undergo psychological evaluation at the court's discretion: Arizona) (ARIZ. REV. STAT. ANN. § 13-1411(B)(1) (2009)) (for bestiality only); Colorado (COLO. REV. STAT. ANN. § 19-2-918.5(2) (2012)) (for juveniles); Connecticut (CONN. GEN. STAT. ANN. § 46b-140(c) (2009) (for juveniles); Delaware (DEL. CODE ANN. tit. 11, § 1326(h) (West, Westlaw through 80 Laws 2016, ch. 427)); District of Columbia (D.C. CODE ANN. § 22-1001(a)(2)(A) (West, Westlaw through Sept. 19, 2016)); Georgia (GA. CODE ANN. § 16-12-4(f) (West, Westlaw through 2016 Legis. Sess.)); Illinois (510 ILL. COMP. STAT. ANN. 70/3.02(c) (West 2014)) and (720 ILL. COMP. STAT. ANN. 5/12-35(f)(3) (Supp. 2013) (bestiality only); Louisiana (LA. STAT. ANN. § 14:102.1(2)(d) (Westlaw through the 2016 Regular Sess.); Maine (Me. Rev. Stat. Ann. tit. 7, § 4016(1)(D) (2002)); Michigan (MICH. COMP. LAWS ANN. §§ 750.50(5), 750.50b(5) (West, Westlaw through P.A.2016, No. 280 of the 2016 Regular Sess.)); Mississippi (MISS. CODE ANN. § 97-41-16(3)(b)(ii)(1) (Supp. 2013); Missouri ((MO. REV. STAT. § 566.111(3)(3) (2012)) for bestiality); Nevada (NEV. REV. STAT. ANN. § 176A.416(1)(a) (LexisNexis 2011)); New Mexico (N.M. STAT. ANN. § 30-18-1(G) (West 2016)); Ohio (OHIO REV. CODE ANN. § 959.99(7) (LexisNexis Supp. 2016); Oregon (OR. REV. STAT. ANN. §

ment[113] provisions. At the time of writing, thirty-one states, as well as the District of Columbia, address the mental health aspect

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167.334 (2011)); Rhode Island (4 R.I. GEN. LAWS § 4-1-36) (West 2016, Westlaw current through January 2016 session); Tennessee (TENN. CODE ANN. § 39-14-212(f) (2014)); Utah (UTAH CODE ANN. § 76-9-301(11)(a) (LexisNexis 2012); Washington (WASH. REV. CODE ANN. § 13.40.127(5) (West Supp. 2013)) (for juveniles).

113. The following states *require* offenders convicted of animal cruelty to complete some form of therapeutic counseling: Arkansas (ARK. CODE ANN. § 5-62-103 (Supp. 2013)); California (CAL. PENAL CODE § 597(h) (West, Westlaw through 2016 Reg. Sess.)); Florida (FLA. STAT. ANN. § 828.12(2)(a) (West 2016)) (for torture); Illinois (510 ILL. COMP. STAT. ANN. 70/3.03 (West, Westlaw through 2016 Reg. Sess.)) (for torture) and (510 ILL. COMP. STAT. ANN. 70/3.01–3.02 (West, Westlaw through 2016 Reg. Sess.)) (for juveniles and hoarders); Iowa (IOWA CODE ANN. § 717C.1(3) (West 2013)); Kansas (KAN. STAT. ANN. § 21-6412(b)(1) (Supp. 2012)); Nevada (NEV. REV. STAT. ANN. § 62E.680 (LexisNexis 2012)) (for juveniles); New Jersey, N.J. STAT. ANN. § 4:22-17(g) (West, Westlaw through 2016)) (for juveniles); New Mexico (N.M. STAT. ANN. § 30-18-1(H) (Supp. 2012.) (for juveniles); Texas (TEX. FAM. CODE ANN. § 54.0407 (West 2014)) (for juveniles). The following states *permit* offenders convicted of animal cruelty to complete some form of therapeutic counseling at the court's discretion: Arizona (ARIZ. REV. STAT. ANN. § 13-1411(B)(1) (2010)) (for bestiality); Colorado (COLO. REV. STAT. ANN. § 18-9-202(2)(a)(II) (West, Westlaw through 2016 Reg. Sess.) and (COLO. REV. STAT. ANN. § 19-2-918.5(1) (2012)) (for juveniles); Delaware (DEL. CODE. ANN. tit. 11, § 1326 (West, Westlaw through 80 Laws 2016)) (for animal fighting); District of Columbia (D.C. CODE ANN. § 22-1001(a)(2)(A) (West, Westlaw through 2016)); Illinois (510 ILL. COMP. STAT. ANN. 70/3.01-2 (West, Westlaw through 2016 Reg. Sess.)); Indiana (IND. CODE ANN. § 35-46-3-12(f)(1) (West, Westlaw through 2016 Reg. Sess.)); Louisiana (LA. STAT. ANN. § 14:102.1(2)(d) (West, Westlaw through 2016 Reg. Sess.)); Maine (ME. REV. STAT. ANN. tit. 17, § 1031(3-B) (West, Westlaw through 2015 Leg. Sess.)); Maryland (MD. CODE ANN., CRIM. LAW § 10-604–08 (LexisNexis 2012)); Michigan (MICH. COMP. LAWS ANN. §§ 750.50(5), 750.50b(5) (West, Westlaw through 2016 Reg. Sess.)); Minnesota (MINN. STAT. ANN. § 343.21(10)(4) (West 2012)); Mississippi (MISS. CODE ANN. § 97-41-16(b)(ii)(1) (West, Westlaw through 2016 Reg. Sess.)); Missouri (MO. ANN. STAT. § 566.111(3)(3) (West 2012)) (for bestiality); Nevada (NEV. REV. STAT. ANN. § 176A.416(1)(b) (LexisNexis 2011)); New Mexico (N.M. STAT. ANN. § 30-18-1(G) (West, Westlaw through 2016 Reg. Sess.)); Ohio (OHIO. REV. CODE ANN. § 959.99(E)(6) (West, Westlaw through 2015–2016 Legis. Sess.)); Oregon (OR. REV. STAT. ANN. § 167.350(4) (West, Westlaw through 2016 Reg. Sess.)); Rhode Island (4 R.I. GEN. LAWS § 4-1-36 (Supp. 2012)); Tennessee (TENN. CODE ANN. § 39-14-212(f) (LexisNexis 2014)); Utah (UTAH CODE ANN. § 76-9-301(11)(a) (LexisNexis 2012)); Ver-

of animal cruelty by permitting or requiring courts to order psychological evaluation and treatment for certain offenders. For example, Illinois requires judges to order psychological evaluation and treatment as part of sentencing in cases of animal hoarding, animal torture, or when the offender is a juvenile.[114] Iowa requires psychological treatment and evaluation upon conviction for animal torture or bestiality.[115] California requires offenders to undergo counseling "designed to evaluate and treat behavior or conduct disorders" as a condition of probation.[116]

IV. CLOSING THE LEGISLATIVE GAP IN PROTECTION

According to the Animal Legal Defense Fund's annual year-end report, Tennessee's animal protection laws currently rank twenty-second out of fifty-six in the nation for overall strength and comprehensiveness.[117] Despite its current middle-tier ranking, Tennessee has enacted several groundbreaking laws aimed at increasing protection for animals. Among these notable changes are the extension of the state's Good Samaritan law to include animals, and the creation of the nation's first statewide animal abuse registry. As originally enacted, Tennessee's Good Samaritan law relieved civilians from liability "for any damage resulting from the forcible entry of a motor vehicle for the purpose of removing a

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mont (VT. STAT. ANN. tit. 13, § 353(b)(4) (2009)); Virginia (VA. CODE ANN. § 3.2-6570(A) (West, Westlaw through 2016 Reg. Sess.)); Washington (WASH. REV. CODE ANN. § 13.40.127(5) (West, Westlaw through 2016 Reg. and Spec. Sess.)) (for juveniles) and (WASH. REV. CODE ANN. §§ 16.52.200(9), 16.52.205(5)(b) (West, Westlaw through 2016 Reg. and Spec. Sess.)); West Virginia (W. VA. CODE ANN. § 61-8-19(h)(2) (LexisNexis 2010) (anger management)).

114. 510 ILL. COMP. STAT. §§ 70/3.01–3.03 (West, Westlaw through 2016 Reg. Sess.).

115. IOWA CODE ANN. §§ 717B.3A(3)(1), 717C.1(3) (West 2016).

116. CAL. PENAL CODE § 597(h) (West, Westlaw through 2016 Reg. Sess.).

117. 2015 U.S. ANIMAL PROTECTION LAWS RANKINGS, *supra* note 78, at 7. In its tenth annual year-end report, the ALDF ranked the strength and overall comprehensiveness of each states' animal protection laws. *Id.* at 1–18. Also included in the rankings are the laws of the District of Columbia, the Virgin Islands, the Northern Mariana Islands, Puerto Rico, Guam, and American Samoa. *Id.*

minor from the vehicle."[118] In 2015, Tennessee amended the law and became the first state in the nation to extend immunity to civilians for breaking into a car to save an animal in distress.[119] Also in 2015, Tennessee lawmakers passed a historic bill that created a statewide animal abuse registry.[120] This online registry took effect January 1, 2016,[121] and is the first of its kind in the nation.[122] Several states have since followed Tennessee's lead in establishing a statewide animal registry, with similar bills currently pending in Illinois, Massachusetts, Michigan, Missouri, New Jersey, Pennsylvania, Washington, and West Virginia.[123]

A. *Current Status of Animal Cruelty Laws in Tennessee*

Tennessee, like many states, has a cross-reporting statute aimed at addressing the link between animal abuse and human violence. Current Tennessee law imposes a duty to report on "[a]ny state, county or municipal employee of a child or adult protective services agency, while acting in a professional capacity or within the scope of employment" who encounters an animal he or she knows or reasonably suspects has been abused or neglected.[124] Employees of child or adult protective services agencies must report such known or suspected animal abuse to "the entity or enti-

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118. TENN. CODE ANN. § 29-34-209 (West, Westlaw through 2014 Reg. Sess.) (amended 2015).

119. TENN. CODE ANN. § 29-34-209 (Supp. 2016); *see also* Arin Greenwood, *Groundbreaking Tennessee Law Lets Good Samaritans Save Dogs Trapped in Hot Cars*, HUFFINGTON POST (July 7, 2015, 8:03 PM), http://www.huffingtonpost.com/2015/07/07/tennessee-dog-hot-car_n_7746944.html. Although Tennessee is among several other states with laws pertaining to animals left in hot cars, Tennessee was the first state to extend immunity to civilians—rather than just law enforcement officers—for damage resulting from forcible entry of a car to save an animal in distress. *Id.*

120. *See* TENN. CODE ANN. §§ 40-39-101 to -103 (Suppl. 2016).

121. The Tennessee Animal Abuse Registry is available at: *Tennessee Animal Abuse Registry*, TENNESSEE BUREAU OF INVESTIGATION, https://www.tn.gov/tbi/topic/tennessee-animal-abuse-registry (last visited Sept. 14, 2016).

122. *New State Animal Abuser Registries Proposed in 2016*, NAT'L ANTI-VIVISECTION SOC'Y (Jan. 21, 2016), https://www.navs.org/news/new-state-animal-abuser-registries-proposed-in-2016.

123. *Id.*

124. TENN. CODE ANN. § 38-1-402(a) (2014).

ties that investigate reports of animal cruelty, abuse, and neglect in that county."[125] Tennessee is also one of the thirty-two states that address the mental health aspect of animal cruelty by either permitting or requiring courts to order psychological evaluation and treatment for certain offenders.[126] According to current Tennessee law, offenders convicted of aggravated cruelty to animals may—at the court's discretion—be required to undergo psychological evaluation and complete treatment or counseling.[127] Additionally, "[i]f a juvenile is found to be within the court's jurisdiction, for conduct that, if committed by an adult, would be a criminal violation involving cruelty to animals . . ., then the court may order the juvenile" to undergo a psychological evaluation and complete any necessary treatment.[128]

Although Tennessee's recent strides have increased the scope of protection for animals and thrust the state into the spotlight, the state's middle-tier ranking lends support to the notion that room for further improvement remains. As Tennessee is now in position to serve as a working model for other states hoping to bolster the strength of their animal-cruelty laws, Tennessee lawmakers should take this opportunity to improve its own existing laws. This Note proposes two statutory measures that would increase protection to animals, as well as humans, in Tennessee. First, Tennessee lawmakers should enact an inverse of the state's current cross-reporting statute, which requires health and human services agencies to report signs of animal abuse observed during the course of their employment, by imposing a reciprocal duty to report on animal welfare agents who encounter signs of domestic violence while acting in the scope of their employment. Second, Tennessee lawmakers should amend the penalty provisions in the state's current animal cruelty statutes to mandate—rather than merely allow—psychological evaluation and treatment both for juvenile offenders convicted of animal cruelty and for all offenders convicted of aggravated animal cruelty.

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125. *Id.*

126. COUNSELING LAWS FOR CONVICTED ANIMAL ABUSERS, *supra* note 83.

127. TENN. CODE ANN. § 39-14-212(f) (2014).

128. TENN. CODE ANN. § 39-14-212(j) (2014).

B. The Duty to Cross-Report Needs to Be a Two-Way Street

Given the frequent co-occurrence of animal abuse and domestic violence within a home, many states have enacted various forms of cross-reporting legislation that permit or mandate the sharing of known or suspected abuse between animal welfare agencies and human health and social services. The majority of states with cross-reporting laws permit or require child and adult protective services employees to report any signs of animal abuse they encounter while acting in the scope of their employment.[129] Most states, however, do not impose this same duty to report on animal welfare agency employees who encounter signs of domestic violence while acting in the scope of their employment.[130]

Tennessee's current cross-reporting statute is a one-way street, as employees of child or adult protective services agencies must report possible cases of animal abuse that they encounter, but animal welfare agency employees who observe signs of domestic violence within a home while investigating reports of animal cruelty are under no duty to report the suspected abuse to child or adult protective services.[131] This one-sided duty to report is illogical and under-inclusive. Acts of animal cruelty are typically part of a cyclical pattern of violence that affects human victims as well.[132] Animal welfare agencies are often the "first responder" to a family or household in distress,[133] which provides them with a glimpse into the home and an opportunity to observe additional, hidden forms of abuse that might otherwise go undetected. In the course

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129. NAT'L DIST. ATT'YS ASS'N, STATE CROSS-REPORTING MANDATES BY PROFESSION 1–11 (2014), http://www.ndaa.org/pdf/Cross-Reporting%20Mandates%20by%20Profession%20and%20State%20-%20Jan%202014%20-%20Jennifer's%20updates.pdf.

130. *Id.*

131. This deficiency in cross-reporting is somewhat remedied by a Tennessee law that requires all persons to report suspected cases of child abuse or neglect. *See* TENN. CODE ANN. § 37-1-403 (2014). However, older victims are left to fall through the cracks as no current or existing Tennessee law imposes a duty to report suspected domestic violence or elder abuse. *See id.*

132. *See supra* Part II.

133. *What is the Link*, *supra* note 23 (explaining that victims can be more comfortable disclosing details of animal abuse within the home than they are in discussing their own abuse, and neighbors are more likely to report suspected animal abuse than child or intimate partner abuse).

of investigating and responding to cases of animal abuse, animal welfare agencies may also encounter signs of children or women within the home who need help.[134] By not requiring animal welfare agencies to report this information to child and adult protective services, Tennessee's current statutory scheme allows victims of child abuse and intimate partner abuse to fall through the cracks. This must stop.

It is equally important for human health and social services to be familiar with signs of animal cruelty and to cross-report any suspected animal abuse to the appropriate agency. Screening for animal abuse by asking about companion animals and their welfare while speaking to victims of child and intimate partner abuse places mental health clinicians and social services employees in a unique position to discover multiple types of family violence.[135] Children who witness or perpetuate acts of violence towards animals[136] are at substantial risk of developing mental health problems and of becoming increasingly violent towards animals and fellow humans as he or she progresses into adulthood.[137] Social services professionals and mental health clinicians should incorporate questions about animals into their discussions with children

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134. *See* Janet Mickish & Kathleen Schoen, *Colorado Alliance for Cruelty Prevention: Safe Pets, Safe Families, Safe Communities*, 33 COLO. LAW. 37, Apr. 2004, at 37. (2004). Interestingly, the nation's first legal intervention in a child abuse situation occurred in 1874 when a child was successfully removed from the abusive home using animal protection laws. *Id.* at 38.

135. *What is the Link*, *supra* note 23.

136. *See* Phillips, *supra* note 68, at 15–23. Several states have recognized the negative effects of childhood exposure to animal abuse and the potential harm such abuse can have on a child's mental health development. *Id.* Some states have amended their laws to reflect this growing concern by increasing penalties for animal abuse perpetrated in front of a child. *Id. See* FLA. STAT. ANN. § 800.04 (West Supp. 2016) (increasing penalty for bestiality when committed in front of a minor child); IDAHO CODE ANN. § 18-1506A(1)(a) (West 2004 & Supp. 2013) (classifying animal torture committed in front of a child as ritualized child abuse and a felony); 720 ILL. COMP. STAT. ANN. 5/12-33(a)(1) (West 2002 & Supp. 2013) (classifying animal torture in front of a minor child as ritualized child abuse); OR. REV. STAT. ANN. § 167.320(4)(b) (2011) (committing animal abuse in front of a minor child is a first-degree felony); P.R. LAWS ANN. tit. 5, §§ 1668–70 (Westlaw through 2013) (enhancing the felony penalty for subsequent convictions of animal abuse if the offender has previously been convicted of abusing an animal in front of a minor child).

137. Phillips, *supra* note 68, at 15–23.

and battered spouses because victims who are hesitant to disclose details of their own abuse may be more open to discussing harm inflicted upon their pets.[138]

Accordingly, this Note proposes that Tenn. Code Ann. § 38-1-402(a) be amended to include the following italicized language:

> (a) Any state, county or municipal employee of *either* a child or adult protective services agency, *or an animal welfare and control agency,* while acting in a professional capacity or within the scope of employment, who has knowledge of or observes an animal *or person* that the person knows or reasonably suspects has been the victim of *domestic violence*, *animal* cruelty, abuse, or neglect, shall report the known or reasonably suspected *domestic violence*, animal cruelty, abuse, or neglect to the entity or entities that investigate reports of *domestic violence*, animal cruelty, abuse, and neglect in that county.

Expanding the scope of the duty to cross-report would lead to increased protection for humans and animals in Tennessee. The purpose behind cross-reporting statutes is to implement a multifaceted approach to better detect, resolve, and prevent these separate but often-interrelated forms of familial violence. The added value of cross-reporting amongst related entities and agencies is significantly diminished when the flow of information is one-sided. This illogical, one-sided duty to report has left a gaping hole that victims of child abuse and intimate partner violence continue to fall through. It is time for Tennessee lawmakers to fill this legislative gap in protection by imposing a reciprocal duty to report on any state, county or municipal employee of an animal control or welfare agency, who, while acting in a professional capacity or within the scope of his or her employment, encounters an individual he or

138. *What is the Link*, *supra* note 23 (explaining that when a victim is reluctant to talk about their abuse, discussing any abuse to pets within the home may "break the ice" and lead the victim to reveal details about his or her own abuse).

she knows or reasonably suspects has been the victim of domestic violence. Requiring animal welfare agencies to relay suspected child abuse or intimate partner violence to child and adult protective services is a rational extension of the already existing duty to cross-report. Expanding the scope of Tennessee's current duty to cross-report is a simple legislative act that could save lives.

C. The Need for Mandatory Psychological Evaluation and Treatment

Animal abuse offenders are unique in the sense that every perpetrator has individualized diagnostic factors, so the dynamics and underlying causes of each case must be individually assessed.[139] Required psychological evaluations are necessary not only to determine which offenders would stand to benefit from psychological treatment or counseling but also to formulate an individualized treatment approach once such a determination is made. "One size fits all" interventions, such as anger management, do not take into account the specific needs of each offender and may not address or treat the underlying issues that led to the initial animal abuse.[140] Each offender's potential risk to society varies depending on "the context and seriousness of the abuse, causative factors and the perpetrator's level of blameworthiness for their actions,"[141] so not all individuals who have engaged in acts of violence towards animals need therapeutic or mental health treatment.[142] Although not all abusers need to receive psychological treatment, it is important for all juvenile offenders convicted of animal cruelty and all offenders convicted of aggravated animal cruelty to undergo a diagnostic, psychological evaluation because

139. *Treatment Interventions*, *supra* note 109.

140. *See What is the Best Form of Treatment for an Animal Cruelty Offender?*, COLO. LINK PROJECT, http://coloradolinkproject.com/what-is-the-best-form-of-treatment-for-an-animal-cruelty-offender/ (last visited Sept. 14, 2016).

141. *Treatment Interventions*, *supra* note 109.

142. KEN SHAPIRO, STRATEGIZING THE LINK: A BRIEFING PAPER FROM THE NATIONAL LINK COALITION FOR MENTAL HEALTH PROFESSIONALS 1 (2015), https://www.researchgate.net/publication/277814626_Strategizing_the_Link. "At one end of the spectrum is a child of 4 years old who is curious about animals and pulls the wings off of butterflies; at the other end is a dual-diagnosed adult whose chronic delusions direct him or her to torture cats." *Id.*

simply subjecting an offender to traditional penalties—such as fines or imprisonment—is an ineffective response that fails to address or treat causative factors that contributed to the abuse.

The appropriate course of treatment will depend on the underlying behavioral typologies and experiences of a particular offender, and comprehensive evaluations should consider the following areas of each offender's background: cognitive functioning; blameworthiness; personality and mental health; social and developmental history; individual functioning and developmental competence; current family functioning; sexual and deviancy issues; employment and academic functioning; delinquency, conduct and behavioral issues; assessment of risk; protective factors; empathy and awareness of victim impact; substance abuse; offense and abuse characteristics; and supervision and legal issues.[143]

Tennessee law divides crimes of animal abuse into two separate offenses: cruelty to animals[144] and aggravated cruelty to animals.[145] Currently, the court has discretion in choosing whether to order juvenile defendants convicted of animal cruelty or defendants convicted of aggravated animal cruelty to undergo a psycho-

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143. *Animal Cruelty Specific Evaluation*, COLO. LINK PROJECT, http://coloradolinkproject.com/assessment-and-intervention/animal-cruelty-evaluation/ (last visited Sept. 14, 2016).

144. *See* TENN. CODE ANN. § 39-14-202 (2014). A person commits an offense of animal cruelty when he

> intentionally or knowingly (1) Tortures, maims or grossly overworks an animal; (2) Fails unreasonably to provide necessary food, water, care or shelter for an animal in the person's custody; (3) Abandons unreasonably an animal in the person's custody; (4) Transports or confines an animal in a cruel manner; or (5) Inflicts burns, cuts, lacerations, or other injuries or pain, by any method, including blistering compounds, to the legs or hooves of horses in order to make them sore for any purpose including, but not limited to, competition in horse shows and similar events.

Id.

145. See TENN. CODE ANN. §39-14-212 (2014) (defining "aggravated cruelty to animals" as intentionally killing or intentionally causing serious physical injury to a companion animal, through "conduct which is done or carried out in a depraved and sadistic manner and which tortures or maims an animal including the failure to provide food and water to a companion animal resulting in a substantial risk of death or death").

logical evaluation and receive counseling or treatment.[146] Tennessee lawmakers should amend the current penalty provisions to instead require that juvenile offenders convicted of animal cruelty, and all offenders convicted of aggravated animal cruelty, undergo psychological evaluation and, if deemed necessary, complete the appropriate mental health treatment or counseling. This Note proposes that the penalty provision of Tenn. Code Ann. § 39-14-202 be amended to include the following italicized language:

> (e) In addition to the penalty imposed in subsection (g), the court making the sentencing determination for a person convicted under this section shall order the person convicted to surrender custody and forfeit the animal or animals whose treatment was the basis of the conviction. Custody shall be given to a humane society incorporated under the laws of this state. The court may prohibit the person convicted from having custody of other animals for any period of time the court determines to be reasonable, or impose any other reasonable restrictions on the person's custody of animals as necessary for the protection of the animals. *If the convicted offender is a juvenile, the court shall order the offender to undergo a psychological evaluation and, if deemed necessary, to complete the appropriate form of psychological treatment and/or counseling.*

The link between childhood animal abuse and later violence towards humans supports mandatory psychological evalua-

146. TENN. CODE ANN. § 39-14-212(f) (2014); *see also* § 39-14-212(j) (2014) (Although TENN. CODE ANN. § 39-14-202 does not explicitly address the court's authority to order psychological evaluation and treatment for any offender convicted of cruelty to animals, § 39-14-212(j) explains that "[i]f a juvenile is found to be within the court's jurisdiction, for conduct that, if committed by an adult, would be a criminal violation involving cruelty to animals or would be a criminal violation involving arson, then the court may order that the juvenile be evaluated to determine the need for psychiatric or psychological treatment. If the court determines that psychiatric or psychological treatment is appropriate for that juvenile, then the court may order that treatment.").

tion and treatment, if needed, for juvenile offenders convicted of animal cruelty. It is imperative that children who commit acts of violence towards animals receive the appropriate psychological treatment because such aggression, especially at an early age, signals a developmental lack of empathy and a desensitized response to violence. A child who lacks empathy for others and is incapable of internalizing "ordinary social constraints on violent actions" will likely "progress towards further and more deviant criminal behavior as he gets older" if his psychological condition goes untreated.[147]

Additionally, this Note proposes that the penalty provisions of Tenn. Code Ann. § 39-14-212 be amended to include the following italicized language:

> (f) In addition to the penalty imposed by subsection (d), the court *shall order* the defendant to undergo psychological evaluation and counseling, the cost to be borne by the defendant. *If deemed necessary, the court shall order the defendant to complete the appropriate form of psychological treatment and/or counseling*;
>
> (j) If a juvenile is found to be within the court's jurisdiction, for conduct that, if committed by an adult, would be a criminal violation involving cruelty to animals or would be a criminal violation involving arson, then the court *shall* order that the juvenile be evaluated to determine the need for psychiatric or psychological treatment. If the court determines that psychiatric or psychological treatment is appropriate for that juvenile, then the court *shall* order that treatment.

At whatever age an offender's violence against animals is detected, it is essential that he be held accountable for his actions and receive the appropriate mental health treatment, if needed. Animal abuse is often indicative of deep psychological issues, and

147. Livingston, *supra* note 31, at 45.

traditional criminal punishments are "ineffective at reducing recidivism or preventing future acts of violence against animals and humans," because such penalties fail to address the causative factors at the root of the abuse.[148]

The importance of detecting and effectively treating those with a propensity to harm animals cannot be understated. Given the frequent overlap of animal abuse and interpersonal violence towards humans, treating the underlying causative factors of an offender's animal abuse will likely have a preventative effect on his later inclination to harm fellow humans. In cases where animal abuse and violence towards humans already co-exist within a home, properly addressing the mental health aspects behind the animal abuse would have a similar effect on decreasing other forms of abuse within the home as well. In sum, effectively treating the mental health deficiencies of animal abusers would directly benefit and protect society as a whole.

V. CONCLUSION

Research and statistics show a significant link between animal abuse, child abuse, and intimate partner abuse. These types of familial violence share a common theme involving power, control, and preying on the weak and vulnerable. Animal abuse, child abuse, and intimate partner abuse form an interrelated, cyclical pattern of violence, and states have responded to this cycle of abuse by enacting legislation to increase protection for both animals and humans. Already a trendsetter in the animal law world, Tennessee lawmakers can continue to pave the way for other states by enacting two statutory measures that would increase the overall strength and comprehensiveness of Tennessee's animal protection laws. First, Tennessee lawmakers should enact an inverse of the state's current cross-reporting statute, imposing a reciprocal duty to report on animal welfare agents. Second, Tennessee lawmakers should amend the penalty provisions in the state's current animal laws to include mandatory psychological evaluation and treatment for juvenile offenders convicted of animal cruelty and all offenders convicted of aggravated animal cruelty.

148. Muller-Harris, *supra* note 39, at 315.

Banning the Box in Tennessee: Embracing Fair Chance Hiring Policies for Ex-Offenders

MEGAN MCKENZIE REED*

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I. INTRODUCTION

In 2014, there were 636,346 people released from jail or prison in the United States, including 15,556 prisoners released in Tennessee.[1] In the most recent statewide recidivism study in Tennessee, forty-six percent of people released from jail or prison were re-incarcerated within just three years.[2] Recidivism, returning to prison for a new crime, stems in part from the inability of people with convictions to effectively assimilate back into the law-abiding community.[3] To combat recidivism, communities need to aid the flood of ex-offenders in their reentry to both the workplace and society at large.[4]

Over one hundred municipalities and twenty-four states have recently adopted a growing fair chance hiring policy called "ban the box," which refers to the commonly-used check box on job applications inquiring into an applicant's prior criminal record.[5] Ban the box laws mandate that employers remove the question from employment applications asking, "Have you ever been convicted for violation of the law other than minor traffic offenses?

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1. E. ANN CARSON, U.S. DEPARTMENT OF JUSTICE, PRISONERS IN 2014 10 tbl.7 (2015).

2. CHRISTINE HERRMAN ET AL., VERA INST. OF JUSTICE, REPORT OF THE VERA INSTITUTE OF JUSTICE TO THE TENNESSEE GOVERNOR'S TASK FORCE ON SENTENCING AND RECIDIVISM 3 (2015).

3. *Id.* at 4.

4. Nancy B. Sasser, *"Don't Ask, Don't Tell": Negligent Hiring Law in Virginia and the Necessity of Legislation to Protect Ex-Convicts from Employment Discrimination*, 41 U. RICH. L. REV. 1063, 1063 (2007).

5. MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY, NAT'L EMP'T LAW PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS 1 (2016) [hereinafter CITIES, COUNTIES, AND STATES], http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf. Five states—Louisiana, Missouri, Oklahoma, Tennessee, and Wisconsin—just adopted Ban the Box policies in 2016, and Vermont amended its Ban the Box policy to apply to public employers as well as private employers in 2016. *Id.*

If yes, state the nature of the offense[.]"[6] The standard ban the box law removes this box on the employment application, ensuring that employers consider applicants on their merits before taking any past mistakes into consideration.[7] For example, Connecticut's ban the box policy requires employers to deem a potential employee as otherwise qualified for the position before conducting a criminal background check.[8] So, an employer is not prohibited from ever looking into the employee's criminal history; the employer must simply postpone the background check until some time after the initial application. This usually happens once the employer has deemed the employee otherwise qualified for the job, which can be evidenced by a conditional offer of employment.[9] If, after the employer has given a conditional offer of employment, the background check reveals a prior conviction or arrest history, the employer must then consider factors derived from *Green v. Missouri Pacific Railroad Company*.[10] In *Green*, the court established a list of factors to guide an employer's evaluation of whether to disqualify an applicant based on a prior criminal offense.[11] Under *Green*, an employer should consider: (1) the time elapsed since the conviction; (2) the nature and seriousness of the crime in relation to the job sought; (3) the degree of the individual's rehabilitation; and (4) the circumstances under which the crime was committed.[12]

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6. Joey Garrison, *Metro Adopts 'Ban the Box' for Most City Job Applications*, THE TENNESSEAN (Nov. 10, 2015, 5:26 PM), http://www.tennessean.com/story/news/politics/2015/11/10/metro-adopts-ban-box-policy-most-city-jobs/75515562/.

7. *See* Michelle Natividad Rodriguez & Anastasia Christman, *The Fair Chance / Ban the Box Toolkit*, NAT'L EMP'T LAW PROJECT (Apr. 2, 2015), http://www.nelp.org/publication/the-fair-chance-ban-the-box-toolkit/.

8. CONN. GEN. STAT. ANN. § 46a-80(b) (West 2009 & Supp. 2013).

9. *See id.*; *Criminal Background Screenings and Employment – Fact Sheet for Job Applicants*, OFFICE OF HUMAN RIGHTS, D.C., http://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/ApplicantFAQ_FINAL_120914.pdf (last updated Dec. 11, 2014).

10. *See* Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1297 (8th Cir. 1975); *see also* CONN. GEN. STAT. ANN. § 46a-80(c) (West 2009 & Supp. 2013).

11. *Green*, 523 F.2d at 1297.

12. *See Green*, 523 F.2d at 1297 (affirming an Iowa district court ruling that condemned employment practices that banned applicants with criminal records when "no consideration is given to the nature and seriousness of the crime in relation to the job sought, [t]he time elapsing since the conviction, the

These factors ensure that an employer has a legitimate business reason for disqualifying a potential employee based on his prior criminal history rather than systematically excluding all people with conviction histories. States need to implement this added protection because, while Title VII and the Fair Credit and Reporting Act provide some protection, there are still many holes in whom the law protects.[13] Ban the box policies offer fair chances for job opportunities to those with prior criminal records, which encourages rehabilitation, promotes community development, and reduces the recidivism rate.[14]

Throughout the United States, over 100 states and municipalities have already adopted hiring practices that prohibit employers from inquiring into an applicant's criminal history on an initial employment application.[15] As of 2016, twenty-four states from almost every region of the country had adopted some form of policy limiting employer inquiry into criminal backgrounds of job applicants.[16]

This Note will argue that Tennessee should enact a statute guiding both public and private employers in their use of criminal history in job applications. The proposed statute will serve as a means to encourage incorporation of ex-offenders into the workplace and into a productive community by allowing them to be considered for jobs. Municipalities in Tennessee, such as Nashville, Memphis, and Chattanooga, have already begun implementing ordinances governing employer use of criminal history in the hiring process.[17] A statewide statute embracing the goals of reducing recidivism and incorporating ex-offenders into the productive workforce is necessary to address this fast-growing national issue. Further, in what is likely to be a huge step for Tennessee, the state

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degree of the felon's rehabilitation, and the circumstances under which the crime was committed . . . ."); *see also* CONN. GEN. STAT. ANN. § 46a-80(b) (West 2009 & Supp. 2013); D.C. CODE ANN. § 32-1342(d) (West, Westlaw through 2016).

13. *See infra* Part IV.

14. *See* Michelle Natividad Rodriguez, *"Ban the Box" Is a Fair Chance for Workers with Records*, NAT'L EMP'T LAW PROJECT (Aug. 1, 2015) [hereinafter *Fair Chance*], http://www.nelp.org/publication/ban-box-fair-chance-workers-records/.

15. CITIES, COUNTIES, AND STATES, *supra* note 5, at 1.

16. *Id.*

17. *See, e.g.*, MEMPHIS, TENN., CITY CODE § 3-4-4 (2016).

legislature recently passed a ban the box law applying to all *state employers*, prohibiting them from inquiring into criminal history on an initial job application, with some exceptions.[18] The new Tennessee ban the box statute prevents a state employer from inquiring into an applicant's criminal history on the initial job application but allows the state to inquire about an applicant's criminal history after the initial screening if the applicant has the opportunity to explain the circumstances around the conviction.[19] However,

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18. *See* TENN. CODE ANN. § 8-50-112 (2016); *see also* Kitty Capelle, *"Ban the Box" Bill Passes Senate in Tennessee*, LOCAL 8 (Mar. 8, 2016, 11:50 AM), http://www.local8now.com/content/news/Ban-the-Box-bill-passes-Senate-in-Tennessee-371401731.html. Governor Haslam subsequently signed this bill into law. *See* Joel Ebert, *House Sends 'Ban the Box' Bill to Haslam*, THE TENNESSEAN (Mar. 14, 2016, 10:17 PM), http://www.wbir.com/news/local/house-sends-ban-the-box-bill-to-haslam/82838484 ("Before the chamber's vote, Gov. Bill Haslam said he supported the bill and would likely sign the legislation."). But he signed a companion bill first on March 31, 2016, prohibiting any local government in Tennessee from prohibiting a private employer from requesting certain information on an employment application or during the hiring process. *See* Act of Mar. 31, 2016, Pub. Ch. No. 606 (to amend TENN. CODE ANN. § 7-51-1802). The Act states:

> Except as otherwise provided by state or federal law, a local government shall not, as a condition of doing business within the jurisdictional boundaries of the local government or contracting with the local government, prohibit an employer from requesting any information on an application for employment or during the process of hiring a new employee.

Id. So, before passing the proposed statewide ban the box statute for public employers, Tennessee first banned local governments from extending any ban the box policy to private employers. *See id.* This is at odds with the ultimate goal behind the ban the box movement—to offer fair chances of employment to ex-offenders and reduce the recidivism rate. Tennessee should not limit its fair chance hiring policies to public employers before it has had any chance to evaluate how a statewide ban the box policy for public employers affects recidivism.

19. TENN. CODE ANN. § 8-50-112(b) (2016) provides that:

> If an employer announces a position for employment that is not a covered position, the employer shall not inquire about an applicant's criminal history on the initial application form. An employer may inquire about an applicant's criminal history after the initial screening of applications. If an employer inquires about an applicant's criminal history, the employer shall provide the applicant with an opportunity to provide an explanation of the applicant's criminal history to the employer.

this new Tennessee statute does not apply to private employers, leaving many jobs completely unattainable for those with criminal records.[20] This Note will argue that a statute applying to both public and private employers is more in line with current public policy throughout the nation and best serves the goals of reducing recidivism and encouraging post-arrest employment in Tennessee.[21]

Part II of this Note will provide an overview of how criminal history affects job opportunities for ex-offenders. Part III will outline different interests of employers in the hiring process, focusing mainly on negligent hiring and how it relates to criminal background checks. Part IV will examine the different federal implications relating to criminal background checks in the hiring process, specifically Title VII, the Equal Employment Opportunity Commission ("EEOC"), and the Fair Credit and Reporting Act. Part V will examine different ban the box laws in other states, as well as the Memphis, Tennessee, ban the box ordinance. Part V will then argue that the ban the box movement is imminent for Tennessee because of various underlying policy ramifications. Finally, Part VI will provide the elements of a proposed ban the box law for Tennessee.

II. OVERVIEW OF CRIMINAL HISTORY AFFECTING JOB PLACEMENT

A. Implications of Ban the Box

As many as 70 million adults in the United States have a prior arrest or conviction, and it is nearly impossible for those individuals to find employment in a time when employers can easily access background checks through the Internet, thereby systematically excluding anyone from employment who has a conviction

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Id.

20. *See id.*

21. While the policies that have already been implemented prohibiting state and local government employers from inquiring into criminal history on initial job applications show that Tennessee is receptive to the idea of fair chance hiring policies, the recent legislation prohibiting localities in Tennessee from limiting private employers does not embrace the underlying goals of such legislation and is not in accordance with the direction these laws are moving. *See supra* note 18, Act of Mar. 31, 2016, Pub. Ch. No. 606 (to amend TENN. CODE ANN. § 7-51-1802) (banning local governments in Tennessee from extending ban the box policies to private employers).

record.[22] A majority of employers currently use criminal background checks as an integral part of their hiring processes, and this trend has continued to increase in the last several years.[23] Particularly in the aftereffects of September 11, 2001, background checks have become both easily accessible and inexpensive, making them a popular tool for employers.[24] One survey found that as many as ninety-two percent of employers use background checks when making hiring decisions.[25] Criminal background checks can promote safety in the workplace by allowing employers to exclude anyone with a criminal history, but it is still up to the employer to become informed about the individual it is hiring. "However, imposing a background check that denies *any* type of employment for people with criminal records is not only unreasonable, but it can also be illegal under civil rights laws."[26] Employers who use "blanket exclusions fail to take into account critical information, including the nature of an offense, the age of the offense, or even its relationship to the job."[27] This is important because blanket

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22. NAT'L EMP'T LAW PROJECT, SEIZING THE "BAN THE BOX" MOMENTUM TO ADVANCE A NEW GENERATION OF FAIR CHANCE HIRING REFORMS 2 (2014) [hereinafter SEIZING MOMENTUM] http://www.nelp.org/content/uploads/2015/03/Seizing-Ban-the-Box-Momentum-Advance-New-Generation-Fair-Chance-Hiring-Reforms.pdf (estimating that 70 million U.S. adults have some arrest or conviction that makes the likelihood of a callback interview for an entry level position drop by fifty percent).

23. *See* MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 1 (2011), http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf?nocdn=1 (noting that the criminal background check industry has grown in recent years, providing access to more employers and further limiting the pool of jobs that ex-offenders can attain).

24. *See id.*

25. *See* SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS 3 (2010) [hereinafter CONDUCTING CRIMINAL BACKGROUND CHECKS], https://perma.cc/4MKV-YKY7 (displaying the findings of a survey conducted by the largest association of human resources personnel of which the members consist mostly of large employers).

26. RODRIGUEZ & EMSELLEM, *supra* note 23, at 1.

27. *Id.*

exclusions that fail to take such information into account could be unconstitutional.[28]

For example, a fifteen-year-old *nonviolent* drug charge will likely have no effect on the job performance of a potential employee at a grocery store but can serve as a barrier to employment at the grocery store. Johnny Magee found himself in exactly this situation.[29] He was a developmentally disabled man in Dublin, California, who picked up a package for his uncle; Magee was completely unaware that the package contained drugs.[30] Although Magee had never used drugs or been convicted of any other offense, he was arrested and convicted of conspiracy to commit a drug offense in 1999.[31] Magee had held the same landscaping job for six years, but budget cuts forced him to search for a new job in 2008.[32] He applied to be a garden center attendant at Lowe's Home Improvement store in 2008, nearly ten years after his arrest.[33] Despite Magee's years of prior experience in the industry and good job performance, Lowe's denied Magee the job because of his single conviction.[34] Magee never had an opportunity to explain the circumstances of his arrest or demonstrate his fitness for the job.[35] Later, Magee petitioned the court for a dismissal of his conviction, which the court granted, setting aside his finding of guilt.[36] Companies with blanket-exclusion hiring policies for those with any arrest history deny employment to potentially better-qualified applicants without even reaching the applicant's qualifications or providing an opportunity for the applicant to explain the circumstances around his or her conviction.

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28. *See* Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1297–98 (establishing the list of factors for an employer to evaluate a prior criminal offense and reasoning that failing to consider these factors is likely to result in "an unnecessarily harsh and unjust burden" on certain racial groups, particularly black males).

29. *See* RODRIGUEZ & EMSELLEM, *supra* note 23, at 4.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

Ban the box laws reduce discrimination in the hiring process by allowing a fair chance for ex-offenders to attain employment or to at least be considered for the position.[37] Ban the box laws encourage numerous goals: (1) they promote hiring based on qualifications for the job rather than placing a complete bar on employment due to a prior conviction; (2) they encourage individualized assessment of applicants, potentially leading to more efficient hiring practices; (3) they reduce the recidivism rate by increasing job opportunities for people with convictions; and (4) they incorporate ex-offenders back into the workplace.

1. Promote Hiring Based on Qualifications for the Job

Ban the box laws promote hiring decisions based on qualifications for the job rather than criminal histories.[38] "Ban the box laws do not preclude employers from ever looking into an applicant's criminal history, but do postpone the inquiry until later in the hiring process."[39] The rationale behind postponing an employer's inquiry into an applicant's criminal history is to promote hiring based on qualifications for the job, such as prior experience in the industry or educational background, rather than systematically denying every applicant with a conviction history.[40] The conviction may have been a youthful indiscretion that is remote in time and easily explained, or it may be a situation like Johnny Magee's, in which a court later set aside his finding of guilt.[41] Moreover, society should not continue to hold people accountable when they have already served their time and paid their debt to society; the criminal justice system does not intend a conviction to forever bar an individual from employment.[42]

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37. *See* SEIZING MOMENTUM, *supra* note 22, at 2.

38. *See Fair Chance*, *supra* note 14.

39. Barbara L. Johnson & Stefanee J. Handon, *State Employment Law Developments* II.B. Mar. 26–28, 2015, Westlaw SW025 ALI-CLE 1441.

40. *Id.*

41. *See* RODRIGUEZ & EMSELLEM, *supra* note 23, at 4.

42. *See, e.g.*, SEIZING MOMENTUM, *supra* note 22, at 1 ("Fair chance hiring policies are positioned like never before to change minds and open up job opportunities for the millions of people who have been unfairly locked out of the job market.").

Opponents of ban the box laws argue that employers should retain full discretion over hiring persons with criminal records, regardless of the effect on recidivism. Their concern is not without merit, but "[b]an the [b]ox laws do not *require* employers to hire people with criminal records."[43] Employers still retain control over the hiring process, and specific exceptions, such as sensitive jobs or jobs involving contact with vulnerable populations, would allow initial background checks.[44] Many ban the box laws provide a list of factors for employers to take into account when evaluating whether an employee is fit for the job.[45] These factors provide a framework for employers to evaluate potential employees based on qualifications for the job rather than criminal history alone; they also reduce employer liability under negligent hiring laws by requiring the employer to be aware of potential risks associated with each particular position and potential employee.[46]

Many of the factors employers must take into account in making employment decisions under ban the box laws stem from the factors the Eighth Circuit set out in *Green v. Missouri Pacific Railroad Company.*[47] In *Green*, the court struck down an employment practice that refused to consider any applicant convicted of a crime other than a minor traffic offense.[48] The court opined that:

> We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed. This is

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43. Johnson & Handon, *supra* note 39 at II.B. (emphasis added).

44. *Id.* at II.E.2.; *see also infra* note 133 (indicating the exception under New York law); *infra* note 161 (indicating the exception under the Memphis, Tennessee, City Code).

45. *See* D.C. CODE ANN. § 32-1342 (West, Westlaw through 2016); N.Y. CORRECT. LAW § 753 (McKinney, Westlaw through L.2016).

46. *See* James R. Todd, Comment, *"It's Not My Problem": How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-convicts*, 36 ARIZ. ST. L.J. 725, 727–28 (2004) (examining the factors an employer needs to take into account when deciding whether to hire a new employee, especially when looking to hire an ex-convict).

47. Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1297 (8th Cir. 1975).

48. *Id.*

> particularly true for blacks who have suffered and still suffer from the burdens of discrimination in our society. To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.[49]

When evaluating whether an employer should disqualify an applicant based on a criminal offense, the employer should look at the time elapsed since the conviction, the nature and seriousness of the crime in relation to the job sought, the degree of the individual's rehabilitation, and circumstances under which the crime was committed.[50] These factors have become a basis of various topics in employment law, including suggested employment practices. For example, the EEOC has incorporated these factors into its guidelines for consideration of arrest and conviction records in employment decisions.[51] The EEOC guidelines outline "Targeted Exclusions that Are Guided by the *Green* Factors."[52] The *Green* factors and their salience in ban the box legislation are important for weight of authority reasons. They demonstrate that ban the box is justified by the judiciary and is not an entirely legislatively-created doctrine.

2. Encourage Individualized Assessment

Ban the box laws encourage individualized assessment by potential employers, which should result in the hiring of employees more suited to each job.[53] Under ban the box laws, employers

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49. *Id.* at 1298.

50. *Id.* at 1297.

51. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), [hereinafter EEOC ENFORCEMENT GUIDANCE], https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

52. *Id.*

53. *See* SEIZING MOMENTUM, *supra* note 22, at 2 ("The most effective fair chance hiring policies not only remove the conviction and arrest history questions from the application, they also ensure that employers take into account other important factors when considering an applicant's conviction history, in-

cannot place a blanket ban on employment because of a conviction, so this allows the employer an opportunity to interview the candidate, observe his demeanor, and, if allowed by the particular statute, have him explain the circumstances around any conviction or arrest.[54] As discussed in Part III, this could also serve as protection against employer liability for negligent hiring because the employer did take time during the hiring process to assess the individual and his or her suitability for the particular job.[55] Part V discusses specific factors involved in ban the box laws that are supported by both the EEOC guidelines and case law.

3. Reduce Recidivism by Increasing Job Opportunities

Ban the box laws reduce recidivism by increasing employment opportunities for people with convictions. Studies suggest that up to seventy-seven percent of ex-offenders will be re-incarcerated within five years of initial release.[56] Allowing more job opportunities for ex-offenders has numerous and far-reaching benefits, including promoting public safety, saving costs associated with the criminal justice system such as court costs and prison costs, increasing tax revenue by generating more income tax, and improving the family lives of persons related to ex-offenders.[57] According to the National Employment Law Project, a nonprofit

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cluding the age of the offense, the relationship of the individual's record to the job duties and responsibilities, and evidence of rehabilitation.").

54. *Id.*

55. *See generally* Marshalls of Nashville, Inc. v. Harding Mall Assocs., 799 S.W.2d 239, 243 (Tenn. Ct. App. 1990) (holding that defendant was not negligent in hiring).

56. *See* Press Release, Bureau of Justice Statistics, 3 in 4 Former Prisoners in 30 States Arrested Within 5 Years of Release (Apr. 22, 2014), http://www.bjs.gov/content/pub/press/rprts05p0510pr.cfm (stating that two-thirds of a sample of prisoners released were arrested for a new crime within three years, and three-fourths were arrested within five years).

57. Christina O'Connell, Note, *Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination*, 83 FORDHAM L. REV. 2801, 2805–06 (2015); *see also* Anastasia Christman & Michelle Natividad Rodriguez, *Research Supports Fair Chance Policies*, NAT'L EMP'T LAW PROJECT (Aug. 1, 2016), http://www.nelp.org/publication/research-supports-fair-chance-policies/ (noting that nearly 700,000 people return to their home communities from incarceration every year).

organization that continually researches relevant issues in employment law:

> The reality that over one in four U.S. adults has a criminal record brings this issue and its public safety and economic consequences to the doorstep of every home in America. As U.S. Secretary of Labor Hilda L. Solis recently stated, "Stable employment helps ex-offenders stay out of the legal system. Focusing on that end is the right thing to do for these individuals, and it makes sense for local communities and our economy as a whole."[58]

When individuals are employed, recidivism goes down.[59] The Safer Foundation, an organization that helps to incorporate formerly incarcerated individuals back into productive society, offers a staffing service for people with criminal records.[60] The program offers initial transitional employment in ninety-day time slots and then offers support as participants move towards permanent employment.[61] The program started in 2005, and, in 2011, Loyola University conducted a recidivism study of the Safer Foundation's outcomes, finding that the program's recidivism rate was sixty-three percent lower than the statewide rate when the individuals maintained an initial employment for at least thirty days.[62]

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58. *See* RODRIGUEZ & EMSELLEM, *supra* note 23, at 4 (quoting Press Release, U.S. Dep't of Labor, US Department of Labor Announces Grant Competition to Help Former Offenders Gain Career Skills and Rejoin Community Life (Feb. 10, 2011), http:// www.dol.gov/opa/media/press/eta/ETA20110185.htm).

59. *See* John M. Nally et al., *The Post-Release Employment and Recidivism Among Different Types of Offenders with a Different Level of Education: A 5-Year Follow-Up Study in Indiana*, 9 JUST. POL'Y J. 1, 20 (2012) (finding that "the 'employed' offenders had a lower recidivism rate than the 'unemployed' offenders after release from prison" and "African American males were likely to be recidivist offenders after release from IDOC custody").

60. *Transitional Employment Program*, SAFER FOUNDATION, http://www.saferfoundation.org/services-programs/transitional-employment-program (last visited Oct. 20, 2016).

61. *Id.*

62. *Id.*

4. Incorporate Prior-Convicts Back into the Workplace

Ban the box laws help to incorporate prior convicts back into both the workforce and society. Initiatives like ban the box laws

> reduce barriers to employment, so that people with past criminal involvement – after they have been held accountable and paid their dues – can compete for appropriate work opportunities in order to support themselves and their families, pay their taxes, and contribute to the economy.[63]

Research of ban the box laws shows that employment of ex-offenders reduces recidivism, helps to strengthen family life, and allows parents to maintain child support.[64] Research also indicates that where ban the box policies do exist, there is an "unmistakable impact on employer hiring practices benefiting people with arrest and conviction histories."[65] In Minneapolis, "city officials found that removing the conviction or arrest history check-box from initial applications and postponing background checks until after a conditional offer of employment resulted in more than half of applicants with a conviction being hired."[66] Moreover, city officials in Atlanta discovered that ten percent of new hires were people with convictions due to its fair hiring policy.[67] These studies show that ban the box policies already in place are accomplishing their goal of encouraging productive employment for people with convictions.

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63. Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Files Suit Against Two Employers for Use of Criminal Background Checks (June 11, 2013), http://www.eeoc.gov/eeoc/newsroom/release/6-11-13.cfm.

64. SEIZING MOMENTUM, *supra* note 22, at 2.

65. *Id.*

66. *Id.*

67. *Id.*

III. Employers' Interests: The Tort of Negligent Hiring

A. Negligent Hiring in General

Opponents of ban the box movements, particularly ban the box policies that apply to private employers, may fear that policies limiting employer inquiry into criminal history put employers at risk for the tort of negligent hiring. But this risk is both minimal and unlikely because ban the box policies provide additional incentive and guidelines for employers to thoroughly interview potential employees before giving a conditional offer.

Employers can face liability for negligent hiring when an employer is negligent in employing an individual who poses an unreasonable risk of harm to others.[68] This liability is based in tort law rather than under an agency theory.[69] Liability under negligent hiring turns on whether a plaintiff can prove that the employer knew or should have known that an employee was unfit or possessed otherwise dangerous characteristics at the time of hiring.[70] Some jurisdictions involve unreasonable or foreseeable risk of harm as an additional element.[71]

B. Negligent Hiring Laws in Tennessee

To recover under a negligent hiring claim in Tennessee, a plaintiff must establish the elements of a negligence claim and that the employer had knowledge of the employee's unfitness for the job.[72] The prima facie elements of negligence in Tennessee are: "(1) a duty of care owed by defendant to plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that

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68. 27 AM. JUR. 2D *Employment Relationship* § 372, Westlaw (database updated Sept. 2016) (citations omitted).

69. *Id.* (citations omitted).

70. *Id.* (citations omitted).

71. *Id.* (citations omitted).

72. *See* Marshalls of Nashville, Inc. v. Harding Mall Assocs., 799 S.W.2d 239, 243 (Tenn. Ct. App. 1990) (holding that defendant was not negligent in hiring the independent contractor because the plaintiff did not prove that the defendant knew or ascertained by reasonable means that the independent contractor was not qualified).

duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause."[73]

"The tort of negligent hiring stems from the principle that a person conducting an activity through employees is liable for harm resulting from the negligent conduct in the employment of improper persons . . . involving risk of harm to others."[74] The risk described is a foreseeable one;[75] thus, in-depth interviews of candidates inherently reduce the foreseeable risk by ensuring that the employer takes the opportunity to find out additional information about the candidate, observing his demeanor during the interview, and otherwise assessing how good a fit the applicant would be for the job at issue. Antidiscrimination laws concerning criminal background explicitly address this concern by providing incentives to conduct in-depth interviews of potential employees and also by providing factors under which to evaluate a conviction if one is discovered.[76]

C. Ban the Box and Negligent Hiring

Ban the box laws create further incentive for employers to conduct in-depth job interviews in order to determine whether applicants pose foreseeable risks. Ban the box laws do not mandate that employers hire ex-offenders; they merely provide guidelines for use of information regarding criminal history in the hiring process and some timing requirements for obtaining that information.[77] Even though some might object to ban the box policies because of negligent hiring liability, a negligent hiring suit is unlikely under a ban the box policy.[78] Under a ban the box policy,

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73. Giggers v. Memphis Hous. Auth., 277 S.W.3d 359, 364 (Tenn. 2009) (quoting McCall v. Wilder, 913 S.W.2d 150, 153 (Tenn. 1995)).

74. Phipps v. Walker, No. 03A01-9508-CV-00294, 1996 WL 155258, at *2 (Tenn. Ct. App. Apr. 4, 1996) (citation omitted).

75. *See* Doe v. Catholic Bishop for the Diocese of Memphis, 306 S.W.3d 712, 714 (Tenn. Ct. App. 2008).

76. *See infra* Part V.

77. Johnson & Handon, *supra* note 39.

78. An employer is allowed to revoke a conditional offer to a potential employee if he concludes that the nature and seriousness of the crime relate to the job sought. *See* Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1297 (8th Cir. 1975) (quoting Butts v. Nichols, 381 F. Supp. 573, 580 (S.D. Iowa 1974)) ("There is no doubt that the State could logically prohibit and refuse employ-

employer liability based on negligent hiring is a small risk because the employer uses the *Green* factors and individualized assessments to thoroughly evaluate potential employees.[79] Therefore, it is unlikely that this thorough investigation would be found negligent.

IV. FEDERAL ISSUES: TITLE VII AND THE FAIR CREDIT AND REPORTING ACT

A. Title VII and the EEOC

Ban the box laws provide protection for classes not fully shielded from discrimination by federal laws. This includes ex-offenders who cannot easily recover as part of a protected class, such as white males or women with criminal records.

While courts recognize both disparate impact and disparate treatment liability under Title VII, ban the box policies deal only with disparate impact. Under a disparate impact analysis, Title VII prohibits employment practices that, although facially neutral, exclude a "disproportionate percentage" of minorities unless the employer can prove that there was a "business necessity."[80] Under the burden-shifting analysis, a plaintiff must first establish a "prima facie case of substantially disparate impact."[81] Once the plaintiff establishes the prima facie case, the burden then shifts to the employer to demonstrate that the employment practice at issue is justified as a business necessity.[82]

An employment policy that uses an applicant's criminal background as a bar to employment could face a Title VII challenge based on a discriminatory impact on race.[83] Title VII claims are prevalent due to the high rate of individuals in prisons belonging to protected classes.[84] In *Green*, the court found the railroad

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ment in certain positions where the felony conviction would directly reflect on the felon's qualifications for the job . . . .").

79. *See Green*, 523 F.2d at 1297–98.

80. *Id.* at 1293 (citations omitted).

81. *Id.* (citations omitted).

82. *Id.* (citations omitted).

83. O'Connell, *supra* note 57, at 2808.

84. *Inmate Race*, Fed. Bureau of Prisons, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last updated Oct. 20, 2016).

company's employment practice of placing an absolute bar on employment for applicants with conviction records had a discriminatory impact on race and, therefore, violated Title VII.[85] Further, Johnny Magee[86] filed Title VII charges with the EEOC against Lowe's after the home improvement store denied him employment based on his criminal conviction record.[87] An ex-offender can prevail under Title VII if he can show that the particular hiring practice of the business had a disparate impact on a protected class and that the employer cannot prove a business necessity.[88] Courts have held that a criminal conviction is not prima facie job related and requires a more in-depth analysis of the nature of the specific criminal behavior compared to the nature of the job for which the individual is applying.[89] This means that an individual cannot bring an action under Title VII solely because a policy discriminated against people with convictions.

Disparate impact claims only come into play if the employment practice has a significant impact on a protected class.[90] Ex-offenders are not a protected class under Title VII.[91] Further, disparate impact liability does not protect classes such as women

85. *Green*, 523 F.2d at 1298–99.

86. *See supra* Part II.

87. *See* RODRIGUEZ & EMSELLEM, *supra* note 23, at 4.

88. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."); *see also* 42 U.S.C.A § 2000e-2(k)(1)(A)(i) (2013) ("[A] complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.").

89. *Compare* El v. Se. Pa. Transp. Auth., 479 F.3d 232 (3rd Cir. 2007) (holding that an aggressive crime could disqualify an applicant from a job involving transporting disabled persons), *with Green*, 523 F.2d at 1298 (striking down an employment practice that refused to consider any applicant convicted of a crime other than a minor traffic offense because "fear of cargo theft," "employment disruption caused by recidivism," and "alleged lack of moral character" were not business necessities).

90. 42 U.S.C.A. § 2000e-2 (2013) (enumerating "race, color, religion, sex, and national origin" as the categories of which discrimination is expressly prohibited).

91. *Id.*

or white citizens.[92] This is one of the holes in federal protection. In a state such as Tennessee without additional state law protection for ex-offenders, many prospective employees who are discriminated against based on having a criminal record only have a claim through state versions of Title VII *as a member of a protected class*.[93] White citizens, females, and certain other minorities are unlikely to be able to prove the prima facie case of significant impact. This leaves them without a remedy in states that lack additional anti-discrimination protection.[94]

The EEOC endorsed the movement to limit inquiry into criminal records on job applications in its Enforcement Guidance of 2012.[95] Courts typically look to EEOC guidelines as guiding and very persuasive authority. The EEOC's guidance states, "As a best practice, and consistent with applicable laws, the Commission recommends that employers do not ask about convictions on job applications . . . ."[96] The EEOC provides stricter guidelines for employer consideration of arrest and conviction records in relation to Title VII.[97] The EEOC notes that an arrest, as opposed to a conviction, does not establish that the individual has engaged in criminal conduct and does not prove a business necessity.[98] However, "an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position."[99] In most circumstances, a conviction (as opposed to an arrest) can be "sufficient evidence" that an applicant engaged in criminal activity, and, when otherwise allowed by the guidelines, an employer may rely on the conviction when considering potential employees.[100]

Employment practices not conforming to the EEOC guidelines might be subject to Title VII challenges. Because the EEOC and private parties file suits in this area based on disparate treatment and disparate impact of the hiring process, the guidance thor-

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92. *Id.*
93. Todd, *supra* note 46, at 744.
94. *See generally Green*, 523 F.2d at 1293.
95. EEOC ENFORCEMENT GUIDANCE, *supra* note 51.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*

oughly discusses when a potential violation may occur.[101] A disparate treatment violation may occur if an employer treats conviction or arrest history differently for different applicants based on race.[102] A disparate impact violation may also occur if an employer's facially neutral employment practice disproportionately impacts a protected class and there is no legitimate business necessity.[103] Factors the EEOC consistently recognizes as job related and as a business necessity are: (1) whether the employer's policy follows the Uniform Guidelines on Employee Selection Procedures or (2) whether the "targeted screen considers at least the nature of the crime, the time elapsed, and the nature of the job."[104] The second factor above provides for individualized assessment and notes that, while not required, "individualized assessment" significantly decreases the likelihood of a Title VII violation.[105]

The EEOC outlined suggestions for best employer practices, including:

> Eliminate policies of practices that exclude people from employment based on any criminal record. Train managers, hiring officials, and decision makers about Title VII and its prohibition on employment discrimination . . . . Develop a narrowly tailored written policy for screening potential applicants and employees for criminal conduct . . . . Determine the specific offenses that may demonstrate unfitness for performing such jobs . . . . Include an individualized assessment . . . . When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.[106]

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101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* Note that these are the factors identified by the Eighth Circuit in *Green v. Missouri Pacific Railroad*, 523 F.2d 1290, 1297 (8th Cir. 1975).
105. *Id.*
106. *Id.*

State ban the box statutes reflect many of these factors and guidelines.[107] These guidelines signal the EEOC's intent to monitor and pursue litigation in the area described in the above section more aggressively.[108] The EEOC's intent is also evidenced by the EEOC's recent increase in litigation in the area of employer use of criminal background checks.[109] The EEOC's growing concern in the area of criminal background checks in the employment process shows that public policy is moving towards broader protection, such as ban the box laws, for people with convictions.

B. Fair Credit and Reporting Act

The Fair Credit and Reporting Act (FCRA) also provides some protection against absolute bans on employment based on prior convictions or arrests, but, like Title VII, it fails to provide enough protection for ex-convicts. The FCRA regulates both employer use of criminal background information and also the credit reporting agencies (CRAs) that compile criminal background information.[110] The FCRA's goal is to "monitor accuracy in credit reporting by regulating CRAs and employer disclosure once a report is consulted."[111] The FCRA requires employers to provide notice of adverse actions to applicants along with an opportunity to correct the information.[112] The FCRA uses three main guidelines to regulate certain aspects of employer use of background checks: (1) the applicant must provide the employer with signed permission before conducting the background check; (2) if the employer intends to use information gleaned from the background check to deny employment, the employer must provide the applicant with a report and a summary of the applicant's FCRA rights; and (3) the

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107. *See, e.g.*, D.C. CODE ANN. § 32-1342 (West, Westlaw through 2016).

108. *See* EEOC ENFORCEMENT GUIDANCE, *supra* note 51; *see also* Theodore W. Reuter, *Equal Employment Opportunity Commission's War on Background Checks*, 57 ADVOCATE 24 (2014); Press Release, U.S. Equal Emp't Opportunity Comm'n, *supra* note 62 (reporting that the EEOC filed suit against both BMW and Dollar General for using criminal background policies resulting in disproportionate exclusion of African Americans).

109. *See* Press Release, U.S. Equal Emp't Opportunity Comm'n, *supra* note 63.

110. O'Connell, *supra* note 57, at 2812.

111. *Id.*

112. Johnson & Handon, *supra* note 39.

employer must provide notice if he intends to take adverse action against the applicant based on the background check.[113]

The FCRA, however, is relatively narrow in its scope and application to criminal background checks and employment applications. First, the FCRA only provides a private cause of action to individuals who can show that a CRA was negligent or willfully noncompliant.[114] Second, courts require a high showing of error or inaccuracy in the reporting itself to provide a cause of action under the FCRA.[115] The remedy is based on the presence of a misleading report, not just the use of a report in general.[116] Moreover, courts are reluctant to hold the credit reporting agencies liable since the Federal Trade Commission has failed to provide adequate guidelines in evaluating inaccuracies.[117] Because the FCRA does not provide significant protection for people with convictions, many states have enacted policies like ban the box laws to provide additional opportunities for people with convictions to attain employment.

States and localities have increasingly passed laws governing the use of criminal histories in employment applications because, under Title VII and the FCRA, federal law fails to provide adequate protection for individuals with criminal histories to allow them to assimilate back into productive society.[118]

V. BAN THE BOX INITIATIVES ALREADY IN PLACE

Throughout the United States, twenty-four states and over 150 cities and counties have adopted ban the box policies.[119] Most states have policies that remove the conviction history question on

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113. *See* 15 U.S.C. § 1681b(b)(2)–(b)(3) (2014); O'Connell, *supra* note 57, at 2813.

114. O'Connell, *supra* note 57, at 2814.

115. *Id.*

116. *See* 15 U.S.C. § 1681(b) (providing that the FCRA's purpose is "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information. . . .").

117. O'Connell, *supra* note 57, at 2814.

118. Johnson & Handon, *supra* note 39.

119. *See* CITIES, COUNTIES, AND STATES, *supra* note 5, at 1.

job applications for public employers only, but nine states and the District of Columbia have policies that extend to both public and private employers, representing a new and crucial step in the movement.[120]

A. Ban the Box Laws that Apply to Public Employers

The states that prohibit initial inquiry into criminal history by public employers are: California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Vermont, Virginia, and Wisconsin.[121] Along with these states, many cities and municipalities have ban the box policies that apply to public employers.[122] In Tennessee, these include Memphis, Nashville, and Chattanooga.[123]

Connecticut's ban the box policy, like many others, requires public employers to deem a potential employee otherwise qualified for the position before conducting a criminal background check.[124] Connecticut is a good example of a recently adopted ban the box statute because it contains a standard list of factors or guidelines that an employer must consider when evaluating an applicant's criminal history. If the background check reveals a prior conviction or arrest, the employer must consider: "(1) the nature of the crime and its relationship to the job for which the person has applied; (2) information pertaining to the degree of rehabilitation of the convicted person; and (3) the time elapsed since the conviction or release . . . ."[125]

Connecticut's ban the box statute is also a good example of the policy underlying the movement. The statute provides that:

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120. *Id.*

121. *Id.*

122. *See, e.g.*, MEMPHIS, TENN., CITY CODE § 3-4-4 (2016); Garrison, *supra* note 6; Valeria Sistrunk, *City Council Votes to "Ban the Box"*, WDEF.COM, (Dec. 1, 2015, 11:02 PM), http://www.wdef.com/2015/12/01/city-council-votes-to-ban-the-box/.

123. *See* MEMPHIS, TENN. CITY CODE § 3-4-4 (2016); Garrison, *supra* note 6; Sistrunk, *supra* note 122.

124. *See* CONN. GEN. STAT. ANN. § 46a-80(b) (West 2009 & Supp. 2013).

125. *Id.* § 46a-80(c).

> The General Assembly finds that the public is best protected when criminal offenders are rehabilitated and returned to society prepared to take their places as productive citizens and that the ability of returned offenders to find meaningful employment is directly related to their normal functioning in the community. It is therefore the policy of this state to encourage all employers to give favorable consideration to providing jobs to qualified individuals, including those who may have criminal conviction records.[126]

The Connecticut statute embodies the movement towards incorporating ex-offenders back into society and recognizes the positive impact on the rest of the public that occurs by allowing these individuals to find gainful employment. Further, it is noteworthy here that the house and the senate both unanimously passed the ban the box bill and overrode a veto by the governor.[127] This demonstrates the receptiveness of many state legislators to adopt fair hiring practices that provide a chance for ex-offenders to attain gainful employment. It also reveals the significance of the underlying goals of these policies—to return ex-offenders to gainful employment and to reduce the recidivism rate. These goals are best served by policies applying to both public and private employers. Dual policies provide a larger pool of jobs and a better opportunity to reincorporate ex-convicts into productive society, thereby reducing the recidivism rate and bettering the public good.

B. Ban the Box Laws That Apply to Both Public and Private Employers

The states that prohibit initial inquiry into criminal history by public and private employers are: Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, and Vermont, and also the District of Columbia.[128]

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126. *Id.* § 46a-79.

127. *Connecticut's Fair Chance Law*, VERIFYPROJECT.COM, http://www.verifyprotect.com/ban-the-box/connecticut/ (last visited Oct. 20, 2016).

128. *See* CITIES, COUNTIES, AND STATES, *supra* note 5.

New York's Antidiscrimination Statute is an example of a fair chance hiring policy that applies to both public and private employers, but it focuses more on the reasons for using criminal history in an employment decision rather than the timing of when an employer can use that information.[129] This statute is a good example of the goals behind fair chance hiring policies—allowing job opportunities for ex-convicts while still protecting employers and preserving their control over hiring decisions.

New York's statute applies to:

> any application by any person for a license or employment at any public or private employer, who has previously been convicted of one or more criminal offenses in this state or in any other jurisdiction . . . . Nothing in this article shall be construed to affect any right an employer may have with respect to an intentional misrepresentation in connection with an application for employment.[130]

New York's antidiscrimination statute prohibits an employer from rejecting an applicant convicted of a crime, or from finding a lack of "good moral character" based solely on the fact that the applicant was convicted of the crime.[131] New York's statute prohibits a blanket denial of employment based on a prior conviction.[132] The statute then lays out exceptions to the prohibition:

> (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to

129. *See* N.Y. CORRECT. LAW § 751 (McKinney, Westlaw through L.2016).

130. *Id.*

131. *Id.* § 752.

132. *See id.*

> property or to the safety or welfare of specific individuals or the general public.[133]

In considering a potential employee, the public agency or private employer must look to several factors: (a) New York's public policy to "encourage the licensure and employment of persons previously convicted of one or more criminal offenses"; (b) the duties and responsibilities related to the employment; (c) the effect the crime for which the applicant was convicted will have on performance of the job; (d) the time elapsed since the crime; (e) the age of the person at the time of the criminal offense; (f) the seriousness or nature of the offense; (g) any information related to the potential employee's rehabilitation and good conduct; (h) "[t]he legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public."[134]

In making an employment determination, the employer must also consider any "certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein."[135] Note that the certificate of good conduct is similar to the certificate of employability in Tennessee, which provides judicial authorization that a specific individual has rehabilitated to a substantial degree and will be able to contribute and perform in employment.[136] This further demonstrates the need for a similar statute in Tennessee—Tennessee has already taken one of the crucial steps listed in the New York Antidiscrimination Statute.[137]

Washington D.C.'s ("D.C.") Antidiscrimination Statute is an example of a statute that has specific and individualized assessment requirements.[138] D.C.'s antidiscrimination statute prohibits an employer from inquiring about or requiring an application to reveal an arrest or criminal accusation.[139] Employers cannot ask

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133. *Id.*
134. *Id.* § 753(1).
135. *Id.* § 753(2).
136. TENN. CODE ANN. § 40-29-107 (2015).
137. *See id.*
138. D.C. CODE ANN. § 32-1342 (West, Westlaw through 2016).
139. *Id.* § 32-1342(a).

an employee or require disclosure of a criminal conviction until after a conditional offer of employment is given.[140] A conditional offer of employment is defined as an offer that is conditional based only on results of subsequent inquiry into a criminal background or another "employment-related contingency expressly communicated to the applicant at the time of the offer."[141] Employers may only revoke conditional offers for a legitimate business reason, which must be reasonable in light of the following factors:

> (1) The specific duties and responsibilities necessarily related to the employment sought or held by the applicant; (2) The bearing, if any, of the criminal offense for which the applicant was previously convicted will have on his or her fitness or ability to perform one or more such duties or responsibilities; (3) The time which has elapsed since the occurrence of the criminal offense; (4) The age of the applicant at the time of the occurrence of the criminal offense; (5) The frequency and seriousness of the criminal offense; and (6) Any information produced by the applicant, or produced on his or her behalf, in regard to his or her rehabilitation and good conduct since the occurrence of the criminal offense.[142]

These factors are nearly identical to the factors in the New York Anti-discrimination statute, and they are also consistent with the business necessity defense in similar actions under federal law, particularly Title VII actions of discriminatory impact.[143]

The D.C. statute exempts companies that employ people who will work in sensitive industries or with vulnerable populations.[144] For example, the statute exempts employers "[w]here a federal or District law or regulation requires the consideration of an applicant's criminal history for the purposes of employment"

140. *Id.* § 32-1342(b).

141. *Id.* § 32-1341(3).

142. *Id.* § 32-1342(d).

143. *See* N.Y. CORRECT. LAW § 753 (McKinney, Westlaw through L.2016); *see also supra* Part IV.A.

144. D.C. CODE ANN. § 32-1342 (West, Westlaw through 2016).

and employers that "provide[] programs, services, or direct care to minors or vulnerable adults."[145]

C. Why Ban the Box is Imminent for Tennessee

In March 2016, both houses of the Tennessee legislature voted in favor of a ban the box bill applying to all state employers in Tennessee.[146] The law provides that any state employer announcing an employment position that is not covered shall *not* inquire into an applicant's criminal history on the application form, but "[a]n employer may inquire about an applicant's criminal history after the initial screening of applications."[147] However, this does not apply to private employers.[148] During the inquiry, an employer must provide the applicant an opportunity to explain any conviction, and the employer must consider factors such as:

> (1) The specific duties and responses of the position;
>
> (2) The bearing, if any, that an applicant's criminal history may have on the applicant's fitness or ability to perform the duties required by the position;
>
> (3) The amount of time that has elapsed since the applicant's conviction or release;
>
> (4) The age of the applicant at the time of the commission of each offense;
>
> (5) The frequency and seriousness of each offense;
>
> (6) Any information produced by the applicant regarding the applicant's rehabilitation and good conduct since the occurrence of an offense; and

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145. *Id.*

146. S.B. 2440, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016); H.B. 2442, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016), which became TENN. CODE ANN. § 8-50-112 (2016).

147. TENN. CODE ANN. § 8-50-112(b) (2016).

148. *See id.* § 8-50-112(f)(2) ("'Employer' [m]eans the state and any agency, authority, branch, bureau, commission, corporation, department, or instrumentality of the state. . . .").

> (7) Any public policy considerations with respect to the benefits of employment for applicants with criminal histories.[149]

A "[c]overed position" in Tennessee would be "a position for employment for which a criminal background check is required under federal law or for which the commission of an offense is a disqualifying event for employment under federal or state law[.]"[150]

The Tennessee ban the box law represents a huge milestone for Tennessee in embracing fair chance hiring policies for ex-offenders.[151] While this is a significant step in the right direction for reducing recidivism and incorporating ex-convicts back into productive society, evidence shows that the best way to fulfill these goals is through a fair chance hiring policy that applies to *both* public and private employers.[152] The current legislation alone shows that the ban the box movement is imminent for Tennessee. And evidence of localities in Tennessee willingly embracing fair chance hiring policies is further proof that Tennessee should adopt a statewide ban the box policy.

The National Employment Law Project, which researches the latest developments in fair hiring practices and widely promotes ban the box laws, recently outlined several "Lessons Learned from Fair Chance Hiring Campaigns[.]"[153] The study found that it is helpful to establish strong ban the box policies in major metropolitan areas in a state before enacting a statewide reform.[154] Many of the current statewide ban the box laws were passed following enactment of local ordinances (California, Connecticut, Illinois, Massachusetts, Minnesota, and Rhode Island are

149. *Id.* § 8-50-112(c). Note the similarities to the *Green* factors. Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1297 (8th Cir. 1975).

150. *Id.* § 8-50-112(f)(1).

151. *See id.*

152. *See supra*, Part II.A. Further, the thousands of individuals released from prison in Tennessee each year will likely be applying for jobs not limited to state employment. To best meet the goals of these policies, a Tennessee ban the box policy should apply to both public and private employers, encouraging employment for individuals fit for the job across the board, not just in government jobs.

153. SEIZING MOMENTUM, *supra* note 22, at 4–5.

154. *Id.* at 5.

a few examples).[155] The study found that this "is especially true in more politically conservative states, like Georgia, Florida, Indiana, Michigan, North Carolina, Texas, and Wisconsin, where there are local campaigns that can help lay the groundwork for statewide initiatives."[156]

Memphis, for example, has a ban the box law applying to the city as an employer.[157] This demonstrates that some Tennessee citizens, through their legislatures, have been thinking about, and are receptive to, the idea of promoting job opportunities for individuals with criminal records.[158] The Memphis ordinance bans inquiry by the city into an applicant's criminal history until "after it has been determined that the applicant is otherwise qualified for the position."[159] This prohibits initial, automatic disqualification of an applicant based solely on criminal record. The ordinance also explicitly prohibits the "box" on the job application regarding inquiry into criminal history.[160] It specifically excludes "police, fire and emergency medical services positions," allowing those positions to have initial background checks for safety reasons.[161] This is similar to the exceptions in statewide statutes for sensitive jobs.

The Memphis ordinance then outlines the specific steps an employer must make to inquire into a criminal background once a candidate has been deemed otherwise qualified for the position.[162] The employer must give a conditional offer of employment, pending a history check, and the applicant must complete a form listing any previous convictions.[163] The city then must provide the applicant with written notification: (1) that a criminal background check will be conducted, (2) that the applicant has an opportunity to rebut a decision of withdrawal of the conditional offer, and (3) what evidence the applicant can provide to rebut information.[164] If

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155. *Id.*
156. *Id.*
157. MEMPHIS, TENN. CITY CODE § 3-4-4 (2016).
158. *See id.*
159. *Id.* § 3-4-4(B).
160. *Id.*
161. *Id.*
162. *Id.* § 3-4-4(C).
163. *Id.*
164. *Id.* § 3-4-4(C).

the city does choose to rescind an offer after the criminal background check, it must provide a copy of the background check with the specific incident disqualifying employment highlighted.[165] The applicant then has ten days to rebut the denial of employment.[166]

The Memphis ordinance identifies factors the city may use to evaluate previous convictions: (1) the nature of the crime in relation to the job at issue, (2) information concerning the applicant's rehabilitation, (3) time elapsed since the conviction, (4) other information about the degree of rehabilitation or good conduct, (5) the applicant's age at the time of the conviction, (6) the gravity of the offense, and (7) the public policy of the city to encourage employment for ex-offenders.[167]

Other Tennessee cities also support ban the box policies. For instance, Nashville has a significant ban the box movement, and efforts to add a ban the box referendum for all Nashville employers to the August 2015 ballot nearly passed.[168] The Nashville Metro Civil Service Commission recently adopted a ban the box statute effective January 1, 2016, that applies to all potential employees for the Metro Civil Service Commission.[169] Further, Chattanooga voted to remove the criminal history question on city job applications in December 2015.[170] The presence of ban the box legislation in all of the major metropolitan areas in Tennessee, along with the newly-passed statewide ban the box policy for public employers, demonstrates that Tennessee is receptive to the goals behind this movement. A statewide ban the box policy

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165. *Id.* § 3-4-4(D)(1).

166. *Id.* § 3-4-4(D)(2) ("The applicant or current employee shall have ten business days, after notice and the photocopy of the conviction history report from the city, to respond to the city regarding the conviction history report. The city shall provide the applicant with an opportunity to present information rebutting the accuracy and/or relevance of the conviction history report, including information pertaining to any of the factors listed in this subsection D. The city must review all information and documentation received from the applicant prior to taking any final action as to whether to hire said applicant.").

167. *Id.* § 3-4-4(E). Again, note the similarities to the *Green* factors. Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1297 (8th Cir. 1975).

168. *See* Garrison, *supra* note 6.

169. Garrison, *supra* note 6.

170. Sistrunk, *supra* note 122.

would align with current views and promote uniformity across the state.

Moreover, in 2014, Tennessee enacted a law to "help reformed former felons find employment and lead lawful lives as productive members of society."[171] The law creates a certificate of employability, in which a judge determines that a specific person with a conviction is sufficiently rehabilitated to be deemed fit for employment.[172] The certificate is meant to help create jobs for those with criminal histories, reduce crime by decreasing the recidivism rate, and protect employers from claims of negligent hiring.[173] When determining whether to grant the certificate of employability, the judge will consider whether the petitioner has sustained an honest, respectable character and whether granting of the petition will materially assist the petitioner in attaining gainful employment; the judge will also ensure that the petitioner does not pose an unreasonable risk to public safety or the safety of any individual.[174]

While the certificate of employability is a step in the right direction, it does not fully address the issue.[175] The certificate neither guarantees hiring nor prevents an employer from inquiring into the criminal background of the applicant; it is more so aimed at providing legal protection to the employer.[176] It also puts a financial burden on the applicant by requiring a filing fee of up to $450.[177] This is a huge burden for a person who has been incarcerated and is seeking a job. Further, the process requires an individual to prepare a petition, find references, and appear before a court; some situations may even require the petitioner to hire an attor-

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171. Suzanne Robertson, *Senate Approves Bill for Felons' Employability Certificate*, TENN. B. ASS'N (Mar. 11, 2014, 4:15 PM) http://www.tba.org/news/senate-approves-bill-for-felons-employability-certificate; *see also* TENN. CODE ANN. § 40-29-107 (2015).

172. *See* TENN. CODE ANN. § 40-29-107 (2015).

173. Robertson, *supra* note 171.

174. *See* TENN. CODE ANN. § 40-29-107(2015).

175. Josh Spickler, *New Certification Law Seeks to Give Tennesseans with a Record a Better Chance in the Job Market*, SHELBY COUNTY PUB. DEFENDER (July 18, 2014), http://defendshelbyco.org/new-certification-law-seeks-to-give-tennesseans-with-a-record-a-better-chance-in-the-job-market/.

176. *See id.*

177. *Id.*

ney.[178] A certificate of employability, though, is one way states begin to address the problem of recidivism and incorporating ex-convicts back into the workforce. Tennessee has already adopted the certificate of employability, which shows that Tennessee is ready to address recidivism and incorporate ex-convicts into the workplace.

In addition to the evidence within Tennessee showing the state is receptive to the policies behind the ban the box movement, there is evidence of similar states embracing ban the box laws. Georgia, a similar southern and conservative state, has a ban the box law that applies to public employers.[179] Georgia became the first state in the South to ban the box in 2015 when Governor Nathan Deal signed the policy into law through an executive order.[180] In Atlanta, Georgia, research showed that a separate city-wide fair chance hiring policy resulted in people with previous arrest or conviction histories making up ten percent of the City's new employees between March and October of 2013.[181] In North Carolina, another southern and conservative state with a similar policy background, many counties and cities have adopted ban the box laws as well: Charlotte, Carrboro, Durham County, Durham City, Spring Lake, Cumberland County.[182]

Throughout the United States, the trend among both public and private employers is to move away from initially inquiring into criminal history in order to promote effective assimilation into the workplace for ex-offenders. In addition to similar southern states moving towards fair chance hiring policies, some private sector companies have abandoned inquiry into criminal history on job applications, which shows how broad and far-reaching this issue is. For example, nationwide employers such as Target are enacting ban the box policies to increase job opportunities for those who

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178. *Id.*

179. *Victory! Georgia Becomes the First State in the South to "Ban the Box" on State Employment Applications*, GA. JUST. PROJECT (Feb. 23, 2015), http://www.gjp.org/news/victory-georgia-becomes-the-first-state-in-the-south-to-ban-the-box-on-state-employment-applications/.

180. *Id.*

181. *See* SEIZING MOMENTUM, *supra* note 22, at 2.

182. *See North Carolina's Fair Chance Law: Cities or Counties with a Fair Chance Policy*, VERIFYPROJECT.COM, http://www.verifyprotect.com/ban-the-box/north-carolina/ (last visited Oct. 20, 2015).

have served their time for an offense and are ready to assimilate back into productive society.[183] Because many private sector companies and states have implemented fair hiring practices like ban the box, employers already have to comply with numerous variations in fair hiring practices.[184] Montserrat Miller, a partner in the D.C. office of Arnall Golden Gregory, who deals closely with varying ban the box policies, advised, "[t]he trend on passage of ban-the-box measures will continue at the state levels and should therefore be considered holistically by companies as they consider their overall hiring and retention practices with respect to the use of criminal history records."[185]

State ban the box statutes serve as a remedy for those affected by this largely unregulated area of federal law. Because ban the box laws help to solve significant problems, and are gaining nationwide attention, the Tennessee legislature should adopt a statewide ban the box policy applying to both public and private employers. This will provide avenues of aid to those, such as white males, who have no other remedies under Tennessee law for employment discrimination based on criminal convictions. It will also aid tremendously in reducing the recidivism rate and paving the way for more stable communities.

VI. PROPOSED BAN THE BOX LAW FOR TENNESSEE

To accommodate for the integration of the 15,556 individuals who were released from incarceration in Tennessee in 2014 (along with the tens of thousands of individuals released from prison in Tennessee in previous years), who will need to assimilate back into society and the workforce, the Tennessee legislature should enact a policy that restricts the use of criminal convictions and arrest records in the hiring process for both public and private

183. Maxwell Strachan, *Target to Drop Criminal Background Questions in Job Applications*, HUFFINGTON POST (Oct. 30, 2013, 6:24 PM), http://www.huffingtonpost.com/2013/10/29/target-criminal-history-questions_n_4175407.html.

184. *See* Roy Maurer, *Ban-the-Box Movement Goes Viral*, SOC'Y FOR HUM. RESOURCE MGMT., http://www.shrm.org/hrdisciplines/safetysecurity/articles/pages/ban-the-box-movement-viral.aspx (last visited Oct. 21, 2016).

185. *Id.*

employers.[186] The national ban the box movement, supported by federal institutions such as the EEOC, has been steadily gaining momentum in Tennessee. This is evidenced by Nashville, Memphis, and Chattanooga passing city ordinances banning the box for public employers and the Tennessee legislature voting in favor of a ban the box law applying to all state employers.[187] Taking into account the effectiveness of laws in other states, as well as the enforcement guidelines provided by the EEOC, this Note proposes a ban the box law to apply across the state of Tennessee.

The proposed Tennessee law will apply to both public and private employers. This is important because it provides the most significant protection for ex-offenders and best accommodates the policies behind the ban the box movement—decreasing recidivism by increasing employment opportunities. A law applying to only state employers increases the job opportunities available to individuals released from incarceration, but it leaves out a significant portion of jobs for which those individuals could apply and possibly attain. This proposed law does not mandate that any private employer hire people with convictions. It would simply allow the opportunity for all persons deemed otherwise fit for the job to be interviewed and given a chance for employment. The timeline for my proposed Tennessee law provides that employers may not inquire into criminal history until the employer has determined that the applicant is otherwise qualified for the position. This will provide an opportunity for the candidate to explain or provide other evidence relating to the conviction. Further, only a relevant conviction will be used as grounds for denial of a position.

The law will provide exceptions for sensitive jobs or jobs associated with vulnerable populations, meaning that the ban the box law will not apply to those positions. This will be developed on a case-by-case basis rather than specifically listing the jobs that come into contact with vulnerable populations, but the statutory comments will purposely mention several examples.[188] The statute will also provide an exception for employers that "provide[] pro-

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186. *See* CARSON, *supra* note 1, at 10 tbl.7.

187. *See* MEMPHIS, TENN. CITY CODE § 3-4-4 (2016); Garrison, *supra* note 6; *see also* Capelle, *supra* note 18.

188. Some examples could include teachers, social workers, firefighters, and child care providers.

grams, services, or direct care to minors or vulnerable adults," or any job required by state or federal law to have a background check.[189] This provision includes teachers and adult caregivers, along with positions such as therapists, doctors, or other positions of significant fiduciary authority.

My proposed Tennessee ban the box law will also provide an exemption for employers who have ten or fewer employees. This is meant to protect and encourage small businesses that do not have the resources to screen potential employees, in contrast to larger businesses with dedicated human resources departments.

When the employer, in compliance with the rest of the statute, has otherwise deemed a potential employee fit for the position, the employer may then conduct a background check into the applicant's criminal history. If the background check reveals a prior arrest or conviction, the employer must use the following guidelines to evaluate the offense:[190] (1) specific duties and responsibilities necessarily related to the position sought by the applicant; (2) whether the prior conviction will bear upon the applicant's fitness or ability to perform a duty or responsibility of the position; (3) the time elapsed since the criminal offense; (4) the applicant's age at the time of the offense; (5) the frequency and seriousness of the offense; and (6) any information produced by the applicant or on his or her behalf regarding rehabilitation and good conduct since the offense.[191] These factors align with those set forth in the guidelines provided by the EEOC and the *Green* factors recognized by federal courts in determining a business necessity.[192]

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189. *See* D.C. CODE ANN. § 32-1342(c) (West, Westlaw through 2016).

190. *See, e.g.*, D.C. CODE ANN. § 32-1342(d) (West, Westlaw through 2016) ("legitimate business reason" factors); N.Y. CORRECT. LAW § 753(h) (McKinney, Westlaw through L.2016); MEMPHIS, TENN. CITY CODE § 3-4-4(E) (2016).

191. *See* TENN. CODE ANN. § 40-29-107 (2015) (providing for a certificate of employability if a judge determines certain factors of rehabilitation are met); *see also* Green v. Mo. Pac. R. Co, 523 F.2d 1290, 1297 (8th Cir. 1975) (identifying factors to consider when assessing whether an exclusion is consistent with a business necessity: the nature and gravity of the offense, time passed since the offense, and the nature of the job held or sought).

192. *See Green*, 523 F.2d at 1298 (striking down an employment practice refusing to consider any applicant convicted of a crime other than a minor traffic offense because "fear of cargo theft," "employment disruption caused by recidi-

If an employer follows the above guidelines but deems the applicant unfit for the position, the employer must provide written notice to the applicant containing the reason (the specific factor that the applicant did not meet) for refusing the position.[193] The written notice requirement will align with the guideline from the EEOC that provides for identifying the specific offenses that would make a candidate unfit for the particular job.[194] It would also ensure that the employer thoroughly assessed the candidate and provide some protection against misuse of the guidelines. Understandably, many may argue that this proposed law is a meaningless hurdle for employers who will likely just dismiss the applicant from consideration as soon as the law will allow them to, but, as mentioned previously, statistics taken from other states and municipalities suggest that such an argument is likely to fail because ban the box policies have led to employers hiring more people with convictions.[195] Opponents of ban the box policies may also argue that a policy limiting inquiry into criminal background during the application process puts an undue burden on small businesses without human resources offices because they will be forced to waste valuable resources interviewing potential candidates and providing conditional offers to later discover a hurdle to employment because of a criminal history.[196] However, concerns like these are not as significant as they might seem because many ban the box laws, including my proposed law for Tennessee, exempt employers who have ten or fewer employees, recognizing their lack of

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vism," and "alleged lack of moral character" were not business necessities); EEOC ENFORCEMENT GUIDANCE, *supra* note 51.

193. *See* MEMPHIS, TENN. CITY CODE § 3-4-4(D) (2015) (providing guidelines for how a public employer must inform the potential employee of revocation of the conditional offer).

194. EEOC ENFORCEMENT GUIDANCE, *supra* note 51.

195. *See* SEIZING MOMENTUM, *supra* note 22, at 2 (describing how city officials in Atlanta discovered that, in the seven months after the ban the box policy took force, ten percent of new hires were people with convictions).

196. *Tennessee Considers Ban the Box*, NAT'L FED'N OF INDEP. BUS. (Mar. 31, 2015), http://www.nfib.com/article/tennessee-considers-ban-the-box-68581/. Josh Boyd, a small business owner in Nashville, indicates that ban the box will cause him to waste "hours of time" on the wrong candidate, increase the likelihood of his hiring a felon, and will overall make work environments more dangerous due to the risk of hiring a prior felon. *Id.*

resources to conduct such in-depth hiring practices.[197] This exemption of small businesses, along with the exemption for sensitive jobs or those associated with vulnerable populations, stems from balancing the concern of safety against the concern of improving job opportunities for ex-offenders.[198] Current ban the box laws take into account the conflicting concerns of the employer's interest in hiring the best candidate for the job and protecting against negligent hiring versus the public concern for ex-convicts to assimilate back into the productive workforce, reducing the recidivism rate and improving the overall public good.

VII. CONCLUSION

Tennessee should adopt a statewide ban the box law applying to both public and private employers to encourage employment and assimilation back into productive society of individuals who do not pose a threat to others and who have already served time for their prior offenses. The nationwide trend is to move towards fair hiring practices for those with criminal convictions and arrest records, and there is also significant evidence that Tennessee is ready to embrace an expanded policy. Other states have adopted statewide ban the box policies after a major metropolitan area in the state enacted a ban the box ordinance. For example, Tennessee's fellow southern state, Georgia, enacted a statewide ban the box policy on February 23, 2015, less than a year after Atlanta had enacted its own city ordinance limiting inquiry into criminal history on job applications.[199] In Tennessee, Nashville, Memphis, and Chattanooga have all adopted ban the box policies that apply to public city employers, demonstrating that Tennesseans are receptive to the idea and setting the stage for a statewide ban the box policy. The Tennessee legislature seemingly took a huge step for-

197. *See id.*

198. *See* D.C. CODE ANN. § 32-1342 (West, Westlaw through 2016).

199. *See* Roz Edward, *Atlanta City Council Approves Ban the Box Legislation*, ATLANTA DAILY WORLD, http://atlantadailyworld.com/2014/10/06/atlanta-city-council-approves-ban-the-box-legislation/ (last visited Oct. 21, 2016); Mollie Reilly, *Georgia Governor Signs 'Ban the Box' Order Helping Ex-Offenders Get Jobs*, HUFFINGTONPOST (Feb. 24, 2015, 4:17 PM), http://www.huffingtonpost.com/2015/02/24/georgia-ban-the-box_n_6746006.html.

ward by passing a statewide ban the box bill applying to public employers.[200] This has the potential, based on statistics from other states, to significantly increase job opportunities for people with convictions. But to fully meet the goals of reducing recidivism and bettering the public good by incorporating ex-convicts into the productive workforce, Tennessee should enact a statewide ban the box policy applying to both public and private employers.

200. *See* TENN. CODE ANN. § 8-50-112 (2016).

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Fostering a Culture of Solutions: An Introduction to the Urban Revitalization Symposium Issue

DANIEL M. SCHAFFZIN*

In opening this year's Law Review Symposium, I proclaimed that no city is better positioned than Memphis to host scholarly discussion on the many-layered topic of *Urban Revitalization: The Legal Implications of Restoring a City*. Memphis, of course, was among the cities hardest hit by the historic housing crisis that resulted from the subprime mortgage and predatory lending schemes of the 2000s.[1] For a city that had suffered steady population decline[2] and long ranked among the nation's leaders in bankruptcies,[3] those practices exacerbated an already extreme situation, inflicting a new brand of devastation marked by unprecedented levels of home abandonment, severely diminished property

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1. *See* Corky Neale, *Subprime Loans and Bankruptcy: The Memphis Experience Post-BAPCPA*, 28 AM. BANKR. INST. J. 50, 51 (2009) (detailing Memphis' relatively high rate of foreclosures among Top 100 metro areas in 2006 and 2007).

2. *See* Jimmie Covington, *Memphis Population is Down*, BEST TIMES (June 6, 2014, 8:54 AM), http://thebesttimes.com/news/2014/jun/06/memphis-population-down/ (noting that "[h]istorical data reflect that people have been steadily moving out of the city since 1960. Population gains since that time have been the result of annexations rather than any increase in residents within city limits.").

3. *See* Jacqueline Marino, *We Do Bankruptcy Right*, MEM. FLYER (Dec. 22, 1997), http://www.weeklywire.com/ww/12-22-97/memphis_cvr.html (detailing Memphis' emergence as "the Bankruptcy Capital of America" despite the economic boom of the late 1990s).

values, and entire neighborhoods changed forever.[4] Today, nearly ten years removed from the crisis' peak and amidst cautious talk of local and national economic recovery, an estimated 13,000 vacant housing units and 53,000 vacant lots linger as blighted properties threaten the stability of Memphis and its citizens.[5]

My proclamation did not find its roots in this problem of admittedly epidemic proportion; rather, it instead had everything to do with the creative and collaborative strategies Memphis is using to confront it.[6] Guided by the collective vision and sheer will of many who participated in this Symposium, including several authors who have contributed to this volume, Memphis has become a model for the innovation and cooperation necessary to fight the scourge of blighted properties and to reenergize the communities in which they sit.[7] And the Law Review's decision to devote its Symposium to the often controversial legal and policy issues connected to any community revitalization effort is just the latest example of the leading role that the University of Memphis Cecil C. Humphreys School of Law ("the Law School") and its students have come to play in that important fight.

In January 2015, the Law School and the City of Memphis Law Division partnered to form the Neighborhood Preservation Clinic.[8] In what is believed to be a first-of-its-kind construct, Clin-

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4. *See* Eric Smith, Roulette: *How the National Foreclosure Crisis is Playing out Locally – Where it stops, Nobody knows*, MEMPHIS NEWS, Sept. 3–9, 2008, http://www.chandlerreports.com/Site/Docs/ForeclosureUpdate-TheMemphisNews3.pdf (describing the impact of the housing and foreclosure crisis of the late 2000s on Memphis).

5. *See Our Crisis*, MEM. BLIGHT ELIMINATION SUMMIT, http://www.memphisfightsblight.com/#our-crisis (last visited May 17, 2016); *see also* Ruth McCambridge, *What's the Prescription for the Blight Contagion in Memphis? A New Nonprofit?*, NONPROFIT Q. (Jan. 26, 2016), https://nonprofitquarterly.org/2016/01/26/whats-the-prescription-for-the-blight-contagion-in-memphis-a-new-nonprofit (noting that "[w]ithin the Memphis City Limits, there are more than 53,000 vacant properties, and since vacancies are the leading cause of blight, the city is plagued by the problem.").

6. *See* J.B. Wogan, *It Takes A Village: The Idea Behind Memphis' Anti-Blight Strategy*, GOVERNING (May 17, 2016), http://www.governing.com/topics/urban/gov-memphis-blight-elimination-charter.html.

7. *Id.*

8. *See* Peggy Burch, *Demolition of Executive Inn Kicks Off Anti-blight Law Clinic*, COM. APPEAL (Jan. 9, 2015), http://www.commercialappeal.com/

ic students represent the City of Memphis in lawsuits aimed at abating the public nuisance caused by abandoned properties.[9] Clinic students investigate property ownership and conditions, communicate with and train Code Enforcement professionals, and prepare civil actions seeking enforceable orders of compliance with property maintenance and other local housing and building code standards. Just as importantly, to inform their casework, Clinic students learn—and teach[10]—about the history and causes of blighted properties and the pervasive impact those properties have on the children that walk by them on the way to school, the families that live next to them, and the neighborhoods that surround them.[11] Over the course of just three semesters, 24 students

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news/government/city/demolition-of-executive-inn-kicks-off-anti-blight-law-clinic-ep-867136357-324499121.html; Bianca Phillips, *New Anti-Blight Clinic Launched at U of M Law School*, MEM. FLYER (Jan. 9, 2015, 1:40 PM), http://www.memphisflyer.com/NewsBlog/archives/2015/01/09/new-anti-blight-clinic-launched-at-u-of-m-law-school.

9. The Clinic files its lawsuits pursuant to the Tennessee Neighborhood Preservation Act, TENN. CODE ANN. § 13-6-101. Under the statute, "public nuisance" is defined as

> any vacant building that is a menace to the public health, welfare, or safety; structurally unsafe, unsanitary, or not provided with adequate safe egress; that constitutes a fire hazard, dangerous to human life, or no longer fit and habitable; a nuisance as defined in § 29-3-101; or is otherwise determined by the court, the local municipal corporation or code enforcement entity to be as such.

Id. § 13-6-102(8).

10. Among their other responsibilities, Clinic students conduct workshops and training sessions designed to educate community representatives groups about the Tennessee Neighborhood Preservation Act, their casework in the Shelby County Environmental Court, and the causes and impact of neglected property. *See Westwood Students, Alumni Attack Blight at School*, WMCACTIONNEWS5.COM (Apr. 26, 2016, 6:39 AM), http://www.wmcactionnews5.com/story/31800357/westwood-students-alumni-attack-blight-at-school.

11. *See* Jarrett Spence, *Neighborhood Building in Memphis: A Strategy of Hope*, CEOS FOR CITIES (May 7, 2015), https://ceosforcities.org/neighborhood-building-in-memphis-a-strategy-of-hope. In his excellent piece *Perspectives on Abandoned Houses in a Time of Dystopia*, Professor Kermit Lind explores the "various perspectives on abandoned houses in urban neighborhoods" and "how conflicting reactions perpetuate the crisis of blight for individual residents and their communities." 24 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 121,

have participated in the Clinic, assisting in the filing of more than 100 new blight lawsuits for the City and helping to achieve positive community outcomes in hundreds more.[12]

Yet the Neighborhood Preservation Clinic is just one of many ways in which the Law School has emerged as a centerpiece of Memphis' remarkable community revitalization movement. A week before the Symposium, the Law School's Public Action Law Society convened an Alternative Spring Break program in which more than 60 students from across the county (including many of our own) provided supervised legal assistance and participated in service project initiatives focused on a theme of "Building Community Hope Through Blight Reduction."[13] And just a day before the Symposium, the Law School hosted a summit of community leaders at which its partner, Neighborhood Preservation Inc., unveiled the Memphis Neighborhood Blight Elimination Charter[14] a comprehensive consensus document "intended to serve as both a playbook and a game plan for current and future blight abatement actions."[15]

Indeed, the articles published as part of the 2016 Symposium reflect the blend of creative, committed, and multi-faceted thinking that has characterized Memphis's recent rise against the ills of vacant, abandoned, and neglected properties. The volume's authors, an exceptional group of national scholars and local change

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121 (2015). Lind makes the compelling argument that "real solutions for management of abandonment must be based in local communities and tailored to local conditions." *Id.*

12. *See* Lance Wiedower, *Memphis Law Students Help Shape City's Blight Fight*, HIGH GROUND NEWS (Jan. 14, 2016), http://www.highgroundnews.com/features/BlightClinic.aspx.

13. See the University of Memphis School of Law Alternative Spring Break Video, *2016 Alternative Spring Break at Memphis Law*, https://video.search.yahoo.com/search/video;_ylt=AwrBT4ajNj1X08oAtTNXNyoA;_ylu=X3oDMTEyMm43aWFsBGNvbG8DYmYxBHBvcwMxBHZ0aWQDQjE5MTBfMQRzZWMDc2M-?p=Memphis+Alternative+Spring+Break+Blight&fr=aaplw#id=7&vid=e378940b81b1f62099223eae56fcf053&action=view.

14. *See* MEMPHIS NEIGHBORHOOD BLIGHT ELIMINATION CHARTER (Mar. 16, 2016), http://static1.squarespace.com/static/56ba157ab654f9986538a18c/t/56e9f94b86db430e409acfc3/1458174297659/Blight+Elimination+Charter+final+3-14-15.pdf.

15. *Id.*; *Our Charter*, MEM. BLIGHT ELIMINATION SUMMIT, http://www.memphisfightsblight.com/#our-charter (last visited May 20, 2016).

agents, pragmatically consider both the opportunities and the risks associated with urban revitalization. They admonish us not to forget the complicated causes of the blight epidemic and the predominantly low-income and minority communities that have suffered most because of it. But they also offer solutions.

Kermit Lind and Joe Schilling, patriarchs of the national blight policy movement and architects of the aforementioned Blight Elimination Charter, begin their article *Abating Neighborhood Blight with a Collaborative Policy Network—Where Have We Been? Where Are We Going* by examining the complex legal and policy influences that have combined to confound the meaning of the word "blight"[16] and to create a culture that accepts property neglect and neighborhood decline as societal norms.[17] Lind and Schilling detail their own work over much of the last 25 years establishing and collaborating with networks of communities and professionals on strategic initiatives designed to thwart, redress, and reclaim blighted properties.[18] Reflecting on lessons learned from these initiatives, Lind and Schilling conclude with a call for even broader collaboration among public, private, and community actors, and recommendations for the implementation of "a more systematic suite of neighborhood preservation and revitalization strategies"[19]—including clarifying the legal principles of blight and nuisance in state and local law,[20] expanding capacity-building opportunities for strategic code enforcement,[21] and the development of local teams or councils for supporting cross-sector coordination and collaboration.[22]

In their article *Regulatory Created Blight in a Legacy City: What is It and What Can We Do About It?*, Memphians Josh

16. Kermit Lind & Joe Schilling, *Abating Neighborhood Blight with Collaborative Policy Networks—Where Have we Been? Where are we Going?*, 46 U. MEM. L. REV. 803, 806 (2016) (explaining "blight . . . is a term encumbered with a history of associations that have diffused and diminished its clarity").

17. *Id.* at 812–15.

18. *Id.* at 818–39.

19. *Id.* at 840.

20. *Id.* at 841–44.

21. *Id.* at 844–48.

22. *Id.* at 849–51.

Whitehead, Tommy Pacello, and Steve Barlow[23] posit that, separate and apart from traditional causes of blight,[24] land use regulations and building codes designed to encourage growth and development instead act often to create additional stimuli for the abandonment and decline upon which blighted communities emerge.[25] To make their case, Whitehead, Pacello, and Barlow delve into the rich history and complex evolution of Memphis's regulation of land use and construction, demonstrating how such regulation continues to counteract good faith efforts by government actors and others to eliminate vacant and abandoned properties.[26] To do away with regulatory created blight, the authors conclude, cities like Memphis should "identify and focus on small neighborhood target areas and start by finding ways to remove such regulatory barriers at that level, thereby stimulating small re-development projects that were previously impossible in that location."[27]

Judge Raymond Pianka, one of our country's preeminent housing court jurists, writes in *Community Control Supervision of Building Code Offenders in Cleveland's Housing Court: Making the Most of Ohio's Direct Sentencing for Misdemeanors* about his Court's novel use of community control sentencing to ensure owner compliance beyond just the single blighted or code-violating property that may be at issue.[28] After giving insight into the Court's development, jurisdiction, and evolution into a "problem-solving" advocate,[29] Judge Pianka explores the statutory underpin-

23. I note with pleasure that Mr. Whitehead, Mr. Pacello, and Mr. Barlow are all distinguished alumni of The University of Memphis School of Law. Both Mr. Whitehead and Mr. Barlow serve as adjunct Law School faculty, and Mr. Barlow (or Professor Barlow, as I call him) is both the Co-Director of the Neighborhood Preservation Clinic and the undisputed leader of the remarkable blight-fighting effort in Memphis. I am proud to partner with and learn from him at every turn.

24. Josh Whitehead, Tommy Pacello & Steve Barlow, *Regulatory Created Blight in a Legacy City: What Is It and What Can We Do About It?*, 46 U. MEM. L. REV. 857 (2016).

25. *Id.* at 857–63.

26. *Id.* at 869–89.

27. *Id.* at 901.

28. Judge Raymond Pianka, *Community Control Supervision of Building Code Offenders in Cleveland's Housing Court: Making the Most of Ohio's Direct Sentencing for Misdemeanors*, 46 U. MEM. L. REV. 903 (2016).

29. *Id.* at 906–09.

nings of community control sanctions in Ohio and explains how the Court's use of such sanctions operates in line with the direct sentencing method recommended by the Ohio Criminal Sentencing Commission.[30] Judge Pianka then details the community control obligations posed on offending owners—namely the provision of a list of all properties the defendant owns, the duty to keep all properties in good repair, and a requirement to regularly visit and inspect each property to ensure it remains in good repair—and the manner in which the Court's Housing Specialists operate to enforce these obligations.[31] Concluding with a candid assessment of the efficacy, opportunities, and challenges of community control supervision as demonstrated in his Court,[32] Judge Pianka endorses this sentencing alternative as one supplying the flexibility needed by courts specializing in housing issues.[33]

In *Saving Our Cities: Land Banking in Tennessee*, Sohil Shah offers land banking as a "novel and assertive approach" capable of succeeding where other efforts to address vacant and neglected properties have not.[34] After explaining land banking—Shah notes that "[a] land bank, at its essence, converts vacant, abandoned, tax-delinquent, and foreclosed properties into productive use"[35]—Shah details the evolution of the Tennessee Local Land Bank Act before comparing the Tennessee legislation to template legislation created by land banking expert Professor Frank Alexander.[36] Shah ends with an assessment of the three land banks presently active in Tennessee (Oak Ridge, Chattanooga, and Memphis),[37] upon which he reaffirms his conclusion that local governments across Tennessee should create and devote significant resources to land banks as a means of combatting vacant, abandoned, tax-delinquent, and foreclosed properties.[38]

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30. *Id.* at 909–13.
31. *Id.* at 913–94.
32. *Id.* at 907–26.
33. *Id.* at 926.
34. Sohil Shah, *Saving Our Cities: Land Banking in Tennessee*, 46 U. MEM. L. REV. 927, 928. (2016).
35. *Id.* at 929.
36. *Id.* at 939–66.
37. *Id.* at 966–69.
38. *Id.* at 973.

Although her article is also solution-focused, University of Texas School of Law Professor A. Mechele Dickerson's leads off *Revitalizing Urban Cities: Linking the Past to the Present* with a strong caution to policymakers against using the nebulous concept of "blight" to defend traditional urban revitalization remedies that have concentrated on communities consisting of low-income, primarily black or Latino residents.[39] Dickerson roots her admonition in a thorough review of the role that federal, state, and local government actors—through discriminatory laws and practices, pretextual zoning laws, and racially and demographically-segregated public housing programs—and private actors, most notably urban landlords and lenders, have historically played in planting the seeds of blight in low-income neighborhoods.[40] She then takes to task the eminent domain and urban removal programs traditionally used by cities to counteract blight. Though these programs have often revitalized blighted neighborhoods, Dickerson notes, they have done so only after destroying entrenched and potentially sustainable communities while "pushing" their low-income, minority residents to other blighted areas.[41] Rather than defaulting to demolition of troubled buildings and relocation of poor resident in the neighborhoods most threatened by blight, Dickerson closes with a call for early and innovative interventions that strive to save and rehabilitate buildings where possible, restore economic viability, and encourage investment, and keep long-standing neighborhoods intact by revising zoning restrictions, using land banks, and supporting other initiatives designed to grow affordable housing stock.[42]

In similar fashion, James Kelly's *Affirmatively Furthering Neighborhood Choice: Vacant Property Strategies and Fair Housing* reminds that even the most innovative efforts to address vacant properties must operate in line with the Fair Housing Act's new mandate to Affirmatively Further Fair Housing ("AFFH").[43] Kelly first offers a comprehensive analysis of AFFH's place within the

39. A. Mechele Dickerson, *Revitalizing Urban Cities: Linking the Past to the Present*, 46 U. MEM. L. REV. 973, 973–79 (2016).

40. *Id.* at 979–94.

41. *Id.* at 994–1002.

42. *Id.* at 1002–08.

43. James Kelly, Jr., *Affirmatively Furthering Neighborhood Choice: Vacant Property Strategies and Fair Housing*, 46 U. MEM. L. REV. 1009 (2016).

broader FHA context and the obligations it can be said to impose upon local government entities following HUD's issuance in 2015 of the Final Rule for AFFH.[44] HUD's clear focus on AFFH, Kelly advises, requires that "[l]ocal governments seeking to make their distressed neighborhoods attractive to potential residents choosing new homes must be able to express these revitalization goals as consonant with the promotion of fair housing even as they contend with accusations their market-sensitive approaches to vacant properties reinforces segregation patterns."[45] Kelly uses the common approaches of market-sensitive code enforcement and land banking to demonstrate his point, offering guidance as to how each revitalization mechanism can satisfy the dual aims of affirmatively furthering neighborhood choice and ensuring fair housing compliance.[46]

J. William Callison's article, *Inclusive Communities: Geographic Desegregation, Urban Revitalization, and Disparate Impact Under the Fair Housing Act* likewise offers helpful insight into the impact of fair housing law on urban revitalization efforts.[47] Delving into the Supreme Court's 2015 decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,[48] Callison begins by noting that the Court's decision should quell the concerns of many that its repeated acceptance of disparate impact cases on *certiorari* spelled doom for the theory.[49] Beyond affirming the viability of disparate impact claims under the FHA and the need for both government and private actors to act with related liability in mind, however, Callison posits that *Inclusive Communities* represents a deterioration of disparate impact theory as a weapon in the fight for racial desegregation and the elimination of race considerations in housing.[50] With this in mind, and pointing to specific language in the Court's opinion, he antici-

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44. *Id.* at 1009–13.
45. *Id.* at 1025.
46. *Id.* at 1025–38.
47. J. William Callison, *Inclusive Communities: Geographic Desegregation, Urban Revitalization, and Disparate Impact Under the Fair Housing Act*, 46 U. MEM. L. REV. 1039 (2016).
48. 135 S. Ct. 2507 (2015).
49. *Id.* at 1039–42.
50. *Id.* at 1042–48.

pates that future fair housing claims may fail unless able to show discriminatory intent.[51]

Collectively, this Symposium volume offer valuable insight and ideas to those working so hard to breathe new life into many of our country's urban centers. Amidst novel suggestions and distinctive viewpoints, the authors are consistent in the passion with which they emphasize the benefits of creative, collaborative approaches, the crucial need to appreciate the history that has led us to this point, and the paramount importance of taking action in a way that truly acknowledges the many perspectives of blight and the many constituencies impacted by it.[52] To overcome the pervasive culture of blight that has taken hold over decades,[53] we must revitalize our cities and communities by instead fostering a culture of solutions.

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51. *Id.* at 1048–54.

52. See also Lind, supra note 11, at 126 ("Some piecemeal solutions actually make things worse because they serve only the interests of the politically and economically powerful at the expense of the poorly represented. Real solutions are not possible from only one or even two perspectives.").

53. See *Our Crisis*, supra note 5 (describing the "self-perpetuating . . . culture of blight" that has been "allowed to take hold, eroding the aesthetic standards of a community and frustrating other abatement efforts").

Abating Neighborhood Blight with Collaborative Policy Networks—Where Have we Been? Where are we Going?

KERMIT LIND* AND JOE SCHILLING**

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Blight is a term with multiple meanings and a complex legal and policy history in the United States.[1] Currently, blight and its community costs are frequently associated with vacant and often foreclosed homes, defective and abandoned buildings, litter, vacant lots, and graffiti. As a legal and policy term, blight has roots in the common law definitions of public nuisance.[2] Researchers and scholars in other disciplines have cited blighted neighborhoods as both a cause and symptom of larger socio-economic problems such as poverty, crime, poor public health, educational deficits, and other personal or systemic distress.

Traditionally neighborhood blight has long been considered a city problem, especially in Rust Belt cities such as Detroit, Cleveland, Flint, and Youngstown. These older, industrial "legacy cities" have become property abandonment's poster children as the result of global waves of socio-economic calamity: first, the deindustrialization of the 1970s and 1980s, and more recently, the mortgage meltdown and Great Recession. Today, blight's geography knows no boundaries as its impacts can be felt in first tier suburban cities, rural towns, and even in the fast growing Sun Belt regions from Phoenix and Las Vegas in the West to Atlanta, New Orleans, and Memphis in the South.

For the past twenty-five years, local government officials and community-based organizations have launched numerous initiatives to combat blighted properties. Cities such as New Orleans, Detroit, Philadelphia, Baltimore, and Cleveland have been at the forefront of innovation, adapting traditional legal tools and experimenting with new policy and planning strategies to address neighborhood blight. Several of these cities formed local coalitions of lawyers, local officials, community developers, and university professors to fix out-of-date and ineffective policies and programs to reclaim vacant properties. Emerging from these local collabora-

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1. *See* Vacant Properties Research Network, *Charting the Multiple Meanings of Blight—A National Literature Review on Addressing the Community Impacts from Blighted Properties*, KEEP AMERICA BEAUTIFUL (May 20, 2015), https://www.kab.org/sites/default/files/Charting_the_Multiple_Meanings_of_Blight_Executive_Summary_FINAL.pdf.

2. Kermit J. Lind, *Can Public Nuisance Law Protect Your Neighborhood from Big Banks?*, 44 SUFFOLK U. L. REV. 89, 117–18 (2011).

tions and experiments is a national network of practitioners, policymakers, and researchers—often supported by national and regional foundations—who have developed a common language, shared strategies, and stretched legal and policy boundaries. These coalitions of early adopters helped facilitate the development and transfer of innovative laws, policies, plans, and programs that can more systematically prevent, abate, and reclaim vacant and blighted properties.

This Article traces the evolution of these local and national networks and the seeds of a blight policy movement through the experiences of two of its pioneering members: Clinical Professor Emeritus Kermit Lind and Senior Researcher Joe Schilling. Lind and Schilling will offer insights on the movement's legal and policy foundations while reflecting on the challenges that lie ahead for lawyers and policymakers.

Part I defines the legal and policy parameters of neighborhood blight by examining its origins and linkages with public nuisance principles and eminent domain as well as blight's social and cultural dimensions.

Part II outlines the characteristics, members, and elements of a vacant property policy movement from 1990 to 2015. Lind and Schilling describe their collaborations in Cleveland and other cities in helping local practitioners and leaders revise and reform their vacant property policies with a special focus on local government code enforcement programs. They outline a new model—strategic code enforcement—that communities will need to adopt and deploy in light of dramatic shifts in real estate markets, the globalization and securitization of the mortgage industry, and dwindling public resources. Lind and Schilling will offer critical legal and policy lessons from the second wave of vacant properties and neighborhood decline caused by the Mortgage Foreclosure Crisis and Great Recession that still reverberates throughout communities today.

Part III concludes with further reflections about the vacant property policy movement and how its local and national networks can help communities build greater legal and policy capacity as well as facilitate the sharing and development of innovative strategies through collaborative working groups and coordinating councils. Using recent developments in Memphis with the introduction of the nation's first Neighborhood Blight Elimination Charter, Lind and Schilling stress the pivotal roles that community devel-

opment intermediaries, law schools, and nonprofit lawyers must play in developing and sustaining these local problem-solving networks.

I. WHAT IS THE LEGAL AND POLICY CONTEXT OF NEIGHBORHOOD BLIGHT?

Blight is often associated with a particular property or building, but perhaps its most pernicious impacts occur when it accumulates multiple vacant and abandoned properties in the same place; thus, the neighborhood scale of human habitat—the immovable land and occupied structures—becomes the critical intervention point. These defined habitats have unique characteristics derived from their location and their inhabitants over time. This neighborhood focus is important because millions of people living in neighborhoods, both urban and suburban, are in a battle against blight for the survival of their neighborhood and their health, safety, security, and property values. Interventions for survival must be implemented at the neighborhood level, on a neighborhood scale, and with neighborhood participation in order to be successful. Moving neighborhoods is not an option. Maintaining them is a possibility that depends on policies and programs that operate at the appropriate neighborhood scale.

A discussion of neighborhood blight must first recognize the inherent difficulties in the definition and uses of the term "blight." It is a term encumbered with a history of associations that have diffused and diminished its clarity. Indeed, its attachment to terms like economic, social, crime, health, architecture, and aesthetics push its dimensions to diverse fields of study. Even the use of blight by scholars and practicing professionals in housing, neighborhood, community and urban redevelopment has contributed to confusion about what it means.[3]

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3. A study conducted by the Vacant Property Research Network ("VPRN"), provides a thorough review of academic and policy literature on the subject of urban blight. *Charting the Multiple Meanings of Blight*, *supra* note 1. A large majority of the 300+ articles and reports were written after 2000. *Id.* This study was led by co-author Schilling.

A. *The Legal Roots of Blight in Public Nuisance Doctrine*

The term "nuisance" has technical legal meaning that is not the same as its popular meaning. The popular use of the word connotes an annoyance, inconvenience, irritation or offensiveness, like unwanted telephone robocalls.[4] Its technical legal meaning for use in law and public policy is more complex and consequential. The legal doctrine of public nuisance is still not completely settled law and continues to be shaped in the battles over a large range of environmental and product liability issues.

The Restatement (Second) of Torts is perhaps the most convenient guide to current public nuisance law. Nuisance first entered the Restatement of Torts in 1979 and included, for the first time, a discussion of public nuisance doctrine.[5] The venerable torts scholar, Dean William L. Prosser, chaired the committee that drafted the Restatement (Second) of Torts' chapter on nuisance.[6] Prosser said a public nuisance was always a crime and sometimes might be a tort.[7] The common law action of private nuisance emerged from ancient root as the tort we recognize today.

According to Prosser, the term nuisance was also used in connection with a different type of action, one involving an interference with the property rights of the Crown.[8] As such, those interferences—typically obstruction of the king's highway—were

4. U.S. Senator Charles Schumer from New York has fought this nuisance unsuccessfully for several years. Dana Sauchelli & Emily Saul, *Chuck Schumer is Sick of Robocalls*, NEW YORK POST (Mar. 6, 2015 6:05 PM), http://nypost.com/2016/03/06/chuck-schumer-is-sick-of-robo-calls/. Their use in electoral politics makes relief a remote possibility.

5. RESTATEMENT (SECOND) OF TORTS § 821A reporter's note (AM. LAW INST. 1979); Kermit J. Lind, *Can Public Nuisance Law Protect Your Neighborhood*, 89 SUFFOLK U. L. REV. 90, 114–22 (2011) (discussing in detail the history of the doctrine of public nuisance law and its expression in the Restatement (Second) of Torts).

6. *See* Craig Joyce, *Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy*, 39 VAND. L. REV. 851 (1986) (discussing Prosser's invaluable contributions to the Restatement); John W. Wade, *William L. Prosser: Some Impressions and Recollections*, 60 CALIF. L. REV. 1255 (1972) (recounting Prosser's unwavering devotion to the law of torts).

7. William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 997 (1966).

8. Lind, *supra* note 5, 114–17.

deemed crimes and were exclusively prosecuted by the king's officers.[9] Interference with the rights common to all royal subjects came to be regarded as a type of nuisance that could result in criminal sanctions.[10] Activities such as disruption of public markets, emission of noxious smoke or foul odors, diversion of water for a mill, unlicensed plays, and keeping diseased animals were treated as nuisance offenses against these public rights.[11] In these instances, the interference with the public right was so clearly unreasonable that it was often codified as a crime by statute or ordinance.[12]

This, according to Prosser, led to diverse and confusing use of the same term for two entirely different legal matters.[13] The confusion of the principles of private tort and public nuisance theory continues to the present. Since the early 1970s, plaintiffs have used public nuisance law in attempts to abate and obtain compensation for the harm attributed to the private manufacture and distribution of lead paint, poisons and toxins, guns, and climate-changing activities.[14] Municipalities and community groups are using public nuisance law to rein in the predatory practices of financial institutions that are alleged to be the cause of massive blight, abandonment, and devastation to local tax bases.[15] The decisions in these cases over the past several decades have not produced a clear and consistent doctrine. Today the law of nuisance, especially the law of public nuisance, remains unsettled.

Nevertheless, public nuisance law plays a crucial role in the deployment of municipal police power both in the making and the enforcing of laws that protect public health, safety, welfare, security and property rights.[16] Where legislative bodies identify conduct or conditions that need to be prevented or abated, they legislate to ban them and authorize police to enforce those regulations and

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 115–18.
14. *Id.* at 118.
15. *Id.* at 128.
16. Stephen R. Miller, *Community Rights and the Municipal Police Power*, 55 SANTA CLARA L. REV. 675 (2015) (exploring the nature of police power and its application by communities to defend against predatory business practices of invasive corporations).

assign penalties for noncompliance or remedies.[17] The civil remedies for public nuisance can include a court-ordered abatement of nuisances by or at the expense of those owning a legal interest in the property.[18] Owners who refuse or fail to comply with nuisance remedial orders are most likely to lose their property through liens—either property tax foreclosure or creditor foreclosure on unpaid liens and a sale of property to satisfy those debts.[19]

Civil nuisance remedies to abate nuisance conditions are now becoming a standard tool for housing and neighborhood environmental code enforcement in many local jurisdictions.[20] While it is very effective in dealing with individual properties, the use of civil nuisance abatement against individual owners of large numbers of derelict properties is difficult and expensive.[21] Enforcement of housing and neighborhood codes against abuses by global corporations and other absentee property owners remains a serious problem, especially in neighborhoods of average or depressed housing demand.[22]

As a legal matter, then, public nuisances are clearly a form of blight; a form of blight that may be acted upon by both civil and criminal sanctions. Hitching nuisance and blight together in local

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17. *See* Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV'T L. REV. 101 (2009) (dealing thoroughly with code enforcement issues).

18. Co-author Lind's practice included litigation of numerous civil nuisance abatement cases using Ohio Revised Code Section 3767.41 and foreclosing on receivers' judgment liens to pay for abatement costs. *See* Lind, *supra* note 5. Practice aids for attorneys published by the Urban Development Law Clinic at Cleveland State University in support of this type of litigation may be found at https://sites.google.com/site/cmudlc1/Home/public-nuisance-abatement-and-receivership-a-guide-to-ohio-revised-code-3767-41.

19. It should be noted that the involuntary loss of property ownership described here is not a taking in violation of constitutional requirements for just compensation. The loss of title arises from the collection of a debt secured by a lien against the real property for legally authorized expenses to abate nuisance conditions. There is no condemnation for expropriation. *See* Steven J. Eagle, *Does Blight Really Justify Condemnation?* 39 URB. LAW. 833, 858 (2007).

20. ALAN MALLACH, BRINGING BUILDINGS BACK 150 (Rutgers Univ. Press ed., 2d ed. 2010) (providing model provisions based on the author's study of many state statutes and participation in drafting some).

21. Lind, *supra* note 5, at 129.

22. *See generally id.* at 122–37 (exploring civil nuisance remedies in greater depth and detail).

and state property maintenance codes has the advantage of expanding remedial options to include police power not only to punish owners but also to abate nuisance conditions when owners do not. At the neighborhood level, the statutory designation of specific harmful conditions as public nuisances in public policy is critical for policing seriously harmful blight. Making abatement of nuisance conditions a preparation for redevelopment or reuse of land may incidentally provide an alternative to the eminent domain taking process.[23]

B. Definition and History of Blight

The term blight was appropriated from the field of plant pathology by urban reformers in the early twentieth century to describe the increasing urban disorder associated with crowded, poor, working class neighborhoods. At the turn of the century, many rapidly industrializing cities had woefully inadequate municipal regulation or social services to cope with unhealthy and many times dangerous living and working conditions brought on by rapid urbanization. Blight was used by real estate development and financing enterprises and by governments at all levels to identify and segregate people whose mere presence was deemed a blight on neighborhoods intended to be reserved for white people.[24] Seeing people as blight has been at the root of residential, neighborhood and school segregation by custom and law for much of this country's existence. Using blight in discriminatory urban renewal and suburban development infused it deep in our societal institutions and habits.[25] Blight was a dominant term in describing the urban

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23. The debate over the role of housing and building maintenance code enforcement in eminent domain proceedings is beyond the scope of this Article. It is, however, clear that the use of the term "blight" interchangeably with the term "nuisance" is a source of some confusion.

24. *See* Florence Wagman Roisman, *Intentional Racial Discrimination and Segregation by the Federal Government as a Principal Cause of Concentrated Poverty: A Response to Schill and Wachter,* 143 U. PENN. L. REV. 1351, 1369 (1995) (critiquing strongly federal housing policies that concentrate poverty and blight).

25. While this Article was being written, the national conversation about racism and white supremacy's role is at new levels of intensity. If any evidence of this is to be noted, one needs only to read the publications and speeches of Ta-Nehisi Coates and the responses to his call to consider reparations. *See, e.g.*, Ta-Nehisi Coates, *The Case For Reparations*: *An Intellectual Autopsy*,

slums which justified urban renewal campaigns that replaced whole neighborhoods of poor people with new economic development. [26]

Blight still plays a big role in the vocabulary of public policy and statutory law. Evidence of this is provided in the exhaustive survey of the meaning of blight found in statutory and case law by Hudson Hayes Luce published in 2000.[27] Luce poses twelve categories of blighting criteria: (1) Structural Defects; (2) Health Hazards; (3) Faulty or Obsolescent Planning; (4) Taxation Issues; (5) Lack of Necessary Amenities, and Utilities; (6) Condition of Title; (7) Character of Neighborhood; (8) Blighted Open Areas; (9) Declared Disaster Areas; (10) Uneconomical Use of Land; (11) Vacancies; and (12) Physical and Geological Factors.[28] He found that language common to all the statutes surveyed include phrases such as: "constitutes an economic and social liability," "conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime," and "detrimental (or a menace) to the public safety, welfare, or morals."[29] Here we can see blighting criteria in a legal and public policy context applied to factors not apparent to casual observation: namely, invisible health hazards, bad planning, taxation, and condition of title.

The VPRN's 2015 national literature review undertaken for the national nonprofit, Keep America Beautiful, sheds some additional light on the current use of the term.[30] Intending to aid in the national campaign to support neighborhood beautification, the study logs recent literature on economic, social, environmental,

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ATLANTIC (May 22, 2014), http://www.theatlantic.com/business/archive/2014/05/the-case-for-reparations-an-intellectual-autopsy/371125/.

26. *See Charting the Multiple Meanings of Blight*, *supra* note 1, at 10–11.

27. Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP., PROB. & TR. J. 289 (2000) (reviewing the statutory definitions of blight in the fifty United States, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands). First, common characteristics of blight as defined by these statutes are grouped into categories, and standards of evidence for finding blight are examined. *Id.* Next, standards of review for the various jurisdictions are analyzed. Finally, case law on each of the enumerated categories of blight is analyzed. *Id.*

28. *Id.* at 395–96.

29. *Id.* at 403.

30. *Charting the Multiple Meanings of Blight*, *supra* note 1.

and legal dimensions of blight.[31] It illustrates how a multiplicity of uses of the term resists a clear and certain definition.[32] That prompts some people to remember what former United States Supreme Court Justice Potter Stewart said in his concurring opinion in a famous case about pornography, "I could never succeed in intelligibly [defining it]. *But I know it when I see it*."[33]

C. A Culture that Perpetuates Blight, Property Abandonment, and Neighborhood Decline

The blight now threatening to become a chronic crisis across much of the American urban landscape thrives on a culture of neglect and abandonment. Since the days when Manifest Destiny justified our nation's inherent right to expand westward, the American experience expresses a compulsion to advance from the present into something new. While this compulsion can result in valuable gain, such a persistent drive to move forward instead of sustaining what is already built can have serious consequences: threats to individual security, social status, or economic advancement. This expansionist tendency is demonstrated in the development and population of suburban neighborhoods with homeowners seeking to realize the American Dream through newer, bigger houses and lawns.[34] That surging sprawl leaves a destructive impact on the neighborhoods abandoned by their most prosperous and energetic residents.[35] Owners planning to move are more like-

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31. *Id.*

32. *Id.* at 2.

33. Jacobellis v. Ohio, 378 U.S. 184, 196 (Stewart, J. concurring) (emphasis added). Incidentally, the case was about a film being shown at a theater in the Coventry Village neighborhood of Cleveland Heights, Ohio. One of the co-authors once lived across the street but did not see the movie.

34. See RICHARD DRINNON, FACING WEST: THE METAPHYSICS OF INDIAN-HATING AND EMPIRE-BUILDING (Univ. of Okla. Press, 1997) and ANDERS STEPHANSON, MANIFEST DESTINY: AMERICAN EXPANSION AND THE EMPIRE OF RIGHT (Hill & Wang 1995), for examples of the literature on the ideology and history of American expansionism. See ANDRES DUANY, ELIZABETH PLATER-ZYBERK AND JEFF SPECK, SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM (North Point Press 2000), for a powerful critique of sprawling expansion from urban to suburban lifestyles.

35. *See generally* JOHN KROMER, FIXING BROKEN CITIES. THE IMPLEMENTATION OF URBAN DEVELOPMENT STRATEGIES, (Routledge 2010) (providing experience-based guidance on restoring abandoned places in cities);

ly to defer or lower maintenance of present structures.[36] The huge investment in sprawling development of housing and infrastructure—such as schools, roads, water systems, sewers, and, commercial amenities—diverts material and human resources away from previously established places.[37]

The cultural priority of building up and moving out diminishes the priority and the value of maintaining and improving existing homes and communities. Neighborhoods once cared for religiously become neglected as the attraction for the new, bigger, and better housing opportunities are promoted.[38] As housing trickles down from people with abundant economic power and social status to those of lesser economic and social status, the means and the standards of neighborhood and housing maintenance eroded.[39] This erosion is exacerbated by the ethnic and racial discrimination

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ALAN MALLACH, BRINGING BUILDINGS BACK: FROM ABANDONED PROPERTIES TO COMMUNITY ASSETS: A GUIDEBOOK FOR POLICYMAKERS AND PRACTITIONERS 1–9 (2d ed., National Housing Institute 2010) (providing an excellent description of abandonment at the neighborhood level). The authors must acknowledge that Mallach and Kromer are colleagues with whom we have worked and talked regularly and often over the past two decades. Their publications express much of what has been shared among us.

36. MALLACH, *supra* note 35, at 1; *see also* Kermit J. Lind, *Collateral Matters: Housing Code Compliance in the Mortgage Crisis*, 32 N. ILL. U. L. REV. 445, 446–49, 454–55 (2012) (describing neglect and abandonment in the context of the mortgage crisis).

37. ALAN MALLACH, FACING THE URBAN CHALLENGE: THE FEDERAL GOVERNMENT AND AMERICA'S OLDER DISTRESSED CITIES (2010), http://www.brookings.edu/~/media/research/files/papers/2010/5/18-shrinking-cities-mallach/0518_shrinking_cities_mallach.pdf (describing loss of urban populations and neighborhood structures with recommendations for federal policies to deal with the situation).

38. *See generally* Lind, s*upra* note 36 (discussing neglected and abandoned properties as a result of the mortgage crisis).

39. The Broken Windows theory made famous by Kelling and Wilson in 1982 uses broken windows left unrepaired as a metaphor for the emergence of a culture of lower standards of care and order that enables blight to be acceptable and to spread. Its later application to policing personal conduct may be a departure from its initial focus on the visual appearance of neglected buildings and neighborhood environments. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/.

that permeates a society frequently described as separate and unequal. Mid-twentieth century suburban sprawl in America is a realization of a white American Dream by those in a supreme position to abandon not only a place they consider undesirable but also a social diversity they reject as well.

As blight becomes more common it becomes more acceptable. As it becomes more acceptable, neglect, abandonment, and even destruction become more evident.[40] It also contributes to the decisions made by local leaders, legislators, elected officials, and administrators who set priorities, make budgets, and allocate resources. Their policy making demonstrates the prevailing values of their constituents. That is at the heart of the Broken Windows theory.[41] Today many state legislatures are cutting taxes, mostly on high incomes and large accumulations of wealth of people in upscale suburban neighborhoods, which then requires the reduction of tax generated revenue going to local municipalities, public schools and the infrastructure maintenance of older communities.[42] As a result, municipalities have to cut services and raise local taxes to subsidize the cuts in state taxes and revenue distributions.[43] This reinforces the cultural notions that old is bad and new is better; poor is unworthy and riches are evidence of worthiness; and abandoning the structures and land in inner cities is justified by the easier, more lucrative development outside of them. By a mixture of design and disdain, the culture accepts the lowering level of

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40. *Id.*

41. *Id.*

42. In an example, many Ohio cities and towns are seeking tax increases in 2016 to replace cuts in state revenue. Local municipalities complain bitterly that the State's governor campaigning for President claims he cut state taxes but ignores the fact that municipalities paid for those cuts with reduced services and increased local taxes. Rich Exner, *Ohio Tax Changes Under Gov. John Kasich Leave Villages, Cities Scrambling To Cope with Less*, CLEVELAND.COM (Mar. 9, 2016 5:21 PM), http://www.cleveland.com/datacentral/index.ssf/2016/03/ohio_tax_changes_under_gov_joh.html.

43. *Id.* A 2011 report by the Center on Budget and Policy Priorities details state budget cuts to localities in 46 states and the District of Columbia showing the services people most affected. NICHOLAS JOHNSON ET AL., CTR. ON BUDGET & POLICY PRIORITIES, AN UPDATE ON STATE BUDGET CUTS: AT LEAST 46 STATES HAVE IMPOSED CUTS THAT HURT VULNERABLE RESIDENTS AND CAUSE JOB LOSS (2011), http://www.cbpp.org/sites/default/files/atoms/files/3-13-08sfp.pdf.

maintenance by both individuals and the public; defers and diminishes the upkeep of urban water systems, sewer systems, bridges, roads, power grids, and utility facilities; and is sanguine about the way large, remote corporations treat homeowners, borrowers, debtors, and the neighborhoods are being stripped of economic value and social significance.

It is now past time to take a wider look at neighborhood blight, a look that includes the cultural, social, economic, and political factors that are the context for sustaining and growing blight. The struggle against cultural values that allow blight requires more than these new strategies, policies, programs, and data systems. It requires a counter-culture that does not accept blight but instead advances the values of healthy neighborhoods and engaged communities against blight, whether it be intentional or by neglect. What matters most in resisting a culture of blight is a willing coalition of collaborators at the local community level capable and determined to remove blight and resist all that causes or allows it in their community and neighborhoods.

D. Blighted Houses and the Mortgage Crisis

Recent reports suggesting that the U.S. housing market has largely recovered from the 21st century Mortgage Crisis are premature.[44] A closer look reveals that the country is composed not of one market, but of thousands of smaller, local housing markets that have experienced dramatically uneven levels of recovery.[45] Repeated waves of home mortgage failures have inundated certain communities (the "Hardest Hit Communities") resulting in what amounts to a permanent transition to a lower value plateau or, in some cases, to repurposing of previously used land.[46] Homeown-

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44. HUD posts a monthly scorecard on the housing market recovery. *See e.g.,* Katherine O'Regan, *Measuring Progress in the Housing Market*, HUDDLE (Jan. 11, 2016), http://blog.hud.gov/index.php/2016/01/11/measuring-progress-housing-market-16/.

45. For a study estimating recovery times of metropolitan markets up to ten years, see Mark Lieberman & Thomas C. Frohlich, *Housing Markets Facing Longest Road to Recovery*, USA TODAY (Mar. 28, 2015, 8:30 AM), http://www.usatoday.com/story/money/personalfinance/2015/03/28/24-7-wall-st-housing-markets-tough-recovery/70551350/.

46. *See, e.g.*, Joe Light, *Why the U.S. Housing Recovery is Leaving Poorer Neighborhoods Behind*, WALL STREET J., http://www.wsj.com/articles/in-u-s-

ers in these predominantly low and middle income and/or minority communities who endured the Crisis lost significant equity in what is typically their principal asset.[47] Many, including the co-authors, have been closely involved with the tsunami of housing distress, abandonment, chronic vacancy, fraud, and abuse that has overtaken neighborhoods and, in some cases, utterly destroyed them. When we use the word blight to describe the devastation that has happened, and is still happening, to the housing in neighborhoods hardest hit by mortgage abuses and failures, there is no larger or deeper category of blight with which to compare it. The property loss visible to the eye is only the surface.[48] Not so visible is the loss of municipal revenue, the increase cost of virtually every public service provided by municipalities and public schools, and the increasing fiscal instability of many municipalities.[49] And the loss

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poorer-areas-have-yet-to-see-housing-rebound-1435091711 (last updated June 23, 2015); Nelson D. Schwartz, *Poorest Areas Have Missed Out on Boons of Recovery, Study Finds*, N.Y. TIMES (Feb. 24, 2016), http://www.nytimes.com/2016/02/25/business/economy/poorest-areas-have-missed-out-on-boons-of-recovery-study-finds.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0.

47. Matthew J. Rossman, *Counting Casualties in Communities Hit Hardest by the Foreclosure Crisis* 3 (Case W. Reserve Univ. Sch. Of Law, Case Studies Legal Research Paper No. 2015-22, 2015), http://ssrn.com/abstract=2698756 (assessing the scope and scale of damage not nearly and not likely ever to be, recovered by housing consumers). Another study published by the Haas Institute for a Fair and Inclusive Society draws attention to the concentration in African American communities of underwater mortgages and lost equity. *See* PETER DREIR ET AL., HAAS INST., UNDERWATER AMERICA: OW THE SO-CALLED HOUSING "RECOVERY" IS BYPASSING MANY AMERICAN COMMUNITIES 2 (2014), http://diversity.berkeley.edu/sites/default/files/HaasInsitute_UnderwaterAmerica_PUBLISH.pdf

48. The housing equity loss is estimated at $7 trillion out of some $16 trillion lost altogether. Recovery in the housing sector is going much slower than the rest of the economy and the concentration of high rates of loss by homeowners of color in middle and lower economic households means those who lost the most will recover the least, many not at all. *See* Rossman, *supra* note 46, at 1–3.

49. *See generally*, Raymond H. Brescia. *Cities and the Financial Crisis*, in *in* HOW CITIES WILL SAVE THE WORLD: URBAN INNOVATION IN THE FACE OF POPULATION FLOWS, CLIMATE CHANGE, AND ECONOMIC INEQUALITY (Ray Brescia and John Travis Marshall, eds., 2016); *see also*, Howard Chernick & Andrew Reschovsky, *The Fiscal Health of U.S. Cities* (2013), http://www.lincoln

of dreams, hopes, expectations, and status of individuals and families is beyond counting. One needs to spend only a few hours in a courtroom where code violation cases are heard to see how housing blight is taking its high toll. The concluding chapter on the Mortgage Crisis is yet to be written.

The scale of blight represented in the abandonment of dilapidated housing by those with a legal obligation for or interest in the property is an unprecedented challenge in the neighborhoods of all cities; however, for those cities and older suburbs where most of the housing is occupied by people whose livelihood depends on wages, blight threatens the very survival of their neighborhoods. Removing those blighted structures or rehabilitating them is the essential blight strategy. Where houses are still occupied, blight may be anticipated by property tax and mortgage defaults, deferred or neglected maintenance, ineffective code enforcement, poor rental practices, disappearing equity, underwater mortgages, failure of dwellings for sale to attract purchasers, or replacement of owner occupants with renters. Those indicators call for early intervention.

In the Mortgage Crisis, neighborhood blight usually starts with things that are not apparent from the curb. For instance, in cities where predatory subprime lending was an emerging threat people were unaware that this was the beginning sign of a blight crisis.[50] Some cities that became aware of the threat were preempted by state legislatures from protecting residents and property owners from fraudulent financial practices until it was too late to prevent disaster.[51] The blight that results in structures being

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inst.edu/pubs/2338_The-Fiscal-Health-of-U-S--Cities (last visited May 22, 2016).

50. *See, e.g.*, KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 3–11 (Oxford Univ. Press 2011).

51. Brett Altier, *Municipal Predatory Lending Regulation in Ohio: The Disproportionate Impact of Preemption in Ohio's Cities*, 59 CLEV. ST. L. REV. 125, 127 (2011) (analyzing the preemption of Cleveland's attempt to protect borrowers from predatory lending practices resulting in a surge of defaults and foreclosures). The use of preemptive legislation to undermine community resilience in the face of abusive business practices is routine. *See id.* at 129–30. Legislative proposals ostensibly to fast track mortgage foreclosure of abandoned vacant housing have language attached that would impede localities from code

disposed of as solid waste is preceded by blighting influences—owner neglect, personal crises, predatory lending and debt collecting, poor maintenance code compliance, an abandoned dwelling next door.[52] Therefore, the Mortgage Crisis presents a situation in which the term blight needs to apply to the causes, especially the lawless causes, of the abandoned properties that are an immediate threat to public health, safety, welfare, and property interests. Preventing incipient blight from taking hold of properties and spreading by early intervention with strategically designed maintenance policies and programs is a good investment for neighborhoods and cities.

II. LEGAL AND POLICY CHALLENGES IN ADDRESSING NEIGHBORHOOD BLIGHT—THE FORMATION OF NATIONAL AND LOCAL NETWORKS

Against this conceptual framework of blight and nuisance abatement, the authors of this article were both working in the 1990s on the development and implementation of municipal housing codes and code enforcement policies to address community concerns over substandard housing and vacant and abandoned properties. In 2000, Joe Schilling, a former municipal prosecutor from San Diego, was then heading the brownfields redevelopment and smart growth programs for the International City/County Management Association ("ICMA") in Washington D.C. Kermit Lind, a Clinical Professor of Law at Cleveland State University, was in a teaching law practice representing inner city community development corporations whose neighborhood agenda included housing development and neighborhood maintenance.

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enforcement efforts to ensure banks and other dealers in distressed foreclosed houses comply with community codes. *See id.* at 159.

52. *See* Lind, *supra* note 36, at 450. For more studies on this topic, see CLAUDIA COULTON, ET AL., CTR. ON URB. POVERTY & CMTY. DEV., FORECLOSURE AND BEYOND: A REPORT ON OWNERSHIP AND HOUSING VALUES FOLLOWING SHERIFF'S SALES, CLEVELAND AND CUYAHOGA COUNTY, 2000-2007, 2 (2008); CLAUDIA COULTON, ET AL., CTR. ON URB. POVERTY & CMTY. DEV., PATHWAYS TO FORECLOSURE: A LONGITUDINAL STUDY OF MORTGAGE LOANS, CLEVELAND AND CUYAHOGA COUNTY, 2005-2008, 3, 14 (2008); Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1260 (2002).

A conference in Cleveland co-sponsored by the Housing Division of Cleveland's Municipal Court and the Cleveland-Marshall College of Law in the spring of 2000 brought these two blight pioneers together for their first meeting. In light of the growing crisis of abandoned vacant houses in Ohio cities, the conference reexamined the use of civil nuisance litigation to abate the blighted conditions caused by abandonment of both local maintenance regulations and unmarketable houses. Although San Diego and Cleveland have dramatically different real estate markets and scales of blighted properties, they found common ground in assessing the challenges of capacity, structure, and code enforcement processes in both cities to adequately address neighborhood blight.

Since then the co-authors have partnered in a variety of technical assistance projects helping local government and community leaders across the country develop more effective legal tools and policy strategies for dealing with the multiple waves of neighborhood blight. Their individual contributions through research, writing, drafting legislation, litigation, speaking, and consulting, helped to lay the foundation for new concepts, such as strategic code enforcement, as well as facilitate the creation of local and national networks of communities and professionals dedicated to reclaiming vacant properties.[53] With a special focus on municipal code enforcement policies and programs, this next section describes their work with local government officials, community developers, and civic leaders to develop and design more collaborative, data driven strategies that can help communities prevent, abate and reclaim blighted properties in a more systematic way.

A. Code Enforcement's Evolution and Prominence

Although neighborhood blight has many drivers and takes different forms, it seems to move fast and takes hold where housing markets and local regulation are weak and fragmented. One common contributing factor that we have seen and studied is the failure of local government code enforcement—the traditional

53. A brief disclaimer is perhaps in order here. Our story is not unique for we have been fortunate to work with many amazing practitioners, policymakers, and community leaders in forging these national and local networks. Space does not allow us to name them, but we want to acknowledge the impact and influence of our fellow travelers upon us and this vacant property policy movement.

housing and neighborhood maintenance programs and associated public policies—to take systematic approaches to manage blight.[54]

Another factor is the inherent and historic isolation of code enforcement as a practice and as a policy strategy for helping preserve, protect, and revitalize neighborhoods. Few avenues exist for those "doing" code enforcement to learn innovative polices and model practices beyond their respective ranks and professions. Effective code enforcement demands breaking down organizational silos and specialized fields, but most code enforcement programs, leaders, and staff operate within a culture of isolation. Below we trace the recent evolution of code enforcement practices and policies as the field expands its horizon. These efforts to reform code enforcement policy and enhance its practice illustrate the work of individuals and the increasing impact and influence of local and national vacant property networks.

In reflecting back, code enforcement during the 1990s seemed to work best when it took actions against individual property owners on a case by case basis. Neglect was perhaps more of a side effect of sprawl and deindustrialization. From our litigation experience at the time, problem property owners were typically of two common types—(1) local rental property owners including the small time, "mom and pop" landlords that rented apartments, duplexes and a few single family homes; and (2) the indigent, unstable or elderly, single-family homeowners and tenants. Code enforcement management and inspection were still emerging as a profession with little formalized training, few resources, and a lack of technology to support it.[55]

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54. Code enforcement ("CE") often means the legal and administrative processes and tools that local governments use to gain compliance with relevant property maintenance, housing, building and zoning codes designed to protect the public health, safety, and welfare under the municipal police power. *See* Karen Beck Pooley & Joseph Schilling, *Emerging Research on Code Enforcement Strategies for Reclaiming Vacant Properties and Stabilizing Neighborhoods*, VACANT PROP. RES. NETWORK (forthcoming summer 2016) (translation brief), http://vacantpropertyresearch.com/translation-briefs/code-enforcement.

55. For a general description of the state of code enforcement practice (the good, bad and ugly) during the 1980s and 1990s, see generally, Elizabeth Howe, *Housing Code Enforcement in Eleven Cities*, 60 U. DET. J. URB. L. 373 (1982–83); Peter J. May & Raymond J. Burby, *Making Sense Out of Regulatory Enforcement*, 20 L. & POL'Y 157 (1998); and H. Laurence Ross, *Housing Code Enforcement Law in Action*, 17 L. & POL'Y 133 (1995).

During our early days of practice, Cleveland and San Diego were gaining attention among their peers for testing new code enforcement strategies and approaches. Cleveland's Municipal Housing Court broke new ground with its innovative sentencing and effective deployment of court specialists to work with homeowners, including corporate defendants. By 2000, Cleveland State University's Urban Development Law Clinic came into its own by using Ohio's receivership statute to support its CDC clients in their efforts to acquire and revitalize vacant properties. By 1995, San Diego City Attorney's Code Enforcement Unit ("CEU") grew to five full time attorneys, three litigation investors, and three support staff prosecuting violations of zoning, building, housing, and other quality of life codes. In partnership with the University of San Diego Law School, CEU also adapted community mediation processes and models to help the city's Planning Department resolve nearly 600 zoning, noise, and other quality of life code cases long before they might need the attention of the courts.[56] CEU also experimented with civil injunctive action against owners of multiple substandard properties and even resurrected provisions of California's old drug and red-light abatement statutes.

By 2000, code enforcement practice seemed somewhat stable, even coming out of the Savings and Loan debacle of the late 1980s. However, as the financing and holding of property portfolios became more sophisticated, predatory, and located far from the community itself, these shifting dynamics within the real estate and lending industries started to expose the weaknesses and limitations of traditional code enforcement practices. Within a few short years the arthritic and fragmented code enforcement apparatus became inadequate for protecting ordinary communities in the path of more complex and pernicious forms neighborhood blight.

Based on our work then and now, we recognized that code enforcement programs and policies serve as the lynchpin for blight prevention and neighborhood preservation. Communities need effective code enforcement, which includes a wide range of legal

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56. Joseph Schilling, *Local Land Use and ADR—The San Diego Saga* (1997) (paper presented before the Committee on ADR and Land Use and Development, Texas State Bar, Real Estate and Probate Section and the Center for Public Policy Dispute Resolution, University of Texas School of Law) (on file with co-author).

and administrative remedies, well written codes, more capacity, and new strategies to address the increasingly complex reality of declining housing markets, institutional owners, and a wide array of property conditions. Reforming code enforcement into a system that can be deployed strategically for maximum effect requires political will from a variety of public institutions and officials responsible for the public health, safety and welfare. It takes not only a community-wide commitment and political will to achieve change, we also found out that it would require the formation of and support for local and national networks.

B. Formation of the National Vacant Properties Campaign

The 2000 conference in Cleveland stimulated lots of ideas and subsequent discussions about the need for and value of sharing best practices across communities. A growing number of cities and organizations were looking for new solutions to address blight which threatened their work and investments in neighborhood revitalization. Community advocates wanted to adapt model practices from places as different as Cleveland and San Diego. National funders, public and private, were approached by alarmed community developers and intermediaries looking for help with the explosion of abandonment and vacancy undermining their rehabilitation and restoration work. Those working the front lines of code enforcement and vacant properties also wanted the benefit of new tools such as housing courts, code inspection technology, departmental reorganization, statutory authority for civil litigation, and code reforms—all things that were being tried and tested in those cities hit with the first waves of blight in the 1980s and 1990s.

Around the same time, the Fannie Mae and Ford Foundations became concerned about the threats to their community development and community building investments from neighborhood blight. In the fall of 2001, they brought together leading experts and local housing and community development officials to explore the dimensions of vacant property reclamation—from code enforcement and land banking to repair and rehabilitation.[57] Schilling shared his work with ICMA's vacant properties consortium

57. *Vacant Land and Abandoned Properties*, FANNIE MAE FOUNDATION ROUNDTABLE (Nov. 5, 2001), co-sponsored by the Ford Foundation (Roundtable Binder and Briefing Papers on file with co-author).

while learning about similar educational efforts for community development professions through the Local Initiative Support Corporation ("LISC"). The convening also drew attention to the pioneering work of Emory Law Professor Frank Alexander on land banking[58] along with the deep insights about housing, community development, and neighborhood revitalization from national expert Alan Mallach.[59] What became apparent from this gathering was the desperate need for information sharing and collaborative problem solving by those policymakers and practitioners working on the front-lines of neighborhood blight.

From this gathering, ICMA and LISC formed a partnership with a new Washington, D.C. nonprofit Smart Growth America ("SGA") to launch the National Vacant Properties Campaign ("NVPC").[60] SGA served as its institutional home with significant contributions from ICMA and LISC offering their outreach and technical expertise. With initial support from the Fannie Mae and Surdna Foundations, the NVPC quickly went to work providing various forms of technical assistance to roughly 50 communities over the course of six short years. NVPC relied on the extensive networks and expertise of the three principle organizations—ICMA, SGA, and LISC—as they each represented both new and traditional players in the vacant property issue—local governments, community development organizations, and planners and policymakers interested in revitalization of existing neighborhoods to prevent further sprawl.[61] A wide range of national organizations

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58. FRANK ALEXANDER, LAND BANK AUTHORITIES—A GUIDE FOR THE CREATION AND OPERATION OF LOCAL LAND BANKS (2005), https://www.hudexchange.info/resources/documents/LandBankAuthoritiesGuideforCreationandOperation.pdf.

59. *See* MALLACH, *supra* note 35,

60. *See generally Policy Analysis*, SMART GROWTH AMERICA, http://www.smartgrowthamerica.org/research/policy-analysis-vacant-properties (last visited May 22, 2016). NVPC's mission and goals included: (1) creating the national network of practitioners and experts trained to help communities implement and improve vacant property strategies and tools; (2) develop and deliver policy tools, research and information resources; (3) build capacity of local regional and national practitioners; and (4) communicate the "case" and brand the issue.

61. *See generally Vacant Properties and Smart Growth: Creating Opportunities from Abandonment*, FUNDERS NETWORK FOR SMART GROWTH AND

(such as American Planning Association, National Trust for Historic Preservation, etc.) and national experts engaged in different NVPC activities.[62] The NVPC produced a number of important policy assessments, none more influential than its first in Cleveland.

Its report—*Cleveland at the Crossroads*—set forth a comprehensive vacant property action plan for public officials and community leaders to adopt and adapt.[63] Together, this initial intervention in Cleveland and the *Crossroads* report served as the template for subsequent NVPC technical assistance projects. Its four-point policy and program framework—(1) real property data and information systems; (2) code enforcement, nuisance abatement, and housing rehabilitation; (3) demolition, land banking, vacant property acquisition and disposition; and (4) land reuse planning, urban greening, and redevelopment—arose from NVPC's compilation of model practices from other communities.[64] The NVPC model provided a menu of short and long term strategies with the goal of affecting positive changes not only to individual properties but also to neighborhoods and the public and nonprofit organizations involved in addressing neighborhood blight.[65]

Another program hallmark piloted in Cleveland was its collaborative process of engaging diverse groups of local stakeholders (e.g., representing local government, the community development field, universities, etc.) to guide the technical assistance team. Neighborhood Progress, Inc., a Cleveland community development

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LIVABLE COMMUNITIES (Sept. 2004), http://www.fundersnetwork.org/files/learn/LCW_4_Vacant_Properties.pdf.

62. From 2005 to 2009, the NVPC's email list grew from 300 to over 3,000—a good indicator of the Campaign's importance and impact. Interview with Jennifer Leonard, Former NVPC Director (Apr. 6, 2016).

63. ALAN MALLACH, LISA LEVY & JOSEPH SCHILLING, CLEVELAND AT THE CROSSROAD: TURNING ABANDONMENT INTO OPPORTUNITY (2005), https://clevelandmunicipalcourt.org/docs/default-source/default-document-library/at_the_crossroads.pdf?sfvrsn=0.

64. Jennifer Leonard & Joseph Schilling, *Lessons from the Field—Strategies and Partnerships for Preventing and Reclaiming Vacant and Abandoned Properties*, 36 REAL EST. REV. 31, 31–39 (2007).

65. *See generally* Robert Beauregard, *Strategic Thinking for Distressed Neighborhoods*, *in* THE CITY AFTER ABANDONMENT 227–43 (Margaret Dewar & June Manning Thomas eds. 2013).

intermediary, formed a 25-plus person steering committee that provided feedback to Mallach and Schilling, the NVPC lead consultants. Based on the Cleveland experience, subsequent NVPC technical assistance work was typically led by one NVPC staff member with a team of two to three consultants or practitioners with expertise that closely matched the pressing vacant property challenges identified in preliminary "scoping" visits. Such peer-to-peer learning along with collaborative engagement with local stakeholders increased the likelihood of buy-in and follow-through with the assessments recommendations. The NVPC repeated this approach to technical assistance in other cities by conducting preliminary scoping meetings and study visits to build relationships, uncover the underlying issues, determine the most effective areas of engagement, and then facilitate coalitions of local official and community development practitioners to assess the gaps in their vacant property policies and programs.[66]

Now more than ten years since its release in the summer of 2005, the legacy of the *Crossroad's* process and the report's recommendations can be measured by the on-going work of the Cleveland's Vacant and Abandoned Property Council ("VAPAC").[67] With initial support from the Cleveland Foundation

66. Co-author Schilling led a series of comprehensive policy assessments, including Cleveland (2005), Dayton (2005), New Orleans (2006), Richmond, Virginia (2006), Buffalo (2006), Toledo (2007), and Youngstown (2009). Each was funded by a combination of resources from local governments, local foundations, and technical assistance grants supported by the Surdna Foundation and a HUD Community Development Block Grant Technical Assistance grant to LISC. The Campaign, under the direction of its first and only full time Director, Jennifer Leonard, also provided other types and levels of technical assistance on specific vacant property issues, such as land banking or code enforcement, etc. Several of these assessment reports can be found at *Policy Analysis: Vacant Properties*, SMART GROWTH AMERICA, http://www.smartgrowthamerica.org/research/policy-analysis-vacant-properties/.

67. VAPAC grew from the advisory group that helped guide the NVPC's Crossroad report. *See generally* FRANK FORD, CUYAHOGA COUNTY'S VACANT AND ABANDONED PROPERTY ACTION COUNCIL—VAPAC (Sept. 22, 2015), http://www.wrlandconservancy.org/wp-content/uploads/2015/12/Collaboration_VAPAC.pdf; David Morley, *Leading the Charge on Neighborhood Stabilization in Cleveland*, VACANT PROPERTY RESEARCH INSTITUTE, http://vacantproperty research.com/wp-content/uploads/2012/02/Ford_Final.pdf; Mary Helen Petrus, *Growing Pains*, FED. RESERVE BANK OF CLEVELAND (May 5, 2015)

and the Enterprise Community Partners, this ad-hoc group of mid-level public officials, nonprofit leaders, and university and institutional experts have met monthly for more than ten years to trouble shoot policy issues and shepherd the adoption of policy actions recommended in the *Crossroads Report*. Two of those recommendations have in fact become national models such that other cities now look to Cleveland for expertise and advice—the Cuyahoga County Land Reutilization Corporation (a powerful land bank) and Case Western Reserve's real property information system, the Northeast Ohio Community and Neighborhood Data for Organizing ("NEO CANDO").[68]

Beyond its fieldwork, the NVPC leveraged its institutional home at SGA to expand its network and reach within the policy dynamics of Washington, D.C. Working with LISC's public affairs division, the NVPC helped design and draft federal legislation sponsored by Congressmen Higgins from Buffalo and Ryan from Youngstown that would have established a competitive federal technical assistance grant program specifically targeted to older industrial cities that had lost more than fifteen percent of their population.[69] NVPC released an influential survey of the literature documenting the costs and impacts form vacant properties—*Vacant Properties—the True Costs to Communities*.[70] Given his leadership in reforming state law and creating a new breed of land bank authorities in Michigan, former County Treasurer Dan Kildee and his Genesee Institute, the nonprofit research arm of the Gene-

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https://www.clevelandfed.org/en/newsroom-and-events/publications/notes-from-the-field/nftf-20150505-growing-pains.aspx.

68. For more in depth history and analysis of the VAPAC, NEO CANDO, the Cuyahoga County Land Reutilization Corporation, Reimaging a More Sustainable Cleveland, and other policies and programs that Cleveland developed and expanded, see JOSEPH SCHILLING, CLEVELAND CUYAHOGA COUNTY—A RESILIENT REGION'S RESPONSE TO RECLAIMING VACANT PROPERTIES, VACANT PROPERTIES RESEARCH NETWORK (2014), http://vacantpropertyresearch.com/case-studies/cleveland/.

69. *See generally Support the Community Regeneration, Sustainability, and Innovation Act of 2009 (H.R. 932)*, SMART GROWTH AMERICA, http://www.smartgrowthamerica.org/documents/coalition/2009/08/CRSI-Fact-Sheet_House.pdf.

70. NATIONAL VACANT PROPERTIES CAMPAIGN, *Vacant Properties: The True Costs to Communities* (2005), http://www.smartgrowthamerica.org/documents/true-costs.pdf.

see County Land Bank Authority, became part of the NVPC's executive team. Perhaps its most enduring legacy is the Reclaiming Vacant Properties Conference, first convened in Pittsburgh in 2007, then subsequently in Louisville in 2009, and again in Cleveland in 2010.[71] Even today, now hosted by the Center for Community Progress, the Reclaiming Vacant Properties Conference remains the only national convening exclusively devoted to vacant property strategies and tools.[72] The NVPC served as the incubator for this national movement by catalyzing local action, synthesizing model practices across communities, and providing a conduit for national organizations, associations, and frontline practitioner and policymakers devoted to finding better ways for reclaiming vacant and abandoned properties. Many of these and other early relationships and connections made through the NVPC still endure today.

C. Expanding the Network in Response to National Crisis of Vacant Properties

By 2003, signs of the mortgage foreclosure crisis were visible in Cleveland—long before they were visible in other communities. As the proverbial "canary in the coalmine," many of Cleveland's thirty-six community development corporations were already documenting the stories of predatory lending as increasing numbers of mortgage foreclosures prompted homeowners, and eventually traditional lending intuitions, to abandon their investments, many of which were located in once stable or transitional neighborhoods.[73]

During NVPC's preliminary work on Cleveland's *Crossroads Report*, the team found that Dayton and Toledo, Ohio, had

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71. *See generally Reclaiming Vacant Properties Conference Champions Economic and Environmental Revitalization*, SMART GROWTH AMERICA (Oct. 15, 2010), http://www.smartgrowthamerica.org/2010/10/15/reclaiming-vacant-properties-conference-champions-economic-and-environmental-revitalization/; Steve Davis, *Second Reclaiming Vacant Properties Conference Begins Today*, SMART GROWTH AMERICA (June 1, 2009), http://www.smartgrowthamerica.org/2009/06/01/second-reclaiming-vacant-properties-conference-begins-today/.

72. *About*, CTR. CMTY. PROGRESS, http://www.communityprogress.net/2015-archives-pages-423.php (last visited May 10, 2016).

73. Kermit J. Lind, *The Perfect Storm: An Eyewitness Report from Ground Zero in Cleveland's Neighborhoods*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 237, 240–41 (2008).

adopted local ordinances that would impose new disclosure requirements on predatory lenders.[74] Unfortunately, the powerful banking interests convinced the Ohio Supreme Court to take a narrow interpretation of the case law by striking down this local neighborhood protection effort under the rubric of state preemption.[75]

Symbolically, Cleveland's Slavic Village neighborhood became known as "ground zero" for the mortgage foreclosure crisis.[76] Cleveland, like many older industrial legacy cities from Detroit and Flint to Buffalo and Baltimore, was now in the middle of a second tsunami of vacant and abandoned properties that crushed many neighborhoods already diminished by decades of depopulation and deindustrialization.[77] News reports and documentaries reinforced the widespread negative impacts of the crisis in major cities across the country from Cleveland and Detroit in the Midwest to Phoenix and Las Vegas in the West.[78]

By 2008 to 2009, the United States' financial system was on the verge of collapse, led by the mortgage foreclosure crisis. As foreclosures escalated and smaller financial institutions failed, thousands of underwater homeowners and victims of predatory lending and debt collecting were forced out of their homes.[79] Local governments were left to figure out how to keep neighborhoods stable. The mortgage foreclosure crisis caused a myriad of "spillover" impacts to once stable neighborhoods, such as the decreases in property values and increases in crime and property abandon-

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74. Altier, *supra* note 51 (reporting on this preemptive reaction to municipal self-protection from corporate abuse of land and consumers of housing).

75. *Id.* at 126–27.

76. Lind, *supra* note 77, at 237–38.

77. SCHILLING, *supra* note 68.

78. JUSTIN HOLLANDER, SUNBURNT CITIES: THE GREAT RECESSION, DEPOPULATION, AND URBAN PLANNING IN THE AMERICAN SUNBELT (2011); *see* David R. Godschalk, *In Print: Sunburn Cities by Justin B.* Hollander, URBANLAND (July 27, 2011), http://urbanland.uli.org/economy-markets-trends/in-print-sunburnt-cities-by-justin-b-hollander/.

79. *See generally* DAN IMMERGLUCK, FORECLOSED: HIGH-RISK LENDING, DEREGULATION, AND THE UNDERMINING OF AMERICA'S MORTGAGE MARKET (2011).

ment.[80] Homeowners and mortgagees alike were overwhelmed by the explosion of mortgage foreclosures.[81] Many community development corporations watched sadly as years of hard work and millions of dollars' worth of buildings and rehabbed housing became engulfed by foreclosed vacant abandoned properties.[82]

As the crisis of foreclosed and vacant homes spread across the nation, community development organizations and government associations, such as the Local Initiative Support Corporation, Enterprise Community Partners, NeighborWorks America, and the National Governor's Association, convened a series of workshops, conference calls, and developed online web resources with neighborhood based strategies.[83] They and others became deeply interested in the vacant property assessments and policy strategies, such as land banking and code enforcement, that had been developed and disseminated through the NVPC's emerging network of vacant property communities and practitioners.

For the first time in decades, perhaps since the creation of HUD as part of President Lyndon Johnson's Great Society program, the federal government launched several policy initiatives to combat the market collapse of the mortgage industry. Federal agencies, such as HUD, Treasury, and the Federal Reserve Bank's Community Affairs and Research Divisions convened meetings, workshops, symposiums, and commissioned case studies and research about vacant properties.[84] As the federal government

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80. *See generally* Joseph Schilling & Jimena Pinzon, *The Basic of Blight*, VACANT PROPERTY RESEARCH NETWORK, http://vacantpropertyresearch.com/translation-briefs/blight/.

81. Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV'T L. REV. 101, 103 (2009).

82. *Id.*

83. *See generally* FORECLOSURE RESPONSE, http://foreclosure-response.org (last visited May 11, 2016) (listing a sampling of the foreclosure analysis and support from national community development NGOs that still continues today).

84. Co-author Schilling and NVPC Director Jennifer Leonard attended more than twenty meetings with federal government officials during the peak of the foreclosure crisis from 2008–2010. They were engaged with dozens of national, regional, and local community development organizations through the Neighborhood Stabilization and Foreclosure Prevention Task Force staffed by the National Housing Conference and Enterprise Community Partners. Schilling

brought together members of NVPC to share strategies, it started to understand the need to address the potential spillover effects from this concentration of vacant and foreclosed homes. Until that point the federal government's focus was on the individual homeowners, banks, and the mortgage lending industry.[85] With the rather quick adoption of President Obama's stimulus plan, the Neighborhood Stabilization Program ("NSP") became in many respects the federal government's first line of defense against the mortgage foreclosure crisis.[86]

In light of this national crisis, it became apparent that NVPC's work and its network would need to scale up quickly. The Ford Foundation again brought together a critical mass of national leaders and experts, several of whom had been at their earlier meeting in Washington, D.C. that lead to the creation of the NVPC, to develop a game plan for addressing the nation's expanding needs.[87] From this convening, a plan emerged to merge the NVPC with Dan Kildee's Genesee Institute (GI) that would provide additional capacity and capabilities to help communities address the national vacant properties crisis. The new entity would leverage the NVPC's national leadership and holistic command of the issues with GI's deep expertise on land banking and tax foreclosure. With multi-year funding commitments from the Ford Foundation and the Mott Foundation in Flint, Michigan, a new entity arose, the Center for Community Progress ("CCP") led by former Genesee County Treasurer Dan Kildee,[88] the land bank pioneer who became CCP's first president and chairman. Former NVPC Director Jennifer Leonard along with Professor Frank Alexander, and Amy Hovey from the GI served as CCP's first leadership team. During its early days CCP quickly became the "go-to-group" for expanding land banks throughout the rust belt states and beyond along with hosting important events, such as the Reclaim-

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also made several presentations at workshops and conferences of the Federal Reserve Banks of Cleveland and Richmond.

85. *Id.*

86. Schilling, *supra* note 81, at 163.

87. Vacant Properties Strategy Meeting, May 7–8th, 2008. Ford Foundation Binder and Briefing Papers on file with co-author Schilling.

88. Dan Kildee has been the U.S. Representative for Michigan's 5th congressional district since 2013.

ing Vacant Properties Conference and the CP Leadership Institute at Harvard.

Today, under the leadership of President and CEO Tamar Shapiro, the Center for Community Progress ("CCP"), headquartered in Flint, Michigan, with offices in Washington, D.C., Detroit, New Orleans, and Atlanta, has continued to solidify itself as the primary hub for this growing national network of practitioners and policymakers.[89] Nothing illustrates Community Progress' role more than its signature event—the Reclaiming Vacant Properties Conference—which now draws over 1,000 participants to share model practices from data systems, code enforcement, land banking, tax foreclosure, and more recently emerging examples of innovative reuse, among other topics. With ongoing support from the Ford, Mott, Kresge Foundations, and others, CCP, with a full-time staff of nineteen and several senior advisors, now has a robust suite of initiatives including direct technical assistance, leadership and education, policy, and research.

As an outgrowth from the Campaign, the Vacant Property Research Network ("VPRN") plays complementary roles convening working groups of practitioners and researchers, translating the latest academic and policy research, documenting this emerging policy network, and producing comprehensive case studies.[90] Under the leadership of co-author Schilling, and with assistance from university researchers, graduate students and experts, VPRN synthesizes existing research about blight and vacant properties in order to support innovative policies and programs in the field. Many of the activities also engage new researchers and scholars to help build interest and expertise in vacant property reclamation as a field of applied policy and planning research.

Other strategic linkages in the emerging vacant property network include several state nonprofit organizations that engage in education, training, research, and state legislative advocacy. Over the past ten years, the Housing Alliance of Pennsylvania has been the driving force behind several important state law changes to expand the powers and ability of local governments to fight

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89. *See About*, CTR. CMTY. PROGRESS, http://www.communityprogress.net/2015-archives-pages-423.php (last visited May 10, 2016).

90. *See About the Network*, VACANT PROP. RES. NETWORK, http://vacantpropertyresearch.com/about (last visited May 10, 2016).

blight, such as land banking and conservatorship (e.g., receivership).[91] It has also produced strategic and influential reports, including the popular and easily digestible practitioners guide "From Blight to Bright."[92] In Ohio, the Thriving Communities Institute in Cleveland and the Greater Ohio Policy Center in Columbus together have diffused and supported the state's growing number of city and county land bank authorities. Thriving Communities' President Jim Rokakis (former Cuyahoga County Treasurer) led the effort to enact land-banking legislation in Ohio.[93] He was the driving force behind the federal government's allocation of Hardest Hit Funds to Ohio and other rust belt states in need of demolition resources for vacant, abandoned, and unusable foreclosed homes.[94] Greater Ohio continues to examine the intersections of land use planning, sprawl, and the reuse of brownfields (former industrial properties with actual or perceived environmental contamination) and most recently greyfields (the design and reuse of vacant and underused commercial/retail properties).[95]

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91. See VACANT PROP. RES. NETWORK, PHILADELPHIA'S VACANT PROPERTY JOURNEY: FOSTERING COLLABORATIVE ALLIANCE WITH CONVERGING POLICY REFORM (2013), http://vacantpropertyresearch.com/wp-content/uploads/2015/06/VPRN_Philadephia-full-report.pdf.

92. THE HOUSING ALLIANCE ON PENNSYLVANIA, FROM BLIGHT TO BRIGHT: A COMPREHENSIVE TOOLKIT FOR PENNSYLVANIA (2013), http://www.nxtbook.com/nxtbooks/swell/fromblighttobright.

93. *See Jim Rokakis*, WESTERN RESERVE LAND CONSERVANCY, http://www.wrlandconservancy.org/who-we-are/our-staff/jim-rokakis (last visited May 10, 2016).

94. *See Neighborhood Initiative Program*, OHIO FINANCE HOUSING AGENCY, https://ohiohome.org/savethedream/neighborhoodinitiative.aspx (last visited May 10, 2016).

95. MARIANNE EPPING & LAVEA BRACHMAN, REDEVELOPING COMMERCIAL VACANT PROPERTIES IN LEGACY CITIES, A GUIDEBOOK TO LINKING PROPERTY REUSE AND ECONOMIC REVITALIZATION (2014), http://www.greaterohio.org/files/pdf/eppigbrachman-vacantproperties-updatedoct14-lowres.pdf.

D. Developing a Systematic, Data-Driven Policy Framework for Strategic Code Enforcement[96]

The seeds for a new approach to code enforcement were sowed in 2009 to 2010 when Schilling returned to work with Professor Lind and Cleveland's VAPAC. Despite many positive changes, the City of Cleveland's building and housing code enforcement programs were still addressing vacant properties in a reactive way, responding on a case-by-case basis in light of the mounting mortgage foreclosure crisis. Even suburban cities with very good enforcement programs in traditionally stable communities, such as Shaker Heights and South Euclid, were challenged with how to effectively identify, locate, and take code enforcement actions against banks, flippers, and institutional investors. With a small grant to the Campaign from the Fannie Mae Corporation, Schilling was tasked to help a VAPAC working group reexamine traditional code enforcement approaches through a series of working sessions and site visits.

Schilling found that once again local community development organizations, the law school's clinic, and Cleveland's Municipal Housing Court were continuing to push code enforcement changes. Neighborhood Progress, Inc. ("NPI"), launched its Neighborhood Stabilization Team ("NST") project with assistance from NEO CANDO and co-author Lind's Urban Development Law Clinic. NST represented a new type of data driven problem solving using all available legal and administrative tools to identify a course of action against different types of problem properties owned by different individuals or corporations within a defined

96. Although this Article and section focus on strategic code enforcement, it is important to understand that code enforcement is part of a larger vacant property policy system that includes real property information systems, land banking, demolition, reuse planning, and urban greening. The executive summaries for VPRN's Cleveland and Philadelphia case studies sets forth a vacant property policy system model that illustrates how these pieces fit together and the policy process for design, adoption, and implementation. Our point is not to downplay the importance of land banking, urban greening, and other relevant legal and policy strategies and tools, but to recognize code enforcement does and can serve as a multiple prong policy intervention that can support many of the other vacant property reclamation strategies. Unfortunately, it has been the experience of the co-authors that code enforcement often gets the least attention and the least resources.

neighborhoods or geography.[97] NPI and Professor Lind gained nation-wide attention for filing civil nuisance abatement lawsuits against Wells Fargo and Deutsche Bank for failure to abate serious nuisance conditions at REO foreclosed residences they held title to as trustees.[98] In a classic battle of "David vs. Goliath," Cleveland's Housing Court Judge Raymond Pianka also issued criminal bench warrants against corporate officials from global financial institutions when the defendant corporations ignored criminal nuisance complaints for failure to secure and maintain vacant and foreclosed homes.[99]

During this engagement, Schilling brought to bear his code enforcement experiences and knowledge of model practices from other cities. By this time, Michael Braverman's transformation of Baltimore City's code enforcement program was becoming the gold standard by which major city code enforcement departments are now measured against today.[100] Braverman revamped reactive code enforcement processes by infusing business practices and systems that rely heavily on data driven program and policy decisions.[101] By taking a more proactive approach, Baltimore's code enforcement managers and inspectors could tailor their code enforcement interventions to address different types of problem properties. Baltimore's Housing Code Enforcement operation also included legal counsel and enforcement attorneys within the department, which made it more efficient to take more aggressive

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97. *See* SCHILLING, *supra* note 68.

98. *See* Lind, *supra* note 5, at 103–12.

99. *See* SCHILLING, *supra* note 68; Raymond L. Pianka, *Cleveland Housing Court—A Problem-Solving Court Adapts to New Challenges*, TRENDS IN STATE COURTS, http://ncsc.contentdm.oclc.org/cdm/ref/collection/spcts/id/232.

100. Both authors have known Assistant Housing Commissioner Braverman for over ten years and presented with him at workshops and roundtables. Co-author Schilling conducted interviews and site visits with Braverman and some of his staff in 2008, 2011, and 2012. Unfortunately, this research has not yet found its way into a published article. Perhaps the best sources are the many presentations Braverman has made at national conferences. *See generally* MICHAEL BRAVERMAN, BUILDING CAPACITY & DEPLOYING IT STRATEGICALLY (2011), http://www.hcdnnj.org/assets/documents/braverman%20%20-%20final.pdf.

101. *See* Jim Chrisinger, *Smart Management and the Turnaround of a City: The Right Management Tools Can Literally Help Rebuild a Blighted City*, GOVERNING MAGAZINE, June 1, 2011.

civil receivership actions against those long-standing abandoned properties with serious title issues.[102] New Orleans was another city transforming its code enforcement approaches.[103] In the post Katrina world, the city adopted a new property maintenance/blighted property code but chose to design and manage an elaborate administrative hearing process to more aggressively gain compliance.[104]

In late 2010, CCP asked Schilling to develop ideas for expanding its code enforcement capacity building and technical assistance efforts. Schilling brought the usual suspects to Flint, Michigan, to take stock of the current state of the field, assess its needs and opportunities, and spend a day with the city of Flint's code enforcement officials.[105] CCP played another important role by featuring code enforcement issues and model practices at its March 2011 Community Progress Leadership Institute. In September 2011, as a follow up to these two activities, the CCP invited several teams from emerging code enforcement programs (e.g., Memphis, New Orleans, Atlanta, Newburg (New York), Flint, and Detroit) to tour Braverman's operation in Baltimore and further ex-

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102. *See e.g.*, Jason Hessler & Steve Barlow, *The Code Enforcement 'Plaintiffs' Lawyer: Practitioner Notes and Observations From the Front Lines* (paper and presentation at September 2014 workshop hosted by the International Municipal Lawyers Associations (IMAL) and CCP) (on file with co-author).

103. At the request of the NVPC Office in New Orleans Lind and Schilling participated in several study visits post Katrina to help guide NVPC's efforts to help the city transform its code enforcement operation and professionalize the staff. They reviewed the city's administrative hearing ordinances and hearing officer procedures, recommended the hiring of Doug Leeper as code enforcement executive in residence, and facilitated a visit by Michael Braverman and his team with New Orleans's existing code enforcement managers, inspectors, and administrative staff.

104. See CITY OF NEW ORLEANS, BLIGHT REDUCTION REPORT 16 (2014), http://www.nola.gov/getattachment/Performance-and-Accountability/Initiatives-and-Reports/BlightSTAT/Blight-Report_web.pdf for details on reorganization for the code enforcement and hearing bureau.

105. The usual suspects featured several well-known code enforcement practitioners and experts, including Professor Kermit Lind, John Kromer, author and former Housing Director for City of Philadelphia under former Mayor Rendell, Baltimore City's Deputy Housing Commissioner Michael Braverman, Former Code Enforcement Director for the City of Chula Vista, California (the first city to adopt a vacant property registration ordinance that applied to foreclosed properties) Doug Leeper.

plore the dimensions and range of possible code enforcement capacity building activities along with national experts Schilling, Lind, Leeper, and CCP staff. These CCP convenings and the intense discussions with Cleveland's VAPAC began to inform Lind and Schilling's thinking about the need for a new code enforcement model.

From these past and recent collaborations, Schilling and Lind have issued a call to action for local governments and their partners to design, adopt, and support a strategic approach to code enforcement. Although Lind and Schilling each stress different dimensions,[106] as an emerging concept**,** strategic code enforcement includes: (1) tactical decisions that involve specific code enforcement issues at particular properties; and (2) strategic policy and programmatic decisions that might apply to entire neighborhoods and/or address broader policy and planning goals. From the tactical perspective, strategic code enforcement encourages local governments to deploy their legal remedies and policy tools in a more effective and efficient way by targeting the right response to the right place at the right time. This approach requires investigative resources and expertise beyond site inspections that can identify and unravel the contemporary complexities of property owners and legal interests. Strategic code enforcement relies on improving operational, administrative, and legal processes so that code enforcement systems are more nimble, time-and-cost efficient, and, as a result, effective. Such a systematic approach demands close interagency and inter-departmental coordination and seamless integration with a jurisdiction's planning, land development, and housing and community development plan, policies and programs. Another core element is the pivotal role of community groups,

106. Note that Lind calls it strategic code "compliance" enforcement, stressing the ultimate goal of this endeavor is to bring properties into compliance with relevant rules and regulations regardless of the means. Kermit J. Lind, *Code Compliance Enforcement in the Mortgage Crisis* 3 (2012), http://www.communityprogress.net/filebin/pdf/new_resrcs/Kermit_Lind_Code_Enforcement_Paper.pdf. Enforcement actions—those formal administrative and judicial remedies and processes—are not necessary for the larger percentage of violation cases that local governments manage. However, for purposes of this Article we are using strategic code enforcement to include both compliance strategies, tools and techniques as well as the traditional enforcement mechanism.

neighborhood organizations, and local residents. Strategic code enforcement cannot be effective without transparent processes and meaningful public engagement and, in some cases, empowerment.

The foundation of strategic code enforcement, however, rests on data and integrated real property information systems. Developing integrated data systems are now regarded as essential for dealing with neighborhood blight. Public policy makers and officials, neighborhood public interest advocates, and scholars search for data in various separate institutional silos. They are looking for information on individual properties as well as the connections among the changing variables related to large-scale blight. Since parcels of real property bear unique identifying codes (often a single unique parcel identification number issued and maintained by local government assessors and tax collectors), all real property related data can be assembled from many sources into an integrated data system for access, analysis, and mapping. Decision makers and program managers need this capacity to monitor and evaluate their work in real time. For example, many such systems often connect existing data from different local government departments and agencies, such as: (1) Code Enforcement Cases: common indicators of blight are the existing and past cases which outline violations of real property, building, health, or housing codes.[107] Most local governments have ordinances and processes that declare problem properties, often vacant and/or abandoned, as public nuisances and concentrations of public nuisances as blighted areas. (2) Mortgage Foreclosure: tracking the homes in the mortgage foreclosure process offers another common indicator of blight, such as neighborhoods or blocks with higher foreclosure rates, inactive or abandoned foreclosures, foreclosure sale of defective homes, and disposition by mortgagees of defective homes taken in foreclosure.[108] (3) Tax Foreclosure: Some tax-delinquent

107. R.C. Weaver, *Re-framing the Urban Blight Problem with Transdisciplinary Insights from Ecological Economics*, 90 ECOLOGICAL ECON. 168, 170 (2013).

108. *See generally*, Michael P. Johnson et al., *What Foreclosed Homes Should a Municipality Purchase to Stabilize Vulnerable Neighborhoods?*, 10 NETWORKS & SPATIAL ECON, 363–88 (2010); Ingrid Gould Ellen et al., *The Foreclosure Crisis and Community Development: Exploring REO Dynamics in Hard-Hit Neighborhoods*, FURMAN CTR. FOR REAL EST. & URB. POL'Y N.Y.U.

properties are seen as blighted by their communities.[109] Tax delinquency is often an indicator of abandonment and blight. One recent study showed that areas where there are high levels of city-owned properties and elevated rates of vacancies are more likely to experience housing abandonment.[110] (4) Vacant and Abandoned Lots, Homes and Buildings: Abandonment occurs when a property no longer has a steward who is responsible for the basic responsibilities of property ownership.[111] Vacancy describes property that is not occupied, which may or may not be a public nuisance—much depends on who monitors and can maintain the property during vacancy. The critical data reveals when, how, and why a vacant or abandoned building becomes a public nuisance—those problem properties that pose threats to public safety and neighborhood quality of life.[112]

Without these critical indicators, code enforcers and neighborhood community organizations cannot respond effectively. Sharing data and the knowledge it yields enables collaboration among data keepers across sectors and institutional boundaries. Sharing knowledge can result in more and better information for making policy decisions and resource allocations.

In today's climate of local government fiscal instability and dwindling revenues and resources, strategic code enforcement is even more critical as local leaders ask more from their code en-

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1–13 (2013), http://furmancenter.org/files/publications/REOHardHitWorkingPaperApril2013.pdf.

109. Stephan Whitaker & Thomas J. Fitzpatrick, *Deconstructing Distressed-Property Spillovers: The Effect of Vacant, Tax-Delinquent, and Foreclosed Properties in Housing Submarkets*, 22 J. HOUSING ECON. 79, 3 (2012).

110. Robert Mark Silverman et al., *Dawn of the Dead City: An Exploratory Analysis of Vacant Addresses in Buffalo, NY 2008-2010*, 35 J. URB. AFF. 131, 133 (2013) (citing A.E. Hiller et al., *Predicting Housing Abandonment with the Philadelphia Neighborhood Information System*, 25 J. URB. AFF. 91–105 (2003)).

111. *See generally* Paolo Rosato et al., *Redeveloping Derelict and Underused Historic City Areas: Evidence From a Survey of Real Estate Developers*, 53 J. ENVTL. PLAN. & MGMT. 257, 257–81 (2010); Daniel Miller Runfola & Katherine B. Hankins, *Urban Dereliction as Environmental Injustice*, 9 ACME: AN INT'L E-JOURNAL FOR CRITICAL GEOGRAPHIES 345, 345–67 (2009); Miriam Hortas-Rico, *Sprawl, Blight, and the Role of Urban Containment Policies: Evidence from U.S. Cities*, 55 J. REGIONAL SCI. 298, 298–323 (2010).

112. *Charting the Multiple Meanings of Blight*, *supra* note 1, at 25–35.

forcement agencies and frontline inspectors in neighborhoods with ever changing conditions, markets, and local conflicts. Code enforcement agencies thus need a greater array of different code enforcement interventions—more arrows in their quivers—that can identify substandard properties, prevent them from becoming vacant, secure and save them when possible, demolish vacant and abandoned structures, abate a wide array of public nuisances, and recover the costs of doing so. If done right, strategic code enforcement programs can improve housing and property conditions, support neighborhood revitalization projects, and contribute to the overall health of its residents. However, as far as we can tell, only a handful of communities are actually taking a more strategic, proactive approach to code enforcement.

III. Reflections on How Far we Have Come and How Far we Need to Go

Great progress has been made over the past ten plus years to design and test new responses to the multiple dimensions of neighborhood blight. Thanks in part to the development of a national network of practitioners and policymakers, innovative policies and program such as land banking, real property information systems, and urban greening initiatives, have become prevalent and common practices. Relationships and partnerships continue to grow and expand among national, regional, and local organizations involved in this common quest to reclaim abandoned properties and revitalize neighborhoods. Sharing of best practices through conferences, workshops, web sites, and reports have become the lifeline to and the inspiration for many local governments and nonprofit organizations working the frontlines of the fight against blight.

Despite the efforts within these vacant properties networks, local code enforcement officials and community-based organizations now operate within a more complex world that demands increasing levels of collaboration and creativity. The diversity of the housing and real estate markets and property business models, the on-going community impact of the mortgage foreclosure crisis and economic dislocation from the Great Recession, along with decreasing government resources and increasing local government instabilities, all indicate that neighborhood blight will continue to spread and fester, especially in those communities with aging

housing stock and surplus commercial and retail properties. Vacancy and abandonment is no longer just a big city problem. Many inner ring suburban cities are now seeing more vacant properties as they lose population and once strong real estate markets become weaker.[113]

There is no reason to expect neglected, poorly maintained structures to recover overnight or for neighborhoods with households of wage earners who lost savings and income prospects to now magically blossom and thrive. The economics of home repair and building rehabilitation does not deliver the benefits it once did. That reality makes it difficult for community development corporations, especially in legacy cities, to make the policy and economic case for the traditional model of substantial rehab and resale.[114] Credible economic analysis predicts what appears to be a permanent restructuring of many urban neighborhoods with less homeownership, more rental properties, fewer resources to maintain homes for family households, and a reduction in the coming generations' dreams or capacity for ownership of single family dwellings surrounded by yards.[115]

In light of this "new normal," municipal governments, civic organizations, community groups, the real estate and housing industries—with support from universities, nonprofits, and foundations—must collaborate to design, adopt, and implement a more systematic suite of neighborhood preservation and revitalizations strategies that can tackle these more complex and dynamic challenges. Cross sector collaboration becomes the political and community mortar that strengthens the campaign for better public poli-

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113. Kathryn W. Hexter, et al., *Revitalizing Distressed Older Suburbs*. WHAT WORKS COLLABORATIVE & CLEV. ST. U. 1–2 (2011), http://cua6.urban.csuohio.edu/publications/center/center_for_community_planning_and_development/Final_11.28.11_RevitalizingDistressedSuburbs.pdf.

114. *See* Frank Ford et al., *The Role of Investors in the One-to-Three Family REO Market: The Case of Cleveland*, JOINT CTR. FOR HOUSING STUD. HARV. U. 10 (2013). As an addendum to this study, Ford and his team estimated the rehabilitation levels and costs for three neighborhoods and found only one first tier suburban community where the most basic rehabilitation would make economic sense. *Id.*

115. *See id.* at 3 (studying the post-foreclosure REO properties and their disposition in the housing market to make recommendations on curbing business practices harmful to neighborhood stability and renewal).

cies and more effective programs and actions—both in the prevention of blight's spread and the recovery and resilience of vitality at the neighborhood level. Below we offer a few ideas on how national and local networks can foster the collaboration, coordination, and capacity needed to address some of these emerging challenges.

A. Clarifying the Legal Principles of Blight and Nuisance in State and Local Laws and Policies

Referring to the opening discussion of the important legal uses of blight, nuisance (both public and private), police power, property rights, and public rights to protect public health, safety, and welfare, legal scholars and their practicing colleagues have more to do to defend neighborhoods from the rapaciousness ingrained in predatory business practices.[116] A new but powerful threat to community life has taken root. The titans of global commerce and finance have demonstrated a profound disregard for the way ordinary people in their ordinary neighborhoods are burdened with the external consequences of their business plans. Regulatory agencies appear to be feeble and out of touch with the impact on neighborhoods of titanic global profit seeking.[117] This new reality calls urgently for renewed vigor in public interest legal work and legal training and education—work that recognizes communities are coping with new, unfamiliar threats to their sustainability.

New remedies for blight must start with clear, up-to-date codes for local housing and neighborhood environmental maintenance stating in law what is properly to be deemed blight and setting forth model code enforcement processes. Municipal legislators and code officers responsible for the exercise of police power need to study in detail the harm that blight causes to the public and make sure the legislation necessary for policing blight is current and effective. Blight conditions that are public nuisances must be described clearly as such with appropriate remedies and sanctions

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116. *See supra* Part I.A.

117. Lind, *supra* note 5, at 91–93; David P. Weber, *Zombie Mortgages, Real Estate, and the Fallout for the Survivors*, 45 N.M. L. REV. 37, 43–45 (2014); *see also* Nicholas Freudenberg & Sandro Galea, *Cities of Consumption: The Impact of Corporate Practices on the Health of Urban Populations*, 85 J. URB. HEALTH: BULL. N.Y. ACAD. MED. 462 (2008).

levied in administrative and judicial proceedings. The regulations and the enforcement system need additional capacity and expertise to match the new realities of the land use, markets, structures, and the persons, both real and corporate, who are subject to the police power. Policing and adjudicating code enforcement cases can no longer function with uncertain regulations, ineffective sanctions, easily manipulated case management, and unqualified, untrained, or unmotivated personnel.

Criminal codes must be policed by a system strategically managed to achieve compliance first, without unreasonable delay and at the least cost to the public. Many municipal court dockets reveal a trend toward larger and slower moving caseloads with repeat offenders and repeated cases on the same property. Raymond L. Pianka, Judge of the Housing Division of the Cleveland Municipal Court, has described many of these problems he has confronted in his twenty years as a judge in a special purpose housing and environmental court where he sees most of the biggest challenges in code enforcement.[118] He advocates for the establishment of more special purpose courts (e.g., housing and environmental courts) with special jurisdictional and subject matter authority over legal issues involving housing, urban environments, real estates and neighborhoods. Such problem solving courts are better equipped to adapt creatively to new challenges[119] by using local rules to manage dockets, organizing special dockets according to the nature and difficulty of cases, establishing new programs of assistance for defendants with special needs, and using the court for educating the community at large, tenants, landlords, property management servicers, and elderly homeowners.[120] Innovations in service of notice to secure appearances by corporate officers, creative sentencing, and the use of parole in situations involving corporate owners to maximize compliance are among the court's tools.[121] The Cleveland Housing Court is one of the busiest courts in Ohio, handling more than 7,000 criminal cases and 11,000 civil

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118. *See* Pianka, *supra* note 99, at 44–49; *see also* Kermit J. Lind, *The People's Court*, SHELTERFORCE, NAT'L HOUSING INST. (2011), http://www.shelterforce.org/article/2484/the_peoples_court2.

119. *See* Pianka, *supra* note 99, at 44–49.

120. *Id.*

121. *Id.* at 47.

cases a year at this point in time.[122] Among those are civil public nuisance abatement cases involving the appointment of receivers.[123] Finally, it should be noted that the court maintains relationships with other key institutions like the county's state-of-the-art land bank, the other courts, and local law school clinics, and bar associations.[124]

A strategic code compliance system should include programs of information, incentives, and assistance for those residents who will—with help—comply. The vast majority of housing and environmental code violations are corrected by responsible owners or occupants without a court appearance. Some communities have neighborhood-based programs to help people avoid citations with financial and/or self-help training, tool lending, or volunteer labor.[125] More advanced innovations involve training community members to assist in monitoring abandoned properties that are or need to be boarded up, making qualified complaints to the inspection officials to cut the time and expense of officers in the field.[126] The development of hand-held telecommunication devices for photography and direct data entry via the internet is opening up many new ways community organizations can expand the scope and immediacy of routine work in code compliance.[127]

Underlying these policies and programs should be a civic culture that will not tolerate either blighted places or blighting conduct. Without an organized and sustained community-based commitment to combat blight, the struggle for survival and sustainability, especially in hard hit neighborhoods, is unlikely to be

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122. *Id.* at 45.

123. *Id.* at 46.

124. *Id.* at 47; *see also* Lind, *supra* note 118.

125. *See, e.g.*, HOME REPAIR RESOURCE CTR., http://www.hrrc-ch.org (last visited May 11, 2016).

126. Cleveland's code enforcement partnership pilot program uses citizen code compliance inspectors assigned to local community development corporations. *See* MARK FRATER, COLLEEN M. GILSON & RONALD J. H. O'LEARY, THE CITY OF CLEVELAND CODE ENFORCEMENT PARTNERSHIP (2009), http://www.communityprogress.net/filebin/pdf/CLE_CE_Partnership.pdf.

127. Several cities have partnered with NGOs to conduct extensive property condition surveys that identify the vacant properties throughout an entire city. *See City of Change: Evolutions in the Condition of Detroit's Housing Stock*, DATA DRIVEN DETROIT (Nov. 18, 2014), http://datadrivendetroit.org/city-of-change/city-of-change-evolutions-in-the-condition-of-detroits-housing-stock.

successful. Indeed, public officials whose platform includes fighting blight cannot win the fight without wide-scale support from residents who want their neighborhood to be litter free and civic leaders who are prepared to give time and political force to making difficult changes in public policies and programs in the public interest, even when those changes may affect their own business or professional interests.

Changing a culture with new norms and expectations is difficult. It takes more than slogans and campaigns. It is more like a movement than a program. Yet the urgency for advancing such a movement has reached greater intensity with the obvious distress in many ordinary neighborhoods and communities fighting to survive the tsunami of housing abandonment and neighborhood distress. Being indifferent or neutral about advancing blight—in small matters like "free range litter" as well as whole blocks of empty row houses, apartments, and store fronts—is self-destructive. The acceptance of blight as either not a personal issue or as one too vast to care about by ordinary people guarantees that it will prevail. Ultimately, it is the community as a whole, not just its government, civic pillars, and neighborhood activists, who will be needed to meet the challenge of blight.

B. Developing New Systems and Capacities for Strategic Code Enforcement

Since our discussion centers on code enforcement, it seems appropriate and perhaps necessary that we reflect on its future. As this Article explains, our experience working with dozens of cities highlights that typical code enforcement programs spend most of their efforts reacting to individual cases of vacant properties and neighborhood blight. Given dwindling resources and greater complexities, policymakers and practitioners need help in transforming existing code enforcement policies and programs into more strategic and comprehensive enterprises. Here we consider how collaborative networks (local and national) could help communities recalibrate their code enforcement programs around the concepts of strategic code enforcement—the standard against which all future code enforcement program and policies should be measured.

The cornerstone of this transformation will rest with those who lead, manage, and direct code enforcement programs and neighborhood stabilization and revitalizations initiatives. This group of potential change agents includes local government man-

agers, CDC directors, housing and community development department directors, municipal attorneys, prosecutors, and others in civic leadership positions. Collectively they can set and influence code enforcement's policy and program direction and they occupy the positions and perspectives to effectuate this type of change. Collectively, they comprehend the political, community, policy, and legal context as well as the micro level details and long standing culture of code enforcement organizations. They also work closely with and engage community leaders and neighborhood residents. Code enforcement managers are critical in leading this change as they can translate code enforcement's role in broader housing and community development policy goals to front line inspectors, community leaders, and state and local government officials.

Code enforcement managers will need help in guiding and directing this level of change. They could benefit from a deeper understanding about the process of changing organizations and policies as well as the practical techniques for developing, implementing and evaluating new sets of strategic procedures, remedies and policies for addressing neighborhood blight. Change of this magnitude—shifting the code enforcement community of practice towards a strategic and systematic model—will demand the development of core principles, a comprehensive curriculum and a variety of capacity building activities.

Unfortunately, within the existing national vacant property network, only a few organizations and code enforcement experts provide direct technical assistance to a limited number of communities on how to improve their code enforcement programs. Since 2014 the Center for Community Progress ("CCP") has administered its Technical Assistance Scholarship Program ("TASP") serving thirteen cities covering a wide range of vacant property policies and programs, some which focus upon code enforcement.[128] CCP also convenes its annual leadership institute where it brings together small teams (around three to six people) from four

128. For example, Gary, Indiana, a 2015 TASP recipient, requested code enforcement help. *See* Tarik Abdelazim, *Building a Strategic, Data Drive Code Enforcement Program for Gary, Indiana*, CTR. FOR CMTY. PROGRESS (2015), http://www.communityprogress.net/filebin/150928_TASP_Gary_Report__FINAL.pdf.

to six cities for three plus days of intensive instruction, discussion, troubleshooting, and reflection on vacant property challenges and solutions.[129] From time to time discussions about code enforcement issues arise at this annual gathering but much depends on the focus on the participant cities and individuals. CCP also sponsors occasional code enforcement workshops.[130] Outside of CCP, few national organizations engage in code enforcement education or technical assistance.[131] While state and local chapters of code enforcement associations offer inspector education and training, and some states, such as California, have inspector certification processes,[132] our recent research could not find a comprehensive course and curriculum for code enforcement department directors, prosecutors, policymakers, hearing officers and judges on the legal and policy dimensions of a data driven, strategic approach to code enforcement.[133] Moreover, little research exists on how to consistently track, document, and evaluate the outputs and outcome from these new code enforcement interventions.[134]

Now is the time for policymakers and public interest foundations to invest in the capacity of a new cadre of code enforce-

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129. *Community Progress Leadership Institute*, CTR. FOR CMTY. PROGRESS, http://www.communityprogress.net/community-progress-leadership-institute-pages-414.php (last visited May 10, 2016).

130. *See, e.g.*, *Regulation to Revitalization: The Role of Strategic Code Enforcement*, CTR. FOR CMTY. PROGRESS, http://www.communityprogress.net/regulation-to-revitalization--the-role-of-strategic-code-enforcement-pages-434.php (last visited May 10, 2016).

131. Note the International Municipal Lawyers Association (IMLA) has a special code enforcement working group and has held one and two-day code enforcement workshops prior to their annual conference. *See 2015 Code Enforcement IMLA's 2015 Code Enforcement Program*, INT'L MUN. LAWYER'S ASS'N, http://www.imla.org/events/code-enforcement (last visited May 10, 2016).

132. *Certification*, CAL. ASS'N CODE ENF'T OFFICERS, http://www.caceo.us/?page=66 (last visited May 10, 2016).

133. The authors conducted a simple scan of different organizations that have done or touch upon code enforcement, vacant properties, and blight elimination and could not find a comprehensive course or workshop tailored for code enforcement managers and directors on strategic code enforcement.

134. *See Code Enforcement*, VACANT PROP. RES. NETWORK, forthcoming summer 2016 VPRN translations and policy brief on code enforcement at http://vacantpropertyresearch.com/translation-briefs/code-enforcement (last visited May 10, 2016).

ment leaders. If these public and philanthropic organizations are serious about changing the substantial role that neighborhood blight plays in income inequality and social injustice, then it becomes critical to support local capacity building and policy interventions that regenerate physical place and people at the same time. A professional management academy for directors, supervisor, municipal lawyers, and judges could in the short term enhance and expand the capacities of individual communities; and it could also lay the foundation for transforming the practice of code enforcement to meet current challenges.

The potential management curriculum would prepare managers and directors for establishing and expanding special investigation processes, developing performance metrics, understanding the legal and policy impacts and tradeoffs for their activities. Core to the strategic model is the tailoring of code enforcement and compliance interventions based on neighborhood assets, real estate markets, property ownership profiles, case type and community needs, capacity and engagement—selecting the right remedy for the right case at the right time. Such a strategic approach is fundamentally different than how most code enforcement managers operate or think. The transformation from reactive to strategic will take time, resources, and significant political will and community support.

Beyond education and training, community code enforcers will need reinforcement to launch and sustain such transformative change. While existing conferences and workshops can help plant the seeds of change by researching and sharing model practices from across cities and code enforcement programs, more intensive follow through can ensure the effective and complete shift towards the operation of strategic code enforcement. Additional hands-on technical assistance would also expedite the policy transfer process and facilitate adaptation of innovative policies and programs to local political, policy, and legal circumstances. Hiring consultants, who often have little direct code enforcement experience or expertise or who pay insufficient attention to their clients' circumstances usually leads to disappointing results. Although they will require additional resources and greater technical expertise, policymakers and foundations should explore, perhaps even pilot, other capacity building interventions, such as placing code enforcement executives in residence, facilitating short-term peer exchanges, and launching a fellowship program that might allow an experienced

department director to spend six months to a year assisting in the reorganization of another city's code enforcement department.

Within the domain of legal education, the emergence of the University of Memphis' Neighborhood Preservation Clinic offers a potential model for shaping the next generation of blight litigators and code enforcement directors.[135] Law schools operate clinical practice as a training ground for lawyers while also providing critical public and legal services to individual and organizational clients who do not have access to or sufficient resources to obtain legal services. Co-author Lind directed the Urban Development Law clinic at Cleveland Marshall School of Law at Cleveland State for more than fifteen years. Currently the Memphis Neighborhood Preservation Clinic assists the city of Memphis in the prosecution of code enforcement cases that come before the Shelby County Environmental Court, the Honorable Larry Potter presiding. More than twenty-four students have filed more than one hundred actions in the community's campaign against blighted properties. Beyond learning the nuts and bolts of code enforcement ligation, the students also spend time collaborating with frontline inspectors, law enforcement, community members, and other stakeholders involved with fighting blight. By practicing before a special purpose problem solving court, they gain insights beyond litigation tactics. In reality the clinic lays the foundation for a wide variety of potential careers fighting blight beyond litigation—directing a city housing/community agency, code enforcement unit, or community development corporation, for some examples. In fact, several major cities have attorneys who currently direct code enforcement departments and started their careers as code enforcement litigators.[136]

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135. *See* Karen Sloan, *Law Students Combat Urban Blight in Memphis*, Karen Sloan, NAT'L L. J., (Jan. 21, 2015), http://www.nationallawjournal.com/id=1202715716500/Law-Students-Combat-Urban-Blight-in-Memphis #ixzz448g70L5h; *see also* Lance Wiedower, *Memphis Law Students Help Shape City's Blight Fight* (Jan. 14, 2016), http://www.highgroundnews.com/features/blightclinic.aspx.

136. As of 2016 our personal list includes Michael Braverman, Baltimore, Ron O'Leary, Cleveland, and now the new code enforcement for Memphis, Patrick Dandridge.

C. Developing Local Teams or Councils for Supporting Cross Sector Coordination and Collaboration

One reality faced by those threatened by neighborhood blight is that the various agencies and programs needed to be marshaled are often fragmented and disconnected from each other. As a result, sometimes they compete or interfere with each other without intending to do so. Legal and political impediments often prevent the sharing of information or taking collective action, let alone the more permanent merger or reorganization of such agencies. Deeply entrenched interests usually resist institutional change that would cross particular bureaucratic silos. However, those institutional units can be connected and coordinated by the formation of teams or councils composed of senior policy and program leaders in public and public interest agencies who meet regularly to share experiences, problem solve, pool resources and collectively set policy priorities and develop action plans for reform.[137]

Within the vacant property field, a number of cities have government led task forces, often initiated by the mayor or other policymaker and led by a city manager, county executive or department head. Task forces typically focus on inter-department or intra-agency collaboration on particular types of vacant properties or specific neighborhoods.[138] Nothing is wrong with this approach, as they can help break down government silos and foster program and project coordination; but we contend they do not go far enough. We observe that long term, effective initiatives against blight and vacant properties must include strategic partners outside of local government. While local code enforcement programs control many of the policy levers and legal tools, the complexities of fighting neighborhood blight require significant contributions from nonprofit organizations, community based groups, philanthropy

137. *See* Jessica Bacher & Meg Byerly Williams, *A Local Government's Strategic Approach to Distressed Property Remediation*, 46 URB. LAW. 877, 879 (2014).

138. *Id.* Task forces can also include representatives from nonprofit, business, and local institutions as they do for the Distressed Property Task Force in Newburgh, New York. Note, Lind and Schilling performed a special assessment of the vacant property challenges in Newburgh, New York, as consultants to the Pace Land Use Law Center. *Id.*

and private business interests. Nongovernmental organizations are usually able to act with flexibility and nimbleness in the public interest that is uncharacteristic of government. That is especially true in the acquisition, management, and disposition of real property interests and in organizing complex financial transactions from multiple sources in major projects. Their governing structures can be tailored to provide a high level of accountability to both private and public stakeholders. We find that public-private teamwork is the hallmark of communities that are leading the way in battling blight.

As we have discussed earlier in this Article, a leading example of such cross sector collaboration is Cleveland's Vacant Abandoned Property Action Council ("VAPAC"). In 2005 VAPAC came together with the preliminary goal to oversee implementation of the NVPC's policy and program recommendations set forth in their *Cleveland at the Crossroads* report. VAPAC includes leaders from local public interest housing and community development organizations, along with key public officials in county, city, and suburban jurisdictions in an informal collaborating group of professionals. This self-initiating group realized that progress in dealing with their vacant abandoned property crisis required them to work together, sharing information, coordinating policies and, in general, cooperating instead of competing. In their nearly eleven-year history there have been major accomplishments, such as scaling NEO CANDO into a robust real property information system, lobbying for the creation of the Cuyahoga County Land Reutilization Corporation, and supporting reforms to municipal code enforcement operations and county tax foreclosure programs.[139] It has commissioned, conducted, or collaborated in studies of local issues that provide information and guidance for policy and program development. VAPAC continues to hold monthly meetings where the members trouble-shoot intricate details of vacant property processes, share information across sectors and agencies, coordinate their actions for maximum effective results, and advocate for changes in state and local policy. Those partici-

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139. For more detailed reports and descriptions, see SCHILLING, *supra* note 68, and Morley, *supra* note 67. *See also* Kermit J. Lind, *Strategic Code Compliance Enforcement: A Prescription for Resilient Communities*, *in* HOW CITIES WILL SAVE THE WORLD (Ashgate Pub.) (forthcoming).

pating in the monthly meetings regard the gatherings as essential. Variations on this type of coordination and collaboration are emerging in other places around the country. While the concept of a "coalition of the willing" is generally the same from place to place, the details of participation, structure, and mission may vary in accord with local circumstances.[140]

D. Developing New Collaborative Models—Insights from the Memphis/Shelby County Neighborhood Blight Elimination Charter

Since the summer of 2015, the co-authors have been working with a new Memphis nonprofit, Neighborhood Preservation, Inc. ("NPI"), to develop what could be the nation's first official community-wide charter to fight blight.[141] Throughout this entire strategic planning process, local officials in Memphis and Shelby County, along with civic and public interest community developers, have been adapting lessons from other communities, such as Cleveland and Baltimore, as they tailor policy and program innovations from these and other cities to match local conditions and dynamics. Memphis in many respects is experimenting with a new prototype for cross sector collaboration against blighted properties.[142] Other cities taking similar approaches include Detroit, which adopted a citywide blight strategic plan,[143] and Flint, Michigan, which incorporated a special element on blight remediation into its comprehensive land use plan.[144] Although implementation

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140. Lind, *supra* note 139.

141. *See generally* MEMPHIS BLIGHT ELIMINATION CHARTER, www.memphisfightsblight.com (last visited May 11, 2016) (listing all Charter related activities maintained by NPI).

142. J.B. Wogan, *It Takes a Village: The Idea Behind Memphis' Anti-Blight Strategy*, GOVERNING MAG. (May 17, 2016), http://www.governing.com/topics/urban/gov-memphis-blight-elimination-charter.html.

143. Cassie Owens, *A 341-Page Blight-Fighting Plan Requires a Lot of Teamwork*, NEXT CITY (June 15, 2015), https://nextcity.org/daily/entry/detroit-blight-task-force-models-collaboration. The entire plan and task force activities can be found at DETROIT BLIGHT REMOVAL TASK FORCE PLAN (May 17, 2014), http://report.timetoendblight.org.

144. Anna Clark, *Flint, Michigan Has an Ambitious New Plan to Fight Blight* (Mar. 16, 2015), https://nextcity.org/daily/entry/flint-michigan-blight-plan-cost-metrics. For a review of the complete five-year plan, see NATALIE PRUETT, BEYOND BLIGHT, CITY OF FLINT COMPREHENSIVE BLIGHT

of this charter remains a work in progress, we close with a brief review of the Charter's content, and reflect on the successful ingredients of the high level of collaboration and trust that helped create it.

Released at a community summit on March 17, 2016, the Greater Memphis Neighborhood Blight Elimination Charter contains an ambitious vision that all neighborhoods have the right to be free from vacant, abandoned, and blighted properties. Its ten core principles reflect a number of important community values, such as creating a culture of care, engaging local residents, and strategically deploying resources and tools. The principles also acknowledge the multiple dimensions of blight—the social and community impacts beyond the physical appearance and neighborhood deterioration. The Charter's overarching goal is to enable stronger coordination of existing and prospective blighted property programs and policies across all sectors—nonprofit, public, and private. Several of the principles incorporate what are now becoming the well-accepted policy elements—expand information systems, proactive policy interventions and investment, link neighborhood stabilization, revitalization, and reuse activities. The charter even calls for Memphis to link blighted property remediation with the city's land use and community development plans, housing and environmental codes and economic development processes.

Although the Charter is not a legally binding document, it can provide policy and program guidance to help align those agencies and entities that directly deal with blight, their various programs and policies, and the necessary public and philanthropic resources to reclaim and reuse vacant properties. Lind and Schilling served as national experts and facilitators for this process. From their vantage point, the Memphis Charter experience offers several important lessons that other cities should consider for their blight-fighting initiatives:[145]

ELIMINATION FRAMEWORK (Feb. 10, 2015), https://www.cityofflint.com/planning-and-development/blight-elimination-and-neighborhood-stabilization.

145. Co-author Schilling shared several of these insights on the Urban Wire blog at THE URBAN INSTITUTE, http://www.urban.org/urban-wire/lessons-memphiss-collaborative-campaign-against-blight (last visited May 23, 2016).

- Local intermediaries within the vacant property networks play incredibly pivotal roles, often as convener, collaborator, and/or connector. NPI in Memphis illustrates a new intermediary prototype that combines its process roles with significant expertise in blight policy and programs. Core to the success of NPI and other intermediaries is the passion and energy of a catalytic leader. For Memphis, NPI co-founder and blight litigator Steve Barlow drives the blight agenda with high levels of trust and support from public officials, civic organizations, and community leaders.[146]

- Invest sufficient time and resources in the process. The Memphis experience reinforces the importance of meaningful engagement around critical issues, such as the need for better data about the cost and impacts of blight and demystifying agency and nonprofit roles and programs that address blight. The process of creating a charter is often more important than the document as it builds trust and mutual understanding of blight's problems and solutions among the key stakeholders in key positions.

- A blight charter offers communities a flexible format. The principles can reflect core values, local priorities, as well as elevate essential vacant property strategies, such as data driven decision making, strategic code enforcement, land banking, and urban greening. More importantly, a charter can speak to the social impacts of blight, its racial legacy, and the disparate impacts that blight imposes on communities of color.

146. Note that many of these lessons were first established through the NVPC's Cleveland at the Crossroads process and convened by another NPI, but led by another pioneer in this field, Frank Ford now at Thriving Communities Institute.

- Leveraging the charter itself as a way to bring local and national attention to the issue and the plight of disinvested neighborhoods. NPI's communication team's framing and marketing activities around the Memphis Charter and Community Summit helped connect new voices to the blight fight.[147]

- Instituting a blight coordinating council or team. Blight does not happen overnight, as thoroughly discussed throughout this Article. It is produced by processes and changing conditions. It will take the concerted efforts of a coalition of the willing to address the persistent churn of real property abandonment in our cities. Memphis put implementation of a sustained response front and center by writing a separate section in the Charter that calls for two critical goals—formation of a Blight Coordinating Team and development of a Blight Elimination Action Plan. Initial meetings were held at the end of April 2016.

"It's like de ja vu all over again," the phrase often associated with former New York Yankee's catcher, Yogi Berra,[148] somehow seems appropriate here as we reflect on our journey and on the new directions and challenges that lie ahead for distressed communities and the national and local vacant property networks that support them. The frameworks developed first in Cleveland and refined in other cities through the NVPC and CCP are still being revised and recalibrated in cities such as Memphis as people adapt these policies and programs and to different sets of driving forces, local market characteristics, and changes in neighborhood conditions and circumstances. Despite the differences, the same core policies and programs still apply—real property information systems, strategic code enforcement, restoration and preservation of structures, land banking, land reutilization and urban greening—

147. *See* MEMPHIS BLIGHT ELIMINATION CHARTER, www.memphisfightsblight.com (last visited May 11, 2016).

148. *See* Yogi Berra, WIKIPEDIA, https://en.wikipedia.org/wiki/Yogi_Berra#.22Yogi-isms.22 (last visited May 11, 2016).

to all cities seeking to revitalize neighborhoods and regenerate. Facilitating the learning across cities and professions, adapting the lessons from one place to another, still remains the hallmark of these functional and effective local and national networks.

As a result of our research across communities and our front line experiences, we know that many factors affect how communities remain resilient when confronting existing, new, and difficult circumstances. Therefore, informed collaboration that encompasses those factors—collaboration among public actors and among stakeholders residing in publicly defined jurisdictions—must reach unprecedented levels moving forward. Unless blight-threatened neighborhoods have the political and community commitment to abate and prevent blight their future remains in peril and will be determined by external market forces that care little for preserving and protecting healthy, resilient neighborhoods.

Regulatory Created Blight in a Legacy City: What is it and What can we do About it?

Including a Historical Review of Planning and Zoning in Memphis

STEVE BARLOW,* TOMMY PACELLO,** & JOSH WHITEHEAD***

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Abstract: *Memphis, Tennessee, located in Shelby County, has an extensive legacy in land use regulation, having been the first city in Tennessee and one of the first in the South to engage in comprehensive planning and zoning. While arguably progressive at the time adopted, there has been a general failure of the regulations to keep pace with market realities. Today, a series of complex and sometimes contradictory land use regulations, often with a storied history in the Tennessee courts, have the effect of holding back progress in the modern urban built environment. Memphis has gone through no less than four comprehensive zoning ordinances, each with very different regulations guiding growth and development. Layer in decades of changing construction standards and building regulations, mostly written and enforced without regard for practical neighborhood realities, and you begin to understand regulatory created challenges in the current urban context. Older developments and uses built or established under prior regulations are often seen as damaging to changing neighborhoods. Newer land use regulations enacted to address poor site design and inappropriate close proximity between incompatible uses may have the unintended consequence of maintaining the status quo and discouraging redevelopment and reinvestment. Newer building regulations designed with modern perspectives on safety and technology yield large swaths of buildings undevelopable, and when rigidly enforced trap many an older building in the past. Regulations imposed by a city to protect the city may also do a great deal to hold the city back. A careful review of the impact of land use and building regulations reveals that the very tools designed to stimulate*

growth and positive development often instead create abandonment and decline.

Disclosure

The authors wish to clarify from the beginning that we are not land use, community development, or building code scholars. We all count "lawyer" among our titles, but we find that most of our days as practitioners are filled with urban planning and development, community revitalization, real estate, code enforcement, policy, and other related decisions. As we discussed the drafting of this article, we worked on but failed to settle upon a joke that opens "a planning director, a community developer, and a litigator walked into a bar . . . ." We are serious about the work that we do to bring about the revitalization of declining Memphis neighborhoods, but want the reader to understand that this piece is not a scholarly piece but more like "notes from the field" and a description of the challenges and opportunities that we have observed in our years of observing, and engaging in, efforts to bring about improvement in some of Memphis' most distressed communities.

I. INTRODUCTION

Historically, few cities and their suburbs have placed a high enough priority on planning or growth management, preferring instead, intentionally or not, the proliferation of unplanned new development around the edges. In Memphis, Tennessee, this has certainly been the case for decades. The Memphis story includes decades of infrastructure investments in far outlying areas that were annexed as older neighborhoods received little or no infrastructure maintenance or improvements. Illustrative of this challenge is the fact that between 1970 and 2010 the population of the City of Memphis increased by 4% while the geographic area of the city increased by 55%.

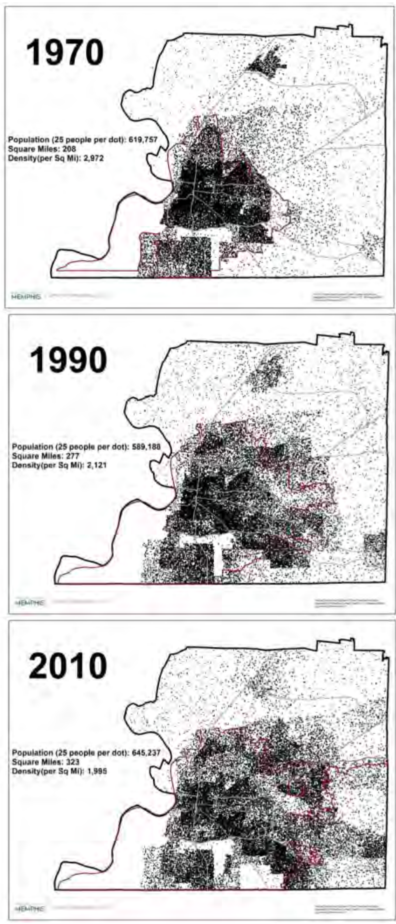

Image 1: Population Distribution*. Population distribution of the residents of Memphis and Shelby County between 1970 and 2010. Each dot represents twenty-five people. The red line represents the geographic boundary of the city of Memphis at each the respective year.*

The decades-long combination of policies encouraging low-cost greenfield development, public investments in new infrastructure at the edge of the city, and an expanding urban level of services provided by county government triggered aggressive annexation by the city. This massive shift in population from the city's historic neighborhoods to the new suburban options masked a shrinking city population helped maintain short-term financial solvency. This trend continued largely unquestioned by policy makers from the 1960's until the great recession of 2008.

Since the recession there has been a renewed interest in strengthening historic neighborhoods and infill development. 2010 marked the first year that the population inside the 1970 city of Memphis boundaries has increased since the 1960s. Today, there are more than $4 billion in development projects inside the 1970 city boundaries. Many of these projects represent large-scale investments targeting urban areas in downtown Memphis and in areas along Memphis' primary commercial corridors, Poplar Avenue and Union Avenue.

Meanwhile, in a time of renewed interest in development and revitalization of the core, many neighborhoods in and near the core—often just blocks away from the referenced corridors—remain literally in shambles. For example, a recent visual survey of a one-thousand parcel neighborhood adjacent to Memphis' thriving medical center reveals that one in three parcels is a vacant and abandoned lot. Owner occupants of a nearby small cluster of historic homes are attempting to hold on, but their home values have declined to such an extent that they are trapped. Investment, even by community minded, socially progressive organizations is stymied. Neighborhood commercial development is non-existent, and the majority of single family and multi-family residential rental properties are in poor condition. What factors influenced the decline of this once thriving neighborhood? And how can the vacancy and abandonment be addressed?

There are no simple answers. Most conversations about the challenge of vacancy, abandonment, and redevelopment of real estate in American cities involve the thorny question of the "root causes" of vacancy and abandonment, or "blight." Blight, as used in this Article, is a term commonly used across the United States to describe real property that is in a state of deterioration beyond what is acceptable to the surrounding community. We are aware of, and sensitive to, the concerns that have been raised about the use of the term historically, but the phrase is used here for lack of a simpler descriptive phrase. Where practical, the phrase "blighted property" is used instead.[1]

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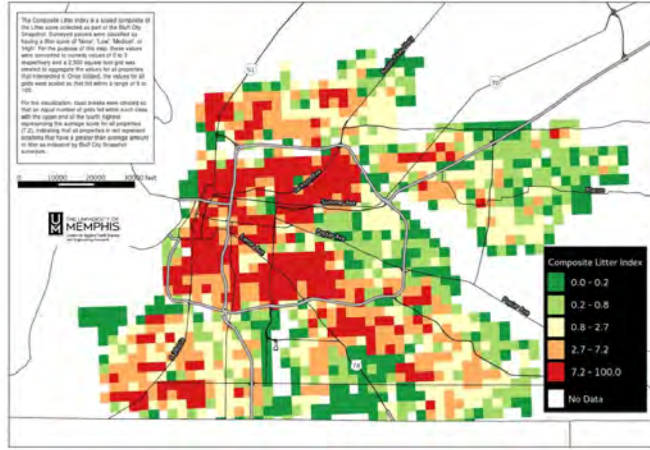

Image 2: Composite Litter Index*. This map highlights the presence of litter throughout the City of Memphis and provides an example of how the city is using data to measure the impacts of several different types of blight.*

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1. For a full charting of the history of the term "blight" and an in depth classification of the many meanings of "blight," see LEE HAUNG ET AL., CHARTING THE MULTIPLE MEANINGS OF BLIGHT (May 2015), https://www.kab.org/sites/default/files/News%26Info_Research_Charting_the_Multiple_Meanings_of_Blight_Executive_Summary.pdf.

***Image 3**: This 10 to 12 unit "shoebox" apartment building, typical of many found throughout Memphis, often on formerly single family lots, has been abandoned because there is no current market for it in its neighborhood.*

II. BLIGHT IN MEMPHIS: THE EXTENT OF THE CHALLENGE

While there are many positive things happening in Memphis, it is important to understand the nature and extent of the vacancy and abandonment Memphis is experiencing. Memphis is by far the largest city in Shelby County, Tennessee, comprising more than 70% of the tax parcels and 41% of the land area, or 315 square miles. In Shelby County there are 351,000 parcels of land. The two best indicators of the presence and scale of blight in Memphis are parcels that are delinquent on property tax payment and numbers of structures with no utility connections for an extended period of time.

In Memphis, at least 34,000 parcels are delinquent on the payment of real estate taxes, a commonly used indicator of abandonment, and 53,000 parcels are vacant lots. As of 2010, more than 10,000 single family homes and more than 3,000 units of multifamily housing in Memphis had been without utilities for more than a year. In three of the seven City of Memphis Council Districts (Districts 4, 6, and 7), the percent of residential properties without utility services as of 2013 (including single-family and

multifamily units) exceeded 10% (approximately 12,000 units).[2] A report based upon a survey of all residential parcels in Memphis completed in 2010 found that Memphis "blight rate" was 22%.[3]

A comprehensive parcel survey of Memphis is currently nearing completion,[4] and Memphis leaders are nearing a complete "blight data" warehouse, which will be called the Memphis Property Hub. This snapshot of the extent of blight in Memphis should make it clear that the challenge is daunting and that urgent responses are required.

III. DIFFERENT TYPES OF BLIGHT

Regulatory Created Blight (or "Regulatory Blight") has different causes than non-regulatory blight and calls for a different range of responses than other types of blighted properties. Regulatory blight occurs in three major instances: hardship, walk-away, and economic. Each of these is prevalent in Memphis and is described below.

A. Non-Regulatory Blight

1. Hardship Cases

Sometimes genuine economic hardship is the only reason for the physical deterioration and lack of maintenance of a property. Owners in these cases have not abandoned their real estate—they simply do not have the means to maintain it. These owners may reside in a deteriorating house that they cannot afford to repair, or they may own a dilapidated residential rental property or storefront that was, or was planned to be, a source of additional income before some hardship made it impossible for them to make repairs necessary to keep the property in acceptable condition. For example, an 85-year-old owner of a single-family home in a well-

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2. This was calculated using the City of Memphis Neighborhood Blight Abatement Strategy (a PowerPoint document). The source of the data was Memphis Light Water and Gas spreadsheets, which we evaluated by district.

3. *See* TK BUCHANAN ET AL., NEIGHBORHOOD-BY-NEIGHBOR: A CITYWIDE PROBLEM PROPERTY AUDIT (Apr. 2010), https://web.archive.org/web/20121202112712/http://cbana.memphis.edu/GenResearch/NxN_SUMMARY_FINAL_REVISION_8_30_2010.pdf.

4. The "Bluff City Snapshot" is expected to be complete by mid-2016.

preserved neighborhood experienced a house fire several years ago in which he lost everything. The house became uninhabitable, but he did not have insurance. He maintains the rose beds and visits the front porch on a regular basis, but has no way to complete repairs and move back in.[5] These are perhaps the most sympathetic cases.

2. Walk-away Cases

Other owners of blighted property have the means to maintain their real estate but have abandoned it because they have determined that any further investment in maintaining or improving it will not provide any return. These owners have usually stopped paying property taxes and mortgages, and are either attempting to "walk away" from the property or are speculating that someday there will be a demand for the real estate sufficient to cover years of deferred maintenance and other expenses and provide the owners with a return on their investment. One example of an owner of this type of blighted property is the investor who buys total loss burned out houses for cash at an extreme discount, and takes no action to maintain them but holds out hope that he will find other investors who will join in his ill-fated venture to repair and sell the houses at a profit.

5. City of Memphis v. LT Boyce, Shelby County Environmental Court, Case No. 12637035.

Image 4*: This vacant, bank-owned house drew the ire and activism of neighbors.*

Sometimes these owners acquired the blighted property as a part of a bulk acquisition, knowing that a certain percentage of the properties would have no value; other times these owners made money in the past from their real estate but due to market changes, neighborhood changes and/or lack of adequate maintenance and upkeep, profitability is no longer feasible under their business model. Another category of such owners are the well-documented foreclosing lenders who have taken back real property through the foreclosure process only to find, once the title is in the name of the lender, that there is no market for the property.[6]

Resolution to this type of case is often made more complex by the imposition of tax penalties, administrative fees, penalties, and the like that become attached to the real property and further hinder its disposition or redevelopment. In this way, these cases move into the regulatory blight category, as discussed below.

3. Economic Cases

Still other owners of blighted property, particularly in thriving or upward trending communities, have the means to maintain their real estate and know that their real estate has market value and demand, but for reasons, either rational or irrational, have determined to neither improve nor sell their real estate. In some of these cases, an owner is holding out for a higher sale or rental price or a better or longer-term tenant. In other cases, no logical reason can be ascertained as to why an owner will not sell or lease a marketable property in a high demand area.

Sometimes owners have formed an irrational emotional attachment to a property and believe against all reason that they will someday develop the property themselves or sell for an outrageous profit. One example of an owner of this type of blighted property is the dreamer who acquired a vacant mid-rise commercial building with an attractive historical façade on the edge of a thriving commercial district. For twenty-five years he planned to develop it

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6. For an insightful analysis of many components of this type of blight, see Kermit J. Lind, *Collateral Matters: Housing Code Compliance in the Mortgage Crisis*, 32 N. ILL. U. L. REV. 445 (2012).

himself, and therefore turned down countless reasonable offers based on appraised value. Meanwhile, he invested only the bare minimum that was required by enforcement agencies, and the large vacant structure loomed over a would-be thriving block, attracting crime and promoting decay for blocks.

B. Regulatory Created Blight

Distinguishable from hardship, walk-away, and economic cases are situations where the primary driver of blight is regulatory in nature. We are unaware of an extensive scholarly analysis of this less understood cause of blighted property, which we refer to as "regulatory blight."[7]

Image 5*: This large vacant downtown midrise is surrounded by development, but the owner's expectations of financial return and lack of experience in development of this nature has resulted in at least fifteen years of complete inactivity.*

The owners or prospective purchasers of these blighted properties have the means to maintain, repair, or develop their real estate, and it would be marketable if they did so. The logjam for these properties, and the reason they remain blighted, is the applicable local regulations and/or the local approach to the enforcement of those regulations.

7. The three authors of this Article are practitioners in planning (Whitehead), community revitalization (Pacello), and anti-blight litigation (Barlow). We readily acknowledge our "non-scholar" status, and are hopeful that this effort to compile our practitioner perspectives may stimulate more discussion of this crucial issue at the scholarly and practitioner level.

***Image 6**: This superfund site has been cleaned at various levels over decades since a cooperage business went out of business at the downtown Memphis site. Taxes owed and the fear of future environmental threats have prevented any development of the site, despite a resurgence of development around the perimeter.*

The economic costs to the would-be developer of bringing these blighted properties back in conformance with zoning and subdivision regulations, building codes, fire codes, property maintenance codes, and/or other locally enforced, usually locally enacted, regulations is, or is perceived to be, greater than the economic benefits to the developer. In other words, owners or potential purchasers are priced out of redeveloping the blighted property due to the presence of regulatory restrictions so costly to follow that the project has no economic feasibility.

One example of regulatory blight can be observed in the form of longtime vacant upstairs flats over commercial space in a resurgent downtown district with high residential rental demand, where the cost and complexity of complying with regulations for occupancy of such second story flats makes doing so practically impossible.

In an environment where local government is the first defense against the damage done by blighted properties, this is a type of blighted property which local government is perhaps in the best position to address by improving the regulatory environment

through amending local ordinances and regulations and making improvements to regulatory enforcement mechanisms.

It is our belief that the lack of contextually applicable local regulations and/or their enforcement without regard to the real estate realities at the neighborhood level has the direct result of creating and maintaining blight in urban areas where development is most needed. Ironically, this is particularly the case in older neighborhoods where local government is striving to revitalize the very neighborhoods that its own regulations are holding back.

IV. REGULATORY BARRIERS

The two areas of regulation that most directly limit, and often prevent revitalization of core city neighborhoods, particularly when it comes to small-scale development, are the zoning and subdivision regulations and the building codes.[8] The zoning and subdivision regulations control what any owner or user is permitted to do on their property, including how big the building(s) may be, how much land must be associated with the building type, what improvements are required, and other operational controls on the land. The building codes, on the other hand, have more to do with minimum construction standards, materials, safety concerns as well as fire and health restrictions.

The chart below outlines the regulatory categories through examples of what is regulated by each code section. Together these codes create a complex array of regulations thousands of pages long that constantly evolve. The complexity inherently favors larger projects by experienced developers who know how to navigate the system or are able to hire experts to do it for them.

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8. An important difference between the zoning and subdivision regulations and the building codes is that the states grant local governments the authority to adopt zoning and subdivision regulations as they see fit but mandate local government to adopt certain model building codes with very limited flexibility. Therefore, while there is broad local control in the enforcement of building codes, local government must work with state government where those building codes imposed do not meet the local government needs.

	Common Regulations Found in Zoning, Subdivision and Building Codes				
Zoning Codes	Allowed use of property	Height of building	Setback from lot lines	Required parking and location	Lighting and land-scaping standards
Subdi-vision Codes	Size of lot	Size of blocks	Access and connectivity	Utility con-nections	
Build-ing Codes	Building material require-ments	Building access and ADA compliance	Fire Prevention requirements	Energy efficiency requirements	Heating, Cooling, and Plumbing standards

A. Memphis and Shelby County Land Use Codes: A Historical Overview

Zoning and subdivision regulations, together referred to as "land use controls," as applied and enforced, directly impact the feasibility of revitalization of blighted properties and abandoned neighborhoods. A full review of the history of land use controls in Memphis provides invaluable context for any conversation about how to streamline regulations to promote positive growth and lends an important perspective to any urban revitalization thinking and planning. This lengthy historical overview is intended to set the context and provide a common starting point for discussion about how these and other regulations may be improved to facilitate the removal of unnecessary regulatory barriers to otherwise desirable blight elimination efforts.

As noted above, Memphis was the first city in the State of Tennessee to engage in planning and zoning. On March 30, 1920, the City Commission, precursor to today's City Council, passed an ordinance creating a citizen City Planning Commission. A year later, on February 3, 1921, the Tennessee General Assembly passed legislation specifically for Memphis (through what is known as a "private act"), granting the Planning Commission formal powers such as the authority to recommend adoption of a zoning code and to hear appeals and variance requests from the admin-

istration of the code.[9] Tennessee's first zoning ordinance, including its first zoning map, was adopted by the City Commission on November 17, 1922.

While Memphis' 1921 private act authorizing the creation of the Memphis Planning Commission was silent on a general plan, the general acts that affect all other cities in the state are not.[10] With that said, Tennessee is generally considered to be a state that takes a unitary approach to planning as it relates to zoning, meaning that the zoning map may act as the general plan in the absence of such a plan.[11] Despite the absence of any public acts recommending or mandating the adoption of a comprehensive plan, or the fact that the private act for Memphis was silent on the issue, the City Planning Commission entered into a contract with Harland Bartholomew of St. Louis for the purpose of preparing a long range city plan for the growth and development of the city. This plan, entitled "A Comprehensive City Plan," was presented to the Planning Commission for their approval in 1924.

In an effort to separate the long range planning and zoning activities from individual hearings of variances and appeals, the General Assembly passed a private act for Memphis on April 3, 1925, to create the Memphis Board of Adjustment ("The Board").[12] The Board was created as a zoning board that would act independently of the Planning Commission, and to some degree, the Comprehensive City Plan that it had promulgated a year before. The Board met for the first time on July 16, 1925. One unique aspect with the Board's enabling legislation was that the General Assembly included the term "use of land" on the list of zoning regulations that Board could waive. This has enabled Memphis' zoning board to approve *use* variances, which distinguishes it from the general act that enables all cities throughout the state to create zoning boards.[13]

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9. 1921 Tenn. Priv. Acts, ch. 165, 450–55; Memorandum from Josh Whitehead, Sec'y, on History of Board of Adjustment to Bd. of Adjustment 3 (Dec. 17, 2014), http://www.shelbycountytn.gov/DocumentCenter/View/19403.

10. *See* TENN. CODE ANN. §13-4-201 (2011).

11. Edward J. Sullivan & Matthew J. Michel, *Ramapo Plus Thirty: The Changing Role of the Plan in Land Use Regulation*, 35 URB. LAW 75, 98 (2003).

12. 1925 Tenn. Priv. Acts, ch. 428, Sec. 1, 1622.

13. *See* TENN. CODE ANN. § 13-7-207(3) (2011).

Due to the rapid growth of the City of Memphis in the 1920s, the City petitioned the State to pass enabling legislation granting it some level of land use authority over properties just outside of its borders. This culminated with the passage of a private act by the General Assembly on June 25, 1931, which not only granted the City Board of Commissioners zoning authority over zoning decisions in the five-mile area outside of the corporate limits of the City of Memphis, but it also created a Shelby County Planning Commission and Board of Adjustment to review and amend a zoning code and hear variance requests, respectively.[14] Like the earlier private act, this legislation was silent on long range planning and granted the Board of Adjustment use variance powers.

As development was also occurring in the area more than five miles away from the city limits, Shelby County petitioned the State for the ability to plan and zone for these unincorporated areas. The State obliged with the passage of two pieces of legislation. The first was passed by the General Assembly on April 18, 1935, that authorized the County Planning Commission to review and approve a zoning code and amendments thereto in the area outside of the five-mile zone. This private act also created a County Board of Adjustment that was supposed to be separate and apart from the file-mile Board to hear variances.[15] Like the two enabling acts creating the City and County Boards of Adjustment, this new Board was authorized the power to grant use variances. The second piece of legislation was approved by the General Assembly on April 20, 1935. It represented a first in Memphis and Shelby County: it authorized the Shelby County Planning Commission to adopt a general plan for the development of the area under its purview.[16]

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14. 1931 Tenn. Priv. Acts, ch. 613, 1649, 1649–66; Memorandum from Josh Whitehead, Sec'y, on History of Board of Adjustment to Bd. of Adjustment 4 (Dec. 17, 2014), http://www.shelbycountytn.gov/DocumentCenter/View/19403.

15. 1935 Tenn. Priv. Acts, ch. 625, 1650, 1650–62; Memorandum from Josh Whitehead, Sec'y, on History of Board of Adjustment to Bd. of Adjustment 4 (Dec. 17, 2014), http://www.shelbycountytn.gov/DocumentCenter/View/19403.

16. 1935 Tenn. Priv. Acts, ch. 706, 1869, 1869–79; Memorandum from Josh Whitehead, Sec'y, on History of Board of Adjustment to Bd. of Adjustment

For the next twenty years, a small planning staff supported the City and County Planning Commissions and the City and County Boards of Adjustment (a third Board of Adjustment was never created, despite the explicit instructions by the General Assembly to do so, which would become problematic in the future). In December of 1955, the final draft of a comprehensive plan was submitted to the Board of Commissioners of the City of Memphis and the City Planning Commission. Entitled *The Comprehensive Plan*, it outlined growth and development of the city for the next twenty-five years. Like the 1924 long-range plan, it was authored by Harland Bartholomew and Associates of St. Louis. By the 1950s, there was a growing concern that the somewhat archaic and cumbersome arrangement of having two planning boards and two zoning boards was not conducive to the post-war boom that Memphis and Shelby County were experiencing.[17] *The Comprehensive Plan* called for the merger of the City and County Planning Commissions and Boards of Adjustment. This prompted the General Assembly to pass enabling legislation to the same effect on March 17, 1955.[18]

On May 31, 1955, the Board of Commissioners of the City of Memphis passed a new zoning code. This marked the first major revision to the City's zoning ordinance since it was adopted in 1922. In early 1956, in response to *The Comprehensive Plan* and General Assembly action of the previous year, the City and County approved an ordinance merging the Planning Commissions and creating a more formal and professional Planning Commission staff to administer the new zoning code. The Boards of Adjustment were not merged at the time, but the Planning Commission staff continued to serve these two zoning boards.

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4 (Dec. 17, 2014), http://www.shelbycountytn.gov/DocumentCenter/View/19403.

17. HARLAND BARTHOLOMEW ET AL., THE COMPREHENSIVE PLAN 104–05 (1955).

18. 1955 Tenn. Priv. Acts, ch. 353, 1180, 1180–85; Memorandum from Josh Whitehead, Sec'y, on History of Board of Adjustment to Bd. of Adjustment 4 (Dec. 17, 2014), http://www.shelbycountytn.gov/DocumentCenter/View/19403.

1. History of the Board of Adjustment

One final significant zoning event occurred in 1955: the amendment of the Memphis Board of Adjustment's enabling legislation. On February 28, 1955, the General Assembly added language that required the Board make certain findings as to the exceptional nature of a piece or property as a predicate to it approving a variance on that property.[19]

In 1962, plans for a Texaco station at the corner of Poplar venue and June Road in East Memphis were filed with the Board of Adjustment.[20] As the property was zoned residential, the request represented a use variance. The Planning Commission was adamantly opposed to this request; its staff drafted a policy statement urging that the entire 17-mile stretch of Poplar from Highland to Collierville remain exclusively residential. In addition, a neighboring property owner, James N. Reddoch, urged that the Board reject the case. The Board held the case in abeyance for seven months as it considered the request. Finally, on April 11, 1963, the Board heard the request. Despite opposition from neighboring property owners and a recommendation of rejection from its staff, the Board approved the service station on the basis that a hardship did in fact exist as the owner had attempted to sell it for many years as a residential property but to no avail. Mr. Reddoch appealed. This appeal eventually found its way to the Tennessee Supreme Court, which found in favor of the Board of Adjustment. In *Reddoch v Smith*,[21] the Court reviewed the private acts governing the Board and agreed it had the authority to approve use variances and that no peculiar feature of the property was necessary as a predicate of its findings. However, it also included analysis of the trial judge on the case, Shelby County Circuit Court Judge Edward Quick, who found that there should have been three Boards of Adjustment in Memphis and Shelby County (not two), but that the Shelby County Board had been acting as the *de facto* board for both the five-mile zone and the outside-five-mile zone.

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19. 1955 Tenn. Priv. Acts, ch. 142, 418, 418–20.

20. Memphis and Shelby County Board of Adjustment Archives, Case No. BOA 62-35 (County).

21. 214 Tenn. 213 (Tenn. 1964).

***Image 7**: Gasoline station at Poplar and June that was the subject of the* Reddoch *case. Memorial Park Cemetery and Memphis Hilton are seen in the background.*

Eight years later in 1969, an application was submitted to the Board of Adjustment to allow 165 apartment units on Helene, north of I-240 and south of Quince, in a single-family zoning district. The Board approved this use variance request. The neighbors appealed and the case made its way up to the Tennessee Supreme Court. In *Glankler v. City of Memphis*,[22] the Court agreed with the Board that the cost of removing the property out of the 100-year floodplain represented a hardship that warranted the request. It also cited its *Reddoch* case from eight years prior as precedence on the ability of the Board to grant use variances, even though the board in the *Reddoch* case was the County Board and the board in the instant case was the City Board, which had its enabling legislation amended by the General Assembly in 1955.

22. 481 S.W.2d 376 (Tenn. 1972).

***Image 8**: Apartments proposed on Helene that were the subject of the* Glankler *case.*

In early 1969, the Memphis City Council and Shelby County Quarterly Court (precursor to today's Shelby County Board of Commissioners) approved a joint ordinance/resolution that split the staffing duties of the Boards of Adjustment away from the Planning Commission, possibly the result of the growing rift that had developed between the Board of Adjustment and Planning Commission over the former's use variance authority. Despite the City Council and Quarterly Court's frequent disagreement over the Board's use variances on particular properties, this joint ordinance/resolution reflects some measure of approval of the zoning "relief valve" that the use variance process embodied.

The newly independent Boards of Adjustment soon found themselves in controversy. Later in 1969, plans were submitted to the County Board for a mobile home park at the southwest corner of Shelby Drive and Crumpler. The County Board approved the request over the objections of neighboring property owners, who subsequently sued the Board in Shelby County Circuit Court. In his order overturning the Board, Judge Greenfield Polk cited the "renowned" *Reddoch v. Smith* decision, particularly the section of the case where the Supreme Court recites verbatim Judge Quick's analysis of the private acts that govern zoning in Memphis and Shelby County.[23] Judge Polk found that the Shelby County Board of Adjustment's authority in the five-mile zone effectively ended on May 8, 1964, the date the Tennessee Supreme Court decided

23. Bell v. Shelby Cty. Bd. of Adjustment, No. 20071RD (Cir. Ct. Shelby Cty., Div. 5 Apr. 29, 1970); Memorandum from Josh Whitehead, Sec'y, on History of Board of Adjustment to Bd. of Adjustment 4 (Dec. 17, 2014), http://www.shelbycountytn.gov/DocumentCenter/View/19403.

Reddoch and put the Board on notice it was not properly empaneled under the "de facto doctrine." Judge Polk's order was handed down on April 29, 1970, which set off a series of events that eventually resulted in the merger of the Memphis and Shelby County Boards of Adjustment.

After the Boards of Adjustment merged into one, plans were submitted by Shell Oil to build a service station at the northeast corner of Summer and Graham.[24] The Board approved the request for a commercial use in a multi-family zoning district.[25] The Court of Appeals affirmed the ability of the *joint* Board to grant use variances in *Houston v. Board of Adjustment*, even though the court found that no hardship in this case existed and overturned the Board's approval of the service station.[26] The court was persuaded by evidence presented to the Board that the existing apartments had enjoyed a high rate of occupancy.[27]

***Image 9**: Extant apartment building at the corner of Summer and Graham, site of* Houston *case.*

24. Houston v. Bd. of Adjustment, 488 S.W.2d 387, 387–88 (Tenn. Ct. App. 1972).

25. *Id.* at 389.

26. *Id.*

27. *Id.*

2. Office of Planning and Development

By the early 1970s, nearly the entire staff of the Planning and Development Office was devoted to subdivision and zoning cases. This led to criticism by some members of the community that the City and County were not engaging in long-range planning to the degree of many of its peer cities. This culminated in a report published in May of 1975 by the American Society of Planning Officials (the "ASPO," one of the predecessors of today's American Planning Association). In their report, the ASPO bristled at the state of planning affairs in Memphis and Shelby County. They recommended a complete overhaul of the organization that would require, by ordinance, that it engage in long-range planning efforts. The ASPO report also recommended that many zoning decisions be made at the Planning Commission level with only appeals heard by the legislative bodies. This, they found, would make zoning less political. Finally, the ASPO recommended that the General Assembly amend the private acts affecting the Board of Adjustment so it would no longer be able to approve use variances after a zoning case had failed before the City Council or Quarterly Court.[28]

The ASPO report sent shockwaves through 125 and 160 North Main Street (the City Hall and County Administration Buildings, respectively). For the past few years, the Planning Commission had difficulty hiring a Planning Director as there were questions over the ethics and educational background by the Memphis City Council and Shelby County Quarterly Court of its choice. Under the 1955 ordinance, the Planning Director first had to be chosen by the Planning Commission, then their choice had to be approved first by the Mayor of Memphis, the Chairman of the Shelby County Commission and then the respective legislative bodies of the City and County.

In 1976, the City and County took the advice of the ASPO and overhauled the Planning Commission organization with the adoption of Joint Ordinance/Resolution 2524. First, Ordinance/Resolution 2542 renamed the citizen body from the Planning

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28. AM. SOC'Y OF PLANNING OFFICIALS, MAKING JOINT PLANNING WORK: AN ADMINISTRATIVE STUDY OF THE MEMPHIS AND SHELBY COUNTY PLANNING COMMISSION ch. 1 (1975).

Commission to the Land Use Control Board. Second, it reorganized the Planning Commission staff as the Office of Planning and Development ("OPD"), which was to contain two separate sections: (1) Land Use Controls, which would staff the Land Use Control Board and (2) Comprehensive Planning, which would create a citywide and/or countywide plan and various neighborhood plans. The former would be funded largely through application fees to the Land Use Control Board; the latter would be funded largely by the Community Development Block Grant ("CDGB") program of the federal government. No action was taken on the Board of Adjustment or its still-autonomous staff, which indicates that the City and County still appreciated, to some degree, the relief valve provided by that quasi-judicial body.

About a year later, in 1978, the City of Memphis created the Division of Housing and Community Development ("HCD") to perform certain long-range planning functions. This new branch of government would eventually receive directly all federal CDBG funds, leaving none for OPD and its planning efforts, therefore greatly impacting OPD's ability to draft long-range plans and to meet the comprehensive planning requirement of Ordinance/Resolution 2524. Nevertheless, OPD completed a new comprehensive, citywide and countywide plan, titled "Memphis 2000" in 1981. As was customary with previous comprehensive plans, Memphis 2000 was accompanied by a new zoning ordinance, the third since the original zoning ordinance in 1922.

In addition to the elimination of access to federal funds for comprehensive planning efforts that came with the creation of HCD, two Court of Appeals decisions in the early 1980s greatly impacted long-range planning in Memphis and Shelby County. The first, *Barret v. Shelby County*, involved a rezoning on Austin Peay Highway near the Tipton County line.[29] OPD recommended against the rezoning based on a comprehensive plan that allegedly covered the area in question and a general policy on rezoning that had been the past practice of the Shelby County Quarterly Court. In the *Barret* decision, the Court of Appeals states they are "unmoved" by terms such as "spot zoning" and "approved compre-

29. Barret v. Shelby Cty., 619 S.W. 2d 390, 391–92 (Tenn. Ct. App. 1981).

hensive plan"[30] and further stated that a local legislative body "is not bound by any comprehensive plan. *If it were, there would be no need for rezonings.*"[31]

A few years following the *Barret* case, the Court of Appeals took a different look at comprehensive planning when it held that an apartment building on the north side of Park Avenue east of Estate Drive was arbitrary and capricious because it was out of line with the approved neighborhood plan.[32] The *Barret* and *Ray* cases may be differentiated by the fact that the *Barret* case involved a rezoning and a very loose comprehensive plan and the *Ray* case involved a planned development and a very specific comprehensive plan. Nevertheless, the two cases resulted in a general reluctance for either the City or County to spend time or resources on comprehensive plans.

***Image 10**: Apartment building that was the subject of the* Ray *case.*

B. The Unified Development Code

By the dawn of the twenty-first century, there was a general feeling from a variety of fronts that the 1981 zoning ordinance no longer met the needs of the community. Developers found it cumbersome to such a degree that almost all projects were processed as planned developments, which had the ability to waive any regula-

30. *Id.* at 392.
31. *Id.* at 394 (emphasis added).
32. Ray v. Dattel, 1985 WL 1126692, at *11 (Tenn. Ct. App. Aug. 2, 1985).

tion found in the zoning ordinance. Many community groups felt that it promoted automobile-oriented development at the expense of inner-city neighborhoods. So, beginning in 2003, work began for the creation of a revised zoning ordinance, which was in keeping with the long history of creating a zoning code about once every thirty years (1922, 1955, and 1981). Dubbed the Unified Development Code, or ("UDC") or ("Code"), for *unifying* the zoning ordinance with the subdivision regulations, the Code took several years to complete. During that time, there was an intense conversation over the level of aggressiveness that should be embraced by the new set of regulations. For some, the UDC represented an opportunity to end the practice of planned developments and variances and to generally raise the bar for new development by adopting a form-based code. For others, this approach seemed radical and politically impracticable.

An outside consulting firm was hired to assist with the creation of the UDC. Its work was augmented by a separate initiative by OPD, Sustainable Shelby. The first several drafts of the UDC reflected the aggressive approach to planning and zoning pursued by many design professionals. In time, the contract with the outside consulting firm expired and in-house discussions began, many of which with practitioners who had worked with the 1981 and even the 1955 zoning codes. There were personnel changes both within and outside of the OPD that eventually helped craft a Code that was ready for approval in 2010. One of the authors of this Article, Josh Whitehead, ushered the new Code through its approval by the Memphis City Council and Shelby County Board of Commissioners in the summer of 2010. By that fall, he was appointed Planning Director of the City and County and administrator of the Code.

The UDC became effective on January 1, 2011. Shortly after adoption, the staff at OPD noticed that many routine zoning requests required action by the Memphis City Council, contrary to the premise made during the adoption of the UDC that the Code would streamline and provide efficiencies in the zoning entitlement process. Indeed, it had become apparent to OPD and an increasing number of elected officials that the team tasked with writing the UDC had inadvertently, or perhaps deliberately, altered the use chart in such a way that thousands, if not tens of thousands, of properties had converted from legal, "by right" uses to noncon-

forming uses with the adoption of the Code. And unlike down-zonings, this was done without individualized notice.[33]

Many property and business owners found that the uses on their properties and inside their buildings had been made nonconforming by the adoption of the UDC. This left them captive to various zoning entitlement processes that they were not subject to before the UDC was adopted. But in addition to these individuals, there were also thousands upon thousands of additional owners of nonconforming *sites*. The UDC had created a regime where almost every property required zoning fixes from the regulations dealing with items such as maximum building setbacks, parking lot islands, landscaping buffers, location of sidewalks, etc. This not only strayed from the objective of the UDC to promote development, but was also a departure from a long standing zoning tradition in Memphis and Shelby County whereby "by right" uses are incentivized by allowing administrative site plan review.

Although the UDC has been amended several times since its initial manifestation to reduce the situations cited above, the exercise of amending the Code does highlight the unfortunate reality of regulatory blight. Even in its present form, the UDC and its associated entitlement processes may be too onerous for many properties in neighborhoods with few economic opportunities and with low land valuation.

1. Suburban Sprawl

One of the primary goals of the UDC was to curtail, at least to whatever degree practicable, suburban sprawl. Metropolitan Memphis is one of the most sprawling cities in America, as measured by job creation in relation to the urban core.[34] Unfortunately, the City of Memphis never used its extraterritorial jurisdiction to

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33. A down-zoning is a government-initiated rezoning of one or more privately held parcels from a zoning district that permits more intensive uses to a zoning district that permits less intensive uses. Since there is a finite geography affected, notice for down-zonings involves a mailed notice to all owners of properties that are subject to the rezoning.

34. *See* ELIZABETH KNEEBONE, METRO, POLICY PROGRAM, JOB SPRAWL STALLS: THE GREAT RECESSION AND METROPOLITAN EMPLOYMENT LOCATION 7 (2013), http://www.brookings.edu/~/media/research/files/reports/2013/04/18-job-sprawl-kneebone/srvy_jobsprawl.pdf.

limit sprawl in the 5-mile zone outside of the city limits. Instead, it pursued an aggressive annexation policy whereby it would extend its sanitary sewers into the 5-mile area, approve zoning and subdivision requests in the area and then annex the area when it achieved a certain level of population attainment.

While no zoning code has the real or apparent authority to turn back the clock on decades of an annexation system that promoted sprawl, the UDC did attempt to combat sprawl in ways the 1981 Zoning Code did not. For instance, the 1981 Code contained strict Euclidian zoning districts that neither promoted nor allowed mixing uses with one another. Front yard setbacks were excessive; floor area ratio was common with office buildings and maximum dwellings per acre dominated the multi-family section. The UDC turns all of these regulations on their head, by either eliminating the requirements altogether or stipulating the polar opposite. For instance, mixed use buildings with ground floor retail on the bottom floor and apartments above are incentivized by being permitted "by right" in commercial zoning districts while conventional apartments require action by the governing body. As for annexation, in 2014, the General Assembly changed the state's annexation laws by requiring the approval of a majority of the property owners affected by the annexation. This will likely end the long-standing sewer extension policies of the City.

2. Form-Based Code

In addition to attempting to discourage sprawl, the UDC also moved into a regulatory system in which many design issues were given greater emphasis. This would ideally foster vibrant urban spaces that could better compete with their suburban counterparts. Chief among the new design-related regulations is the requirement, along certain roads throughout the city, to build new buildings in close proximity to their adjacent sidewalks in order to create a more pedestrian-friendly and urban streetscape. In this respect, the UDC has elements of a form-based code. The existing regulation was problematic in that it did not include provisions for existing buildings. In fact, many of the streets designated by the UDC and its overlay districts had been developed as suburban corridors in the first few decades after World War II. Buildings along these streets were mostly located behind wide swaths of parking lots and green spaces, and they all immediately became noncon-

forming structures with the adoption of the UDC and its overlay districts. Prohibiting any expansion to existing buildings that did not involve the construction of a sidewalk-backed storefront created a measure of turmoil in the local development sector. Many business owners decided not to improve their properties, or worse, to vacate them and relocate to other sections of the metro area rather than file for variances with the Board of Adjustment. The few property and business owners that decided to submit variance applications faced an uphill battle as many UDC stakeholders took the opportunity to attack the applicants for their unwillingness to adhere to the UDC. The Office of Planning and Development staff, due to their recommendations made on these cases, also suffered some degree of political pressure from those who assisted in the drafting of the UDC and its overlay districts. Further discussion on form-based codes may be found in Part V below.

Image 11: *Example of the form-based nature of the Unified Development Code is demonstrated with this new Subway restaurant at Madison and Manassas.*

3. Nonconformities

In a perfect world, a community could adopt or amend its general plan and zoning ordinance and enjoy the results of its regulatory regime instantly as would be the case with a game of

"SimCity." However, most states either prohibit or largely restrict a municipality's ability to retroactively zone properties. This leaves the built environment in a sort of hodgepodge where older developments built under relatively loose zoning regulations stand side-by-side to newer developments built under stricter zoning regulations. "Grandfathered" sites and uses are protected from adhering to the provisions of a new or revised zoning ordinance and are therefore known as "nonconformities." Whether nonconformities contribute to blight or help create an interesting and vibrant neighborhood is a matter of debate.

Nonconformities differ greatly from state to state and municipality to municipality. In Tennessee, the 1935 public act enabling municipalities to engage in zoning has been periodically amended by the General Assembly to expand the rights of nonconformities. For instance, under Tennessee Code Annotated section 13-7-208, nonconforming uses may be discontinued for a period of 30 months without losing their grandfathered status.[35] Each year, the General Assembly considers bills that would greatly expand this permissible cessation period, with the most excessive being 20 years.[36] In addition, the public acts permit nonconformities to not only expand and build additional facilities,[37] but also to be torn down completely and rebuilt if there's a demonstrable "business necessity."[38] The Court of Appeals of Tennessee has found that the latter enabled nonconforming billboards of various sizes in Johnson City to be enlarged to the now standard size of 672 square feet because such an upgrade was found to be a "business necessity."[39]

Despite the generous provisions of the Tennessee public acts that address nonconformities, one of its provisions, Tennessee Code Annotated section 13-7-208(j) limits some of its applicability. For instance, the 30-month cessation rule does not apply to home-rule cities, of which there are thirteen in Tennessee. The zoning ordinances in these communities rule the length of discon-

35. *See* TENN. CODE ANN. § 13-7-208(g) (2011 & Supp. 2015).

36. *See* S.B. 1467, 106th Gen. Assemb., (Tenn. 2009).

37. *See* § 13-7-208(c).

38. *See* § 13-7-208(d)(1).

39. Outdoor W. of Tenn. v. Johnson City, 39 S.W.3d 131, 137–38 (Tenn. Ct. App. 2000).

tinuance. Some home rule cities limit their cessation period to six months; Memphis, which is also a home rule city, limits its period to one year. In addition to the provisions of Tennessee Code Annotated section 13-7-208(j), section 13-7-210 allows cities with zoning ordinances promulgated by private acts to be exempt from many provisions of the zoning public acts, including those involving nonconformities. For instance, when a very similar case had been filed against the City of Memphis and Shelby County that had been filed against Johnson City to allow many "junior billboards" to be upsized, the court found for the City and County based on Tennessee Code Annotated section 13-7-210.[40]

On one hand, the ability of a community to address blight through its zoning code is severely limited by its ordinances and enabling laws that govern nonconformities. For if a city cannot adequately address noxious nonconforming uses, it may find it difficult to attract investment in the area around that nonconforming use. On the other hand, blight often is not exhibited in the form of nonconforming uses and businesses but rather the absence of uses and businesses. By aggressively targeting nonconformities, a city could dampen reinvestment into a particular section of town where the only viable reinvestment that might occur, at least for a foreseeable period, comes from these very nonconforming businesses. While the community may have down-zoned the nonconformities in an effort to eradicate them, it may later find that its zoning ordinance was too idealistic and should be implemented on a more gradual, piecemeal approach. There are others that claim that a resurgent community built around nonconformities is what differentiates an older urban neighborhood from its banal counterparts in the suburbs. In Memphis, such examples are the Sugar Services facility at G.E. Patterson and Tennessee and the Turner Dairy on Madison in Overton Square.

40. Prime Locations, Inc. v. Shelby Cty., No. CT-006449-04, 2010 WL 8705666 (Tenn. Cir. Ct. May 26, 2010).

Image 12*: Aerial photograph of Sugar Services at GE Patterson and Tennessee in downtown Memphis (center right) in the midst of residential development.*

Image 13*: Aerial photograph of Tuner Dairy in Midtown Memphis in the midst of commercial redevelopment of Overton Square.*

As outlined above, with the UDC's adoption, thousands, if not tens of thousands, of nonconforming uses were created at midnight on December 31, 2010, the date the UDC took effect. Uses that were once permitted in their zoning district were no longer permitted. Undefined uses were now defined and explicitly prohibited. While this would not have presented a large problem in most of Tennessee's cities where nonconformities are permitted some degree of expansion, discontinuance and continued exist-

ence, the same was not true in Memphis and Shelby County, which operate under the more restrictive private acts. Ironically, the first few drafts of the UDC attempted to omit the planned development tool, despite the fact that the voters had placed the tool in the Charter of the City of Memphis many decades before on August 1, 1974.

Again, many longstanding businesses decided not to expand, some decided to move but others forged ahead with zoning applications to OPD to expand in contradiction of the UDC. However, the UDC attempted to rid the community of the use variance authority granted to the Board of Adjustment by enabling legislation and blessed by the Tennessee Supreme Court, so the only option for expansion was the filing of a planned development.[41]

4. Vested Rights

Another legal principle that affects a city's ability to address blight through zoning is the law of vested rights. In zoning terms, a right is vested if a building is constructed or a use is established prior to new zoning regulations that would prohibit such construction or use. Nonconformities are created when an existing business, often a business that has operated for decades in a given location, is down-zoned by a community's new zoning regulations. A business claiming vested rights is on the other end of the spectrum: it is a new business, one that has perhaps spurred a change to the community's zoning regulations, that wishes to be a nonconformity. After all, existing as a nonconformity beats the alternative: not existing at all.

For many years, the law governing vested rights in the zoning arena was static, based on a 1939 Tennessee Supreme Court opinion. In that case, the court aligned with many other states in finding that a business could not claim a vested right unless it had (1) a building permit, (2) performed substantial construction and (3) good faith, or no knowledge that the city may try to change its zoning laws to address it.[42] For obvious reasons, the "substantial

41. *See* MEMPHIS TENN., CHARTER & RELATED LAWS art. 21, § 157 (2012), https://www.municode.com/library/tn/memphis/codes/charter?nodeId=PTICHRELA_ART21GEZORE_S157PLUNDE.

42. Howe Realty Co. v. Nashville, 141 S.W.2d 904 (Tenn. 1940).

construction" aspect of this three-prong test was heavily litigated in the ensuing decades. This all changed in 2014 when the General Assembly revised Tennessee Code Annotated section 13-4-310. This new vesting statute, which took effect on January 1, 2015, removes the substantial construction requirement for a business to claim a vested right in an older set of zoning regulations.[43] Instead, he or she need only show that a building permit was obtained. For land use entitlements that do not require building permits, such as subdivision plats and planned developments plans, the preliminary approval of those plats and plans creates a vested right. It is clearly the legislative intent of the State of Tennessee to limit the ability of cities to use their zoning code to address pending businesses, many of which had been historically selected because of the real or perceived blighting effects of that type of business. So, while one source of blight may come in the form of overly strict local zoning regulations that punish longstanding nonconforming businesses, another may come in the form of state action allowing a local government from preventing these nonconformities opening in the first place.

V. LATEST TRENDS IN LAND-USE REGULATION

Today, planners and attorneys across the country are using the zoning and subdivision enabling legislation to craft a new type of codes that more precisely communicate the rules to the end user. This new approach to zoning and subdivision is based on the understanding that the rules that govern downtown or older neighborhoods should be different than those that govern new suburban development. This more modern approach to development codes is called form-based codes. Rather than the use of a property being the primary organizing mechanism for controlling land, as is typically the case under Euclidian zoning, form-based codes place a greater emphasis on the form of the building and create codes that better implement the vision of the community and are easier to navigate.

43. TENN. CODE ANN. § 13-4-310(k)(2) (Supp. 2015).

Form-based codes are also contextually based,[44] meaning that the right rules are in the right places—urban rules for urban places, suburban rules for suburban places, rural rules for rural places, and natural areas treated as natural areas. Well-crafted form-based codes organize these rules by context or transect at the site, block and neighborhood scale and encourage the appropriate mixing while simplifying the ability to navigate and understand what is expected of the developer.

While land use regulations have been in place for more than ninety years in Memphis and Shelby County, the community has embraced building and other technical codes for a much longer period of time.[45] In fact, the first building code was adopted by the City of Memphis in 1860.[46] This early code was updated eleven times before finally being codified into the General Ordinances of the City of Memphis in 1931 as the "Memphis Digest 1931."[47] This Code was largely peculiar to Memphis; the city did not embrace a uniform building code until 1967 with the adoption of the Basic Building Code, 1965 Edition, written by the Building Official and Code Administrator International, Inc., or "BOCA."[48] The city migrated to the Southern Building Code in 1979 to better align with Shelby County, which had been using the Southern Building Code since 1959.[49] In early 1984, the Memphis and Shelby County Building Departments merged to create the Office of Construction Code Enforcement.[50] With this merger came a new uniform building code, the Standard Building Code, 1982 Edition.[51] Since

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44. Many codes use the urban to natural transect or T-zones to organize various rules across the complexity of a neighborhood or city. An example of these types of codes is the SmartCodes. *See, e.g.*, CENTER FOR APPLIED TRANSECT STUDIES, http://transect.org/codes.html (last visited May 15, 2016). For additional information on the history of zoning and subdivision codes, see THE CODES PROJECT, http://codesproject.asu.edu (last visited May 16, 2016). The website, managed by Arizona State University professor Emily Talen, is an anthology of rules and regulations that seeks to create a specific urban form. *Id.*

45. *See* TERRY HUGHES, THE HISTORY OF MEMPHIS AND SHELBY COUNTY TECHNICAL CODES.

46. *Id.* at 1.

47. *Id.*

48. *Id.*

49. *Id.*

50. *See id.* at 2.

51. *See id.*

2005, the community has been utilizing the International Building Code, published by the International Code Council, the "ICC."[52]

While many refer to all technical codes as the "building code," they are in actuality separate codes with separate appellate bodies and required separate adoptions by both the city and county. These include the fuel gas code, the mechanical code, the electrical code, the plumbing code, and perhaps most importantly in relation to regulatory blight, the existing building code.[53] The "existing building code" is a term that refers to the building code that is applied to the rehabilitation of existing buildings; therefore, it is also known as the "rehab code."[54] Memphis and Shelby County originally adopted a rehab code in 2006 with its adoption of the ICC Existing Building Code, 2003 Edition.

> In late 2012, the Memphis City Council and Shelby County Board of Commissioners adopted the 2012 Edition of the ICC Existing Building Code with local amendments recommended by the Memphis and Shelby County Building Code Advisory Board.
>
> Today, there are three key sections of the technical codes that act as "rehab codes" in Memphis and Shelby County: 1) Chapter 34 of the ICC International Building Code, 2) the ICC Existing Building Code, and 3) Appendix C of the ICC Existing Building Code. The table below explains the situations in which each may best be applied[.]
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> All three sections of the technical codes cited . . . give the Building Official the authority to accept compliance alternatives if he or she finds that strict compliance with each code section in question is impractical; that the alternative conforms with the intent and purpose of the Code and that the pro-

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52. *Id.*

53. *See generally id.*

54. For a practical and detailed explanation of the Rehab Codes, see PHILIP MATTERA, GOOD JOBS FIRST, BREAKING THE CODES: HOW STATE AND LOCAL GOVERNMENTS ARE REFORMING BUILDING CODES TO ENCOURAGE REHABILITATION OF EXISTING STRUCTURES 4 (2006).

posed alternative does not lessen any health, life safety, fire safety or structural integrity element required.[55]

	Chapter 34	**Existing Building Code**	**Appendix C**
Scope	This section establishes requirements to be met when an existing building is being altered, repaired, added to or undergoing a change in occupancy.	Same as Chapter 34, except there are three methods of obtaining compliance: the prescriptive and work area methods where each element of construction meets a set standard and the performance method where the owner demonstrates on a case-by-case basis that the work is in compliance with all Code requirements.	This section may only be utilized if an existing structure is being converted into apartments.
Seismic Require quire-ments	Use current seismic standards unless the owner demonstrates the existing design loads will provide equivalent performance to that of any system that could be installed in the building.	There are two methods of obtaining compliance: meet the prescribed force level values established in the Building Code or follow the requirements of Standard Reference Methods ASCE 41, using BSE-1 and 2 and the table found in Section 301.1.1.4.1. When using the latter, the structure shall provide at least 75% of the proscribed force level values from the Building Code or comply with Appendix A of the Existing Building Code.	The design loads that were applicable when the building was originally constructed, if any, provided no dangerous condition is created.

55. MEMPHIS & SHELBY CTY. OFFICE OF CONSTR. CODE ENF'T, MEMPHIS AND SHELBY COUNTY REHABILITATION CODE, https://shelbycountytn.gov/DocumentCenter/View/23044.

Alterations	Alterations shall comply with new code requirements and be installed so that the building is no less compliant with the code than it is currently.	Sets three levels of [alterations], based on size and scope. Level 1 alterations, the smallest, must comply with Chapter 7 of the Existing Building Code; Level 2 with Chapters 7 and 8 and Level 3 with Chapters 7 through 9. Regardless of which level the alternations fall under, the resulting structure shall be no less conforming with the code than it was prior to the alteration.	Similar to the Existing Building Code; there are three levels of alterations articulated with progressive requirements for compliance.[56]

A. Rehab Codes and Pink Zones

Many cities have adopted what is called a "Rehab Code," but it is fairly clear that the full potential of these codes has not been realized. Eric Bethany, an urban architect at Kronberg Wall in Atlanta, recently commented on the firm's blog that his firm "constantly find[s] that local government officials are completely unaware of the importance of the existing building code as a critical tool for redevelopment and reuse of portions of their town, often the cherished buildings along Main Street."[57]

Early adopters of a Rehab Code included the states of New Jersey, Maryland, Minnesota, and Rhode Island and the cities of Wilmington, Delaware and Wichita, Kansas.[58] According to the Guide, Rehab Codes are "building and construction codes that encourage the alteration and reuse of existing buildings . . . . devel-

56. MEMPHIS & SHELBY CTY. OFFICE OF CONSTR. CODE ENF'T, MEMPHIS AND SHELBY COUNTY REHABILITATION CODE, https://shelbycountytn.gov/DocumentCenter/View/23044.

57. Eric Bethany, *In Praise of the Existing Building Code*, KRONBERG WALL (Sept. 24, 2015), http://kronbergwall.com/in-praise-of-the-existing-building-code/.

58. BUILDING TECH., INC., SMART CODES IN YOUR COMMUNITY: A GUIDE TO BUILDING REHABILITATION CODES 3, 12 (2001), https://www.huduser.gov/Publications/pdf/smartcodes.pdf.

oped because the building regulatory system in the U.S., including building codes, is a significant impediment to investments in the alteration and reuse of existing buildings. This has led to a complete re-thinking of how existing buildings should be regulated."[59]

Building Codes are often cited by developers and builders as a barrier to revitalization of existing buildings. However, where Rehab Codes have been adopted, giving broader discretion to the local Building Official, the barrier is more likely in the enforcement than in the language of the applicable ordinances, although the two cannot be readily separated.

> The burden of building regulation on this country's housing builders and developers seems to come less from the actual restrictions of the codes than in their administration. Problems still arise in code creation (codes continue to be far from performance-based) and adoption (most jurisdictions continue to make amendments based on local political conditions rather than on climatic, geological, or material realities). . . . Code enforcement, however, seems to be the most significant barrier to development. . . . Extreme variations in plan reviews and inspections still exist not just between jurisdictions but also increasingly *within* jurisdictions.[60]

There is very little empirical research establishing that Rehab Codes, if enforced as intended, yield the desired result of decreased costs for redevelopment while not compromising life safety concerns. Perhaps one reason for the dearth of research on this topic is the lack of publicly available data that would be necessary to conduct such research. The result is that anecdotal information is relied upon in the crafting of rehab codes, the enforcement of rehab codes, and the efforts of developers and builders to comply with rehab codes. Carlos Martin calls for the development of a methodological approach to measuring and gathering data on how

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59. *Id.*

60. Carlos Martin, *Response to "Building Codes and Housing" by David Listokin and David B. Hattis*, 8 CITYSCAPE, no. 1, 2005, app. at 253, 255, https://www.huduser.gov/periodicals/cityscpe/vol8num1/res1.pdf.

cities enforce codes as a "first order of business" to address the dearth of research in the field.[61]

In an article printed in the same HUD journal focused on regulatory barriers to affordable housing, Peter May detailed the components of regulatory barriers in any development.[62] May discusses research across the United States that identifies and charts building codes pertaining to affordable housing development on a spectrum from "business friendly" to "by-the-book."[63] He goes on to describe how around the turn of the century efforts at regulatory reform began to "shift in perspective from considering ways to strengthen enforcement to addressing ways to improve compliance[,]" and he uses the research and writing about Rehab Codes as evidence of the success of this approach.[64]

A study of New Jersey's experience with Rehab Codes found that so called "facilitative enforcement" of Rehab Codes can stimulate residential investment in central city neighborhoods.[65] While not the only answer, Rehab Codes properly enforced show promise as a local response to Regulatory Blight. As further explained below, more fine-grained approaches are required to turn around specific targeted revitalization clusters, but even there, the power of the Building Official to interpret the "intent" of the building codes may be key.

Regardless of the language of the codes or their enforcement, as noted above, the small size of a very desirable community revitalization project may actually make it impossible as a practical matter. Therefore, cities that hope to spur reinvestment in largely

61. *Id.* at 257.

62. Peter J. May, *Regulatory Implementation: Examining Barriers from Regulatory Processes*, 8 CITYSCAPE, no. 1, 2005, at 209, https://www.huduser.gov/periodicals/cityscpe/vol8num1/ch6.pdf.

63. *Id.* at 213.

64. *Id.* at 217, 218 (citing Raymond J. Burby et al., *Building Code Enforcement Burdens and Central City Decline*, 66 J. AM. PLAN. ASS'N 143, 154–155 ("Adopting business-friendly approaches will not reverse the movement of industrial, office, and retail businesses from central cities to the suburbs. But these approaches can help cities attract more single-family detached housing (and the population that comes with it) and spur more commercial rehabilitation projects.").

65. Raymond J. Burby et al., *Encouraging Residential Rehabilitation with Building Codes: New Jersey's Experience*, 72 J. AM. PLAN. ASS'N, 183, 191–92 (2006).

blighted areas have the challenge of establishing a mechanism to make small development possible. This approach has been experimented with, and has yielded promising results in many communities. The focused attention, concentration of enforcement and other resources, and regulatory flexibility can make all the difference and can stimulate multiple small projects, whose whole is greater than the sum of its parts.

B. Making Small Possible

While large investments are needed and welcome there remain many neighborhoods in Memphis where it is difficult to develop. Older, distressed, and transitional neighborhoods often do not have the ability to generate rent sufficient to finance the costs of renovation or new construction without subsidies. In these neighborhoods, small commercial buildings (less than 10,000 square feet), small apartment buildings, and vacant single-family homes continue to deteriorate into blighted conditions and reduce surrounding property values while adding cost to city budgets due to maintenance and increases in crime. This is a desperate cycle for neighborhoods and slow-growth cities such as Memphis. So how can this cycle be interrupted?

One approach is to encourage more small, independent developers by reducing the difficulty, costs and time required for small-scale infill development. There is a correlation between the increasing regulations, cost, and time required to complete infill projects and the typical size of the projects. Larger projects are able to absorb the cost associated with the consultant team needed to navigate the system. This requires a degree of experience and sophistication that only a few local developers in Memphis possess. In a relatively slow-growth, weak market city such as Memphis this can leave many small projects and potential "end-user developers" out of the picture. How can policy makers encourage small-scale development in neighborhoods?

The economics of real-estate development are basic. For a project to be viable, the owner must be able to build a building that will cost less to build and operate than the owner receives in rent [X (rents) - Y (cost to build and operate) = Z (profit or loss)]. The two variables are the rent generated and the cost to build and operate the building. If the equation is negative then the development loses money and will not likely occur. If it is positive then the project is at least viable. So, in theory, to make this equation positive one would

want to increase rents or decrease costs (or some combination of both).

Rent represents the rental rate or sale price of the property. If rents increase above a certain amount too quickly then issues of displacement and gentrification can emerge. The costs include all hard and soft costs associated with development—planning and entitlements, construction materials and labor, marketing, insurance, taxes, etc. For policy makers interested in promoting small-scale affordable development as a tool to combat blighted neighborhoods, the focus becomes identifying and reducing the regulatory burden and time that can inflate the cost of building rehab and operations.

This leaves cities that want to streamline and remove regulatory barriers to redeveloping blighted properties with a couple of options. Cities may choose to conduct a total reform of regulations including a complete rewrite of the zoning, subdivision, and building regulations. In theory this approach may seem the cleanest, however, this work is complex, expensive, and time consuming. Further, we have not proven to be very good at anticipating necessary reforms on a wholesale basis. Additionally, local politics and a resistance to change may impede total reform of zoning and subdivision codes. Further, state politics and issues of insurability may hinder comprehensive reform of statewide building codes.

Alternatively, cities may choose to work within the current system to improve opportunities for small infill and rehab projects. Cities might implement "Pink Zones"[66] or overlay zones that create exceptions in zoning and building codes that allow for easier redevelopment of buildings. Additionally cities may look to streamline the approval process to: make it easier for small pro-

66. Pink Zones are designated areas of a city where community members believe a less rigid enforcement of zoning and/or building regulations will yield a more desirable community. *See* Keith Boyfield & Daniel Greenberg, *Pink Planning*, CENTRE FOR POLICY STUDIES 1 (2014), http://www.cps.org.uk/files/reports/original/141105085708-PinkPlanning.pdf. In essence Pink Zones are overlay districts where the regulatory "red tape" is lightened to promote easier and more cost effective infill and redevelopment. *Id.* These are discussed in more detail below in the context of Phoenix, Arizona. Additional information on Pink Codes and other approaches to making small development easier can be found through The Project for Lean Urbanism. Ctr. For Applied Transect Studies, LEAN URBANISM, http://leanurbanism.org (last visited May 16, 2016).

jects to get a permit, train planners and code inspectors to be more supportive, and help applicants to find equivalent alternatives that can satisfy the black letter of the law. Further, cities can work with applicants and community members to explain how they are supportive of small redevelopment projects. This type of approach enables innovation and experimentation to occur because small projects represent lower risk projects due their size and scale.

This is the approach taken by the city of Phoenix, Arizona. In addition to rethinking their regulatory paradigm they are also supporting stakeholders in other ways. What follows is a quick overview of some of the steps the city of Phoenix has taken to implement a "Lean Government" approach to build stronger communities, infill and redevelopment of vacant buildings, and test ideas before investing in them. This summary is based on interviews with municipal officials in Phoenix and a well-written white paper on the topic entitled *Lessons from PHX–Embracing Lean Urbanism* by Lysistrata Hall and Braden Kay.[67]

Phoenix, Arizona, is similar to Memphis in that it has more land than it needs. Phoenix is approximately 518 square miles and home to 1.5 million people (about 2,967 people per square mile).[68] Memphis is about 324 square miles and home to 660,000 people (2,000 people per square mile). Both cities have also been subject to misguided urban renewal policies leaving large swaths of vacant land (40–45% of Phoenix is vacant land). As a result of the failed urban renewal policies of the 70's–90's and an increasing regulatory regime,[69] developers in Phoenix were finding it more cost effective to tear down buildings and build new construction at the edge of the city rather than to rehab existing buildings or infill in historic neighborhoods.

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67. Lysistrata Hall & Braden Kay, *Lessons from PHX—Embracing Lean Urbanism*, THE PROJECT FOR LEAN URBANISM (Aug. 18, 2015), http://leanurbanism.org/publications/lessons-from-phx/.

68. *See* Quickfacts, Phoeniz City, Arizona, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/table/PST045215/0455000,04 (last visited May 16, 2016).

69. The entitlement and permitting processes in Phoenix may take upwards of eighteen months for completion, for projects that align with city policy. Interview by Tommy Pacello with Lysistrata Hall, Neighborhood Specialist, The City of Phoenix Neighborhood Servs. Dep't (Nov. 17, 2015).

When the 2008 recession stalled suburban greenfield development, city officials recognized that one of the few bright spots in the economy was redevelopment of Phoenix's historic core by local residents and stakeholders through small-incremental infill projects. They began to recognize that existing processes and regulations were preventing residents from participating, let alone contributing, to the revitalization of their neighborhood. Establishing strong working relationships with an organization (thanks to a network of stakeholders), city officials realized the disconnect between their desire to encourage infill and redevelopment and the city's policies that promoted suburban sprawl and demolition of existing buildings. Officials wanted to see areas of the city revitalize and maintain their existing building stock but the city's codes and ordinances were oriented to promote new development over redevelopment and infill. To address this, city officials began to think differently about conventional policies and applied a comprehensive approach to neighborhood revitalization. They began to:

> (1) Build relationships between city staff and residents, businesses, nonprofit and community development groups to create a network of assets to address the challenge.
>
> (2) Nurture relationships and abilities of stakeholders by co-creating a shared vision between city staff, residents, business groups, and developers.
>
> (3) Reduce red tape by creating "Pink Zones" or areas of the city with lighter regulations and more place-based standards in an effort to preserve existing buildings and promote redevelopment.
>
> (4) Fill in the gaps between the existing buildings by adjusting regulations to allow temporary and semi-permanent buildings and uses to activate the area.
>
> (5) Establish walkable streets using low-cost iterative solutions that demonstrate what is possible for the street.

In Phoenix, government officials identified a challenge, reached out to communities, prototyped regulatory approaches and infrastructure ideas, and implemented the concepts that worked. The work was supported by the administration and had the effect of removing several of the regulatory barriers neighborhood stakeholders were facing in small-scale infill and redevelopment of blighted neighborhoods.[70]

Specifically related to the regulatory approach, the city created "Pink Zones" or areas to promote adaptive reuse. Officials initially identified small pilot areas where buildings of less than 5,000 square feet were subject to lower restrictions related to the zoning, building and technical codes. The program has since expanded citywide and applies to buildings built prior to 2000 that are up to 100,000 square feet. The program includes streamlined process, technical assistance, and cost savings to applicants. Additionally, the city developed a series of overlay zoning districts that further encourages small-scale redevelopment. Further, city departments such as the fire department, solid waste, public works, and environmental compliance (storm water) began to work together to reduce the burdens on infill projects. Finally, the city removed the requirement to bring existing parking lots, sidewalks, and driveways up to the current city code. Comprehensively these regulatory changes combined with the other efforts from the city have made it easier for small-scale adaptive reuse and infill development to take place. At the heart of these reforms is the understanding of the value that residents can deliver to their neighborhood when barriers that prevent from them contributing are reduced. These reforms look to restart historic cycles of revitalization and reduce the need for government agencies to underwrite redevelopment with subsidies that have questionable returns.

70. The City of Phoenix Adaptive Reuse Program outlines many of the exceptions that are available to applicants including issues of storm water retention, toilet fixtures and restrooms, life safety issues, and landscaping standards. *See Adaptive Reuse Policies*, CITY OF PHOENIX, https://www.phoenix.gov/pdd/services/permitservices/arp/adaptive-reuse-policies (last visited May 15, 2016).

V. CONCLUSION

We have attempted to shed some light, from the practitioner's perspective, on the barriers to eliminating blight that local land use and building code regulations erect and reinforce, even while local government strives and spends in an effort to eliminate vacancy and abandonment. In some cases, the regulations themselves should be changed to make revitalization possible; in other cases, the answer lies in more creative or facilitative enforcement. We recommend that cities like Memphis, that are serious about neighborhood and community revitalization, identify and focus on small neighborhood target areas and work to find ways to remove regulatory barriers at that level in order to stimulate small redevelopment projects that were previously impossible in that location. Based upon lessons learned in such neighborhood target projects, the broader regulatory structure may be addressed.

Expert knowledge of the regulations themselves—their history in the community, and the mechanisms of enforcement—will be essential to policy makers seeking to remove these barriers.

We believe that contextually applicable local regulations and their enforcement with neighborhood level real estate realities in mind will result in the elimination of blighted properties by market forces in urban areas where development is most needed. It is time for local government operators everywhere to recognize that their own rules are killing any hope of redevelopment of the very neighborhoods they are responsible for nurturing back to economic prosperity.

Community Control Supervision of Building Code Offenders in Cleveland's Housing Court: Making the Most of Ohio's Direct Sentencing for Misdemeanors

JUDGE RAYMOND L. PIANKA*

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I. INTRODUCTION

An owner of twenty rental properties in Cleveland appears before the Cleveland Housing Court (the "Housing Court") to be sentenced for failing to repair a collapsing porch and to repaint the exterior of a rental property in Cleveland. After being charged, the owner made the needed repairs and now asks for a lenient sentence, given his eventual compliance. What the owner does not tell the Housing Court is that the City of Cleveland (the "City") has condemned one of his other properties—a vacant house vandalized by thieves who tore out the copper pipe. That property currently poses a threat to the community, as it is open to entry because the owner has done nothing to address the problem.

Fortunately, the condemned house will not escape the Housing Court's attention for long because the Housing Court sentences the owner to a term of community control supervision. Instead of choosing to mistrust and punish, or to trust and forgive, the Housing Court directly sentences him to meet community control requirements designed to ensure that he will responsibly maintain *all* of his properties, including the condemned house he failed to bring to the Housing Court's attention. Under community control requirements, the Housing Court will assign one of its ten Housing Specialists to monitor the owner's compliance with building codes at all of his rental properties. He will have the duty to provide a list of all the properties he owns, to visit each of them regularly, and to provide the Specialist with photographs of each property. The owner, now an "offender," will be proving his own failure to obey the law if the photographs show peeling paint or rotted wood at any of the properties that the City inspector had not previously visited. The pressure on him to comply with code requirements at all of his properties will not fade.[1]

* Cleveland Municipal Court, Housing Division.

1. The examples used in this article are based on fact patterns and legal issues in cases that came before the Housing Court. Because the court's obligation is not to comment publicly on pending or impending cases, and all cases with an unexpired term of community control are potentially impending cases, the examples are amalgamations of different cases or have details altered.

The Housing Court has developed its community control program[2] as an alternative to the traditional punishments of fines or jail time, which, though intended as a deterrent, may not persuade a neglectful owner to change his conduct or repair the properties which threaten Cleveland neighborhoods. The community control program, by requiring continued supervision of the repair process, thus makes the most of the "direct sentencing method" recommended by the Ohio Criminal Sentencing Commission when it recommended changes to Ohio's misdemeanor sentencing law in 1998.[3]

Implementing the program has required the Housing Court to consider several policy considerations. To what extent is a sanction reasonably related to the overriding purpose of the sentence? While the Housing Court has the ability to monitor an offender's behavior and actions, how far should the Housing Court's supervision extend? Should the Housing Court limit its use of community control when monitoring an offender becomes a drain on staff resources? And to what extent should the court base its decisions on its knowledge of limits in the City's code enforcement efforts?

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2. *Dictionary of Legal Terms: Community Control Sanctions*, OHIO LEGAL SERVS., http://www.ohiolegalservices.org/public/legal_terms_dictionary/community-control-sanctions (last visited Mar. 31, 2016) ("While often called 'probation,' community control sanctions cover a wide variety of residential, non-residential, and financial options that judges use in criminal sentencing, including traditional probation supervision and numerous other restrictions administered by the local court. Community control is used for felons when a prison term is not imposed. It is imposed on misdemeanants when a jail term is not warranted. Residential community control sanctions include community-based correctional facilities, halfway houses, and others. Non-residential options include community supervision, drug and alcohol treatment, house arrest, electronic monitoring, community service, and the like. Financial sanctions include fines, restitution, and various reimbursements. Persons facing mandatory prison terms (e.g., for murder, high level sex and drug offenses, felonies committed with firearms, certain repeat offenders, etc.) or mandatory jail terms (e.g., for driving under the influence of alcohol or drugs) are not eligible for community control, other than financial sanctions.").

3. OHIO CRIMINAL SENTENCING COMM'N, A PLAN FOR MISDEMEANOR SENTENCING IN OHIO 19–21 (1998), http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/publications/misdemeanor_vol1.pdf [hereinafter COMMISSION REPORT]. The General Sentencing Proposal was adopted and is now a part of the Ohio Revised Code, Chapter 2929.

This Article will describe how the Housing Court has answered these questions so that it can best use community control sanctions to stop neglectful property owners from re-offending by failing to maintain and repair Cleveland's trouble housing stock.[4] The Article will discuss the history of the Housing Court, the availability of community control as a sentencing option for misdemeanants in Ohio, and the inception of the Housing Court's unique community control supervision program, highlighting how the Housing Court has adapted the traditional community control model to meet the unique challenges of defendants convicted of a housing, building or health code violation. It will also focus on the policy implications that the Housing Court has faced and continues to face as it develops its program of community control supervision.

II. DEVELOPMENT OF CLEVELAND'S HOUSING COURT

> [The Cleveland] Housing Court is part courtroom, part emergency room that performs legal triage on a mix of criminal and civil cases for people who fall behind on their rent and mortgage payments—financial problems that lead to other charges, such as housing, zoning and fire code violations.[5]

The Housing Court was created in 1980 in response to deteriorating conditions in Cleveland's neighborhoods and other concerns that would be better addressed by a specialty court with a single judge.[6] The legislation that created the Housing Court gave

4. *See* Michelle Jarboe, *Vacant Houses, Blighted Buildings Still Plague Cleveland, But Problem is Shrinking: Taking Stock*, CLEVELAND.COM (Nov. 21, 2015, 7:00 AM), http://www.cleveland.com/business/index.ssf/2015/11/vacant_houses_blighted_buildin.html (explaining that although 6,000 structures still need demolition in Cleveland, this number is down from 7,700 in 2013).

5. Chief Justice Thomas J. Moyer, Annual State of the Judiciary Address on Sept. 14, 2006, SUP. CT. OHIO & OHIO JUD. SYS., http://www.supremecourt.ohio.gov/PIO/Speeches/2006/SOJ_091406.asp.

6. *See* Hon. Raymond L. Pianka, *Cleveland Housing Court—A Problem-Solving Court Adapts to New Challenges*, *in* FUTURE TRENDS IN STATE COURTS 44 (2012), http://www.ncdsv.org/images/NCSC_FutureTrendsInStateCourts_2012.pdf; *see also* OHIO REV. CODE ANN. § 1901.051(A) (LexisNexis 2010) (specifying that the Cleveland Housing Court have only one judge).

it extensive jurisdiction over housing issues and authorized it to make use of a staff of Housing Specialists to help the Housing Court in its mission.[7]

The Housing Court has exclusive jurisdiction over all criminal cases brought to enforce the City's Housing, Building, Fire Prevention, Zoning, and Agriculture and Air Pollution Codes.[8] The Housing Court's jurisdiction over civil cases includes evictions, rent deposits, restraining orders, landlord/tenant disputes, actions to abate nuisances, and some foreclosures. If an issue impacts real property in the City, the Housing Court likely has the authority to hear the case.

> [T]he division has exclusive jurisdiction within the territory of the court in any civil action to enforce any local building, housing, air pollution, sanitation, health, fire, zoning, or safety code, ordinance, or regulation applicable to premises used or intended for use as a place of human habitation, buildings, structures, or any other real property subject to any such code, ordinance, or regulate . . . in any civil action commenced pursuant to Chapter 1923. or 5321. or sections 5303.03 to 5303.07 of the Revised Code . . . [and] in any criminal action for a violation of any local building, housing, air pollution, sanitation, health, fire, zoning, or safety code, ordinance, or regulation applicable to premises used or intended for use as a place of human habitation, buildings, structures, or any other real property subject to any such code, ordinance, or regulation . . . [and] in any civil action as described in division (B)(1) of section 3767.41 of the Revised Code that relates to a public nuisance.[9]

In addition, unlike most municipal courts, the Housing Court has unlimited monetary jurisdiction.[10] This extra power prevents land-

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7. OHIO REV. CODE ANN. §§ 1901.011, .02(B), .025, .031, .331(A)(1) (LexisNexis 2010).

8. *Id.* § 1901.181(A)(1).

9. *Id.*

10. *Id.* § 1901.131.

lords or tenants from forum shopping by bringing a claim in excess of the municipal court's jurisdiction; housing cases stay in Housing Court. With this streamlined approach, the Housing Court is the first to know and recognize repeat offenders.

The Housing Court has evolved into a problem-solving court.[11] The statutes establishing the Housing Court authorized that court to hire Housing Specialists to enable it to address concerns outside the courtroom.[12] The Housing Court has a complement of ten Specialists who have backgrounds in probation, landlord/tenant law, building and housing code enforcement, banking, social work, and community organizing. The Specialists serve as community control probation officers, operating the Housing Court's walk-in landlord/tenant clinic, and mediating disputes between parties. They serve as the eyes and ears of the Housing Court in Cleveland's neighborhoods.

The Housing Court emphasizes compliance with code requirements as the primary goal of criminal prosecution. The public good is best served when properties are repaired and maintained.[13] While some punishment is warranted even if an owner eventually complies with code requirements, punishment alone will not serve the public if it does not function as a deterrent, the public continuing to suffer from blighted property conditions. The Housing Court's focus is therefore on deterrence and property rehabilitation. The Housing Court designed and implemented its community control program with this end in mind.

Prior to the implementation of the current community control supervision program, the Housing Court's practice was to defer its ultimate decision on execution of sentence so that defendants could argue in mitigation that they had eventually complied with Building Code requirements. This approach burdened the Housing Court's docket because of the need to hold repeated status hearings to determine if an owner has brought his property into compliance. It also focused the Housing Court's, and the offend-

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11. Pianka, *supra* note 6, at 44.

12. OHIO REV. CODE ANN. §§ 1901.011, .331.

13. *See generally* Jarboe, *supra* note 4 ("[Vacant] buildings taint neighborhoods, hurt home values and entice criminals. Shabby houses stand as testaments to a half-century of population loss capped by a decade-long flood of foreclosures and a brutal housing bust.").

er's, attention only on the property that was the subject of the criminal charges; it did not allow the Housing Court to insist that the offender make needed repairs at his other properties. When owners failed to comply, the Housing Court could choose to execute on a fine or jail term but then lost its power to try to compel the owner to comply. Keeping jurisdiction over the question of sentencing allowed the Housing Court to meet its policy goals, but failed to meet the goal of reaching finality in a criminal case. The Housing Court had to be mindful that, as a case progressed, it needed to reach a final sentencing decision. The Housing Court could not retain the ability to modify fines and jail time unless those sanctions were part of a sentence of community control sanctions. Creating a comprehensive program of community control supervision allowed the Housing Court to achieve a dual purpose of maintaining jurisdiction to consider all of an offender's properties and lessening the number of status hearings per case.

III. COMMUNITY CONTROL SENTENCING

A. The Scope of Community Control Sanctions in Ohio

Community Control, often called probation,[14] is defined by Ohio statute as a sanction that is separate and distinct from a prison term.[15] The sanction covers a wide variety of residential, non-residential, and financial options that judges may use in criminal sentencing.[16] Community control is used for felons when a prison term is not imposed and for misdemeanants when a jail term is not warranted.[17] A judge can consider imposing other sanctions—such as electronic monitoring, community service, and residential treatment at a drug and alcohol rehabilitation center[18]—when sentencing a misdemeanant[19] to jail time in order to encourage the

14. OHIO LEGAL SERVS., *supra* note 2.
15. OHIO REV. CODE ANN. § 2929.01(E) (LexisNexis 2010).
16. OHIO LEGAL SERVS., *supra* note 2.
17. *Id.*; COMMISSION REPORT, *supra* note 3, at 21.
18. OHIO LEGAL SERVS., *supra* note 2.
19. Violations of the City's housing, building, fire, zoning, agriculture, health, and air pollution codes range from minor misdemeanors to first-degree misdemeanors.

optimum use of taxpayer money.[20] "The longest jail term should be reserved for the worst offenders and offenses."[21]

At the time of sentencing, the Housing Court will directly impose a sentence that consists of one or more community control sanctions.[22] After an offender is sentenced, the Housing Court places the offender under the supervision of the Housing Court or department of probation in the Housing Court's jurisdiction.[23] If the offender violates any condition of community control, the Housing Court has the opportunity to reevaluate and revise the original sentence.[24] The Housing Court hearing the community control violation hearing must provide an offender with six minimum due process rights:

> (1) written notice of the claimed violations; (2) disclosure of the evidence against the offender; (3) an opportunity to be heard in person and to present evidence; (4) the right to confront and cross-examine adverse witnesses; (5) a neutral and detached magistrate, and (6) written findings of fact stating the evidence relied on and the reasons for the revocation [in the event of revocation of community control].[25]

A community control violation hearing is not a criminal trial and the City need only to present substantial evidence of a violation and not prove a violation beyond a reasonable doubt.[26]

Upon finding that an offender has violated community control sanctions, the Housing Court may extend community control sanctions, impose more restrictive community control sanctions, or cancel community control sanctions and impose a definitive sentence.[27] Community control sanctions may not exceed five years,[28]

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20. COMMISSION REPORT, *supra* note 3, at 14.
21. *Id.*
22. OHIO REV. CODE. ANN. § 2929.25(A)(1)(a) (LexisNexis 2010).
23. *Id.* § 2929.25(C)(1).
24. LEWIS R. KATZ ET AL., BALDWIN'S OHIO PRACTICE CRIMINAL LAW § 119:8 (3d ed. 2014).
25. *Id.*
26. *Id.*
27. *Id.*

and the Housing Court can reward success by shortening the time on community control or lessening the severity of the sanction.[29]

B. The Intent of Community Control: "Direct Sentencing Method"

The Housing Court's community control supervision program makes the most of the "direct sentencing method" recommended by the Ohio Criminal Sentencing Commission ("the Commission") in 1998, and adopted by the legislature.[30] The Commission feared that the existing system of imposing, and then suspending, a sentence failed to make clear the overriding purpose of misdemeanor sentencing: "to protect the public from future crime by the offender and others and to punish the offender."[31] The Commission opined that the suspended sentencing method frustrated this purpose.

Prior to the adoption of the Commission's Proposal, in order to sentence an offender to probation, a court had to first impose a jail term and then suspend it:

> Today, in sentencing an offender to probation, a court must first impose a jail term, then suspend it, then place the offender on "probation" subject to various conditions. A jail term must be imposed even when the court does not intend that the offender be jailed, except as a punishment for violating probation. When offenders succeed on probation, as most do, the jail term is never served. In fact, even when the offender violates probation, the full suspended jail term is seldom ordered.
>
> During its felony deliberations, the Commission concluded—and the General Assembly agreed—that suspended sentences can confuse defendants, victims, and the public. If we were creating a new justice system from scratch, it is unlikely we would start by imposing a jail term that we do not truly intend to have served.

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28. OHIO REV. CODE ANN. § 2929.25(A)(2).
29. COMMISSION REPORT, *supra* note 3, at 8.
30. *Id.* at 19.
31. *Id.* at 7.

> By sentencing directly, the offender, victim, and public know exactly what is required. The probation department keeps the hammer it needs to make sure the defendant complies. The sentence does not flow from an often fictitious jail term. Honesty is the better policy.[32]

Rather than first impose a jail sentence only to suspend it, the Commission proposed that a judge should be able to sentence directly to probation.[33] At sentencing, the judge could warn offenders that violations of the terms of probation could mean longer terms under the sanction or more restrictive sanctions, including a specified jail term, thus achieving the same result but doing so openly.[34] Direct sentencing notifies the offender, victim, and public of both the requirements of compliance and the consequences should the offender not comply.[35]

While the Commission strongly recommended that judges use directed sentencing, it also recommended that they remain free to use suspended sentencing.[36] The practical effect on the offender is the same, but the way the judge announces the sentence is altered.[37] Adapting the Commission's sentencing example involving a drunk driving case to the housing context, under the suspended sentencing approach, the Housing Court judge would say, "six months in jail, suspended, and one year of probation, during which you must repair the roof, paint the front porch and maintain the property to minimum code." By contrast, the Housing Court judge imposing a direct sentence would announce, "I am imposing one year of community control supervision during which you must repair the roof, paint the front porch and maintain the property to minimum code; if you violate any of these conditions, you face the maximum sentence of six months in jail."

In recommending the direct sentencing method, the Commission envisioned that judges would be creative in their sentencing through, "additional sanctions designed to discourage the of-

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32. *Id.* at 19–20.
33. *Id.* at 8.
34. *Id.*
35. *Id.* at 20.
36. *Id.*
37. *Id.*

fender and others from committing a similar offense, provided the sanctions are reasonably related to the overriding purposes of sentencing."[38] The Housing Court has embraced this idea and designs its community control sanctions to discourage offenders from re-offending.

IV. DEVELOPMENT OF COMMUNITY CONTROL SENTENCING IN HOUSING COURT

A. General Obligations of Community Control for Building Code Offenders

When the Housing Court began to implement its community control program, its first challenge was to develop general community control supervision requirements. The restrictions typically imposed on offenders—to get treatment for substance abuse, to seek employment, to avoid former associates—are not applicable to the case of a neglectful property owner. The Housing Court instead imposed, by local rule, the obligation to provide a list of all properties the offender owns in Cleveland (or the Village of Bratenahl, Ohio, over which the Housing Court also has jurisdiction), the duty to keep all properties in good repair, and a requirement to regularly visit and inspect each property to ensure that it remains in good repair.[39] Each offender is also required to report to his assigned Housing Court Specialist who may give more specific instructions.[40]

B. The Role of Housing Specialists

The Specialists' role is to enforce the community control obligations imposed on the offender while functioning as community control officers. Though they offer coaching and assistance, they also serve as enforcers, summoning offenders before the Housing Court for community control violation hearings when the offenders do not comply with supervision requirements.

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38. *Id.* at 24.

39. CLEVELAND MUN. HOUS. CT. LOCAL R. app. 2.18(3)–(4), (6) (2016), https://www.clevelandmunicipalcourt.org/docs/default-source/default-document-library/2016-cleveland-housing-court-local-rules-as-transmitted-02-01-2016.pdf?sfvrsn=0.

40. *Id.* at 2.18(2).

The supervision requirements are designed so that the burden of demonstrating compliance is placed on the offender. The offender must prepare a list of properties to submit to the Specialist.[41] The offender must regularly visit his properties.[42] And the offender must make needed repairs, even before the Specialist visits some or all of his properties.[43] The most common statement from offenders found to be in violation of community control requirements is that they made repairs once the Specialist identified for them the defects at their property. The Housing Court responds by informing them that the assigned Specialist is not their employee; offenders are supposed to regularly visit their properties, note any defects, and correct them before the Specialist visits. The Specialist's visits are to check up on the offender, not to guide the offender.

The offender's first burden is to address the conditions that were a part of the City's Notice of Violations of Cleveland's ordinances. In the strictest sense, the offender is already re-offending if the repairs are not completed. But the Specialist will have the discretion to decide on the time for compliance before a summons for violation of community control is issued.

Because the Specialist's goal is to help the offender to not re-offend, the Specialist may identify what repairs are needed and find resources to assist the offender. Sadly, there are not many resources to help homeowners. If the offender lacks sophistication, the Specialist will help educate the offender about minimum safety code requirements. The Specialist may suggest, or require, that the offender take general classes such as the Housing Court's seminar for landlords, "What Every Landlord Should Know," commonly called "Landlord School," or specific training such as training in lead abatement.

Because the offender is under the watchful eye of the Specialist, he or she can be brought back to the Housing Court quickly and called to account for failing to make repairs. This procedure is more expeditious than the City's procedure for inspection, which includes issuance of a notice of violations and subsequent criminal

41. *Id.* at 2.18(3).
42. *Id.* at 2.18(6).
43. *Id.* at 2.18(4).

prosecution.[44] The Specialist prepares a written report with photographs indicating the alleged violations of community control requirements. If the judge finds probable cause, the case is set for a community control violation hearing.[45] Community members benefit from the program because they can bring violations to the attention of the Housing Court's Specialists more easily than they could through the complaint process of the City's Department of Building and Housing. Any neighbor who knows about the offender's community control sentence can contact the Housing Specialist. More commonly, local community development corporations who monitor code enforcement become aware of the sentence and, if they send staff to check on the condition of properties in their service area, can have those staff members notify the court's Housing Specialist about any problems at the offender's properties.

The Housing Court conducts its community control violation docket twice per month. In most cases, the offender's hearing is divided into two stages. At the first stage, the judge or magistrate determines whether the offender has violated the requirements of his sentence of community control. Then, if there is a finding of violation, the judge or magistrate decides on the penalty. Before deciding on the penalty, the Housing Court typically continues the case to allow the offender to seek a lesser penalty if he or she addresses the underlying problem.

In keeping with the goal of placing the burden of compliance on the offender, the Housing Court emphasizes the offender's community control obligations and the Housing Court's expectation that the offender meet those obligations prior to any visit from the Specialist.

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44. Building owners are required to keep properties in good repair and to demolish or repair them when ordered to by the Department of Building and Housing. CLEVELAND, OHIO CODE OF ORDINANCES § 3103.09(e)(1) (2016), http://library.amlegal.com/nxt/gateway.dll/Ohio/cleveland_oh/cityofclevelandohiocodeofordinances?f=templates$fn=default.htm$3.0$vid=amlegal:cleveland_oh. Failure to comply is a first degree misdemeanor. *Id.* § 3103.99(a).

45. Probable cause here can be supported by evidence that building code defects exist that the offender has not repaired or that the offender has failed to comply with specific terms of community control such as providing reports to the Housing Specialist or making regular visits to the offender's properties.

The Housing Court's ability to modify the terms of community control can be to the benefit of offenders.[46] Offenders who comply with community control requirements can ask the Housing Court to modify the terms of their sentence by reducing fines, lessening community control requirements, or shortening or ending their term of community control.[47]

V. COMMUNITY CONTROL IN PRACTICE

In the years that the Housing Court has implemented community control sanctions, several public policy concerns have shaped the Housing Court's response to unique situations and offenders. The Housing Court's ultimate goal for offenders is full compliance to the City's housing, building, and health codes. Incarceration prevents the offender from bringing the property into full compliance, so how does the Housing Court guarantee that an offender makes the necessary repairs to his property? How does the Housing Court ensure that a property is brought into compliance when the offender is a bank holding the property as a trustee for another beneficiary or when the offending property is sold to escape the jurisdiction of the Housing Court?

The Housing Court's solution to many of these compliance puzzles has been to craft unique and creative sanctions under the direct sentencing method intended to prevent offenders from reoffending. The Housing Court has the power to impose any sanction "that is intended to discourage the offender or other persons from committing a similar offense if the sanction is reasonably related to the overriding purposes and principles of misdemeanor sentencing."[48] The sanction must not, however, "be overly broad so as to unnecessarily impinge upon the probationer's liberty."[49]

Ohio's courts have not considered the scope of community control sanctions imposed for housing or building code violations. The main sanctions that have been subjected to scrutiny are sanctions that involve parental rights. The courts have allowed or dis-

46. COMMISSION REPORT, *supra* note 3, at 20–24.

47. *Id.*

48. OHIO REV. CODE ANN. § 2929.27(C) (LexisNexis 2010).

49. State v. Talty, 814 N.E.2d 1201, 1204 (Ohio 2004) (quoting State v. Jones, 550 N.E.2d 469, 470 (Ohio 1990)).

allowed such sanctions based on the circumstances of the offense.[50]

The Housing Court's power to impose sanctions on housing offenders may face similar limits. It could exceed the Housing Court's authority to order as a community control sanction that an offender stop being a landlord altogether since lesser restrictions could serve the goal of preventing the offender from re-offending.[51] The Housing Court has, however, ordered offenders who have failed to make repairs to a large inventory of houses not to buy any more houses and has ordered offenders to demolish condemned houses without first having an opportunity to offer them for sale "as is" when it seems likely that an "as is" sale would not lead to the house being promptly repaired.[52]

Community control supervision has not proven effective for every offender. Stricter punishments, such as imposing large fines or incarceration may be the Housing Court's best tool in these situations. Finally, even where direct sentencing appears to be a good solution, it can prove to be a drain on Housing Court resources for offenders with a large number of properties in disrepair. All of these concerns have created a malleable system, ever adapting to best accomplish the Housing Court's ultimate mission.

A. *Creative Sentencing: Tailoring Community Control Obligations to Specific Circumstances*

Community control supervision carries with it the duty for the offender not to re-offend.[53] But the goal of sentencing is not

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50. *Compare Talty*, 814 N.E.2d at 1204–07 (finding it unconstitutional to order an offender convicted of non-support of his children not to have any more children); State v. Sturgeon, 742 N.E.2d 730, 733 (Ohio Ct. App. 2000) (finding it unconstitutional to order an offender convicted of domestic violence against the mother of his children not to have contact with his children), *with* State v. Jones, 550 N.E.2d 469, 472 (Ohio 1990) (finding it constitutional to restrict an offender convicted of contributing to the delinquency of children from having contact with children not related to him); State v. McClure, 825 N.E.2d 217, 220 (Ohio Ct. App. 2005) (finding it constitutional to order an offender not to have contact with her children because she had admitted that she tried to kill them).

51. COMMISSION REPORT, *supra* note 3, at 24.

52. Kermit J. Lind, *The Perfect Storm: An Eyewitness Report from Ground Zero in Cleveland's Neighborhoods*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 237, 239–40 n.11 (2008).

53. COMMISSION REPORT, *supra* note 3 at 24.

merely to put offenders in peril of being punished because that increased scrutiny may, in fact, fail to deter them from re-offending.[54] The Housing Court therefore tailors community control sanctions to best stop each individual offender from re-offending.[55] This is the creative sentencing the legislature envisioned for misdemeanor sentencing.

One example of creative sentencing is how the Housing Court handled one offender who bred a large number of dogs at his residence in violation of City zoning laws, neglecting the dogs in the process. The offender so mistreated the dogs he was breeding that many had to be euthanized. Neighbors complained about the excessive odor coming from his yard as a result of the number of dogs he kept. The offender was convicted and placed on community control so he first had the general obligation not to re-offend. He failed his obligation by continuing to use his home to breed dogs, continuing to keep a large number of dogs there. As a more stringent sanction, the Housing Court ordered that he could not keep more than one dog at his home. When the offender again kept multiple dogs at his house—neglecting one of them so severely that it needed immediate medical attention—the Housing Court forbade him from having any dogs in his home. The Housing Court thus ensured that the offender could not try to hide his dog breeding from scrutiny.

The Housing Court's greatest challenge since the foreclosure crisis has been how to address cases involving properties formerly in foreclosure. Many offenders in Cleveland face the problem of continuing to own homes they thought they had lost through foreclosure.[56] Banks have increasingly decided not to take title to houses in Cleveland if no one offers the minimum bid at a foreclosure sale, since the cost of making necessary repairs may exceed the price the house is likely to command.[57] The banks' decision

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54. *Id.*

55. *Id.*

56. Marissa Weiss, *Attack of the Zombie Properties*, 47 URB. LAW. 485, 485–86 (2015) (explaining that many homeowners incorrectly believe that the start of the foreclosure process means that the bank is taking responsibility for the property and they must immediately vacate).

57. Lind, *supra* note 52, at 239–40 (explaining that foreclosure processes can take several years and by the time they are sold the cost of repairs exceed

not to take title leaves the original owner with responsibility for repairing or demolishing the house, which has usually been broken into and vandalized, yet unable to sell or give it away because of its "zombie" title.[58] Because Cleveland is served by the Cuyahoga County Land Revitalization Corporation (commonly known as the Cuyahoga County Land Bank), many of these offenders plan to seek release of mortgage liens, and other liens, so they can convey the property to the Land Bank. In these cases, the Housing Court orders offenders to keep the home secure from entry, free of graffiti, with the grass and weeds cut, and no debris in the yard while they seek release of liens.

In cases where owners are not able to obtain release of liens, they often wish to stay in a holding pattern, hoping that a tax foreclosure leads to them losing title or that the City demolishes the house. But Cuyahoga County does not have the staff to bring tax foreclosures on every abandoned house and the City does not have the funds to demolish every condemned house. In these cases, if the offender lacks the money to repair or demolish the house, the threat of punishment will not force the issue. But neither is it just for the offender to walk away from his or her responsibility. In such cases, the Housing Court, after evaluating the offender's income, orders the offender to allocate at least a portion of their income to funding a savings account with the goal of eventually saving enough money to pay for demolition of the house. This tailored remedy forces the offender to keep up the effort not to re-offend rather than punishing the offender with fines that will only make it harder for them to comply.

However, there is a set of offenders who in no way lack funds. Several major national banks have been convicted and sentenced to community control supervision. None of the banks, unfortunately, have kept their properties free of building code defects. After finding the banks to have violated community control, the Housing Court considers what sanctions would prove most effective in preventing the banks from re-offending. Since many of the building code defects result from repeated break-ins, the Hous-

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the value of the house causing many lien holders to simply walk away and abandon the property as "worthless").

58. *See id.* at 240 ("These owners are, however, still owners of record and legally responsible for the condition the property.").

ing Court ordered one bank to install metal security doors at each property where a break-in had occurred. When this measure failed to prevent the bank from re-offending, the Housing Court imposed the requirement that the bank install wireless security alarms in each of its vacant properties. The bank objected that this sanction was not reasonably related to the goal of stopping the bank from re-offending, arguing that it was third parties, not the bank, who caused the re-offense against the law. The Housing Court overruled the objections because the record established that, even if the break-ins were outside the bank's control, the bank's failure to promptly secure and repair the properties was caused by its failure to regularly inspect its vacant houses. When the Housing Court's Housing Specialist drove by a small sample of the bank's properties, he discovered several break-ins that the bank did not yet know about. The sanction of installing wireless home security systems was therefore reasonably related to the goal of stopping the bank from re-offending.

The Housing Court also imposes a sanction on neglectful landlords that was once innovative but has become tried and true: residential confinement to property owned and neglected, by the landlord. Such confinement serves two functions: it punishes the offender by making him or her the party who suffers from any failure to make repairs, and it motivates the offender to make the needed repairs. The hope is also that the sanction sensitizes the landlord to the effects on others of his or her neglect of property.

The Housing Court retains jurisdiction over cases where it has imposed community control sanctions, allowing it to reward offenders who comply. Offenders can request that the court terminate their term of community control or modify financial sanctions imposed on them.

B. When Punishment is Needed

When offenders subject to community control sanctions fail to comply with the requirement not to re-offend, despite the fact that there are no obstacles preventing them from taking steps not to re-offend, the Housing Court no longer has the freedom to tailor the sanction. The Housing Court can only deter such offenders through traditional punishment.

One such offender was a for-profit business that, despite having had its eyes wide open when it became owner of vacant houses in Cleveland, nevertheless asked the Housing Court to be

lenient with it. The business requested that the Housing Court expect no more of it than the Housing Court would of former homeowners struggling with zombie titles. The business became owner of vacant houses in Cleveland because it chose to purchase tax certificates from the Cuyahoga County and to foreclose on homeowners who did not pay the offender on demand. Yet the owner failed to show the Housing Court that it was making any effort to make needed repairs or promptly demolish condemned houses. It would take action only when the Housing Court's Housing Specialist identified specific defects at particular houses. The Housing Court announced to this offender that the Housing Court's community control officer was not its employee, checking its housing stock as a service to the offender; the Specialist was checking to see if the offender had met its obligation to regularly inspect and repair. Though the offender did not wish to spend money on repairs, preferring to sell the vacant houses in their "as is" condition, the Housing Court explained that compliance with the community control requirement to keep property in good repair was not optional. The Housing Court fined the offender $20,000 and extended its term of community control supervision.

C. When Punishment Fails: Defiant Offenders

The Housing Court's decision to punish offenders who violate the terms of community control can fail to bring about the desired result of changing the offender's behavior. In the case of an individual, the threat of incarceration or incarceration may fail to coerce the offender to comply with community control requirements. In the case of offenders who are shielded business entities—corporations or limited liability companies—the threat of fines may have no effect on the offender if the investor/owners of the offender entity conclude that raising the capital needed to comply with community control requirements would lead to a greater loss for them than the imposition of fines, even when those fines are substantial.[59] The Court has, in the past year, been confronted with three offenders who have not hidden the fact that they violat-

59. Business entities are subject to fines up to $5,000 for each day during which they fail to comply with an order from the city's building department. CLEVELAND, OHIO CODE OF ORDINANCES § 3103.99(c) (2016) (citing OHIO REV. CODE ANN. § 2929.31(8) (LexisNexis 2010)).

ed community control requirements because the owners of the company, the sole asset of which was the derelict property, had not, and would not, raise the capital needed for the offender to comply with the law. They chose instead to leave the company unable to comply with the law and therefore subject to the maximum punishment the Housing Court could impose. Since it is the offender itself, as distinct from its owners, and has the obligation to comply with community control requirements, the owners can choose to let the company fail so that they face no additional financial liability. The offenders argued that the fact that making the needed repairs would likely cause it a business loss should excuse them from complying or that the Housing Court should hold them blameless. The fact that complying with the law will cause a company, or a person, to lose money is no justification for failing to comply and does not render the offender blameless. The Housing Court therefore punishes these offenders with fines, fully aware that the shield of liability provided by corporate law will likely defeat the public's interest in code enforcement in cases where a company's owners hold to the view that the company's value is less than the cost of funding the company so that it can comply with the law. The fines ordered by the Court can be converted to civil judgment but may go uncollected or be collected without causing the offender to make any effort to comply with community control requirements.

D. Transferring Property Without Making Repairs

When an offender transfers a property without making needed repairs, the failure to make repairs during the time of ownership is a violation of community control requirements. But in these cases the Housing Court cannot design a sentence intended to cause the offender to repair the property. The Housing Court can only decide what punishment is appropriate given the offender's violation. The Housing Court may consider the sale a mitigating factor in determining punishment to the extent to which the sale was to a responsible buyer such as an established company with a record of renovating properties or an individual who plans to live in the house and has sufficient income to repair and maintain the property. The Housing Court will not find the sale to be a mitigating factor if it was a quick sale to an out of state speculator who will likely neglect the property while trying to sell, or "flip" it, for a quick profit.

E. Direct Sentencing Turns into a Drain of Court Resources

The Housing Court must consider, when imposing creative community control sanctions, the burden on its staff of Housing Specialists that the sanctions create. It is the Housing Specialists that must monitor the offender's compliance with increasingly specific requirements.

Some offenders, after having been found to have violated community control requirements, appear to the Housing Court to be in good faith when they pledge to meet their obligations. When called to account for their subsequent failures to make repairs at particular properties, they often justify those failures based on their efforts to address problems at other properties. If the Housing Court faults the offender for his or her priorities, it can order the offender to change those priorities, to make certain repairs before others. This approach, however, burdens the assigned Housing Specialist who may be asked to decide on the right priorities and will be asked to inspect and confirm that particular repairs were made.

One offender purchased over twenty vacant homes in Cleveland using money from an investor but without obtaining funds needed for repairs. In addition, some of the homes were condemned and needed to be demolished. The offender allegedly also lacked the money to pay for demolitions. The Housing Court began to consider sanctions more and more narrowly tailored to the task of getting the offender to make the most needed repairs first. But doing so threatened to make the Housing Specialist into the offender's property manager, so, instead of asking the Housing Specialist to prioritize how the offender should spend the funds he did have through lists of repairs at particular houses, the Housing Court made the sanctions more general, ordering the demolition of certain condemned houses by certain dates and for other houses, ordering that all repairs needed for those houses be accomplished by set deadlines.

The Housing Court's willingness to burden its staff with detailed supervision of offenders depends, in part, on the extent to which the City is enforcing its codes through its inspectors. If the City sends its inspectors, issues notices of violation, and brings new criminal cases against offenders sentenced to community control, the Housing Court does not need to duplicate those efforts by using its own staff to visit those same properties. The City brings

both minor misdemeanor charges and first-degree misdemeanor charges before the Housing Court three days a week. The Department of Building and Housing and the City's Law Department decide on the cases to be brought and sometimes make it a priority to inspect and prosecute landlords who own, but neglect, a substantial number of properties. But, when the City's enforcement is haphazard or incomplete, with criminal charges brought only for a particular property, the Housing Court makes it a priority for its staff to consider the condition of all of an offender's properties.

F. Connecting the Dots Between Civil and Criminal Cases

The Housing Court's Housing Specialists also help landlords and tenants in civil cases. A tenant might come to Housing Court to find out what she can do about her water being shut-off. A landlord asks about the process to evict a tenant. When the same Housing Specialists are assigned to monitor offenders' compliance with community control requirements, they have a ready-made opportunity to confirm what offenders are telling them or to find out when offenders are not telling the whole truth.

One offender told the Housing Specialist assigned to his case that he had only purchased houses for extended family members to live in. But the Housing Specialist learned from her work on civil cases that the offender had purchased more properties than he told her about and that he was renting out some of the properties to non-family members. She brought him in for a violation hearing so the Housing Court could force him to provide her with honest information and to make repairs at all the properties he bought.

G. Highs and Lows: Community Control's Effective and Ineffective Cases

Community control sanctions sometimes achieve the Housing Court's goal of ensuring that offenders make repairs to neglected properties in Cleveland. One of the Housing Court's most extensive community control sentences involved a real estate company that purchased vacant homes in bulk from major banks, paying about $500 per house. The company intended to sell the properties to low income families with poor credit using land contracts with almost no down payment required. Houses that did not attract interest would be flipped to other speculators. The Housing Court ordered that the homes be repaired prior to being sold by land contract, that condemned houses be demolished, and that houses not

be flipped to other speculators. Completely rehabbing the homes would have made them too expensive for most Cleveland families, but allowing them to be sold "as is" would leave eager homebuyers without hot water tanks or furnaces, with leaky roofs and collapsing foundations, with lead paint and electrical hazards. In a word—uninhabitable.

In this case, the Housing Court chose to devote the time of the Housing Specialist assigned to the task of determining what repairs would justify modifying the company's $500,000 in fines. She visited every home sold to an owner occupant to interview the buyers and determine what condition the house was in and what the buyers had already paid to repair or replace. The Housing Court heard her specific recommendations and ordered the company to make repairs and to credit buyers for repairs the company should have made. At regular status hearings, the Housing Court heard the results of her inspection of vacant condemned houses and set deadlines for those houses to be demolished.

The judge and magistrates of the Housing Court rarely see the offenders who comply with the requirements of community control since they are not summoned to Housing Court for violation hearings. Offenders who are successfully complying may file written motions asking for the modification of community control based on their success; the modification can include the reduction of fines, the lessening of community control requirements, or the early termination of community control.

It should be noted that community control sanctions can sometimes fail to achieve their purpose. An owner of nine rental properties on Cleveland's west side claimed to lack the money needed to make repairs. After hearing from a homeowner who had lived for years directly beside one of the offender's worst properties, the Housing Court sentenced the offender to home confinement at that property. The offender defied the Housing Court by failing to terminate the tenancy of the month-to-month tenant who occupied that property so that he could begin serving his sentence. The offender also failed to cut the grass and weeds at the property; he did not install a simple pipe to drain the kitchen sink, which his tenant could not use except by putting a bucket under the sink to catch the wastewater. Given his defiance, the Housing Court ordered this offender to serve ninety days incarceration, that sentence to be modified as soon as he had arranged to serve the previously ordered home confinement. After being released from incarcera-

tion due to failing health, the offender sold the property where he was to serve his sentence, defeating once again the Housing Court's intent to force him to make needed repairs. The Housing Court must now consider the appropriate punishment given the offender's inability to make repairs.

VI. CONCLUSION

The traditional view of criminal sentencing is that punishing an offender deters that offender and others from violating the law again. This traditional model, however, lacks the flexibility needed by a court specializing in housing issues. Ohio's community control sentencing alternative provides a much more flexible approach. A court can directly sentence owners to take actions that will prevent them from re-offending. The offenders avoid greater punishment at the cost of taking on the burden of having the court monitor all the properties they own.

Cleveland's Housing Court is using just such an approach in sentencing, an approach made possible by the Housing Court's expertise in housing issues, its experienced staff, and its ongoing evaluation of the success of its community control requirements.

Saving Our Cities: Land Banking in Tennessee

SOHIL SHAH*

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I. INTRODUCTION

Vacant, abandoned, tax-delinquent, and foreclosed properties present one of the greatest impediments to growth and security for our cities and communities. Properties with any of these characteristics not only create a cycle of land waste and poverty but also contribute to declining investment and interest in the areas in which they are located. Governments all over the country, from the federal government, state governments, and local governments, have tried repeatedly to devise solutions to solve the problems posed by vacant, abandoned, tax-delinquent, and foreclosed properties, but for the most part the strategies they have used have been limited or temporary in their success. Land banks present a novel and assertive approach to solving this problem by efficiently changing the legal status of these properties and converting them into productive and attractive pieces of land. In this article, I explain land banking, break down the land bank statutory scheme in Tennessee, and explore how Tennessee can use land banking to solve the problems of vacant, abandoned, tax-delinquent, and foreclosed properties.

Part I discusses the history and structure of land banks. Part II explores the evolution of land banking in Tennessee and its eventual adoption by certain cities within the state. Part III compares Tennessee's land banking legislation with the template upon which it is based and with land banking legislation in other states. Part IV provides an analysis on the current status of land banking in Tennessee. Tennessee is new to the national land banking movement and a better understanding within the state of this mechanism will aid in a more emphatic embrace of land banking as a tool that will help save our cities.

II. WHAT IS LAND BANKING?

A land bank is many things, but, first and foremost, it is a practical solution to a problem that touches almost every aspect of

local government. The United States Department of Housing and Urban Development defines a land bank as "a governmental or nongovernmental nonprofit entity established, at least in part, to assemble, temporarily manage, and dispose of vacant land for the purpose of stabilizing neighborhoods and encouraging re-use or redevelopment of urban property."[1] A land bank, at its essence, converts "vacant, abandoned, [tax-delinquent,] and foreclosed properties into productive use."[2]

What does it mean to label a property vacant, abandoned, tax-delinquent, and foreclosed? First, a vacant property is one that is unoccupied.[3] Second, an abandoned property means that the owner has stopped investing any resources into the property, including ceasing routine maintenance and payments on related financial obligations.[4] Abandonment presents a stronger sense of neglect to the property than mere vacancy.[5] Third, a tax-delinquent property is one for which the owner has failed to pay the appropriate amount of property tax.[6] Often, but not always, vacant and abandoned properties are tax-delinquent as well.[7] Fourth, a foreclosed property means that the mortgagor has forfeited the property due to non-payment of the money due on the mortgage.[8]

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1. U.S. DEP'T OF HOUS. & URBAN DEV., NEIGHBORHOOD STABILIZATION PROGRAM LAND BANK FACT SHEET 1, http://www.hud.gov/offices/cpd/about/conplan/foreclosure/doc/landbanksfactsheet.doc.
2. FRANK S. ALEXANDER, LAND BANKS AND LAND BANKING 10 (2d ed. 2015).
3. *Id.* at 14.
4. *Id.*
5. *Id.*
6. *See id.*
7. *Id.*
8. *See Foreclosure,* BLACK'S LAW DICTIONARY (10th ed. 2014).

Properties possessing any, some, or all of these four characteristics present a large range of issues for the communities in which they are located. Vacant properties can fall into disrepair and become neglected.[9] Abandoned properties attract vandalism and criminal activity and pose fire and safety hazards.[10] Tax-delinquent properties burden local governments with an increase in service and maintenance costs as well as a result of lower tax revenues for governments.[11] The Great Recession, with its housing and economic crises, has led to record numbers of foreclosed properties.[12] The two crises have also led to population and job loss that have resulted in vast surpluses of vacant and abandoned properties not only in cities but also in surrounding suburbs.[13]

These types of properties have a wide range of effects on adjacent neighborhoods including a decrease in (1) "property values of [nearby] properties," (2) "property tax revenues from nonpayment of taxes," and (3) "property tax revenues from declining property values of [nearby] properties."[14] They also lead to an increase in (1) costs of police and public safety, (2) incidences of arson resulting in higher fire prevention costs, (3) costs of local governments to enforce codes, and (4) costs of judicial actions.[15]

While local governments have a myriad of options to address these issues, land banking presents the most effective and comprehensive tool for local governments to address vacant, abandoned, tax-delinquent, and foreclosed properties. A land bank with wide discretionary power can convert these properties into productive real estate through three primary attributes.[16] First, it has the ability to acquire title to vacant, abandoned, and foreclosed proper-

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9. OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., REVITALIZING FORECLOSED PROPERTIES WITH LAND BANKS 1 (2009), http://www.huduser.gov/portal/publications/landbanks.pdf.

10. *Id.*

11. *Id.*

12. *See* Alan MALLACH & JENNIFER S. VEY, BROOKINGS-ROCKEFELLER, PROJECT ON STATE AND METRO. INNOVATION, RECAPTURING LAND FOR ECONOMIC AND FISCAL GROWTH 1 (2011), http://www.brookings.edu/~/media/research/files/papers/2011/5/03-land-value-mallach-vey/0503_land_value_mallach_vey.pdf.

13. *Id.*

14. ALEXANDER, *supra* note 2, at 15.

15. *Id.*

16. *See id. at 10.*

ties.[17] Second, it has the power to eliminate financial liabilities.[18] Third, it can transfer properties to new owners so that the properties can add value to the local community through productive use.[19] Examples of productive use include downtown redevelopment, housing new businesses, mixed-use development, "building housing to meet new demands for urban living," and improving "quality of life through [new] parks, waterfronts, and other green spaces."[20] I explain the specific powers a land bank can possess to achieve these goals in Part III below.

III. EVOLUTION OF TENNESSEE LOCAL LAND BANK ACT

In this part, I describe the history of the Tennessee Local Land Bank Act, discussing its history and its initial passage, which allowed only one city, Oak Ridge, to establish a land banking entity. I then look at the April 2014 amendment that expanded its applicability to certain other local governments in the state. I conclude the section by highlighting the foreclosure crisis across the state.

A. *Brief History Behind Tennessee Land Banking*

The impetus for introducing land banking in Tennessee derived from the large amount of vacant and abandoned property that existed in the City of Oak Ridge, located in the eastern part of the state near Knoxville.[21] Oak Ridge was founded as a location to house a uranium enrichment facility and other scientific facilities as a part of the World War II Manhattan Project.[22] In 1942, the United States Army Corps of Engineers bought approximately 60,000 acres of rural farm land to build a city and wartime facili-

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17. *Id.*

18. *Id.*

19. *Id.*

20. MALLACH & VEY, *supra* note 12, at 2.

21. TENN. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, COMBATING BLIGHT IN TENNESSEE COMMUNITIES PRELIMINARY REPORT 1 (2011), https://tn.gov/assets/entities/tacir/attachments/Combating_Blight_in_Tennessee_Communities_-_Preliminary_Report_.pdf [hereinafter TENN. ADVISORY COMM'N].

22. *See Residents: About Oak Ridge*, CITY OF OAK RIDGE TENN., http://www.oakridgetn.gov/content/RESIDENTS/About-Oak-Ridge (last visited May. 16, 2016).

ties.[23] Between 1942 and 1945, the federal government brought in tens of thousands of workers to staff the new facilities in Oak Ridge.[24] Due to an expectation that the city would only be used during the war, the government brought in or built a large number of temporary houses, intending to move them out when the war ended.[25]

After the war, Oak Ridge became an independent city, and, in 1959, its residents voted to incorporate the city.[26] Following a referendum held on November 7, 1962, the City of Oak Ridge adopted home rule.[27] The houses were never moved—some remain occupied but others are vacant and abandoned.[28] A large number are in disrepair of various degrees, with absentee landlords owning many of them without performing proper maintenance.[29]

To respond to this problem, State Senator Randy McNally, who represents Oak Ridge, introduced a resolution in the spring of 2011 to study blight in the state.[30] The Tennessee Senate adopted the resolution in May 2011, directing the Tennessee Advisory Commission on Intergovernmental Relations to perform the following functions: (1) to study the effects on local governments when owners abandon their blighted properties; (2) to recommend solutions for local governments to return these properties to some sort of positive use; and (3) to report its findings to the Chairmen of the Finance, Ways, and Means Committees of the Tennessee Senate and House of Representatives.[31]

In its preliminary report, released in 2011, the Commission summarily declared that blight was a widespread problem in the state and highlighted problems that local governments in the state

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23. *Id.*
24. TENN. ADVISORY COMM'N, *supra* note 21, at 1.
25. *Id.*
26. CITY OF OAK RIDGE TENN., *supra* note 22.
27. OAK RIDGE CHARTER COMM'N, CHARTER OF THE CITY OF OAK RIDGE, TENNESSEE C-1 (2010), http://www.mtas.tennessee.edu/public/CHARTERS.nsf/0/CD346A3BE98CF44185256E2F0058159B/$File/Oak%20Ridge.cht.pdf?OpenElement.
28. TENN. ADVISORY COMM'N, *supra* note 21, at 1.
29. *Id.*
30. *Bill History: SJR0103*, TENN. GEN. ASSEMBLY, http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SJR0103&ga=107 (last visited Oct. 25, 2014).
31. S.J. Res. 0103, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011).

faced when attempting to address blight.[32] These problems included the difficulty in attempting to enforce basic property standards without the authority to do so and the loss of interest of potential developers in certain properties due to the length of time it took to complete tax foreclosure sales.[33] The report proposed various remedies for addressing blight, specifically concluding that Tennessee did not widely use or understand land banking, and highlighting the success of land banking in other states.[34]

B. *Passage of the Tennessee Local Land Bank Pilot Program*

After the Commission's preliminary report was released, the Tennessee Local Land Bank Pilot Program Legislation ("Pilot Legislation") was introduced in both the Tennessee House of Representatives and the Tennessee Senate on January 30, 2012.[35] After various amendments and committee procedures, the House of Representatives and the Senate approved the bill in April of 2012 and the Governor signed the bill in May of 2012.[36] The bill went into effect on July 1, 2012.[37] The Pilot Legislation introduced a sweeping land banking program to the state, authorizing local governments to establish a land bank entity with a large number of powers, which is discussed in detail in Part III. Generally, the Pilot Legislation allowed a local government to create a corporation that is authorized to operate land bank within the jurisdictional boundaries of that government. One section of the law, though, limited its applicability to only one local government. The Pilot Legislation allowed for any municipality, county, or municipality county combination incorporated or existing under state law to establish a local land bank pilot program only if it satisfied the following three conditions:

> (1) The local government was chosen as a site for a nuclear research facility for the

32. TENN. ADVISORY COMM'N, *supra* note 21, at 1–3.

33. *Id.* at 2–3.

34. *Id.* at 3–5.

35. H.R. 3400, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012); S. 3223, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012).

36. *Bill History: SB 3223 (HB 3400)*, TENN. GEN. ASSEMBLY, http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=%20SB3223&GA=107 (last visited May 15, 2016).

37. TENN. CODE ANN. § 13-30-101 to -119 (West 2012) (amended 2014).

United States government during the World War II era;

(2) Prefabricated modular homes, apartments and dormitories, many made from cemesto panels, were quickly erected for those employed at the nuclear research facility; and

(3) Many units of such housing, while intended to be only temporary structures, are in extremely deteriorated conditions and still serve as residential homes for municipal residents seventy (70) years after originally constructed.[38]

As stated above, Oak Ridge was the only Tennessee site for nuclear research during World War II as a part of the Manhattan Project—no other site in the state meets these criteria. The language in the Pilot Legislation effectively limited the legislation's applicability to Oak Ridge. As a result of this legislation, Oak Ridge created a local land bank pilot program. I provide a summary of Oak Ridge's land banking entity in Part IV below.

C. Amending Land Banking Legislation in Tennessee

The Tennessee General Assembly amended the Pilot Legislation in 2014 to allow other local governments around the state to adopt land banking. In January 2014, a bill was introduced in both the Tennessee House of Representatives and the Tennessee Senate to amend the Pilot Legislation.[39] Representative Gerald McCormick of Chattanooga stated that the impetus for the change came from the request of Chattanooga and Knoxville to have the ability to create land banking entities in their cities.[40] In the spring of

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38. TENN. CODE ANN. §§ 13-30-104(a)(1), -103(4) (West 2012) (amended 2014).

39. H.R. 2142, 108th Gen. Assemb., Reg. Sess. (Tenn. 2014); S. 2315, 108th Gen. Assemb., Reg. Sess. (Tenn. 2014).

40. *Hearing Before the H. Subcomm. on Local Gov't*, 2014 Leg., 108th Sess. (Tenn. 2014) (statement of Rep. Gerald McCormick), http://tnga.granicus.com/MediaPlayer.php?view_id=226&clip_id=8690 (statement beginning around the 13 min, 8 second mark).

2014 both chambers approved the bill, the Governor signed it, and it went into effect.[41]

The bill amended the Pilot Legislation by removing the previous limitation that allowed only Oak Ridge to create a land bank. Specifically it eliminated the previous definition of "local government" and replaced it with the following:

> [A]ny home rule municipality; any county having a population of not less than one hundred twenty-three thousand one (123,001) nor more than one hundred twenty-three thousand one hundred (123,100), according to the 2010 federal census or any subsequent federal census; any county having a population of not less than eighty-nine thousand eight hundred (89,800) nor more than eighty-nine thousand nine hundred (89,900), according to the 2010 federal census or any subsequent federal census; or any county having a metropolitan form of government.[42]

The General Assembly expanded the definition further in 2015 by adding the following designation: "Any municipality having a population of not less than forty-eight thousand two hundred (48,200) nor more than forty-eight thousand two hundred nine (48,209), according to the 2010 federal census or any subsequent federal census."[43]

The following table translates these legislative designations to the actual local governments that now have the authority to develop land banks:

Legislative Designation	Geographic Equivalent
Any home rule municipality;	Chattanooga, Clinton, East Ridge, Etowah, Johnson City, Knoxville, Lenoir City, Memphis, Mt. Juliet,

41. *Bill History: HB 2142 (SB 2315)*, TENN. GEN. ASSEMBLY, http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB2142&ga=108 (last visited May 15, 2016).

42. TENN. CODE ANN. § 13-30-103(4) (West 2014) (amended 2015).

43. H.R. 454, 109th Gen. Assemb., Reg. Sess. (Tenn. 2015); S. 1185, 109th Gen. Assemb., Reg. Sess. (Tenn. 2015).

	Oak Ridge, Red Bank, Sevierville, Sweetwater, and Whitwell[44]
Any county having a population of not less than one hundred twenty-three thousand one (123,001) nor more than one hundred twenty-three thousand one hundred (123,100), according to the 2010 federal census or any subsequent federal census;	Blount County[45]
Any county having a population of not less than eighty-nine thousand eight hundred (89,800) nor more than eighty-nine thousand nine hundred (89,900), according to the 2010 federal census or any subsequent federal census;	Sevier County[46]
Any county having a metropolitan form of government;	Hartsville—Trousdale County, Lynchburg—Moore County, and Nashville—Davidson County[47]
Any municipality having a	Kingsport

44. *Cities by Charter Form: Home Rule*, MUN. TECH. ADVISORY SERV., http://www.mtas.tennessee.edu/web2012.nsf/Web/Charter+Form+Codes?OpenDocument&Start=1&Count=1000&Expand=4 (last visited May 15, 2016).

45. *Community Facts*, U.S. CENSUS BUREAU (Mar. 2014), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF (type "Blount County, Tennessee" into State, County, City, Town or Zip Code form).

46. *Id.* (type "Sevier County, Tennessee" into State, County, City, Town or Zip Code form).

47. *Cities by Charter Form: Metropolitan Government*, MUN. TECH. ADVISORY SERV., http://www.mtas.tennessee.edu/web2012.nsf/Web/Charter+Form+Codes?OpenDocument&Start=1&Count=1000&Expand=5 (last visited May 15, 2016).

population of not less than forty-eight thousand two hundred (48,200) nor more than forty-eight thousand two hundred nine (48,209), according to the 2010 federal census or any subsequent federal census	

Currently, only Oak Ridge has an active land bank with properties under its control.[48] Other local governments such as Chattanooga and Memphis have taken the beginning steps by passing local resolutions for the creation of land banking authorities but these have yet to become operational. Local governments in the state should create land banks to deal with widespread vacant, abandoned, tax-delinquent, and foreclosed properties.

D. Foreclosure and Delinquency in Tennessee

Blight or masses of vacant, abandoned, tax-delinquent, and foreclosed property exist not only in Oak Ridge but also across the entirety of the state, and local governments that have the authorization to create land banking entities should take advantage of this power and move forward. No statewide database exists which measures numerically the number of vacant and abandoned properties, but some reports do give us a picture of foreclosures and delinquencies across the state. The percent of mortgages past due at the end of the second quarter of 2014 was 7.7%, compared to the national average of 6% for the same quarter.[49] While this figure is lower than the peak 10.8% that Tennessee saw in 2010 during the Great Recession, it still remains high compared to rates before the Great Recession.[50]

Another study also looks at the combined foreclosure and delinquency rate, which it calculates as the percentage of loans that

48. *See* Oak Ridge, Tenn., Ordinance 08-2013 (Sept. 19, 2013), http://oakridgetn.gov/images/uploads/Documents/Ordinances/2013/8-2013.PDF.

49. DAVID PENN, MIDDLE TENN. STATE UNIV. BUS. & ECON. RESEARCH CTR., TENNESSEE HOUSING MARKET 2ND QUARTER 2014 6 (2014), http://issuu.com/mtsuberc/docs/housingbrief2q14.

50. *Id.*

have been delinquent for 90 days or more.[51] For the second quarter 2014, Tennessee's combined rate was 4.12%, only slightly better than the national rate of 4.8%.[52] While Tennessee's rate for the second quarter of 2014 declined approximately .7% from the second quarter of 2013,[53] there is still cause for concern. The total number of properties with new foreclosure filings was 2,134 in the second quarter of 2014.[54] Shelby County had the highest number of properties with new foreclosure filings, with 531, and Davidson County came in second with 195 properties.[55] It should be noted that until around 2011, Shelby County had the highest number of foreclosure filings by far—today its numbers are more in line with the overall state.[56]

Another report highlights the lingering problem of blight in the state as it compares nationally.[57] First, out of metropolitan areas with populations over one million, the Memphis metropolitan area is ninth in the county for percentage of houses with negative equity, with 27% of homes having underwater mortgages and 10% of homes having below peak home prices.[58] Second, when evaluating cities themselves (not the outer metropolitan area and also disregarding population) nationally, Memphis ranks 36th on the list of cities with the highest incidences of negative equity—33% of homes have underwater mortgages and 25% are below peak home prices.[59] For the calendar year 2013, Memphis had 3,242 homes in default or foreclosure.[60] Clarksville, the fifth-largest city in the state, ranks 85th on the list—25% of homes have underwater

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51. HULYA ARIK, TENN. HOUS. DEV. AGENCY, TENNESSEE HOUSING MARKET AT A GLANCE 2014 14 (2014), http://www.tnmha.org/TMHA2/html.pages/Documents/TN%20Housing%20Market%20at%20a%20Glance_2014.pdf.
52. *Id.*
53. *Id.* at 15.
54. *Id.* at 17.
55. *Id.*
56. *Id.* at 19.
57. PETER DREIER ET AL., HAAS INST. FOR A FAIR & INCLUSIVE SOC'Y, UNDERWATER AMERICA (2014), http://diversity.berkeley.edu/sites/default/files/HaasInsitute_UnderwaterAmerica_PUBLISH_0.pdf.
58. *Id.* at 22.
59. *Id.* at 24.
60. *Id.*

mortgages while only 3% are below peak home prices.[61] Third, moving to just zip codes with the highest incidence of negative equity, the 38115 zip code, which sits in the middle of Memphis, ranks 286 out of approximately 22,000 total zip codes for the United States.[62] Forty-five percent of the homes in the zip code have underwater mortgages and 30% are below peak home prices.[63] The statistics can be endless, but the story is the same—Tennessee faces major hurdles in combatting its foreclosed and delinquent properties, and nowhere is that more evident than in Memphis.

IV. COMPARATIVE ANALYSIS OF TENNESSEE LOCAL LAND BANKING ACT

In this Part, I present an overview of the components of the Tennessee Legislation. Much of the current land banking legislation in the United States was enacted to solve the problem of the vast amounts of vacant, abandoned, tax-delinquent, and foreclosed properties left after the Great Recession, and derives from template legislation created by Professor Frank Alexander from Emory University School of Law, as a part of his work for the Center for Community Progress (the "Template Legislation").[64] This Template Legislation creates a comprehensive legislative mechanism for setting up land banking in any state.[65] Rather than states enacting piece-meal legislation that addresses various issues such as reformation of tax foreclosure laws or authority to take possession of properties, states have used a single piece of legislation, often modeled after the Template Legislation, to authorize the creation of land banking authorities. This single piece of legislation allows legislators and local governments an easy way to understand the numerous powers being granted to local land banking authorities.[66]

Numerous states, including, but not limited to New York, Georgia, Pennsylvania, and Missouri have used the Template Leg-

61. *Id.* at 25.

62. There are approximately 30,000 zip codes in the United States but data is only available for 22,000 of these zip codes. *Id.* at 37.

63. *Id.* at 33.

64. ALEXANDER, *supra* note 2, app. D, at 142 [hereinafter TEMPLATE].

65. *Id.*

66. ALEXANDER, *supra* note 2, ch. 2, at 21–22.

islation in its entirety or have used it as a basic framework.[67] I will explore the Tennessee Legislation, by comparing it to the Template Legislation, from which it has also derived, and point out major differences between it and legislation these other states have enacted.[68]

A. Legislative Findings

The Tennessee Legislation begins with a section on legislative findings, explaining the reasoning behind the need for land banking and its purpose, something shared by states around the country. The Tennessee Legislation includes every legislative finding clause from the Template Legislation: (1) importance of social and economic vitality, (2) recognition of the vacant and abandoned property crisis, (3) need to strengthen and revitalize economy by solving the vacant and abandoned property problem, (4) need to create new tools to turn vacant spaces into vibrant places, and (5) identification of land banks as a tool of converting vacant, abandoned, and tax-delinquent properties to productive use.[69] The Tennessee Legislation contains an additional clause which states: "In the interest of self-governance on the part of Tennessee's cities, this pilot program will be used in specific areas as a testing model of a self-governing, self-sustaining land bank that can revitalize Tennessee cities and counties."[70]

B. Definitions

As with its respective counterpart in any piece of legislation, the definitions section lays out basic terms and their meanings. Here, the definitions section of the Tennessee Legislation differs from the Template Legislation mainly in how the Tennessee Legislation organizes the land bank. As the sections below indi-

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67. *See* GA. CODE ANN. §§ 48-4-100 to -112 (West, Westlaw through 2015 Legis. Sess.); MO. ANN. STAT. §§ 141.980–.1015 (West Supp. 2014); N.Y. NOT-FOR-PROFIT CORP. LAW §§ 1600–1617 (McKinney Supp. 2014); 68 PA. STAT. AND CONS. STAT. ANN. §§ 2101–2120 (West Supp. 2013).

68. My aim is not to cover every difference among the New York, Georgia, Pennsylvania, and Missouri statutes but only major differences affecting policy, function, and mechanisms.

69. *Compare* TENN. CODE ANN. § 13-30-102 (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 2, at 143.

70. TENN. CODE ANN. § 13-30-102(6) (Supp. 2015).

cate, the Tennessee Legislation authorizes the creation of a corporation to create a land bank, which is a collection of real property, while the Template Legislation authorizes the creation of a land bank, which is the governing entity itself, not real property.[71]

First, the Tennessee Legislation defines "corporation" as a corporate entity created to operate a land bank[72] and "board of directors" or "board" as "the board of directors or other similar governing body of the corporation."[73] It then defines "land bank" as:

> [R]eal property, however obtained or acquired and held by a corporation . . . with the intent of acquiring and holding onto the real property so acquired until such a time as the corporation is able to find a willing and able buyer to acquire the real property from the corporation.[74]

This differs from the Template Legislation, which defines "land bank" as the legal organizing entity itself.[75]

Second, the Tennessee Legislation defines "real estate" as "an identified parcel or tract of land, including improvements,"[76] and "real property" as "one (1) or more defined parcels or tracts of land or interests, benefits, and rights inherent in the ownership of real estate."[77] This definition of "real property" differs from the Template Legislation definition in specificity but appears to encompass the land and everything attached to it, similar to the breadth proposed in the Template Legislation.[78] There does not appear to be significant reason for these deviations, other than a preference by Tennessee state legislators for this formation procedure.

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71. *Compare* TENN. CODE ANN. § 13-30-103(3) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 3(c), at 143.

72. TENN. CODE ANN. § 13-30-103(2) (Supp. 2015).

73. *Id.* § 13-30-103(1).

74. *Id.* § 13-30-103(3).

75. TEMPLATE, *supra* note 64, § 3(c), at 143.

76. TENN. CODE ANN. § 13-30-103(5) (Supp. 2015).

77. *Id.* § 13-30-103(6).

78. TEMPLATE, *supra* note 64, § 3(g), at 144 ("'Real Property' shall mean lands . . . and every estate and right therein . . . and any and all fixtures and improvements located thereon.").

Third, the Tennessee Legislation and the Template Legislation differ in their definitions of which local governments can create land banking entities: the Template Legislation grants almost any local government the power to set up a land bank, while also acknowledging that states may need to limit the power to certain local governments only, and the Tennessee Legislation acknowledges such a limitation by maintaining applicability of the legislative authority to the local governments described above in Part II.[79] It is likely that Tennessee's limitation to home rule municipalities and the five additional counties reflects the concentration of population centers in the state such as Memphis and Nashville and a recognition of areas with measurable amounts of abandoned, tax-delinquent, and foreclosed properties. Other states, similar to Tennessee, have limited the power to certain local governments—Missouri's legislation states that only a municipality located "wholly or partially within a county in which a land trust created under"[80] another certain statutory section may establish a land bank agency (effectively Kansas City), and Pennsylvania's legislation defines a "land bank jurisdiction" as either:

> (1) a county, a city, a borough, a township, and an incorporated town with a population greater than 10,000; or
>
> (2) two or more municipalities with populations less than 10,000 that enter into an intergovernmental cooperation agreement to establish or maintain a land bank.[81]

C. Creation

The Tennessee Legislation pulls selectively from the Template Legislation for this section. Essentially, the Tennessee Legislation allows for any local government that is authorized to create a

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79. *Compare* TENN. CODE ANN. § 13-30-103(4) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 3(e), at 144.

80. MO. ANN. STAT. § 141.980.1 (West Supp. 2014).

81. 68 PA. STAT AND CONS. STAT. ANN. § 2103 (West Supp. 2013).

corporation to operate land banks within that local government's jurisdictional boundaries.[82]

The creation section then states that the corporation is performing a public function, is a public instrumentality of the creating local government, and, as a result, it and all properties held in the name of the corporation as well as the income and revenues received from the properties shall be tax-exempt.[83] It also states that a corporation shall come into existence when a qualified local government applies on its own behalf or in conjunction with another qualified local government to establish the corporation by majority vote of its legislative body.[84] The creating government's or governments' governing bodies, as a part of the authorization process, must indicate their willingness to appropriate funds to provide for the corporation's initial administration and can provide such funding or grants and appropriate money to the corporation.[85] This element ensures that any such corporation will have enough funds to operate and acquire, manage, and dispose of property.

The Template Legislation, on the other hand, offers more avenues for creation of the land banking entity itself, allowing for the variety of partnerships that may want to create a land bank. It allows a local government to create a land bank entity where an ordinance, rule, or resolution, as appropriate, is adopted by that respective local government, two or more local governments that have entered into an intergovernmental cooperation agreement, any local government and municipality that have entered into an intergovernmental cooperation agreement, or a school district and any local government that have entered into an intergovernmental cooperation agreement.[86] It also indicates that each land bank created pursuant to the act shall have permanent and perpetual duration until terminated and dissolved under a later section of the act.[87] Other states mainly mimic the Template Legislation, containing minor differences related to which local governments have the power to create land banks, as indicated above. Pennsylvania's

82. TENN. CODE ANN. § 13-30-104(a)(1) (Supp. 2015).
83. *Id.* § 13-30-104(a)(2).
84. *Id.* § 13-30-104(b)(1).
85. *Id.* § 13-30-104(b)(2).
86. TEMPLATE, *supra* note 64, § 4, at 144.
87. *Id.* § 4(f), at 144.

statute shows additional deference to residents by indicating that any ordinance creating a land bank must contain (1) how residents will have an opportunity to provide "input into the land bank decision-making process,"[88] and (2) "[p]olicies regarding former owner-occupants who are occupying homes acquired by the land bank" that show a preference for keeping them in their homes, when possible.[89] Missouri limits the land bank agency to sell at most five contiguous parcels of land to the same entity in one year.[90]

D. Board of Directors

Some of the Tennessee Legislation's sections relating to the Board differ from relevant provisions in the Template Legislation but others are identical. I first outline the differences and then look at the similarities. I also note the major differences that other states have enacted.[91]

1. Different Provisions

The Tennessee Legislation differs from the Template Legislation as follows:

(1) Number of Directors

a. The Template Legislation allows the local government to set the number of directors but the number must be odd and between five and eleven members.[92]

b. The Tennessee Legislation allows the corporation to have a board of directors that can consist of any number of directors, no fewer than five.[93]

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88. 68 PA. STAT. AND CONS. STAT. ANN. § 2104(a)(5) (West Supp. 2013).
89. *Id.* § 2104(a)(6).
90. MO. ANN. STAT. § 141.980.1 (West Supp. 2014).
91. For the purposes of this part, the words director and member are used interchangeably.
92. TEMPLATE, *supra* note 64, § 4(a)(2), at 144.
93. TENN. CODE ANN. § 13-30-105(a) (Supp. 2015).

(2) Directors' Requirements

a. The Template Legislation allows the local government to determine the qualifications, manner of selection or appointment, and terms of members.[94] It states, though, that vacancies shall be filled in the same manner as the original appointment.[95]

b. The Tennessee Legislation states that all directors must be qualified electors of and taxpayers in the creating local government or governments,[96] but that the creating local government determines the qualifications, manner of selection or appointment, terms of office, the manner of filling vacancies, and whether and to what extent local legislators shall be appointed or elected to serve on the board.[97] Specifically, the Tennessee Legislation states that the creating local government, at the first organizational meeting of the corporation, shall establish the terms of the initial directors so that they serve staggered terms and an approximately equal number of directors have terms that expire in each year.[98]

c. Remembering that the Missouri legislature effectively limited Kansas City as the only local government to establish a land banking entity, the legislation allows for only five directors—one appointed by Jackson County, one by the Kansas City Missouri School District, and three by the mayor of Kansas City.[99] This is the only state out of the states analyzed for this piece that

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94. TEMPLATE, *supra* note 64, § 4(a)(4), at 144.
95. *Id.* § 6(f), at 145.
96. TENN. CODE ANN. § 13-30-105(a) (Supp. 2015).
97. *Id.* § 13-30-105(b).
98. *Id.* § 13-30-105(c).
99. *See* MO. ANN. STAT. § 141.981.1 (West Supp. 2014).

gives the school district power to appoint a director.

d. Pennsylvania requires at least one member who is a resident of the jurisdiction of the respective land bank, is not a public official or municipal employee, and is a continuing member of a recognized civic organization within the land bank's jurisdiction.[100]

(3) Director Voting

a. The Tennessee Legislation mainly mimics the Template Legislation regarding voting procedures but provides for the following, which are not present in the Template Legislation: a "quorum" means a majority of the board present at a meeting, and a simple majority vote of the directors present at any meeting at which a quorum is present constitutes action.[101] Additionally, a director may participate in meetings through any means of communication allowing for all directors who are participating to simultaneously hear each other during the meeting.[102]

b. Additional provisions relating to voting are the same in both pieces of legislation and are listed in the Identical Provisions section that follows below.

(4) Director Removal

a. The Tennessee Legislation allows for a citizen petition having a clearly worded purpose and consisting of at least twenty signatures of qualified registered voters to seek the removal

100. 68 PA. STAT. AND CONS. STAT. ANN. § 2105(b)(3) (West Supp. 2013).

101. TENN. CODE ANN. § 13-30-106(a) (Supp. 2015).

102. *Id.*

of any board member.[103] The creating local government then can consider the petition and a response from the board before deciding whether to remove or retain the director by simple majority vote.[104] It also states the removal of a director shall not "impair the public official or municipal or county employee in that person's other duties."[105]

b. This citizen removal procedure does not appear in the Template Legislation.

(5) Other Provisions

a. The Template Legislation contains provisions mandating the following that do not appear in the Tennessee Legislation: board members are not personally liable for bonds and other obligations of the land bank and rights of creditors are solely against the land bank;[106] and any public officer or municipal employee shall be eligible to serve as a board member and acceptance of the appointment does not terminate or impair that public officer's position within the local government.[107]

2. Identical Provisions

The Tennessee Legislation's provisions relating to the following are identical to the same provisions in the Template Legislation:

103. *Id.* § 13-30-106(d).
104. *Id.*
105. *Id.*
106. TEMPLATE, *supra* note 64, § 6(j), at 145.
107. *Id.* § 6(c), at 145.

> (1) The directors shall select officers from themselves and establish duties as may be regulated by rules adopted by the board.[108]
>
> (2) The board has discretion in establishing participation and attendance rules and requirements.[109]
>
> (3) If any director fails to comply with such rules and regulations, a minimum majority vote of the remaining members of the board is required to disqualify and remove that director from the board.[110]
>
> (4) Directors shall serve without compensation.[111]
>
> (5) Directors have the power to organize executive, administrative, clerical, and other departments of the land bank or corporation and determine the duties, powers, and compensation of all the employees, agents, and consultants of the land bank or corporations.[112]
>
> (6) The board can reimburse members for any land bank-related expenses they incur.[113]
>
> (7) The board shall establish a schedule for meetings and meet in regular session, per that schedule, and, upon the chairman's request or a written notice

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108. *Compare* TENN. CODE ANN. § 13-30-106(b) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 6(d), at 145.
109. *Compare* TENN. CODE ANN. § 13-30-106(c) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 6(e), at 145.
110. *Compare* TENN. CODE ANN. § 13-30-106(c) (Supp. 2015), *with* TEMPLATE, *supra* note 60, § 6(e), at 145.
111. *Compare* TENN. CODE ANN. § 13-30-106(e) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 6(g), at 145.
112. *Compare* TENN. CODE ANN. § 13-30-106(e) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 6(g), at 145.
113. *Compare* TENN. CODE ANN. § 13-30-106(e) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 6(g), at 145.

> signed by a majority, the board shall meet in special session.[114]
>
> (8) An affirmative vote by a majority vote of the members present and voting shall approve the board's actions unless the matter concerns one of the following categories, which requires a majority of the total board membership: bylaws and other rules and regulations, hiring and firing of employees or contractors, incurring of debt, adoption or amendment of the annual budget, or transactions dealing with property with a value of more than $50,000.[115]
>
> (9) Members cannot vote by proxy.[116]
>
> (10) Members may request a recorded vote on any of the land bank or corporation's resolutions or actions.[117]

E. Applicability of State Law and Conflicts

The Tennessee Legislation states that none of the corporation's rules or bylaws may contravene state law, giving deference to pre-existing and future state laws.[118] The Template Legislation,

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114. *Compare* TENN. CODE ANN. § 13-30-106(f) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 6(h), at 145.

115. *Compare* TENN. CODE ANN. § 13-30-106(g) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 6(i), at 145. New York requires a majority vote of the total board membership to sell, lease, encumber, or alienate any real property, improvements, or personal property. N.Y. NOT-FOR-PROFIT CORP. LAW § 1605(i)(5) (McKinney Supp. 2014). Missouri requires a majority vote of the total board membership to sell real property for a selling price that represents "a consideration less than two-thirds of the appraised value of such property," and to lease, encumber, or alienate "real property, improvements, or personal property" valued more than $50,000. MO. ANN. STAT. § 141.981.6(5) and (6) (West Supp. 2014).

116. *Compare* TENN. CODE ANN. § 13-30-106(h) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 6(k), at 145.

117. *Compare* TENN. CODE ANN. § 13-30-106(h) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 6(k), at 145.

118. TENN. CODE ANN. § 13-30-107(b) (Supp. 2015).

on the other hand, states that if any provisions of the act conflict with other state law, this act shall prevail, deferring instead to the land bank authority.[119]

The Tennessee Legislation also states that the board and directors are not exempt from the following state laws: ethical obligations for officials and employees, public meetings information, and public records access—these requirements allow for continuing transparency in land banking authorities.[120] These provisions do not appear in the Template Legislation.

The Template Legislation also states that the Act only applies to land banks created pursuant to the Act while the Tennessee Legislation does not contain a related provision, but this distinction has no bearing on Tennessee as its home rule municipalities derive their authority to create land banking statutes only from the Tennessee Legislation.[121]

F. Staffing

The Tennessee Legislation contains a clause allowing the corporation to enter into a contract with the creating local government for the corporation's staffing services.[122] The Template Legislation contains the same clause, but goes further, allowing for a land bank to employ a wide array of staff and for the land bank to enter into a contract to provide staffing to a local government.[123]

G. Powers

Both pieces of legislation contain many of the same powers but also differ regarding certain others. I have placed the powers into three categories: those that are the same in both pieces of legislation; those that exist in both pieces of legislation but contain differences; and those that are exclusive to each piece of legislation.

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119. TEMPLATE, *supra* note 64, § 5, at 144.
120. TENN. CODE ANN. § 13-30-107(c)–(e) (Supp. 2015).
121. TEMPLATE, *supra* note 64, § 5, at 144.
122. TENN. CODE ANN. § 13-30-108 (Supp. 2015).
123. TEMPLATE, *supra* note 64, § 7, at 146.

1. Identical Provisions

The Tennessee Legislation and the Template Legislation both contain provisions giving the corporation or land bank the power to:

> (1) Adopt, amend, and repeal bylaws;[124]
>
> (2) Sue and be sued in its own name in all civil actions including those related to clearing title;[125]
>
> (3) Adopt and alter a seal;[126]
>
> (4) Enter into contracts and other instruments incidental or convenient to performance of duties and exercise of powers;[127]
>
> (5) Design, develop, or improve real property or interests in its real property;[128]
>
> (6) Fix and collect rents for use of its real property and services provided;[129]
>
> (7) Grant or acquire a license, easement, or lease with respect to its real property;[130]
>
> (8) Enter into limited collaborative relationships with local governments and other entities for the

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124. *Compare* TENN. CODE ANN. § 13-30-109(1) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 8(a), at 146.

125. *Compare* TENN. CODE ANN. § 13-30-109(2) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 8(b), at 146.

126. *Compare* TENN. CODE ANN. § 13-30-109(3) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 8(c), at 146.

127. *Compare* TENN. CODE ANN. § 13-30-109(5) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 8(g), at 146.

128. *Compare* TENN. CODE ANN. § 13-30-109(11)(A) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 8(m), at 146.

129. *Compare* TENN. CODE ANN. § 13-30-109(11)(B) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 8(n), at 146.

130. *Compare* TENN. CODE ANN. § 13-30-109(11)(C) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 8(o), at 146.

> ownership, management, development, and disposition of its real property;[131] and
>
> (9) Do all other things necessary or convenient to achieve its objections and purposes related to its real property.[132]

Both documents also charge that the land bank or corporation shall not "own, hold, maintain, or manage any real property acquired through eminent domain."[133] These provisions allow for a broad range of powers for the local land banking authority to ensure that it is not limited in its ability to manage properties it has in its possession and ultimately help transform vacant, abandoned, tax-delinquent, and foreclosed properties into productive pieces of land. It is also important to note that the lack of eminent domain power reflects the fact that this power rests with other local government bodies and giving this power to the land banking authority could create conflict with these bodies.

2. Different Provisions

The pieces of legislation differ in the following respects:

(1) Borrowing

> a. The Template Legislation allows the land bank to borrow on its own from private lenders, municipalities, the state, or federal government funds.[134]
>
> b. The Tennessee Legislation allows the corporation to borrow funds as may be necessary only with the creating local government's con-

131. *Compare* TENN. CODE ANN. § 13-30-109(11)(D) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 8(p), at 146.

132. *Compare* TENN. CODE ANN. § 13-30-109(12) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 8(q), at 146.

133. *Compare* TENN. CODE ANN. § 13-30-120 (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 8(r), at 146.

134. TEMPLATE, *supra* note 64, § 8(d), at 146.

currence.[135] It is likely that this provision was qualified to allow for additional local government oversight for the corporation.

(2) Contracts

a. Both pieces of legislation allow for the corporation or land bank to enter into contracts incidental or convenient to performance of its duties and exercise of its powers but differ in their general contract clauses.

b. The Template Legislation gives the land bank the power to make and execute contracts and other instruments necessary or convenient for it to exercise its powers.[136]

c. The Tennessee Legislation gives the corporation the same power, but limits it to those necessary or convenient to the exercise of powers to acquire, hold, and dispose of its real property.[137]

(3) Insurance and Liabilities

a. The Template Legislation grants the land bank the power to procure insurance against losses in connection with the land bank's real property, assets, or activities.[138]

b. The Tennessee Legislation grants the corporation the power to procure insurance and enter into contracts for indemnity, including but not limited to the following: loss of use and occupancy, death or injury of any person, employer's liability, any act of any member, officer, or

135. TENN. CODE ANN. § 13-30-109(4) (Supp. 2015).
136. TEMPLATE, *supra* note 64, § 8(i), at 146.
137. TENN. CODE ANN. § 13-30-109(6) (Supp. 2015).
138. TEMPLATE, *supra* note 64, § 8(j), at 146.

employee in the performance of his or her duties, or any other insurance risk as the board of directors may deem necessary.[139]

(4) Investments

a. The Template Legislation allows for the land bank to invest its money in instruments, obligations, securities, or property with the approval of the Board of Directors, and name and use depositories for its money.[140]

b. The Tennessee Legislation gives the corporation the same power, but limits the investing of money only to investments that are eligible for a municipality or county in the state and limits depositories to a bank or trust company that is a member of the Federal Deposit Insurance Corporation.[141]

(5) Management and Sale of Real Property

a. The Template Legislation grants the land bank the power to enter into contracts for the management of, collection of rent from, or sale of its real property.[142]

b. The Tennessee Legislation allows the corporation to enter into contracts for the management of or sale of its real property as long as they do not violate the definitions clause of the state eminent domain statute.[143]

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139. TENN. CODE ANN. § 13-30-109(7) (Supp. 2015).
140. TEMPLATE, *supra* note 64, § 8(k), at 146.
141. TENN. CODE ANN. § 13-30-109(9) (Supp. 2015).
142. TEMPLATE, *supra* note 64, § 8(l), at 146.
143. TENN. CODE ANN. § 13-30-109(11) (Supp. 2015).

3. Exclusive Provisions

The Template Legislation contains provisions granting power to the land bank for the following: to issue negotiable revenue bonds and notes,[144] to procure insurance or guarantees from the state or federal government for debt or premium payments,[145] and to enter into contracts and other instruments necessary, incidental, or convenient to the performance of functions by the land bank on behalf of municipalities and their respective agencies or departments and vice versa.[146] The Tennessee Legislation omits these provisions, which allow for the authority to raise money and create a stream of revenue, however, supplants them with a blanket provision. The clause gives the corporation the power to accept donations, contributions, revenues, and capital grants or gifts from an almost unlimited list of entities to carry out its powers and to enter into agreements in connection with the donations, contributions, revenues, and capital grants or gifts.[147] This provision can allow the corporation to accept funding from non-profits or similar entities to ensure its continuing financing and operation.

New York gives the land bank the following additional powers: to inventory vacant, abandoned, and tax foreclosed properties;[148] to subject itself to municipal building codes and zoning laws;[149] and, if acquiring property from a foreclosing governmental unit, to create a redevelopment plan with the approval of that unit[150] and to enter into an agreement with that unit to determine revenue distribution to that unit.[151]

Georgia also gives the land bank additional powers, including the ability: "to acquire, accept, or retain equitable interests, security interest, and other interests in real property, personal property, or fixtures" by financial instruments to secure credit;[152]

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144. TEMPLATE, *supra* note 64, § 8(e), at 146.
145. *Id.* § 8(f), at 146.
146. *Id.* § 8(h), at 146.
147. TENN. CODE ANN. § 13-30-109(8) (Supp. 2015).
148. N.Y. NOT-FOR-PROFIT CORP. LAW § 1607(a)(17) (West Supp. 2014).
149. *Id.* § 1607(a)(19).
150. *Id.* § 1607(a)(18).
151. *Id.* § 1607(a)(20).
152. GA. CODE ANN. § 48-4-106(a)(5) (West, Westlaw through 2015 Legis. Sess.).

and "to hold title to real property for purposes of establishing contracts with nonprofit community land trusts, including, but not limited to long-term lease contracts."[153] The Georgia legislation also adds much more detail to the financial powers of the land bank, giving the land bank more robust power in these areas.

H. Acquisition of Property

The acquisition of property is the single greatest power a land banking authority can possess, and in order to be effective, it needs the ability to acquire property from a wide variety of sources, including private landowners and other governmental entities.

The Tennessee Legislation contains most of the related clauses from the Template Legislation, including the authorization to "acquire real property or interests in real property for the land bank by gift, devise, transfer, exchange, foreclosure, purchase" or other appropriate terms;[154] and to acquire real property by contracts and agreements and accept transfers from municipalities in mutually agreed upon terms.[155] Both pieces of legislation require the corporation or land bank to maintain its property according to the laws of the jurisdiction in which the real property is located,[156] and mandate that the corporation or land bank not own or hold real property outside the jurisdictional boundaries of the local government(s) that created it unless under an intergovernmental agreement.[157] Additionally, both allow a transferring municipality to convey to the corporation or land bank real property and interests in real property according to its own terms, conditions, and procedures.[158] The Tennessee Legislation omits the following clause provided in the Template Legislation: "The real property of a

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153. *Id*. at (a)(23).

154. *Compare* TENN. CODE ANN. § 13-30-110(a) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 9(b), at 147.

155. *Compare* TENN. CODE ANN. § 13-30-110(b) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 9(c), at 147.

156. *Compare* TENN. CODE ANN. § 13-30-110(c) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 9(d), at 147.

157. *Compare* TENN. CODE ANN. § 13-30-110(d) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 9(e), at 147.

158. *Compare* TENN. CODE ANN. § 13-30-110(b)–(c) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 9(c), (f), at 147.

Land Bank and its income and operations are exempt from all taxation by the State and by any of its political subdivisions."[159] Regardless, the broad grant of power to a corporation to acquire and accept property ensures that a corporation can effectively take possession of vacant, abandoned, tax-delinquent, and foreclosed properties in almost any manner.

The New York legislation allows the land bank to enter into agreements to purchase real property that is not vacant, abandoned, and tax-delinquent, as long as it is consistent with an approved redevelopment plan.[160] It also requires the land bank to maintain a complete inventory of all property the land bank receives and make that inventory available for public review.[161] If it does not comply with the detailed requirements, that property acquisition becomes null and void.[162]

Pennsylvania also imposes additional requirements and options. First, if the land bank leases real property to a private third party, the property becomes subject to state and local taxes after five years.[163] Additionally, if the land bank leases real property to a nonprofit or governmental agency at less than fair market value, then the property remains exempt from state and local taxes.[164] Second, the legislation allows a tax claims bureau under the states Real Estate Tax Sale Law to transfer real property to the land bank.[165] Third, it gives the land bank the ability, if authorized by the local government that created the land bank, to accept donations of real property and extinguish delinquent taxes for that property under the states Municipal Claim and Tax Lien Law and Real Estate Tax Sale Law.[166]

Missouri adds certain provisions allowing the land bank power at a foreclosure sale. In combination with a different provision of state law, if no bid equal to the total amount of all tax bills, interest, penalties, and attorneys' fees and costs is received after a

159. TEMPLATE, *supra* note 64, § 9(a), at 147.
160. N.Y. NOT-FOR-PROFIT CORP. LAW § 1608(g) (West Supp. 2014).
161. *Id.* § 1608(h).
162. *Id.* § 1608(h)–(j).
163. 68 PA. STAT. AND CONS. STAT. ANN. § 2109(b)(2) (West Supp. 2013).
164. *Id.*
165. *Id.* § 2109 (g).
166. *Id.* § 2109 (h).

property has been offered for sale at a sheriff's foreclosure sale on three different days, a land bank shall have been deemed to have bid that full amount, and its bid accepted.[167] The legislation also explicitly gives a land bank the power to bid on real estate at a sheriff's foreclosure sale notwithstanding the preceding provision if the real property is located in a low- to- moderate-income area that the land bank has targeted for redevelopment.[168] If a land bank wins the bid at the sale, it only has to pay the amount that its bid exceeds the total amount of all tax bills, principal amount, interest, penalties, and attorneys' fees and costs of the piece of property—the tax collector takes a credit for the remaining amount.[169]

I. Disposition of Property

Related to the acquisition of property, a land banking authority also needs a wide swath of power to dispose of property, including making it available on the open market or converting it to public use by transferring it to a local government. The Tennessee Legislation includes all the disposition provisions from the Template Legislation but makes changes for some of them.

The clauses relating to the following powers of the corporation or land bank are identical in both pieces of legislation: (1) the land bank holds real property in its own name,[170] (2) the land bank "shall determine and set forth in policies and procedures of the board of directors, the general terms and conditions for consideration to be received for transfer of real property and interests,"[171] (3) the local ordinance or resolution establishing the land bank can set a hierarchical ranking of real property use priorities,[172] (4) the local government creating the land bank may subject certain forms of

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167. MO. ANN. STAT. §§ 141.984.4, 141.560.3 (West Supp. 2014).

168. MO. ANN. STAT. § 141.984.4 (West Supp. 2014).

169. *Id.* § 141.984.6.

170. *Compare* TENN. CODE ANN. § 13-30-111(a) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 10(a), at 147. Pennsylvania includes this provision in the acquisition section of its legislation. 68 PA. STAT. AND CONS. STAT. ANN. § 2109(a) (West Supp. 2013).

171. *Compare* TENN. CODE ANN. § 13-30-111(c) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 10(c), at 147.

172. *Compare* TENN. CODE ANN. § 13-30-111(e) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 10(e), at 147. Missouri also adds hierarchical priorities for application of proceeds from sales or dispositions for certain types of properties. MO. ANN. STAT. § 141.985.8 to .9 (West Supp. 2014).

disposition of real property to particular board voting and approval requirements,[173] and (5) the board may delegate authority to officers and employees to enter into and execute agreements and other documents related to conveyance of real property held by the land bank.[174] Most notable among these powers is the local government's ability to maintain a higher threshold for the disposition of certain properties, such as school buildings or property surrounding areas with robust development.

The Tennessee Legislation includes a clause from the Template Legislation allowing the corporation to maintain and make available for public review and inspection its real property inventory.[175] It expands this authority to allow the corporation to create an independent, publically available, electronic inventory and make sure that information in the inventory is accurate.[176] The Tennessee Legislation also includes the Template Legislation clause allowing the corporation to convey, exchange, sell, transfer, and do other things with its real property,[177] but it limits this power by stating that it must not violate the definitions clause of the state eminent domain statute.[178] Creating an inventory of the properties a land banking authority holds is vital to ensure that the authority properly indexes the various features of the properties including tax liabilities, title, liens, and other liabilities that the authority must address, and allowing public access to it ensures continuing transparency throughout the perpetuity of the authority.

Missouri adds two interesting provisions in an effort to stimulate disposition. First, a land bank must accept a written offer for purchase that is equal to or greater than the fair market value of

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173. *Compare* TENN. CODE ANN. § 13-30-111(f) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 10(f), at 147.

174. *Compare* TENN. CODE ANN. § 13-30-111(f) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 10(f), at 147.

175. *Compare* TENN. CODE ANN. § 13-30-111(b) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 10(b), at 147. It is important to note that New York breaks this requirement into two separate categories. The first category is for all property the land bank receives. N.Y. NOT-FOR-PROFIT CORP. LAW § 1608(h)–(j) (West Supp. 2014). The second category is for all property of which the land bank disposes. *Id.* § 1609(b), (g), (h).

176. TENN. CODE ANN. § 13-30-111(b) (Supp. 2015).

177. *Compare* TENN. CODE ANN. § 13-30-111(d) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 10(d), at 147.

178. TENN. CODE ANN. § 13-30-111(d) (Supp. 2015).

the real property.[179] If it rejects such an offer, or does not respond to it within sixty days, its action or inaction is subject to judicial review unless the reason for its rejection is that it has accepted another offer that is equal to or greater than the property's fair market value.[180] Second, if the land bank owns more than five pieces of real property that are in a single city block and has not received a written purchase offer for any of them within the past twelve months, it must reduce the requested price for them and publicly advertise the new price.[181]

J. Open Meetings and Records

The Tennessee Legislation contains the public records clause from the Template Legislation, that the board shall keep minutes and a record of all of its proceedings.[182] It expands this to allow for timely public inspection of all of the board's minutes and records.[183]

The Tennessee Legislation adds four clauses not found in the Template Legislation relating to its public access to its records. First, the board must publish an annual report of the corporation's activities for the creating local government and make it available to public inspection.[184] Second, the board must have an annual audit of the corporation's books and records performed.[185] The corporation must pay for the audit, and the state comptroller of the treasury must assure audit compliance with its own and other government standards.[186] Third, if the board fails to have an audit prepared, the comptroller can direct that an audit be performed.[187]

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179. MO. ANN. STAT. § 141.985.7 (West Supp. 2014).

180. *Id.*

181. *Id.* § 141.985.10.

182. *Compare* TENN. CODE ANN. § 13-30-112(a) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 13, at 149. The other states in our survey have similar provisions, and reference public meetings laws in their respective states. *See generally* GA. CODE ANN. § 48-4-111(a) (West, Westlaw through 2015 Legis. Sess.); MO. ANN. STAT. § 141.997 (West Supp. 2014); N.Y. NOT-FOR-PROFIT CORP. LAW § 1612(a) (McKinney Supp. 2014); 68 PA. STAT. AND CONS. STAT. ANN. § 2113(b) (West Supp. 2013).

183. TENN. CODE ANN. § 13-30-112(a) (Supp. 2015).

184. *Id.* § 13-30-112(b).

185. *Id.* § 13-30-112(c).

186. *Id.*

187. *Id.* § 13-30-112(d).

Fourth, a copy of the annual audit must be filed with the creating local government.[188]

K. Dissolution

The Tennessee Legislation does not contain the extensive dissolution provision from the Template Legislation.[189] Rather it states that the creating local government can establish the procedure for dissolution, or that the corporation can be dissolved per the general law for public corporation dissolution.[190] The Template Legislation's section states the following: (1) once two-thirds of the board membership approves dissolution, the land bank can be dissolved after sixty days;[191] (2) the land bank must give sixty calendar days advance written notice of consideration of the resolution for dissolution to the local government that created the land bank, publish it in a local newspaper of general circulation, and send it by certified mail to the trustee of any outstanding bonds of the land bank;[192] (3) upon dissolution, all assets will become assets of the local government that created the land bank;[193] (4) if two or more local governments created the land bank, the withdrawal of one does not dissolve the land bank unless the intergovernmental agreement provides for such and no local government wants to continue the land bank's existence.[194] Tennessee's deferential provision here reflects the fact Tennessee and other states have various procedures for dissolving or terminating public corporations and related entities.

L. Conflicts of Interest

The Tennessee Legislation's conflict of interest provision mimics the one from the Template Legislation, prohibiting (1) a board member or employee of the land bank from acquiring any

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188. *Id.* § 13-30-112(e).

189. TEMPLATE, *supra* note 64, § 14, at 149.

190. TENN. CODE ANN. § 13-30-113 (Supp. 2015).

191. TEMPLATE, *supra* note 64, § 14, at 149.

192. *Id.*

193. *Id.* In Georgia and Pennsylvania, these assets become the property of the local government unit in which they are located. GA. CODE ANN. § 48-4-111(c)(3) (West, Westlaw through 2015 Legis. Sess.); 68. PA. STAT. AND CONS. STAT. ANN. § 2114(c) (West Supp. 2013).

194. TEMPLATE, *supra* note 64, § 14, at 149.

direct or indirect interest in real property acquired or held by the land bank, and (2) a board member or employee of the land bank from having any direct or indirect interest in any contract or proposed contract for services or materials for the land bank.[195] They both also allow the board to adopt additional rules and regulations regarding conflicts of interest and ethics.[196]

M. Construction of Legislation

The construction clause of the Tennessee Legislation is identical to that in the Template Legislation; they both hold that the land banking act shall be construed liberally so as to allow for legislative intent to be broad and so that powers of the land bank shall not be limited.[197] Again, this is important to allow the corporation to utilize effectively its broad range of powers.

N. Property Taxes

The Template Legislation discusses property taxes in two sections. First, a clause under the Financing section states, "[f]ifty percent of the real property taxes collected on real property conveyed by a Land Bank pursuant to the laws of the State shall be remitted to the Land Bank."[198] It goes on to state that this allocation shall commence with the first taxable year after conveyance and continue for five years.[199] The Tennessee Legislation does not contain this clause.

Second, in its Delinquent Property Tax Enforcement Section, the Template Legislation contemplates allowing the land bank to discharge and extinguish delinquent taxes on properties it owns, participate in tax foreclosures and tax lien sales, and allow for bulk tax foreclosures.[200] The Tennessee Legislation does not include

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195. *Compare* TENN. CODE ANN. § 13-30-114 (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 15, at 149.

196. *Compare* TENN. CODE ANN. § 13-30-114 (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 15, at 149.

197. *Compare* TENN. CODE ANN. § 13-30-115 (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 17, at 150.

198. TEMPLATE, *supra* note 64, § 11(c), at 148.

199. *Id.*

200. *Id.* § 18, at 150. It is important to note that a review of the other states in our survey has not been included for the property taxes and title sections as the powers vary widely and an analysis of the differences would require

any provisions allowing for these powers; instead, it adds other provisions. First, it states that the corporation is exempt from state taxation.[201] Second, it gives the corporation the power to pay unpaid taxes due and owing and make government mandated improvements to the property in exchange for the real property deed.[202] Third, it states that the corporation shall receive all proceeds from the sale of the corporation's real property.[203] Fourth, it mandates that the board should hold all corporate revenue and that proceeds shall go only to helping with the acquisition or resale of real property by the corporation.[204] While the Template Legislation contemplated this power to remedy the tax-delinquency of properties, the Tennessee Legislation presents a different approach to achieving the same goal.

O. Action to Quiet Title

The Tennessee Legislation provisions on actions to quiet title are mostly similar to the ones in the Template Legislation.[205] First, both allow for the land bank to file an action to quiet title for any real property in which the land bank has an interest.[206] Second, both also require that prior to filing such an action, the land bank must examine the title to determine if there are any other entities that have a claim or interest in or to the real property.[207] Third, they outline various methods for service of the complaint to quiet title,[208] with the Tennessee Legislation only adding the following method: electronically published notices with addresses and descriptions on the municipality's website.[209] Fourth, they both re-

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an entirely separate piece evaluating both the respective land bank statutes and the other states' property taxes and title sections.

201. TENN. CODE ANN. § 13-30-116(a) (Supp. 2015).

202. *Id.* § 13-30-116(b).

203. *Id.* § 13-30-116(c).

204. *Id.* § 13-30-116(d).

205. *Compare* TENN. CODE ANN. § 13-30-117 (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 19, at 150.

206. *Compare* TENN. CODE ANN. § 13-30-117(a) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 19(a), at 150.

207. *Compare* TENN. CODE ANN. § 13-30-117(b) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 19(b), at 150.

208. *Compare* TENN. CODE ANN. § 13-30-117(b)(1)–(6) (Supp. 2015), *with* TEMPLATE, *supra* note 60, § 19(b)(1)–(5), at 150.

209. TENN. CODE ANN. § 13-30-117(b)(5) (Supp. 2015).

quire that the land bank file an affidavit identifying all parties that might have an interest in the real property.[210] Fifth, they state that the court must schedule a hearing within 90 days after the complaint's filing and must issue a judgment within 120 days of the filing.[211] This ability to clear any cloud on the title is essential to making the property an attractive target once placed back onto the open market and ensuring its future vitality.

P. Appeals

The Tennessee Legislation adds a section on appeals that is not present in the Template Legislation. The provisions allow for the following and appear to create a public grievance hearing mechanism:

> (1) The creating local government must establish an appeal procedure for any person who is aggrieved by the corporation's decisions with respect to real property.[212]
>
> (2) The creating local government's legislative body can create an appeals committee.[213]
>
> (3) The aggrieved person can obtain review of an official's decision by submitting a written form to the appeals committee within ten days of the official's decision.[214]
>
> (4) The appeals committee must hear the appeal within thirty days of the written request.[215]
>
> (5) The appeals committee must render a decision on the appeal within thirty days of the hearing, un-

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210. *Compare* TENN. CODE ANN. § 13-30-117(c) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 19(c), at 150.

211. *Compare* TENN. CODE ANN. § 13-30-117(d) (Supp. 2015), *with* TEMPLATE, *supra* note 64, § 19(d), at 150.

212. TENN. CODE ANN. § 13-30-118(a) (Supp. 2015).

213. *Id.* § 13-30-118(b).

214. *Id.*

215. *Id.* § 13-30-118(c).

> less the committee, by majority vote, continues the hearing for further information.[216]
>
> (6) The appeals committee must act as a quasi-judicial body and is not bound by the formal rules of evidence.[217]
>
> (7) The appeals committee must follow a detailed trial-like procedure when considering appeals and the committee's decision on the appeal is final.[218]

Q. Comptroller Authority

The Tennessee Legislation contains two additional provisions relating to monitoring of the corporation by the comptroller of the treasury that are not present in the Template Legislation. First, the comptroller must monitor the corporation for three years after its creation.[219] Second, after the three years, the comptroller must file a report with the government and other state officials with recommendations on whether the land bank pilot project should be continued, expanded, discontinued, or whether some related potential legislative actions should be taken.[220] The comptroller's oversight maintains a semblance of state level monitoring of the financial stability of the local corporations that will be created under the legislation.

R. Other Sections

The Tennessee Legislation does not contain the following sections from the Template Legislation: Financing of Land Bank Operations,[221] Borrowing and Issuance of Bonds[222] (likely because under the Tennessee Legislation, the corporation does not have the power to issue bonds), Land Bank Creation in a Natural Disaster,[223] and Effective Date.[224] These are not of serious concern,

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216. *Id.* § 13-30-118(d).
217. *Id.* § 13-30-118(e).
218. *Id.* § 13-30-118(f).
219. *Id.* § 13-30-119(a).
220. *Id.* § 13-30-119(b).
221. TEMPLATE, *supra* note 64, § 11, at 148.
222. *Id.* § 12, at 148–49.
223. *Id.* § 16, at 149.

however, because the Tennessee Legislation addresses financing for the corporation, the most significant of these omissions, in other sections.[225]

V. EXISTING LAND BANKS IN TENNESSEE

What is the current status of land banking in Tennessee? I now discuss various land banking efforts in the state, of which there are only a few. Oak Ridge, the beneficiary of the Pilot Legislation, has one active land bank entity. Chattanooga has set up the framework for a land bank but it is still in its nascent stage, and the Memphis City Council recently passed a resolution for the creation of a land banking authority. No other local governments are using land banking, and, as Part II illustrates above, this is problematic.

A. Oak Ridge

The Oak Ridge City Council passed an ordinance on September 19, 2013 to create the Oak Ridge Land Bank Corporation.[226] Specifically, the ordinance states that the Oak Ridge Land Bank Corporation is created "pursuant to the authority of the Tennessee Local Land Bank Pilot Program set forth in Tennessee Code Annotated § 13-30-101 et seq."[227] The ordinance, for the most part, mimics the Tennessee Legislation—it acknowledges the findings of the Tennessee Legislation as the basis of establishing the Corporation;[228] it gives the Corporation many of the powers allowed for in the Tennessee Legislation including the ability to acquire land, file actions to quiet title, and to dispose of land; it maintains the tax-exempt status of the Corporation and its properties;[229] and it provides an organizational structure including a board of directors, meeting and voting requirements, and annual reporting that are similar to those laid out in the Tennessee Legislation.[230]

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224. *Id.* § 20, at 150.
225. *See supra* text accompanying note 144.
226. Oak Ridge, Tenn., Ordinance 08-2013 (Sept. 19, 2013), http://oakridgetn.gov/images/uploads/Documents/Ordinances/2013/8-2013.PDF.
227. OAK RIDGE, TENN., CODE OF ORDINANCES tit. 13, ch. 6, § 13-603.
228. *Id.* § 13-602.
229. *Id.* § 13-606 to -607.
230. *Id.* § 13-604 to -605.

The ordinance allowed for the automatic transfer of twelve city-owned properties to the Corporation by quitclaim deed without further city council action.[231] The Corporation received $25,000 in funding from the city in 2013, and $20,000 in 2014.[232] It used these funds to start a bank account, create a 501(c)(3) non-profit organizational structure, and pay administrative costs associated with establishing a nonprofit organization.[233] Before the initial transfer of twelve properties from the City to the Corporation in January of 2014, the City demolished the structures on all but one of these pieces of property.[234] Throughout 2014 and 2015, the City continued to demolish structures on additional properties, and then transferred those properties to the Corporation.[235]

The Corporation has used various approaches for these properties. It renovated the structure on one of the properties in partnership with a private contractor, and after placing the property back on the market, sold it within five days.[236] The Corporation also donated two properties to the Aid to Distressed Families of Appalachian Counties organization, a local non-profit that provides assistance to low-income individuals, for it to build moderate to low-income housing.[237] It also sold two properties to a private citizen on the open market for owner-occupied dwelling.[238] As of January 1, 2016, the Corporation holds twenty properties and is partnering with a real estate agent to sell certain properties.[239] It is also looking for a private contractor/investor interested in developing a number of the properties together, including some which are about to be transferred to the Corporation.[240]

Matt Widner, the Oak Ridge Housing Specialist, who also acts as the city government staff liaison to the Land Bank Corpora-

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231. Oak Ridge, Tenn., Ordinance 08-2013 § 4 (Sept. 19, 2013), http://oakridgetn.gov/images/uploads/Documents/Ordinances/2013/8-2013.PDF.
232. Telephone Interviews with Matt Widner, Oak Ridge Housing Specialist, City of Oak Ridge, Tenn. (Aug. 10, 2015 and Jan. 19, 2016).
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*

tion, has indicated that when the Corporation began its operations, it did not have the money to purchase properties. As the Corporation grows, it will be seeking out new partnerships with local financial institutions for lines of credit and developers for development of the properties it possesses. He has also stated that the Corporation could acquire more properties if the tax foreclosure system were modified to allow the Corporation the first right of refusal for foreclosed properties and other allowances before they are put on the open auction market. This way the Corporation can become more robust and closer to fulfilling its ultimate purpose of ridding the city of vacant, abandoned, tax-delinquent, and foreclosed properties.[241]

B. Chattanooga

Chattanooga, a city in the eastern part of the state on the state's southern border, has established the legal authority for a land bank. The Chattanooga City Council adopted a resolution on February 17, 2015 to create the Chattanooga Land Bank Authority.[242] The council created the Land Bank Authority "to provide a tool to support economic revitalization through returning vacant, abandoned and tax-delinquent properties to productive use."[243] The resolution cites to the Tennessee Legislation for the legal authority to establish the Land Bank Authority and then states that "land bank" means the following: "real property, however obtained or acquired and held by the Chattanooga Land Bank Authority, with the intent of acquiring and holding onto the real property so acquired until such time as the Corporation is able to find a willing and able buyer to acquire the real property from the Corporation."[244] It grants the Land Bank Authority to have all the powers stated under the Tennessee Legislation and a proposed Land Bank Authority charter.[245] It also, under the purview of Tennessee Legislation, holds that because the Land Bank Authority is performing

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241. *Id.*
242. Chattanooga, Tenn., Res. 28152 (Feb. 17, 2015), http://www.chattanooga.gov/city-council-files/OrdinancesAndResolutions/Resolutions/Resolutions%202015/28152%20Approving%20Land%20Bank%20Authority%20Charter-FINAL.pdf.
243. *Id.*
244. *Id.*
245. *Id.*

a public function for the city, it and all of the properties it owns or holds in its name and the income and revenues from the those properties are tax-exempt.[246]

Development on the land banking authority is continuing. The resolution calls for the authority to apply to the Secretary of State for a certificate of incorporation.[247] The Authority filed for incorporation on March 26, 2015, and was granted a perpetual charter.[248] The Authority though has not yet established a board and has not acquired or received any property. The City appears to be simply taking the steps necessary to establish the land banking authority, but it is too early to tell how the Land Banking Authority will operate—it first needs a leadership structure in place and then properties.

C. Memphis and Shelby County

Shelby County is Tennessee's largest county and encompasses and surrounds Memphis, Tennessee's largest city. Under the Tennessee Legislation, only the City of Memphis has the authority to create a land banking authority, not Shelby County. As the figures above in Part II demonstrated, however, Memphis and its surrounding metropolitan area, which includes all of Shelby County, are in dire need of a land bank.

Shelby County currently has a land bank, but for our purposes it is a local government entity with extremely limited power that the county government has labeled a "land bank"—it does not fit the traditional definition of a land bank and the label is a misnomer.[249] Rather, the Shelby County Land Bank acts simply as a repository for tax-delinquent property by taking possession of it and selling it. It does not remove redemption rights, does not quiet title, and does not take any other action with regards to the property it is selling. The entity really only publishes a monthly list of

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246. *Id.*

247. *Id.*

248. *Business Entity Detail: Chattanooga Land Bank Authority*, TENN. SEC'Y OF STATE, https://tnbear.tn.gov/ecommerce/FilingDetail.aspx?CN=115127067121067100086060115253158172184169057002 (last visited Aug. 1, 2015).

249. *Land Bank*, SHELBY CTY, TENN., https://landbank.shelbycountytn.gov/aboutus (last visited May 16, 2016).

available properties and interested buyers can contact it directly to purchase the property at a reasonable purchase price.[250]

Memphis recently took the first steps to establish a corporation of the type contemplated under the Tennessee Legislation. On November 3, 2015, the Memphis City Council approved a resolution to establish the Blight Authority of Memphis, Inc.[251] Similar to the Chattanooga resolution, this resolution derives the authority to create a local corporation from the Tennessee Legislation.[252] It defines "land bank" as "real property, however obtained or acquired and held by the Blight Authority of Memphis, Inc., with the intent of acquiring and holding onto the real property so acquired until such time as the corporation is able to find a willing and able buyer to acquire the real property from the corporation, pursuant to the Tennessee Local Land Bank Program."[253] It also grants the corporation all of the powers provided in the Tennessee Legislation, and makes tax-exempt the corporation and all of its properties as well as any income and revenue from its properties.[254]

The resolution also authorized the corporation to apply for a certificate of incorporation.[255] The corporation applied for such on November 23, 2015, and the state granted it a perpetual charter.[256] This development is a positive step for Memphis, and for the entire state. A land banking entity in the largest city in the state not only has wide and positive implications for the entire area, but also, assuming it continues its progression and is successful, presents an opportunity to illustrate the importance of such a tool for other local governments throughout the state.

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250. *Id.*

251. Memphis, Tenn., Resolution Authorizing Establishment of the Blight Authority of Memphis, Inc. ("BAM") (Nov. 3, 2015), http://www.memphistn.gov/Portals/0/pdf_forms/Memphis_City_Council_resolution_102815.pdf.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Business Entity Detail: Blight Authority of Memphis, Inc.*, TENN. SEC'Y OF STATE, https://tnbear.tn.gov/ecommerce/FilingDetail.aspx?CN=043103072235254112086243139185138013047232175054 (last visited May 16, 2016).

VI. CONCLUSION

Land banks present an innovative approach to combatting and solving the problem of vacant, abandoned, tax-delinquent, and foreclosed properties across the state including, but not limited to, smaller cities in the eastern portion of the state and the biggest in the west. Local governments who have the state authority to develop land bank authorities should adopt the necessary measures to create their land banking authorities. They also should devote the appropriate monetary and non-financial resources to make them robust entities with real power to face this problem. Only if local land banking authorities are given the essential powers to affect change in their communities can they "return" these properties to their cities and make them integral parts of their communities once again.

Revitalizing Urban Cities: Linking the Past to the Present

A. MECHELE DICKERSON*

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I. INTRODUCTION

Many neighborhoods in U.S. cities still have not recovered from the housing crisis that triggered the 2007–2009 recession. Urban neighborhoods throughout the country continue to exhibit characteristics of "blight" and struggle to attract commercial investments. While there is no precise definition of blight, most blighted neighborhoods have dilapidated and vacant residential and

commercial properties, have high crime rates, and lack desirable community amenities like high-quality schools or parks.[1] Starting in the 1940s, cities used federal funds provided by urban renewal or slum clearance plans to clear blighted neighborhoods. Though these policies often succeeded in removing blight from the neighborhood, they also destroyed intact communities, forced lower-income (and often black or Latino) residents out of their neighborhoods, and shifted the blight to other neighborhoods. Most urban renewal plans continue to focus on demolishing older, deteriorated property and recent urban revitalization efforts have led to the gentrification of cities and the displacement of lower- and middle-income residents from those cities.

This Article considers the current challenges urban cities are facing with blighted neighborhoods and urges city leaders who are developing remedies for blighted neighborhoods to avoid repeating the mistakes of the past. Part II of the Article discusses "urban blight" and explains how the term can be used to justify the destruction of lower-income, but likely sustainable, communities. Part III then shows how federal, state, and local housing and transportation policies in this country helped create and perpetuate urban ghettoes for black residents.

Part IV explores the role that private actors, including banks and the fabled urban slumlords, play in creating blighted neighborhoods. Specifically, this Article discusses how high-cost and high-risk subprime loans were disproportionately made to borrowers in black and Latino neighborhoods and why these discriminatory lending policies ultimately caused the higher foreclosure rates in these communities. The Article also examines data that reveal that, after the recession, lenders failed to market abandoned homes in black and lower-income neighborhoods as aggressively as they marketed homes in white neighborhoods and that this behavior has continued to contribute to depressed home values in neighborhoods with abandoned properties.

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1. *See* ARTHUR D. LITTLE, INC., U.S. DEP'T OF HOUS. & URBAN DEV., H-1299, A STUDY OF PROPERTY TAXES AND URBAN BLIGHT 72–73 (1973).

Part V of the Article presents the methods cities have typically used to respond to blighted neighborhoods. From the end of the 1940s until the 1970s, most cities used federal funds provided for in "slum clearance programs" to condemn, then destroy, decaying, vacant, or abandoned residences and commercial buildings in lower-income neighborhoods. Cities continue to implement urban renewal policies and rely on those policies to destroy deteriorated buildings, *especially* if the buildings are in neighborhoods that are near the city's central business district.

The Article ends by urging policymakers to remember how blighted neighborhoods are created and maintained and how lower-income residents are often displaced and economically harmed when the policymakers implement policies to remove blighted conditions in their cities. Because lower- and middle-income residents are generally the ones who are harmed the most when cities destroy decaying residences, the Article specifically urges cities to include affordable and innovative housing solutions like land trusts in their renewal plans and to decrease the number of lower-income blacks and Latinos who are displaced during the city's revitalization.

II. URBAN BLIGHT: DEFINED

A. Physical Characterization

Urban blight is not a new phenomenon. There have been blighted neighborhoods (which historically were called slums)[2] in cities for more than a century.[3] Since at least the middle of the twentieth century, a wide range of federal housing policies and programs have attempted to eliminate urban blight. For example, the national housing policy for the United States, as stated in 42 U.S.C. § 1441, notes:

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2. Anthony Downs, *Local Regulations and Housing Affordability*, *in* REGULATING PLACE: STANDARDS AND THE SHAPING OF URBAN AMERICA 109 (Eran Ben-Joseph & Terry S. Szold eds., 2005) ("In reality, America has always depended upon overcrowded and often deteriorated slums to accommodate its poorest urban dwellers, and we still do. But we do not like to admit it, so we pretend the word *slums* is obsolete.").

3. ALEXANDER VON HOFFMAN, HOUSE BY HOUSE, BLOCK BY BLOCK: THE REBIRTH OF AMERICA'S URBAN NEIGHBORHOODS 8 (2003) (stating that many Americans accepted urban blight as an inevitable part of life).

> The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing *through the clearance of slums and blighted areas*, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation.[4]

Although revitalizing blighted areas and clearing slums may be a stated national housing priority, there is no one definition of blight.

Blight has been described as a "vague, amorphous term" and a "rhetorical device" that lets governing bodies deem "certain real estate dangerous to the future of the city."[5] Though blight cannot be precisely defined, laws, renewal programs, and housing policies use similar terms when discussing blight. For example, a 1938 Harvard regional planning department study that examined blighted areas and slums in U.S. cities defined blight communities as those

> where, as a result of social, economic, or other conditions, there is a marked discrepancy between the value placed upon the property by the owner and its value for any uses to which it can be put, appropriate to the public welfare, under existing circumstances. This discrepancy prevents or handicaps the improvement of the area. Old buildings are ne-

4. 42 U.S.C. § 1441 (West 2012) (emphasis added).
5. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 3 (2003).

> glected and new ones are not erected and the whole section becomes stale and unprofitable.[6]

This study contends that a "slum is relatively easy to locate and define" because of the "general agreement that it is an area in which the housing is so unfit as to constitute a menace to the health and morals of the community, and that the slum is essentially of social significance."[7]

The federal government has defined "blighted neighborhoods" as areas with low or sinking property values,[8] and cities and political leaders view blighted areas as dangerous to the "safety, health, morals and comfort" of the people who live in those blighted neighborhoods.[9] Blighted areas are characterized by the presence of physically deteriorated or vacant buildings, and those buildings (both residential and commercial) often have high occupancy turnover or vacancy rates.[10] In addition to the sub-standard dwellings that are typically found in blighted neighborhoods, the public schools and other local amenities (parks, etc.) in those areas also tend to be dilapidated.[11] In addition, blighted areas are often overcrowded and have little open or green space, and blighted

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6. MABEL L. WALKER, URBAN BLIGHT AND SLUMS: ECONOMIC AND LEGAL FACTORS IN THEIR ORIGIN, RECLAMATION, AND PREVENTION 6 (1938).

7. *Id.* at 3; *see also* United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (1937) ("The term 'slum' means any area where dwellings predominate which, by reason of dilapidation, overcrowding, faulty arrangement or design, lack of ventilation, light or sanitation facilities, or any combination of these factors, are detrimental to the safety, health, or morals.").

8. ARTHUR D. LITTLE, INC., *supra* note 1, at 11.

9. WALKER, *supra* note 6, at 3.

10. *See id.* at 15 ("[T]he most valid criteria for determining [blighted areas] location would be . . . falling land values (over a long period); detrimental shifts of business or population . . . failure to make or maintain improvements over extended period; [and] substandard housing.").

11. *See* 24 C.F.R. § 570.208(b) (2007). Conversely, homes and apartments that are located near highly rated schools are higher quality and charge higher rent. *See* Marty Toohey, *Rents, School Quality Linked*, AUSTIN AMERICAN-STATESMAN (Dec. 28, 2015), http://www.pressreader.com/usa/austin-american-statesman/20151228/281487865318383/TextView.

communities also are likely to have known (or suspected) environmental contamination.[12]

B. Social Definition

Though the buildings in blighted neighborhoods often share similar physical characteristics and blighted neighborhoods lack business investments, there is also a social dimension to blight. To some extent, blight is based on perceptions of the value or worth of the people or businesses that are in the neighborhood.[13] For example, poor people live in blighted neighborhoods and this could cause policymakers to conclude that poverty causes blight.[14] In addition to socio-economic status, there is also a racial component to urban blight.[15] That is, while not all residents of blighted neighborhoods are non-white, most neighborhoods that are designated as (or likely will become) blighted consist of black and Latino residents.[16] Because most renewal programs are designed to clear

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12. *See* ARTHUR D. LITTLE, INC., *supra* note 1, at 19. A report prepared on behalf of the United States Department of Housing and Urban Development notes that blighted neighborhoods "are characterized by a large proportion of sub-standard and vacant dwellings; mixed residential, commercial, commercial and/or industrial use; relatively low rent levels; high densities and minority population." *Id.*

13. *See* Micheal Carriere, *Fighting the War against Blight: Columbia University, Morningside Heights, Inc., and Counterinsurgent Urban Renewal*, 10 J. PLAN. HIST. 5, 13 (2011). Carriere noted the contradiction that "common spaces and many individual apartment units within the building (even those marked for eviction) were well maintained," notwithstanding the fact that the building was deemed blighted because Columbia University sought to demolish the building to make space for additional campus buildings. *Id.*

14. *See* WALKER, *supra* note 6, at 23 ("Poverty and blight are not always synonymous. Poverty is, however, a potent factor in translating the blighted area into a slum. To attribute blight solely or essentially to poverty is largely to dodge the issue.").

15. *See* Carriere, *supra* note 13, at 11 (describing efforts to remove urban blight near the Columbia University campus and noting that "there was a definite racial component to Columbia's urban renewal strategies in the postwar era, as the battle to contain blight often seemed to become a battle to contain the population of nonwhite community members").

16. Miriam Hortas-Rico, *Sprawl, Blight, and the Role of Urban Containment Policies: Evidence from U.S. Cities*, 55 J. REGIONAL SCI. 298, 308 (2015) ("The higher the crime rate or the poverty level, and the higher the proportion of black and Hispanic residents, the greater the level of blight.").

blight in low-income, predominately black or Latino areas that are deemed economically underutilized,[17] these programs frequently result in displacing minority residents.[18] Once the area is redeveloped, the new neighbors are almost always richer and whiter than the displaced residents, and the low-income displaced residents typically move to another blighted, and usually segregated, area.[19]

Because blight is so racially coded, what some people might view as a blighted, dangerous, and economically underutilized neighborhood, others may view as a working class but valuable close-knit community that could be rehabilitated for current residents if city leaders were willing to invest adequate resources in the neighborhood. Since municipalities have wide discretion in determining whether an area is blighted, "blight" is often whatever the governing body says it is. In most cases, existing residents generally can do little to prevent their neighborhoods from being "revitalized" even if they are forced out of their revitalized neighborhood.

III. CREATING AND PERPETUATING BLIGHT: FEDERAL AND STATE LAWS AND POLICIES

Urban blight is not inevitable, nor does it develop overnight. Since the 1930s, federal, state, and local housing policies

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17. For example, the Morningside Heights, Inc. was founded in 1947 "to wage a war on urban blight" in the Harlem/Morningside Heights community in New York City. *See* Carriere, *supra* note 13, at 10. The group's charge was to develop a plan that would improve and redevelop Morningside Heights and make that neighborhood "an attractive residential, educational, and cultural area." *Id.*

18. Pritchett, *supra* note 5, at 6 ("By selecting racially changing neighborhoods as blighted areas and designating them for redevelopment, the urban renewal program enabled institutional and political elites to relocate minority populations and entrench racial segregation."); *see also* Alison Gregor, *Crown Heights, Brooklyn, Gets Its Turn*, N.Y. TIMES (July 4, 2014), http://www.nytimes.com/2014/07/06/realestate/crown-heights-brooklyn-gets-its-turn.html (addressing a housing advocate's concern that private equity firms have bought older rent-regulated buildings in Crown Heights and were in the process of driving out lower-income tenants).

19. Pritchett, *supra* note 5, at 6; Derek S. Hyra, *Conceptualizing the New Urban Renewal: Comparing the Past to the Present*, 48 URB. AFF. REV. 498, 512 (2012).

and practices have helped create blight in low-income, particularly ethnic and black, neighborhoods. While not all lower-income neighborhoods are blighted, housing and transportation policies that created neighborhoods with higher concentrations of poverty helped create many of the conditions that lead to urban blight. In addition, federal housing and transportation policies that could have prevented low-income neighborhoods from becoming blighted frequently were not implemented because of political leaders' often biased views concerning changing demographics and economic conditions in lower-income neighborhoods.

A. *Discriminatory Laws, Practices, and Policies*

Racially discriminatory laws and practices in the last century created many of the racially segregated and blighted neighborhoods in this country. For example, during the "Great Migration" at the end of the 1800s and first few decades of the 1900s, poor rural blacks fled the racially hostile and violent post-Civil War South and moved to northern cities. They were not welcomed in urban neighborhoods when they arrived, and instead, were often confronted by hostile property owners and unsupportive local leaders.[20] For example, political leaders relied on nuisance laws and racially-restrictive public zoning laws to keep blacks (and lower-income residents) in overcrowded urban ghettoes. These race-restrictive zoning laws, which the United States Supreme Court later ruled to be unconstitutional,[21] kept blacks out of white neighborhoods by designating who could live in any given neighborhood.

When city leaders could no longer use race-restrictive zoning laws to keep blacks in lower-income racially segregated neighborhoods, white homeowners, private realtors, and real estate developers, with the implicit support of the federal government, then changed the tactics they used to create and maintain overcrowded, blighted, and racially segregated neighborhoods. Some white residents used violence to scare and keep blacks out of their neighbor-

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20. A. Mechele Dickerson, *Sorting the Neighborhood*, 93 TEX. L. REV. 179, 181 (2014) (reviewing RICHARD R. W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS (2013)).

21. Buchanan v. Warley, 245 U.S. 60, 82 (1917).

hoods or convince them to leave if they had moved in the all-white neighborhood.[22] Other white homeowners used racially restrictive covenants in deeds to keep their neighborhoods racially segregated. These covenants[23] provided that owners could not sell or lease their property to blacks and, like race-restrictive zoning laws, ultimately were ruled unconstitutional in the Supreme Court's 1948 holding in *Shelley v. Kraemer*.[24]

In addition to race-restrictive zoning laws and private covenants, the Federal Housing Administration ("FHA") had policies in the 1930s and 1940s that virtually ensured that blacks could not move into suburban neighborhoods.[25] Specifically, because the FHA refused to insure loans for blacks or for anyone who wanted to purchase homes in racially mixed or homogeneous black neighborhoods,[26] lenders would not approve mortgage loans for

22. Dickerson, *supra* note 20, at 181.

23. RICHARD R. W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 80 (2013). Examples of restrictive covenants have been collected by the Seattle Civil Rights and Labor History Project. *See Racial Restrictive Covenants*, SEATTLE CIVIL RIGHTS & LABOR HISTORY PROJECT, http://depts.washington.edu/civilr/covenants.htm (last visited Apr. 18, 2016). Four neighborhoods shared the following racial-restrictive covenant: "No person of any race other than the white race shall use or occupy any building or any lot, except this covenant shall not prevent occupancy by domestic servants of a different race domiciled with an owner or tenant." *Id.*

24. 334 U.S. 1, 20–21 (1948).

25. The FHA was authorized by the National Housing Act and was created to insure residential mortgages, supervise mortgage associations, and regulate low-income housing projects. *See* WALKER, *supra* note 6, at 323–24 (discussing role of FHA in low-income housing projects).

26. To ensure that no blacks would be allowed to buy any home (whether in a black or white neighborhood) using an FHA-insured loan, the FHA required lenders to provide information about the borrower's characteristics. In addition, to be sure that no buyer would use an FHA-loan to buy a house in a non-white neighborhood, the FHA required lenders to provide corroborating reports about neighborhood characteristics from third-parties (inspectors, examiners, appraisers, etc.) and the FHA refused to accept an appraiser's report unless the report revealed whether the neighborhood was racially mixed or, if the neighborhood currently was all-white, whether the neighborhood was at risk of being "infiltrated" or "invaded" by blacks or immigrants. *See* A. MECHELE DICKERSON, HOMEOWNERSHIP AND AMERICA'S FINANCIAL UNDERCLASS: FLAWED PREMISES, BROKEN PROMISES, NEW PRESCRIPTIONS 148–49 (2014).

blacks.[27] Because blacks could not be approved for low-cost FHA-insured loans, it was virtually impossible for them to buy homes in suburban white neighborhoods. Likewise, until the 1950s, the FHA underwriting manual encouraged builders to include racially restrictive covenants in the suburban subdivisions they were building, and developers also used subtle racial cues (like advertising that the homes met the FHA standards and could be purchased with a low-cost FHA-insured loan) to signal that the subdivisions were racially-exclusive.[28]

Federal housing laws ultimately banned all of these racially discriminatory lending and real estate practices.[29] Nonetheless, many of the neighborhoods that were "contained and constrained by public and private devices of exclusion and confinement" had been formed.[30] Although federal and state laws and policies can no longer force blacks to live in racially segregated neighborhoods, cities have used other methods, including exclusionary zoning

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27. Lenders relied on a rating system that was created by the federal Home Owners' Loan Corporation ("HOLC"). This rating system gave suburban neighborhoods that were predominately all-white the highest "A" rating and these neighborhoods were shaded green on lending maps. All-black urban neighborhoods received the lowest ranking of D and were shaded red, which gave rise to the term redlining. Because the federal government and the real estate industry deemed homes in ethnically or racially integrated urban neighborhoods to be unstable and unsafe, redlining made it virtually impossible for blacks to receive low-cost and federally-insured mortgage loans. *Id.* at 146–49. In a 1962 Executive Order, President John F. Kennedy made redlining illegal. This Order banned federal agencies that insured or guaranteed housing loans from discriminating in the sale or rental of property based on race and also outlawed housing discrimination by lenders who originated mortgage loans insured by the federal government. Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 20, 1962).

28. DICKERSON, *supra* note 26, at 148.

29. The Fair Housing Act makes it illegal to refuse to sell or rent, or otherwise make unavailable or deny housing to any person on the basis of race. 42 U.S.C. § 3604 (2013).

30. LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA 18 (2000); *see also* Tex. Dep't. of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S.Ct. 2507, 2515 (2015) (discussing discriminatory housing and lending policies and noting that "[b]y the 1960's, these policies, practices, and prejudices had created many predominantly black inner cities surrounded by mostly white suburbs").

laws, to keep public housing and other affordable housing in low-income urban areas and out of higher-income neighborhoods.

B. Zoning Laws

Once the United States Supreme Court deemed comprehensive zoning laws to be a constitutionally valid limitation on private property rights in *Euclid v. Ambler Realty*,[31] cities used zoning laws to keep multi-family housing out of neighborhoods that primarily consist of owner-occupied, single-family homes. In this 1926 ruling, the Court allowed cities to deem apartment buildings to be public nuisances and to exclude multi-family housing from residential districts because these units could monopolize "the rays of the sun which otherwise would fall upon the smaller homes."[32] In addition, the Court referred to apartment houses as "parasites" and concluded that cities could segregate single-family homes from multi-unit housing to ensure that homeowners were not deprived of the "free circulation of air" and that their children could continue to have "quiet and open spaces for play."[33]

While cities no longer characterize apartments or public housing tenants as parasites, facially race-neutral land use laws continue to make it hard for lower-income households to move out of older, decaying urban neighborhoods. For example, local planning commissions have adopted rules and regulations (or wealthy voters have voted in favor of zoning laws) that exclude affordable, multi-family housing (like mobile homes and public housing complexes) from single-family neighborhoods.[34] Likewise, land use laws in subdivisions in suburban neighborhoods require developers to build homes that have a minimum lot size, and zoning laws may also limit the number of people who can live in a home. The stated purpose of these zoning laws is to preserve the character of the neighborhood, but the laws are also designed to exclude lower-

31. 272 U.S. 365, 397 (1926).
32. *Id.* at 394.
33. *Id.*
34. Bernard H. Siegan, *The Benefits of Non-Zoning*, *in* REGULATING PLACE: STANDARDS AND THE SHAPING OF URBAN AMERICA, *supra* note 2, at 219–20 (noting that black, Latinos, and low- and moderate-income voters typically vote against zoning laws).

income residents from certain subdivisions and keep them trapped in urban, blighted neighborhoods.[35]

C. Public Housing

Most urban cities started to build large public housing units in the 1930s and 1940s. While federal funds have almost always been used to finance public housing, local housing boards or authorities are responsible for managing public housing and typically have wide discretion to determine the number, type, and location of public housing.[36] Many of these early public housing units were erected as part of the New Deal Public Works Administration's efforts to reinvigorate an economy that was devastated by skyrocketing foreclosure rates and record high unemployment during the Great Depression.[37] These early public housing units were designed to provide shelter for low-income, working-class residents

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35. DICKERSON, *supra* note 26, at 185–86; Eran Ben-Joseph, *Facing Subdivision Regulations*, *in* REGULATING PLACE: STANDARDS AND THE SHAPING OF URBAN AMERICA, *supra* note 2, at 175–76; *see also* Alana Semuels, *How to Decimate a City*, THE ATLANTIC (Nov. 20, 2015), http://www.theatlantic.com/business/archive/2015/11/syracuse-slums/416892/ (discussing how a two-acre minimum lot size prevents low-income residents in Syracuse from leaving decaying urban neighborhoods and moving to suburban neighborhoods).

36. Lisa Redfield Peattie, *Public Housing: Urban Slums Under Public Management*, *in* RACE, CHANGE AND URBAN SOCIETY 301 (Peter Orleans & William Russell Ellis, Jr. eds., 1971). Federal public housing projects had historically been used as tools to modify residents' behavior and improve the "social usefulness" of low-income tenants. Lawrence J. Vale, *Standardizing Public Housing*, *in* REGULATING PLACE: STANDARDS AND THE SHAPING OF URBAN AMERICA, *supra* note 2, at 71. For example, units generally were 2–3 bedrooms in part to discourage "the cultural preferences of immigrant groups" who lived multi-generationally. *Id.* at 70. Housing staff also refused applications from potential tenants who cohabitated without marriage and for couples who had out-of-wedlock children. *Id.*

37. *See* Peattie, *supra* note 36, at 300–01. A major goal of Public Works Administration projects was to help reduce unemployment and stimulate economic activity during the Depression. *See* WALKER, *supra* note 6, at 347 (discussing urban planning policies in the 1930s and noting that "[f]ederal interest in housing in this country appears to be distinctly a by-product of the depression. Slum clearance and housing were seized upon by the National Government as a means of creating employment and stimulating industry.").

and typically consisted of high-density, high-rise apartment complexes located in urban neighborhoods.[38]

Some housing advocates argued that working-class housing should be sited in suburban neighborhoods which, at that time, were less populated. While suburban land could be purchased for cheaper than land in urban areas at the time, most public housing projects during the Depression era were built in urban areas because of a desire to link urban renewal with affordable housing.[39] Moreover, because cities could use these federal funds to clear "slums," leaders preferred to build public housing projects in urban areas that formerly contained older, dilapidated tenement housing.[40]

Like homeowner-occupied neighborhoods, public housing projects have almost always been racially segregated.[41] Public housing projects are more likely to be placed in lower-income and predominately non-white neighborhoods because of the political clout higher-income homeowners exert when they learn of proposed zoning changes.[42] That is, based in part on what they perceive as their privileges as property owners, homeowners routinely lobby against proposed zoning changes that would permit affordable housing—including housing projects or mixed-income apartments—to be built in their neighborhoods.[43] They seek to exclude

38. *See* Vale, *supra* note 36, at 72.

39. *See id.* at 69–77.

40. Slum clearance projects were enormously profitable with real estate investors, often mortgage companies, after the Depression because these private entities were seeking ways to rid themselves of underperforming real estate. *See* Pritchett, *supra* note 5, at 23.

41. *See* Peattie, *supra* note 36, at 286–87.

42. DICKERSON, *supra* note 26, at 186–87.

43. Downs, *supra* note 2, at 107 ("[T]he more public policy emphasizes homeownership, the more it leads to NIMBY (Not-in-my-backyard!) resistance to affordable housing by suburban homeowner majorities."). Homeowners in upper-income neighborhoods also fight attempts to place socially useful but undesirable properties like half-way housing, homeless shelters, and group homes in their neighborhoods because of concerns that those properties may depress the values of their homes. For example, when the City of Dallas, Texas, sought to place a home for chronically homeless people in public housing units, neighbors mobilized to defeat the plan citing safety risks to school children and arguing that the presence of homeless residents in their neighborhood would depress property values. Kim Horner & Roy Appleton, *Oak Cliff Opposition*

affordable housing from their neighborhoods and place that housing in other neighborhoods based on their view that multi-family housing would change the character of their community, increase traffic, affect the academic rating or performance of their neighborhood schools, increase congestion, and depress their home values.[44]

Concentrating public housing units in low-income, racially segregated neighborhoods has, not surprisingly, caused both public and private low-income housing to experience rapidly decay.[45] One reason public housing units have deteriorated is because there has always been limited public support for increasing funding to repair or upgrade affordable housing projects for lower-income residents.[46] In addition, public housing projects stopped expanding once urban redevelopment programs began to encourage private developers to create low-income housing.[47] Once low-income housing units (whether publicly- or privately-owned) start to deteriorate, the housing becomes undesirable, vacancy and turnover rates rise, and in turn, deterioration of the housing units accelerates.[48]

Shows Why Supportive Permanent Housing in Dallas is Still a Tough Sell, DALLAS MORNING NEWS (June 13, 2010), http://www.dallasnews.com/news/community-news/dallas/headlines/20100613-Oak-Cliff-opposition-shows-why-supportive-8560.ece.

44. LEEANN LANDS, THE CULTURE OF PROPERTY: RACE, CLASS, AND HOUSING LANDSCAPES IN ATLANTA, 1880–1950, 210–15 (2009).

45. Peattie, *supra* note 36, at 287.

46. *See generally* Marc Bussanich & Jarrett Murphy, *Protest as City Auctions Land Despite Housing Need*, CITYLIMITS.ORG (Oct. 30, 2015), http://citylimits.org/2015/10/30/protest-as-city-auctions-land-despite-housing-need/ (discussing New York City's sale of lands for private ownership despite the housing needs). The Mayor of New York City has proposed building mixed-income housing in a public housing project in order to generate more revenue for the city's public housing authority. Mireya Navarro, *In Chelsea, a Great Wealth Divide*, N.Y. TIMES (Oct. 23, 2015), http://www.nytimes.com/2015/10/25/nyregion/in-chelsea-a-great-wealth-divide.html.

47. Vale, *supra* note 36, at 92.

48. Peattie, *supra* note 36, at 297.

IV. Creating and Perpetuating Blight: Private Actors

A. Urban Landlords

Most low-income housing in urban areas is privately owned. A common myth associated with urban blight is that absentee "slumlords" who own the private housing units help perpetuate the blighted conditions by allowing their rental properties to deteriorate. In the myth of the urban slumlord, the absentee landlord purchases property with the goal of extracting "the maximum possible cash flow from the property," making an above-market return on the property, and then selling the property to a tenant or abandoning the property if there is no available buyer.[49] According to the myth, because the property owners (especially if they are not the same race as the tenants) often do not live in the low-income properties they rent,[50] they make only the repairs that are required by applicable housing regulations or the minimal expenditures they need to attract tenants.[51]

While some urban landlords fit the profile of the slumlord,[52] not all owners of low-income housing in urban areas are slumlords.[53] Indeed, research indicates that some owners choose not to make major improvements to their properties because they are concerned that they would need to raise rents and displace

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49. Arthur D. Little, Inc., *supra* note 1, at 86, 88. *See generally* George Sternlieb & Robert W. Burchell, Residential Abandonment: The Tenement Landlord Revisited 53–55 (1973) (discussing the "myth" of the urban slumlord).

50. A study of Newark low-income housing found black owners are five times more likely to live in their rental properties than whites who owned rental property in low-income neighborhoods. Sternlieb & Burchell, *supra* note 49, at 102–03.

51. Arthur D. Little, Inc., *supra* note 1, at 88.

52. For example, a 1938 planning report that examined blighted neighborhoods throughout the U.S. criticized municipal agencies for failing to promptly respond to decaying housing ("old disease breeders and fire traps") and for allowing owners "to derive profit by renting them to the public long after they have become a menace to the community." Walker, *supra* note 6, at 82, 111.

53. In addition, while the property owner in the myth of the urban slumlord is often assumed to be white, a study of low-income housing in Newark found that both the landlord and tenants of many rental homes are black. Sternlieb & Burchell, *supra* note 49, at 97–133.

long-term tenants to recoup their investment in the property.[54] Likewise, some owners stop making repairs or doing major maintenance on their properties because they are elderly and can no longer do or afford the repairs needed to rehabilitate the building.[55] Some landlords ultimately decide to abandon their properties for pure economic reasons.

Landlords who conclude that the cost to repair their properties to meet applicable building code requirements exceeds their anticipated rate of return (based on the rents they can collect for the units)[56] often choose to allow their properties to deteriorate. In addition, some urban landlords abandon their rental property because of high crime rates, vandalism, and worries that those factors make it unlikely they will ever be able to sell the property.[57] Similarly, owners who believe the city will condemn the property have little incentive to repair their dilapidated housing units if they have concluded that making any additional repairs would be economically senseless.[58] In addition, owners sometimes abandon rental properties in deteriorating neighborhoods if they conclude that the neighborhood has become so dangerous that they no longer feel safe going to their properties to make repairs (or even to collect rent).[59] Regardless of the reason landlords choose to neglect or abandon rental properties, dilapidated or vacant private rental properties contribute to urban blight, and the presence of those properties destroy the value of all homes in the neighborhood.[60]

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54. STERNLIEB & BURCHELL, *supra* note 49, at 69–71.

55. STERNLIEB & BURCHELL, *supra* note 49, at 76 ("The facts of age frequently play a role in the abandonment of a unit.").

56. ARTHUR D. LITTLE, INC., *supra* note 1, at 106–07. While tenants might be willing to pay the cost of amenities that make their rental housing secure, they likely are not willing to pay the cost the landlord incurs to bring the rental unit up to code. *Id.* at 93.

57. STERNLIEB & BURCHELL, *supra* note 49, at 298–93.

58. *Id.* at 291; *see also* Pritchett, *supra* note 5, at 22 (suggesting that some landlords during the post-depression era became "increasingly amenable to condemnation as a means to exit a failing market. Where they once opposed any government regulation, landlords now wanted to be 'bailed out' of their troubled investments.").

59. STERNLIEB & BURCHELL, *supra* note 49, at 137–41.

60. *Id.* at 53.

B. Suburban White Flight

As older neighborhoods in many urban cities deteriorated during the early part of the twentieth century, federal transportation policies and laws created and funded the national system of interstate highways. Having a comprehensive four-lane highway system in the 1940s made it easier for white residents to flee from urban cities to live in the suburbs but return daily to work in the city.[61] Once whites abandoned urban neighborhoods, real estate developers then focused on building homes in the suburbs.[62] Eventually, jobs followed whites to the suburbs, and since the turn of the twenty-first century, job growth in suburban areas has been five times faster than job growth in urban areas.[63]

Many cities used federal funds to create comprehensive highway systems in the 1950s that razed—or split in half—urban, predominately black communities.[64] Blacks could not leave the decaying urban areas by purchasing and moving to suburban homes because of redlining,[65] because of realtors steering blacks away from white neighborhoods,[66] and because of other discriminatory housing policies that existed until the 1960s. Likewise,

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61. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2511 (2015) ("Rapid urbanization, concomitant with the rise of suburban developments accessible by car, led many white families to leave the inner cities. This often left minority families concentrated in the center of the Nation's cities.").

62. DICKERSON, *supra* note 26, at 152–53; Pritchett, *supra* note 5, at 14.

63. DICKERSON, *supra* note 26, at 153.

64. *See* Semuels, *supra* note 35 (describing a close-knit community in Syracuse that was split in half by highway construction).

65. Generally speaking, redlining divided neighborhoods into colors based on their perceived stability. The race of the homeowners was used to categorize and rate neighborhood stability, safety, and desirability. DICKERSON, *supra* note 26, at 146–47. The phrase "redlining" arose because black neighborhoods (which received the lowest ranking) were coded red while upper-income white neighborhoods were shaded blue on the rating maps. Dickerson, *supra* note 20, at 184; *see also infra* Section IV.C (discussing the effects of reverse redlining).

66. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2515 ("[S]teering by real-estate agents led potential buyers to consider homes in racially homogenous areas."); Dickerson, *supra* note 20, at 184 (discussing how white realtors steered black clients away from white neighborhoods to preserve racially segregated neighborhoods).

blacks were trapped in decaying urban areas because realtors routinely refused to rent properties in white neighborhoods to blacks.[67] Even now, low-income black and Latino residents cannot escape from blighted urban neighborhoods because there are virtually no public housing projects in suburban neighborhoods and because many landlords still resist renting to tenants whose rent will be paid in part with a Section 8 housing voucher.[68]

C. Lenders

Foreclosure rates nationwide hit record highs during the recession, and urban cities with large black or Latino populations (including Memphis) were hit especially hard. One reason cities like Memphis and Baltimore had such high foreclosure rates is because of reverse redlining, i.e., the practice of steering borrowers to certain products based on their race. Studies found that lenders systematically steered black and Latino borrowers to higher cost and higher risk subprime loans which—because of the cost and risks—have higher rates of foreclosure. One study found that these higher cost loans accounted for fifty-one percent of refinance loans in predominately black neighborhoods but only nine percent of subprime refinance loans in white neighborhoods.[69] Similarly, more than fifty percent of all loans blacks received to buy homes and forty percent of the loans Latinos received were subprime loan products, while only eighteen percent of the loans whites used to purchase homes were high-cost subprime loans.[70]

Many minority and lower-income neighborhoods that were hit particularly hard by foreclosures during the recession still have not recovered. A 2014 study found that home prices in black and Latino neighborhoods were still depressed and that a disproportionate percentage of homeowners in those neighborhoods were at risk of losing their homes because they were "underwater," i.e.,

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67. *See* Dickerson, *supra* note 20, at 184–86.

68. *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2514 (discussing that segregated housing patterns exist in predominantly black inner-city areas because of the allocation of low income tax credits in those areas rather than predominantly white suburban neighborhoods); *see also* Semuels, *supra* note 35 (describing the obstacles blacks in urban Syracuse neighborhoods encounter when they try to move out of high-poverty neighborhoods).

69. DICKERSON, *supra* note 26, at ch. 7.

70. *Id.*

they owed more on their mortgages than the homes are worth.[71] Property owners who have underwater mortgages and assume they might lose their home in a foreclosure sale may perceive that they have little financial stake in those homes, which may give them less of an incentive to properly maintain their homes.

There are often signs of blight in neighborhoods that consist of homes where owners have little economic incentive to perform or pay for routine maintenance on the homes or where there are homes that were sold in a foreclosure or short sale. Homes in these neighborhoods often have overgrown lawns, have broken windows, are in a visibly deteriorated condition, and sit abandoned until the bank completes the foreclosure process or a new owner buys the home. In addition, data consistently show that neighborhoods with a high percentage of foreclosed homes or with rental properties that are abandoned by absentee landlords have higher rates of crime (including arson, prostitution, and looting), and the homes themselves are often used to commit crimes.[72] In addition, vacant and deteriorated homes in some urban cities have been occupied by homeless people, are often stripped bare both inside and outside of anything of value, and even attract wild animals.[73]

In addition to the disproportionate number of high-cost subprime loans that were steered to lower-income neighborhoods, evidence shows that banks and lenders treat the homes they foreclose on and own, i.e., Real Estate Owned ("REO"), differently depending on where the REO properties are located. That is, a report found that banks, lenders, and investors were far less likely to allow foreclosed properties in predominately black and Latino neighborhoods to become (or remain) in disrepair than properties in white neighborhoods.

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71. HAAS INST. FOR A FAIR AND INCLUSIVE SOC'Y, UNDERWATER AMERICA 5 (2014), http://diversity.berkeley.edu/sites/default/files/HaasInsitute_UnderwaterAmerica_PUBLISH_0.pdf.

72. DICKERSON, *supra* note 26, at ch. 8. One group of "investors" who purchased foreclosed homes at bottom rock prices used the homes to grow marijuana plants. Norimitsu Onishi, *Foreclosed Houses Become Homes for Indoor Marijuana Farms*, N.Y. TIMES (May 6, 2012), http://www.nytimes.com/2012/05/07/us/marijuana-growers-move-to-the-suburbs.html.

73. Meghan Hoyer & Matthew Jones, *Urban Blight, Investors Buy, Abandon Properties as Part of Profit Plan, Data Show,* VIRGINIAN PILOT (July/Aug. 2007).

REO properties in black and Latino neighborhoods were more likely to exhibit visible signs of blight, including chipped paint, broken fences, or broken or boarded-up windows. Homes in those neighborhoods also were more likely to have trash strewn on the property and overgrown (or dead) lawns. Similarly, those REO homes were frequently left unlocked, which encourages thefts from the unsecured homes and also encourages people to engage in criminal activities inside the homes.[74] In contrast, REO homes in white neighborhoods were more likely to have manicured lawns and be securely locked.[75] Finally, the study further found that foreclosed properties in black and Latino neighborhoods were more likely to be vacant and abandoned for longer periods than homes in white neighborhoods and were less likely to have "For Sale" signs in the yards than homes in white neighborhoods.[76]

While not all current blight in urban neighborhoods was caused by discriminatory lending practices, there are negative economic consequences to living in a neighborhood that is littered with deteriorated and abandoned buildings. Real estate agents are less likely to show homes that show signs of blight to clients who seek to live in the home. As a result, it is less likely that properties with substandard maintenance will be purchased by an owner-occupant and more likely that the buyer will be investors who seek to use the homes as rental property.

Vacant and deteriorated homes and buildings in a neighborhood impose costs on other homeowners because the blighted properties depress the value of all other properties in the neighborhood. Specifically, homes that are sold in a foreclosure or short

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74. *See* MICHAEL BONDS, RACE, POLITICS, AND COMMUNITY DEVELOPMENT FUNDING: THE DISCOLOR OF MONEY 33 (2004) ("[In Milwaukee], the property listings in largely African-American and integrated neighborhoods were only half as likely to be advertised . . . and only one-fourth were as likely to have an open house relative to homes in white neighborhoods.").

75. NATIONAL FAIR HOUSING ALLIANCE, THE BANKS ARE BACK—OUR NEIGHBORHOODS ARE NOT: DISCRIMINATION IN THE MAINTENANCE AND MARKETING OF REO PROPERTIES 18 (2012), http://www.nationalfairhousing.org/portals/33/the_banks_are_back_web.pdf; Danielle Douglas, *Wells Fargo Settles Complaint on Foreclosed Homes*, WASH. POST (June 6, 2013), http://www.washingtonpost.com/business/economy/wells-fargo-settles-complaint-on-foreclosed-homes/2013/06/06/18e55954-ce24-11e2-9f1a-1a7cdee20287_print.html.

76. DICKERSON, *supra* note 26, at ch. 8.

sale, especially abandoned blighted homes, are almost always sold at a discount. Homes sold at a discount depress the market value of other homes in the neighborhood largely because appraisers assess the value of homes based partially on recent sales of comparable homes in the neighborhood.[77] Thus, properties sold at below market prices depress the market values and selling prices of all homes located near those properties even when the existing owners have taken care of and maintained their homes. These lower selling prices make it harder for owners to sell their homes for a profit or to use their homes as collateral for a loan. Finally, vacant and blighted properties in neighborhoods generally prevent the functioning of a stable housing market as tenants and businesses are less willing to move into blighted neighborhoods.[78]

Higher foreclosure rates and depressed home values do more than just harm individual homeowners. Depressed home values also reduce municipal real estate tax revenue, which accounts for about 75% of local tax revenue.[79] In addition, cities with vacant properties also incur additional costs in the form of additional police, fire, and other public safety services related to these vacant properties. Moreover, because cities often try to prevent blight from spreading and they seek to encourage economic activity in blighted areas, cities often incur costs to preserve property values in blighted neighborhoods. For example, cities have demolished uninhabitable abandoned properties and paid maintenance costs for habitable properties. However, because of lower tax revenues, some cities found they simply could not afford the cost of maintaining abandoned properties.[80]

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77. W. Scott Frame, *Estimating the Effect of Mortgage Foreclosures on Nearby Property Values: A Critical Review of the Literature*, FED. RES. BANK OF ATLANTA 5–7 (2010); Dan Immergluck & Geoff Smith, *The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime*, 21 HOUSING STUD. 851, 851–66 (2006).

78. ARTHUR D. LITTLE, INC., *supra* note 1, at 106–07.

79. Mark Niquette & Tim Jones, *Foreclosure Deal May Help States Prop Up Budgets, Raze Homes*, BLOOMBERG.COM (Feb. 13, 2012, 6:52 AM), http://www.bloomberg.com/news/articles/2012-02-13/foreclosure-windfall-may-help-u-s-states-prop-up-budgets-raze-houses; Shaila Dewan, *A City Invokes Seizure Laws to Save Homes*, N.Y. TIMES (July 29, 2013), http://www.nytimes.com/2013/07/30/business/in-a-shift-eminent-domain-saves-homes.html.

80. DICKERSON, *supra* note 26, at 169.

Some municipalities that were particularly hit hard by foreclosures threatened to use their eminent domain powers to seize underwater mortgages if the investors who owned the mortgages refused the city's offer to buy the loans at an amount that roughly equals the fair market value of the home. If investors refused the city's offer to purchase the loan at lower than face value, the city threatened to reduce the principal loan balance and then resell the reduced mortgages to new investors (or refinance the now lower amount with a government-backed loan).[81] Other cities, including Memphis, responded to revenue losses and blighted vacant homes by suing the banks who engaged in reverse redlining.[82]

Memphis and other cities sued Wells Fargo Bank and alleged that it steered minority borrowers to higher-cost subprime loans even though many of those borrowers could have qualified for lower-cost and lower-risk loans.[83] The cities argued that these lending practices resulted in disproportionately high foreclosure rates and caused property values and municipal tax revenues to plummet because of the number of homes in neighborhoods that had vacant foreclosed homes. Wells Fargo ultimately settled the claims the City of Memphis filed against it by investing more than $400 million in loans to help generate economic development.[84]

V. TRADITIONAL MUNICIPAL RESPONSE TO URBAN BLIGHT

In general, cities respond to deteriorating or blighted neighborhoods by seeking to repair, demolish, or transfer ownership of properties in the area to third party investors who agree to remove the blight or restore the decaying properties. Just as federal funds were used to build public housing units, cities (including Memphis) have used federal funds to demolish decaying public

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81. Ian Urbina, *Foreclosures Prompt Cities to Make Plea for Aid*, N.Y. TIMES (Jan. 24, 2008), http://www.nytimes.com/2008/01/24/us/24mayors.html. Some states used funds they received as part of the national foreclosure settlement against lenders to demolish abandoned and dilapidated homes. Niquette & Jones, *supra* note 79; Dewan, *supra* note 79.

82. Creola Johnson, Symposium, *Fight Blight: Cities Sue to Hold Lenders Responsible for the Rise in Foreclosures and Abandoned Properties*, 2008 UTAH L. REV. 1169, 1186–92 (2008).

83. DICKERSON, *supra* note 26, at 169–70.

84. *Id.* at ch. 7.

housing projects.[85] While destroying dilapidated low-income housing will help revitalize blighted neighborhoods, a consistent consequence of blight removal is the displacement of low-income residents, who are typically pushed to another blighted neighborhood.[86]

A. Eminent Domain

Originally, localities used their eminent domain power to condemn land that would be used to construct government buildings, highways, or public utilities. Since at least the 1920s, government agencies have also used their eminent domain police powers to condemn vacant or structurally unsound buildings.[87] Once buildings are deemed to be blighted and to endanger the public safety, health, or welfare, the buildings or entire areas can be treated as a public nuisance, and the governing body can order owners to repair or destroy the buildings.[88] If owners refuse to (or are unable to) comply with an abatement order, the city can use its police powers to clear the blighted buildings or areas[89] (as long as private

85. Hyra, *supra* note 19, at 504.

86. Peattie, *supra* note 36, at 300–01; Hyra, *supra* note 19, at 510 (discussing research that considers whether public housing tenants who are displaced from housing projects receive any positive benefits from the displacement).

87. Berman v. Parker, 348 U.S. 26, 32 (1954). Eminent domain is provided for in the United States Constitution and is also authorized by statutes or constitutions in most states. *See* U.S. CONST. amend. V (private property cannot "be taken for public use, without just compensation"); Kellen Zale, *The Government's Right to Destroy*, 47 ARIZ. ST. L.J. 269, 293–94 (2005); *See, e.g.*, TEX. CONST. art. I, § 17 ("No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made.").

88. Pritchett, *supra* note 5, at 25 (noting that slums were deemed to be a public nuisance, urban renewal efforts that ordered them to be destroyed would be a valid use of a city's eminent domain powers).

89. A 1938 urban planning report notes cities' traditional response to dilapidated housing:

> A very effective method of getting rid of bad housing is to demolish it. In most cities there are ordinances of rather long standing authorizing one or more city departments . . . to notify an owner when a building is in an unsafe condition. If the owner sees fit neither to remedy the condition nor to demolish the building, the city official may order demolition at the expense of the owner.

owners are paid for the taking of their property) if the blight poses health or safety risks to other citizens, decreases tax revenues, or decreases the values of neighboring properties.[90]

B. Urban Renewal

1. Slum or Blight Removal Programs

Since Congress passed the Housing Act of 1949, cities have developed and implemented urban renewal programs to revitalize blighted areas in neighborhoods near the business districts of major U.S. cities. Urban renewal programs in the mid-twentieth century used war-like terminology to describe the need to fight blight, and even today, political leaders often refer to blight as an infectious disease that must be eliminated before it spreads to other areas of the city.[91] Cities typically use their redevelopment authorities or agencies to develop urban planning policies, and for a number of reasons, those policies almost always are designed to condemn then destroy blighted properties.

Cities often seek to destroy dilapidated housing projects and relocate lower-income residents away from the urban core because blight is viewed as "geographically contagious" and "detrimental to the well-being of people living in or near such areas"[92] and because buildings in blighted areas generate little tax revenue but have higher needs for police and social services. Blighted

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WALKER, *supra* note 6, at 132.

90. Zale, *supra* note 87, at 291–92.

91. For example, efforts to renew the Morningside Heights/Harlem neighborhood in Manhattan in the 1950s characterized blight as "a parasite that was able to infect a healthy host body" and urged the need to contain blight and prevent it from spreading to (and infecting) the Columbia University campus. Carriere, *supra* note 13, at 11. Likewise, in announcing plans to demolish 4,000 buildings in Baltimore, the mayor was quoted as saying that "[f]ixing what is broken in Baltimore requires that we address the sea of abandoned, dilapidated buildings that are infecting entire neighborhoods." Patrick Clark, *Can we Fix American Cities by Tearing them Down?*, BLOOMBERG EXPRESS (Jan. 13, 2016, 11:42 AM), http://www.bloomberg.com/news/articles/2016-01-13/can-we-fix-american-cities-by-tearing-them-down-; *see also* William J. Collins & Katharine L. Shester, *Slum Clearance and Urban Renewal in the United States,* 5 AMER. ECON. J. 239, 240 (2013) ("Proponents of urban renewal believed that blight was rooted in powerful negative externalities and was therefore 'contagious.'").

92. Collins & Shester, *supra* note 91, at 243.

neighborhoods are viewed as a "drain on public resources, and both a cause and consequence of middle-class flight and local governments' fiscal problems."[93] Given these concerns, urban renewal programs have focused on reinvigorating central city business districts, making decaying cities become more economically viable[94] and encouraging white upper- and middle-class suburbanites to return to cities.[95]

Cities have often relied on federal funds to remove blight. Until the end of the 1970s, virtually all major urban renewal programs in the country were financed using funds provided by federal housing acts.[96] While not all urban renewal programs are funded totally with federal funds, cities continue to receive grants from the federal government to remove blight from their communities. For example, to create more housing in downtown areas, housing authorities in Memphis and other major cities used federal funds provided by the Hope VI program to demolish decaying public housing projects and replace them with mixed-income housing.[97] Likewise, housing authorities used federal Community Development Block Grants ("CDBG") and federal funds provided by the HOME Investment Partnership Program to rebuild infrastructure in urban areas and to create affordable housing for lower- and moderate-income households.[98]

After the 2007–2009 recession, cities used funds from HUD's Neighborhood Stabilization Program to demolish or rehabilitate abandoned properties. The U.S. also allowed states to use money they received from the Hardest Hit Fund to demolish dete-

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93. *Id.*

94. Hyra, *supra* note 19, at 502 ("Urban renewal was a downtown preservation and minority containment revitalization strategy.").

95. For example, New York City suffered a population loss of almost one million people in the 1970s. The population of the city has consistently increased since the 1980s, which has now exacerbated housing unaffordability concerns for lower-income New Yorkers. *State of New York City's Housing and Neighborhoods—2014 Report*, NYU FURMAN CTR. (2014), http://furmancenter.org/files/sotc/NYUFurmanCenter_SOCin_2015_4MAY2016.pdf.

96. *See* Hyra, *supra* note 19, at 503; VON HOFFMAN, *supra* note 3, at 8–14 (2003) (discussing slum clearance programs).

97. Hyra, *supra* note 19, at 504.

98. For an overview of the CDBG program and how some politicians misuse CDBG funds by allocating them in a racially discriminatory manner, see BONDS, *supra* note 74, at 14–22, 75–89.

riorated, vacant residences.[99] The Hardest Hit Fund was originally created to provide funds to help homeowners prevent foreclosures. The large number of abandoned residences and buildings in some states caused the U.S. to allow a few states with high foreclosure rates to use Hardest Hit Fund allocations to demolish blighted properties and prevent those properties from harming the value of neighboring residences and also to decrease burglary, theft, and vandalism in blighted areas.[100]

Urban renewal programs have always been controversial. Some property rights scholars contend that these programs allow cities to encroach on individual property owners' rights and force owners into involuntary sales at prices that may be less than market value.[101] Other critics argue that the programs displace poor residents, destroy cohesive and viable neighborhoods, and are biased in favor of modern facilities over older or historic structures because newer facilities can provide more tax revenues for cities. Urban renewal or revitalization programs are also controversial because of the wide discretion they give municipalities when they are determining whether a building is blighted or merely old.

Some critics suggest that the inherent biases of urban renewal programs and the officials who administer these programs cause buildings or entire neighborhoods to arbitrarily be deemed blighted.[102] As long as there is a reasonable difference in opinion

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99. CHRISTY L. ROMERO, OFF. SPECIAL INSPECTOR GEN., TREASURY SHOULD DO MUCH MORE TO INCREASE THE EFFECTIVENESS OF THE TARP HARDEST HIT FUND BLIGHT ELIMINATION PROGRAM 12, 14–15 (Apr. 21, 2015), https://www.sigtarp.gov/Audit%20Reports/SIGTARP_Blight_Elimination_Report.pdf.

100. Clark, *supra* note 91. *See generally* Zale, *supra* note 87, at 271 (detailing the number of demolished properties in Cleveland, Buffalo, and Detroit).

101. Collins & Shester, *supra* note 91, at 240, 248 (listing criticisms of urban renewal programs); Pritchett, *supra* note 5, at 21 (observing that blighted areas often "supported viable businesses and provided affordable housing to working class persons" but were deemed to not be "profitable enough" because they failed to produce sufficient tax revenues for cities or "profit opportunities for those who most coveted the land").

102. *See* Eric R. Claeys, *Don't Waste a Teaching Moment: Kelo, Urban Renewal, and Blight*, 15 J. AFF. HOUS. & COMM. DEV. L. 14, 16 (2005) (suggesting that cities can deem homes to be "deteriorating or detrimental by laying a paper trail to document broken windows and frayed porch screens, or by citing the fact that the houses were more than twenty years old").

about whether an area is blighted, cities can almost always deem a neighborhood or property as blighted and use their eminent domain powers to condemn and destroy private land. Because there is no clear definition of blight, one housing advocate has suggested that if the only tool cities have to address blight is a hammer, then "everything looks like a nail."[103]

Urban renewal programs can order the destruction of private property even if the existing landowners disagree that their properties are substandard or pose health risks to the community.[104] While destroying decaying buildings may revitalize the neighborhood or make redevelopment more likely, deeming old homes and buildings in lower-income neighborhoods to be blighted in order to pave the path for the construction of newer housing and trendy businesses often ignores the value that the existing (but soon-to-be-displaced) lower- and working-class residents might place in their neighborhood. Perhaps the biggest criticism of urban renewal programs, though, is that they have a disproportionately negative impact on racial minorities.

Most areas that have been deemed blighted have been in ethnic neighborhoods.[105] Some urban renewal projects have provided jobs for some black residents and cities like Detroit and Baltimore have "greened" some of the vacant lots, and allowed them to become parks.[106] Generally speaking, though, urban renewal generally has negative economic effects for black residents whose communities are razed or, in some instances, split in half by highway projects and once public or low-income housing is destroyed, cities rarely rebuild affordable housing units on the vacant land. Instead, displaced residents typically are forced to find other low-

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103. Clark, *supra* note 91.

104. *See generally* Semuels, *supra* note 35 (observing that black residents fondly viewed the Syracuse neighborhood as a "close-knit black community that socialized around Wilson Park, a square of green grass and trees in the center of town" while whites viewed the predominately black neighborhood as a slum that was "ripe for redevelopment because of its proximity to downtown").

105. *See* Pritchett, *supra* note 5, at 20 ("Ethnic prejudice underlay much of the analysis of blighted areas . . . .").

106. For example, Detroit destroyed over 3,000 homes and used some of the vacant lots for storm water control. Clark, *supra* note 91. Baltimore, which intends to destroy up to 16,000 vacant homes, may ultimately build affordable housing on those lots but initially will convert the vacant lots into parks. *Id.*

income housing or are relocated to public housing in other lower-income, predominately black neighborhoods.[107] In short, although slum or blight clearance programs might eliminate blight in one part of a city, the poverty and conditions that caused the first neighborhood to be blighted often shift to another neighborhood.

2. Urban Renewal: Economic Development

In addition to using eminent domain to stop blight (however defined), properties in some urban areas are now being condemned as part of cities' economic development efforts. Generally speaking, if a governing body deems property to be blighted and used in an economically inefficient manner, the property can be condemned and the land transferred, sold, or leased to a private developer who promises to generate revenue for the city in the form of new job creation and additional tax revenues. The United States Supreme Court held in *Kelo v. City of New London*[108] that it is constitutional for cities to take private property and transfer the property to another owner as part of the city's economic development efforts. As a result, urban planners who view "blight" as an impediment to economic development now have even stronger incentives to condemn older buildings in lower-income, non-white neighborhoods in order to develop modern facilities that can attract upper-income (white) residents and upscale businesses to those neighborhoods.

Since *Kelo*, courts have given cities wide discretion to condemn and destroy property deemed to be blighted as part of the cities' economic development efforts. For example, one court observed that "only where there is no room for reasonable difference of opinion as to whether an area is blighted" are judges allowed to "substitute their views as to the adequacy with which the public purpose of blight removal has been made out" for the views held by the legislatively designated governing body that condemned the private property.[109] Urban renewal programs that focus on economic development are even more controversial than programs

107. Hyra, *supra* note 19, at 504.

108. 545 U.S. 469, 483–84 (2005).

109. Goldstein v. N.Y. State Urban Dev. Corp., 921 N.E.2d 164, 172 (2009).

that are designed to eliminate blight because these programs essentially take property owned by private individuals and transfer it to other private owners who will then use the property to build homes or businesses.

Critics of urban renewal economic development programs suggest that cash-strapped cities are now using their eminent domain powers, not for the public good but, to profit from public-private partnerships that allow real estate developers to cheaply acquire property that owners have been forced to sell.[110] Rather than put the property to public use (for example, building a highway), critics suggest that the private developer rather than the city's residents primarily benefits from the taking of the "blighted" property. The residents who are most harmed by these renewal efforts are often lower-income people who live in the neighborhoods that are being revitalized.

For the last several decades, urban renewal programs have caused waves of gentrification in many large cities in the U.S. The "back-to-the-city" movement caused young, upper-income (and mostly white) residents to return to live in funky, hipster downtown areas in major metropolitan areas, like New York, Los Angeles, Washington, D.C., and Chicago.[111] Their return to the city has, however, caused housing prices to soar.[112]

Soaring housing prices and higher property taxes in revitalized and gentrified neighborhoods often displace lower-income (and mostly non-white) residents and also make it hard for middle-income residents to live in the central business districts of many cities.[113] In fact, recent urban renewal projects in Chicago, New

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110. *See generally* Pritchett, *supra* note 5, at 2–4 ("[E]minent domain could be used only where it provided specific benefits to the general public, and critics and supporters alike questioned whether urban renewal met this standard.").

111. Gregor, *supra* note 18 (describing the gentrification process in the Crown Heights section of Brooklyn).

112. *Id.* (describing how abandoned and underutilized warehouses, factories, and auto shops were turned into high-income condominiums).

113. *See generally* Eugene L. Meyer, *Washington Neighborhood Is Remade for Young Urbanites*, N.Y. TIMES (Dec. 1, 2015), http://www.nytimes.com/2015/12/02/realestate/commercial/development-redefines-character-of-washingtons-shaw-area.html (discussing the economic impact of gentrification on an urban neighborhood).

York, Washington, D.C., and other major U.S. cities forced existing residents out of gentrified, urban neighborhoods and into suburbs.[114] Gentrification combined with the lingering economic problems from the recent recession have increased suburban poverty, and suburban poverty rates often exceed the poverty rates in the recently revitalized neighborhoods.[115]

VI. INNOVATIVE URBAN RENEWAL

A. Preserving Neighborhoods

Once a neighborhood starts to transition "downward," urban blight is almost inevitable unless policymakers intervene. Before blight becomes irreversible, cities should engage in creative efforts to help older urban neighborhoods remain economically viable, to encourage investment in those neighborhoods, and to help existing residents remain in their neighborhoods. To encourage investment in an aging but sustainable community, cities should urge lenders—especially if they have participated in renewal efforts in other parts of the city—to increase their presence in lower-income neighborhoods.

Traditional banks have fewer branches in low-income neighborhoods, which causes residents of those neighborhoods to use financial services provided by higher-cost payday lenders and

114. For example, the Mayor of New York has proposed renewal plans that would lease land within a public housing project to a developer who would then create mixed-income housing. Navarro, *supra* note 46. Likewise, the Mayor announced plans to change zoning laws in certain neighborhoods in order to build housing that would be both affordable and also market rate. *Id.* Critics fear that development efforts that privatize or destroy affordable public housing might improve decaying neighborhoods, make the neighborhood safer, and improve the neighborhood schools but would almost inevitably result in displacing the poor residents who currently rent in those areas. *Id.*

115. *See* Hyra, *supra* note 19, at 512 (observing that "the revival of the central city and inner city gentrification coincided with the movement of poverty to the suburbs"); Henry Grabar, *More Americans are Going Hungry in the Suburbs*, ATLANTIC CITY LAB (Jan. 26, 2016), http://www.citylab.com/housing/2016/01/more-americans-are-going-hungry-in-the-suburbs/426786/?utm_source=SFTwitter.

check-cashing companies.[116] In addition, entrepreneurs and businesses in lower-income neighborhoods often must travel farther to get access to capital. Traditional banks seem amenable to opening branches in low-income, non-white neighborhoods only when forced to do so as part of settlements of lawsuits alleging that they engaged in lending discrimination (as First Tennessee Bank recently did).[117]

Cities should actively encourage banks to return to older, urban neighborhoods or to partner with community-based organizations to provide credit or financial services to residents. To make it easier for businesses that already operate in aging urban neighborhoods or ones that would like to invest in those neighborhoods, cities should help ensure that they have access to financial capital and have fair access to both municipal and private-sector contracting opportunities.[118] To ensure that entrepreneurs have access to capital, cities should continue to monitor and gather data about potential discrimination against black-owned businesses.

To ensure that lower-income residents who are displaced as part of urban renewal projects have access to affordable housing, local planning commissions must be willing to truncate the legal challenges suburban homeowners are allowed to mount to prevent affordable housing units from being built in their communities.[119] Similarly, cities must find ways to internalize the costs that wealthy neighborhoods place on lower-income neighborhoods when they insist that socially beneficial (but societally undesirable) projects, like public housing projects or homeless shelters, be placed in lower-income communities. Since the presence of these

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116. *See* DICKERSON, *supra* note 26, at 173–75 (discussing dearth of traditional lending facilities in lower-income neighborhoods and the resulting prevalence of high-cost loans in minority communities).

117. *See* Ben Lane, *First Tennessee Bank Reaches $1.9 million Settlement Agreement Over Discriminatory Lending*, HOUSINGWIRE (Feb. 1, 2016), http://www.housingwire.com/articles/36175-first-tennessee-bank-reaches-19-million-settlement-over-discriminatory-lending?utm_source=dlvr.it&utm_medium=twitter&utm_campaign=housingwire.

118. Carolyn M. Brown, *Black Farmers Shut Out Of $10 Billion Legal Marijuana Business*, BLACK ENTERPRISE (Nov. 10, 2015), http://www.blackenterprise.com/small-business/black-farmers-shut-out-of-legal-marijuana-business/.

119. Ben-Joseph, *supra* note 35, at 180.

projects makes it more likely that the community will become blighted, lower-income communities that are forced to accept these properties should receive additional support—perhaps in the form of additional parks or neighborhood school funding.

If renewal programs succeed in revitalizing urban neighborhoods and attracting higher-income residents, many lower-income residents will be displaced. To make it possible for developers to build affordable higher density housing (both in the urban core and also in inner suburbs), many cities will need to revise zoning requirements (including density, height, and parking requirements) or grant zoning variances. In addition, cities should adopt inclusionary zoning laws that require builders of new developments to set-aside a certain percentage of the units in their new residential housing projects for lower- or middle-income residents.[120]

Cities must also commit to creative uses of land banks. Land banks are entities (often controlled by governments) that hold title to land that is often vacant, abandoned, dilapidated, or owned by the city because of tax delinquencies.[121] Land banks typically are given the authority to buy, rehabilitate, destroy, or resell the housing held in the bank and quickly return the property to productive uses. Most land banks are used to ensure that municipalities have a quick and efficient means of transferring blighted property to new private owners who can redevelop the process and, in the process, help generate tax revenues for the city.[122] If cities opt to use land banks to keep housing affordable for residents who live in neighborhoods that are (or are at risk of becoming) blights, the

120. Robert W. Burchell et al., *Inclusionary Zoning: A Viable Solution to the Affordable Housing Crisis?*, NEW CENTURY HOUSING (Oct. 5, 2000), http://www2.nhc.org/media/documents/InclusionaryZoning.pdf. The California Supreme Court recently upheld an inclusionary zoning ordinance that requires developers to set aside housing for moderate-income households, pay a fee in lieu of providing the housing, or provide equivalent substitute housing. *See* Cal. Bldg. Indus. Ass'n v. City of San Jose Cal., 61 Cal. 4th 435 (2015), *cert. denied*, 136 S. Ct. 928 (2016); Emily Badger, *Why it's so Hard to Afford a Rental Even if you Make a Decent Salary*, WASH. POST (Dec. 9, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/12/09/why-its-so-hard-to-afford-a-rental-even-if-you-make-a-decent-salary/.

121. Zale, *supra* note 87, at 297.

122. *Id.*

bank must insist that private developers who acquire the property at low (or no) cost agree to invest in the blighted community and also set aside some of the redeveloped housing units for middle- or lower-income residents who currently live in the community.

Cities should also support the attempts of Community Land Trusts' ("CLTs") and Community Development Corporations' ("CDCs") to preserve affordable housing. Generally speaking, CDCs enter into long-term residential property leases with low-income residents in neighborhoods that are at risk of gentrifying and pricing out existing residents.[123] CLTs help create permanently affordable homes by giving low- and moderate-income households the opportunity to purchase homes that would otherwise be unaffordable. Homeowners generally are permitted to remain in homes held in a CLT indefinitely, and they can build equity in those homes while they live there. They cannot, though, rent out the homes and if they sell the home it must be to another lower-income household at an affordable price. By limiting the owner's property rights, CLTs ensure that the home remains affordable to lower-income families.[124]

CLTs and CDCs, while valuable, have high operating costs in part because they must purchase and potentially upgrade or refurbish homes before selling or leasing them to owners. Costs would be lower if CLTs and CDCs received additional financial support from financial institutions or if cities made it easier and more affordable for CLTs and CDCs to purchase blighted properties. If used on a larger scale, these entities could play a greater role both in helping to eliminate blight and in assisting existing residents remain in their neighborhoods.

Finally, one example of an innovative approach to fighting blight and encouraging existing residents to improve their communities is the Shelby County Land Bank's "mow-to-own program."[125] This program gives people who own land adjacent to vacant city- or county-owned lots the opportunity to purchase

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123. A. Mechele Dickerson, *Millennials, Affordable Housing and the Future of Homeownership*, J. AFFOR. HOUSING (forthcoming 2016).

124. *Id.*

125. Linda A. Moore, *Memphis' Mow-to-Own Takes Off in 2016*, COM. APPEAL (Dec. 21, 2015), http://www.commercialappeal.com/news/government/city/memphis-mow-to-own-takes-off-in-2016-276e0cf9-a163-7881-e053-0100007f0f3a-363181171.html.

those vacant lots at below-market costs. Participating owners are required to register for the program, pay $175, and maintain the appearance of the lot for up to 3 years by mowing the property one initial time and then committing to mowing and maintaining the lot in the future.[126] Residents who comply with these requirements are then awarded credit toward buying the vacant lots.[127]

B. Sharing Revitalization's Benefits

Unless city leaders consider the likely results of their revitalization efforts *before* those efforts start, gentrification is almost an inevitable result of urban renewal efforts. Gentrification, like urban renewal, implicates race because gentrification has *always* involved affluent whites moving to urban neighborhoods that have become chic or desirable. As noted in a federal housing report almost forty years ago, "[d]ramatic restoration of aged and blighted housing stock is almost exclusively a white phenomenon, undertaken by families whose alternative residence is the suburbs."[128]

Of course, there is no reason that city leaders must reflexively respond to blight by immediately destroying all existing buildings and replacing them with condominiums, bagel pubs, and trendy cafes. That is, while revitalization efforts that succeed in stimulating economic growth in an area will likely displace some of the existing residents, the forced displacement of the existing low-income (black or Latino) households need not be the inevitable result of urban renewal programs.

Texas housing advocate John Henneberger (the recipient of a MacArthur "genius" grant)[129] has articulated four rights he believes all low-income households should have when cities are developing plans to revitalize a low-income or blighted area:

- the right to choose to live in a stable, mixed-race neighborhood;

- the right to stay in their neighborhoods and not be displaced by higher-income residents;

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126. *Id.*

127. *Id.*

128. ARTHUR D. LITTLE, INC., *supra* note 1, at 128.

129. *MacArthur Fellows Program*, MACARTHUR FOUND. (Sept. 17, 2016), https://www.macfound.org/fellows/916/.

- the right to equal access to public services and facilities; and

- the right to have a say in how their neighborhoods will be redeveloped.[130]

While it is unrealistic to think that wealthier residents will reverse their trend of moving into revitalized neighborhoods, urban renewal efforts must be more inclusive. Specifically, urban planners should make sure that existing residents participate in the benefits associated with the revitalized neighborhood and renewal plans should include mandatory set-asides for affordable housing.

One successful example of a city's inclusive urban renewal efforts involves the culturally historic Shaw neighborhood in Washington, D.C. Shaw is in the process of transforming from a working-class neighborhood where predominately black families have lived for generations to a trendy upper-income neighborhood of mostly young, white, single-person households.[131] The renewal efforts have, by design, ensured that the revitalized neighborhood will provide economic benefits for current residents. For example, the real estate development firm that is spearheading the revitalization efforts is headed by a black native Washingtonian whose firm has committed to having thirty percent of the units reserved for middle-income tenants.[132] Urban renewal projects in other cities (including Chicago and New York) that were revitalized in the 2000s also ensured that (1) black real estate development firms helped construct or manage new inner city housing developments; (2) black churches participated in community economic redevelopment programs; and (3) black banks are allowed to help finance the redevelopment projects.[133]

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130. John Henneberger, *The Right to Choose, the Right to Stay, the Right to Equal Treatment, the Right to Have a Say: Reimagining Fair Housing*, TEX. HOUSERS (Oct. 24, 2015), http://texashousers.net/2015/10/24/the-right-to-choose-the-right-to-stay-the-right-to-equal-treatment-the-right-to-have-a-say-reimagining-fair-housing/.

131. Meyer, *supra* note 113; *see also* Gregor, *supra* note 18 (noting that most new residents were in their late twenties and early thirties).

132. Meyer, *supra* note 113.

133. Hyra, *supra* note 19, at 511.

VII. CONCLUSION

Urban blight has always existed and always will. Unfortunately, the country's history of pushing poor residents out of revitalized neighborhoods will remain a part of our present and future as long as the goal of urban renewal programs is to demolish and destroy. As a 1938 urban planning report observed: "Government[s] must provide the framework of legislation within which private industry can operate effectively. Zoning laws, building restrictions, mortgage laws, tax policies, and land control are some of the important obligations of the government."[134]

While urban blight will never disappear, cities can do more to anticipate and respond to the consequences of urban renewal programs. Although urban renewal programs should demolish buildings that cannot be rehabilitated, these programs should also make every effort to renovate or modernize buildings that still have value. Moreover, even if it is not feasible to save the existing buildings in a neighborhood, land use policies must take care to provide affordable housing for the displaced residents of blighted neighborhoods.

134. WALKER, *supra* note 6, at 87.

Affirmatively Furthering Neighborhood Choice: Vacant Property Strategies and Fair Housing

JAMES J. KELLY, JR.*

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I. INTRODUCTION

When many of us think about fair housing enforcement, scenes involving undercover apartment applicants ferreting out racially biased landlords come to mind. Indeed, fair housing "testers" have been and continue to be an important element of civil rights accountability.[1] However, implementation of the Fair Housing Act of 1968 has had at least as much to do with increasing the supply of decent, affordable housing options to members of protected groups as with assuring those individuals that they will not be denied a particular housing unit because of the color of their skin or a disability.[2]

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1. Michael J. Yelnosky, *What Does "Testing" Tell us About the Incidence of Discrimination in Housing Markets?*, 29 SETON HALL L. REV. 1488, 1492 (1999); *see also* Teresa Coleman Hunter & Gary L. Fischer, *Fair Housing Testing—Uncovering Discriminatory Practices*, 28 CREIGHTON L. REV. 1127, 1132–34 (1995).

2. The Fair Housing Act bans housing discrimination on any one of six bases: "race, color, religion, sex, familial status, or national origin." 42 U.S.C.

This macro aspect of fair housing enforcement has been led by organized activists challenging the policies, actions, and inactions of state and local housing and land use agencies. Early on, it involved battles over the siting of public housing projects outside areas of concentrated poverty, like the 1980's-era struggle in Yonkers depicted in the recent critically acclaimed HBO series, *Show Me a Hero*.[3] As housing subsidy increasingly took the form of rent payment vouchers, advocates litigated to force local agencies to facilitate the voluntary relocation of poor, inner-city residents of color to suburban areas that had good schools as well as jobs.[4]

Critical to plaintiffs' prospects for success in these impact cases has been the ability to establish a violation of the Fair Housing Act through evidence that showed that the policies in question disproportionately harmed the housing opportunities of federally protected racial groups. Proving racial bias as the motivation behind the adoption of a harmful governmental policy has been even more difficult than it has been in the reason for denial of an apartment or mortgage application. The U.S. Supreme Court has ruled that a showing of deliberate discrimination is required to establish a violation of constitutional rights under the Equal Protection Clause, but the lower court, upon remand, held that the Fair Housing Act was not so limited in its protection.[5] Evidence that a facially neutral policy nevertheless harmed the housing prospects of a protected group would at least shift the burden of proof to the defendant governmental unit to justify the policy approach.[6] Advocates battling against the exclusion of affordable housing have had some success in showing that targeted policies harm the hous-

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§ 3604(a) (2012). Racial minorities and the disabled, however, face the most compromised housing options because they, to a greater extent than religious minorities, face significant economic marginalization, which causes them to be harmed by shortages of affordable housing. *See The Fair Housing Act*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/fair-housing-act-1 ("The number of cases filed since 1968 alleging religious discrimination is small in comparison to some of the other prohibited bases, such as race or national origin.") (last visited April 4, 2016).

3. *Show Me a Hero* (HBO 2015).

4. *See, e.g.*, Hills v. Gautreaux, 425 U.S. 284 (1976); Thompson v. U.S. Dep't of Hous. & Urban Dev., 348 F. Supp. 2d. 398 (D. Md. 2005).

5. Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 (1977), *remanded to* 558 F.2d 1283 (7th Cir. 1977).

6. Metro. Hous. Dev. Corp. v. Arlington Heights, 558 F.2d at 1294–95.

ing options of racial minorities.[7] But, local jurisdictions' ability to escape liability by showing a non-racial basis for a detrimental policy has contributed to a declining overall success rate in federal appellate courts.[8] Such a record has encouraged activists to look elsewhere in the law to advance housing justice for protected groups.[9]

Potentially more important than the ability to prove unlawful discrimination through disparate impact evidence is the capacity to scrutinize a local agency's compliance with its Fair Housing Act obligation to Affirmatively Further Fair Housing ("AFFH").[10] Offered as a possible "missing link" in the chain of fair housing accountability,[11] AFFH has significant potential to affect local decision-making. By law, recipients of funding from the United States Department of Housing and Urban Development ("HUD") not only have to avoid policies that deny protected groups housing opportunities, they also are required to work proactively to eliminate entrenched segregation in their communities regardless of who is to blame for its creation.[12]

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7. This success with prima facie cases against exclusionary policies is particularly notable when compared with the struggle to challenge revitalization efforts. *See* Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 399–402 (2013).

8. *Id.* at 388–89.

9. Advocates have sought state law remedies against exclusionary zoning in the courts. *See, e.g.*, S. Burlington Cty. NAACP v. Mt. Laurel, 336 A.2d 713, 713 (1975). Advocates have also sought these remedies in the legislature through the enactment of inclusionary housing land use measures. *See, e.g.,* MASS. GEN. LAWS ANN. ch. 40B, §§ 20–30 (West 2012).

10. 42 U.S.C. § 3608(e)(5) (2012) ("The Secretary of Housing and Urban Development shall . . . administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this title . . . ."); 24 C.F.R. § 5.150–5.180 (2015) (establishing regulations which further the policy of affirmatively furthering fair housing).

11. Stacy E. Seicshnaydre, *The Fair Housing Choice Myth*, 33 CARDOZO L. REV. 967, 1006 (2012), *reprinted in* 23 J. AFFORDABLE HOUSING & COMTY. DEV. L 149, 188 (2015).

12. The AFFH duty applies to all barriers to the housing opportunities of protected groups, but those impediments to fair housing brought about by a local jurisdiction's policies may be entitled to a priority response under its AFFH strategy. *See infra* text accompanying note 65.

In 2009, the new leadership at HUD began a process of developing regulations for the AFFH duty. Those efforts came to fruition in July 2015 with the publication of the Final Rule for AFFH.[13] In this Article, I will examine how the new AFFH rule impacts local government efforts to confront the epidemic of vacant houses in America's older cities. Market-sensitive responses to vacant properties drive many of the best practices in code enforcement and land banking.[14] Reconnecting marginalized areas to functioning real estate markets promotes neighborhood choice not only because remaining in the communities they have called home should be a viable option for residents of color but also because the ability of local government to provide essential services requires the elimination of vacant property nuisances. Yet, the short-term effects of these strategies and their similarities to previous publicly sanctioned instances of government redlining raise profound questions of racial and social equity.[15] The first Part of this Article will examine both the unique role of AFFH within the Fair Housing Act and its articulation in the recently released Final Rule. The next Part will articulate how local governments required by the Final Rule to submit Assessments of Fair Housing ("AFHs") to HUD should structure and discuss innovative, market-based approaches to their vacant property challenges.

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13. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272–42,371 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, & 903).

14. Understanding the availability of capital investment for renovations is vital to a municipality's strategic planning for vacant property nuisance responses. James J. Kelly, Jr., *A Continuum* In Rem*edies: Reconnecting Vacant Properties to the Market*, 23 ST. L. U. PUB. L. REV. 109, 117–20 (2013). Mapping neighborhoods for the strength of their housing markets can "make it possible not only to design cost-effective strategies for revitalization but also to adjust them to reflect changes in market conditions." ALAN MALLACH, BRINGING BUILDINGS BACK: FROM ABANDONED PROPERTIES TO COMMUNITY ASSETS 23. For an explanation of how data can inform vacant property strategies, see Ira Goldstein, *Using the Market Value Analysis to Analyze Markets, Set Strategy and Evaluate Change*, THE REINVESTMENT FUND (2013), http://www.trfund.com/using-the-market-value-analysis-to-analyze-markets-set-strategy-and-evaluate-change.

15. JAMES J. KELLY, JR., JUST, SMART: CIVIL RIGHTS PROTECTIONS AND MARKET-SENSITIVE VACANT PROPERTY STRATEGIES 2 (2014), *reprinted in* 23 J. AFFORDABLE HOUS. & CMTY. DEV. L. 209, 210–11 (2015).

Market-sensitive vacant property strategies affirmatively further fair housing as long as they are not implemented in a way that runs afoul of the Fair Housing Act's prohibitions and provided that they look to the potential unintended consequences of strengthening real estate markets in marginalized neighborhoods.[16] Furthermore, framing vacant property strategies as an AFFH approach may have benefits for vacant property reforms, especially those connected with acquisition of vacant properties by land banks. Because the AFFH framework sees the problem of housing justice for statutorily protected groups as a regional one, municipal jurisdictions in need of cooperation from county governments in order to achieve their land banking goals may be able to use the AFFH requirement as leverage.

II. AFFIRMATIVELY FURTHERING FAIR HOUSING

The Fair Housing Act prohibits discrimination based on race, color, religion, sex, family composition, disability, or national origin in the marketing and management of residential real estate.[17] Specifically it prohibits motivated rejection or steering of a prospective tenant or homebuyer, discriminatory advertising, and blockbusting.[18] These prohibitions directly address many of the tactics that individual private actors employed to perpetuate residential segregation of various kinds but especially that of race. But, the Fair Housing Act also provides mechanisms for eliminating systemic barriers to neighborhood integration.

The Fair Housing Act makes it unlawful to "otherwise make unavailable or deny a dwelling to any person because of race."[19] Civil rights groups, affordable housing activists, and anti-poverty advocates have used the "otherwise make unavailable"

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16. Paul C. Brophy & Jennifer S. Vey, *Seizing City Assets: Ten Steps to Urban Land Reform*, THE BROOKINGS INST. CEOS FOR CITIES RES. BRIEF 18 (Oct. 2002), http://www.brookings.edu/~/media/research/files/reports/2002/10/metropolitanpolicy-brophy/brophyveyvacantsteps.pdf ("Step 9: Be Sensitive to Gentrification and Relocation Issues").

17. 42 U.S.C. § 3604(a) (2012).

18. 42 U.S.C. §§ 3604, 3605. The FHA also makes it illegal to hinder those who support protected persons in securing their fair housing rights. 42 U.S.C. § 3617.

19. 42 U.S.C. § 3604(a).

language to confront various housing assistance,[20] community development[21] and zoning[22] policies, and decisions of state and local governments. As with the provisions holding parties in real estate deals accountable, the broader prohibition on discriminatory policies can be proven with a showing that the banned action was motivated by bias. However, if proof of racist or other discriminatory intent can be difficult to uncover when someone's apartment application is denied, it is all but impossible to find evidence of similar intent behind the enactment of a policy that prevents the construction of the entire apartment building.

In seeking to invalidate a policy under the Fair Housing Act, advocates have offered, and courts have considered, statistical evidence of the policy's disproportionate adverse impact on a protected group's access to housing.[23] Because the actions of both governments and private institutions can be motivated by a wide range of goals and have an even greater number of effects, courts have allowed defendant policymakers to respond to showings of disparate impact by presenting evidence of legitimate, neutral policy objectives that cannot be attained, easily or, sometimes, at all, without the cited adverse impacts.[24] The approach of the U.S. Court of Appeals for the Seventh Circuit, sometimes labeled "impact plus," incorporates elements of both effect and intention.[25] In

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20. *See, e.g.*, Gautreaux v. Chicago Hous. Auth., 436 F. 2d 306 (7th Cir. 1970).

21. *See, e.g.*, Resident Advisory Bd. v. Rizzo, 564 F. 2d 1261 (3rd Cir. 1977).

22. *See, e.g.*, Metro. Hous. Dev. Corp. v. Arlington Heights, 558 F.2d 1283 (7th Cir. 1977).

23. 100 A.L.R. Fed. 97, § 2(a).

24. Bradley v. U.S. Dep't Hous. & Urban Dev., 658 F.2d 290, 295 (5th Cir. 1981) ("If the court ruled, as the plaintiffs would have us, that the transfer of funds to redevelopment planning was illegal because it did not benefit persons of low and moderate income as much as would rehabilitation of the area's stock housing, we would be usurping the legislature's role in determining community needs and establishing priorities.").

25. *Metro. Hous. Dev. Corp.*, 558 F.2d at 1290 ("We therefore hold that at least under some circumstances a violation of section 3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent. . . . [W]e agree that a showing of discriminatory intent is not required under section 3604(a), we refuse to conclude that every action which products discriminatory effects is illegal.").

examining the rejection of a petition to rezone a parcel for the development of affordable multifamily housing, the Seventh Circuit found that the plaintiffs' evidence should be judged by weighing the following factors: (1) the presentation of strong evidence for discriminatory effect; (2) the existence of some evidence for discriminatory intent; (3) the lack of a substantial nondiscriminatory basis for the defendant's action; and (4) a showing that the defendant is interfering with, rather than merely failing to produce, housing opportunities for protected persons of color.[26]

As influential as this and other, similar disparate impact tests have been in the federal courts, the U.S. Supreme Court did not rule on the sufficiency of disparate impact evidence until its 5-4 decision last year in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc*.[27] In an opinion authored by Justice Anthony Kennedy, the majority upheld the disparate impact test but emphasized the burden plaintiffs bore to show a strong causal connection between the challenged policy and the adverse effects on protected groups.[28] The Court also cautioned lower courts not to disregard defendants' justifications for policy decisions if they are not shown to be "artificial, arbitrary and unnecessary barriers."[29] Even as the courts have solidified the Fair Housing Act as a tool against unlawful practices and policies, another FHA mechanism for dismantling segregation and promoting meaningful residential choice is only now coming into its own nearly half a century after its enactment.

Even with the ability to challenge harmful policies by demonstrating causation if not intent, civil right advocates struggle against an overwhelming array of state and local government decisions that contribute to the isolation of poor people of color. Many of these decisions will never be successfully invalidated in federal court. Complainants can produce a compelling account of the desperation that racial minorities and the disabled face in their search for decent, affordable housing. They may go further and show how various exclusionary zoning practices aggravate that hardship.

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26. *Id.* at 1290–93.
27. 135 S. Ct. 2507 (2015).
28. *Id.* at 2523.
29. *Id*. at 2522 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

But, once the defendant local government articulates an otherwise neutral—that is, nondiscriminatory—basis for the policies, the burden remains on the plaintiff to show how that objective can be achieved, at little or no additional cost, without the adverse impact on any protected group.[30] Striking down practices and policies, while effective in some cases,[31] fails to hold local and state agencies accountable for the persistence of deeply-rooted racial segregation spanning decades and generations.

The Fair Housing Act charges HUD not only to enforce its prohibitions but to "affirmatively further" its stated goals of ending segregation in housing and increasing meaningful housing choice for members of protected groups.[32] The principal method by which HUD has affirmatively furthered fair housing is to extend that obligation to the hundreds of states, participating jurisdictions, and public housing authorities that receive HUD funding. The legal obligations of many state and local agencies do not end, then, with mere compliance with FHA's primary prohibitions against interfering with the housing and neighborhood choices of protected group members. On the contrary, these municipal and county actors appear to have an unbounded mandate to break down barriers to racial integration, no matter their role in creating or sustaining those barriers. Given the broad array of governmental actions that could be taken to bring about more housing choice for marginalized racial minorities and disabled persons, it is not completely surprising to read that some conservative commentators have greeted the Obama administration efforts to more effectively implement the AFFH duty with alarm bordering on panic.

In a 2015 National Review article entitled "Attention America's Suburbs: You Have Just Been Annexed," Stanley Kurtz professes amazement at the lack of media attention to the "breathtaking radicalism" embodied by HUD efforts to enforce Affirma-

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30. *Id.* at 2515.

31. In 2006, the Greater New Orleans Fair Housing Center sued St. Bernard Parish over its zoning ordinance prohibiting property owners, 93% of whom were white, from renting to anyone not related to them by blood, marriage, or adoption and forced the county government to repeal the blatantly racist law. *Time Runs Out for St. Bernard Parish*, N.Y. TIMES (Mar. 29, 2011), http://www.nytimes.com/2011/03/30/opinion/30wed3.html.

32. 42 U.S.C §§ 3601–3619 (2012).

tively Furthering Fair Housing.[33] Kurtz claims the Federal government will confront wealthy suburban governments with the facts of regional housing inequality and then they would be "obligated to nullify their zoning ordinances and build high-density, low-income housing at their own expense."[34] Comparing the obligations that these local governments have under the "otherwise make unavailable" prohibition and AFFH, it seems plausible that the latter may be the missing piece for federal efforts to strike down barriers to housing choice for protected groups. But, neither the elation nor the panic is justified. The Fair Housing Act does not empower HUD to mandate the spending priorities of state and local governments or to force its funding recipients to abandon their duly adopted policies or laws, even if they clearly run counter to a mission of affirmatively furthering fair housing. Instead, federal law explicitly prohibits HUD from conditioning its funding on the abolition of any state or local government law, policy, or practice that does not itself violate federal law.[35]

AFFH is not a wholesale Congressional revision of local land use law, however crucial that might be to ending patterns of residential discrimination in certain parts of the country. Instead, AFFH creates the basis for a discussion between HUD and its recipients about what those recipients are doing "to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination."[36] HUD cannot require a suburban county government to repeal its exclusionary zoning practices as a condition of continued funding. HUD can, however, insist that it acknowledge that such duly adopted laws create barriers to affordable housing, the lack of which disproportionately harms racial minorities and perpetuates

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33. Stanley Kurtz, *Attention America's Suburbs: You Have Just Been Annexed*, NAT'L REVIEW (July 20, 2015, 10:01 AM), http://www.nationalreview.com/corner/421389/attention-americas-suburbs-you-have-just-been-annexed-stanley-kurtz.

34. *Id.*

35. 42 U.S.C.A. § 12711 (West 2015). A jurisdiction that has violated the law may negotiate a settlement of the related charges that may include its commitment to make specific changes in its laws and/or fund, at its own expense, the development of affordable housing, but that is a mutually acceptable form of punishment.

36. 24 CFR § 5.150 (2015).

racial segregation.[37] Moreover, HUD can insist that the same local government explain how its priorities and goals are designed to "overcome the effects" of those contributing factors and related fair housing issues.[38]

Under the system of fair housing reporting that existed prior to the adoption of the Final Rule on AFFH last year, state and local jurisdictions, as well as public housing authorities, that received Community Planning and Development Formula Grant Program funds[39] were required to submit an annual certification that each had prepared an Analysis of Impediments ("AIs") to the achievement of fair housing in its program or jurisdiction.[40] Each was also required to articulate steps taken to overcome those impediments and document information related to the impediments and/or the remedial actions.[41] A 2010 study of AIs by the Government Accountability Office, however, found that many of them were outdated or lacked plans for responding to fair housing barriers.[42] The same report criticized HUD's own efforts to promote AFFH pointing out that funding recipients lacked guidance as to the content and format of AIs and that funding recipients had little reason to fear enforcement actions by HUD related to AFFH.[43]

With the issuance of the Final Rule in July 2015,[44] HUD has responded to each of these problems. Instead of certifying the existence of a fair housing analysis, recipients of HUD funds will now be required to submit an Assessment of Fair Housing to HUD

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37. *See infra* notes 59–60 and accompanying text.

38. Westchester v. U.S. Dep't of Hous. & Urban Dev., 802 F.3d 413, 434 (2nd Cir. 2015) (citing 24 C.F.R. § 91.225(a)(1) (2015)).

39. 24 C.F.R. § 5.162(b)(1)(ii)(B) (2015).

40. Timothy M. Smyth, Michael Allen & Marisa Schaith, *The Fair Housing Act: The Evolving Landscape for Federal Grant Recipients and Sub-Recipients*, 23 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 231, 235 (2015).

41. *Id.* at 236.

42. U.S. GOV'T ACCOUNTABILITY OFFICE, HOUSING AND COMMUNITY GRANTS: HUD NEEDS OT ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS 1 (2010), http://www.gao.gov/products/GAO-10-905.

43. *Id.* at 1–2.

44. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272-01 (to be codified at 24 C.F.R. pt. 5).

for review and acceptance.[45] By creating this new reporting approach to fair housing, HUD is setting the stage for a broader and more consistent enforcement of the duty to Affirmatively Further Fair Housing. The Final Rule takes an expansive approach to the subject matter and geography of fair housing. While some commenters objected during the rulemaking process that HUD's new reporting system would require analysis of governmental functions not funded by HUD or even controlled by state and local agencies funded by HUD,[46] HUD insisted that a thorough analysis of barriers to fair housing had to include all of the factors affecting the availability of housing opportunities for statutorily protected groups.[47] Nothing in the statute or in the case law restricts the discussion of AFFH compliance to those areas of state and local government function that are administered by housing and community development agencies. If local tax policies within the control of local jurisdictions have an impact on fair housing in a metropolitan area, then the reporting grant recipient cannot merely disclaim any responsibility just because control of those functions have been assigned to the finance department. The housing and community development agency is reporting on behalf of the entire city or county and must articulate how that unit of government is complying with AFFH.[48]

Similarly, analysis of barriers to housing opportunities cannot be compartmentalized within a single set of municipal or county boundaries. Housing markets are metropolitan in their overall scope and the analysis of fair housing barriers must be regional as well.[49] Here, however, the AFFH duty does not become a collective duty. Each participating jurisdiction has its own AFFH duty. But, the Final Rule encourages reporting fund recipients to collaborate with other participating jurisdictions in the same metropolitan area to produce reports that systematically analyze segregation in the area and offer collaborative integration strategies.[50]

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45. 24 C.F.R. § 5.154 (2015).

46. Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,278, 42,281, 42,284–85.

47. *Id.* at 42,282, 42,285.

48. *Id.* at 42,285.

49. *Id.* at 42,286.

50. 24 C.F.R. § 5.156 (2015).

The Final Rule also combats compartmentalization in the understanding of fair housing objectives. The quality of housing opportunities for racial minorities and the disabled is not judged exclusively by the physical condition and suitability of the housing unit itself. An analysis of housing availability must also look to the neighborhood environments associated with the possible residential options. Certainly, the level of crime, especially burglaries and home invasions, is relevant to evaluating the adequacy of a housing opportunity. But, AFFH is not limited to those aspects of life associated with actual physical presence in the home.

Appropriate housing type and physical quality of structure are important, but, increasingly, residence location is key to a variety of developmentally essential public goods. Frequently, a family's access to strong primary and secondary schools is determined by where that family lives. For people of limited means, public transportation may be essential to connecting with good jobs and/or training and education resources. Even access to quality food, health, and recreation resources are often dependent on the neighborhood one lives in. Even as racial segregation has moderated over the last three decades, isolation of poor households has intensified.[51] The result is that the typical poor African-American or Hispanic family was more likely to live in area with high concentration of poverty in 1990 than it was twenty years earlier.[52] Thus, HUD's AFH process requires analysis of and strategies responsive to "significant disparities in access to opportunity."[53]

The redesign of the reporting process provides for clearer accountability by making submission to and acceptance by HUD a prerequisite of continued funding. But, the process also requires that reporting entities listen to their citizens and base their analysis on the quantitative indicators most relevant to an assessment of fair housing in a particular geographic area. HUD has taken it upon itself to provide this "data related to education, poverty, transit access, employment, exposure to environmental health hazards,

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51. Douglas S. Massey, Jonathan Rothwell, & Thurston Domina, *The Changing Bases of Segregation in the United States*, 626 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 77, 82 (2009).

52. PAUL A. JARGOWSKY, POVERTY AND PLACE: GHETTOS, BARRIOS AND THE AMERICAN CITY 40 (1996).

53. 24 C.F.R. § 5.154(d)(2)(iii) (2015).

and other critical community assets, as well as nationally uniform local and regional data on patterns of integration and segregation; racial and ethnic concentrations of poverty; disproportionate housing needs based on protected class; and outstanding discrimination findings."[54] HUD's communication of the data is not itself a judgment by HUD as to the severity of segregation and housing inequality in the region. On the other hand, the fact that the Fair Housing Act has been held by the U.S. Supreme Court to embrace disparate impact arguments clears the way for HUD to make a strong connection between affordable housing availability and fair housing goals.[55]

Enforcement of AFFH would have been significantly limited if the Supreme Court in *Inclusive Communities* had ruled that the Fair Housing Act itself and/or the 5th Amendment's guarantee of equal protection excluded consideration of disparate impact showings in adjudicating Fair Housing Act violations.[56] Although the immediate consequence of such a ruling would have been to protect all policies that could not be shown to be the products of deliberate discrimination, the argument could have then been made that the only kind of segregation that could be the legitimate concern of AFFH was segregation that was deliberately created. If so, then even clear statistical demonstration of the lack of affordability in opportunity areas and the lack of opportunity in areas with plenty of low-cost housing would not be enough to put local governments to the question as how they would respond as required by AFFH. As it is, the high court's confirmation of disparate impact allows HUD to supply data that raises compelling AFFH questions simply by showing the spatial mismatch of affordable housing and important community goods. Doing so requires that HUD's evi-

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54. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710, 43,731 (July 19, 2013) (to be codified at 24 C.F.R. pt. 5).

55. *See infra* note 58 and accompanying text. For an analysis of the "robust causality" required by *Inclusive Cmtys. Project*, see William J. Callison, *Inclusive Communities: Geographic Desegregation, Urban Revitalization, And Disparate Impact Under The Fair Housing Act*, 46 U. MEM. L. REV. 1039, 1048–50 (2016).

56. HUD cited the Supreme Court ruling in response to comments about the use of disparate impact theories in the articulation of the Final Rule. 80 Fed. Reg. 42,272-01, 42,283 (citing Texas Dept' of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 132 S. Ct. 2507, 2525–26 (2015)).

dence shows that certain protected groups, usually the disabled as well as economically disadvantaged racial minorities, are disproportionately harmed by the lack of affordable housing in desirable neighborhoods. The data provided by HUD is not the only source of information to which reporting jurisdictions must respond.

The AFH process also facilitates citizen participation by requiring participating jurisdictions to seek input from those wishing to address local fair housing issues.[57] Community groups will confront reporting jurisdictions with accusations of deliberate discrimination and challenge the justifications of policies that disproportionately harm protected groups. They, along with civil rights and affordable housing advocates, will offer their own views on what are the most important fair housing issues and the best ways to address them. As seen from the Final Rule's description of the AFH report's structure, local governments must be prepared not only to relate these messages on to HUD, but also to state whether or not they agree and why.

The Final Rule on Affirmatively Furthering Fair Housing provides the following breakdown of the Assessment of Fair Housing Report:

> (1) Analysis: Identification of integration and segregation patterns, racially or ethnically concentrated areas of poverty, significant disparities in access to community assets for all protected classes, and disparities in access to housing for all protected classes.
>
> (2) Fair Housing Priorities and Goals: A prioritized list of fair housing issues, a list of the most significant factors in shaping the fair housing situation, and goals for addressing them.
>
> (3) Community Input: Process for and content of community input as well as the reporting jurisdiction's responses.[58]

57. 24 C.F.R. § 5.158(a) (2015).
58. *Id.* § 5.154.

After it has been submitted, HUD has sixty days to reject the AFH report.[59] Obviously, if the report' s summary of community input reveals substantiated allegations that the reporting jurisdiction deliberately discriminates against protected groups or "otherwise . . . make[s] unavailable"[60] their housing options, HUD can reject the report and require any future funding be contingent on compliance with the basic obligations of the Fair Housing Act.[61] Likewise, an AFH report will be required to relay information from civil rights advocates that the reporting entity's policies reinforce or aggravate segregation by preventing the creation of affordable housing in desirable neighborhoods or by frustrating revitalization efforts. The legitimate land use or fiscal objectives behind these policies may prevent them from being invalidated under the Fair Housing Act.[62] But, the question remains as to whether or not the duty to AFFH is not somehow increased by a reporting jurisdiction's policies being shown to be a contributing factor to the reinforcement of segregation. An argument could be made that, in prioritizing the contributing factors to segregation, a reporting jurisdiction has an obligation to elevate the harms it has caused through its own policies.[63] The AFH would also then name among its top goals responses to these contributing factors. Following this logic through the integrated reporting process, the consolidated plan of that jurisdiction would articulate strategies and actions that give special attention to remedying those negative effects caused by the jurisdiction's own actions.

More than anything, the AFH should explain how a reporting jurisdiction is overcoming any spatial mismatch between opportunity and affordable housing. HUD was challenged on its fo-

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59. *Id.* § 5.162.

60. 42 U.S.C. §3604 (2012).

61. *See supra* notes 42–43 and accompanying text.

62. *See supra* notes 6–8, 25–31 and accompanying text.

63. The Supreme Court has recognized the relevance of a local history of de jure segregation to the imposition of desegregation remedies by federal courts and the adoption of affirmative action mechanisms where such responses would be problematic legally in the absence of past deliberate discrimination. *See* Milliken v. Bradley, 418 U.S. 717, 745–47 (1974); Parents Involved v. Seattle School Dist. No. 1, 551 U.S. 701, 721 (2007) (citing Freeman v. Pitts, 503 U.S. 467, 494 (1992)).

cus on concentration of poverty with the argument that "[p]overty is not a protected class."[64] In response, HUD stated:

> it is entirely consistent with the Fair Housing Act's duty to affirmatively further fair housing to counteract past policies and decisions that account for today's racially or ethnically concentrated areas of poverty or housing cost burdens and housing needs that are disproportionately high for certain groups of persons based on characteristics protected by the Fair Housing Act. Preparation of an AFH could be an important step in reducing poverty among groups of persons who share characteristics protected by the Fair Housing Act. The focus and purpose of the AFH is to identify, and to begin the process of planning to overcome, the causes and contributing factors that deny or impede housing choice and access to opportunity based on race, color, religion, sex, national origin, familial status, and disability. In addition, a large body of research has consistently found that the problems associated with segregation are greatly exacerbated when combined with concentrated poverty. That is the legal basis and context for the examination of RCAPs/ECAPs [Racially & Ethnically Concentrated Areas of Poverty], as required by the rule.[65]

Many of the fair housing advocates urging increased attention to the problems associated with overconcentration of poverty have championed mobility strategies over revitalization investments to overcome the spatial mismatch between affordable housing and economic opportunity. They have fought for the development of subsidized housing in areas that lack affordable housing opportunities, even when such siting costs additional time and money. Inclusive Communities, the plaintiff in the recent landmark Supreme Court case, has directly opposed the diversion of

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64. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272-01, 42,283 (July 16, 2015) (to be codified at 24 C.F.R. pt. 5).

65. *Id.*

affordable housing subsidy from areas of opportunity to neighborhoods that are already home to many low-income households.[66] As AFFH made its way through the rulemaking process, advocates for investment in distressed neighborhoods expressed concern that HUD was discouraging recipients from developing affordable housing opportunities in or near areas of concentrated poverty.

With the issuance of the Final Rule, HUD made clear that "strategically enhancing access to opportunity include[d] . . . : Targeted investment in neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing" in addition to "promoting greater housing choice within or outside of areas of concentrated poverty and greater access to areas of high opportunity."[67] HUD added this clarification in response to comments it received about earlier versions of the rule.[68] Commenters argued that, as originally framed, the AFFH rule "appears to prohibit program participants from using Federal resources in neighborhoods of concentrated poverty."[69] HUD responded that "[t]he duty to affirmatively further fair housing does not dictate or preclude particular investments or strategies as a matter of law. . . . HUD's rule recognizes the role of place-based strategies, including economic development to improve conditions in high poverty neighborhoods . . . ."[70]

HUD's commitment to recognizing both the revitalization of dilapidated neighborhoods and the facilitation of the voluntary relocation of the low-income households to opportunity areas is critical for cities and counties struggling with vacant and abandoned properties. These communities depend greatly on the funds they receive from HUD in the form of HOME funds, Emergency Solutions Grants and, particularly, Community Development Block Grants ("CDBG"). Their softer real estate markets make housing affordability less of a concern than in higher-demand regions. But, the older, post-industrial cities of the Rust Belt also exhibit some of the most severe and intractable patterns of racial

66. *See* Texas Dept' of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 132 S. Ct. 2507 (2015).

67. 24 C.F.R. § 5.150 (2015).

68. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,277–79 (July 16, 2015) (to be codified at 24 C.F.R. pt. 5).

69. *Id.* at 42,278.

70. *Id.* at 42,279.

segregation in the country. As such, these jurisdictions need to be especially attentive to recent developments in AFFH and make sure that their revitalization programs that depend on HUD funding support their AFFH goals.

III. DISCUSSING MARKET-SENSITIVE VACANT PROPERTY STRATEGIES IN ASSESSMENTS OF FAIR HOUSING AND CONSOLIDATED PLANS

Local governments seeking to make their distressed neighborhoods attractive to potential residents choosing new homes must be able to express these revitalization goals as consonant with the promotion of fair housing even as they contend with accusations their market-sensitive approaches to vacant properties reinforces segregation patterns. They must be able to respond to any allegations from the community that their vacant property strategies are deliberately discriminatory or that they disproportionately and unjustifiably impair the housing opportunities of racial minorities. Even if the market-sensitive approaches are justifiable, the local governments still need to be attentive to any disparate impact they may have on the access that minority households have to decent, affordable housing and key community goods. Most importantly, county and municipal agencies that embrace market-sensitive approaches to code enforcement and land banking must show how these strategies will achieve the AFFH goal of promoting stable, inclusive communities.

At first it would appear that HUD's acceptance, as a legitimate fair housing goal, of revitalization of concentrated areas of poverty would end the discussion there. But, the importance of attracting private capital to these distressed areas puts vacant property revitalization strategies in apparent conflict with the goal of promoting the housing prospects of low-income families of color. In chasing households who already have housing choices, these older cities seem to be casting aside those with limited options. A superficial understanding of the market-sensitive approach to code enforcement would not only disqualify the market-sensitive approach to vacant properties as an AFFH strategy but would cast doubt on its compatibility with the anti-discrimination provisions of the Fair Housing Act. Only a thorough exploration of the logic that animates market-sensitive code enforcement and land banking can illustrate its true worth as a mechanism for affirmatively fur-

thering neighborhood choice as well as pointing out genuine areas of concern with regard to fair housing compliance.

An appreciation of the place of vacant property revitalization in the larger struggle for housing justice begins with an understanding of how vacant properties ruin neighborhoods. When left completely unsecured and open to casual entry, vacant properties attract criminal activity and unauthorized occupancy and pose a significant fire danger. Both vacant houses and abandoned lots can harbor rats and other vermin as well as pose dangers for neighborhood children.[71] Because abandoned houses can inflict fire and water damage on adjacent houses, neighboring property owners have encountered, sometimes insurmountable, difficulties in obtaining casualty and liability insurance for their own properties.[72] The lack of such basic protection can make mortgage financing unavailable or even cause a current mortgage loan to be declared in default despite the owner being current on his or her monthly payments.[73] Given the variety of serious spillover effects, one can easily imagine how a lone vacant house can diminish the value of compliant houses within a block or two by 1.5% to 3%.[74]

Given the severity of the impact of abandonment, local governments would apparently be well-served to aggressively pursue enforcement of any relevant code in all cases. And indeed, addressing vacant properties has become an urgent priority for many older cities. But, the market conditions of a neighborhood dramatically impact the ability of code enforcement authorities to compel the rehabilitation of dilapidated houses.

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71. Brian Nordli, *Boy Killed in Fire was Playing with Brother Inside Vacant Home*, LAS VEGAS SUN (May 2, 2013, 5:15 PM), http://www.lasvegassun.com/news/2013/may/02/house-fire-claims-life-las-vegas-child.

72. MARGARET BASS ET AL., VACANT PROPERTIES: THE TRUE COST TO COMMUNITIES 11 (2005).

73. *See e.g.*, *Federal National Mortgage Association Indiana Mortgage Form*, FANNIE MAE §5, https://www.fanniemae.com/singlefamily/security-instruments (last visited Apr. 11, 2016); *Federal National Mortgage Association Multistate Fixed-Rate Note*, FANNIE MAE § 10, https://www.fanniemae.com/singlefamily/notes (last visited Apr. 11, 2016).

74. Stephan Whitaker & Thomas J. Fitzpatrick IV, *The Impact of Vacant, Tax-Delinquent, and Foreclosed Property on Sales Prices of Neighboring Homes* 35 (Federal Reserve Bank of Cleveland Working Paper 11-23R).

An example will illustrate the impact of neighborhood real estate markets. Imagine a freestanding wood-frame house with 1,500 square feet of interior space. If this house has been unoccupied and neglected for more than a year or two, it may have sustained significant damage to the exterior doors and windows exposing its interior to the elements. At $50 per square foot, a conservative, full-scale attempt to bring this vacant house into full code compliance would cost $75,000. Even properties that can be made ready for occupancy for substantially less nearly always require more cash than a typical owner would have on hand for ordinary repairs.[75] Since elimination of a vacant house nuisance always involves a major capital investment, no sensible response strategy can ignore the importance of the return on that investment. Even if an owner is willing to make repair expenditures that cannot be recaptured through increased use, income, or resale value, no lender may be willing to provide the necessary funds. With so much money involved, the financial feasibility of that capital investment often dictates whether or not it goes forward, the owner's obligations under local codes notwithstanding.

Nothing limits the ability of a property to make a return on rehabilitation investment more than the weakness of the surrounding real estate market. If nearby houses, even ones not impacted directly by the abandoned property, are not selling for more than $50,000, it is unlikely that a $75,000 investment will pay off for the renovating owner of the vacant house. In many Rust Belt inner-city neighborhoods, inhabitable homes can be purchased for less than $25,000. But, if such properties are allowed to fall into severe disrepair, their rehabilitation will not necessarily be achievable for less than $25,000. As such, their owners may simply walk away from them rather than throw good money after bad.

Local building codes allow authorities to impose fines and even seek court orders against owners that fail to bring vacant properties into basic code compliance.[76] But, even these powerful

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75. Leila Atassi, *Cleveland's Glut of Vacant Housing Could Cost Billions to Eliminate at Current Pace*, CLEVELAND PLAIN DEALER (Sept. 25, 2011, 3:02 PM), http://www.cleveland.com/metro/index.ssf/2012/09/clevelands_glut_of_vacant_hous.html.

76. *See e.g.*, INT'L BLDG. CODE § 116.1 (2012); IND. CODE §36-7-9-1 (2015).

remedies will have limited impact on an owner that lacks the cash to return the property to productive use. They certainly will not induce a third party to buy the property and make a clearly bad bet by rehabbing the house. Likewise, no court order or fines will induce a bank to lend the desperate owner money on such a property, even if it happens to be free and clear of any preexisting mortgages. For those relatively few owners with the available resources to bring the property up to code, coercion may make all the difference. Even here though, courts may be reluctant to require them to make the property habitable if more modest means of mitigating the nuisance effects on surrounding properties are available.

For those vacant properties, however, located in neighborhoods with stronger real estate markets, the prospects are quite different. Once renovated, a formerly vacant property should be able to command the same rent or sale price as comparable properties on the same block. If those values are sufficient to justify the cost of the renovation, then the question shifts from whether, when or how the repairs are to be made to why not immediately, especially when code enforcement looms as an additional inducement. Many times, a financially prudent renovation of a vacant house is delayed indefinitely by an owner's unwillingness or ability to carry out the repairs. Coercion by code enforcement remedies functions to force such an owner to internalize the costs imposed on the neighborhood. If the owner is incapable of bringing about the repairs, then a voluntary sale may be the best solution. If the owner's obstinacy, total absence, or title problems with the property limit the prospects of market transfer, then a more innovative code enforcement procedure may be needed.

In the early 1990's, the City of Baltimore amended its Building Code to create a special proceeding that authorized a court to appoint a receiver for an unoccupied residential property with serious, long-standing code violations.[77] Like receivership remedies for occupied multifamily buildings that had been enacted in large cities, this vacant house receivership proceeding authorized the receiver to place a super-priority lien against the property for any code-related expenses incurred. Unlike those preexisting approaches, however, the Baltimore version of receivership al-

77. BUILDING, FIRE, AND RELATED CODES OF BALTIMORE CITY §121 (2013).

lowed for an almost immediate foreclosure on that lien, if the owner or one of the affected mortgagees did not step forward and commit to immediate elimination of the code violations.[78] The ordinance provided for a special auction process that required the foreclosing receiver to ensure that all bidders were ready, willing, and able to bring the property into full code compliance.[79] Although this pre-renovation sale remedy is far from universal, Ohio and Indiana have also enacted similar vacant building receivership provisions.[80] As more jurisdictions see the benefit of being able to "fire" an owner unwilling or incapable of renovating his or her property, neighborhoods still strong enough to support renovations of their vacant properties will have the legal means to achieve them.

Comparing the truly distressed areas with stronger neighborhoods, we see that vacant properties virtually identical in their defects may have completely different futures depending on the values of the occupied properties around them. Neighborhood market strength so strongly determines the economic feasibility of major repairs that even equally aggressive code enforcement in each situation will not significantly improve the rehabilitation prospects for the vacant house in the deteriorated neighborhood. Those houses will not be fixed up one at a time. Rather, investment in them needs to be coordinated. For this reason, cities dealing with large, concentrated inventories of vacant houses have turned to land banking.

Land banking is nothing more than the large-scale acquisition of vacant properties for subsequent return to productive use. Tax foreclosure of delinquent houses and lots allows for land assembly and a bundled disposition process. Land banking strategies can work in tandem with demolition of vacant houses to create usable open space in severely undercrowded neighborhoods. Newly created vacant lots can be made available to neighboring homeowners as side yards and to community greening groups as vegeta-

78. *Id.*; *see* James J. Kelly, *Refreshing the Heart of the City: Vacant Building Receivership as a Tool for Neighborhood Revitalization and Community Empowerment,* 13 J. AFFORDABLE HOUS. & CMTY. DEV. L. 210, 217 (2004).

79. BUILDING, FIRE, AND RELATED CODES OF BALTIMORE CITY §121.

80. OHIO REV. CODE ANN. § 3767.41 (2015); IND. CODE §36-7-9-20 (2015).

ble gardens and pocket parks. By gaining control and taking responsibility for vacant properties right now, land banks can set the stage for a grounded move forward for communities contending with decades of demographic decline. But, while land banking may offer a viable future to the distressed neighborhood, it does so on a much more extended timetable than the revitalization offered to the healthier neighborhoods receiving targeted, aggressive code enforcement.

One neighborhood receives immediate renovation of its remaining vacant properties while another receives demolitions and long-term plans for future revitalization. The Fair Housing Act implications of the stark difference, at least in the short run, between these governmental responses becomes more clear when we recognize that the truly distressed neighborhoods, especially in older cities in the Northeast and the Midwest, are overwhelmingly occupied by African-Americans. On the other hand, the healthier neighborhoods, even in cities with large African-American populations, tend to be a mix of majority-white and majority-black areas. Rather than closing the gap between Racially Concentrated Areas of Poverty and more viable neighborhoods, market-sensitive code enforcement and land banking seem to be reinforcing and, possibly, expanding it.

Scholars have argued about whether choices made to save those neighborhoods that can be saved while letting others slip away constitute "planned abandonment" of African-American communities.[81] While such academic discussions have continuing

81. In *Planned Abandonment: The Neighborhood Life-Cycle Theory and National Urban Policy*, 11 HOUSING POL'Y DEBATE 7 (2000), John Metzger attacked Anthony Downs "[t]riage planning [as] the synthesis of the redlining thesis and the postriot FHA [greenlining to promote neighborhood stability] antithesis." *Id*. at 24. Metzger defined triage planning as the "target[ing of] federal funds to neighborhoods where there was a moderate decline in property values but not yet a clear downward trend of population loss, housing abandonment, and increasing poverty." *Id*. at 17. For a response by Downs and others, see Anthony Downs, *Comment on John T. Metzger's "Planned Abandonment: The Neighborhood Life-Cycle Theory and National Urban Policy,"* 11 HOUSING POL'Y DEBATE 41 (2000); George C. Galster, *Comment on John T. Metzger's "Planned Abandonment: The Neighborhood Life-Cycle Theory and National Urban Policy"*(2), 11 HOUSING POL'Y DEBATE 61 (2000), and Kenneth Temkin, "*Comment on John T. Metzger's "Planned Abandonment: The Neighborhood*

relevance, jurisdictions depending on CDBG and other HUD funds for their community development programs will certainly be more focused on the recriminations that may come their way as part of the AFH-required community comment process. As market-sensitive vacant property strategies are facially race neutral, they will be as safe from accusations of deliberate discrimination as nearly all local government policies are. Code enforcement strategies, however, that deliver immediate results in many white-majority neighborhoods while offering only distant hope for poor, black areas would seem to raise serious disparate impact issues. But, the case outlined above for market-sensitive code enforcement addresses not only justification but also causation. That is, the argument for not pursuing repair orders as aggressively in the distressed neighborhoods as in healthier blocks is not based on the contention that the resulting renovations would not be enough to significantly improve the more deteriorated communities. Rather, the reality is that more aggressive prosecution of repair orders would not produce any meaningful number of full-scale rehabilitations at all. When it is known that diligent effort will produce only failure, the decision not to even try cannot be said to be the cause of the lack of success.

Nevertheless, it is true that targeting code enforcement resources on the relatively few vacant properties in healthy neighborhoods will not only keep those areas from becoming unable to support individual, uncoordinated renovations but also set them on a path to a decidedly brighter immediate future than the more distressed communities. To the extent that these resurgent neighborhoods have smaller proportions of African-American residents, these revitalization efforts will disproportionately benefit a city's white residents. For this reason, it is vital that market-sensitive code enforcement be accompanied by meaningful land banking efforts so that the gap between a distressed neighborhood and a healthy one can eventually be diminished rather than increased.

Substantive land banking efforts require publicly funded resources. A city housing agency or a specially created land bank authority has been given by the state legislature the ability to obtain the right to foreclose on tax-delinquent vacant houses and lots

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Life-Cycle Theory and National Urban Policy" (3), 11 HOUSING POL'Y DEBATE 55 (2000).

without having to pay the full amount of taxes owed on the properties.[82] Even so, there will be substantial costs in obtaining the necessary information about the titles to these properties and notifying the various stakeholders of their final chance to redeem their interests by paying off the tax debts completely. Once the property is acquired, the land bank will need to spend money to minimize any nuisances associated with the property and to market it for return to productive use. City officials can hope that the sale or rental of properties owned by the land bank might fund these activities, but it is unlikely that land banks focusing on distressed neighborhoods will be self-sustaining. If the value to be gained from assembling dilapidated properties and bundling them for sale clearly produced short-term gain, then there would be little need in the first place for public intervention. Leading national experts call upon land banking advocates to argue for public funding for a land bank "by showing that its activities provide a significant return to the local treasury, either in the form of revenues from property sales or tax revenues generated from properties being placed back in productive use."[83]

HUD acknowledges that AFFH cannot be used to mandate specific spending priorities. Local governments engaged in market-sensitive vacant property strategies retain the discretion as to when, if at all, they pursue land banking in their distressed neighborhoods. If, however, jurisdictions use CDBG funds to aggressively pursue repair orders in viable neighborhood real estate markets and do nothing to stabilize the markets in more distressed neighborhoods, then those jurisdictions will face great difficulties in showing their overall approach to neighborhood revitalization mitigates rather than aggravates racial segregation and the relative lack of decent, affordable housing options for their residents of color.

A local government's commitment to land banking may allow it to argue very persuasively in its AFH report that it has a long-term plan to promote the viability of its racially concentrated areas of poverty. But two aspects of land banking may alienate members of the community anxious to see their neighborhood re-

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82. Frank S. Alexander, Ctr. for Cmty. Progress, Land Banks and Land Banking 76–77 (2011).

83. MALLACH, *supra* note 16, at 141.

stored to its former vitality: the message of defeat communicated by house demolition and the common land-banking practice of selling properties in bundles rather than in single lots. The dangers associated with long-term abandonment of vacant properties[84] require that land banks seriously consider demolishing the houses rather than continuously securing them against entry and the elements. Tearing down these houses sends a clear signal that rehabilitation of these and similar properties in the neighborhood is not feasible. In February 2014, the Mayor of South Bend announced that the City would transform 1,000 vacant houses in 1,000 days. Even though the overwhelming majority of the properties were located in severely distressed neighborhoods,[85] the City was able to renovate 378 of those properties while the rest were demolished.[86] While some might see this as an unexpectedly positive result, some of the owners of the demolished properties feel that they were deprived of the opportunity to fix up the houses they owned. Regina Williams-Preston lost to demolition three such houses that she and her husband had recently purchased after he unexpectedly fell ill.[87] They wanted to be part of a grassroots effort but were unable to convince the City to give them the time they needed to complete renovations. It is not clear whether the City's decisions were based on the weakness of the neighborhood market or on the owners' inability to bring the properties into code compliance right away or some combination of both. What is clear is that Ms. Williams-Preston, as a newly elected member of the South Bend Common

84. *See supra* notes 76–77 and accompanying text.

85. CITY OF SOUTH BEND, VACANT AND ABANDONED PROPERTIES TASK FORCE REPORT 10 (2013), http://southbendin.gov/sites/default/files/files/Code_FinalVATF_Report_2_red.pdf.

86. Erin Blasko, *City Reaches its Vacant and Abandoned Housing Goal*, SOUTH BEND TRIBUNE (Sept. 23, 2015), http://www.southbendtribune.com/news/local/south-bend-reaches-vacant-and-abandoned-housing-goal/article_9ec592d9-efec-52e4-b1ed-45f892ac18ae.html.

87. Erin Blasko, *Candidate: House Issues Due to Illness*, SOUTH BEND TRIBUNE (April 12, 2015), http://www.southbendtribune.com/news/local/candidate-house-issues-due-to-illness/article_f1c751bb-a348-5ace-8545-955815c068d2.html.

Council, wants to explore the racial justice issues raised by the aggressive use of demolition orders in distressed neighborhoods.[88]

Apart from its reliance on demolition, land banking can also frustrate grassroots advocates of revitalization when it advocates that vacant properties be sold in bundles rather than one at a time. When repair orders on vacant houses were not aggressively pursued because the neighborhood market was found to be too weak, those responsible for disposing of these same vacant houses and lots may be skeptical of a development proposal limited to just one property. Land bank staff may determine that it is in the long-term interest of the neighborhood to make sure the properties go to a developer that can create or renovate several houses together and achieve a return that would be unlikely in the case of a much smaller change in the neighborhood. Such developers may have significant resources and be relatively unknown to the long-time members of the community. With both the demolition and bundled disposition aspects of land banking work, local governments committed to the long-term viability must work to involve members of the community in these decisions or be prepared to face widespread backlash after inviting community comments about the fair housing aspects of their land banking efforts. Because the challenges that the AFH process presents to a local government taking innovative approaches to vacant properties arise from the AFH community input component, it is critical that land banks not only practice social equity but also communicate with and involve those most affected by their work.

Even success in land banking can raise racial justice concerns. Once a distressed neighborhood has gained traction with people shopping for places to live, the history and lore of gentrification recast residents from their previous roles as disregarded persons into their new identities as potentially displaced persons. After decades of enduring urban renewal and revitalization efforts, inner-city residents of color have come to believe that if the neighborhood they live in is being improved by money from outside the community, then the intention is to improve it for someone other than them. As a form of urban revitalization that seeks to reestab-

88. *District 2: Regina Williams-Preston*, CITY OF SOUTH BEND, INDIANA, https://www.southbendin.gov/government/content/district-2-regina-williams-preston (last visited Apr. 11, 2016).

lish market activity in distressed neighborhoods, land banks do in fact seek to make these communities attractive to households that have an array of choices of where they can live. Achieving these goals can raise property taxes and rents for residents and small businesses in the community. Since land banks bring potential sites for decent, affordable homes into government ownership, it is entirely reasonable for housing advocates to insist that all, or at least some, of those properties be dedicated to the needs of low- and moderate-income residents. The Community Land Trust ("CLT") model has been put forward as an ideal solution especially in cities such as Philadelphia and Baltimore, where large-scale abandonment exists side-by-side with very exclusive residential development.[89] Community Land Trusts are democratically controlled, nonprofit organizations dedicated to holding land for the benefit of local communities.[90] They typically focus on creating and stewarding permanently affordable owner-occupied homes.[91] The legal mechanisms they use to allow homes to be affordable not only to the original owners but also to future owners as well are uniquely effective with single-family homes.[92] Advocates of equitable development have argued that it is never too soon to plan for high land values and the attendant lack of affordable housing.[93] While a CLT can play a key role in insuring that a reinvigorated real estate market does not drive out the very people who revitalized the community, other measures may also further the goal of

89. Jill Feldstein, *Winning a Land Bank We Can Trust*, SHELTERFORCE (Oct. 2, 2014), http://www.shelterforce.org/article/3910/winning_a_land_bank_we_can_trust2/; BALTIMORE HOUSING ROUNDTABLE, COMMUNITY + LAND + TRUST: TOOLS FOR DEVELOPMENT WITHOUT DISPLACEMENT 24–35 (2015), https://d3n8a8pro7vhmx.cloudfront.net/unitedworkers/pages/239/attachments/original/1453986068/C_L_T_web.pdf?1453986068.

90. James J. Kelly, Jr., *Land Trusts that Conserve Communities*, 59 DEPAUL L. REV. 69, 79–81 (2009).

91. *Id.* at 82.

92. James J. Kelly, Jr. *Homes Affordable for Good: Covenants and Ground Leases as Long-Term Resale Restriction Devices*, 29 ST. LOUIS U. PUB. L. REV. 9, 38 (2009).

93. SHELTERFORCE, THE ANSWER: WHAT'S THE POINT OF SHARED-EQUITY HOMEOWNERSHIP IN WEAK MARKET AREAS (2015), http://cltnetwork.org/wp-content/uploads/2014/04/CLTs-and-Land-Banks-Article1.pdf.

community conservation.[94] Long-time homeowners, especially the elderly, or others living of fixed incomes, may be pressured to sell if rising land values in their neighborhood dramatically increase their property tax burdens.[95] Broad or targeted protections against such increases may promote the socioeconomic diversity in an increasingly attractive neighborhood that can be a core goal of an AFFH strategy.[96]

Whether responding to charges of redlining or making the case for their own AFFH efforts, local governments involved in land banking not only need to get those reading their AFH reports to think in the long term, they must do so themselves. Land banks cannot be just an excuse for not deploying more code enforcement resources to a distressed neighborhood. There must be a long-haul commitment not only to mitigating vacant property nuisances here and now but also reconnecting these communities to the good, services and housing consumers of the metropolitan area. Until this point, this Article has looked at the AFH as a challenge for any community wishing to justify market-sensitive vacant property strategies. But this mechanism for fair housing accountability can also deliver real benefits to cities struggling to get their land banking activities underway.

As noted above,[97] land banks depend largely on tax foreclosure to acquire clear title to the hundreds and thousands of vacant houses and lots in their designated territories. In most states, property tax collection processes are controlled by county governments. Municipal land banks that wish to acquire vacant properties through tax foreclosure often need to go "hat in hand" asking the county for the ability to acquire those vacant properties without having to pay the full balance of the outstanding liens. Sometimes, tax foreclosure reforms enacted at the state level, often as part of push to implement land banking, will give the cities the ability to purchase the tax liens at or below the actual value of the property rather than at the, often much higher, total amount of the public liens on the abandoned property.

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94. James J. Kelly, Jr.*, Sustaining Neighborhoods of Choice: From Land Bank(ing) to Land Trust(ing)*, 54 WASHBURN L. J. 613, 621-22 (2015)

95. *Id.* at 623.

96. *Id.* at 622–24.

97. *See supra* note 84 and accompanying text.

In slow-growth regions with entitlement jurisdictions cities, the surrounding counties themselves not only receive but depend upon Community Development Block Grant funds for their own economic development and neighborhood stabilization work. Their obligation to deal with regional fair housing issues in their AFFH reporting can be an opportunity for cities to exert pressure on them to collaborate in stabilizing inner-city neighborhoods through tax foreclosure reforms that allow land banks to acquire clear title over vacant properties. But, these reforms are far from universal and, where they are lacking, cities remain beholden to counties in their efforts to reconnect distressed neighborhood vacant properties to a functioning real estate market.

As already described,[98] HUD cannot use AFFH to invalidate a policy or practice that is not itself prohibited by law. But, when a county government refuses to release liens or lower the minimum tax sale bid on a vacant property in a city and has no valid reason for doing so, the consequences of that decision for the city's AFFH efforts to create a community with sustainable socioeconomic diversity makes the county's refusal an AFFH issue. Even if the county and the city do not submit a joint AFH, the community input process may allow for several ways for the county to be confronted with its obstruction of revitalization efforts within the municipal boundaries.

98. *See supra* note 37 and accompanying text.

Inclusive Communities: Geographic Desegregation, Urban Revitalization, and Disparate Impact Under the Fair Housing Act

J. WILLIAM CALLISON*

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I. INTRODUCTION

Housing, and in particular affordable housing, is a critical element of urban revitalization for at least two reasons. First, the placement and design of a revitalized community will depend on the extent that it is residential and affordable in nature. Second, the availability of financial resources may depend, at least to some degree, on whether affordable housing is part of the overall revitalization effort.[1]

Both the placement question and the finance question have been part of the affordable housing and community revitalization dialog for many years. Some have argued that the emphasis should be on community development strategies that upgrade the places where people are already living; others have argued that mandates of justice dictate residential integration and changing where people can choose to live.[2] In my view, it is necessary to determine which

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1. *See* J. William Callison, *Achieving Our Country: Geographic Desegregation and the Low-Income Housing Tax Credit*, 19 S. CAL. REV. OF LAW & SOC. JUST. 101 (2010) (discussing project financing using low-income housing tax credits).

2. One community development goal encourages investment in low-income communities, thus "making separate equal." *See* Elizabeth K. Julian, *Fair Housing and Community Development: Time to Come Together,* 41 IND. L.

REV. 555, 555, 557–58 (2008) (noting the 1968 Kerner Commission report's declaration that the country was "moving toward two societies, one black, one white—separate and unequal"; stating that the progressive fair housing and community development movements "have seemed to operate in parallel universes and, at worst, have reflected tension and even conflict that belie their common commitment to social and racial justice[,]"; and arguing that this is a false dichotomy that must be overcome). Another view encourages geographic desegregation. *See* Owen M. Fiss, *What Should Be Done for Those Who Have Been Left Behind?*, *in* A WAY OUT: AMERICA'S GHETTOS AND THE LEGACY OF RACISM 3 (Joshua Cohen, et al. eds., 2003). These issues predate the 1968 Fair Housing Act. *See* THURSTON CLARKE, THE LAST CAMPAIGN: ROBERT F. KENNEDY AND 82 DAYS THAT INSPIRED AMERICA 258–60 (2008) (comparing Eugene McCarthy's and Robert Kennedy's urban plans); ARTHUR MEIER SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 785–89 (1978) (discussing Kennedy's Bedford-Stuyvesant plan). For a historian's perspective, see THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 181–209 (1996). *See also* Philip D. Tegeler, *The Persistence of Segregation in Government Housing Program*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 197 (Xavier de Souza Briggs ed., 2005) (noting that the most important low-income housing development programs are largely unregulated from a civil rights perspective; stating that this reflects a growing emphasis on community revitalization strategies (upgrading the places where disadvantaged people are already living) while efforts to promote residential integration (changing where people can and do choose to live) have faced repeated and seemingly intractable obstacles). Xavier de Souza Briggs argues that public debate over housing policy tends to ignore a "crucial distinction":

> Framed as a question of strategy, the distinction is this: Should we emphasize reducing *segregation* by race and class (through what I term 'cure' strategies), or should we emphasize reducing its terrible *social costs* without trying to reduce the extent of segregation itself to any significant degree (via 'mitigation' strategies)? Put differently, should we invest in changing where people are willing and able to live, or should we try to transform the mechanisms that link a person's place of residence to their opportunity set? . . . For ethical and practical reasons, it is hard to imagine choosing one strategy, always and everywhere, instead of the other . . . .

Xavier de Souza Briggs, *Politics and Policy: Changing the Geography of Opportunity*, *in* THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 310, 329 (Xavier de Souza Briggs ed., 2005). In a more positive vein, although building subsidized housing in high-poverty neighborhoods may initially heighten poverty concentration, it can be argued that over time there will be a lessening of poverty concentration as neighborhoods improve

approach is to be taken, or more likely to determine the appropriate balance between the two approaches, as part of any overall community revitalization plan. As with other discussions of this nature, the law plays a significant role in resolving affordable housing siting questions, raising questions involving both the Fourteenth Amendment's Equal Protection Clause and the Fair Housing Act of 1968 ("FHA").

In order to claim that the siting of housing violates the Constitution's Equal Protection Clause, a plaintiff must be a member of a constitutionally protected class and must plead, and ultimately prove, that the complained-of action or inaction constituted "disparate treatment" resulting from a "[racially] discriminatory purpose."[3] Stated differently, an Equal Protection Clause claim cannot be based on disproportionate effect absent a showing of intent. Since most actors have the sophistication to avoid announcing their discriminatory intent, proof of intent generally relies on circumstantial evidence.[4] Proving intent is thus exceedingly difficult, and housing discrimination cases generally cannot be brought as a constitutional matter. In addition, discriminatory practices often occur due to structural, systematic causes, entirely without specific intent; in such cases, a disparate treatment claim would fail.

Based on the general unavailability of equal protection claims in the housing arena, the focus of this article is on the FHA, particularly on the application of the disparate impact theory under

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and higher-income people move into them. In this view, the LIHTC program is a tool for both neighborhood revitalization and neighborhood integration.

3. See *Washington v. Davis*, 426 U.S. 229, 238–39 (1976), for a discussion on employment discrimination. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), for a discussion of plaintiff's burden in cases alleging housing discrimination.

4. Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973), the Supreme Court adopted a burden-shifting analysis which, in order to prove discriminatory intent, plaintiffs must disprove legitimate reasons offered by the defendant for the defendant's actions. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253–56 (1981) (holding that a defendant need only "articulate legitimate, nondiscriminatory reason" to rebut an allegation of intent. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993) (explaining that even if trial court disbelieves defendant's offered legitimate purpose, verdict does not automatically follow).

the FHA. Courts have recognized that statutory claims can be brought under the FHA using a disparate impact theory, which directs tribunals to consider the racial effects of facially neutral, unintentional practices.[5] In a disparate impact case, the plaintiff does not need to show intentional discrimination.[6] Instead, the plaintiff needs to demonstrate that the defendant has engaged in practices that have a "disproportionately adverse effect on minorities" or other statutorily protected group and show that the practices or policies are not justified by a legitimate governmental rationale.[7] Given the infirmity of constitutional discrimination claims, if there were no disparate impact basis, there would likely be significantly fewer civil rights claims brought under the FHA. Historically, all federal appellate courts have recognized claims for FHA violations under a disparate impact theory.[8] Since the courts of appeals were unanimous in the conclusion that the FHA can be violated through disparate impact, there was concern that the United States Supreme Court's repeated acceptance of these cases on *certiorari* indicated that the Court was likely to reverse the field and hold that disparate impact claims are not cognizable under the FHA.[9] It did not do so, as the next part of this article demonstrates.

II. THE *INCLUSIVE COMMUNITIES* CASE

In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,[10] the Inclusive Communities

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5. See *Griggs v. Duke Power Co*., 401 U.S. 424 (1971), for a decision regarding employment discrimination. For a decision regarding housing discrimination, see *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974). A recent Supreme Court case limited Title VII's disparate impact doctrine with respect to employment discrimination, and created concern whether the doctrine ultimately could withstand constitutional scrutiny. Ricci v. DeStefano, 557 U.S. 557, 584–85, 593 (2009).

6. *See Ricci*, 557 U.S. at 577.

7. *Id.*

8. Most of the appellate cases are cited in *Tex. Dep't of Cmty. Affairs v. Inclusive Cmtys. Project, Inc*. (*Inclusive Cmtys. Project III*), 135 S. Ct. 2507, 2519 (2015).

9. *See* Twp. of Mount. Holly v. Mount Holly Gardens Citizens in Action, Inc., 658 F.3d 375, *cert. granted*, 133 S. Ct. 2824 (2013); Magner v. Gallagher, 636 F.3d 380, *cert. granted*, 132 S. Ct. 548 (2011).

10. 132 S. Ct. 2507.

Project ("ICP"), a nonprofit corporation that promotes housing integration in the Dallas area, alleged that the Texas Department of Housing and Community Affairs ("TDHCA") violated FHA sections 804(a)[11] and 805(a)[12] by allocating too many low-income housing tax credits ("LIHTC") for housing in inner-city neighborhoods and too few for housing in suburban neighborhoods.[13] ICP argued that TDHCA's allocation plan ceased to prioritize the goal of desegregation and caused minorities to be segregated in poor areas of Dallas.[14] TDHCA argued that it legitimately prioritized high-poverty neighborhoods, which often require investment and may have outdated housing stock.[15] The district court accepted ICP's statistical evidence of a disparity in LIHTC allocations and concluded that ICP had established a prima facie disparate impact case.[16] The district court then shifted the burden to TDHCA to

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11. Section 804(a) provides that it shall be unlawful: "To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a) (2014).

12. Section 805(a) provides: "It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a tion, [533] or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3605(a) (2014).

13. *Inclusive Comtys. Project III*, 135 S. Ct. at 2514; *see* Callison, *supra* note 1, at 231–33 (discussing LIHTC allocations). From 1989 to 2008, TDHCA allocated LIHTCs for 49.7% of proposed non-elderly housing projects in areas where white individuals and families made up less than 10% of the population, while allocating LIHTCs for 37.4% of non-elderly housing projects in areas where more than 90% of the population was white. In Dallas, 92.29% of all housing units built using LIHTC financing were located in majority-minority census tracts. *Inclusive Cmtys. Project III,* 135 S. Ct. at 2514.

14. *Inclusive Cmtys. Project III*, 135 S. Ct. at 2514.

15. Inclusive Cmtys. Project Inc. v. Tex. Dept. of Hous. & Cmty. Affairs (*Inclusive Cmtys. Project I*), 860 F. Supp. 2d 312, 319 (N.D. Tex. 2012). Building low-income housing in high-poverty neighborhoods arguably perpetuates segregation by economic class, and ICP argued that it perpetuated racial segregation as well.

16. *Inclusive Cmtys Project III,* 135 S. Ct. at 2514. The district court also held that ICP failed to prove its intentional discrimination claims. *Inclusive Cmtys. I*, 860 F. Supp. 2d at 319.

prove that its stated interests in the allocation were legitimate and that there were no less discriminatory alternatives available.[17] The court assumed the legitimacy question but held that TDHCA failed to prove there were no less discriminatory alternatives to the challenged allocations.[18] The court subsequently issued a remedial order requiring TDHCA to add additional selection criteria for its LIHTC allocations, including awarding points for projects constructed in neighborhoods with good schools and disqualifying projects located in high crime areas.[19]

On appeal, the Fifth Circuit Court of Appeals assumed that ICP established its *prima facie* case and addressed only the issue of whether the trial court had applied the appropriate burden-shifting standard to TDHCA.[20] The appellate court noted that different appellate courts had applied different standards and that following the district court's decision HUD had issued fair housing regulations setting forth a burden-shifting standard.[21] The Fifth Circuit adopted HUD's approach and remanded the case so that the trial court could consider and apply the HUD regulations.[22]

The concurring opinion stated that, on remand, the trial court also "should reconsider the State's forceful argument that [ICP] did not prove a facially neutral practice that caused the ob-

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17. Inclusive Cmtys. Project, Inc. v. Tex. Dept. of Hous. & Cmty Affairs (*Inclusive Cmtys. Project II*), 747 F.3d 275, 279–81 (5th Cir. 2014).

18. *Id.* at 279–80.

19. *Id.* at 280.

20. *Id.* at 280–81.

21. *Id*. at 280–282; *see* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11482 (Feb. 15, 2013) (to be codified at 23 C.F.R. pt. 100). The HUD regulations interpret the FHA to encompass disparate impact liability and establish a burden-shifting framework for disparate impact claims. *Id.* A plaintiff must first make a prima facie case of disparate impact and cannot make such a case if a statistical discrepancy is caused by factors other than the defendant's practice. *Id.* After a plaintiff makes a prima facie showing, the burden shifts to the defendant to show that the challenged practice is necessary to achieve one or more substantial, legitimate and nondiscriminatory purposes. *Id.* The plaintiff can then present evidence that the same purposes can be accomplished without discriminatory effect. *Id.* Although the *Inclusive Communities* decision generally follows the approach taken in the HUD regulations, it is not grounded in deference to the regulatory agency. *Inclusive Cmtys. Project II*, 747 F.3d at 282.

22. *Inclusive Cmtys Project II*, 747 F.3d at 282–83.

served disparity" in LIHTC allocations.[23] It noted that Supreme Court employment discrimination decisions had required more than statistical evidence of a disparity to establish a prima facie case and to shift the burden, and that "plaintiff must specifically identify the facially neutral policy that caused the disparity" in order to avoid dismissal of the case.[24] The concurring opinion also noted that there are numerous criteria for allocating LIHTCs and that the allocation process is "anything but simple."[25] In particular, the concurrence stated that the LIHTC statute advantages projects "located in low income census tracts or subject to a community revitalization plan" and that ICP essentially seeks "a larger share of the fixed pool of tax credits at the expense of other low-income people who might prefer community revitalization."[26] As will be seen, the concurring opinion heavily influenced the Supreme Court's ultimate decision.

The United States Supreme Court granted *certiorari* to review the following question: "Whether disparate impact claims cognizable under the Fair Housing Act?"[27] Writing for a 5-4 majority, Justice Kennedy applied traditional canons of statutory interpretation to conclude that disparate impact claims are legally cognizable but also noted important limitations on the use of disparate impact theory that demonstrate the Court's current conception of the relationship between race and law.[28]

With respect to cognizability, TDHCA argued that statutory differences between the Age Discrimination in Employment Act ("ADEA"), which the Court previously held supports disparate impact liability, and the FHA demonstrate that disparate impact liability is unsupported by the FHA.[29] The Court rejected this ar-

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23. *Id.* at 283–84 (Jones, J., concurring).
24. *See id.* at 283.
25. *Id.* at 284.
26. *Id.*
27. *Inclusive Cmtys. Project III*, 135 S. Ct. at 2513.
28. *Id.* at 2525.
29. *See* Smith v. City of Jackson, 544 U.S. 228 (2005). In *Smith*, a plurality of the Court held that section 4(a)(2) of the Age Discrimination in Employment Act ("ADEA"), which prohibits acts that "otherwise adversely affect" an employee because of his or her age supports a disparate impact claim and held that "the text focuses on the effects of the action on the employee rather than the motivation for the action of the employer." 544 U.S. at 235–36. A

gument and held that there was sufficient evidence of congressional intent that the FHA supports disparate impact claims.[30] Specifically, the Court stated that the phrase "otherwise made unavailable" in FHA section 804(a) "refers to the consequences of an action rather than the actor's intent."[31] The Court also noted that FHA was amended in 1988 after nine courts of appeal had concluded that the FHA encompassed disparate impact claims. This constituted "convincing support" for a conclusion that Congress accepted and ratified the disparate impact rulings.[32] Finally, the Court recognized that the FHA's "central purpose" was served by recognizing disparate impact liability because it roots out systemic problems that have the effect of perpetuating segregation.[33] In addition, it "plays a role in uncovering discriminatory intent" by allowing "plaintiffs to counteract unconscious prejudices and disguised *animus* that escapes easy classification as disparate treatment."[34]

However, in *dictum* the Court articulated "cautionary standards" and stated "disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, *e.g*., if such liability were imposed based solely on a showing of statistical disparity."[35] The Court warned against taking an approach to disparate impact

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concurring opinion in *Smith* noted that ADEA section 4(a)(1)'s "because of" language required discriminatory intent and thus did not support disparate impact liability. *Id.* at 251. TDHCA argued that since the FHA does not contain "otherwise adversely affect" language but only "because of" language, FHA violations require a showing of discriminatory intent. *Inclusive Cmtys. Project II*I, 135 S. Ct. at 2519.

30. *Inclusive Cmtys.Project III*, 135 S. Ct. at 2519–20.

31. *Id.* at 2511. This "results-oriented language" was similar to provisions in Title VII of the Civil Rights Act of 1984, which was construed to allow disparate impact claims in *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), and ADEA section 4(c), discussed in *Smith*. *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971); *Smith*, 554 U.S. at 240.

32. *Inclusive Cmtys. Project III,* 135 S. Ct. at 2520.

33. *Id.* at 2521–22.

34. *Id.* at 2522.

35. *Id*. at 2524, 2512. The fact that the Court's stated limitations on disparate impact analysis are dicta, and thus probably do not have stare decisis effect, point to the importance of the Court's composition in future fair housing cases.

liability that "may be seen simply as an attempt to second-guess which of two reasonable approaches [TDHCA] should follow in the sound exercise of its discretion" in making LIHTC allocations.[36] Instead, housing authorities and private developers should be given leeway to state and explain the valid interests served by their policies.[37] Similarly, courts should not "impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority may seem preferable."[38] The Court thus adopted a deferential attitude toward TDHCA's decisions.

Citing to its earlier decision in *Wards Cove Packing Co. v. Antonio*,[39] the Court stated, "[A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."[40] Further, the Court stated that "policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers'" to housing.[41] This "barrier" requirement stands in contrast to the previous "facially neutral policy" requirement.[42] Thus, imbalance, without more, does not establish a *prima facie* case of disparate impact. In the Court's view, a robust causality requirement prevents race from being used in a pervasive way that would "almost inexorably lead governmental or private entities to use numerical quotas" resulting in "serious constitutional questions" by "perpetuat[ing] race-based considerations rather than mov[ing] beyond them."[43] Thus, if ICP were unable to show a causal connection between TDHCA's policies and a disparate impact, for example because federal law concerning LIHTC alloca-

36. *Id*. at 2522.

37. *Id.* These can include objective factors, such as cost and traffic patterns and subjective factors, such as historical preservation. *Id.* at 2523.

38. *Inclusive Cmtys. Project III,* 135 S. Ct. at 2523.

39. *490 U.S. 542 (1989).

40. *Inclusive Cmtys Project III*, 135 S. Ct. at 2523.

41. *Id*. at 2522 (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

42. *See* Gallagher v. Magner, 619 F.3d 823, 833 (8th Cir. 2010) (holding that plaintiffs "must show that facially neutral policy had significant adverse impact on members of a protected group").

43. *Inclusive Cmtys. Project III*, 135 S. Ct. at 2523–24.

tion priorities limits TDHCA's discretion, then the case should be dismissed. The Court further noted that "remedial orders must be consistent with the Constitution" and must "concentrate on the elimination of the offending practice" through race-neutral means.[44] The Court affirmed the Fifth Circuit Court of Appeals' decision, and remanded the case "for further proceedings consistent with [its] opinion."[45]

III. OBSERVATIONS

1. Disparate impact theory lives. The Court ruled 5-4 that disparate impact claims are recognized under the FHA. *Inclusive Communities* demonstrates that although disparate impact litigation, at least with respect to race,[46] is a costly, burdensome, and low probability strategy, it remains a strategy nonetheless.[47] Potential disparate impact liability creates risk for governmental and private actors, which may cause them to negotiate the fair housing thicket by including racial integration factors in their calculations. In addition, favorable results may be achievable through the settlement of disparate impact claims.

2. When applied as a tool to force racial desegregation in housing, the disparate impact theory is weak.

(a) Robust Causality. Other than its holding that disparate impact claims are actionable under the FHA, another important component to the *Inclusive Communities* decision is the Court's statement that a disparate impact claim relying on statistical disparities must fail if the plaintiff fails to allege facts or produce statistical evidence demonstrating a causal connection between the de-

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44. *Id*. at 2524.

45. *Id*. at 2526.

46. It is important to note that the FHA prohibits discrimination based on race, color, national origin, religion, sex, familial status and disability. *See* 42 U.S.C. §§ 3604–3606, 3617 (2002). *Inclusive Communities* permits disparate impact claims based on the six factors other than race: color, religion, sex, handicap, familial status, and national origin. *Inclusive Cmtys. Project III*, 135 S. Ct. at 2518.

47. *See* Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 393–94 (2013) (concluding that Plaintiffs received positive decisions in fewer than twenty percent of disparate impact cases, and that the success rate has dropped since the 1980s).

fendant's "policies" and the disparity. It is unclear whether this "robust causality requirement", which is phrased by the Court in racial and constitutional terms, applies only in the case of race-based claims, or whether it extends to other FHA claims that do not implicate constitutionally protected categories. It seems likely that *Inclusive Communities* is limited to race and can be expanded only to other constitutionally protected classes, based on the Court's citation to *Wards Cove Packing Co.* and its references to racial imbalance and racial disparities.

In addition, although Justice Kennedy's decision states a broad "robust causality" requirement, *Inclusive Communities* offers little guidance concerning application of robust causality. The guidance that is offered in the majority opinion does little other than indicate that judgments, such as those made by TDHCA, should not be subject to challenge without adequate safeguards, that a "prompt resolution" of disparate impact cases is important, and that decisions that do not equate to "policies" may not be an appropriate subject of disparate impact litigation. Since developers likely do not have "policies" concerning one-time decisions concerning affordable housing location, micro-level location-based claims may not be cognizable even when the location disparately affects minorities. Larger institutions, such as governmental entities, banks and insurance companies, are more likely to have placement, financing, lending and insurance underwriting "policies" that bring disparate impact analysis into play.

However, even with respect to governments and large institutions, the "policy" requirement can be important. Since the *Inclusive Communities* decision, one trial court has considered the robust causality requirement. In *City of Los Angeles v. Wells Fargo & Co.*, the City of Los Angeles argued that Wells Fargo engaged in discriminatory and predatory lending practices that resulted in a disparate number of residential home foreclosures in Los Angeles.[48] The court granted summary judgment for Wells Fargo

48. City of Los Angeles v. Wells Fargo & Co., No. 2:13-cv-09007-ODW, 2015 WL 4398858, at *1 (C.D. Cal. July 7, 2015). The City argued that Wells Fargo engaged in "reverse redlining" by extending mortgage credit or predatory terms to minority borrowers in minority neighborhoods on the basis of race and ethnicity. *Id.*

because the City failed to point to a policy or policies that caused the disparity:

> First, the City fails to actually identify any policy that created an artificial, arbitrary or unnecessary barrier. Instead, the City argues that the *lack* of a policy [e.g., adequate monitoring policies] produced the disparate impact. There is no authority that suggests that disparate impact claims are designed to impose new policies on private actors. Guidance from the Supreme Court is unambiguous that disparate impact claims must solely seek to *remove* barriers . . . .
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> Second, the City is essentially advocating for racial quotas . . . . Such a policy is inapposite to instructions from the Supreme Court. . . . The City . . . advocates for the implementation of "serious constitution" concerns.[49]

Previous fair-lending cases relied on alleged statistical disparities to proceed past the dismissal stage, and the courts imposition of a positive "policy" requirement can be a formidable obstacle to a disparate impact case.

The Court's emphasis on an early causation showing, coupled with its limitations on the use of statistical discrepancies, renders housing disparate impact claims particularly difficult. For example, the Court noted that "[i]f a statistical discrepancy is caused by factors other than the defendant's policy, a plaintiff cannot establish a *prima facie* case, there is no liability."[50] In effect this could mean that district courts may mandate more robust statistical controls to eliminate alternate causes for a disparity. It is also unclear how courts will engage in multivariate analysis, in which multiple factors including nonracial factors have a statistically significant effect, to make these determinations.

(b) Protections for defendants when the burden does shift.

49. *Id*. at *8 (emphasis added).
50. *Inclusive Cmtys. Project III*, 135 S. Ct. at 2514.

Even if a plaintiff pleads and presents a *prima facie* disparate impact claim, the Court emphasized that "[a]n important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies."[51] Thus, "[e]ntrepreneurs must be given latitude to consider market factors" and zoning officials "must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture)."[52] Since "[t]he FHA does not decree a particular vision of urban development,"[53] it seems likely that a determination to revitalize an urban core, even if it means concentrating or deconcentrating affordable housing serving protected classes, would satisfy a "valid interest" test. However, it remains to be seen the type and strength of interest that is required to meet the "valid interest" test.[54]

Further, the court reaffirmed the lower court ruling that, after the defendant provides a "valid interest" served by its policy, the plaintiff has the burden of demonstrating that the justification is a pretext or must be rejected.[55] To meet that burden, the plaintiff must demonstrate "that there is 'an available alternative . . . practice that has less disparate impact and serves the [defendant's] legitimate needs.'"[56] In this equation, however, it is not sufficient for the plaintiff to second-guess the policies since "the FHA is not an instrument to force housing authorities to reorder their priorities."[57]

In conclusion, while *Inclusive Communities* did not eliminate disparate impact as a cause of action under the FHA, it severely limited the scope of the theory and expanded the discretion of the policy-making defendant.

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51. *Id.* at 2522.
52. *Id.* at 2523.
53. *Id.*
54. *Id.* at 2522.
55. *Id.* at 2518–23 (stating that "so too must housing authorities and private developers be allowed to maintain a policy if they can prove it necessary to achieve valid interest.").
56. *Id.* at 2518 (quoting Ricci v. DeStefano, 557 U.S. 557, 578 (2009)).
57. *Id.* at 2522.

(c) Limited Remedy. Even if a disparate impact claim succeeds on the merits, *Inclusive Communities* demonstrates that available remedies may be severely limited in order to "be consistent with the Constitution."[58] Thus, remedial orders should concentrate on elimination of the offending practice and, if additional measures are adopted "courts should strive to design them to eliminate racial disparities through race-neutral means."[59] It is likely that remedial orders imposing or perhaps even referring to, racial targets or quotas would be constitutionally offensive.[60]

3. Disparate impact also limps when applied as a tool to eliminate consideration of race. As noted above, the majority decision in *Inclusive Communities* is highly deferential to governmental actions. Although this means that it will be difficult for plaintiffs to argue that governmental and private action insufficiently addresses racial desegregation, it also means that other plaintiffs will have a difficult case when arguing that governmental and private actions are unlawful simply because they are motivated by racially integrative purposes. In this way, Justice Kennedy's decision in *Inclusive Communities* can be viewed as adopting the position he articulated in his concurring opinion in the *Parents Involved* case.[61]

In *Parents Involved in Community Schools v. Seattle School District No. 1*, Justice Kennedy wrote that state actions that do not racially classify individuals are not constitutionally suspect simply because their purpose is racial integration.[62] This distinction between classification and purpose is constitutionally im-

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58. *Id.* at 2524.

59. *Id.*

60. *Id.* at 2525; *see* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

61. *Parents Involved*, 551 U.S. at 789; *see also* Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411 (2013).

62. 551 U.S. at 788–90 (stating that governmental actors "may pursue the goal of bringing together students of diverse backgrounds and races through other means [i.e., not racial classifications], including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in targeted fashion; and tracking enrollments, performance and other statistics by race.").

portant, but the Court has never defined the term "classification."[63] By ruling that the FHA provides for disparate impact liability in some race-based cases, the Court essentially ruled that disparate impact law is itself constitutional and disavowed the "color blindness" argument espoused by Chief Justice Roberts and other members of the Court.[64] However, having done so, the Court focused on issues involving the application of the disparate impact theory and stated that considering race in an effort "to foster diversity and combat racial isolation" is a legitimate purpose for a policy.[65]

Notwithstanding the legitimacy of racial considerations, Justice Kennedy's opinion is clear that "we must remain wary of policies that reduce homeowners to nothing more than their race,"[66] and that race cannot be used in a "pervasive way" that would lead to the use of numerical quotas.[67] In essence, *Inclusive Communities* creates an environment of disparate impact law that allows governmental and other actors to consider race, unless consideration tips to classification and quotas. This is the flip-side of

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63. *See* Reva B. Siegel, *Foreward: Equality Divided*, 127 HARV. L. REV. 1, 48–49 (2013). The Court has held that racial classifications trigger strict constitutional scrutiny. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). The disparate treatment case demonstrates that discriminatory intent can cause a facially neutral policy to be treated as a racial classification, thereby triggering strict scrutiny. *Id.* at 213. The Court had not, at least until *Inclusive Communities*, decided whether disparate racial impact triggered strict constitutional scrutiny. *See* Ricci v. DeStefano, 557 U.S. 557, 595–56 (2009) (Scalia, J., concurring) ("[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us now to begin thinking about how—and—on what terms—to make peace between them.").

64. *See Parents Involved*, 551 U.S. at 701, 748 ("The way to stop discrimination based on race is to stop discriminating on the basis of race."). On the other hand, the Court also did not adopt an anti-subordination theory, which might allow explicit racial consideration if used to benefit a marginalized racial group. *See* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L. J. 1278, 1281 (2011).

65. *Inclusive Cmtys. Project III,* 135 S. Ct. at 2525 ("When setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor from the outset.").

66. *Id.*

67. *Id.* at 2523.

the Court's limitations on using disparate impact theory to force the policymaker's hand since that might lead to prohibited racial classification and quotas. In either event, *Inclusive Communities* is deferential to governmental and private actors that can state some legitimate purpose for policies that do not cross over the line to constitute "classification." Stated differently, *Inclusive Communities* demonstrates that it will be very difficult both to force action to create racial integration and to forestall action that does purposefully encourage racial integration.[68]

4. *Inclusive Communities* may change the focus of fair housing litigation to discriminatory intent. As noted above, under *Inclusive Communities* it may prove exceedingly difficult for plaintiffs to allege and succeed on a disparate impact claim. Arguably, this may put pressure on "disparate treatment" arguments that actions or inactions, which might not meet the "policy" requirement, intentionally discriminate on the basis of race and, therefore, fail under the Equal Protection Clause's strict scrutiny standard. In this regard, one should not ignore the Court's statement that the "recognition of disparate-impact liability . . . plays a role in uncovering discriminatory intents," and that such intent can include both "disguised animus" and "unconscious prejudices."[69] This reference to "unconscious bias" may lead to further development of disparate treatment law.

IV. CONCLUSION

As a doctrinal matter, *Inclusive Communities* understanding of equal protection Justice Kennedy articulated in the *Parents Involved* case—namely, state actions that do not classify individuals based on race do not violate the Constitution only because they are motivated by racially integrative purposes. Thus, disparate impact theory does not surrender to equal protection theory as long as disparate impact does not stray into classification waters. *Inclusive Communities* thereby gives a fuzzy and perhaps unstable roadmap but a roadmap nonetheless, to guide state and private actors in

68. *Id.* at 2525 (explaining that disparate impact claims encourage "race-neutral efforts to encourage revitalization of communities that have long suffered the consequences of segregated housing patterns" and promote efforts "to foster diversity and combat racial isolation with race-neutral tools").

69. *Id.* at 2522.

making housing placement and financing decisions. It is clear that in the Court's view, disparate impact does raise constitutional questions, but these questions involve the application and not the existence of disparate impact theory. The focus will now likely shift to particular questions of whether consideration and purpose slide into prohibited classifications.

It seems clear that the Court has steered a path between the anti-subordination theory, in which explicitly racial considerations would be constitutional if used to benefit a marginalized class, and color-blind theory, in which all explicit racial considerations would be presumptively unconstitutional. *Inclusive Communities* attempts to straddle these approaches and supports a pragmatic view permitting racial considerations while retaining a renunciation of racial classifications and quotas. Race may be considered, but consideration must be expressed by using race neutral proxies and tools.

The University of Memphis School of Law
Fall 2015 Externship Program

Objectives, Policies, and Procedures

The University of Memphis Externship Program is designed to expose law students to legal practice in a wide range of contexts while providing a framework for understanding and managing the practical, ethical, and personal challenges that are an inherent part of the legal profession. Stepping outside of the traditional classroom, externs are presented with the opportunity to learn by doing and observing under the direction of a field placement supervisor. To maximize this hands-on learning experience, externs participate in a faculty-led seminar in which they reflect upon and assess the skills, relationships, issues, and mindsets that prevail in the practice setting.

While specific objectives will necessarily vary across the spectrum of field placements, the Externship Program aims to help each student extern achieve the following goals:

- To strive toward *practice readiness* through continued development of legal skills, including research and writing;
- To better understand the day-to-day work of a lawyer;
- To apply classroom learning to the world of legal practice;
- To develop the habits of a *reflective practitioner* who understands how to learn from experience;
- To identify, explore and address issues of legal ethics and professional responsibility;
- To evaluate and utilize various approaches to problem solving in the context of real-life legal work;
- To improve upon essential communication and relationship-building skills;
- To explore career interests and goals; and
- To build professional and personal networks.

Through participation in both the field placement and classroom seminar aspects of the Externship Program, it is anticipated that students will further hone their lawyering skills at both practical and theoretical levels, learning from experience, from synthesis, from critique, and from responsibility.

Policies and Procedures of the Externship Program

A. Student Eligibility

1. Prerequisites to Application and Enrollment

Students who have successfully completed their required first year of coursework and at least 28 credit hours toward graduation are eligible to enroll in the Externship Program. Additional prerequisites may be set upon request by specific field placement offices and/or at the discretion of the Director of Clinical Programs and Externships. In exceptional circumstances, the prerequisites may be waived with the approval of the Director of Clinical Programs and Externships in consultation with the Associate Dean for Academic Affairs.

2. Academic Standing

Students must be in good academic standing in the semester preceding their participation in the Externship Program.

In consultation with the Associate Dean of Academic Affairs, the Director of Clinical Programs and Externships retains the discretion to base program admission on a student having compiled an academic record that exceeds the good standing requirement. A student falling below good academic standing (placed on academic probation) while participating in the Externship Program may continue participating barring extraordinary circumstances.

3. *Limitations on Externship Credit and Enrollment*

Students may enroll in the Externship Program subject to the following limitations:

a. In accordance with the Law School's Academic Regulations, not more than a total of twelve (12) credit hours may be utilized toward satisfying graduation requirements by satisfactorily completing the following courses: Any Externship, Law Review, Moot Court (including credit for participation on travel teams), and independent research.

b. For satisfying graduation requirements, a student is permitted a total of three (3) externships, two (2) clinic courses, or a combination of one (1) clinic and two (2) externship courses. A student may not repeat the same clinic or externship.

c. A student may not enroll in both a Clinic course and the Externship Program in the same semester or summer session.

d. Students may not take more than a total of sixteen (16) hours, including enrollment in the Externship Program, in the semester (or its equivalent in the summer) in which they are enrolled in the Externship Program.

e. For enrollment purposes, students who have already taken and received credit for the participation in the Externship Program will not receive priority for enrollment in the Externship Program for a second semester

or summer session.

f. The Director of Experiential Learning, after consultation with the Associate Dean of Academic Affairs, may grant waivers, on a case-by-case basis, to permit repetition of a placement in the Externship Program or enrollment in the Externship Program that may result in the student exceeding the ungraded credit limitation or the limitation on the number of externships in which the student may enroll.

B. Student Application Requirements

1. *Pre-Application Processes*

a. Prior to applying for enrollment in the Externship Program, students must thoroughly familiarize themselves with the Objectives and Goals of the Externship Program as well as the Program's Policies and Procedures.

b. Although not required, interested students should make every effort to attend the Externship Information Session that will be held in advance of registration each semester. Students should also be encouraged to meet with the Director of Experiential Learning to discuss any questions or concerns in advance of moving forward with applications for enrollment.

2. *Application Process*

Students must apply for an Externship Program placement by completing the Externship Program Application. It is anticipated that the application will be distributed to students via electronic means (e-mail, law school website, Simplicity, etc.) and made available in the Office of the Director of Experiential Learning. In addition to submitting the completed application, students may be asked to submit a cover letter, a current professional resume, a writing sample, and/or a current law school transcript.

3. *Security Clearance*

Many externship field placements (primarily judicial and government) require a security clearance, a process that may take several months. If a student seeks an externship field placement that requires security clearance, it is expected that the student will work with the Director of Experiential Learning to provide the field placement with all information necessary to secure that clearance.

C. Standards for Selection of Students for Externships

Offers for enrollment in the Externship Program will be made by and at the discretion of the Director of Experiential Learning. In making enrollment decisions, the following factors will be considered:

1. *Compatibility*

The Director of Experiential Learning will assess whether the placement a good fit for the student and whether the student has the legal, professional, interpersonal and intellectual

skills for a productive externship experience in the particular placement. In making this determination, the Director may examine the student's law school transcript, though academic performance will not necessarily be conclusive. In addition, an interview with the student, input from faculty, consultation with the prospective field placement, and performance in other experiential learning settings may be considered.

2. *Reason for Wanting to Participate in the Placement*

The Director of Experiential Learning will consider whether the placement fits into the educational goals and career interests of the student.

3. *Compliance with Requirements and Prerequisites*

The Director of Experiential Learning will consider whether the student has complied with all placement and Externship Program requirements and prerequisites.

D. Requirements after Acceptance of an Externship Placement

1. *Acceptance and Registration*

Once a student accepts an offer to enroll in the Externship Program, that student will be formally enrolled by the Registrar's office. Once enrollment is complete, a student will not be permitted to drop the Externship course without petitioning for and receiving approval of the Director of Experiential Learning to withdraw from the course.

2. *Withdrawal*

If a student accepts an offer for enrollment in the Externship Program, he or she will not be able to withdraw the commitment except for compelling reasons. To obtain permission for withdrawal, the student must immediately, upon the knowledge of such compelling reasons, petition in writing to the Director of Experiential Learning. The petition must specify the compelling reasons for withdrawal. Failure to petition and receive approval may result in a grade of "Unsatisfactory" for the course and jeopardize the student's chances of being considered for future enrollment in the law school's Experiential Learning courses, including clinical programs and externships.

3. *Compensation*

Students may not accept compensation of any kind for externship work. Where it is the practice of a particular field placement to reimburse reasonable out-of-pocket expenses related to the placement, the extern may receive such reimbursement.

4. *Fulfillment of Externship Placement Requirements*

Subject to the Policies and Procedures of the Externship Program, externs must comply with all working hours requirements and conditions implemented by the field placement. Field placement will generally run from the first day of instruction through the last day of instruction of the academic semester or session. It is expected that the extern will be at the placement each week of the semester or summer session. Students must complete their externship in the semester or term they begin it. A student who fails to complete an externship or who receives a grade of "Unsatisfactory" may be barred from future

enrollment in any of the law school's Experiential Learning courses, including clinical programs and externships.

5. *Completion of Externship Seminar Requirements*

Student externs will be required to attend and fulfill the requirements of a regularly convened, faculty-led classroom seminar designed to focus on and enhance the learning that the externs will be doing in their field placements.

Requirements for the classroom seminar, as well as for submission of Externship-related work product and time sheets, will be specified in the course syllabus for the Externship Program.

In general, it is anticipated that students will be expected to reflect on their field placement experiences through a series of written assignments, including a Final Self-Assessment and Reflection Memorandum. Written assignments may focus on the effective development of legal skills; confidentiality, ethics, and professional responsibility; expectations, conduct, and realities of externship work; learning from experience and reflection; workplace communication and feedback; workplace teams and leadership; community and social responsibility of lawyers; the legal system; developing lawyer skills; and job stress and job satisfaction.

6. *Confidentiality*

The extern is expected to hold in strictest confidence all communications received in the course of the externship placement that are not matters of public record, and to adhere fully to the standards of professional conduct set forth in the Code of Professional Responsibility of the American Bar Association, the Tennessee Rules of Professional Conduct, and any other applicable rules of professional ethics (e.g., codes of judicial conduct)

7. *Conflicts of Interest*

All externs must avoid conflicts of interest based on past or concurrent employment (or volunteer work) situations. Some externship field placements may prohibit an extern from engaging in concurrent employment or volunteer work. An extern who does plan to engage in concurrent employment or volunteer work during the externship semester must confer with the Director of Experiential Learning, the externship field placement supervisor, and the employment or volunteer work supervisor before the start of an concurrent externship/employment work arrangement. Externs with questions about a potential conflict should immediately consult the Director of Experiential Learning.

8. *Unlawful Practice of Law*

Within their placements, externs may have the opportunity for contact with clients or potential clients, the court, other attorneys, etc. Externs should be extremely cautious in their communications so that they are limited to and do not overstep the scope of work that they are authorized to perform. All communications should be prefaced by disclosing the student's extern status.

9. *Professionalism*

Externs are required to exhibit professional conduct at all times during their externships. Students will be appropriately attired as determined by the field placement supervisor. Students will attend all called meetings of the field placement supervisor and/or the faculty supervisor, unless excused by the appropriate party. Students will be familiar with the appropriate Rules of Procedure and other assigned materials.

In the sole judgment of the Director of Experiential Learning, any extern failing to achieve an acceptable level of professionalism may have the academic credit for his/her placement reduced or eliminated.

10. *Removal from Externship Program*

At the discretion of the Director of Experiential Learning, students may be removed from the Externship Program for unsatisfactory or untimely work, unethical conduct, violation of any agreements with the field placement supervisor or law school, breaches of confidence, inappropriate behavior or attire, violation of any rules of court, or at the request of the field placement supervisor.

Credit and Grading

A. Grading

1. Upon completion of the Externship semester, all externs will be assigned a grade of Excellent, Satisfactory, or Unsatisfactory.

2. The determination of grade assignment and credit allocation will be made by the Director of the Experiential Learning after receiving a student evaluation prepared by the field placement supervisor at semester's end. The assigned grade and allocation of credit will be based upon satisfactory and timely completion of the requisite externship hours and work assigned during the placement, satisfactory participation in the classroom seminar component of the Externship Program course (including consideration of the work product), the evaluation of the field placement supervisor, and the student's compliance with all course requirements.

3. At the discretion of the Director of Experiential Learning, any student enrolled in an externship placement who fails to comply with any requirements of the Externship Program (set forth herein or in the course materials), of the Student Honor Code, or appropriate regulations governing the profession, may be assigned a grade of "Unsatisfactory," awarded no credit and be barred from future enrollment in any of the law school's Experiential Learning courses, including clinical programs and externships.

Cecil C. Humphreys
School of Law

Lawyering Fundamentals
Course Syllabus

Overview
Lawyering Fundamentals (LF) lasts three days. You will attend classes in which you will be questioned on the assigned reading, answer law school exam-style questions, and receive helpful strategies for success in law school. Most importantly, the course will attempt to demystify your law school classroom by previewing what you will experience and teaching you how to prepare to learn in this unfamiliar, and often intimidating learning environment. Our goal is to minimize the mystery of law school so you acclimate and succeed.

Class Meeting Times
Classes will meet from 9:00 am to 4:00 pm on the following dates:

Wednesday, August 10th
Thursday, August 11th
Friday, August 12th

Course Professors
Professor Everett Chambers
Professor Samuel Farkas

Course Binder
You will receive a course binder containing reading assignments, homework assignments, in-class exercises, reflection entries, and other course related materials. Please bring your course binder with you to class every day. As detailed below, there are daily pre-class assignments, including **assignments that you must complete prior to the first day of class.**

Course Site
LF also has an online classroom component called the Matrix. You will receive log in information to access the Matrix course page prior to the first day of class.

Reading and Homework Assignments

You are expected to complete the reading and homework assignments **prior to each class**. This will include uploading completed assignments to the Matrix course site. You may be given additional assignments during class. Your Professors reserve the right to change assignments with sufficient notice.

Please see the assignment schedule below:

Before Day One

Complete the following assignments before the first day of class on August 10, 2016:

1. Read Welcome Letter
2. Read: Course Syllabus
3. Read: Lawyering Fundamentals Learning Outcomes
4. Read and brief the following cases on Intentional Torts*—Intent (p.17-30):
   - *Garratt v. Daily*
   - *Spivey v. Battaglia*
   - *Ranson v. Kitner*
   - *McGurie v. Amy*
   - *Talmage v. Smith*
5. Skim: FAQ on Legal Reading
6. Read: FAQ Case Briefing
7. Read: Preparing Yourself for Learning in the Socratic Classroom
8. Skim: Case Briefing Cheat Sheet
9. Skim: Sample Case Brief
10. Skim: Glossary of Legal Terms
11. Complete: Reflection Entry #1*
12. Complete: Writing Sample (The Fruit Problem)*
13. Complete: Pre-Course Survey*

*Upload completed assignment to the Matrix before the start of Day One.

Before Day Two

Complete the following reading assignments and homework before the second day of class on August 11, 2016:

1. Case reading and briefing*
   Intentional Torts—Battery (p.30-37):
   - *Cole v. Turner*

- *Wallace v. Rosen*
- *Fisher v. Carrousel*

Intentional Torts—Assault (p.37-41):

- *I de S et ux. V. W de S*
- *Western Union Telegraph Co. v. Hill*

2. *Wallace* case briefing homework assignment*
3. Complete Daily Quiz #2*
4. Reflection Entry #2*

*Upload completed assignment to the Matrix before the start of Day Two.

Before Day Three

Complete the following reading assignments and homework before the third day of class on August 12, 2016:

1. Case reading and briefing*:
   Intentional Torts—Intentional Infliction of Emotional Distress & Consent (p.51-55;92-93)
   - *State Rubbish Collectors Ass'n v. Siliznoff*
   - *O'Brien v. Cunard S.S. Co.*
2. *Siliznoff* case briefing homework assignment*
3. Outline Intent, Assault & Battery*
4. Complete Daily Quiz #3*
5. Reflection Entry #3*

*Upload completed assignment to the Matrix before the start of Day Three.

After Day Three

1. Reflection Entry #4*
2. Post-Course Evaluation*
3. Final Exam Review

*Upload completed assignment to the Matrix one date specified by Professor.

Final Exam

The Lawyering Fundamentals exam will be administered on the final day of class, Friday, August 12th. The final exam will include short answers, essay, and multiple-choice questions. Please bring your laptop.

Lawyering Fundamentals
Welcome Letter

Dear Student,

Congratulations on your acceptance into the University of Memphis, Cecil C. Humphreys School of Law. Training to become a lawyer is a very exciting undertaking. We are excited to have partnered with the University of Memphis, Cecil C. Humphreys School of Law to provide you with an intensive, three-day course in Lawerying Fundamentals as part of your Orientation program. Barbri is very pleased to play a small part (through *Lawyering Fundamentals)* in laying a foundation on which others will build during the rest of your legal training.

Overview

Lawyering Fundamentals (LF) simulates the first semester of law school. It includes daily classes during which you will be questioned on the assigned reading, answer law school exam-style questions, and receive helpful strategies for success in law school. You will also sit for a final exam at the conclusion of LF. Although the exam does not count for law school credit, it will be a tool to help us and you assess your performance to assist you in achieving your potential. However, most importantly, the course will help demystify some of the law school teaching methods to help you acclimate and succeed. Consider LF the first step of your legal training!

Preparation

LF requires the same effort that will be expected of you in law school - but don't worry, it will be worth it! Like preparing a good meal or building a meaningful relationship—your enjoyment of it and the outcome will be equal to the effort and attention you put into it.

Pre-Class Assignments

You will need to complete 12 items **prior to the first day of Lawyering Fundamentals on Wednesday, August 10, 2016**. We have suggested a time limit for each item, and we even tell you when you can skim a document. Please pace yourself so that you can complete everything. You will need to spend just under 5 hours to complete everything thoroughly.

1. Read: Course Syllabus (10 minutes)
2. Read: Learning Fundamentals Learning Outcomes (15 minutes)
3. Read **and brief** the following Intentional Torts cases—Intent (p.17-30) (two and a half hours)
   - *Garratt v. Daily*
   - *Spivey v. Battaglia*
   - *Ranson v. Kitner*
   - *McGurie v. Amy*
   - *Talmage v. Smith*
4. Read: FAQ on Legal Reading (10 minutes)
5. Read: FAQ Case Briefing (15 minutes)
6. Read: Preparing Yourself for Learning in the Socratic Classroom (15 minutes)
7. Skim: Case Briefing Cheat Sheet (10 minutes)
8. Skim: Sample Case Brief (15 minutes)
9. Skim: Glossary of Legal Terms (15 minutes)
10. Complete: Reflection Entry #1 (20 minutes)
11. Complete: Writing Sample—the Fruit Problem (30-45 minutes)
12. Complete: Pre-class Evaluation (20 minutes)

The course will be challenging, but as you know, nothing worthwhile is ever easy.

Again, welcome to law school! We can't wait to meet you and get started!

Sincerely,

Everett D. Chambers
Vice President, BARBRI's Institutional Programs

Lawyering Fundamentals
Welcome Materials

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Lawyering Fundamentals: Learning Outcomes

Timing: Read before Day One

Purpose: This document contains the expected learning outcomes for Lawyering Fundamentals. Use these stated learning outcomes (i) to better understand the intended goals of the course, (ii) as context for the activities and exercises you will complete, and (iii) to monitor your progress as we move through the course.

After completing the Lawyering Fundamentals course:

1. Students will understand how to effectively prepare for and participate in class, including how to meaningfully engage in Socratic classroom dialogue.
2. Students will be able to synthesize class notes, case briefs (and commercial outlines) into a course outline they can use to study for a final exam.
3. When given a legal problem to solve, students will be able to identify the legal doctrines implicated by the facts; create *basic* arguments by applying facts and rules; write a legal answer organized around IRAC through which they will communicate their reasoning to the question posed.
4. Students will have a basic understanding of some of the differences between law school and their undergraduate experience, including the daily workload.
5. Students will have a basic understanding of many of the critical law school success factors and will gain a basic awareness of their own competencies and motivations with respect to many of the critical law school success factors.
6. Students will become aware of the pathway that will help them reach their goals, and will have begun to the develop the relationships with their peers that is critical to succeeding.

Frequently Asked Questions—Legal Reading

Timing: Read before Day One

Purpose: The purpose of this handout is to provide you with answers to some of the most frequently asked questions about *legal reading*.

In law school, students are required to complete their assigned reading *before* class.

Why do we read cases?

1. *Reading the cases helps to teach you the law.* Cases will show you what the law means, how it works, and how it has been applied in the past.

2. *Reading cases introduces you to speaking legalese.* Legal opinions are written in English, but they may as well have been written in a different language when you start law school. Completing the assigned reading and creating case briefs for each case you read helps you to learn the language of the law. It's daunting at first, but it gets better with practice.

3. *Reading the cases prepares you for law school exams and practicing law.* You will encounter fact patterns similar to cases you read and briefed in preparation for class on your law school finals. The good news is that if you learn how to wrestle with the cases in order to wrap your head around the pertinent information, you will be able to do it in your exams. Therefore, when you read and brief, you are doing many of the very things you will have to do in your exams. And as a lawyer, you will not always know how to answer a client's legal question. Thus, you will have to do legal research. Legal research includes reading cases and statutes in search of answers. Therefore, reading cases is a necessary part of your legal training. Do it now, do it well, and the dividends will be huge.

4. *Reading the cases prepares you to interact with your professor.* Professors rarely say: "The law is…" or "The rule is…" Instead, they expect you to come to class armed with a basic understanding of the rule that you will have pulled from the cases. They tend to use a series of questions and answers (called Socratic dialog) to build and expand your understanding of the rule, and to train you and your classmates to be lawyers. If you don't read before class, you will likely look like a fool. Furthermore, your fellow students pay a lot of money to attend law school; if you don't come to class well-prepared and ready to

discuss the case, you are wasting everyone's time. That shows professional incompetence, which is a reputation that could follow you for a long time!

How long should it take to complete my reading?

How long it takes to finish your reading depends on several factors. Consider the following:

1. *Size of the Reading Assignment.* Obviously, 50 pages will take longer to read than 10 pages.

2. *Reading Speed.* How fast do you read normally? How many minutes does it take you to read ten pages? How difficult were those pages? Were you reading ten pages of *Harry Potter* or ten pages of Isaac Newton's *The Principia: Mathematical Principles of Natural Philosophy*? Generally, the slower you read, the longer your assigned reading will take. The good news is that over time, if you put in the effort, you should become faster.

3. *Vocabulary.* How large is your legal vocabulary (e.g., do you know the *legal* difference between *motive* and *intent*?) How familiar are you with legal procedure (e.g., do you know the difference between *summary judgment* and *judgment as a matter of law*?) The smaller your vocabulary and the less familiar you are with how the law works, the longer it will take to complete your assigned reading. The good news is that if you put in the effort, your vocabulary and familiarity with the law will grow over time. (Learning the language of the law is critical to your training. Therefore, don't just gloss over unfamiliar terms of art. Although it slows your reading, look up terms in a legal dictionary or on the internet.)

4. *Level of Focus*. You will complete your assigned reading faster if you are able to focus and minimize distractions. Read in an environment and at a time that helps you learn best.

Will your professor know if you have not read?

As you will find out, it is pretty easy for everyone, including the professor, to tell if a student has read. Students often skip dissenting opinions or the notes following the case—a very unwise mistake. To test if you read and understood the case, your professor will definitely ask you about the items in the Case Briefing Cheat Sheet. But that's not the only reason the professor will question you. The professor may also ask you about other details that are important to your training. Only a student who read thoroughly and spent time thinking about what he or she read will be able to answer. If you devoted sufficient time to prepare, you will sometimes have the answers to these extra questions and sometimes you won't. Everyone can tell the difference between one who has diligently prepared and a slacker. The key is to be diligent and to always go back and correct your notes and case briefs after class.

Frequently Asked Questions—Case Briefing

Timing: Read before Day One

Purpose: The purpose of this handout is to provide you with answers to frequently asked questions on *case briefing*.

Introduction:

In law school, students take notes on everything they read. When the notes are on a legal opinion, they are called "case briefs." A case brief is a summary of the essential information found in a court opinion—the "key points" of the story. You might also think of it like your shopping list—things you need to get when you read a case. You should create a case brief for every case you read. Typically, your case brief should include each item on the Case Briefing Cheat Sheet (included in your materials). The cheat sheet lists and describes the information you should include. We have also provided a sample case brief with your materials.

Why do I need to case brief?

1. *Briefing helps you prepare for class.* Briefing trains you to read cases closely, to thoroughly analyze legal issues, and to distill cases down to their essence, which helps you process and retain the important information more efficiently. A well-written case brief will also serve as your guide when you are called upon to speak in class.

2. *Briefing helps you develop analytical skills you will need for your final exam and beyond.* On a final exam essay, you will use the analytical skills you developed through case briefing to determine the issue, find the legally significant facts, connect the rule to the facts, and present well-reasoned arguments to support the outcome you predict—just as the court supported its holding.

3. *Briefing is the first step in creating an exam outline.* Your case briefs will serve as the foundation for the notes you will take in class that will later be translated into a course outline. You will use your case briefs in class, which in turn you will use to create your course outline. We will discuss outlining as we move through the course. Hint: If you handwrite your class notes, be sure your briefs have sufficient space.

4. *Briefing is an important professional skill.* Briefing cases is not just for law school. When you brief, you pull apart how other lawyers reason and write! As a lawyer, you will have to read and analyze cases with a careful eye to detail. You will also have to summarize cases when writing legal memoranda, briefs, and other documents, as well as when making oral arguments to courts. So although it takes a bit of time to develop competence, don't shortchange your training to be a lawyer; start briefing and keep briefing!

Should I type or handwrite my case brief?

Use the method that will work best for you. Handwriting takes time, but it may help you process the materials more fully. Of course, it is much easier to clean up and reformat type-written materials.

Why are the items in case briefing cheat numbered?

Some students have asked us why the items are numbered. Their questions include the following:

1. *Are the items numbered because I am supposed to search for them in that order?* Not really. Not all courts write in the same way. Therefore, while some of the items will be at the beginning of the case, the location of other items will vary. What is important is that you find the information. The numbering system is just a way for you to logically organize the information you pull out of the case. As your reading comprehension skills improve, you will likely vary the order in which you look for and organize the items.

2. *Are they numbered because the professor will ask about them in that order?* No, professors ask questions to test you and teach you, so they may or may not ask the questions in this order and may also ask different questions. The list represents the *basic* information you should *always* pull out of case.

3. *Do I have to write them down in that order?* We find it helpful to organize the items in this order, but if you later develop an order that is more comfortable for you, do it.

4. *Why are the items numbered?* The items are numbered simply for ease of reference in class. If you randomly set down the notes you pulled out of case, it's harder to find

specific items when you need them. The list makes your case brief consistent. But headings without numbering will work just as well.

Can't I just Google a summary of the case or buy a commercial case brief?

This analogy might be helpful: What if lawyers are like lifeguards? Both lifeguards and lawyers help people. Imagine that you went to the pool and the lifeguard was wearing a life jacket because he was a weak and slow swimmer; this would be less than ideal. Now imagine that you went to a lawyer who never developed his reading, researching, case-briefing, and writing skills. If you really hate spending time developing these skills, that is perfectly fine, but you may want to reevaluate your decision to practice law.

Prepare Yourself for Learning in the Socratic Classroom: *Anticipate the Types of Questions Law Professors Will Ask You in Class*

Timing: *Carefully* read before Day One.

Purpose: This handout lists the types of questions law professors tend to ask during class. It explores why professors ask these types of questions, and discusses how they use their questions to not only teach you the rules, but to *train* you to become lawyers. Try to fully wrap your head around each question type and use the insight you gain to focus your preparation so you can better prepare for class and more meaningfully participate. Whether you are called on, volunteer, or are just listening, this handout will help you to follow along and fully absorb your new legal training.

Overview:

Learning in law school is very different from the typical undergraduate experience. Professors will not spoon-feed you rules through lectures, and they will not *describe* what it takes to become a lawyer. They assume you have wrestled with the cases they assigned for you to read prior to coming to class. Professors use class time to build on the foundation *you* are constructing through your diligent preparation. Therefore, rather than lecture you, professors use questions and answers drawn from the assigned materials to clarify and strengthen *your* understanding of the rules. But they are not only interested in teaching you the rules. They will also train you to become a lawyer. They will develop and hone your lawyering skills through periods of intensive questions and answers.

These question and answer sessions—they question, you answer—are loosely called the Socratic Method, and will be a staple of your daily classroom experience. But, even after hours of preparation, most students can *appear* to flounder in a Socratic classroom. They struggle to grasp the meaning and purpose of the questions, not to mention the added pressure of having to "spar" in front of their peers with a seasoned lawyer, the professor. They also struggle because they tend to obsess over the "right answer" instead of focusing on the question, especially the purpose of the questions. Another challenge most students face is how to stay fully engaged in the exchange between the professor and their peers. It

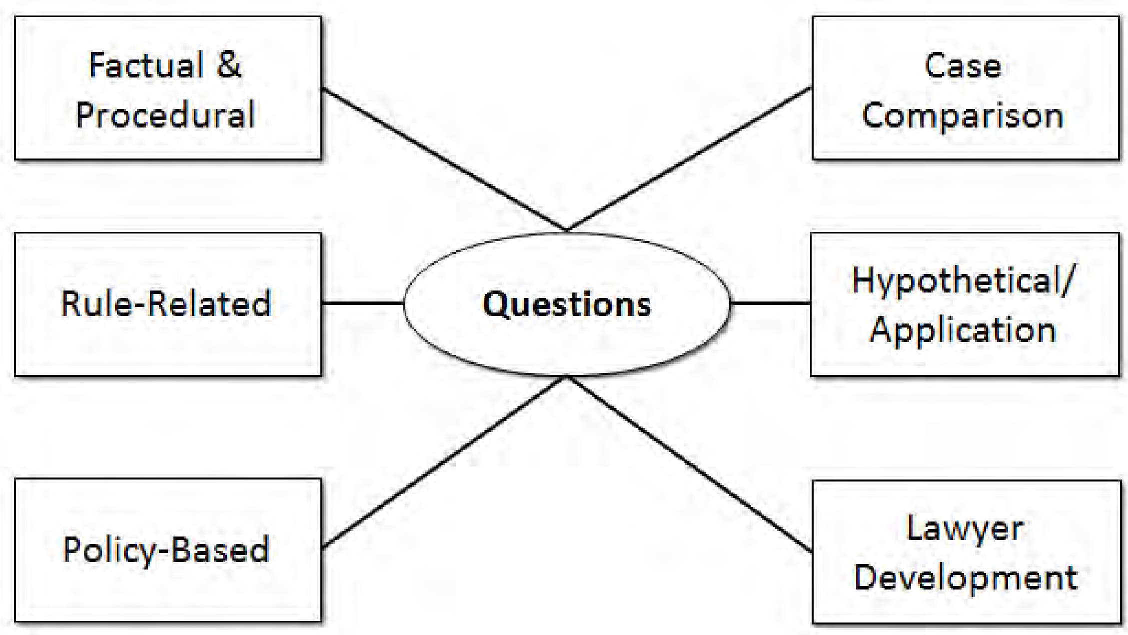
seems daunting not to tune out when you aren't in the hot seat, and it's equally challenging not to get lost in what appears to be a meaningless and interminable back and forth.

Happily, by taking time ahead of class to fully contemplate the types of questions your professors are likely to ask, you will be able to participate in the Socratic dialog in a more relaxed manner. You will be able to follow and engage in the discussion even when you are not being questioned, and will have the courage to volunteer and answer questions, as well as to pose some of your own questions. The right preparation means you can listen, think, answer, take notes, and ask questions to maximize the benefits of your legal training. Although class will still be challenging, your work outside of class will help you learn faster. You will be "in the know" and you won't flounder when you are called upon.

In this handout, we are passing along one of the main takeaways from Lawyering Fundamentals: a tool to thrive in the Socratic classroom, not just survive it. We truly hope that one outcome of absorbing its insights is that you will be inspired to always be fully prepared for class. But more than that, we hope your diligent preparation will allow you to flourish, whether you are thinking, speaking, or merely listening attentively and taking notes. But even when you undergo challenging examination during Socratic dialog, we urge you to embrace your training with an insatiable desire to advance by making sense of it. Questions are one of the most important tools in a lawyer's toolbox, so we never want you to passively float along in a fog of perplexed discouragement. Above all, we want you to see and use your classroom experience—especially the question and answer part of your training—as a precursor to the courtroom or any other place your law license takes you.

The list of questions below is small sampling of the types of questions that could be asked; it is by no means the complete list. Because a good part of class time will be taken up asking and answering questions, the more you know, the faster you will learn.

Types of Questions Law Professors Ask



Factual & Procedural Questions (FBQs)	Fact based questions to flesh out the story of the case (parties, issues, case history, etc.) E.g.: *What were the important facts in the Spivey case? What happened in the lower court? What is this case about? How did this case come before the court? Why did the supreme court send the case back? Are we reading a trial or appellate court opinion? What does remand mean? What is the difference between a petitioner and respondent? Are these terms different from plaintiff and defendant?*
Rule-Related Questions (RRQs)	Questions about the rule or legal principle you are studying. E.g.: *What is the difference between a subjective standard and an objective standard? What standard do we use to judge the defendant's conduct? When, if ever, would we use a subjective standard?*
Rule-Related Questions (RRQs) Continued	Rule Statement/Rule Term Questions—Questions to elicit a precise rule statement. E.g.: *How did the Washington Supreme Court define intent?*

	Rule Explanation Questions—Questions to clarify the entire rule or a single term or phrase of the rule. E.g.: *Can you explain the difference between a subjective and objective standard? What is the difference between motive and intent?* Rule Exceptions Questions—Questions to narrow or expand the rule. E.g.: *To constitute an assault and battery, is it necessary that the defendant touch the plaintiff's body or even his clothing? What if the defendant intended to harm plaintiff A and ended up harming plaintiff B, is the defendant still liable?* Majority/Minority Rule Questions—Questions on jurisdictional splits. E.g.: *What narrow exception have several jurisdictions carved out to the general rule that the mentally disabled can be liable for intentional torts?* Rule Application Questions—Questions to show what the rule means and how it works; they sharpen and deepen your understanding of the rule. E.g.: *Did Prince Charming commit an offensive contact when he kissed Sleeping Beauty? What if Sleeping Beauty enjoyed the kiss?*
Policy Based Questions (PBQs)	Policy-Based Questions (PBQs)—Questions that explore and highlight the purpose of the rule and show you the kinds of problems the rule is intended to tackle E.g.: *Should we as a society hold small children or the mentally ill liable for their intentional conduct? Should we carve out any exceptions? Even if they did not intend the bizarre results of their conduct, is it appropriate that courts hold intentional tortfeasors liable? What interest are we protecting by recognizing this tort?*
Case Comparison Questions (CCQs)	Questions that ask you to compare/contrast the reasoning, holding, etc. from one case to another case or to another source of law (e.g., how a case fits into the context of other cases or how a case connects to a statute or code provision). E.g.: *How does the definition of intent in Garratt v. Dailey differ from the definition of intent in Spivey v. Battaglia? Is this difference significant? Why do we have this difference in how we define intent?*

Hypothetical/Application Questions (HAQs)	Questions that present you with new facts (hypos) and/or that alter the facts from a case you studied earlier, and ask whether you, as the judge, would have decided the case differently. They develop/extend your understanding of what the rule means and they help you see rule exceptions, and nuances of the rule, etc. Many of these questions come from the notes that follow the cases. E.g.: *Could Sleeping Beauty have sued Prince Charming for kissing her? What result if the defendant made an honest mistake? Would we get a different result if…?*
Lawyer Development Questions (LDQs)	Questions that are not necessarily connected to the particular rules you are studying, but they connect you to knowledge, skills, and abilities a lawyer needs to develop. E.g.: *Why did the defendant, Mr. Battaglia argue that his hug was an assault and battery as a matter of law? Why are Mr. and Mrs. Spivey the plaintiffs in the Spivey case? What was Mr. Spivey's cause of action and on what basis was he able to sue the defendant? What is the restatement? Do you think the court got it right in this case?*

Conclusion

You'll soon learn that you won't find the answers to many of these questions directly in the cases. Instead, some of these questions require you to think, use your imagination, common knowledge and common sense and go beyond the obvious. Also, often there are no right answers to some of these questions—at least not a single right answer. Instead, professors ask questions because they want to use them as a springboard for discussion; they are thought provoking. Therefore, don't be surprised when the professor asks you a follow-up question or series of follow-up questions. He or she is not implying that your "answer" is necessarily "wrong." Try to avoid the right/wrong construct. Instead, consider other options or possibilities that your answer did not contemplate. When you prepare and when you are in class, use questions to fire up your imagination and curiosity and take you beyond what you already know. Try to come up with your own list of questions when you read, questions that can enhance your understanding of the subject matter you are studying. Remember, lawyers for the parties in a dispute ask a lot of questions to explore the matter they're tasked to help the client with—this is a big part of what lawyers do. From day one, your professors will use questions—many, many questions—to train you. We recommend you embrace the work out!

Case Briefing Cheat Sheet: A Shopping List of What to Search for in a Judicial Opinion

Item	Description
1. Case Name	The case name is located at the top of the case. It gives the last names of the parties. It is generally formatted like the following: *Plaintiff v. Defendant, Petitioner v. Respondent, or Appellant v. Appellee*. E.g. *Roe v. Wade*
2. Court & Date	This is the court writing the opinion (Ex: Supreme Court) and the date of the opinion (1985)
3. Procedural History	The procedural history is generally found in several paragraphs and describes (i) how the defendant wronged the plaintiff, (ii) what the parties argued in the lower court, (iii) how the lower court ruled, (iv) how and why the case moved from the lower court to the higher court (i.e., the basis of the appeal or what the person appealing wants from the higher court). It is generally a blend of facts and legal language.
4. Question Presented (i.e., the issue)	The question presented is generally a legal or procedural question that the appellant wants the higher court to answer. It is the reason why the case moved from the lower court to the higher court. Sometimes the appellant asks more than one question.
5. Facts	Not all facts are relevant; some are relevant for one purpose but not for another. Once you find the question presented and the legal holding, you should have a better feel for which facts are truly important. The facts do not include the court's opinion, but rather include the legally significant points of the story from the plaintiff's and defendant's points of view.
6. Rule (i.e., the law)	The rule may look like three things: (i) a succinct statement of the governing legal principle that the higher court uses to decide the case (about a sentence in length); (ii) a sentence or paragraph where the higher court answers the question presented; or (iii) a paragraph that describes under what circumstances a person is liable. The rule may be all three. You will sometimes have to reduce the number of words the court uses—without losing meaning—to shorten the rule.
7. Reasoning	The reasoning is generally several paragraphs following the rule where the court explains *how* and *why* it answered the question presented as it did. It is a blend of facts and legal language. Pay close attention to this as you will have to show your reasoning when you answer essay questions. Take time to fully wrap your head around how the court explains itself. You will encounter clear and well-explained reasoning as well as fuzzy and hard-to-follow reasoning.
8. Holding	The holding is the court's answer to the question(s) presented. There are narrow procedural holdings (for example, "case reversed and remanded") and broader substantive holdings that might deal with the interpretation of the Constitution, statutes, or judicial doctrines. If the issues were stated precisely, the holding can be stated as "yes" or "no," or in short statements taken from the language used by the court. Sometimes it's: "We hold that…"
9. Main Take-Away	Every case is in the textbook for a reason. Before you read and while you read, you should ask yourself over and over, "What is the main takeaway of this case? Why have the authors included this case in the book? And why have they placed the case in this particular section?" Find this and you are golden. But remember that sometimes your professors will use a case for different or additional reasons beyond what the casebook author intended. Don't get nervous, just try to understand why the professor is going there…

Sample Case Brief

Timing: Read before Day One

Purpose: The purpose of this handout is to provide you with a sample case brief that you can use as a template when you prepare your own case briefs.

1. Case Name: *Garratt* (P) *v. Dailey* (D) (p. 17)

2. Court & Date: Supreme Court of Washington, 1955

3. Procedural History: (p. 17 & 18) The trial court held that Dailey did not possess "any willful or unlawful purpose" or intent to harm Garratt when he moved the chair. The judge dismissed the action against Dailey. The trial court then determined that Garratt had suffered some $11,000 in damages, in case the decision was to be overruled on appeal. Garratt appealed to the Supreme Court of Washington, requesting entry of judgment in her favor or a new trial.

4. Questions Presented: (P. 18) First, whether the element of intent, for the tort of battery, is satisfied if a defendant knows with "substantial certainty" that his/her act will result in offensive contact? Second, whether a 5-year old can commit an intentional tort? (See holding for answer.)

5. Facts: (P. 18) Conflicting testimony but Garratt alleged that Dailey (who is 5 years old) deliberately pulled a lawn chair out from under her as she started to sit down. Dailey claimed he had moved the chair to sit in it, realized Garratt was about to sit down where chair had been, and was moving it back when she fell and broke her hip. Trial court believed Dailey's version.

6. Rule: (P. 18) "In order that an act may be done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to a particular person . . . the act must be done for the purpose of causing the contact . . . or with knowledge on the part of the actor that such contact . . . is substantially certain to be produced.'"

7. Reasoning: (P. 18) The trial court determined that the plaintiff failed to prove that Dailey pulled the chair out while she was in the act of sitting down. Thus, it cannot be said the act was done for the purpose of causing the contact; however, it is unclear whether Dailey knew that such contact was substantially certain to occur. Plaintiff would establish a battery if, in addition to her fall, she proved Dailey knew with substantial certainty when he moved the chair that she would attempt to sit down where the chair had been. The mere absence of an intent to injure the plaintiff, play a prank on her, embarrass her, or commit an assault and battery on her would not shield Dailey from liability if, in fact, he had such knowledge.

8. Holding: (P. 19) Yes as to both questions presented. The cause is remanded for clarification, with instructions to make definite findings on the issue of whether Dailey knew with substantial certainty that the plaintiff would attempt to sit down where the chair which he moved had been, and to change the judgment if the findings warrant it. The court also held that a minor can be liable for an intentional tort.

9. Main Takeaway: This case defines "intent." A defendant has the required intent (i) when it is his *purpose* that a specific result occurs or (ii) when he is *substantially certain* that a given result will occur.

Glossary of Legal Terms

Timing: Read before Day One

Purpose: The purpose of this handout is to provide you with a glossary of some of the frequently-used legal terms and will help you to jumpstart your case reading.

Appellant: The party who is dissatisfied with the judgment of the trial court and seeks to have that judgment reversed or altered by appealing the judgment to a higher court.

Appellee: Sometimes called a respondent, the party opposing the appellant on appeal.

Bluebook: *The Bluebook: A Uniform System of Citation* is published by the Harvard Law Review and other leading law reviews and sets forth abbreviations and rules of citation for legal materials. It is the accepted standard in law school writing but isn't necessarily followed by courts or attorneys who may be required to follow local rules.

Brief: There are two types of briefs: (1) Briefs of cases and (2) Briefs that are prepared for court. Case briefs are the documents you will create to prepare for class. Your briefs highlight/summarize the most important information in a case. In other words, it's a summary of the high points of the case. Many students find them very useful as a reference when called upon in class. Briefs prepared for court set forth legal arguments and conclusions.

Casebook: The textbook that you will use for your class that is comprised of edited versions of published cases. Note: Most cases have been rather heavily edited by the casebook authors.

Citation: The reference which helps you identify a particular case, law review article, book, statute or other resource, whether primary or secondary. For example, the citation for *Roe v. Wade* is 410 US 959 (1973). This means the case appears in volume 410 of the official United States Reports beginning at page 959. The opinion was rendered in 1973. 42 USC 1983 is the citation for civil rights legislation which appears in title 42 of the United States Code at section 1983.

Civil/Criminal: Civil cases are typically disputes between persons or entities in which the remedy sought is money damages, or sometimes an order that the defendant do, or refrain from doing, certain acts. Civil cases include torts, suits about contracts, family law cases, etc. A criminal case, by contrast, is always brought by a governmental entity (through a federal or local prosecutor) against a defendant for a violation of a criminal statute where the penalty may be a fine, imprisonment, or both. Although the victim of a crime may be a witness, the victim is not really a party to the prosecution of a criminal defendant.

Court/court: When the word "court" by itself is capitalized in a sentence, it is generally referring to the United States Supreme Court. Lower case "court" refers to all other courts. When naming a specific court, such as the Court of Appeals for the Ninth Circuit, the word court is capitalized.

Defendant: The person against whom a lawsuit or prosecution has been brought. In a civil suit this is the person from whom a plaintiff seeks relief. In a criminal action, it is the accused (who is innocent until proven guilty...).

Dissent: A judge's disagreement with the majority of the court. Appellate court cases are heard by a panel of judges that can vary in number depending on the jurisdiction. A judge (or judges) who disagrees with the majority ruling and opinion will often write a dissenting opinion explaining his or her reasons for disagreement.

Opinion: The written product of a judge or judges handing down and explaining a decision. Opinions are usually written by appellate courts, but may also be written by trial judges who resolve legal issues at the trial level. A majority opinion is joined by a majority of the judges participating in the decision. A dissenting opinion disagrees with the holding of the majority; a concurring opinion agrees with the majority's holding but for different reasons; a plurality opinion is joined by the largest number of judges when no majority opinion is achieved; and there can also be opinions that dissent in part, concur in part, etc.

Petitioner: The petitioner is the party who presents a petition to the court. On appeal, the petitioner is usually the party who lost in the lower court. This can be either the plaintiff or defendant from the court below, as either of the parties can present the case to a higher court for further proceedings.

Plaintiff: The individual or organization who initiates a lawsuit by filing a complaint. In a criminal action it is the government. (Typically the government in a criminal matter is not called the plaintiff. Instead, it is called the people or the state or the government…)

Precedent: An existing opinion, usually published, which, because of its similar facts and legal issues, serves to guide a court in the case before it. Our common law system is based upon precedent. Courts will look to principles established in earlier cases. Those decisions that involve similar facts or legal issues serve to guide a court and are regarded as precedent.

Remand: An order made by an appellate court whose ruling was sought by appealing parties. A remand does not end the case. Instead, the case is sent back (remanded) to the lower court to do whatever is necessary to be consistent with the appeals court's decision. This may mean conducting a new trial, entering judgment for a different party, holding a hearing on a part of the case, etc.

Restatement: Several volumes produced by the American Law Institute and authored by legal scholars and experts that set forth statements of major areas of law (as contracts, torts, trusts, and property) and are widely referred to in jurisprudence but are not binding. It is the not the law but a *restatement* of the law by non-judges who are deemed experts in that particular field. Courts sometimes cite to the restatement; if they adopt the restatement, then that becomes the law.

Respondent: The respondent is the party against whom a petition is filed, especially one on appeal—the person who must respond to the filing. The respondent can be either the plaintiff or the defendant from the court below, as either party can appeal the decision, thereby making themselves the petitioner and their adversary the respondent.

Tort: A generic term encompassing many different causes of action in which a plaintiff alleges some injury caused by the defendant. Torts include such actionable wrongs as assault, invasion of privacy, product liability (injury caused by defective goods) and many others. The most common tort is an action for negligence. A person injured by the negligent conduct of another (such as in an automobile accident) may sue to recover monetary damages for those injuries.

Daily Reflections: Entry #1

Timing: Complete before Day One

Purpose: The following questions are intended to help you focus your expectations for the first day of Lawyering Fundamentals so that you can make the most out of the class. Please upload your responses to the Matrix course page.

Reflection:

Socrates said that the unexamined life is not worth living. Indeed, most successful people attribute their success to periods of regular reflection.

What do we mean by reflection? Self-reflection, in its simplest form, is asking thought-provoking questions. Appropriate self-reflection helps you develop a deeper understanding of why you do what you do, how you do what you do, and whether or not you are succeeding; it's a way to get to know yourself better and to evaluate your actions. You can do it (i) when you are unsure about something; (ii) when you feel like you could have (or should have) done something differently; and (iii) when you want to take stock of your accomplishments. In learning theory, this is referred to as metacognition, or "thinking about thinking." Self-reflection is a critical part of your law school success.

While you will have guides and mentors who will show you different pathways to learning, you will soon learn that no one is going to spoon-feed you the law. Although law school is so expensive, you are ultimately responsible for your own learning. Because a lawyer is a problem solver, a critical part of her training from day one is to learn how to recognize

problems and to craft solutions for those problems, sometimes in consultation with more seasoned lawyers. Therefore, take time to assess how your training is progressing early and often. This will allow you to determine when to stay on track to reach your goals, when to make changes, or when to seek help. Your reflection period can also be a time to evaluate your emotions to better manage anxiety and stress. There will be many people to help you along the way, but it's on you to really make it happen.

Because Lawyering Fundamentals is such a fast-paced course, one way to ensure you assimilate what you are learning is to set aside time to process your thoughts. You will be completing one of these reflection exercises every day. Below are several questions to gather your thoughts in anticipation of the first day of classes. Use these questions to aid your preparation and set your expectations.

Questions (upload your responses to Matrix course page):

1. My *initial* thoughts about attending Lawyering Fundamentals are:

___

___

2. I anticipate law school will be different from undergrad in the following ways:

___

___

3. Based on the assigned reading and homework, I anticipate the first class will cover:

___

___

4. In Lawyering Fundamentals, I hope to learn:

___

___

5. I anticipate the most challenging part of the first day of Lawyering Fundamentals will be:

___

___

6. Currently, I feel… (circle all that apply)
   Excited Stressed Tired Anxious Optimistic Prepared Confident Worried

7. If I am feeling stressed or anxious, to reduce or eliminate these feelings I will:

___

___

8. To build my future professional relationships and friendships I plan to:

___

___

9. Other reflections:

___

___

Lawyering Fundamentals Writing Sample:
The Fruit Problem

30 minutes

Name: ________________________________
School: ________________________________ **Section:** __________

Timing: Complete before Day One

Purpose: This assignment requires you to use the IRAC paradigm to organize your answer and serves as a very basic introduction to analyzing and writing like a lawyer. (In this context a paradigm is simply a framework. See below for more on the IRAC paradigm.) Be sure to call on your logical reasoning abilities to analyze and communicate your answer. Use this exercise as a starting point to track your progress as you learn how to problem-solve and communicate like a lawyer.

Instructions:

- Read the fact pattern (the question)
- Take a few minutes to get familiar with the IRAC paradigm (structure) in which your answer should fit. (We have included an example at the end of this document. Do not write your answer until you review the example.)
- Note: You will need to formulate a *rule* or multiple *rules* to guide your analysis of the Fruit Problem. Try to fully *explain* your reasoning
- Upload a copy of your answer to the **Matrix course page by <u>5:00 PM forty-eight hours before the start of the first day of class</u>**
- Bring a copy of your answer to class
- Try to keep your answer brief
- This assignment should take you about 45 minutes to complete.

barbri

Fact Pattern:

Lindsey walked through the grocery store to buy some fruit. She first put two apples in her basket, and then she added three oranges. Later, she realized that she did not have enough apples, so she added four more, along with six bananas. She then dropped one orange on the floor, so she had to add one more orange to her basket. Lindsey finally decided that she had enough fruit.

How many apples and oranges does Lindsey have in her basket? Explain fully.

(Use the template below to assist you to construct a fully explained answer.)

Issue:____

Rule(s):____

Analysis:____

Conclusion:

A Basic Example of Structured Writing

To help you understand the IRAC paradigm/writing structure, here is an example.

Hypothetical Scenario: You really like music; everyone knows that. One day a friend asks you: What makes a good song? You are able to outline the criteria you use to judge if a song is a good song without breaking a sweat. So you tell your friend: Rhymes (lyrics, words), rhythm (beat), and resonation (how well you connect with the song, how it makes you feel, it resonates with you). Your friend seems to agree with your criteria for what makes a good song. But then with a wry smile your friend asks you to name a good song. You drop the name of one of Adele's hit songs: *Someone Like You*, but your friend shakes her head and says: Why is that a good song? You answer: Because I feel that it's a good song; everybody knows that; look how many copies it has sold! That might work with your friend, but if you were asked to provide a logically sound, structured written response to the question "what makes a song a good song," you would need to connect your explanation to a defined rule or framework that will help your friend understand not only *what* criteria you are using to form such a conclusion, but also *how* you reached that conclusion. See the below excerpt for a good example of the kind of structured logical response that would be more appropriate to your friend's question.

After carefully reading the below answer, paying close attention to *how* the answer is structured, return to the *Fruit Problem.*

Question: *What makes a song a good song? Is Adele's Someone Like You a Good Song?*

Issue: The issue is to determine whether or not Adele's "*Someone Like You"* is a good song"

Rules: There are three factors that should be considered when determining whether a song is a good song. First, the song should have a good rhythm or beat. Second, the song should have good rhymes, that is good lyrics, good words. Third, the song's message should resonate with something in the listener's life that makes it enjoyable or meaningful; it should reverberate and be memorable.

Analysis: The song, "*Someone Like You*" by Adele is a good song. First, the song has a soulful rhythm that makes the song fluid and powerful. Many times I catch myself moving to the beat of the song. Second, the song has beautiful and truthful lyrics such as "*Sometimes it lasts in love, sometimes it hurts instead*." Everyone listening to those words can readily understand the meaning; they know what Adele is talking about; her rhymes make sense. Third, the song resonates with me as a listener and is meaningful because I have lost a relationship and had to find a way to deal with the emotional aftermath in order to move forward with my life. In particular, the line "*I will find someone like you*" is very meaningful because it moves me and captures the healing process of a broken heart. The song is one that I think about a lot and will always remember.

Conclusion: Therefore, because of its rhymes, rhythm and the fact that I can so easily relate to it, the song, "*Someone Like You*" is a good song.

Pre-Course Law School Survey

Name: ______________________________
School: ______________________________ **Section:** _________________________

Timing: Before Day One

Purpose: This short survey asks you to record your awareness of some of the important issues that are pertinent to succeeding in law school, including your plans after law school.

Introduction:

We invite you to complete this short pre-course survey before the start of Lawyering Fundamentals. This survey will help us (and you) gain better insight into your knowledge, experience, skills, and goals. It will also serve as a baseline to measure your understanding as your legal training progresses throughout this course.

Directions:

- **Complete this survey on the Matrix course page**. Answer each question by selecting the answer when appropriate or providing a brief explanation when requested.

Section I. Experience with the Work of Lawyers

Have you worked in a law firm before?	Yes	No
Have you ever prepared or help to prepare a legal document such as a brief, complaint, answer, discovery item, contract, or will?	Yes	No
Have you ever attended or participated in a trial or legal proceeding in any capacity?	Yes	No
Have you ever used the services of a lawyer?	Yes	No
If you answered yes, was your experience with the lawyer positive?	Yes	No
Do you have any family members that are lawyers?	Yes	No
Do you have any friends that are lawyers?	Yes	No
Did you do any research on the work of lawyers before or after applying to law school?	Yes	No
How would you rank your familiarity with the workings of the legal system, especially the work of lawyers and judges? (1 is little or no familiarity and 5 is extremely familiar)	1 2 3 4 5	

Section II. Law School Skills

Could you write out a basic description/definition of a legal opinion?	Yes	No
Have you read a legal opinion prior to this class?	Yes	No
Do you know what a case brief is?	Yes	No
If yes, how comfortable do you feel creating a case brief? (1 is the least comfortable and 5 is extremely comfortable)	1 2 3 4 5	
Do you know what the Socratic Method is?	Yes	No
If yes, how comfortable do you feel participating in Socratic dialog? (1 is the least comfortable and 5 is extremely comfortable)	1 2 3 4 5	
How comfortable do you feel about speaking in class? (1 is the least comfortable and 5 is extremely comfortable)	1 2 3 4 5	

Question	Response
How comfortable do you feel about completing your reading for class? (1 is the least comfortable and 5 is the most comfortable)	1 2 3 4 5
How comfortable do you feel about taking notes in a law school class? (1 is the least comfortable and 5 is the most comfortable)	1 2 3 4 5
Do you know what a law school exam outline is?	Yes No
If yes, how comfortable do you feel about creating an outline? (1 is the least comfortable and 5 is the most comfortable)	1 2 3 4 5
Have you ever answered a law school style multiple-choice question?	Yes No
How comfortable are you with multiple-choice tests in general? (1 is the least comfortable and 5 is the most comfortable)	1 2 3 4 5
Have you ever answered a law school style essay question?	Yes No
How comfortable are you with answering essay questions in general? (1 is the least comfortable and 5 is the most comfortable)	1 2 3 4 5
Have you done any kind of legal research and writing before?	Yes No
Are you aware of the distinctions between legal writing and other forms of writing? (1 is unaware and 5 is well versed)	1 2 3 4 5
How comfortable are you with research and writing in general? (1 is the least comfortable and 5 is the most comfortable)	1 2 3 4 5

Section III. Law School Success and Career Goals

Question	Response
How interested are you in practicing law? (1 is the least interested and 5 is the most interested)	1 2 3 4 5
In what area of law would you like to practice? For example, family law, criminal law, environmental, etc. Write your answer in the box to the right.	
Do you understand how your law school's grading curve (if it has one) works?	Yes No

Where do you want to graduate: top 10%, top 25%, top 50%, etc.? Write the percentage in the box to the right.	%
Do you feel confident that you can reach your class rank percentage goal? (1 is the least confident and 5 is the most confident)	1 2 3 4 5
Do you know what Law Review is?	Yes No
Do you want to participate in the Law Review or other Journal?	Yes No
Do you know what Moot Court is?	Yes No
Do you want to participate in Moot Court?	Yes No
Do you know what Mock trial is?	Yes No
Do you want to participate in Mock Trial?	Yes No
How strong are your time management skills? (1 is the weakest and 5 is the strongest)	1 2 3 4 5
How strong are your stress management skills? (1 is the weakest and 5 is the strongest)	1 2 3 4 5
Do you think it is important to make friends in law school?	Yes No
How supportive is your family about you attending law school? (1 is the least supportive and 5 is the most supportive)	1 2 3 4 5
After completing the above questions, do you feel more aware of some of the issues pertinent to your training to become a lawyer? (1 is no increase in awareness and 5 is major increase)	1 2 3 4 5

Is there anything else you would like to share before you start Lawyering Fundamentals?

____

____

____

____

____

Lawyering Fundamentals
Torts Cases

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CASES AND MATERIALS

PROSSER, WADE AND SCHWARTZ'S

TORTS

TWELFTH EDITION

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CHAPTER II

Intentional Interference With Person or Property

1. Intent

Garratt v. Dailey

Supreme Court of Washington, 1955.
46 Wash.2d 197, 279 P.2d 1091.

Hill, Justice. The liability of an infant for an alleged battery is presented to this court for the first time. Brian Dailey (age five years, nine months) was visiting with Naomi Garratt, an adult and a sister of the plaintiff, Ruth Garratt, likewise an adult, in the back yard of the plaintiff's home, on July 16, 1951. It is plaintiff's contention that she came out into the back yard to talk with Naomi and that, as she started to sit down in a wood and canvas lawn chair, Brian deliberately pulled it out from under her. The only one of the three present so testifying was Naomi Garratt. (Ruth Garratt, the plaintiff did not testify as to how or why she fell.) The trial court, unwilling to accept this testimony, adopted instead Brian Dailey's version of what happened, and made the following findings:

"III. * * * that while Naomi Garratt and Brian Dailey were in the back yard the plaintiff, Ruth Garratt, came out of her house into the back yard. Some time subsequent thereto defendant, Brian Dailey, picked up a lightly built wood and canvas lawn chair which was then and there located in the back yard of the above described premises, moved it sideways a few feet and seated himself therein, at which time he discovered the plaintiff, Ruth Garratt, about to sit down at the place where the lawn chair had formerly been, at which time he hurriedly got up from the chair and attempted to move it toward Ruth Garratt to aid her in sitting down in the chair; that due to the defendant's small size and lack of dexterity he was unable to get the lawn chair under the plaintiff in time to prevent her from falling to the ground. That plaintiff fell to the ground and sustained a fracture of her hip, and other injuries and damages as hereinafter set forth.

"IV. That the preponderance of the evidence in this case establishes that when the defendant, Brian Dailey moved the chair in question *he did not have any wilful or unlawful purpose* in doing so; that *he did not have any intent to injure the plaintiff, or any intent to bring about any unauthorized or offensive contact with her person* or any objects appurtenant thereto; that the circumstances which immediately preceded the fall of the plaintiff established that the defendant, *Brian Dailey, did not have purpose,*

intent or design to perform a prank or to effect an assault and battery upon the person of the plaintiff.'' (Italics ours, for a purpose hereinafter indicated.)

It is conceded that Ruth Garratt's fall resulted in a fractured hip and other painful and serious injuries. To obviate the necessity of a retrial in the event this court determines that she was entitled to a judgment against Brian Dailey, the amount of her damage was found to be $11,000. Plaintiff appeals from a judgment dismissing the action and asks for the entry of a judgment in that amount or a new trial.

The authorities generally, but with certain notable exceptions, [c] state that when a minor has committed a tort with force he is liable to be proceeded against as any other person would be. * * *

In our analysis of the applicable law, we start with the basic premise that Brian, whether five or fifty-five, must have committed some wrongful act before he could be liable for appellant's injuries. * * *

It is urged that Brian's action in moving the chair constituted a battery. A definition (not all-inclusive but sufficient for our purpose) of a battery is the intentional infliction of a harmful bodily contact upon another. * * *

We have in this case no question of consent or privilege. We therefore proceed to an immediate consideration of intent and its place in the law of battery. In the comment on clause (a) of § 13, the Restatement says:

''*Character of Actor's Intention.* In order that an act may be done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to a particular person, either the other or a third person, the act must be done for the purpose of causing the contact or apprehension or with knowledge on the part of the actor that such contact or apprehension is substantially certain to be produced.'' [C]

We have here the conceded volitional act of Brian, i.e., the moving of a chair. Had the plaintiff proved to the satisfaction of the trial court that Brian moved the chair while she was in the act of sitting down, Brian's action would patently have been for the purpose or with the intent of causing the plaintiff's bodily contact with the ground, and she would be entitled to a judgment against him for the resulting damages. [Cc]

The plaintiff based her case on that theory, and the trial court held that she failed in her proof and accepted Brian's version of the facts rather than that given by the eyewitness who testified for the plaintiff. After the trial court determined that the plaintiff had not established her theory of a battery (i.e., that Brian had pulled the chair out from under the plaintiff while she was in the act of sitting down), it then became concerned with whether a battery was established under the facts as it found them to be.

In this connection, we quote another portion of the comment on the ''Character of actor's intention,'' relating to clause (a) of the rule from [Restatement, (First) Torts, 29, § 13]:

"It is not enough that the act itself is intentionally done and this, even though the actor realizes or should realize that it contains a very grave risk of bringing about the contact or apprehension. Such realization may make the actor's conduct negligent or even reckless but unless he realizes that to a substantial certainty, the contact or apprehension will result, the actor has not that intention which is necessary to make him liable under the rule stated in this section."

A battery would be established if, in addition to plaintiff's fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been. If Brian had any of the intents which the trial court found, in the italicized portions of the findings of fact quoted above, that he did not have, he would of course have had the knowledge to which we have referred. The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge. [C] Without such knowledge, there would be nothing wrongful about Brian's act in moving the chair and, there being no wrongful act, there would be no liability.

While a finding that Brian had no such knowledge can be inferred from the findings made, we believe that before the plaintiff's action in such a case should be dismissed there should be no question but that the trial court had passed upon that issue; hence, the case should be remanded for clarification of the findings to specifically cover the question of Brian's knowledge, because intent could be inferred therefrom. If the court finds that he had such knowledge the necessary intent will be established and the plaintiff will be entitled to recover, even though there was no purpose to injure or embarrass the plaintiff. [C] If Brian did not have such knowledge, there was no wrongful act by him and the basic premise of liability on the theory of a battery was not established.

It will be noted that the law of battery as we have discussed it is the law applicable to adults, and no significance has been attached to the fact that Brian was a child less than six years of age when the alleged battery occurred. The only circumstance where Brian's age is of any consequence is in determining what he knew, and there his experience, capacity, and understanding are of course material.

From what has been said, it is clear that we find no merit in plaintiff's contention that we can direct the entry of a judgment for $11,000 in her favor on the record now before us.

Nor do we find any error in the record that warrants a new trial. * * *

The cause is remanded for clarification, with instructions to make definite findings on the issue of whether Brian Dailey knew with substantial certainty that the plaintiff would attempt to sit down where the chair which he moved had been, and to change the judgment if the findings warrant it. * * *

Remanded for clarification.

[On remand, the trial judge concluded that it was necessary for him to consider carefully the time sequence, as he had not done before; and this resulted in his finding "that the arthritic woman had begun the slow process of being seated when the defendant quickly removed the chair and seated himself upon it, and that he knew, with substantial certainty, at that time that she would attempt to sit in the place where the chair had been." He entered judgment for the plaintiff in the amount of $11,000, which was affirmed on a second appeal in Garratt v. Dailey, 49 Wash.2d 499, 304 P.2d 681 (1956).]

NOTES AND QUESTIONS

1. The trial court judge found that plaintiff suffered damages in the amount of $11,000. For most intentional torts, the court will award nominal damages even if no actual damages were proved. Of course, if the plaintiff does prove actual damages, as she did in this case, defendant is liable for those actual damages. How would Ms. Garratt's lawyer prove actual damages? See Chapter 10, Damages.

2. Note that the trial judge was the finder of fact at both trials. Why do you think his findings of fact were different the second time? Might he have been influenced by the appellate court's view of the facts as well as its pronouncement of the law?

3. Can a child five years and nine months old have an intent to do harm to another? And if so, how can that intent be "fault"? Suppose that a boy of seven, playing with a bow and arrow, aims at the feet of a girl of five but the arrow hits her in the eye. Is he liable? Weisbart v. Flohr, 260 Cal.App.2d 281, 67 Cal.Rptr. 114 (1968) (yes).

4. Can a four-year-old child who strikes his babysitter in the throat, crushing her larynx, be held liable for an intentional tort? Bailey v. C.S., 12 S.W.3d 159 (Tex. App. 2000) (rejecting argument that four-year-old was incapable of intent). What about a two-year-old child who bites an infant? See Fromenthal v. Clark, 442 So.2d 608 (La.App.1983), cert. denied, 444 So.2d 1242 (1984) (affirming trial court ruling that two-year-old was too young to form intent).

5. Some states have parental responsibility statutes that make parents liable for their child's malicious torts. Can a young child commit a tort requiring a "malicious" state of mind? Ortega v. Montoya, 97 N.M. 159, 637 P.2d 841 (1981) (eight-year-old boy *could* be capable of willful and malicious conduct and it was for jury to determine whether he had acted in such a manner).

Spivey v. Battaglia

Supreme Court of Florida, 1972.
258 So.2d 815.

DEKLE, JUSTICE. * * * Petitioner (plaintiff in the trial court) and respondent (defendant) were employees of Battaglia Fruit Co. on January 21, 1965. During the lunch hour several employees of Battaglia Fruit Co., including petitioner and respondent, were seated on a work table in the plant of the company. Respondent, in an effort to tease petitioner, whom he knew to be shy, intentionally put his arm around petitioner and pulled her head toward him. Immediately after this "friendly unsolicited hug," petitioner

suffered a sharp pain in the back of her neck and ear, and sharp pains into the base of her skull. As a result, petitioner was paralyzed on the left side of her face and mouth.

An action was commenced in the Circuit Court of Orange County, Florida, wherein the petitioners, Mr. and Mrs. Spivey, brought suit against respondent for, (1) negligence, and (2) assault and battery. Respondent, Mr. Battaglia, filed his answer raising as a defense the claim that his ''friendly unsolicited hug'' was an assault and battery as a matter of law and was barred by the running of the two-year statute of limitations on assault and battery. Respondent's motion for summary judgment was granted by the trial court on this basis. The district court affirmed on the authority of McDonald v. Ford, [223 So.2d 553 (Fla.App.1969)].

The question presented for our determination is whether petitioner's action could be maintained on the negligence count, or whether respondent's conduct amounted to an assault and battery as a matter of law, which would bar the suit under the two-year statute (which had run).

In *McDonald* the incident complained of occurred in the early morning hours in a home owned by the defendant. While the plaintiff was looking through some records, the defendant came up behind her, laughingly embraced her and, though she resisted, kissed her hard. As the defendant was hurting the plaintiff physically by his embrace, the plaintiff continued to struggle violently and the defendant continued to laugh and pursue his love-making attempts. In the process, plaintiff struck her face hard upon an object that she was unable to identify specifically. With those facts before it, the district court held that what actually occurred was an assault and battery, and not negligence. The court quoted with approval from the Court of Appeals of Ohio in Williams v. Pressman, 113 N.E.2d 395, at 396 (Ohio App.1953):

''* * * an assault and battery is not negligence, for such action is intentional, while negligence connotes an unintentional act.''

The intent with which such a tort liability as assault is concerned is not necessarily a hostile intent, or a desire to do harm. Where a reasonable man would believe that a particular result was *substantially certain* to follow, he will be held in the eyes of the law as though he had intended it. It would thus be an assault (intentional). However, the knowledge and appreciation of a *risk,* short of substantial certainty, is not the equivalent of intent. Thus, the distinction between intent and negligence boils down to a matter of degree. ''Apparently the line has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable man would avoid (negligence), and becomes a substantial certainty.'' In the latter case, the intent is legally implied and becomes an assault rather than unintentional negligence.

The distinction between the unsolicited kisses in *McDonald,* supra, and the unsolicited hug in the present case turns upon this question of intent. In *McDonald,* the court, finding an assault and battery, necessarily had to find initially that the results of the defendant's acts were ''intentional.''

This is a rational conclusion in view of the struggling involved there. In the instant case, the DCA must have found the same intent. But we cannot agree with that finding in these circumstances. It cannot be said that a reasonable man in this defendant's position would believe that the bizarre results herein were ''substantially certain'' to follow. This is an unreasonable conclusion and is a misapplication of the rule in *McDonald.* This does not mean that he does not become liable for such unanticipated results, however. The settled law is that a defendant becomes liable for reasonably foreseeable consequences, though the exact results and damages were not contemplated.

Acts that might be considered prudent in one case might be negligent in another. Negligence is a relative term and its existence must depend in each case upon the particular circumstances which surrounded the parties at the time and place of the events upon which the controversy is based.

The trial judge committed error when he granted summary final judgment in favor of the defendant. The cause should have been submitted to the jury with appropriate instructions regarding the elements of negligence. Accordingly, certiorari is granted; the decision of the district court is hereby quashed and the cause is remanded with directions to reverse the summary final judgment.

It is so ordered.

NOTES AND QUESTIONS

1. *Distinguish*:

A. The intent to do an act. The defendant throws a rock.

B. The intent to bring about the consequences of the act. The rock hits someone. Liability for intentional torts is premised on the intent to bring about the consequences (e.g., for battery, a touching that is harmful or offensive).

C. The intent to bring about a specific harm (e.g., broken leg). This is sufficient to establish intent, but not necessary.

D. The intent to do an act with actual knowledge on the part of the actor that the consequences (e.g., touching that is harmful or offensive) are substantially certain to follow. This is sufficient to establish intent.

E. The intent to do an act with knowledge on the part of the actor that he is risking particular consequences. This is not sufficient to establish intent—although it may be negligence if the risk is an unreasonable one under the circumstances.

2. *Distinguish*:

A. The defendant does not act. He is carried onto plaintiff's land against his will. Smith v. Stone, Style 65, 82 Eng.Rep. 533 (1647) (no liability).

B. He acts intentionally, but under fear or threats. Twelve armed men compel him to enter plaintiff's land and steal a horse. Gilbert v. Stone, Style 72, 82 Eng.Rep. 539 (1648) (liability).

C. He acts intentionally, but without any desire to affect the plaintiff, or any certainty that he will do so. He rides a horse, which runs away with him and runs the plaintiff down. Gibbons v. Pepper, 1 Ld.Raym. 38, 91 Eng.Rep. 922 (1695) (no

liability if someone else struck the horse; liability if defendant's spurring caused runaway).

D. He acts with the desire to affect the plaintiff, but for an entirely permissible or laudable purpose. He shoots the plaintiff in self-defense or while a soldier defending his country. See Chapter 3 (satisfies intent requirement but may result in no liability if conduct is privileged).

3. While standing in line to pay for her purchases, plaintiff was attacked from behind by a mentally handicapped man who grabbed her hair and head and threw her to the ground. In an attempt to fit her claim within negligence, she argued that he was mentally incapable of forming intent to cause harm and thus did not commit a battery. The court rejected her argument, noting that the intentional tort of battery required only acting with intent to cause contact that was harmful or offensive, not acting with intent to cause harm. Wagner v. State, 2005 UT 54, 122 P.3d 599 (2005).

4. It may not seem important to distinguish between negligent and intentionally wrongful conduct: the defendant usually will be held liable to the plaintiff in either situation. Nevertheless, the distinction may be legally significant. Consider the following:

A. Will defendant be liable for punitive damages? See Chapter 10, Section 3.

B. Will the defense of contributory negligence be available to defendant? See page 613, note 7.

C. Will defendant's employer be liable under the doctrine of *respondeat superior*? See page 614, note 3.

D. How far will the law trace the consequences of defendant's wrongful act? See Tate v. Canonica, 180 Cal.App.2d 898, 5 Cal.Rptr. 28 (1960) (more inclined to find defendant's conduct was legal cause of harm if tort was intentional) and R.D. v. W.H., 875 P.2d 26 (Wyo.1994) (court imposes higher degree of responsibility on those who commit intentional act).

E. Will the defendant be reimbursed through a liability insurance policy? See Allstate Ins. Co. v. Hiseley, 465 F.2d 1243 (10th Cir.1972) (applying Oklahoma law) (following an incident outside a bar, one car pursued another at speeds over 100 miles an hour and then bumped it, causing its driver to lose control and crash) and Automobile Ins. Co. of Hartford v. Cook, 7 N.Y.3d 131, 850 N.E.2d 1152, 818 N.Y.S.2d 176 (2006) (insured shot an acquaintance in self defense inside insured's home). Pryor, The Stories We Tell: Intentional Harm and the Quest for Insurance Funding, 75 Tex.L.Rev. 1721 (1997).

F. Has the state statute of limitations run? See the principal case and Baska v. Scherzer, 283 Kan. 750, 156 P.3d 617 (2007) (statute of limitations for intentional tort applies to cause of action brought against two teenagers who hit the mother of one of their friends when the mother stepped between them to stop a fight).

G. Will an employer be subject to liability to an employee in spite of a general worker compensation immunity shield? Some state worker compensation statutes provide an exception to the immunity for intentional wrongdoing. Does an employer's intentional failure to train an employee to perform a dangerous task supply the requisite intent to injure under the worker compensation intentional injury exception? See Reed Tool Co. v. Copelin, 689 S.W.2d 404 (Tex.1985). What about an employer's deliberate exposure of employees to dangerous products? See Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 501 A.2d 505 (1985) and Bardere v. Zafir, 102 A.D.2d 422, 477 N.Y.S.2d 131, aff'd, 63 N.Y.2d 850, 472 N.E.2d 37, 482

N.Y.S.2d 261 (1984) (plaintiff must show "specific acts [by the employer] directed at causing harm to particular employees").

H. Will the plaintiff be able to bring a cause of action against the United States, which may be liable for the negligent acts of its employees, but not for their intentional acts? See pages 683–684.

5. Do you think that a court's characterization of a defendant's conduct as "negligent" or "intentional" sometimes might be influenced by the legal effect of its finding? Since the court is not bound by either party's characterization of the events, such influence could occur, but only in close cases. At the receiving dock of a meatpacking plant, plaintiff was unloading a truck when a government meat inspector leapt out at him, screamed "boo," pulled his wool stocking cap over his eyes, and jumped on his back. Plaintiff fell forward and struck his face on some meat hooks, severely injuring his mouth and teeth. Plaintiff's complaint was for negligent conduct, apparently because the defendant's employer, the United States, would not be liable for its employee's battery. Cf. Lambertson v. United States, 528 F.2d 441 (2d Cir.1976), cert. denied, 426 U.S. 921 (1976) (court did not permit plaintiff to recover by "dressing up the substance" of battery in the "garments" of negligence).

6. For a discussion of the treatment of intent in English and American tort law, see Finnis, "Intention in Tort Law" in Owen, Philosophical Foundations of Tort Law 229 (Clarenden Press 1995).

Ranson v. Kitner

Appellate Court of Illinois, 1889.
31 Ill.App. 241.

CONGER, J. This was an action brought by appellee against appellants to recover the value of a dog killed by appellants, and a judgment rendered for $50.

The defense was that appellants were hunting for wolves, that appellee's dog had a striking resemblance to a wolf, that they in good faith believed it to be one, and killed it as such.

Many points are made, and a lengthy argument failed to show that error in the trial below was committed, but we are inclined to think that no material error occurred to the prejudice of appellants.

The jury held them liable for the value of the dog, and we do not see how they could have done otherwise under the evidence. Appellants are clearly liable for the damages caused by their mistake, notwithstanding they were acting in good faith.

We see no reason for interfering with the conclusion reached by the jury, and the judgment will be affirmed.

NOTES AND QUESTIONS

1. Did the defendant intend to kill the dog? The court calls it "mistake." Why not accident?

2. Defendant fuel oil distributor had a contract to deliver oil to a residence. One day, during the delivery, the oil overflowed and damaged surrounding lawn and

shrubberies. The tank overflowed because it already had been filled by another company, hired by the new owner. The previous owner apparently had not canceled his contract when he moved. Is the fuel oil distributor liable for trespass? Serota v. M. & M. Utilities, Inc., 55 Misc.2d 286, 285 N.Y.S.2d 121 (1967) (reasonable mistake no defense to trespass).

3. Defendant, seeking to confront the driver who frightened his horses the previous day, pushed back the hat of the wrong man. Does he intend to touch him? Seigel v. Long, 169 Ala. 79, 53 So. 753 (1910). What if a surgeon operates on the wrong patient? Gill v. Selling, 125 Or. 587, 267 P. 812 (1928). Generally, mistake as to the identity of the person or animal does not negate intent. Will the mistake protect the defendant against liability for the result he intended to cause? There is general agreement that it does not where the defendant by mistake appropriates property of the plaintiff. If he is not held liable for his mistake, he would be unjustly enriched. Perry v. Jefferies, 61 S.C. 292, 39 S.E. 515 (1901) (cutting and removing timber from plaintiff's land under a reasonable belief that defendant owned it); Dexter v. Cole, 6 Wis. 319, 70 Am.Dec. 465 (1857) (driving off plaintiff's sheep, believed to be defendant's).

4. On the other hand, some of the defendant's privileges depend, not upon the existence of a fact, but upon the reasonable belief that the fact exists. Defendant, seeing the plaintiff reach for a handkerchief in his pocket, reasonably believes that he is reaching for a gun, and strikes plaintiff to defend himself. See page 105. Mistakes as to the existence of a privilege are dealt with in Chapter 3 in connection with the privilege itself.

McGuire v. Almy

Supreme Judicial Court of Massachusetts, 1937.
297 Mass. 323, 8 N.E.2d 760.

QUA, JUSTICE. This is an action of tort for assault and battery. The only question of law reported is whether the judge should have directed a verdict for the defendant.

The following facts are established by the plaintiff's own evidence: In August, 1930, the plaintiff was employed to take care of the defendant. The plaintiff was a registered nurse and was a graduate of a training school for nurses. The defendant was an insane person. Before the plaintiff was hired she learned that the defendant was a "mental case and was in good physical condition," and that for some time two nurses had been taking care of her. The plaintiff was on "24 hour duty." The plaintiff slept in the room next to the defendant's room. Except when the plaintiff was with the defendant, the plaintiff kept the defendant locked in the defendant's room. * * *

On April 19, 1932, the defendant, while locked in her room, had a violent attack. The plaintiff heard a crashing of furniture and then knew that the defendant was ugly, violent and dangerous. The defendant told the plaintiff and a Miss Maroney, "the maid," who was with the plaintiff in the adjoining room, that if they came into the defendant's room, she would kill them. The plaintiff and Miss Maroney looked into the defendant's room, "saw what the defendant had done," and "thought it best to take the

broken stuff away before she did any harm to herself with it.'' They sent for a Mr. Emerton, the defendant's brother-in-law. When he arrived the defendant was in the middle of her room about ten feet from the door, holding upraised the leg of a low-boy as if she were going to strike. The plaintiff stepped into the room and walked toward the defendant, while Mr. Emerton and Miss Maroney remained in the doorway. As the plaintiff approached the defendant and tried to take hold of the defendant's hand which held the leg, the defendant struck the plaintiff's head with it, causing the injuries for which the action was brought.

The extent to which an insane person is liable for torts has not been fully defined in this Commonwealth. * * *

Turning to authorities elsewhere, we find that courts in this country almost invariably say in the broadest terms that an insane person is liable for his torts. As a rule no distinction is made between those torts which would ordinarily be classed as intentional and those which would ordinarily be classed as negligent, nor do the courts discuss the effect of different kinds of insanity or of varying degrees of capacity as bearing upon the ability of the defendant to understand the particular act in question or to make a reasoned decision with respect to it, although it is sometimes said that an insane person is not liable for torts requiring malice of which he is incapable. Defamation and malicious prosecution are the torts more commonly mentioned in this connection. * * * These decisions are rested more upon grounds of public policy and upon what might be called a popular view of the requirements of essential justice than upon any attempt to apply logically the underlying principles of civil liability to the special instance of the mentally deranged. Thus it is said that a rule imposing liability tends to make more watchful those persons who have charge of the defendant and who may be supposed to have some interest in preserving his property; that as an insane person must pay for his support, if he is financially able, so he ought also to pay for the damage which he does; that an insane person with abundant wealth ought not to continue in unimpaired enjoyment of the comfort which it brings while his victim bears the burden unaided; and there is also a suggestion that courts are loath to introduce into the great body of civil litigation the difficulties in determining mental capacity which it has been found impossible to avoid in the criminal field.

The rule established in these cases has been criticized severely by certain eminent text writers both in this country and in England, principally on the ground that it is an archaic survival of the rigid and formal mediaeval conception of liability for acts done, without regard to fault, as opposed to what is said to be the general modern theory that liability in tort should rest upon fault. Notwithstanding these criticisms, we think, that as a practical matter, there is strong force in the reasons underlying these decisions. They are consistent with the general statements found in the cases dealing with the liability of infants for torts, [cc] including a few cases in which the child was so young as to render his capacity for fault comparable to that of many insane persons, [cc]. Fault is by no means at

the present day a universal prerequisite to liability, and the theory that it should be such has been obliged very recently to yield at several points to what have been thought to be paramount considerations of public good. Finally, it would be difficult not to recognize the persuasive weight of so much authority so widely extended.

But the present occasion does not require us either to accept or to reject the prevailing doctrine in its entirety. For this case it is enough to say that where an insane person by his act does intentional damage to the person or property of another he is liable for that damage in the same circumstances in which a normal person would be liable. This means that in so far as a particular intent would be necessary in order to render a normal person liable, the insane person, in order to be liable, must have been capable of entertaining that same intent and must have entertained it in fact. But the law will not inquire further into his peculiar mental condition with a view to excusing him if it should appear that delusion or other consequence of his affliction has caused him to entertain that intent or that a normal person would not have entertained it. * * *

Coming now to the application of the rule to the facts of this case, it is apparent that the jury could find that the defendant was capable of entertaining and that she did entertain an intent to strike and to injure the plaintiff and that she acted upon that intent. See American Law Institute Restatement, Torts, §§ 13, 14. We think this was enough. * * *

[The rest of the opinion holds that whether the plaintiff consented to the attack or assumed the risk of it is an issue to be left to the jury. There was no evidence that the defendant had previously attacked any one or made any serious threat to do so. The plaintiff had taken care of the defendant for fourteen months without being attacked. When the plaintiff entered the room the defendant was breaking up the furniture, and it could be found that the plaintiff reasonably feared that the defendant would do harm to herself. Under such circumstances it cannot be ruled as a matter of law that the plaintiff assumed the risk.]

Judgment for the plaintiff on the verdict.

NOTES AND QUESTIONS

1. Can someone who is mentally ill have an intent to do harm to another? And if so, how can such an intent be "fault"? How does the insane person differ from the automobile driver who suffers a heart attack, in Cohen v. Petty, page 10?

2. Note that the tort law standards differ from the criminal law standards for holding the mentally ill responsible for their actions. Polmatier v. Russ, 206 Conn. 229, 537 A.2d 468 (1988) (defendant liable for battery of plaintiff's decedent even though he was found not guilty by reason of insanity in criminal case arising out of same incident); Delahanty v. Hinckley, 799 F.Supp. 184 (D.D.C. 1992) (rejecting defendant's argument that he should not be liable to plaintiff police officer who was injured when defendant shot at President Reagan because he was in a "deluded and psychotic state of mind" and found not guilty by reason of insanity in criminal case).

3. Despite criticism, the American decisions are unanimous in their agreement with the principal case. Mentally disabled persons may be held responsible for their intentional torts as long as plaintiff can prove that they formed the requisite intent. Restatement (Second) § 895J (1979). See also White v. Muniz, 999 P.2d 814 (Colo. 2000) (in battery claim against defendant with Alzheimer's, plaintiff must prove defendant desired to cause contact that was offensive or harmful).

4. Mental illness may prevent the specific kind of intent necessary for certain torts, such as deceit, that require the plaintiff to prove that the defendant knew that he was not speaking the truth. See Irvine v. Gibson, 117 Ky. 306, 77 S.W. 1106 (1904); Chaddock v. Chaddock, 130 Misc. 900, 226 N.Y.S. 152 (1927); Beaubeauf v. Reed, 4 La.App. 344 (1926).

5. An action also may lie against persons responsible for caring for the mentally ill person, based on negligent supervision, but only if a caretaking responsibility has been assumed. Familial relationship only is not enough. Rausch v. McVeigh, 105 Misc.2d 163, 431 N.Y.S.2d 887 (1980) (cause of action for negligent supervision against parents of 22–year–old autistic son who attacked his therapist); Shirdon v. Houston, 2006 WL 2522394 (Ohio App.) (no duty to supervise adult son even though father knew his son could be aggressive and combative); and Kaminski v. Town of Fairfield, 216 Conn. 29, 578 A.2d 1048 (1990) (accord).

6. Several jurisdictions have carved out a narrow exception to this general rule, holding that an institutionalized mentally disabled patient who cannot control or appreciate the consequences of his conduct cannot be held liable for injuries caused to those employed to care for the patient. The jurisdictions that have addressed this issue have done so both in the context of intentional torts and negligence. Gould v. American Family Mutual Ins. Co., 198 Wis.2d 450, 543 N.W.2d 282 (1996) (negligence action brought against patient with Alzheimer's); Creasy v. Rusk, 730 N.E.2d 659 (Ind. 2000) (same); Anicet v. Gant, 580 So.2d 273 (Fla.App. 1991) (assault and battery against twenty-three-year-old man suffering from "irremediable mental difficulties" who was unable to control himself from acts of violence).

7. *Intoxication.* What if the defendant is intoxicated? Does intoxication preclude a showing of intent? Bar patron passed out or fell asleep at bar and other patrons agreed to drive him home. Bar employee helped him from bar and was putting him into the back seat of a car when he began shouting obscenities and kicked the employee in the face, seriously injuring him. Sufficient intent for battery? Janelsins v. Button, 102 Md.App. 30, 648 A.2d 1039 (1994) (voluntary intoxication does not vitiate intent).

Talmage v. Smith

Supreme Court of Michigan, 1894.
101 Mich. 370, 59 N.W. 656.

MONTGOMERY, J. The plaintiff recovered in an action of trespass. The case made by plaintiff's proofs was substantially as follows: * * * Defendant had on his premises certain sheds. He came up to the vicinity of the sheds, and saw six or eight boys on the roof of one of them. He claims that he ordered the boys to get down, and they at once did so. He then passed around to where he had a view of the roof of another shed, and saw two boys on the roof. The defendant claims that he did not see the plaintiff, and the proof is not very clear that he did, although there was some testimony from which

it might have been found that he was within his view. Defendant ordered the boys in sight to get down, and there was testimony tending to show that the two boys in defendant's view started to get down at once. Before they succeeded in doing so, however, defendant took a stick, which is described as being two inches in width, and of about the same thickness, and about 16 inches long, and threw it in the direction of the boys; and there was testimony tending to show that it was thrown at one of the boys in view of the defendant. The stick missed him, and hit the plaintiff just above the eye with such force as to inflict an injury which resulted in the total loss of the sight of the eye. * * * George Talmage, the plaintiff's father, testifies that defendant said to him that he threw the stick, intending it for Byron Smith,—one of the boys on the roof,—and this is fully supported by the circumstances of the case. * * *

The circuit judge charged the jury as follows: ''If you conclude that Smith did not know the Talmage boy was on the shed, and that he did not intend to hit Smith, or the young man that was with him, but simply, by throwing the stick, intended to frighten Smith, or the other young man that was there, and the club hit Talmage, and injured him, as claimed, then the plaintiff could not recover. If you conclude that Smith threw the stick or club at Smith, or the young man that was with Smith,—intended to hit one or the other of them,—and you also conclude that the throwing of the stick or club was, under the circumstances, reasonable, and not excessive, force to use towards Smith and the other young man, then there would be no recovery by this plaintiff. But if you conclude from the evidence in this case that he threw the stick, intending to hit Smith, or the young man with him,—to hit one of them,—and that that force was unreasonable force, under all the circumstances, then [the defendant] would be doing an unlawful act, if the force was unreasonable, because he had no right to use it. He would be liable then for the injury done to this boy with the stick. * * * ''[The jury rendered a verdict for the plaintiff.]

We think the charge is a very fair statement of the law of the case. * * * The right of the plaintiff to recover was made to depend upon an intention on the part of the defendant to hit somebody, and to inflict an unwarranted injury upon some one. Under these circumstances, the fact that the injury resulted to another than was intended does not relieve the defendant from responsibility. * * *

The judgment will be affirmed, with costs.

NOTES AND QUESTIONS

1. This doctrine of ''transferred intent'' was derived originally from the criminal law and dates back to the time when tort damages were awarded as a side issue in criminal prosecutions. It is familiar enough in the criminal law, and has been applied in many tort cases where the defendant has shot at A, struck at him, or thrown a punch or rock at him, and unintentionally hit B instead. See, for example, Lopez v. Surchia, 112 Cal.App.2d 314, 246 P.2d 111 (1952) (shooting); Carnes v. Thompson, 48 S.W.2d 903 (Mo.1932) (striking with pliers); Baska v. Scherzer, 283 Kan. 750, 156 P.3d 617 (2007) (while throwing punches at each other,

teenagers hit a woman who stepped between them to stop the fight); Singer v. Marx, 144 Cal.App.2d 637, 301 P.2d 440 (1956) (throwing a rock).

2. The doctrine is discussed in Prosser, Transferred Intent, 45 Tex.L.Rev. 650 (1967). The conclusion there is that it applies whenever both the tort intended and the resulting harm fall within the scope of the old action of trespass—that is, where both involve direct and immediate application of force to the person or to tangible property. There are five torts that fell within the trespass writ: battery, assault, false imprisonment, trespass to land, and trespass to chattels. When the defendant intends any one of the five, and accomplishes any one of the five, the doctrine applies and the defendant is liable, even if the plaintiff was not the intended target.

3. Thus he is liable when he shoots to frighten A (assault) and the bullet unforeseeably hits a stranger (battery). Brown v. Martinez, 68 N.M. 271, 361 P.2d 152 (1961); Hall v. McBryde, 919 P.2d 910 (Colo.App.1996) (firing at passing car and hitting neighbor). Or when he shoots at a dog (trespass to chattels) and hits a boy scout (battery). Corn v. Sheppard, 179 Minn. 490, 229 N.W. 869 (1930). What if defendant, believing a house to be empty, intends arson (trespass to chattels) and accomplishes battery (sleeping man killed by smoke inhalation)? Cf. Lewis v. Allstate Ins. Co., 730 So.2d 65 (Miss. 1998).

4. On the other hand, when either the tort intended or the one accomplished does not fall within the trespass action, the doctrine does not apply. Clark v. Gay, 112 Ga. 777, 38 S.E. 81 (1901) (defendant committed murder in plaintiff's house and plaintiff sought value of house because his family refused to live there after the murder); McGee v. Vanover, 148 Ky. 737, 147 S.W. 742 (1912) (defendant inflicted beating on A, causing mental distress to plaintiff bystander).

2. BATTERY

Cole v. Turner

Nisi Prius, 1704.
6 Modern Rep. 149, 90 Eng.Rep. 958.

At Nisi Prius, upon evidence in trespass for assault and battery, Holt, C.J., declared:

1. That the least touching of another in anger is a battery.

2. If two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently it will be no battery.

3. If any of them use violence against the other, to force his way in a rude inordinate manner, it is a battery; or any struggle about the passage, to that degree as may do hurt, is a battery.

NOTES AND QUESTIONS

1. In United States v. Ortega, 4 Wash.C.C. 531, 27 Fed.Cas. 359 (E.D.Pa. 1825), defendant approached the plaintiff in an offensive manner, took hold of the breast of his coat, and said that he demanded satisfaction. Is this a battery?

2. What about spitting in the plaintiff's face? Alcorn v. Mitchell, 63 Ill. 553 (1872). Or forcibly removing his hat? Seigel v. Long, 169 Ala. 79, 53 So. 753 (1910). Or an attempted search of his pockets? Piggly–Wiggly Alabama Co. v. Rickles, 212 Ala. 585, 103 So. 860 (1925). Or touching her private parts? Skousen v. Nidy, 90

Ariz. 215, 367 P.2d 248 (1961). Cf. Gates v. State, 110 Ga.App. 303, 138 S.E.2d 473 (1964) (stranger touching woman on the buttocks).

3. What about tapping plaintiff on the shoulder to attract his attention? "Pardon me, sir, could you direct me, etc."? Coward v. Baddeley, 4 H. & N. 478, 157 Eng.Rep. 927 (1859).

Wallace v. Rosen

Court of Appeals of Indiana, 2002.
765 N.E.2d 192.

KIRSCH, J. Mable Wallace appeals the jury verdict in favor of Indianapolis Public Schools (IPS) and Harriet Rosen, a teacher for IPS. On appeal, Wallace raises the following issues:

I. Whether the trial court erred in refusing to give her tendered jury instruction regarding battery. * * *

We affirm.

FACTS AND PROCEDURAL HISTORY

[Rosen was a teacher at Northwest High School in Indianapolis. On April 22, 1994, the high school had a fire drill while classes were in session. The drill was not previously announced to the teachers and occurred just one week after a fire was extinguished in a bathroom near Rosen's classroom. On the day the alarm sounded, Wallace, who was recovering from foot surgery, was at the high school delivering homework to her daughter Lalaya. Wallace saw Lalaya just as Wallace neared the top of a staircase and stopped to speak to her. Two of Lalaya's friends also stopped to talk. Just then, the alarm sounded and students began filing down the stairs while Wallace took a step or two up the stairs to the second floor landing. As Rosen escorted her class to the designated stairway she noticed three or four people talking together at the top of the stairway and blocking the students' exit. Rosen did not recognize any of the individuals but approached "telling everybody to move it." Wallace, with her back to Rosen, was unable to hear Rosen over the noise of the alarm and Rosen had to touch her on the back to get her attention. Rosen then told Wallace, "you've got to get moving because this is a fire drill." At trial, Wallace testified that Rosen pushed her and she slipped and fell down the stairs. Rosen denied pushing Wallace, but admitted touching her back. At the close of the trial, the trial court judge refused to give the jury an instruction concerning civil battery that was requested by plaintiff. The jury found in favor of IPS and Rosen on the negligence count, and Wallace appealed.]

DISCUSSION AND DECISION

* * *

I. Battery Instruction

Wallace first argues that it was error for the trial court to refuse to give the jury the following tendered instruction pertaining to battery:

> A battery is the knowing or intentional touching of one person by another in a rude, insolent, or angry manner.
>
> Any touching, however slight, may constitute an assault and battery.
>
> Also, a battery may be recklessly committed where one acts in reckless disregard of the consequences, and the fact the person does not intend that the act shall result in an injury is immaterial. * * *

The Indiana Pattern Jury Instruction for the intentional tort of civil battery is as follows: ''A battery is the knowing or intentional touching of a person against [his] [her] will in a rude, insolent, or angry manner.'' 2 Indiana Pattern Jury Instructions (Civil) 31.03 (2d ed. Revised 2001).[2] Battery is an intentional tort.[C] In discussing intent, Professors Prosser and Keeton made the following comments:

In a loose and general sense, the meaning of ''intent'' is easy to grasp. As Holmes observed, even a dog knows the difference between being tripped over and being kicked. This is also the key distinction between two major divisions of legal liability—negligence and intentional torts. . . .

It is correct to tell the jury that, relying on circumstantial evidence, they may infer that the actor's state of mind was the same as a reasonable person's state of mind would have been. Thus, . . . the defendant on a bicycle who rides down a person in full view on a sidewalk where there is ample room to pass may learn that the factfinder (judge or jury) is unwilling to credit the statement, ''I didn't mean to do it.''

On the other hand, the mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong. In such cases the distinction between intent and negligence obviously is a matter of degree. The line has to be drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable person would avoid, and becomes in the mind of the actor a substantial certainty.

The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids. The defendant may be liable although intending nothing more than a good-natured practical joke, or honestly believing that the act would not injure the plaintiff, or even though seeking the plaintiff's own good. W. PAGE KEETON et al., PROSSER AND KEETON ON THE LAW OF TORTS, § 8, at 33, 36–37 (5th ed.1984) (footnotes omitted).

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2. The Indiana Pattern Jury Instructions are prepared under the auspices of the Indiana Judges Association and the Indiana Judicial Conference Criminal and Civil Instruction Committees. Although not formally approved for use, they are tacitly recognized by Indiana Trial Rule 51(E). [C]

[Witnesses] testified that Rosen touched Wallace on the back causing her to fall down the stairs and injure herself. For battery to be an appropriate instruction, the evidence had to support an inference not only that Rosen intentionally touched Wallace, but that she did so in a rude, insolent, or angry manner, i.e., that she intended to invade Wallace's interests in a way that the law forbids.

Professors Prosser and Keeton also made the following observations about the intentional tort of battery and the character of the defendant's action: ''In a crowded world, a certain amount of personal contact is inevitable and must be accepted. *Absent expression to the contrary, consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life, such as a tap on the shoulder to attract attention*, a friendly grasp of the arm, or a casual jostling to make a passage. . . .''

The time and place, and the circumstances under which the act is done, will necessarily affect its unpermitted character, and so will the relations between the parties. A stranger is not to be expected to tolerate liberties which would be allowed by an intimate friend. But unless the defendant has special reason to believe that more or less will be permitted by the individual plaintiff, the test is what would be offensive to an ordinary person not unduly sensitive as to personal dignity. KEETON et al., § 9, at 42 (emphasis added). * * *

[The court quoted from the trial transcript concerning the nature of the touching.]

Viewed most favorably to the trial court's decision refusing the tendered instruction, the foregoing evidence indicates that Rosen placed her fingertips on Wallace's shoulder and turned her 90 degrees toward the exit in the midst of a fire drill. The conditions on the stairway of Northwest High School during the fire drill were an example of Professors Prosser and Keeton's ''crowded world.'' Individuals standing in the middle of a stairway during the fire drill could expect that a certain amount of personal contact would be inevitable. Rosen had a responsibility to her students to keep them moving in an orderly fashion down the stairs and out the door. Under these circumstances, Rosen's touching of Wallace's shoulder or back with her fingertips to get her attention over the noise of the alarm cannot be said to be a rude, insolent, or angry touching. Wallace has failed to show that the trial court abused its discretion in refusing the battery instruction. * * *

[Other issues raised by the appeal were then discussed.]

Affirmed. [The concurring opinions are omitted.]

NOTES AND QUESTIONS

1. Has the law of battery undergone any substantial changes since Cole v. Turner in 1704?

2. Do you agree that there was not enough evidence to let the jury decide whether the touching was offensive? The concurring opinion notes that there was

testimony that the teacher had grabbed plaintiff's arm or shoulder to turn her around and that when plaintiff told her she was a parent, the teacher responded, ''I don't care who you are, move it.''

3. Note that the court refers to Indiana's pattern jury instruction on battery. Many jurisdictions have pattern or sample instructions that are available to the parties to use in requesting the instructions for their particular cases.

4. In the principal case, in a section omitted from this excerpt, the court noted that the third paragraph of the proposed instruction—that battery may be recklessly committed—was not an accurate statement of Indiana law and could have misled or confused the jury under the facts of the case. The court's discussion of the intent requirement makes it clear that it is an essential element. With the modern shift of emphasis to intent and negligence, as distinguished from trespass and case, ''battery'' has become exclusively an intentional tort. Thus there is no battery when defendant negligently, or even recklessly, drives his car into plaintiff and injures him, without intending to hit him. Cook v. Kinzua Pine Mills Co., 207 Or. 34, 293 P.2d 717 (1956). The same shift of emphasis accounts for the modern cases allowing recovery when the contact inflicted is not direct and immediate, but indirect.

RESTATEMENT (SECOND) OF TORTS (1965)

''§ 13. Battery: Harmful Contact

''An actor is subject to liability to another for battery if

''(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

''(b) a harmful contact with the person of the other directly or indirectly results.''

''§ 18. Battery: Offensive Contact

''(1) An actor is subject to liability to another for battery if

''(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

''(b) an offensive contact with the person of the other directly or indirectly results.

''(2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for a mere offensive contact with the other's person although the act involves an unreasonable risk of inflicting it and, therefore, would be negligent or reckless if the risk threatened bodily harm.''

NOTES AND QUESTIONS

1. When defendant intentionally causes plaintiff to undergo an offensive contact and the resulting injuries are more extensive than a reasonable person might have anticipated, the defendant will still be liable for those injuries. See

Baldinger v. Banks, 26 Misc.2d 1086, 201 N.Y.S.2d 629 (1960) (six-year-old boy shoves four-year-old girl) (broken elbow); Harrigan v. Rosich, 173 So.2d 880 (La.App.1965) (defendant, wishing to get rid of the plaintiff, pushed him with his finger, and said, ''Go home, old man.'') (detached retina).

2. In Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891), one schoolboy, during a class hour, playfully kicked another on the shin. He intended no harm, and the touch was so slight that the plaintiff did not actually feel it. It had, however, the effect of ''lighting up'' an infection in the leg from a previous injury, and as a result the plaintiff suffered damages found by the jury to be $2,500. The court found liability for battery even though the injury could not have been foreseen. The case is entertainingly and exhaustively discussed in Zile, Vosburg v. Putney: A Centennial Story, [1992] Wis.L.Rev. 877 (1992).

3. Does it make any difference if the defendant is trying to help the plaintiff? In Clayton v. New Dreamland Roller Skating Rink, Inc., 14 N.J.Super. 390, 82 A.2d 458 (1951), cert. denied, 13 N.J. 527, 100 A.2d 567 (1953), plaintiff fell at a skating rink and broke her arm. Over the protests of plaintiff and her husband, defendant's employees, one of whom was a prize fight manager who had first aid experience, proceeded to manipulate the arm in an attempt to set it. Is this battery?

4. While her husband was helping her get dressed in her hospital room the day after her back surgery, patient found a washable tattoo of a rose on her lower abdomen. Surgeon says he had placed it there to improve her spirits and help her heal and that none of his other patients had complained. Patient is very upset. Does she have a cause of action for battery? If so, what would her damages be? See Don Sapatkin, ''Surgeon Sued for Giving Anesthetized Patient Temporary Tattoo,'' The Philadelphia Inquirer, July 16, 2008, at B1, available at 2008 WLNR 13274435.

5. Can the plaintiff make the defendant liable for contact that would not be offensive to a reasonable person, such as a tap on the shoulder to attract attention, by specifically forbidding that conduct? The Restatement (Second) of Torts § 19, leaves the question open. See Richmond v. Fiske, 160 Mass. 34, 35 N.E. 103 (1893), where defendant, against orders, entered plaintiff's bedroom and woke him up to present a milk bill. This was held to be battery, but no doubt it would be offensive to a reasonable person.

6. Can there be liability for battery for a contact of which plaintiff is unaware at the time? Did Sleeping Beauty have a cause of action against Prince Charming? What if an unauthorized surgical operation is performed while plaintiff is under an anaesthetic? Does it make any difference whether the operation is harmful or beneficial? See Mohr v. Williams, page 95.

7. Does the exposure to a virus, such as herpes, through sexual activity constitute a battery? Does consent to the sexual activity operate as a defense? See Doe v. Johnson, 817 F.Supp. 1382 (W.D.Mich.1993) (battery action alleged in transmission of HIV; consent to intercourse does not bar action). Liability in Tort for the Sexual Transmission of Disease: Genital Herpes and the Law, 70 Cornell L.Rev. 101 (1984).

8. Does a mortician who embalms a body unaware that it was infected with the AIDS virus have a cause of action for battery? Cf., Funeral Services by Gregory v. Bluefield Community Hospital, 186 W.Va. 424, 413 S.E.2d 79 (1991). What about the patients of a dentist who does not disclose he has AIDS? What if the dentist always wore gloves during treatment procedures? Would the reasonable person find such touching offensive? See Brzoska v. Olson, 668 A.2d 1355 (Dela. 1995).

Fisher v. Carrousel Motor Hotel, Inc.

Supreme Court of Texas, 1967.
424 S.W.2d 627.

[Action for assault and battery. Plaintiff, a mathematician employed by NASA, was attending a professional conference on telemetry equipment at defendant's hotel. The meeting included a buffet luncheon. As plaintiff was standing in line with others, he was approached by one of defendant's employees, who snatched the plate from his hand, and shouted that a "Negro could not be served in the club." Plaintiff was not actually touched, and was in no apprehension of physical injury; but he was highly embarrassed and hurt by the conduct in the presence of his associates. The jury returned a verdict for $400 actual damages for his humiliation and indignity, and $500 exemplary (punitive) damages in addition. The trial court set aside the verdict and gave judgment for the defendants notwithstanding the verdict. This was affirmed by the Court of Civil Appeals. Plaintiff appealed to the Supreme Court.]

GREENHILL, JUSTICE * * * Under the facts of this case, we have no difficulty in holding that the intentional grabbing of plaintiff's plate constituted a battery. The intentional snatching of an object from one's hand is as clearly an offensive invasion of his person as would be an actual contact with the body. "To constitute an assault and battery, it is not necessary to touch the plaintiff's body or even his clothing; knocking or snatching anything from plaintiff's hand or touching anything connected with his person, when done in an offensive manner, is sufficient." Morgan v. Loyacomo, 190 Miss. 656, 1 So.2d 510 (1941).

Such holding is not unique to the jurisprudence of this State. In S.H. Kress & Co. v. Brashier, 50 S.W.2d 922 (Tex.Civ.App.1932, no writ), the defendant was held to have committed "an assault or trespass upon the person" by snatching a book from the plaintiff's hand. The jury findings in that case were that the defendant "dispossessed plaintiff of the book" and caused her to suffer "humiliation and indignity."

The rationale for holding an offensive contact with such an object to be a battery is explained in 1 Restatement (Second) of Torts § 18 (Comment p. 31) as follows:

> "Since the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body, it is not necessary that the plaintiff's actual body be disturbed. Unpermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability is actionable as an offensive contact with his person. There are some things such as clothing or a cane or, indeed, anything directly grasped by the hand which are so intimately connected with one's body as to be universally regarded as part of the person."

We hold, therefore, that the forceful dispossession of plaintiff Fisher's plate in an offensive manner was sufficient to constitute a battery, and the trial court erred in granting judgment notwithstanding the verdict on the issue of actual damages. * * *

Damages for mental suffering are recoverable without the necessity for showing actual physical injury in a case of willful battery because the basis of that action is the unpermitted and intentional invasion of the plaintiff's person and not the actual harm done to the plaintiff's body. Restatement (Second) of Torts § 18. Personal indignity is the essence of an action for battery; and consequently the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting. [Cc]. We hold, therefore, that plaintiff was entitled to actual damages for mental suffering due to the willful battery, even in the absence of any physical injury. [The court then held that the defendant corporation was liable for the tort of its employee.]

The judgments of the courts below are reversed, and judgment is here rendered for the plaintiff for $900 with interest from the date of the trial court's judgment, and for costs of this suit.

NOTES AND QUESTIONS

1. What if the plate had been snatched without a racial epithet? Or, suppose the waiter had not touched plaintiff's plate, but said in a loud voice, "Get out, we don't serve Negroes here!"? What if the doorman at the hotel shouted a racial epithet and kicked plaintiff's car when he was about to leave. Battery? Cf. Van Eaton v. Thon, 764 S.W.2d 674 (Mo.App.1988) (defendant struck horse plaintiff was riding).

2. Does the utilization of the tort of battery confuse things? Why not characterize what happened as "intentional infliction of emotional harm"? Might the case be regarded as one of imaginative lawyering, assuming the state was not ready to recognize intentional infliction of emotional harm as a tort? What other remedies might have been available to plaintiff? Compare this with the *State Rubbish Collectors* case, page 51.

3. Defendant, unreasonably suspecting the plaintiff of shoplifting, forcibly seized a package from under her arm and opened it. Morgan v. Loyacomo, 190 Miss. 656, 1 So.2d 510 (1941). Defendant deliberately blew pipe smoke in plaintiff's face, knowing she was allergic to it. Richardson v. Hennly, 209 Ga.App. 868, 434 S.E.2d 772 (1993), rev'd on other grounds, 264 Ga. 355, 444 S.E.2d 317 (1994).

4. A is standing with his arm around B's shoulder and leaning on him. C, passing by, violently jerks B's arm, as a result of which A falls down. To whom is C liable for battery? Reynolds v. Pierson, 29 Ind.App. 273, 64 N.E. 484 (1902).

3. ASSAULT

I de S et ux. v. W de S

At the Assizes, 1348.
Y.B.Lib.Ass. folio 99, placitum 60.

I de S and M, his wife, complain of W de S concerning this, that the said W, in the year, etc., with force and arms did make an assault upon the

said M de S and beat her. And W pleaded not guilty. And it was found by the verdict of the inquest that the said W came at night to the house of the said I and sought to buy of his wine, but the door of the tavern was shut and he beat upon the door with a hatchet which he had in his hand, and the wife of the plaintiff put her head out of the window and commanded him to stop, and he saw and he struck with the hatchet but did not hit the woman. Whereupon the inquest said that it seemed to them that there was no trespass since no harm was done.

THORPE, C.J. There is harm done and a trespass for which he shall recover damages since he made an assault upon the woman, as has been found, although he did no other harm. Wherefore tax the damages, etc. And they taxed the damages at half a mark. Thorpe awarded that they should recover their damages, etc., and that the other should be taken. And so note that for an assault a man shall recover damages, etc.

NOTES AND QUESTIONS

1. This is the great-grandparent of all assault cases. Why allow the action if "no harm was done"?

Western Union Telegraph Co. v. Hill

Court of Appeals of Alabama, 1933.
25 Ala.App. 540, 150 So. 709.

Action for damages for assault by J.B. Hill against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals.

SAMFORD, JUDGE. The action in this case is based upon an alleged assault on the person of plaintiff's wife by one Sapp, an agent of defendant in charge of its office in Huntsville, Ala. The assault complained of consisted of an attempt on the part of Sapp to put his hand on the person of plaintiff's wife coupled with a request that she come behind the counter in defendant's office, and that, if she would come and allow Sapp to love and pet her, he "would fix her clock."

The first question that addresses itself to us is, Was there such an assault as will justify an action for damages? * * *

While every battery includes an assault, an assault does not necessarily require a battery to complete it. What it does take to constitute an assault is an unlawful attempt to commit a battery, incomplete by reason of some intervening cause; or, to state it differently, to constitute an actionable assault there must be an intentional, unlawful, offer to touch the person of another in a rude or angry manner under such circumstances as to create in the mind of the party alleging the assault a well-founded fear of an imminent battery, coupled with the apparent present ability to effectuate the attempt, if not prevented. * * *

What are the facts here? Sapp was the agent of defendant and the manager of its telegraph office in Huntsville. Defendant was under contract with plaintiff to keep in repair and regulated an electric clock in plaintiff's

place of business. When the clock needed attention, that fact was to be reported to Sapp, and he in turn would report to a special man, whose duty it was to do the fixing. At 8:13 o'clock p.m. plaintiff's wife reported to Sapp over the phone that the clock needed attention, and, no one coming to attend the clock, plaintiff's wife went to the office of defendant about 8:30 p.m. There she found Sapp in charge and behind a desk or counter, separating the public from the part of the room in which defendant's operator worked. The counter is four feet and two inches high, and so wide that, Sapp standing on the floor, leaning against the counter and stretching his arm and hand to the full length, the end of his fingers reaches just to the outer edge of the counter. The photographs in evidence show that the counter was as high as Sapp's armpits. Sapp had had two or three drinks and was ''still slightly feeling the effects of whisky; I felt all right; I felt good and amiable.'' When plaintiff's wife came into the office, Sapp came from towards the rear of the room and asked what he could do for her. She replied: ''I asked him if he understood over the phone that my clock was out of order and when he was going to fix it. He stood there and looked at me a few minutes and said: 'If you will come back here and let me love and pet you, I will fix your clock.' This he repeated and reached for me with his hand, he extended his hand toward me, he did not put it on me; I jumped back. I was in his reach as I stood there. He reached for me right along here (indicating her left shoulder and arm).'' The foregoing is the evidence offered by plaintiff tending to prove assault. Per contra, aside from the positive denial by Sapp of any effort to touch Mrs. Hill, the physical surroundings as evidenced by the photographs of the locus tend to rebut any evidence going to prove that Sapp could have touched plaintiff's wife across that counter even if he had reached his hand in her direction unless she was leaning against the counter or Sapp should have stood upon something so as to elevate him and allow him to reach beyond the counter. However, there is testimony tending to prove that, notwithstanding the width of the counter and the height of Sapp, Sapp could have reached from six to eighteen inches beyond the desk in an effort to place his hand on Mrs. Hill. The evidence as a whole presents a question for the jury. This was the view taken by the trial judge, and in the several rulings bearing on this question there is no error. * * *

[Reversed on the ground that Sapp had not acted within the scope of his employment.]

NOTES AND QUESTIONS

1. Defendant, standing three or four feet from plaintiff, made a ''kissing sign'' at her by puckering his lips and smacking them. He did not touch her and made no effort to kiss her or to use any force. Is this an assault? Fuller v. State, 44 Tex.Crim. 463, 72 S.W. 184 (1903). Defendant Ku Klux Klan members dressed in KKK robes and carrying guns rode around in a shrimp boat on Galveston Bay from dock to dock frightening Vietnamese fishermen and their families. What would the family members have to prove to recover for assault? See, Vietnamese Fishermen's Ass'n v. Knights of the K.K.K., 518 F.Supp. 993 (S.D.Tex.1981) (applying Texas law).

2. Defendant, a hundred yards from plaintiff, starts running toward him, throwing rocks as he runs. At what point does this become an assault? Cf. State v. Davis, 23 N.C. (1 Ired.) 125, 35 Am.Dec. 735 (1840); Grimes v. State, 99 Miss. 232, 54 So. 839 (1911).

3. What about mere preparation, such as bringing a gun along for an interview? Penny v. State, 114 Ga. 77, 39 S.E. 871 (1901).

4. Although the court uses the term "fear" of an imminent battery, assault requires only apprehension or anticipation. Suppose Hill had a black belt in karate and was contemptuous of Sapp? Assault? Cf. Brady v. Schatzel, [1911] Q.St.R. 206, 208 (police officer testified he was not afraid when defendant pulled a gun on him because he did not believe he would fire it). Why might a lawyer plead and try to prove fear if it is not a necessary element of the tort?

5. Is there an assault if defendant threatens the plaintiff with an unloaded gun? See Allen v. Hannaford, 138 Wash. 423, 244 P. 700 (1926). Suppose the gun remains lying in defendant's lap? See Castiglione v. Galpin, 325 So.2d 725 (La.App. 1976).

6. In State v. Barry, 45 Mont. 598, 124 P. 775 (1912), it was held that there was no assault where the plaintiff did not learn that a gun was aimed at him with intent to shoot him until it was all over. The Restatement (Second) of Torts § 22, has agreed.

7. A major distinction between a criminal assault and an assault in tort is that for criminal assault, a victim need not have an apprehension of contact. A criminal assault occurs if the defendant intends to injure the victim and has the ability to do so. Commonwealth v. Slaney, 345 Mass. 135, 185 N.E.2d 919 (1962). For the tort of assault, the victim must have an apprehension of contact, and it is not necessary that the defendant have the actual ability to carry out the threatened contact. Depending upon the jurisdiction, a defendant could be subject to either criminal prosecution or civil damages, or both.

8. What if the threat is not imminent? Brower v. Ackerley, 88 Wash.App. 87, 943 P.2d 1141, 1145 (1997) (threats of future action—"I'm going to find out where you live and kick your ass" and "you're finished; cut you in your sleep"—not imminent enough to state cause of action for assault.) Does a complaint state a cause of action for assault if one paragraph of the complaint asserts that the defendants threatened to strike the plaintiffs with blackjacks and that the threats placed the plaintiffs in fear that a battery will be committed against them and a subsequent paragraph asserts that the defendants showed the plaintiffs that the defendants were carrying blackjacks? Cucinotti v. Ortmann, 399 Pa. 26, 159 A.2d 216 (1960) ("words in themselves, no matter how threatening, do not constitute an assault").

9. What if these words are accompanied by a threatening gesture? Assault?

A. With his hand upon his sword, "If it were not assize-time, I would not take such language from you." Tuberville v. Savage, 1 Modern Rep. 3 (1699).

B. "Were you not an old man, I would knock you down." State v. Crow, 23 N.C. (1 Ired.) 375 (1841).

C. "If it were not for your gray hairs, I would tear your heart out." Commonwealth v. Eyre, 1 Serg. & Rawle 347 (Pa.1815).

D. "I have a great mind to hit you." State v. Hampton, 63 N.C. 13 (1868).

E. "If you do not pay me my money, I will have your life"? Keefe v. State, 19 Ark. 190 (1857).

10. Can words make an assault out of conduct that would otherwise not be sufficient for the tort? Suppose that while defendant and plaintiff are engaged in a violent quarrel, defendant reaches for his hip pocket. Does it make any difference whether he says, "I'll blow your brains out," or "Pardon me, I need a handkerchief"?

11. What about words that threaten harm from an independent source? "Look out! There is a rattlesnake behind you!"

4. FALSE IMPRISONMENT

Big Town Nursing Home, Inc. v. Newman

Court of Civil Appeals of Texas, 1970.
461 S.W.2d 195.

MCDONALD, CHIEF JUSTICE. This is an appeal by defendant Nursing Home from a judgment for plaintiff Newman for actual and exemplary damages in a false imprisonment case.

Plaintiff Newman sued defendant Nursing Home for actual and exemplary damages for falsely and wrongfully imprisoning him against his will from September 22, 1968 to November 11, 1968. * * *

Plaintiff is a retired printer 67 years of age, and lives on his social security and a retirement pension from his brother's printing company. He has not worked since 1959, is single, has Parkinson's disease, arthritis, heart trouble, a voice impediment, and a hiatal hernia. He has served in the army attaining the rank of Sergeant. He has never been in a mental hospital or treated by a psychiatrist. Plaintiff was taken to defendant nursing home on September 19, 1968, by his nephew who signed the admission papers and paid one month's care in advance. Plaintiff had been arrested for drunkenness and drunken driving in times past (the last time in 1966) and had been treated twice for alcoholism. Plaintiff testified he was not intoxicated and had nothing to drink during the week prior to admission to the nursing home. The admission papers provided that patient "will not be forced to remain in the nursing home against his will for any length of time." Plaintiff was not advised he would be kept at the nursing home against his will. On September 22, 1968, plaintiff decided he wanted to leave and tried to telephone for a taxi. Defendant's employees advised plaintiff he could not use the phone, or have any visitors unless the manager knew them, and locked plaintiff's grip and clothes up. Plaintiff walked out of the home, but was caught by employees of defendant and brought back forceably, and thereafter, placed in Wing 3 and locked up. Defendant's Administrator testified Wing 3 contained senile patients, drug addicts, alcoholics, mentally disturbed, incorrigibles and uncontrollables, and that "they were all in the same kettle of fish." Plaintiff tried to escape from the nursing home five or six times but was caught and brought back each time against his will. He was carried back to Wing 3 and locked and taped in a "restraint chair", for more than five hours. He was put back in the chair on subsequent occasions. He was not seen by the home doctor for some 10 days after he was admitted, and for 7 days after being placed in

Wing 3. The doctor wrote the social security office to change payment of plaintiff's social security checks without plaintiff's authorization. Plaintiff made every effort to leave and repeatedly asked the manager and assistant manager to be permitted to leave. The home doctor is actually a resident studying pathology and has no patients other than those in two nursing homes. Finally, on November 11, 1968, plaintiff escaped and caught a ride into Dallas, where he called a taxi and was taken to the home of a friend. During plaintiff's ordeal he lost 30 pounds. There was never any court proceeding to confine plaintiff. * * *

False imprisonment is the direct restraint of one person of the physical liberty of another without adequate legal justification. There is ample evidence to sustain [the jury's finding that plaintiff was falsely imprisoned]. * * *

Defendant placed plaintiff in Wing 3 with insane persons, alcoholics and drug addicts knowing he was not in such category; punished plaintiff by locking and taping him in the restraint chair; prevented him from using the telephone for 51 days; locked up his clothes; told him he could not be released from Wing 3 until he began to obey the rules of the home; and detained him for 51 days during which period he was demanding to be released and attempting to escape. * * *

Defendant may be compelled to respond in exemplary damages if the act causing actual damages is a wrongful act done intentionally in violation of the rights of plaintiff. [Cc]

Defendant acted in the utter disregard of plaintiff's legal rights, knowing there was no court order for commitment, and that the admission agreement provided he was not to be kept against his will. * * *

[The court of appeals found that the amount of damages was excessive and offered plaintiff a remittitur. Plaintiff subsequently agreed to the remittitur and the judgment below, so reformed, was affirmed.]

NOTES AND QUESTIONS

1. Plaintiff has a ticket to enter defendant's race track, but defendant refuses to admit him because the stewards have banned him from the track. False imprisonment? Marrone v. Washington Jockey Club, 35 App.D.C. 82 (1910) (mere refusal to admit not false imprisonment). Plaintiff attempts to enter a dance hall during a public dance, but is prevented by defendant who is under the mistaken belief that she is under eighteen. False imprisonment? Cullen v. Dickenson, 33 S.D. 27, 144 N.W. 656 (1913) (no). Suppose the exclusion is based on race or religion? There may be a civil rights action, but not false imprisonment. See 42 U.S.C. § 2000a, page 74, note 3.

2. Can there be false imprisonment in a moving automobile? Cieplinski v. Severn, 269 Mass. 261, 168 N.E. 722 (1929) (yes). In a city? Allen v. Fromme, 141 App.Div. 362, 126 N.Y.S. 520 (1910) (yes). In the state of Rhode Island? Texas? Cf. Albright v. Oliver, 975 F.2d 343 (7th Cir.1992) (in dicta, court notes that actionable confinement could be "as large as an entire state"). When plaintiff is not permitted to leave the country? Cf. Shen v. Leo A. Daly Co., 222 F.3d 472 (8th Cir. 2000) (applying Nebraska law) (although difficult to define exactly how close the restraint must be, the country of Taiwan is clearly too great an area within which to be falsely imprisoned).

3. If one exit of a room or a building is locked with plaintiff inside, but another reasonable means of exit is left open, there is no imprisonment. Davis & Allcott Co. v. Boozer, 215 Ala. 116, 110 So. 28 (1926) (door through which plaintiff had entered was locked but other door was not); Furlong v. German–American Press Ass'n, 189 S.W. 385, 389 (Mo.1916) ("If a way of escape is left open which is available without peril of life or limb, no imprisonment"). See also the classic case of Bird v. Jones, 7 A. & E., N.S., 742, 115 Eng.Rep. 668 (1845) (the portion of Hammersmith Bridge across the Thames River ordinarily used as a footpath was obstructed by seats that defendant had erected for viewing a regatta on the river and defendant's agents refused to let plaintiff pass along the footpath; no false imprisonment because plaintiff could have returned the way he had come or crossed the bridge in the carriage way).

4. What if it's just a joke? Employees of airline that prides itself on being a "fun-loving, spirited company" arranged for local police officers to perform a mock arrest of a new employee, complete with handcuffs and a suggestion that she find someone to post bail, as a prank to celebrate the end of her probation. Fuerschbach v. Southwest Airlines Co., 439 F.3d 1197 (10th Cir. 2006) (applying New Mexico law) (neither brevity of seizure not its characterization as a prank enabled officers to avoid liability).

5. The Restatement (Second) of Torts § 36, comment *a*, treats the means of escape as unreasonable if it involves exposure of the person (plaintiff in the water and defendant steals his clothes), material harm to the clothing, or danger of substantial harm to another. Plaintiff would not be required to make his escape by crawling through a sewer.

6. A means of escape is not a reasonable one if the plaintiff does not know of its existence, and it is not apparent. Talcott v. National Exhibition Co., 144 App.Div. 337, 128 N.Y.S. 1059 (1911).

7. If the only means of escape could cause physical danger to plaintiff, and he could remain "imprisoned" without any risk of harm, he may not recover for injuries he suffers in making his escape. See Sindle v. New York City Transit Authority, 33 N.Y.2d 293, 307 N.E.2d 245, 352 N.Y.S.2d 183 (1973) (plaintiff jumped from window of moving bus on way to police station).

8. Along with battery and assault, false imprisonment has now become exclusively an intentional tort. The Restatement (Second) of Torts § 35, comment *h*, points out, however, that for negligence resulting in the confinement of another a negligence action will lie, but only if some actual damage results. Cf. Mouse v. Central Sav. & Trust Co., 120 Ohio St. 599, 7 Ohio L.Abs. 334, 167 N.E. 868 (1929). What would be the result if defendant double-parks his automobile and thus prevents plaintiff from driving to an important business meeting? False imprisonment is also like battery and assault in that no actual damages need be proved. Nominal damages may be awarded. Banks v. Fritsch, 39 S.W.3d 474 (Ky. App. 2001) (teacher who chained student to tree because of repeated absenteeism liable for nominal damages if student could not prove actual damages).

Parvi v. City of Kingston

Court of Appeals of New York, 1977.
41 N.Y.2d 553, 362 N.E.2d 960, 394 N.Y.S.2d 161.

[Police, responding to a complaint, found two brothers engaged in a noisy quarrel in an alley behind a commercial building. Plaintiff was with

them, apparently trying to calm them. According to police testimony, all three were showing "the effects of alcohol." Plaintiff told the police he had no place to go, so rather than arrest him, they took him outside the city limits to an abandoned golf course to "dry out." There was conflicting testimony as to whether he went willingly. Within an hour, plaintiff had wandered 350 feet and onto the New York State Thruway, where he was struck by a car and severely injured. On cross-examination, he admitted he had no recollection of what happened that night.

Action for false imprisonment. The trial court dismissed the case and the Appellate Division affirmed.]

FUCHSBERG, JUSTICE. * * * [The element of] consciousness of confinement is a more subtle and more interesting subissue in this case. On that subject, we note that, while respected authorities have divided on whether awareness of confinement by one who has been falsely imprisoned should be a *sine qua non* for making out a case, [cc] *Broughton* [v. State of New York], 37 N.Y.2d p. 456, 373 N.Y.S.2d p. 92, 335 N.E.2d p. 313 has laid that question to rest in this State. Its holding gives recognition to the fact that false imprisonment, as a dignitary tort, is not suffered unless its victim knows of the dignitary invasion. Interestingly, the Restatement (Second) of Torts § 42 too has taken the position that there is no liability for intentionally confining another unless the person physically restrained knows of the confinement or is harmed by it.

However, though correctly proceeding on that premise, the Appellate Division, in affirming the dismissal of the cause of action for false imprisonment, erroneously relied on the fact that Parvi, after having provided additional testimony in his own behalf on direct examination, had agreed on cross that he no longer had any *recollection* of his confinement. In so doing, that court failed to distinguish between a later recollection of consciousness and the existence of that consciousness at the time when the imprisonment itself took place. The latter, of course, is capable of being proved though one who suffers the consciousness can no longer personally describe it, whether by reason of lapse of memory, incompetency, death or other cause. Specifically, in this case, while it may well be that the alcohol Parvi had imbibed or the injuries he sustained, or both, had had the effect of wiping out his recollection of being in the police car against his will, that is a far cry from saying that he was not conscious of his confinement at the time when it was actually taking place. And, even if plaintiff's sentient state at the time of his imprisonment was something less than total sobriety, that does not mean that he had no conscious sense of what was then happening to him. To the contrary, there is much in the record to support a finding that the plaintiff indeed was aware of his arrest at the time it took place. By way of illustration, the officers described Parvi's responsiveness to their command that he get into the car, his colloquy while being driven to Coleman Hill and his request to be let off elsewhere. At the very least, then, it was for the jury, in the first instance, to weigh credibility, evaluate inconsistencies and determine whether the burden of proof had been met. * * *

Reversed.

BREITEL, CHIEF JUDGE (dissenting). * * * [P]laintiff has failed even to make out a prima facie case that he was conscious of his purported confinement, and that he failed to consent to it. His memory of the entire incident had disappeared; at trial, Parvi admitted that he no longer had any independent recollection of what happened on the day of his accident, and that as to the circumstances surrounding his entrance into the police car, he only knew what had been suggested to him by subsequent conversations. In light of this testimony, Parvi's conclusory statement that he was ordered into the car against his will is insufficient, as a matter of law, to establish a prima facie case. * * *

NOTES AND QUESTIONS

1. In addition to the false imprisonment claim, could plaintiff have filed a negligence claim based on the police officers' conduct? For a more recent case with eerily similar facts, see Deuser v. Vecera, 139 F.3d 1190 (8th Cir.1998) (plaintiff's decedent who had been briefly detained by park rangers for public drunkenness, but not arrested, was released in a parking lot and wandered onto interstate where he was killed by motorist).

2. The mother of an ill and disoriented 16–year–old boy instructed a police officer to take her son to a particular hospital. Is there false imprisonment if the officer intentionally takes the boy to a different hospital? Cf. Haisenleder v. Reeder, 114 Mich.App. 258, 318 N.W.2d 634 (1982). Or what if the plaintiff, a sufferer from diabetes who is unconscious from insulin shock, is wrongfully arrested and confined in jail overnight in the belief that he is drunk, but is released before he regains consciousness. Is there a tort? See Prosser, False Imprisonment: Consciousness of Confinement, 55 Colum.L.Rev. 847 (1955); Restatement (Second) of Torts § 42.

3. Called upon to make an emergency evaluation, a doctor diagnoses a person as mentally ill and has her detained in a mental institution. Is this false imprisonment? See Williams v. Smith, 179 Ga.App. 712, 348 S.E.2d 50 (1986) (no false imprisonment if statutory commitment procedures were followed even if doctor was negligent in diagnosis); Foshee v. Health Mgt. Assocs., 675 So.2d 957 (Fla.App.1996) (false imprisonment if statutory commitment procedures were not followed by nurse who physically prevented patient from leaving a psychiatric facility and coerced her into signing voluntary admission papers). What if a hospital detains a woman for two hours while its staff initiates involuntary commitment proceedings because she is agitated and threatened suicide? Riffe v. Armstrong, 197 W.Va. 626, 477 S.E.2d 535 (1996) (hospital's action justified in light of plaintiff's condition upon arrival).

Hardy v. LaBelle's Distributing Co.

Supreme Court of Montana, 1983.
203 Mont. 263, 661 P.2d 35.

GULBRANDSON, JUSTICE. * * * Defendant, LaBelle's Distributing Company (LaBelle's) hired Hardy as a temporary employee on December 1, 1978. She was assigned duty as a sales clerk in the jewelry department.

On December 9, 1978, another employee for LaBelle's, Jackie Renner, thought she saw Hardy steal one of the watches that LaBelle's had in stock.

Jackie Renner reported her belief to LaBelle's showroom manager that evening.

On the morning of December 10, Hardy was approached by the assistant manager of LaBelle's jewelry department and told that all new employees were given a tour of the store. He showed her into the showroom manager's office and then left, closing the door behind him.

There is conflicting testimony concerning who was present in the showroom manager's office when Hardy arrived. Hardy testified that David Kotke, the showroom manager, Steve Newsom, the store's loss prevention manager, and a uniformed policeman were present. Newsom and one of the policemen in the room testified that another policeman, instead of Kotke, was present.

Hardy was told that she had been accused of stealing a watch. Hardy denied taking the watch and agreed to take a lie detector test. According to conflicting testimony, the meeting lasted approximately from twenty to forty-five minutes.

Hardy took the lie detector test, which supported her statement that she had not taken the watch. The showroom manager apologized to Hardy the next morning and told her that she was still welcome to work at LaBelle's. The employee who reported seeing Hardy take the watch also apologized. The two employees then argued briefly, and Hardy left the store.

Hardy brought this action claiming that defendants had wrongfully detained her against her will when she was questioned about the watch.

On appeal Hardy raises basically two issues: (1) Whether the evidence is sufficient to support the verdict and judgment and (2) Whether the District Court erred in the issuance of its instructions.

The two key elements of false imprisonment are the restraint of an individual against his will and the unlawfulness of such restraint. [Cc] The individual may be restrained by acts or merely by words which he fears to disregard. [Cc]

Here, there is ample evidence to support the jury's finding that Hardy was not unlawfully restrained against her will. While Hardy stated that she felt compelled to remain in the showroom manager's office, she also admitted that she wanted to stay and clarify the situation. She did not ask to leave. She was not told she could not leave. No threat of force or otherwise was made to compel her to stay. Although she followed the assistant manager into the office under pretense of a tour, she testified at trial that she would have followed him voluntarily if she had known the true purpose of the meeting and that two policemen were in the room. Under these circumstances, the jury could easily find that Hardy was not detained against her will. [Cc] See also, Meinecke v. Skaggs (1949), 123 Mont. 308, 213 P.2d 237, and Roberts v. Coleman (1961), 228 Or. 286, 365 P.2d 79. * * *

[The court also found that the District Court did not err in issuance of jury instructions on the law of false imprisonment, and affirmed the District Court's judgment in favor of defendants.]

NOTES AND QUESTIONS

1. An employee is suspected of stealing property from her employer and is told a trip to her home is necessary to recover the property. If the employee feels mentally compelled for fear of losing her job to go in an automobile with her supervisor to her home, has she been confined involuntarily? See Faniel v. Chesapeake & Potomac Tel. Co., 404 A.2d 147 (D.C.App.1979) (fear of losing one's job is a powerful incentive, but it does not render behavior involuntary).

2. Retention of plaintiff's property sometimes may provide the "restraint" necessary to constitute false imprisonment. See Fischer v. Famous–Barr Co., 646 S.W.2d 819 (Mo.App.1982), where plaintiff set off the security alarm when exiting a store because the salesperson forgot to remove the sensor tag from an article of clothing she had purchased. Because an employee of the store took possession of the bag containing her purchases, plaintiff felt she had to follow the employee back to the fourth floor where she had made her purchase. Compare Marcano v. Northwestern Chrysler–Plymouth Sales, Inc., 550 F.Supp. 595 (N.D.Ill.1982), where plaintiff went to a car dealership to discuss a dispute over payments on her loan and voluntarily gave her keys to the dealer so he could inspect the car. The dealer locked the car and kept the keys. Plaintiff stayed at the dealership for five hours. The court held that there was no false imprisonment because she could have left and because the intention of defendant was not to confine her personally, but only to keep the car.

3. False imprisonment has not been extended beyond such direct duress to person or to property. If the plaintiff submits merely to persuasion, and accompanies the defendant to clear himself of suspicion, without any implied threat of force, the action does not lie. Hunter v. Laurent, 158 La. 874, 104 So. 747 (1925); James v. MacDougall & Southwick Co., 134 Wash. 314, 235 P. 812 (1925). Suppose the defendant says to the plaintiff, "You must remain in this room, or I will never speak to you again"? Compare Fitscher v. Rollman & Sons Co., 31 Ohio App. 340, 167 N.E. 469 (1929), where defendant threatened to make a scene on the street unless plaintiff remained.

4. It is generally agreed that false imprisonment resembles assault, in that threats of future action are not enough. Thus the action does not lie where the defendant merely threatens to call the police and have the plaintiff arrested unless he remains. Sweeney v. F.W. Woolworth Co., 247 Mass. 277, 142 N.E. 50 (1924); Priddy v. Bunton, 177 S.W.2d 805 (Tex.Civ.App.1943).

5. On the shopkeeper's privilege to detain a suspected thief, see Bonkowski v. Arlan's Department Store, page 116.

Enright v. Groves

Colorado Court of Appeals, 1977.
39 Colo.App. 39, 560 P.2d 851.

SMITH, JUDGE. Defendants Groves and City of Ft. Collins appeal from judgments entered against them upon jury verdicts awarding plaintiff $500

actual damages and $1,000 exemplary damages on her claim of false imprisonment * * *.

The evidence at trial disclosed that on August 25, 1974, Officer Groves, while on duty as a uniformed police officer of the City of Fort Collins, observed a dog running loose in violation of the city's "dog leash" ordinance. He observed the animal approaching what was later identified as the residence of Mrs. Enright, the plaintiff. As Groves approached the house, he encountered Mrs. Enright's eleven-year-old son, and asked him if the dog belonged to him. The boy replied that it was his dog, and told Groves that his mother was sitting in the car parked at the curb by the house. Groves then ordered the boy to put the dog inside the house, and turned and started walking toward the Enright vehicle.

Groves testified that he was met by Mrs. Enright with whom he was not acquainted. She asked if she could help him. Groves responded by demanding her driver's license. She replied by giving him her name and address. He again demanded her driver's license, which she declined to produce. Groves thereupon advised her that she could either produce her driver's license or go to jail. Mrs. Enright responded by asking, "Isn't this ridiculous?" Groves thereupon grabbed one of her arms, stating, "Let's go!" * * *

She was taken to the police station where a complaint was signed charging her with violation of the "dog leash" ordinance and bail was set. Mrs. Enright was released only after a friend posted bail. She was later convicted of the ordinance violation. * * *

Appellants contend that Groves had probable cause to arrest Mrs. Enright, and that she was in fact arrested for and convicted of violation of the dog-at-large ordinance. They assert, therefore, that her claim for false imprisonment or false arrest cannot lie, and that Groves' use of force in arresting Mrs. Enright was permissible. We disagree.

False arrest arises when one is taken into custody by a person who claims but does not have proper legal authority. W. Prosser, Torts § 11 (4th ed.). Accordingly, a claim for false arrest will not lie if an officer has a valid warrant or probable cause to believe that an offense has been committed and that the person who was arrested committed it. Conviction of the crime for which one is specifically arrested is a complete defense to a subsequent claim of false arrest. [Cc]

Here, however, the evidence is clear that Groves arrested Mrs. Enright, not for violation of the dog leash ordinance, but rather for refusing to produce her driver's license. This basis for the arrest is exemplified by the fact that he specifically advised her that she would either produce the license or go to jail. We find no statute or case law in this jurisdiction which requires a citizen to show her driver's license upon demand, unless, for example, she is a driver of an automobile and such demand is made in that connection. * * *

Here, there was no testimony that Groves ever even attempted to explain why he was demanding plaintiff's driver's license, and it is clear

that she had already volunteered her name and address. Groves admitted that he did not ask Mrs. Enright if she had any means of identification on her person, instead he simply demanded that she give him her driver's license.

We conclude that Groves' demand for Mrs. Enright's driver's license was not a lawful order and that refusal to comply therewith was not therefore an offense in and of itself. Groves was not therefore entitled to use force in arresting Mrs. Enright. Thus Groves' defense based upon an arrest for and conviction of a specific offense must, as a matter of law, fail. * * *

Judgment affirmed.

NOTES AND QUESTIONS

1. Is it necessary that the defendant be an officer? Suppose a filling station attendant asserts legal authority to detain the plaintiff, believing he had stolen cash from the station? Daniel v. Phillips Petroleum Co., 229 Mo.App. 150, 73 S.W.2d 355 (1934). (upholding jury verdict for plaintiff). Plaintiff, alighting from defendant's train, fell and broke his leg. Defendant's conductor told plaintiff that the law required him to remain and fill out a statement about the accident. Plaintiff did so, and his cab was held for fifteen or twenty minutes, during which plaintiff was in considerable pain, while the statement was filled out and signed. This was held to be false imprisonment. Whitman v. Atchison, T. & S.F.R. Co., 85 Kan. 150, 116 P. 234 (1911).

2. A private citizen who aids a police officer in making a false arrest can be held liable to plaintiff for false imprisonment. If, however, the police officer requests assistance, the private citizen will not be liable unless he knows the arrest is an unlawful one. See Restatement (Second) of Torts §§ 45A and 139.

3. Merely providing information to the police, even if it turns out to be incorrect information, is not enough to support a claim of false imprisonment. Holcomb v. Walter's Dimmick Petroleum, Inc., 858 N.E.2d 103, 107 (Ind. 2006) (''Liability will not be imposed when the defendant does nothing more than detail his version of the facts to a policeman and ask for his assistance, leaving it to the officer to determine what is the appropriate response, at least where his representation of the facts does not prevent the intelligent exercise of the officer's discretion.'') See also Highfill v. Hale, 186 S.W.3d 277 (Mo. 2006) (because deputy's decision to arrest neighbors for stalking was based at least partly on deputy's own investigation, complainant was not liable).

Whittaker v. Sandford

Supreme Judicial Court of Maine, 1912.
110 Me. 77, 85 A. 399.

[Plaintiff was a member and her husband was a minister of a religious sect, of which defendant was the leader. The sect had a colony in Maine and at Jaffa (now Tel Aviv), the latter of which plaintiff had joined. Plaintiff decided to abandon the sect and to return to America. While she and her four children were in Jaffa awaiting passage on a steamer, defendant offered her passage back to America on his yacht. When plaintiff

told defendant that she was afraid that he would not let her off the yacht until she was ''won to the movement again,'' defendant assured her repeatedly that under no circumstances would she be detained on board. Plaintiff accepted this assurance and sailed for America on the yacht. On arrival in port, defendant refused to furnish her with a boat so that she could leave the yacht, saying it was up to her husband whether she could leave. When plaintiff raised the issue with her husband, he said it was up to defendant, the leader of the sect and the owner of the yacht. She remained on board for nearly a month, during which time defendant and plaintiff's husband attempted to persuade her to rejoin the sect. On several occasions, plaintiff, always in the company of her husband, was allowed to go ashore to the mainland and to various islands. She was not allowed to leave the yacht unaccompanied. She finally obtained her release and that of her four children with the assistance of the sheriff and a writ of habeas corpus. She then brought this action for false imprisonment. The jury returned a verdict in her favor for $1100. Defendant excepted to the court's instructions, and appealed from an order denying his motion for a new trial.]

SAVAGE, J. * * * The court instructed the jury that the plaintiff to recover must show that the restraint was physical, and not merely a moral influence; that it must have been actual physical restraint, in the sense that one intentionally locked into a room would be physically restrained but not necessarily involving physical force upon the person; that it was not necessary that the defendant, or any person by his direction, should lay his hand upon the plaintiff; that if the plaintiff was restrained so that she could not leave the yacht Kingdom by the intentional refusal to furnish transportation as agreed, she not having it in her power to escape otherwise, it would be a physical restraint and unlawful imprisonment. We think the instructions were apt and sufficient. If one should, without right, turn the key in a door, and thereby prevent a person in the room from leaving, it would be the simplest form of unlawful imprisonment. The restraint is physical. The four walls and the locked door are physical impediments to escape. Now is it different when one who is in control of a vessel at anchor, within practical rowing distance from the shore, who has agreed that a guest on board shall be free to leave, there being no means to leave except by rowboats, wrongfully refuses the guest the use of a boat? The boat is the key. By refusing the boat he turns the key. The guest is as effectually locked up as if there were walls along the sides of the vessel. The restraint is physical. The impassable sea is the physical barrier. * * *

A careful study of the evidence leads us to conclude that the jury were warranted in finding that the defendant was guilty of unlawful imprisonment. This, to be sure, is not an action based upon the defendant's failure to keep his agreement to permit the plaintiff to leave the yacht as soon as it should reach shore. But his duty under the circumstances is an important consideration. It cannot be believed that either party to the agreement understood that it was his duty merely to bring her to an American harbor. The agreement implied that she was to go ashore. There was no practical way for her to go ashore except in the yacht's boats. The agreement must be understood to mean that he would bring her to land, or to allow her to

get to land, by the only available means. The evidence is that he refused her a boat. His refusal was wrongful. The case leaves not the slightest doubt that he had the power to control the boats, if he chose to exercise it. It was not enough for him to leave it to the husband to say whether she might go ashore or not. She had a personal right to go on shore. If the defendant personally denied her the privilege, as the jury might find he did, it was a wrongful denial.

NOTES AND QUESTIONS

1. A woman tells her boyfriend she does not want to see him anymore, but agrees to ride with him just to the store and back. When they return to her parents' house and she opens the car door, the boyfriend suddenly starts the car off, making it dangerous for her to exit the moving vehicle. False imprisonment? See Noguchi v. Nakamura, 2 Haw.App. 655, 638 P.2d 1383 (1982).

2. In Talcott v. National Exhibition Co., 144 App.Div. 337, 128 N.Y.S. 1059 (1911), plaintiff was one of a crowd seeking admission to the baseball game between the Chicago Cubs and the New York Giants that played off the tie for the 1908 National League pennant. This was necessary because of a one-to-one tie in an earlier game between the same teams, produced when Fred Merkle of the Giants pulled his famous ''bonehead play'' in failing to touch second base. For two fascinating accounts of that game told by other players in it, see L. Ritter, The Glory of Their Times 98–100 and 124–218 (1966); the book has a picture of the after-game crowd in the Polo Grounds at page 126. The Giants, who would have won the pennant except for the Merkle error, lost the playoff game. Plaintiff succeeded in entering an enclosure where tickets were sold, but found that he could not get in to the stands. Defendant closed the entrance gates behind him to prevent injuries from the crush. There was another exit, but because defendant failed to inform plaintiff of its existence, he remained within the enclosure for more than an hour. In his action for false imprisonment, a verdict and judgment in his favor were affirmed. It was held that while the defendant might have been justified in closing the gates, it was then under a duty to inform plaintiff of the other exit.

3. Members of a religious cult are abducted by their relatives and subjected to deprogramming. Is this false imprisonment? Eilers v. Coy, 582 F.Supp. 1093 (D.Minn.1984).

4. Plaintiff boarded a plane in Washington, D.C., for a flight to New York where he was to attend a reception at the United Nations. After sitting on the tarmac for over an hour waiting for his flight to take off, plaintiff realized he would miss the reception and demanded to be returned to the terminal. Is the airline liable for failing to allow him to leave the airplane after it had pulled away from the gate? After it had sat on the tarmac for an hour? Somewhere above New Jersey? See Abourezk v. New York Airlines, 895 F.2d 1456 (D.C.Cir.1990) (no duty to release passenger until plane reached New York absent exigent circumstances not present in the case).

5. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

State Rubbish Collectors Ass'n v. Siliznoff

Supreme Court of California, 1952.
38 Cal.2d 330, 240 P.2d 282.

[The State Rubbish Collectors Association sued Siliznoff to collect on certain notes. Siliznoff sought cancellation of the notes because of duress

and want of consideration. In addition, he sought general and punitive damages because of alleged ''assaults'' made on him. The evidence was that Siliznoff had collected the trash from the Acme Brewing Company, which the Association regarded as within the territory of another member of the Association named Abramoff. The defendant was called before the Association and ordered to pay over the collected money to Abramoff, as a result of which he signed the notes in question. Further facts appear in the opinion.

The jury returned a verdict for Siliznoff on the original complaint and on the counterclaim. Siliznoff obtained a judgment against the Association for $1,250 general and special damages and $4,000 punitive damages. The Association appealed the judgment.]

TRAYNOR, J. * * * Plaintiff's primary contention is that the evidence is insufficient to support the judgment. Defendant testified that: * * *

Andikian [an inspector of the Association] told defendant that '' 'We will give you up till tonight to get down to the board meeting and make some kind of arrangements or agreements about the Acme Brewery, or otherwise we are going to beat you up.' * * * He says he either would hire somebody or do it himself. And I says, 'Well, what would they do to me?' He says, well, they would physically beat me up first, cut up the truck tires or burn the truck, or otherwise put me out of business completely. He said if I didn't appear at that meeting and make some kind of an agreement that they would do that, but he says up to then they would let me alone, but if I walked out of that meeting that night they would beat me up for sure.'' Defendant attended the meeting and protested that he owed nothing for the Acme account and in any event could not pay the amount demanded. He was again told by the president of the association that ''that table right there [the board of directors] ran all the rubbish collecting in Los Angeles and if there was any routes to be gotten that they would get them and distribute them among their members * * *.'' After two hours of further discussion defendant agreed to join the association and pay for the Acme account. He promised to return the next day and sign the necessary papers. He testified that the only reason ''they let me go home, is that I promised that I would sign the notes the very next morning.'' The president ''made me promise on my honor and everything else, and I was scared, and I knew I had to come back, so I believe he knew I was scared and that I would come back. That's the only reason they let me go home.'' Defendant also testified that because of the fright he suffered during his dispute with the association he became ill and vomited several times and had to remain away from work for a period of several days.

Plaintiff contends that the evidence does not establish an assault against defendant because the threats made all related to action that might take place in the future; that neither Andikian nor members of the board of directors threatened immediate physical harm to defendant. [C] We have concluded, however, that a cause of action is established when it is shown that one, in the absence of any privilege, intentionally subjects another to the mental suffering incident to serious threats to his physical well-being,

whether or not the threats are made under such circumstances as to constitute a technical assault.

In the past it has been frequently stated that the interest in emotional and mental tranquillity is not one that the law will protect from invasion in its own right. [Cc] As late as 1934 the Restatement of Torts took the position that "The interest in mental and emotional tranquillity and, therefore, in freedom from mental and emotional disturbance is not, as a thing in itself, regarded as of sufficient importance to require others to refrain from conduct intended or recognizably likely to cause such a disturbance." Restatement, Torts, § 46, comment *c*. The Restatement explained the rule allowing recovery for the mere apprehension of bodily harm in traditional assault cases as an historical anomaly (§ 24, comment *c*), and the rule allowing recovery for insulting conduct by an employee of a common carrier as justified by the necessity of securing for the public comfortable as well as safe service (§ 48, comment *c*).

The Restatement recognized, however, that in many cases mental distress could be so intense that it could reasonably be foreseen that illness or other bodily harm might result. If the defendant intentionally subjected the plaintiff to such distress and bodily harm resulted, the defendant would be liable for negligently causing the plaintiff bodily harm. Restatement, Torts, §§ 306, 312. Under this theory the cause of action was not founded on a right to be free from intentional interference with mental tranquillity, but on the right to be free from negligent interference with physical well-being. A defendant who intentionally subjected another to mental distress without intending to cause bodily harm would nevertheless be liable for resulting bodily harm if he should have foreseen that the mental distress might cause such harm.

The California cases have been in accord with the Restatement in allowing recovery where physical injury resulted from intentionally subjecting the plaintiff to serious mental distress. [Cc]

The view has been forcefully advocated that the law should protect emotional and mental tranquillity as such against serious and intentional invasions, [cc] and there is a growing body of case law supporting this position. [Cc] In recognition of this development the American Law Institute amended section 46 of the Restatement of Torts in 1947 to provide:

"One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it."

In explanation it is stated that "The interest in freedom from severe emotional distress is regarded as of sufficient importance to require others to refrain from conduct intended to invade it. Such conduct is tortious. The injury suffered by the one whose interest is invaded is frequently far more serious to him than certain tortious invasions of the interest in bodily integrity and other legally protected interests. In the absence of a privilege, the actor's conduct has no social utility; indeed it is anti-social. No reason or policy requires such an actor to be protected from the liability which

usually attaches to the wilful wrongdoer whose efforts are successful.'' (Restatement of the Law, 1948 Supplement, Torts, § 46, comment *d*.)

There are persuasive arguments and analogies that support the recognition of a right to be free from serious, intentional and unprivileged invasions of mental and emotional tranquillity. If a cause of action is otherwise established, it is settled that damages may be given for mental suffering naturally ensuing from the acts complained of [cc], and in the case of many torts, such as assault, battery, false imprisonment and defamation, mental suffering will frequently constitute the principal element of damages. [C] In cases where mental suffering constitutes a major element of damages it is anomalous to deny recovery because the defendant's intentional misconduct fell short of producing some physical injury.

It may be contended that to allow recovery in the absence of physical injury will open the door to unfounded claims and a flood of litigation, and that the requirement that there be physical injury is necessary to insure that serious mental suffering actually occurred. The jury is ordinarily in a better position, however, to determine whether outrageous conduct results in mental distress than whether that distress in turn results in physical injury. From their own experience jurors are aware of the extent and character of the disagreeable emotions that may result from the defendant's conduct, but a difficult medical question is presented when it must be determined if emotional distress resulted in physical injury. [C] Greater proof that mental suffering occurred is found in the defendant's conduct designed to bring it about than in physical injury that may or may not have resulted therefrom. * * *

In the present case plaintiff caused defendant to suffer extreme fright. By intentionally producing such fright it endeavored to compel him either to give up the Acme account or pay for it, and it had no right or privilege to adopt such coercive methods in competing for business. In these circumstances liability is clear. * * *

The judgment is affirmed.

NOTES AND QUESTIONS

1. Why not assault? Why not false imprisonment? Assuming neither tort occurred, how many attorneys in 1952 would have thought of bringing a cross-complaint in this case for ''intentional infliction of emotional harm''? How many judges would have adopted it?

2. But what form of tort has been unleashed? Is it as definite in character as those that arose out of the writ of trespass? What would the result have been in the main case if the Association had only threatened to close down Siliznoff's business, but had not made threats to his physical well-being? Do you agree that the jury can more easily determine whether conduct is outrageous than whether physical injury resulted from emotional harm? If so, does this fact suggest that a claim should be allowed?

3. The seminal case to allow recovery for the intentional infliction of mental distress as a distinct tort was Wilkinson v. Downton, [1897] 2 Q.B. 57, in which a practical joker amused himself by telling the plaintiff that her husband had been

smashed up in an accident, was lying at The Elms in Leytonstone with both legs broken, and that she was to go to him at once in a cab with two pillows to fetch him home. The shock to her nervous system caused serious physical illness with permanent consequences, and at one time threatened her reason. The cause of action through which defendant was held liable is unclear to the reader of the opinion and apparently to the court as well.

4. *Interference with Human Bodies*. Before the recognition of a separate tort for intentional infliction of emotional distress, a number of courts had allowed recovery for mental distress at the intentional mutilation or disinterment of a dead body or for interference with proper burial. See, for example, Alderman v. Ford, 146 Kan. 698, 72 P.2d 981 (1937); Gostkowski v. Roman Catholic Church, 262 N.Y. 320, 186 N.E. 798 (1933); Papieves v. Lawrence, 437 Pa. 373, 263 A.2d 118 (1970). In these and later cases, the courts have talked of a property right in the body, said to be in the next of kin or a group of close relatives, which serves as a foundation for the action for mental disturbance. See, for example, Whaley v. County of Tuscola, 58 F.3d 1111 (6th Cir.1995) (discussing Ohio and Michigan law) (unauthorized removal of corneas and eyeballs by coroner). In Gadbury v. Bleitz, 133 Wash. 134, 233 P. 299 (1925), where the body was held without burial with demand for payment of another debt, the court avoided difficulties surrounding right of ownership by recognizing that the tort was in reality the intentional infliction of mental distress upon the survivors by extreme outrage. In accord, Gray Brown–Service Mortuary, Inc. v. Lloyd, 729 So.2d 280, 285 (Ala. 1999) (''It has long been the law of Alabama that mistreatment of burial places and human remains will support the recovery of damages for mental suffering.'')

5. *Common Carriers and Innkeepers* have been held to a higher standard of conduct and sometimes held liable for using insulting language to their passengers and patrons. See, e.g., Lipman v. Atlantic Coast Line R.R. Co., 108 S.C. 151, 93 S.E. 714 (1917) (carrier); Emmke v. De Silva, 293 F. 17 (8th Cir. 1923) (hotel). But cf. Wallace v. Shoreham Hotel Corp., 49 A.2d 81 (D.C. Mun. App. 1946) (restaurant patron did not state cause of action based on waiter's insult) and Bethel v. N.Y.C. Transit Authority, 92 N.Y.2d 348, 681 N.Y.S.2d 201, 703 N.E.2d 1214 (1998) (abolishing higher standard of care for common carriers).

6. As the principal case indicates, § 46 of the Restatement of Torts was changed in the 1948 Supplement to recognize the cause of action for the intentional infliction of severe emotional distress, called ''outrage'' in some jurisdictions. As with any newly recognized cause of action, the courts in each jurisdiction must struggle with what its contours will be. What sorts of conduct constitutes ''extreme and outrageous'' conduct? Are words alone enough? Should the plaintiff's individual vulnerabilities be taken into account? How does the jury determine whether the emotional distress is ''severe''? Is it necessary that the defendant intended to cause the mental disturbance, or that it be substantially certain to follow, within the rule stated in Garratt v. Dailey, page 17?

Slocum v. Food Fair Stores of Florida

Supreme Court of Florida, 1958.
100 So.2d 396.

DREW, JUSTICE. This appeal is from an order dismissing a complaint for failure to state a cause of action. Simply stated, the plaintiff sought money damages for mental suffering or emotional distress, and an ensuing heart

attack and aggravation of pre-existing heart disease, allegedly caused by insulting language of the defendant's employee directed toward her while she was a customer in its store. Specifically, in reply to her inquiry as to the price of an item he was marking, he replied: ''If you want to know the price, you'll have to find out the best way you can * * * you stink to me.'' She asserts, in the alternative, that the language was used in a malicious or grossly reckless manner, ''or with intent to inflict great mental and emotional disturbance to said plaintiff.''

No great difficulty is involved in the preliminary point raised as to the sufficiency of damages alleged, the only direct injury being mental or emotional with physical symptoms merely derivative therefrom. [C] While that decision would apparently allow recovery for mental suffering, even absent physical consequences, inflicted in the course of other intentional or malicious torts, it does not resolve the central problem in this case, i.e. whether the conduct here claimed to have caused the injury, the use of insulting language under the circumstances described, constituted an actionable invasion of a legally protected right. Query: does such an assertion of a deliberate disturbance of emotional equanimity state an independent cause of action in tort?

Appellant's fundamental argument is addressed to that proposition. The case is one of first impression in this jurisdiction, and she contends that this Court should recognize the existence of a new tort, an independent cause of action for intentional infliction of emotional distress.

A study of the numerous references on the subject indicates a strong current of opinion in support of such recognition, in lieu of the strained reasoning so often apparent when liability for such injury is predicated upon one or another of several traditional tort theories. * * *

A most cogent statement of the doctrine covering tort liability for insult has been incorporated in the Restatement of the Law of Torts, 1948 supplement, sec. 46, entitled ''Conduct intended to cause emotional distress only.'' It makes a blanket provision for liability on the part of ''one, who, without a privilege to do so, intentionally causes severe emotional distress to another,'' indicating that the requisite intention exists ''when the act is done for the purpose of causing the distress or with knowledge * * * that severe emotional distress is substantially certain to be produced by [such] conduct.'' Comment (a), Sec. 46, supra. Abusive language is, of course, only one of the many means by which the tort could be committed.

However, even if we assume, without deciding, the legal propriety of that doctrine, a study of its factual applications shows that a line of demarcation should be drawn between conduct likely to cause mere ''emotional distress'' and that causing ''severe emotional distress,'' so as to exclude the situation at bar. [C] ''So far as it is possible to generalize from the cases, the rule which seems to be emerging is that there is liability only for conduct exceeding all bounds which could be tolerated by society, of a nature especially calculated to cause mental damage of a very serious kind.'' [C] And the most practicable view is that the functions of court and jury are no different than in other tort actions where there is at the outset

a question as to whether the conduct alleged is so legally innocuous as to present no issue for a jury. [C]

This tendency to hinge the cause of action upon the degree of the insult has led some courts to reject the doctrine in toto. [C] Whether or not this is desirable, it is uniformly agreed that the determination of whether words or conduct are actionable in character is to be made on an objective rather than subjective standard, from common acceptation. The unwarranted intrusion must be calculated to cause ''severe emotional distress'' to a person of ordinary sensibilities, in the absence of special knowledge or notice. There is no inclination to include all instances of mere vulgarities, obviously intended as meaningless abusive expressions. While the manner in which language is used may no doubt determine its actionable character, appellant's assertion that the statement involved in this case was made to her with gross recklessness, etc., cannot take the place of allegations showing that the words were intended to have real meaning or serious effect.

A broader rule has been developed in a particular class of cases, usually treated as a distinct and separate area of liability originally applied to common carriers. Rest.Torts, per. ed., sec. 48. The courts have from an early date granted relief for offense reasonably suffered by a patron from insult by a servant or employee of a carrier, hotel, theater, and most recently, a telegraph office. The existence of a special relationship, arising either from contract or from the inherent nature of a non-competitive public utility, supports a right and correlative duty of courtesy beyond that legally required in general mercantile or personal relationships. [Cc]

In view of the concurrent development of the cause of action first above described, there is no impelling reason to extend the rule of the latter cases. Their rationale does not of necessity cover the area of business invitees generally, where the theory of respondeat superior underlying most liabilities of the employer would dictate some degree of conformity to standards of individual liability. This factor, together with the stringent standards of care imposed in a number of the carrier cases [c], may have influenced the treatment of the subject by editors of the Restatement, where the statement of the carrier doctrine is quite limited in scope and classified separately from the section covering the more general area of liability under consideration. But whether or not these rules are ultimately adopted in this jurisdiction, the facts of the present case cannot be brought within their reasonable intendment.

Affirmed.

NOTES AND QUESTIONS

1. Why is the intentional infliction of mental disturbance by the insult not a tort in itself?

2. ''Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be. * * * Of course there is danger of getting into the realm of the trivial in this matter of insulting

language. No pressing social need requires that every abusive outburst be converted into a tort; upon the contrary, it would be unfortunate if the law closed all the safety valves through which irascible tempers might legally blow off steam.'' Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv.L.Rev. 1033, 1035, 1053 (1936).

3. A South Carolina gentleman, incensed at his inability to get a telephone number, so far forgets his chivalry as to call the operator a God damned woman, and to say that if he were there he would break her God damned neck. The unprecedented experience, according to her allegations, causes her extreme mental disturbance and leaves her a nervous wreck. Does this state a cause of action? Brooker v. Silverthorne, 111 S.C. 553, 99 S.E. 350, 352 (1919) (language attributed to defendant ''merits severest condemnation and subjects user to the scorn and contempt of his fellow men. But it is not civilly actionable.'')

4. None of these was found actionable: Halliday v. Cienkowski, 333 Pa. 123, 3 A.2d 372 (1939) (''Scotch bitch,'' ''bastard,'' and ''bum''); Atkinson v. Bibb Mfg. Co., 50 Ga.App. 434, 178 S.E. 537 (1935) (foreman cursing discharged woman, with open knife in his hand); Kramer v. Ricksmeier, 159 Iowa 48, 139 N.W. 1091 (1913) (profanity and abuse over the telephone, with threats of future violence); Barry v. Baugh, 111 Ga.App. 813, 143 S.E.2d 489 (1965) (''crazy'').

5. What if the slurs or insults focus on racial, ethnic, or sexual characteristics? Most courts have found them not so outrageous as to be intolerable in a civilized society. See, for example, Harville v. Lowville Central School Dist., 245 A.D.2d 1106, 667 N.Y.S.2d 175 (App. Div. 1997) (student called ''Polish Nazi'' by teacher); Ugalde v. W.A. McKenzie Asphalt Co., 990 F.2d 239 (5th Cir. 1993) (applying Texas law) (worker called ''wetback'' by supervisor); Taggart v. Drake Univ., 549 N.W.2d 796 (Iowa 1996) (in fit of temper, dean addresses faculty member as ''young woman'' and refers to her in a ''sexist and condescending manner''). Such words may be considered along with other conduct, however, in making a claim. Contreras v. Crown Zellerbach Corp., 88 Wash.2d 735, 736, 565 P.2d 1173, 1174 (1977) (''continuous humiliation and embarrassment by reason of racial jokes, slurs and comments made in his presence'' by coworkers and supervisors held to state a claim).

6. Note the last sentence of the opinion in the principal case. The Supreme Court of Florida did not adopt intentional infliction of emotional distress until almost thirty years later. Metropolitan Life Ins. Co. v. McCarson, 467 So.2d 277 (Fla. 1985).

Harris v. Jones

Court of Appeals of Maryland, 1977.
281 Md. 560, 380 A.2d 611.

MURPHY, CHIEF JUDGE. * * * The plaintiff, William R. Harris, a 26–year–old, 8–year employee of General Motors Corporation (GM), sued GM and one of its supervisory employees, H. Robert Jones, in the Superior Court of Baltimore City. The declaration alleged that Jones, aware that Harris suffered from a speech impediment which caused him to stutter, and also aware of Harris' sensitivity to his disability, and his insecurity because of it, nevertheless ''maliciously and cruelly ridiculed * * * [him] thus causing tremendous nervousness, increasing the physical defect itself and further injuring the mental attitude fostered by the Plaintiff toward his problem

and otherwise intentionally inflicting emotional distress.'' It was also alleged in the declaration that Jones' actions occurred within the course of his employment with GM and that GM ratified Jones' conduct.

The evidence at trial showed that Harris stuttered throughout his entire life. While he had little trouble with one syllable words, he had great difficulty with longer words or sentences, causing him at times to shake his head up and down when attempting to speak.

During part of 1975, Harris worked under Jones' supervision at a GM automobile assembly plant. Over a five-month period, between March and August of 1975, Jones approached Harris over 30 times at work and verbally and physically mimicked his stuttering disability. In addition, two or three times a week during this period, Jones approached Harris and told him, in a ''smart manner,'' not to get nervous. As a result of Jones' conduct, Harris was ''shaken up'' and felt ''like going into a hole and hide.''

On June 2, 1975, Harris asked Jones for a transfer to another department; Jones refused, called Harris a ''troublemaker'' and chastised him for repeatedly seeking the assistance of his committeeman, a representative who handles employee grievances. On this occasion, Jones, ''shaking his head up and down'' to imitate Harris, mimicked his pronunciation of the word ''committeeman,'' which Harris pronounced ''mmitteeman.'' * * *

Harris had been under the care of a physician for a nervous condition for six years prior to the commencement of Jones' harassment. He admitted that many things made him nervous, including ''bosses.'' Harris testified that Jones' conduct heightened his nervousness and his speech impediment worsened. He saw his physician on one occasion during the five-month period that Jones was mistreating him; the physician prescribed pills for his nerves.

Harris admitted that other employees at work mimicked his stuttering. Approximately 3,000 persons were employed on each of two shifts, and Harris acknowledged the presence at the plant of a lot of ''tough guys,'' as well as profanity, name-calling and roughhousing among the employees. He said that a bad day at work caused him to become more nervous than usual. He admitted that he had problems with supervisors other than Jones, that he had been suspended or relieved from work 10 or 12 times, and that after one such dispute, he followed a supervisor home on his motorcycle, for which he was later disciplined.

On this evidence, * * * the jury awarded Harris $3,500 compensatory damages and $15,000 punitive damages against both Jones and GM. [This was reversed by the Court of Special Appeals.]

In concluding that the intentional infliction of emotional distress, standing alone, may constitute a valid tort action, the Court of Special Appeals relied upon Restatement (Second) of Torts, ch. 2, Emotional Distress, § 46 (1965), which provides, in pertinent part:

''§ 46. Outrageous Conduct Causing Severe Emotional Distress

''(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability

for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.''

The court noted that the tort was recognized, and its boundaries defined, in W. Prosser, Law of Torts § 12, at 56 (4th ed. 1971), as follows:

''So far as it is possible to generalize from the cases, the rule which seems to have emerged is that there is liability for conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind.''

The trend in other jurisdictions toward recognition of a right to recover for severe emotional distress brought on by the intentional act of another is manifest. Indeed, 37 jurisdictions appear now to recognize the tort as a valid cause of action. * * *

[F]our elements * * * must coalesce to impose liability for intentional infliction of emotional distress:

(1) The conduct must be intentional or reckless;

(2) The conduct must be extreme and outrageous;

(3) There must be a causal connection between the wrongful conduct and the emotional distress;

(4) The emotional distress must be severe. * * *

[The intermediate Court of Special Appeals had found that the first two elements were established but reversed on the ground that the last two elements were not.]

Whether the conduct of a defendant has been ''extreme and outrageous,'' so as to satisfy that element of the tort, has been a particularly troublesome question. Section 46 of the Restatement, comment *d*, states that ''Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'' The comment goes on to state that liability does not extend, however: ''to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. * * * ''

In determining whether conduct is extreme and outrageous, it should not be considered in a sterile setting, detached from the surroundings in which it occurred. [C] The personality of the individual to whom the misconduct is directed is also a factor. ''There is a difference between violent and vile profanity addressed to a lady, and the same language to a Butte miner and a United States marine.'' Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich.L.Rev. 874, 887 (1939). * * *

It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as extreme and outra-

geous; where reasonable men may differ, it is for the jury to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability. * * *

While it is crystal clear that Jones' conduct was intentional, we need not decide whether it was extreme or outrageous, or causally related to the emotional distress which Harris allegedly suffered.[2] The fourth element of the tort—that the emotional distress must be severe—was not established by legally sufficient evidence justifying submission of the case to the jury. That element of the tort requires the plaintiff to show that he suffered a *severely* disabling emotional response to the defendant's conduct. The severity of the emotional distress is not only relevant to the amount of recovery, but is a necessary element to any recovery. * * *

Assuming that a causal relationship was shown between Jones' wrongful conduct and Harris' emotional distress, we find no evidence, legally sufficient for submission to the jury, that the distress was "severe" within the contemplation of the rule requiring establishment of that element of the tort. The evidence that Jones' reprehensible conduct humiliated Harris and caused him emotional distress, which was manifested by an aggravation of Harris' pre-existing nervous condition and a worsening of his speech impediment, was vague and weak at best. * * * While Harris' nervous condition may have been exacerbated somewhat by Jones' conduct, his family problems antedated his encounter with Jones and were not shown to be attributable to Jones' actions. Just how, or to what degree, Harris' speech impediment worsened is not revealed by the evidence. Granting the cruel and insensitive nature of Jones' conduct toward Harris, and considering the position of authority which Jones held over Harris, we conclude that the humiliation suffered was not, as a matter of law, so intense as to constitute the "severe" emotional distress required to recover for the tort of intentional infliction of emotional distress.

Judgment affirmed; costs to be paid by appellant.

NOTES AND QUESTIONS

1. *Conduct Exceeding All Bounds Usually Tolerated by Decent Society.* How culpable must defendant's conduct be before it reaches the level of being extreme enough to be deemed tortious? Some guidelines can be found in decided cases. For example, it is generally held that the mere solicitation of a woman to illicit intercourse is not only not an assault but does not give rise to any other cause of action. Reed v. Maley, 115 Ky. 816, 74 S.W. 1079 (1903). "The view being, apparently, that there is no harm in asking." Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv.L.Rev. 1033, 1055 (1936). Jones v. Clinton, 990 F.Supp. 657, 677 (E.D.Ark.1998) (applying Arkansas law) ("While the Court will certainly agree that plaintiff's allegations describe offensive conduct, the Court, as previously noted, has found that the Governor's alleged conduct does not constitute sexual assault. Rather, the conduct as alleged by plaintiff describes a

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2. The fact that Harris may have had some pre-existing susceptibility to emotional distress does not necessarily preclude liability if it can be shown that the conduct intensified the pre-existing condition of psychological stress. [Cc]

mere sexual proposition or encounter, albeit an odious one.... The Court is not aware of any authority holding that such a sexual encounter or proposition of the type alleged in this case, without more, gives rise to a claim of outrage.'')

In Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961), a married woman was hounded by continued telephone calls from May to December, some of them late at night; and on one occasion defendant came to her home and made an indecent exposure of his person. The court stated that under usual circumstances solicitation would not be actionable (''It seems to be a custom of long standing and one which in all likelihood will continue''), but found the ''aggravated circumstances'' in this case sufficient to make the defendant liable.

Plaintiff alleged that her rabbi had induced her to enter into a sexual relationship with him in the guise of therapy to assist her in finding a husband. Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue, 11 N.Y.3d 15, 22, 892 N.E.2d 375, 862 N.Y.S.2d 311 (2008) (even if plaintiff could prove that her acquiescence was obtained through lies, manipulation, or other morally opprobrious conduct, the rabbi's conduct was not so outrageous in character and extreme in degree so as to go beyond all possible bounds of decency and be utterly intolerable in a civilized community).

2. Courts are reluctant to subject either internal family disputes or petty but strongly felt antagonisms to the sanctions of tort law. However, when conduct exceeds all reasonable bounds of behavior tolerated by society, courts are likely to find that a claim has been stated. Cf. Miller v. Currie, 50 F.3d 373 (6th Cir.1995) (applying Ohio law) (plaintiff's brother and sister-in-law and the employees of a nursing home prevented her from seeing her ninety-eight-year old mother); Halio v. Lurie, 15 A.D.2d 62, 222 N.Y.S.2d 759 (1961) (man who had jilted a woman wrote her jeering verses and taunting letters); Jackson v. Brown, 904 P.2d 685 (Utah 1995) (last minute cancellation of wedding not enough for outrage, but courting woman, proposing, and making arrangements for wedding including applying for license while married to someone else may be); Smith v. Malouf, 722 So.2d 490 (Miss. 1998) (teenager and her parents hid her location from the father of her baby so that baby could be secretly placed with strangers for adoption); Flamm v. Van Nierop, 56 Misc.2d 1059, 291 N.Y.S.2d 189 (1968) (defendant constantly drove behind plaintiff at a ''dangerously close distance,'' phoned him unnecessarily at his home and business and either hung up or remained on the line in silence, and ''dashed'' at him in public places).

3. Is filing a frivolous lawsuit against someone conduct that is sufficiently outrageous to permit recovery for intentional infliction of emotional distress? After being injured in a fight in a parking lot that was poorly lit, crowded, and chaotic, plaintiff identified a man as her assailant even though she only had a vague impression of the physical characteristics of the person responsible for breaking her leg and someone else had apologized for causing her injury. After the man she identified was found not guilty on the criminal charges arising out of her identification, plaintiff filed a civil suit against the man. He counterclaimed for intentional infliction of emotional distress. Davis v. Currier, 704 A.2d 1207 (Maine 1997) (no cause of action for intentional infliction of emotional distress); Swerdlick v. Koch, 721 A.2d 849 (R.I. 1998) (no cause of action against neighbor who repeatedly photographed and maintained a log of activity in attempt to prove plaintiffs were illegally operating a mail-order business out of their home). What if a juror, found in contempt for failing to show up one day two weeks into the trial of someone accused of torturing and killing six people, was placed alone in a jail cell with the alleged murderer, was questioned and berated by the alleged murderer, and was

laughed at by the jailors who placed her there? Johnson v. Wayne County, 213 Mich.App. 143, 540 N.W.2d 66 (1995) (states a cause of action).

4. What if a hospital had a policy of placing patients infected with the HIV virus in the same rooms as patients who were not, without disclosing that fact? Patient accidentally used his roommate's razor to shave and was then informed by the roommate that roommate was infected with HIV. Patient alleges that the hospital's conduct is outrageous and that he suffered severe emotional distress as a result. Liability? What other information would you like to have before deciding this issue? Bain v. Wells, 936 S.W.2d 618 (Tenn.1997).

5. Is there any common theme or set of similar factors running through the following cases?

A. State Rubbish Collectors Association v. Siliznoff, page 51.

B. Defendant, a private detective representing that he was a police officer, threatened to charge the plaintiff, a resident alien, with espionage unless she turned over to him certain private letters in her possession. She suffered severe mental disturbance and was made seriously ill. The defendant was held liable. Janvier v. Sweeney, [1919] 2 K.B. 316.

C. Defendants, school authorities, called a high school girl to the school office and bullied and badgered her for a considerable length of time, threatening her with prison and with public disgrace for herself and her family, unless she confessed to immoral conduct with various men. They succeeded in extorting from her a confession of misconduct, of which she was innocent. She suffered severe mental disturbance and resulting illness. Defendants were held liable. Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814 (1926).

D. *Collecting Agencies*. While reasonable attempts to collect a debt lead to no liability, even though they may be expected to, and do, cause serious mental distress, more extreme conduct may produce a different result. Defendant, a creditor, had plaintiff called to the telephone of her neighbor, with the message that it was an emergency call. Defendant began the conversation by telling plaintiff that "this is going to be a shock; it is as much of a shock to me to have to tell you as it will be to you." When plaintiff said that she was prepared for the message, the defendant let her have it: "This is the Federal Outfitting Company—why don't you pay your bill?" Plaintiff suffered severe nervous shock and resulting serious illness. A complaint alleging these facts was held to state a cause of action. Bowden v. Spiegel, Inc., 96 Cal.App.2d 793, 216 P.2d 571 (1950). A veterinarian and an animal hospital threaten to "do away with" plaintiffs' dog unless plaintiffs paid in cash a bill for treating the dog for injuries suffered when struck by an automobile. See Lawrence v. Stanford and Ashland Terrace Animal Hospital, 655 S.W.2d 927 (Tenn.1983). See also Cadle Co. v. Hobbs, 673 So.2d 1363 (La. App. 1996) (implying that because plaintiff was African–American, no one would take her word against debt collector's).

E. There are similar cases involving the outrageous tactics of insurance adjusters seeking to force a settlement. Continental Cas. Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935). See also, as to refusal of a liability insurer to settle a claim, Fletcher v. Western Nat. Life Ins. Co., 10 Cal.App.3d 376, 89 Cal.Rptr. 78 (1970). When the insurance company is reasonable in its refusal to settle a claim, it will not be held liable simply because its client happened to be an excessive worrier about fiscal problems. See Rossignol v. Noel, 289 A.2d 691 (Me.1972).

F. Other cases have involved evicting landlords, Kaufman v. Abramson, 363 F.2d 865 (4th Cir.1966), and even high pressure salesmen. See Turner v. ABC Jalousie Co., 251 S.C. 92, 160 S.E.2d 528 (1968).

6. Many cases, like the principal case, arise out of workplace behavior. Anderson v. Oklahoma Temp. Svcs., Inc., 925 P.2d 574 (Okla. App. 1996) (supervisor's use of profanity, smoking around employee after being asked to stop, and vulgar behavior not enough to state a cause of action for extreme and outrageous conduct) and Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d 580 (1987) (employer liable for intentional infliction of emotional distress of plaintiff due to co-employee's actions in repeatedly subjecting plaintiff to physical assaults and vulgar remarks). In the employment context, some courts have held that a plaintiff's status as an employee should entitle him to a greater degree of protection from insult and outrage by a supervisor with authority over him than if he were a stranger while others do not. Compare Alcorn v. Anbro Eng'g, Inc., 2 Cal.3d 493, 468 P.2d 216, 86 Cal.Rptr. 88 (1970) with Texas Farm Bureau Mut. Ins. Cos. v. Sears, 84 S.W.3d 604, 611 (Tex. 2002) (while an employer's conduct might in some instances be unpleasant, the employer must have some discretion to "supervise, review, criticize, demote, transfer, and discipline" its workers; thus, only very unusual employment disputes will give rise to cause of action for intentional infliction of emotional distress).

7. *Vulnerability of Plaintiff*. The plaintiff's sensitivities may be a factor in deeming defendant's conduct extreme and outrageous. Cf. Korbin v. Berlin, 177 So.2d 551 (Fla.App.1965), where defendant approached a six-year-old girl and said to her: "Do you know that your mother took a man away from his wife? Do you know that God is going to punish them? Do you know that a man is sleeping in your mother's room? God will punish them." It was alleged that the child suffered serious mental distress and resulting physical injury. Should a demurrer to a complaint pleading these facts be overruled? Cf. Delta Fin. Co. v. Ganakas, 93 Ga.App. 297, 91 S.E.2d 383 (1956) (eleven-year-old child home alone frightened by threats she would be taken to jail if she did not open door for defendant seeking to repossess television set). Drejza v. Vaccaro, 650 A.2d 1308 (D.C.App.1994) (outrageousness of police officer's conduct while interviewing rape victim must be evaluated in light of the fact that it occurred only an hour after the rape, when she would be expected to be more susceptible to emotional distress). Brandon v. County of Richardson, 261 Neb. 636, 624 N.W.2d 604 (2001) (same). After fourteen years, Plaintiff's illness made her no longer able to care for her two beloved Appaloosa horses, so she made arrangements for them to be pastured on defendants' property. Although defendants assured her they would take good care of the horses and return them to her if they could no longer keep them, they in fact sold them to a buyer for slaughter within a week of when they arrived. When plaintiff came to visit them and discovered them gone, defendants lied about their whereabouts and covered up the sale until it was too late for plaintiff to save the horses from the slaughter house. Burgess v. Taylor, 44 S.W.3d 806 (Ky. App. 2001) (in upholding jury verdict for plaintiff, court notes it appropriate to take into account defendants' knowledge of plaintiff's vulnerability to emotional distress based on her attachment to the horses).

8. Should special protection be accorded to pregnant women? When a creditor came to the house of a woman seven months pregnant and screamed profanity, abuse, and accusations of dishonesty in the presence of others and she suffered severe emotional disturbance which resulted in a miscarriage, she was allowed to recover in Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625 (1936). See Bartow v. Smith, 149 Ohio St. 301, 78 N.E.2d 735 (1948), a holding that otherwise was overruled by Yeager v. Local Union 20, 6 Ohio St.3d 369, 453 N.E.2d 666 (1983).

9. Should protection also be given to the hypersensitive or idiosyncratic plaintiff? In one early landmark case, protection was allowed. Plaintiff, an eccentric woman who had in the past been treated for mental illness, believed that her ancestors had concealed a pot of gold by burying it. After a fortune teller gave her a map that purportedly showed the land upon which the pot was buried, she spent months digging for it. Defendants filled a pot with rocks and dirt and buried it where plaintiff would find it, placing a note on it that directed the finder to gather all the heirs and wait three days before opening it. A large number of townspeople, including the practical jokers, the heirs, a judge, and other town officials, gathered at the local bank to observe plaintiff open the pot in circumstances of extreme public humiliation. She suffered acute mental distress, with resulting serious illness, which apparently further unsettled her reason and contributed to her early death. The "pot of gold" came in the form of a judgment to her heirs. Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920).

10. *Severe Emotional Distress.* All jurisdictions require that the plaintiff prove *severe* not just *mere* emotional distress. This is frequently characterized as distress so severe that no reasonable person could be expected to endure it. Note that unlike most torts, the severity of the damage affects not just how much the plaintiff will recover, but whether the plaintiff recovers at all.

11. *Proof of Severe Emotional Distress.* Testimony that the plaintiff was upset and cried will not be enough. Hatch v. State Farm Fire and Cas. Co., 930 P.2d 382, 397 (Wyo. 1997) ("evidence of crying, being upset and uncomfortable is insufficient to demonstrate severe emotional distress that attains a level no reasonable person could be expected to endure"). Some jurisdictions require that the severe emotional distress be proved by expert witness testimony. Vallinoto v. DiSandro, 688 A.2d 830, 838 (R.I. 1997) (plaintiff must produce "competent medical evidence showing objective physical manifestation of her alleged psychic injuries"). Most, however, do not generally require expert proof to establish severe emotional distress caused by defendant's conduct, preferring to rely on such factors as the flagrant and serious nature of the defendant's conduct, subjective testimony from plaintiff and others, and physical symptoms, if present. Miller v. Willbanks, 8 S.W.3d 607 (Tenn. 1999) (collecting cases from other jurisdictions); Kloepfel v. Bokor, 149 Wash.2d 192, 66 P.3d 630 (2003) (rejecting argument that objective symptomatology is required to prove severe emotional distress); Brandon v. County of Richardson, 261 Neb. 636, 624 N.W.2d 604 (2001) (noting connection between outrageousness of conduct and proof of severe emotional distress); Sacco v. High Country Independent Press, Inc., 271 Mont. 209, 896 P.2d 411 (1995) (evidence of physical injury not necessary to determine whether plaintiff suffered severe emotional distress). Suppose a surgeon, angry at an operating-room nurse, throws a surgical drape into her face, covering her with the patient's blood and tissue. Both the nurse and the patient underwent a series of tests for HIV, hepatitis, and other communicable diseases. All were negative. Is her testimony that she feared for her life and suffered severe emotional distress at the thought of the risk sufficient? Grantham v. Vanderzyl, 802 So.2d 1077 (Ala. 2001) (court finds as a matter of law that the mere fear of contracting a disease, without actual exposure to it, cannot be sufficient to cause the level of distress necessary for tort of outrage).

Taylor v. Vallelunga

District Court of Appeal of California, 1959.
171 Cal.App.2d 107, 339 P.2d 910.

O'DONNELL, JUSTICE pro tem. * * * In the first count, plaintiff Clifford Gerlach alleges that on December 25, 1956, defendants struck and beat him

causing him bodily injury for which he seeks damages. In the second count, plaintiff and appellant Gail E. Taylor incorporates by reference the charging allegations of the first count and proceeds to allege that she is the daughter of plaintiff Clifford Gerlach, that she was present at and witnessed the beating inflicted upon her father by defendants, and that as a result thereof, she suffered severe fright and emotional distress. She seeks damages for the distress so suffered. It is not alleged that any physical disability or injury resulted from the mental distress. A general demurrer to the second count of the complaint was interposed by defendants. The demurrer was sustained and appellant was granted ten days leave to amend. Appellant failed to amend and judgment of dismissal of the second count was entered. The appeal is from the judgment of dismissal.

The California cases have for some time past allowed recovery of damages where physical injury resulted from intentionally subjecting the plaintiff to serious mental distress. [C] In the Siliznoff case [page 51] the Supreme Court extended the right of recovery to situations where no physical injury follows the suffering of mental distress, saying that "a cause of action is established when it is shown that one, in the absence of any privilege, intentionally subjects another to the mental suffering incident to serious threats to his physical well-being, whether or not the threats are made under such circumstances as to constitute a technical assault." [C] In arriving at this result the court relied in substantial part upon the development of the law in this field of torts as traced by the American Law Institute, and it quotes with approval [c] section 46, as amended, of the Restatement of Torts, (Restatement of the Law, 1948 Supplement, Torts, § 46) which reads: "One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it." In explanation of the meaning of the term "intentionally" as it is employed in said section 46, the Reporter says in subdivision (a) of that section: "An intention to cause severe emotional distress exists when the act is done for the purpose of causing the distress or with knowledge on the part of the actor that severe emotional distress is substantially certain to be produced by his conduct. See Illustration 3." Illustration 3 referred to reads as follows: "A is sitting on her front porch watching her husband B, who is standing on the sidewalk, C, who hates B and is friendly to A, *whose presence is known to him,* stabs B, killing him. C is liable to A for the mental anguish, grief and horror he causes." [Emphasis added.]

The failure of the second count of the complaint in the case at bar to meet the requirements of section 46 of the Restatement of Torts is at once apparent. There is no allegation that defendants knew that appellant was present and witnessed the beating that was administered to her father; nor is there any allegation that the beating was administered for the purpose of causing her to suffer emotional distress, or, in the alternative, that defendants knew that severe emotional distress was substantially certain to be produced by their conduct. * * *

Judgment affirmed.

NOTES AND QUESTIONS

1. Plaintiff's proof of intent is relatively straight forward if the conduct is aimed at the plaintiff or if plaintiff can show that defendant knew that extreme emotional distress was substantially certain to follow from the conduct. Blakeley v. Shortal's Estate, 236 Iowa 787, 20 N.W.2d 28 (1945) (Shortal committed suicide by slitting his own throat in Blakely's kitchen). Generally, committing a murder or a suicide is not a tort against an eyewitness; however, it may be if the act is directed at the plaintiff or if defendant knew that extreme emotional distress was substantially certain to follow. Lourcey v. Scarlett, 146 S.W.3d 48 (Tenn. 2004) (plaintiff, while delivering mail, encountered Scarlett and his wife, who was nude from the waist up, in the middle of the road. Scarlett asked for help and then, while plaintiff was calling 911, Scarlett shot his wife, turned toward the plaintiff, and shot himself); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923, 927 (1951) (overturning demurrer where child's father killed her mother with a shotgun in her presence, kept child in cottage with her mother's body for a week, then killed himself with shotgun, spattering child with his blood). Why not use "transferred intent"? See note 2, page 30.

2. As California did in the principal case, many jurisdictions continue to require that the conduct not only be intentional and outrageous, but also directed at the plaintiff or take place in the presence of the plaintiff, with the defendant's awareness. Christensen v. Superior Court of Los Angeles Cty., 54 Cal.3d 868, 2 Cal.Rptr.2d 79, 820 P.2d 181 (1991) (claim of family members for intentional infliction of emotional distress arising out of mishandling of remains of family members did not state cause of action because it did not allege that conduct was directed at family members or done in their presence); Koontz v. Keller, 52 Ohio App. 265, 3 N.E.2d 694 (1936) (recovery denied where defendant murdered plaintiff's sister and plaintiff later discovered body); Ellsworth v. Massacar, 215 Mich. 511, 184 N.W. 408 (1921) (plaintiff later discovered attack on her husband). But see Doe v. Roman Catholic Diocese of Nashville, 154 S.W.3d 22 (Tenn. 2005) (conduct need not be directed at a specific person or occur in the presence of the plaintiff).

3. The Restatement (§ 46(2)) would allow recovery if defendant knows of bystander's presence *and* (1) the conduct was directed at a member of bystander's immediate family or (2) bystander suffers bodily harm as a result of her distress. Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890) (defendant inflicted a bloody battery upon two people in the presence of a pregnant woman who suffered a miscarriage as the result of her mental disturbance). What does it mean to be "present"? Bevan v. Fix, 42 P.3d 1013 (Wyo. 2002) (claim on behalf of young children who could hear their mother being attacked in adjacent hallway) ("sensory and contemporaneous observance of defendant's acts," does not necessarily require being able to see what is happening).

4. Some courts, however, have permitted recovery even though plaintiff was not present. Knierim v. Izzo, 22 Ill.2d 73, 174 N.E.2d 157 (1961) (defendant threatened a woman that he would murder her husband and then carried out the threat outside of her presence); Schurk v. Christensen, 80 Wash.2d 652, 497 P.2d 937 (1972) (mother of five-year-old permitted to recover against teenage babysitter who molested child). In R.D. v. W.H., 875 P.2d 26 (Wyo. 1994), the husband and minor child of decedent sued her stepfather for events leading to her death by suicide. Plaintiffs alleged that the stepfather had sexually abused the decedent, provided her with a firearm with which she attempted suicide, and then provided her with prescription narcotics with which she killed herself. Although emphasizing that the generally better practice is to limit recovery to plaintiffs who were present

during the outrageous conduct, the court recognized a narrow exception for this case.

5. How far should these narrow exceptions go? Should there be a cause of action on behalf of those who witness the assassination of the president? For those who saw it live on television? For those who saw it replayed a few minutes later? The next day? On the first anniversary?

6. The classic articles on the infliction of mental distress are Magruder, Mental and Emotional Distress in the Law of Torts, 49 Harv.L.Rev. 1033 (1936); Prosser, Insult and Outrage, 44 Cal.L.Rev. 40 (1956); Wade, Tort Liability for Abusive and Insulting Language, 4 Vand.L.Rev. 63 (1950); Partlett, Tort Liability and the American Way: Reflections on Liability for Emotional Distress, Am.J. Comp.L. 601 (1997); and Kircher, The Four Faces of Tort Law: Liability for Emotional Harm, 90 Marq. L. Rev. 789 (2007) (including an appendix with case law from all fifty-one jurisdictions).

6. TRESPASS TO LAND

Dougherty v. Stepp

Supreme Court of North Carolina, 1835.
18 N.C. 371.

This was an action of trespass quare clausum fregit, tried at Buncombe on the last Circuit, before his Honor Judge Martin. The only proof introduced by the plaintiff to establish an act of trespass, was, that the defendant had entered on the unenclosed land of the plaintiff, with a surveyor and chain carriers, and actually surveyed a part of it, claiming it as his own, but without marking trees or cutting bushes. This, his Honor held not to be a trespass, and the jury under his instructions, found a verdict for the defendant, and the plaintiff appealed. * * *

RUFFIN, CHIEF JUSTICE. In the opinion of the Court, there is error in the instructions given to the jury. The amount of damages may depend on the acts done on the land, and the extent of injury to it therefrom. But it is an elementary principle, that every unauthorized, and therefore unlawful entry, into the close of another, is a trespass. From every such entry against the will of the possessor, the law infers some damage; if nothing more, the treading down the grass or herbage, or as here, the shrubbery.

Judgment reversed, and new trial ordered.

NOTES AND QUESTIONS

1. We are here concerned only with intentional trespass to land. There may be negligent entry onto land, but it is governed by the ordinary rules applicable to negligence actions. One of these is that when the entry upon the land is merely negligent, proof of some actual damage is essential to the cause of action. Restatement (Second) of Torts § 165. Thus, the word "trespass" may be used to describe the kind of interest that defendant has invaded but usually is reserved for an intentional invasion of that interest—the right to exclusive possession of land.

2. The trespass is intentional even when the defendant enters the land in the honest and reasonable belief that it is his own. See Glade v. Dietert, 156 Tex. 382,

CHAPTER III

PRIVILEGES

1. CONSENT

O'Brien v. Cunard S.S. Co.

Supreme Judicial Court of Massachusetts, 1891.
154 Mass. 272, 28 N.E. 266.

Tort, for an assault, and for negligently vaccinating the plaintiff, who was a steerage passenger on the defendant's steamship. The trial court directed a verdict for the defendant, and the plaintiff brings exceptions. [Plaintiff alleged that she suffered ulceration at the site and blistering all over her body due either to contamination of the vaccine or of the vaccination site. There was conflicting medical expert testimony as to the cause of her injuries.]

KNOWLTON, J. * * * To sustain the first count, which was for an alleged assault, the plaintiff relied on the fact that the surgeon who was employed by the defendant vaccinated her on ship-board, while she was on her passage from Queenstown to Boston. On this branch of the case the question is whether there was any evidence that the surgeon used force upon the plaintiff against her will. In determining whether the act was lawful or unlawful, the surgeon's conduct must be considered in connection with the surrounding circumstances. If the plaintiff's behavior was such as to indicate consent on her part, he was justified in his act, whatever her unexpressed feelings may have been. In determining whether she consented, he could be guided only by her overt acts and the manifestations of her feelings. [Cc] It is undisputed that at Boston there are strict quarantine regulations in regard to the examination of emigrants, to see that they are protected from small-pox by vaccination, and that only those persons who hold a certificate from the medical officer of the steam-ship, stating that they are so protected, are permitted to land without detention in quarantine, or vaccination by the port physician. It appears that the defendant is accustomed to have its surgeons vaccinate all emigrants who desire it, and who are not protected by previous vaccination, and give them a certificate which is accepted at quarantine as evidence of their protection. Notices of the regulations at quarantine, and of the willingness of the ship's medical officer to vaccinate such as needed vaccination, were posted about the ship in various languages, and on the day when the operation was performed the surgeon had a right to presume that she and the other women who were vaccinated understood the importance and purpose of vaccination for those who bore no marks to show that they were protected. By the plaintiff's testimony, which, in this particular, is undisputed, it appears that about

200 women passengers were assembled below, and she understood from conversation with them that they were to be vaccinated; that she stood about 15 feet from the surgeon, and saw them form in a line, and pass in turn before him; that he "examined their arms, and, passing some of them by, proceeded to vaccinate those that had no mark;" that she did not hear him say anything to any of them; that upon being passed by they each received a card, and went on deck; that when her turn came she showed him her arm; he looked at it, and said there was no mark, and that she should be vaccinated; that she told him she had been vaccinated before, and it left no mark; "that he then said nothing; that he should vaccinate her again;" that she held up her arm to be vaccinated; that no one touched her; that she did not tell him she did not want to be vaccinated; and that she took the ticket which he gave her, certifying that he had vaccinated her, and used it at quarantine. She was one of a large number of women who were vaccinated on that occasion, without, so far as appears, a word of objection from any of them. They all indicated by their conduct that they desired to avail themselves of the provisions made for their benefit. There was nothing in the conduct of the plaintiff to indicate to the surgeon that she did not wish to obtain a card which would save her from detention at quarantine, and to be vaccinated, if necessary, for that purpose. Viewing his conduct in the light of the surrounding circumstances, it was lawful; and there was no evidence tending to show that it was not. The ruling of the court on this part of the case was correct. * * *

Exceptions overruled.

NOTES AND QUESTIONS

1. With the principal case, contrast Mulloy v. Hop Sang, 1 W.W.R. 714 (Alberta C.A.) (1935) (appellate court does not accept that consent was given to medical procedure when patient with limited English did not reply or make objections to surgeon's statement that he would do what was necessary after administering anesthesia).

2. Suppose that in the course of an argument defendant announces that he is going to punch plaintiff in the nose. Plaintiff stands his ground but says and does nothing, and defendant punches him. Is there consent?

3. On a park bench in the moonlight, a young man informs his fiancée that he is going to kiss her. She says and does nothing, and he kisses her. Is he liable for battery? What if it's their first date? What if he is a stranger who has just sat down next to her when he makes his announcement?

Hackbart v. Cincinnati Bengals, Inc.

United States Court of Appeals, Tenth Circuit, 1979.
601 F.2d 516, cert. denied, 444 U.S. 931, 100 S.Ct. 275, 62 L.Ed.2d 188 (1979).

WILLIAM E. DOYLE, CIRCUIT JUDGE. The question in this case is whether in a regular season professional football game an injury which is inflicted by one professional football player on an opposing player can give rise to liability

in tort where the injury was inflicted by the intentional striking of a blow during the game.

The injury occurred in the course of a game between the Denver Broncos and the Cincinnati Bengals, which game was being played in Denver in 1973. The Broncos' defensive back, Dale Hackbart, was the recipient of the injury and the Bengals' offensive back, Charles ''Booby'' Clark, inflicted the blow which produced it. * * *

The trial court's finding was that Charles Clark, ''acting out of anger and frustration, but without a specific intent to injure * * * stepped forward and struck a blow with his right forearm to the back of the kneeling plaintiff's head and neck with sufficient force to cause both players to fall forward to the ground.'' Both players, without complaining to the officials or to one another, returned to their respective sidelines since the ball had changed hands and the offensive and defensive teams of each had been substituted. Clark testified at trial that his frustration was brought about by the fact that his team was losing the game. * * *

Despite the fact that the defendant Charles Clark admitted that the blow which had been struck was not accidental, that it was intentionally administered, the trial court ruled as a matter of law that the game of professional football is basically a business which is violent in nature, and that the available sanctions are imposition of penalties and expulsion from the game. Notice was taken of the fact that many fouls are overlooked; that the game is played in an emotional and noisy environment; and that incidents such as that here complained of are not unusual. * * *

Indeed, the evidence shows that there are rules of the game which prohibit the intentional striking of blows. Thus, Article 1, Item 1, Subsection C, provides that: ''All players are prohibited from striking on the head, face or neck with the heel, back or side of the hand, wrist, forearm, elbow or clasped hands.'' Thus the very conduct which was present here is expressly prohibited by the rule which is quoted above.

The general customs of football do not approve the intentional punching or striking of others. That this is prohibited was supported by the testimony of all of the witnesses. They testified that the intentional striking of a player in the face or from the rear is prohibited by the playing rules as well as the general customs of the game. Punching or hitting with the arms is prohibited. Undoubtedly these restraints are intended to establish reasonable boundaries so that one football player cannot intentionally inflict a serious injury on another. Therefore, the notion is not correct that all reason has been abandoned, whereby the only possible remedy for the person who has been the victim of an unlawful blow is retaliation. * * *

In sum, having concluded that the trial court did not limit the case to a trial of the evidence bearing on defendant's liability but rather determined that as a matter of social policy the game was so violent and unlawful that valid lines could not be drawn, we take the view that this was not a proper

issue for determination and that plaintiff was entitled to have the case tried on an assessment of his rights and whether they had been violated. * * *

Reversed and remanded for a new trial.

NOTES AND QUESTIONS

1. What about one player clipping another in a football game? In order to recover, plaintiff must show that the act was intentional, not just that it violated the game's safety rules. See Gauvin v. Clark, 404 Mass. 450, 537 N.E.2d 94 (1989) (jury found college hockey player did not act willfully in striking other player in abdomen). Greer v. Davis, 921 S.W.2d 325 (Tex.App.1996) (question for jury whether base runner acted intentionally or merely negligently in colliding with catcher rather than sliding or stepping out of baseline to avoid the tag).

2. Plaintiff and defendant were opposing players in a family softball game. Defendant, sliding into second base, knocked the plaintiff down and broke two bones in his ankle. Is there liability? Tavernier v. Maes, 242 Cal.App.2d 532, 51 Cal.Rptr. 575 (1966). What other facts do you want to know about the game to decide if the plaintiff consented to the contact? Would it make a difference if the conduct occurred while players were warming up rather than during the game? Cf. Savino v. Robertson, 273 Ill.App.3d 811, 210 Ill.Dec. 264, 652 N.E.2d 1240 (1995) (no difference).

3. What about a course of rough-house practical joking between the parties in the past? Wartman v. Swindell, 54 N.J.L. 589, 25 A. 356 (1892).

4. Defendant taps plaintiff on the shoulder to attract his attention for a reasonable purpose. May consent be assumed? Wiffin v. Kincard, 2 Bos. & P.N.R. 471, 127 Eng.Rep. 713 (1807); Coward v. Baddeley, 4 Hurl. & N. 478, 157 Eng.Rep. 927 (1859); Wallace v. Rosen, 765 N.E.2d 192 (Ind. App. 2002), page 31. Is this a battery, to begin with?

5. Local custom permits the public to take fish from small lakes and ponds. Defendant passes over plaintiff's property to reach such a lake. Consent? See Marsh v. Colby, 39 Mich. 626 (1878).

Mohr v. Williams

Supreme Court of Minnesota, 1905.
95 Minn. 261, 104 N.W. 12.

[Plaintiff consulted defendant, an ear specialist, concerning trouble with her right ear. On examining her, he found a diseased condition of the right ear, and she consented to an operation upon it. When she was unconscious under the anaesthetic, defendant concluded that the condition of the right ear was not serious enough to require an operation; but he found a more serious condition of the left ear, which he decided required an operation. Without reviving the plaintiff to ask her permission, he operated on the left ear. The operation was skillfully performed, and was successful. Plaintiff nevertheless brought an action for battery. In the court below the jury returned a verdict in favor of the plaintiff for $14,322.50. The trial judge denied defendant's motion for judgment notwithstanding the verdict, but granted a new trial on the ground that the damages were excessive. Both parties appeal.]

BROWN, J. * * * The evidence tends to show that, upon the first examination of plaintiff, defendant pronounced the left ear in good condition, and that, at the time plaintiff repaired to the hospital to submit to the operation on her right ear, she was under the impression that no difficulty existed as to the left. In fact, she testified that she had not previously experienced any trouble with that organ. It cannot be doubted that ordinarily the patient must be consulted, and his consent given, before a physician may operate upon him. * * *

The physician impliedly contracts that he possesses, and will exercise in the treatment of patients, skill and learning, and that he will exercise reasonable care and exert his best judgment to bring about favorable results. The methods of treatment are committed almost exclusively to his judgment, but we are aware of no rule or principle of law which would extend to him free license respecting surgical operations. Reasonable latitude must, however, be allowed the physician in a particular case; and we would not lay down any rule which would unreasonably interfere with the exercise of his discretion, or prevent him from taking such measures as his judgment dictated for the welfare of the patient in a case of emergency. If a person should be injured to the extent of rendering him unconscious, and his injuries were of such a nature as to require prompt surgical attention, a physician called to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb, and consent on the part of the injured person would be implied. And again, if, in the course of an operation to which the patient consented, the physician should discover conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life or health of the patient, he would, though no express consent was obtained or given, be justified in extending the operation to remove and overcome them. But such is not the case at bar. The diseased condition of plaintiff's left ear was not discovered in the course of an operation on the right, which was authorized, but upon an independent examination of that organ, made after the authorized operation was found unnecessary. Nor is the evidence such as to justify the court in holding, as a matter of law, that it was such an affection as would result immediately in the serious injury of plaintiff, or such an emergency as to justify proceeding without her consent. She had experienced no particular difficulty with that ear, and the questions as to when its diseased condition would become alarming or fatal, and whether there was an immediate necessity for an operation, were, under the evidence, question of fact for the jury.

The contention of defendant that the operation was consented to by plaintiff is not sustained by the evidence. At least, the evidence was such as to take the question to the jury. This contention is based upon the fact that she was represented on the occasion in question by her family physician; that the condition of her left ear was made known to him, and the propriety of an operation thereon suggested, to which he made no objection. It is urged that by his conduct he assented to it, and that plaintiff was bound thereby. It is not claimed that he gave his express consent. It is not disputed but that the family physician of plaintiff was present on the

occasion of the operation, and at her request. But the purpose of his presence was not that he might participate in the operation, nor does it appear that he was authorized to consent to any change in the one originally proposed to be made. Plaintiff was naturally nervous and fearful of the consequences of being placed under the influence of anaesthetics, and the presence of her family physician was requested under the impression that it would allay and calm her fears. The evidence made the question one of fact for the jury to determine.

The last contention of defendant is that the act complained of did not amount to an assault and battery. This is based upon the theory that, as plaintiff's left ear was in fact diseased, in a condition dangerous and threatening to her health, the operation was necessary, and having been skillfully performed at a time when plaintiff had requested a like operation on the other ear, the charge of assault and battery cannot be sustained; that, in view of these conditions, and the claim that there was no negligence on the part of defendant, and an entire absence of any evidence tending to show an evil intent, the court should say, as a matter of law, that no assault and battery was committed, even though she did not consent to the operation. In other words, that the absence of a showing that defendant was actuated by a wrongful intent, or guilty of negligence, relieves the act of defendant from the charge of an unlawful assault and battery. We are unable to reach that conclusion, though the contention is not without merit. It would seem to follow from what has been said on the other features of the case that the act of defendant amounted at least to a technical assault and battery. If the operation was performed without plaintiff's consent, and the circumstances were not such as to justify its performance without, it was wrongful; and, if it was wrongful, it was unlawful. As remarked in 1 Jaggard on Torts, 437, every person has a right to complete immunity of his person from physical interference of others, except in so far as contact may be necessary under the general doctrine of privilege; and any unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery. In the case at bar, as we have already seen, the question whether defendant's act in performing the operation upon plaintiff was authorized was a question for the jury to determine. If it was unauthorized, then it was, within what we have said, unlawful. It was a violent assault, not a mere pleasantry; and, even though no negligence is shown, it was wrongful and unlawful. The case is unlike a criminal prosecution for assault and battery, for there an unlawful intent must be shown. But that rule does not apply to a civil action, to maintain which it is sufficient to show that the assault complained of was wrongful and unlawful or the result of negligence. [C]

The amount of plaintiff's recovery, if she is entitled to recover at all, must depend upon the character and extent of the injury inflicted upon her, in determining which the nature of the malady intended to be healed and the beneficial nature of the operation should be taken into consideration, as well as the good faith of the defendant.

Order affirmed.

[Reference to the records of the District Court of Ramsey County, Minnesota, discloses that on the second trial the plaintiff received a verdict and judgment for $39. There was no appeal.]

NOTES AND QUESTIONS

1. Why did plaintiff's attorney sue under a theory of battery instead of ordinary negligent medical malpractice? Should there be recovery if defendant used all reasonable care in the operation? Cf. Rogers v. Board of Road Commissioners, page 72.

2. Plaintiff, a boy 15 years of age, was run over by a train and his foot was crushed. When he arrived at the hospital he was unconscious and bleeding. Defendant, the house surgeon, concluded that immediate amputation of the foot was necessary to save the boy's life. Finding no relatives present, he performed the operation. Is he liable? Why? Luka v. Lowrie, 171 Mich. 122, 136 N.W. 1106 (1912).

3. What if the plaintiff had remained conscious, and had insisted on prohibiting the operation, saying that he would rather die than lose his foot? See Mulloy v. Hop Sang, 1 W.W.R. 714 (Alberta C.A.) (1935) (automobile accident victim arrived at hospital asking that his badly injured hand be treated but not amputated). Construction worker, believing that he saw "666, the sign of the devil" on his hand cut it off with a power saw. His co-workers rushed him and his severed hand, packed in ice, to the hospital. A hand surgeon was standing by ready to attempt to reattach it. Patient refused permission, saying it was against his religion. What should surgeon do? See "Man Who Lost Hand Loses Lawsuit," The Richmond Times Dispatch, Sept. 14, 1997 at C4.

4. Medical care providers may act in the absence of express consent if (1) the patient is unable to give consent (unconscious, intoxicated, mentally ill, incompetent); (2) there is a risk of serious bodily harm if treatment is delayed; (3) a reasonable person would consent to treatment under the circumstances; and (4) the physician has no reason to believe this patient would refuse treatment under the circumstances. See, e.g., Kozup v. Georgetown U. Hosp., 851 F.2d 437 (D.C.Cir. 1988) (parents' consent to baby's transfusion was not implied simply because it was necessary to save baby's life where there was no showing that there was no time to seek consent); Stewart–Graves v. Vaughn, 162 Wash.2d 115, 170 P.3d 1151 (2007) (father's consent implied as a matter of law even though he was in nearby waiting room because there was no meaningful opportunity for a deliberate, informed decision concerning treatment where failure to treat would have meant certain and immediate death of newborn).

5. The principal case has been regarded for years as the leading case on unauthorized operations. It is still sound law. Most surgery is performed in hospitals, which have their own rules and standardized practices, including consent forms. In many cases, it has been found that the consent is sufficiently general in its terms to justify the physician in doing whatever the physician believes necessary in the course of the operation. See for example Rothe v. Hull, 352 Mo. 926, 180 S.W.2d 7 (1944); Baxter v. Snow, 78 Utah 217, 2 P.2d 257 (1931). Does that mean the consent should be as broadly worded as possible? What if an obstetrician who has privileges at a hospital fails to obtain consent for a blood transfusion? The obstetrician would be liable. Would the hospital? Ward v. Lutheran Hospitals & Homes Soc. of Am., Inc., 963 P.2d 1031 (Alaska 1998) (noting that overwhelming

weight of authority holds that hospital does not owe duty to patient to obtain consent for treatment when patient is under care of independent physician).

6. What if the plaintiff specifically insists that the procedure shall go thus far, and no further? For example, she consents to an incision and an examination of her stomach under ether, but expressly forbids anything more. If the surgeon goes ahead and removes a tumor found there, is he liable? Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914). What if patient limits her consent to female health care providers, explaining that her religious beliefs prohibit her from being seen unclothed by a member of the opposite sex? During surgery, a male nurse sees and touches her as part of proper medical treatment. Liability for battery? Cohen v. Smith, 269 Ill.App.3d 1087, 207 Ill.Dec. 873, 648 N.E.2d 329 (1995) (violation of plaintiff's right to bodily integrity by unconsented to touching is the essence of battery). What if the consent form states anesthesia will be administered by ''a physician privileged to practice anesthesia'' and an EMT in training is permitted to do her first intubation on the patient? Mullins v. Parkview Hosp., Inc., 865 N.E.2d 608 (Ind. 2007) (battery claim stated against anesthesiologist but not student EMT who did not know that consent had not been obtained). What if patient, about to undergo an MRI, limits her consent to particular drugs—demerol and morphine—because she is concerned about an allergic reaction. The nurse gives her fentanyl. Battery? Duncan v. Scottsdale Med. Imaging Ltd., 205 Ariz. 306, 70 P.3d 435 (2003) (rejecting argument that the patient consented to the administration of pain medication and therefore the nature of the procedure was the same no matter which drug was used). What if a patient withdraws her consent during the procedure? Schreiber v. Physicians Ins. Co. of Wisconsin, 223 Wis.2d 417, 588 N.W.2d 26 (1999) (withdrawal of consent means that physician must conduct new informed consent discussion, cannot continue to rely on previously given consent); Coulter v. Thomas, 33 S.W.3d 522 (Ky. 2000) (withdrawal of consent while medical procedure in progress must be unquestionable response from clear and rational mind and it must be medically feasible for doctor to stop).

7. May a competent, informed adult refuse medical treatment that is necessary to preserve life? Thor v. Superior Court, 5 Cal.4th 725, 855 P.2d 375, 21 Cal.Rptr.2d 357 (1993) (right to refuse treatment not limited to those who are suffering from terminal conditions).

8. Brother Joseph Fox, an 83–year–old member of the Marianists, a Roman Catholic order, had previously expressed a desire not to have his life artificially prolonged by extraordinary means of treatment if there was no reasonable hope for recovery. During surgery to repair a hernia, he suffered permanent brain damage due to cardiac arrest. Was his refusal of extraordinary means of treatment (a respirator) still effective after he became incompetent? Matter of Storar, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64, cert. denied, 454 U.S. 858 (1981). This issue is resolved in many jurisdictions by statutory provisions for ''living wills'' or ''advance directives'' that state the patient's consent and limitations on treatment.

9. When plaintiff refused to consent to a transfusion on religious grounds, the court in Application of the President and Directors of Georgetown College, 331 F.2d 1000 (D.C.Cir.1964), granted a declaratory judgment to proceed, with the judge who issued the emergency order finding that the patient felt that it would not be her responsibility if the judge ordered the transfusion. A similar request was denied in In re Osborne, 294 A.2d 372 (D.C.App.1972), where a bedside hearing disclosed that the patient would regard a transfusion under any circumstances as violative of his religious beliefs. See also Stamford Hospital v. Vega, 236 Conn. 646, 674 A.2d 821

(1996) (patient competent to make decisions entitled to refuse blood transfusion even if that decision is fatal).

10. What happens if health care personnel ignore a "do not resuscitate order"? If the patient (or his family) has a cause of action for battery, what is the measure of damages? Campbell v. Delbridge, 670 N.W.2d 108 (Iowa 2003) (plaintiff entitled to emotional distress damages for unauthorized transfusion); Anderson v. St. Francis–St. George Hospital, Inc., 77 Ohio St.3d 82, 671 N.E.2d 225 (1996) (where the battery was physically harmless, plaintiff entitled only to nominal damages, not compensatory damages for wrongful living or wrongful prolongation of life.) See also, Milani, Better Off Dead Than Disabled?: Should Courts Recognize a "Wrongful Living" Cause of Action When Doctors Fail to Honor Patients' Advance Directives?, 54 Wash. & Lee L. Rev. 149 (1997).

11. In the case of a minor child, consent of the parent is necessary for any medical procedure, except in an emergency. Zoski v. Gaines, 271 Mich. 1, 260 N.W. 99 (1935) (9½ years) (tonsillectomy); Bonner v. Moran, 126 F.2d 121 (D.C.Cir.1941) (15 years) (skin graft). A minor 17 or 18 years of age, however, has been held capable of legally consenting, at least to minor procedures, Gulf & S.I.R. Co. v. Sullivan, 155 Miss. 1, 119 So. 501 (1928) (smallpox vaccination), but not to major ones, Lacey v. Laird, 166 Ohio St. 12, 139 N.E.2d 25 (1956) (nose job). Is consent from a parent necessary to prescribe contraception? The right of mature teenage females to give or withhold consent to abortions is governed by statute in most jurisdictions and the statutes, in turn, must fall within constitutional parameters.

12. When a parent refuses on religious or other grounds to allow a hospital to provide medical treatment for a child, courts are likely to grant a hospital's application to overrule the parent if the treatment is for a life threatening condition, but not if it only will improve the child's comfort or appearance. Compare In re Sampson, 29 N.Y.2d 900, 328 N.Y.S.2d 686, 278 N.E.2d 918 (1972) (approving) with In re Green, 448 Pa. 338, 292 A.2d 387 (1972) (disallowing).

13. Can parents "consent" on behalf of their child to be a donor in a transplant operation for the benefit of a sibling? See Hart v. Brown, 29 Conn.Supp. 368, 289 A.2d 386 (1972). Can a guardian consent to an incompetent's donation of an organ? See Strunk v. Strunk, 445 S.W.2d 145 (Ky.1969). Can a parent consent to a child's participation in nontherapeutic research in which there is a risk of injury or damage to the health of the child? Grimes v. Kennedy Krieger Institute, Inc., 366 Md. 29, 782 A.2d 807 (2001). Does the mother's consent to an abortion prevent the child who was injured by the failed abortion from bringing a personal injury action against the physician? Vandervelden v. Victoria, 177 Wis.2d 243, 502 N.W.2d 276 (App.1993).

De May v. Roberts

Supreme Court of Michigan, 1881.
46 Mich. 160, 9 N.W. 146.

MARTSON, C.J. The declaration in this case in the first count sets forth that the plaintiff was at a time and place named a poor married woman, and being confined in child-bed and a stranger, employed in a professional capacity defendant De May who was a physician; that defendant visited the plaintiff as such, and against her desire and intending to deceive her wrongfully, etc., introduced and caused to be present at the house and lying-in room of the plaintiff and while she was in the pains of parturition

the defendant Scattergood, who intruded upon the privacy of the plaintiff, indecently, wrongfully and unlawfully laid hands upon her and assaulted her, the said Scattergood, which was well known to defendant De May, being a young unmarried man, a stranger to the plaintiff and utterly ignorant of the practice of medicine, while the plaintiff believed that he was an assistant physician, a competent and proper person to be present and to aid her in her extremity. * * *

The evidence on the part of the plaintiff tended to prove the allegations of the declaration. On the part of the defendants evidence was given tending to prove that Scattergood very reluctantly accompanied Dr. De May at the urgent request of the latter; that the night was a dark and stormy one, the roads over which they had to travel in getting to the house of the plaintiff were so bad that a horse could not be rode or driven over them; that the doctor was sick and very much fatigued from overwork, and therefore asked the defendant Scattergood to accompany and assist him in carrying a lantern, umbrella and certain articles deemed necessary upon such occasions; that upon arriving at the house of the plaintiff the doctor knocked, and when the door was opened by the husband of the plaintiff, De May said to him "that I had fetched a friend along to help carry my things;" he, plaintiff's husband, said all right, and seemed to be perfectly satisfied. They were bid to enter, treated kindly and no objection whatever made to the presence of defendant Scattergood. That while there Scattergood, at Dr. De May's request, took hold of plaintiff's hand and held her during a paroxysm of pain, and that both of the defendants in all respects throughout acted in a proper and becoming manner actuated by a sense of duty and kindness. * * *

Dr. De May therefore took an unprofessional young unmarried man with him, introduced and permitted him to remain in the house of the plaintiff, when it was apparent that he could hear at least, if not see all that was said and done, and as the jury must have found, under the instructions given, without either the plaintiff or her husband having any knowledge or reason to believe the true character of such third party. It would be shocking to our sense of right, justice and propriety to doubt even but that for such an act the law would afford an ample remedy. To the plaintiff the occasion was a most sacred one and no one had a right to intrude unless invited or because of some real and pressing necessity which it is not pretended existed in this case. The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its violation. The fact that at the time, she consented to the presence of Scattergood supposing him to be a physician, does not preclude her from maintaining an action and recovering substantial damages upon afterwards ascertaining his true character. In obtaining admission at such a time and under such circumstances without fully disclosing his true character, both parties were guilty of deceit, and the wrong thus done entitles the injured party to recover the damages afterwards sustained, from shame and mortification upon discovering the true character of the defendants. * * *

Judgment for plaintiff affirmed.

NOTES AND QUESTIONS

1. The court says that the plaintiff consented to Scattergood's presence ''supposing him to be a physician'' and that the defendants introduced him without ''fully disclosing his true character.'' In order for a consent to be valid, how much does defendant have to disclose? What if the plaintiff asks no questions? Under what circumstances can consent be assumed? Breast cancer patient, on a routine visit to her oncologist's office, is shown into a private examining room. Her doctor arrives, accompanied by another man, who is introduced as someone who is following his work. She says nothing. Following her doctor's instructions, she disrobes and he examines her breasts and lower abdomen in the other man's presence. As she leaves the office, she asks the receptionist who the other man is and is told he is a ''drug salesman.'' Consent? Cf. Sanchez–Scott v. Alza Pharmaceuticals, 86 Cal.App.4th 365, 103 Cal.Rptr.2d 410 (2001) (because true status of drug company representative was not disclosed to patient, no consent was implied by failure to object).

2. Defendant calls on plaintiff, a woman with an artificial leg, in her house. Representing himself to be a doctor referred by the company that made her leg, he induces her to remove her dress, expose her person, and to permit him to touch her. He is in fact a doctor, but of theology. Battery? Cf. Commonwealth v. Gregory, 132 Pa.Super. 507, 1 A.2d 501 (1938). Defendant gives plaintiff some chocolate candy, which contains an irritant poison. In ignorance of this fact, plaintiff eats the candy, and is made ill. Is there liability for a battery? Cf. Commonwealth v. Stratton, 114 Mass. 303, 19 Am.Rep. 350 (1873). Defendant represents himself to be a licensed physician, but he is not. Cf. Taylor v. Johnston, 985 P.2d 460 (Alaska 1999) (battery claim may lie if person falsely claiming to be physician touches patient, even for purpose of providing medical treatment). On the effect, in general, of fraud and mistake on consent, see Restatement (Second) of Torts § 892B.

3. Suppose that A consents to sexual intercourse with B, in ignorance of the fact that B has a sexually transmitted disease. A contracts the disease. Has she an action against B? Kathleen K. v. Robert B., 150 Cal.App.3d 992, 198 Cal.Rptr. 273 (1984). Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920); cf. De Vall v. Strunk, 96 S.W.2d 245 (Tex.Civ.App.1936). A woman consents to sexual intercourse with a man only after he assured her that ''I can't possibly get anyone pregnant,'' knowing that the statement was false. She then suffers an ectopic pregnancy and must undergo surgery, which saves her life but makes her sterile. Liability? Barbara A. v. John G., 145 Cal.App.3d 369, 193 Cal.Rptr. 422 (1983). Does it make a difference if he also does not know? See McPherson v. McPherson, 712 A.2d 1043 (Me.1998) (no liability because husband who infected wife with venereal disease neither knew nor had reason to know that he was infected). A wife consents to sexual intercourse with her husband, in ignorance of the fact that he is having an affair. After learning of the affair, she sues him for battery, claiming that her consent was obtained by fraud. Liability? Neal v. Neal, 125 Idaho 617, 873 P.2d 871 (1994).

4. Law Professor agrees to appear in the dunking booth at a law school fair. She was told that the proceeds would be donated to a fund to provide debt reduction for students who embark on public interest careers but later learned that the students spent the money on a fancy graduation reception for their parents. Consent valid? Consent induced by fraud or misrepresentation as to a collateral matter, rather than fraud as to the essential character of the act itself, will not invalidate consent. See Restatement (Second) of Torts §§ 55, 57 (1965).

5. Plaintiff consents to an operation under a general anesthetic only on condition that her own physician is present during the operation. He was not present. Is the consent vitiated? Pugsley v. Privette, 220 Va. 892, 263 S.E.2d 69 (1980). What is the effect of allowing a resident physician to perform the operation under the supervision of the designated surgeon? Suppose the designated surgeon is not present at all.

6. ''*Informed Consent.*'' The doctrine of ''informed consent'' requires a physician or surgeon to disclose to the patient the risks of proposed medical or surgical treatment. If she does not do so, she may be liable when injury results from the treatment. In early cases, this liability was placed on the ground of battery, by analogy to De May v. Roberts, and the cases in the preceding notes. Among the cases so holding have been Bang v. Charles T. Miller Hospital, 251 Minn. 427, 88 N.W.2d 186 (1958); Gray v. Grunnagle, 423 Pa. 144, 223 A.2d 663 (1966). Around 1960, the failure to disclose the risk began to be treated as a breach of the doctor's professional duty, and hence as a matter of negligence. The cases now generally proceed on that basis. The matter is therefore treated in Chapter 4, Negligence. When the physician exceeds the boundaries of consent, the matter is still treated as battery as set forth in Mohr v. Williams.

7. Note that most of the ''consent induced by fraud'' cases involve battery. What if the underlying tort is trespass? Compare these two cases against ABC, which broadcasts PrimeTime Live. Plaintiff, an ophthalmic surgeon who owned several clinics, was approached by a producer of PrimeTime Live and told the show was doing a segment on cataract operations. The producer told plaintiff that the segment would not involve ambush interviews or undercover surveillance and would be fair and balanced. Plaintiff cooperated by permitting film crews and interviews of doctors, patients, and technicians at his clinic in Chicago. Unbeknownst to plaintiff, the producer also had dispatched seven undercover test ''patients'' equipped with concealed cameras to other clinic locations owned by plaintiff. The resulting show was very critical of the clinics. Plaintiff sued for trespass, claiming the consent given to the seven test patients with concealed cameras was induced by fraud. Liability? Desnick v. American Broadcasting Co., Inc., 44 F.3d 1345 (7th Cir.1995) (applying Illinois law) (no trespass because not an interference with the ownership or possession of land). Plaintiff, the Food Lion grocery store chain, was the target of a PrimeTime Live exposé on meat handling. Employees of ABC created false identities and applied for work at several Food Lion stores. While working for Food Lion, they filmed various activities with hidden cameras. Food Lion sued for trespass, claiming its consent to the ABC employees' presence in its deli and meatpacking departments was obtained by fraud. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999) (applying North and South Carolina law) (jury verdict of trespass affirmed). See also Copeland v. Hubbard Broadcasting, Inc., 526 N.W.2d 402 (Minn.App.1995) (reporter posing as student interested in observing veterinarian liable in trespass to pet owners who allowed her in their home to observe). For a discussion of the invasion of privacy claims in these cases, see Chapter 18, Privacy.

8. Plaintiff is in a bar, so intoxicated that he does not know what he is doing when he agrees to ''Indian wrestle'' with defendant. Valid consent? Cf. Hollerud v. Malamis, 20 Mich.App. 748, 174 N.W.2d 626 (1969) (consent ineffective if plaintiff incapable of expressing rational will).

9. Plaintiff consented to participate in a prize fight, an illegal activity in that state. He died as a result of a blow received in the fight and his estate filed a battery claim against the other fighter who demurred on the basis of consent. Is consent to

an illegal act a valid consent? Hart v. Geysel, 159 Wash. 632, 294 P. 570 (1930) (recognizing split of authority among jurisdictions as to whether consent to an illegal act is valid consent); Janelsins v. Button, 102 Md.App. 30, 648 A.2d 1039 (1994) (same). The question of when plaintiff's consent should be invalidated because defendant violated a criminal statute may depend on several considerations: (a) the policy of denying compensation to an intentional wrongdoer who himself may have committed a crime and been injured as a result of it; (b) the effect of deterring him, and others like him, by denying him recovery if he gets hurt; (c) the effect of potential liability in deterring defendant and others like him; (d) the fact that plaintiff has after all been intentionally battered by defendant; (e) the policy expressed by the maxim, *In pari delicto potior est conditio defendentis* [In equal guilt, the position of the defendant is the stronger]. Even states that generally recognize the validity of consent to an illegal act will not deny recovery to those whom the statute making the conduct illegal was designed to protect. For example, plaintiff, a 15–year–old girl, consents to intercourse with a 50–year–old man in a state with criminal penalties for men who have sexual relations with children that age. Most courts have held plaintiff's consent to be ineffective. See Gaither v. Meacham, 214 Ala. 343, 108 So. 2 (1926). A competent adult woman, however, cannot maintain an action for her own seduction, even if intercourse between unmarried adults is illegal in the state. See Rouse v. Creech, 203 N.C. 378, 166 S.E. 174 (1932). Defendant provides plaintiff's decedent with sleeping pills, knowing he intends to use them to commit suicide. The state's criminal law prohibits both aiding and abetting suicide and attempted suicide. Schwartz, Civil Liability for Causing Suicide: A Synthesis of Law and Psychiatry, 24 Vand.L.Rev. 217, 220–222 (1971), evaluating the factors set forth above, suggests that a claim should be allowed. Would family members of those who commit suicide using the Kevorkian suicide machine have a cause of action against Dr. Kevorkian?

2. SELF–DEFENSE

The privilege of self-defense is covered in Criminal Law, and detailed discussion must be left to that course. Cases involving tort liability are infrequent. When they arise, the criminal law rules are carried over and applied without much variation. The following brief summary will indicate how self-defense fits into the tort picture:

1. *Existence of Privilege.* Anyone is privileged to use reasonable force to defend himself against a threatened battery on the part of another. The recognition of this privilege came as late as about 1400, and it always has been an affirmative defense to be pleaded and proved by the defendant. In some jurisdictions, the burden of proof is reversed if the defendant is a police officer. Then, plaintiff would have to show as his prima facie battery case that the use of force was unreasonable (and thus not privileged). See, for example, Edson v. City of Anaheim, 63 Cal.App.4th 1269, 74 Cal.Rptr.2d 614 (1998) (collecting cases from other jurisdictions). The trial court judge will make the initial determination whether a self-defense instruction is warranted by the facts. See, for example, Goldfuss v. Davidson, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997) in which the Supreme Court of Ohio approved the trial court judge's refusal to give a jury instruction on self-defense where defendant shot from his kitchen window at two men who had broken in to his pole barn. Defendant and his family were inside the house with all the doors locked, the police had been called, the pole barn

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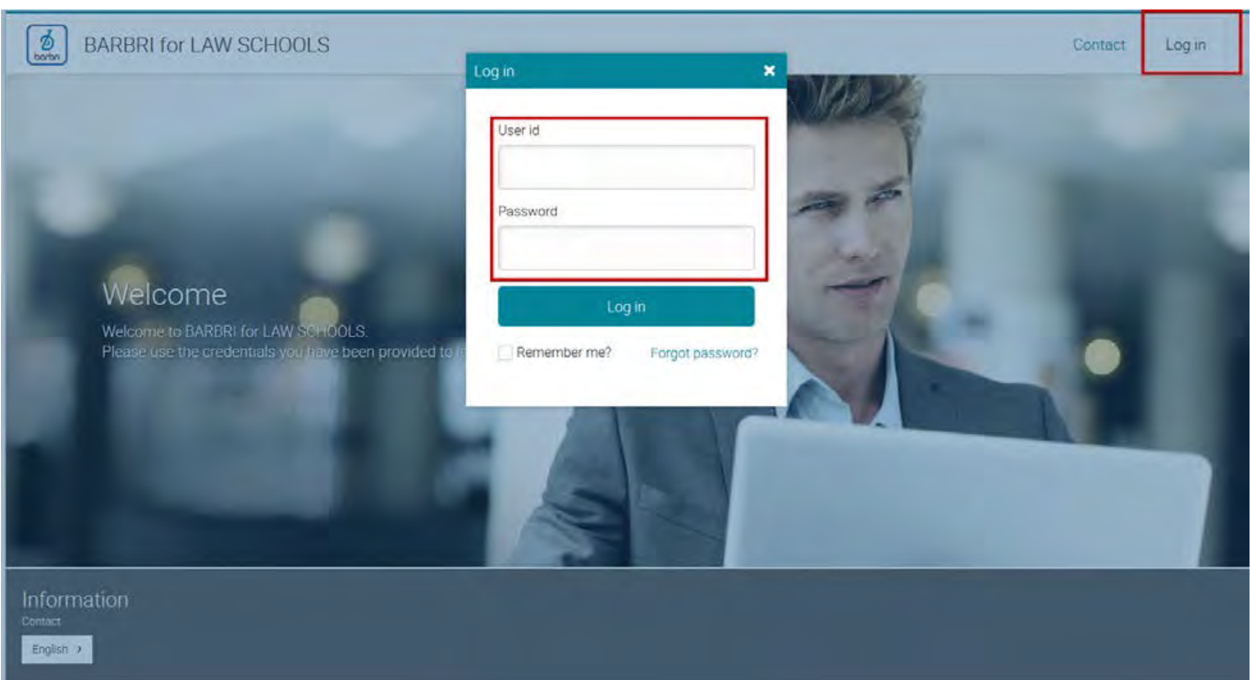

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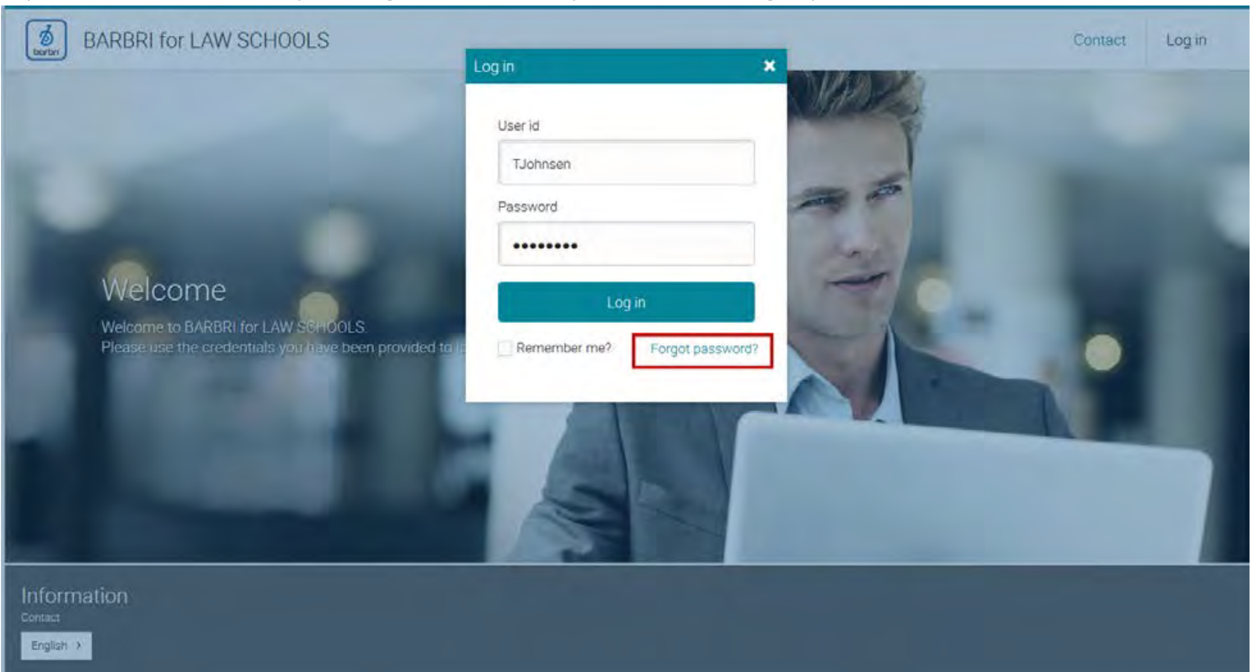
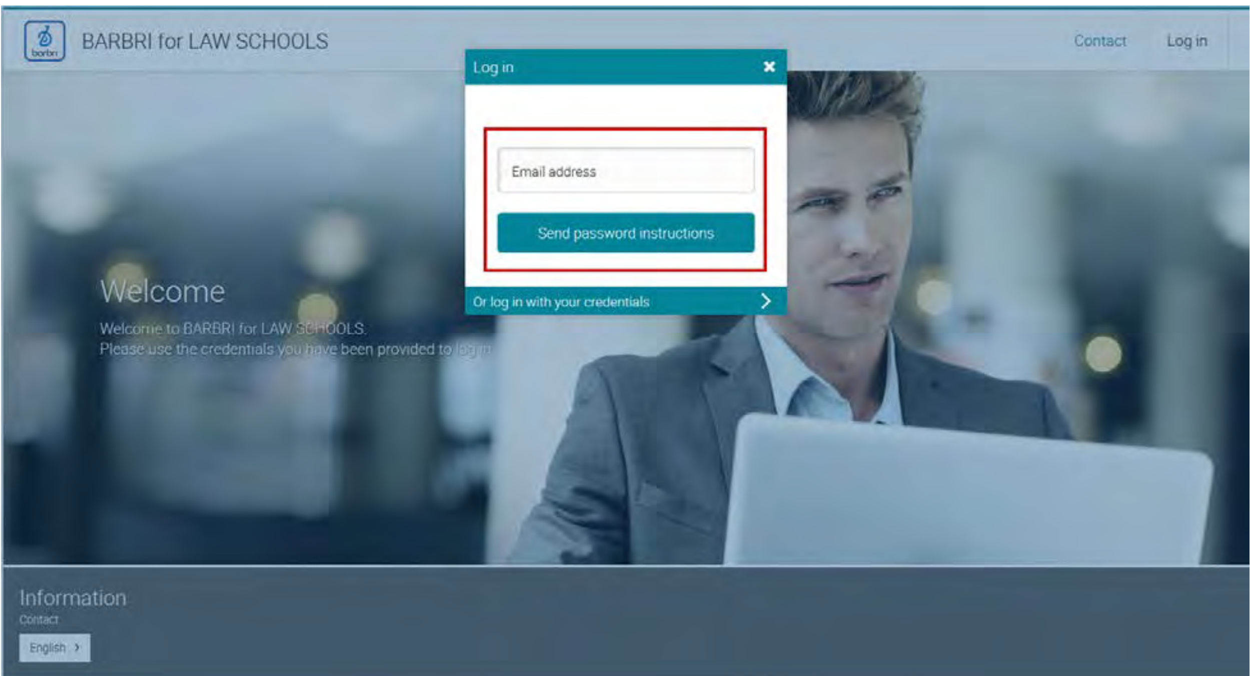
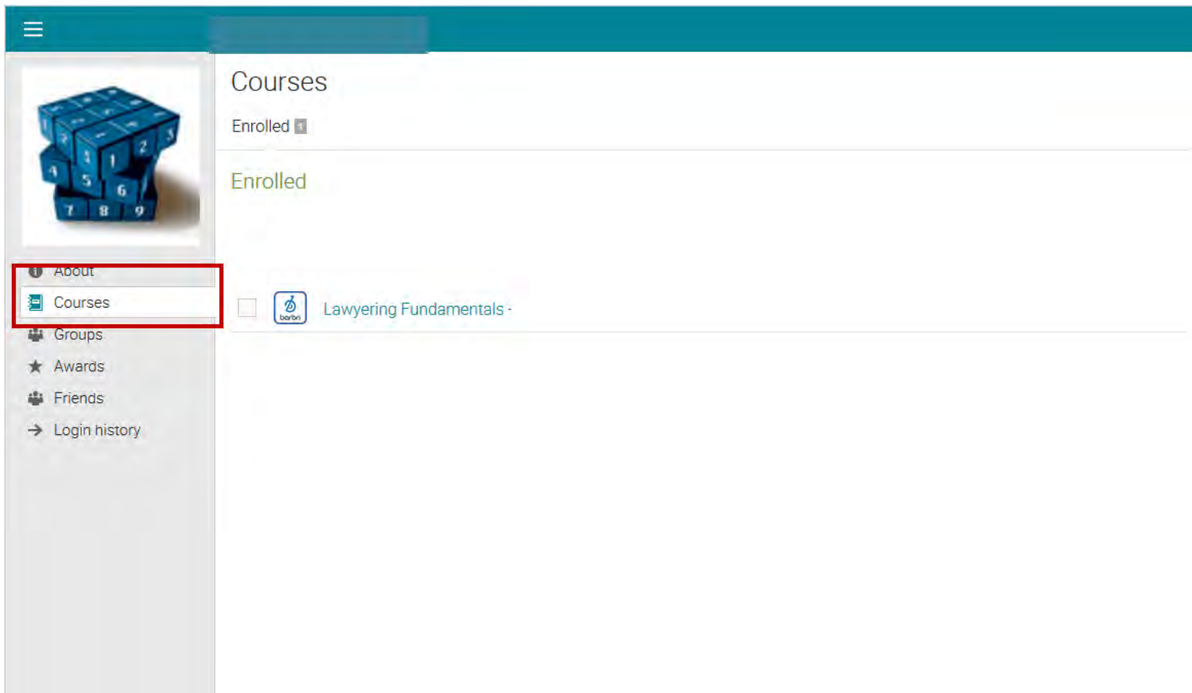


Enter your email address. Click "Send password instructions." You will then receive an email with your log in crententials.

Please Note: Your registratioin email address has been provided by your school. If you need help with the email address provided, please e-mail IPLearningTeam@barbri.com and your Professor.

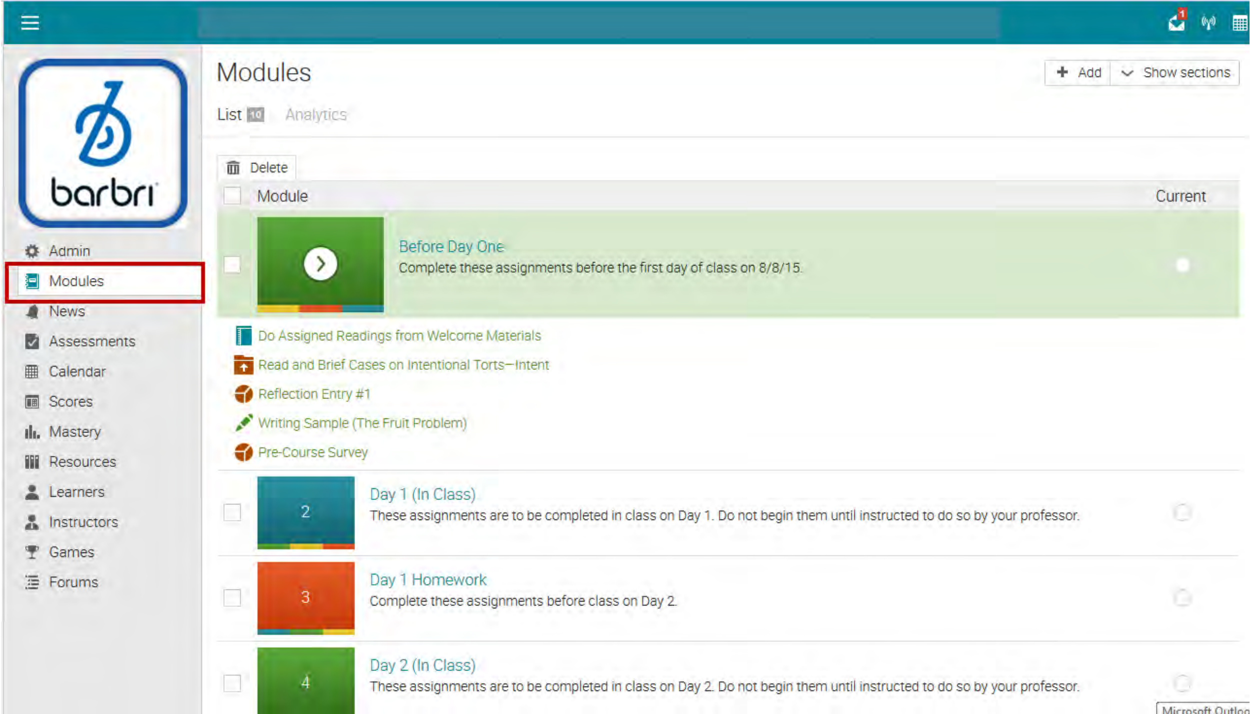


Once you are logged on to Matrix, select "Courses" and then select "Lawyering Fundamentals."

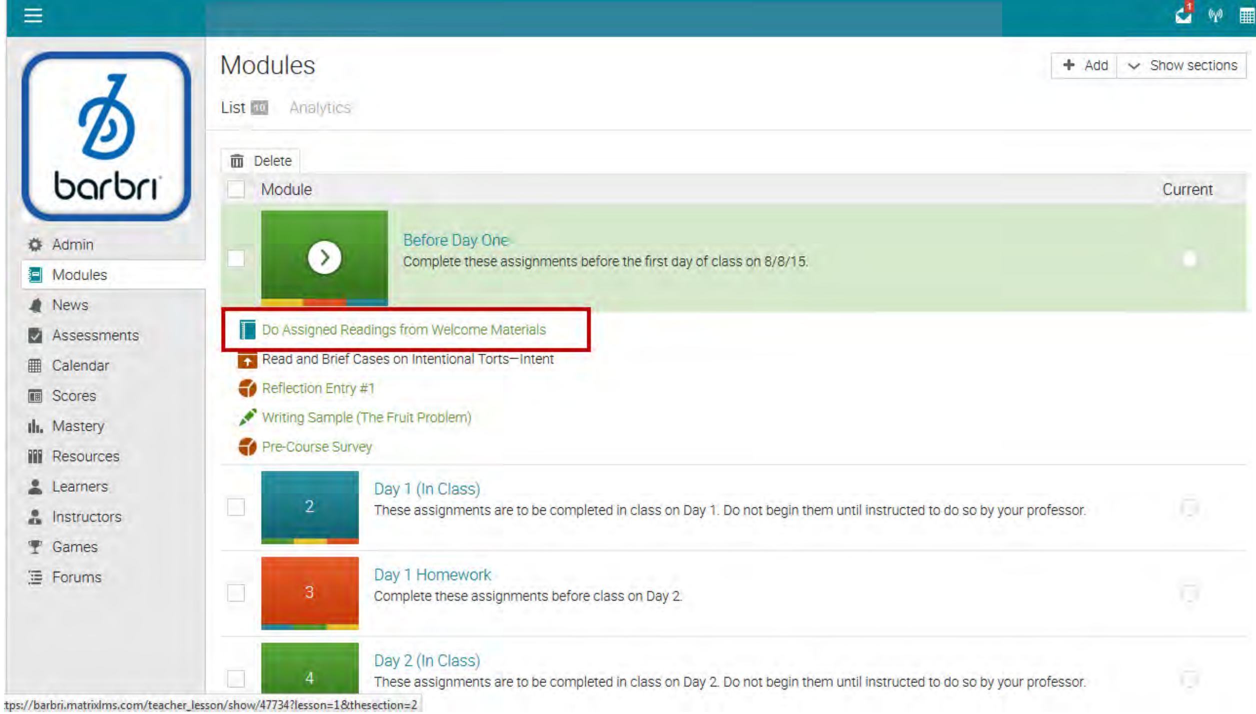


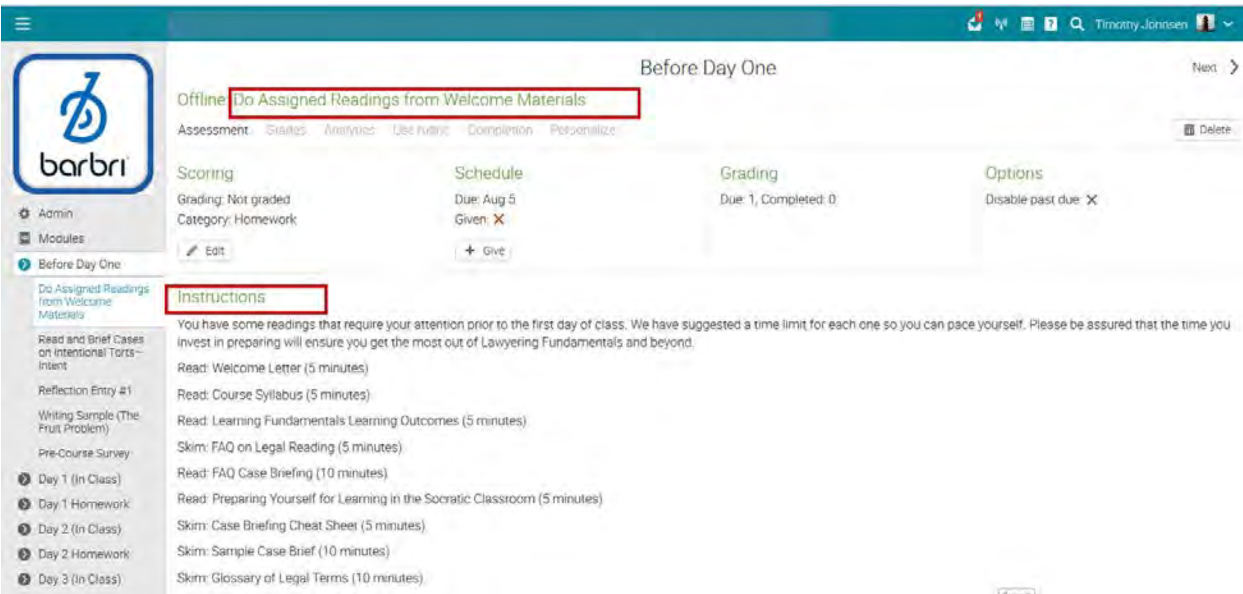
Matrix Instructions For Students

Once you are in the course, click on "Modules." This will show you a list of the assignments you need to complete before each day and during class each day. Please refer to your syllabus for more information on assignment due dates.

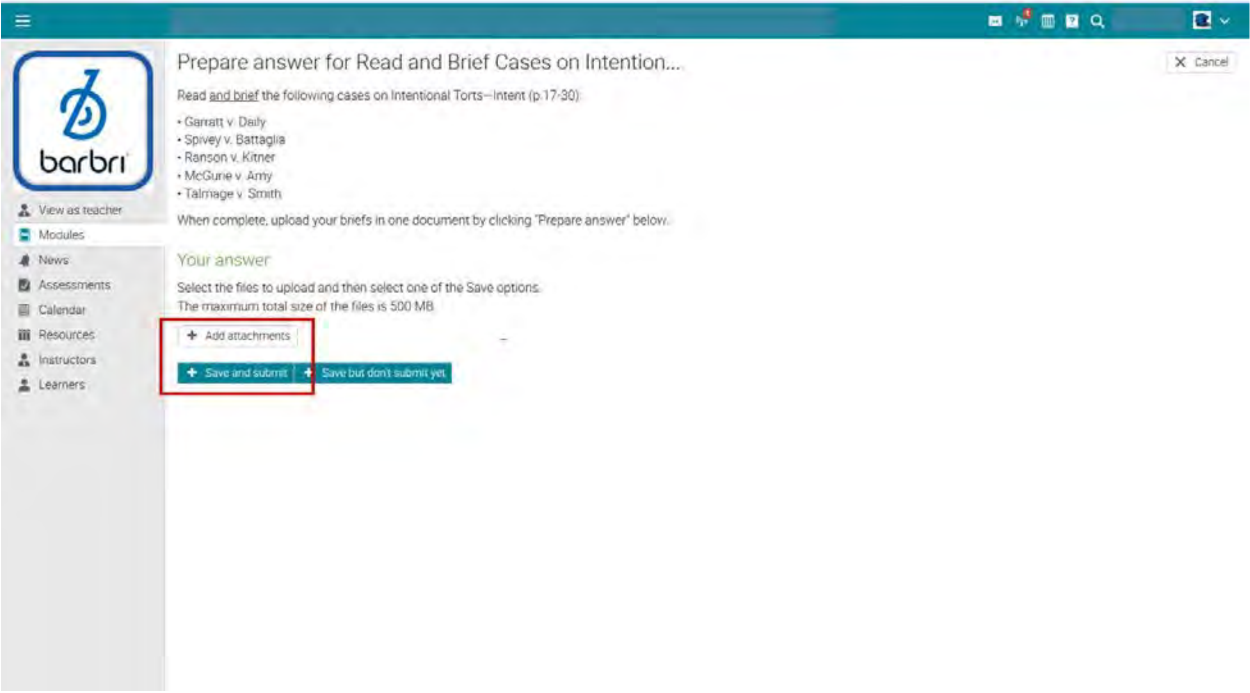


Some assignments require you to answer questions online; other assignments ask for you to upload a document. To see the details of a particular assignment, click on its name and information will appear





If a brown folder appears next to the assignment, you will need to upload a document. To upload a document, click on the assignment, select the “Prepare Answer” button, browse your computer and submit the assignment. Step by Step screen shots below.



Prepare answer f

Upload file

Local

Add Source

Drop file here, or click to browse

Read and brief the following

- Garratt v. Daily
- Spivey v. Battaglia
- Ranson v. Kitner
- McGurie v. Amy
- Talmage v. Smith

When complete, upload you

Your answer

Select the files to upload and

The maximum total size of the files is 500 MB

+ Add attachments

+ Save and submit | + Save but don't submit yet

Cancel

View as teacher
Modules
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Assessments
Calendar
Resources
Instructors
Learners

Before Day One

Next

Dropbox: Read and Brief Cases on Intentional Torts—Intent

Assessment

Scoring	Your submission	Teacher comment
Category: Homework	Attempts: 0	
Due: Aug 5	Max. attempts: 3	
	Allow late submissions: ✓	

Instructions

Read and brief the following cases on Intentional Torts—Intent (p.17-30):

- Garratt v. Daily
- Spivey v. Battaglia
- Ranson v. Kitner
- McGurie v. Amy
- Talmage v. Smith

When complete, upload your briefs in one document by clicking "Prepare answer" below.

+ Prepare answer

View as teacher
Modules
Before Day One
Read and Brief Cases on Intentional Torts—Intent
Writing Sample (The Fruit Problem)
Day 1 (In Class)
Day 1 Homework
Day 2 (In Class)
Day 2 Homework
Day 3 (In Class)
Homework Day 3
Day 4 (In Class)
Homework Day 4
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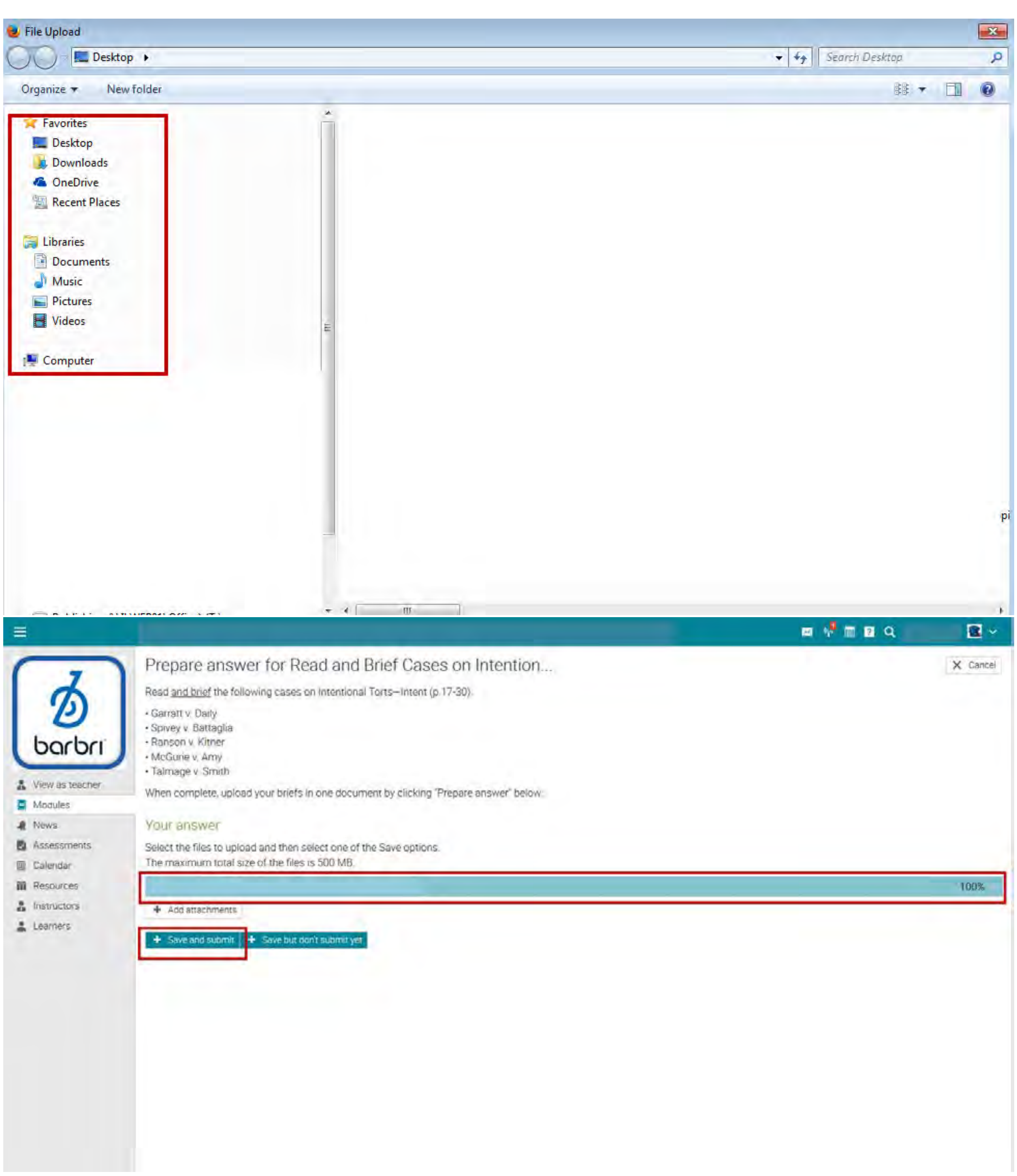
File Upload
Desktop
Search Desktop
Organize
New folder
Favorites
Desktop
Downloads
OneDrive
Recent Places
Libraries
Documents
Music
Pictures
Videos
Computer
Prepare answer for Read and Brief Cases on Intention...
Cancel
Read and brief the following cases on Intentional Torts—Intent (p.17-30).
• Garratt v. Daily
• Spivey v. Battaglia
• Ranson v. Kitner
• McGuire v. Amy
• Talmage v. Smith
When complete, upload your briefs in one document by clicking "Prepare answer" below.
Your answer
Select the files to upload and then select one of the Save options.
The maximum total size of the files is 500 MB.
100%
Add attachments
Save and submit
Save but don't submit yet
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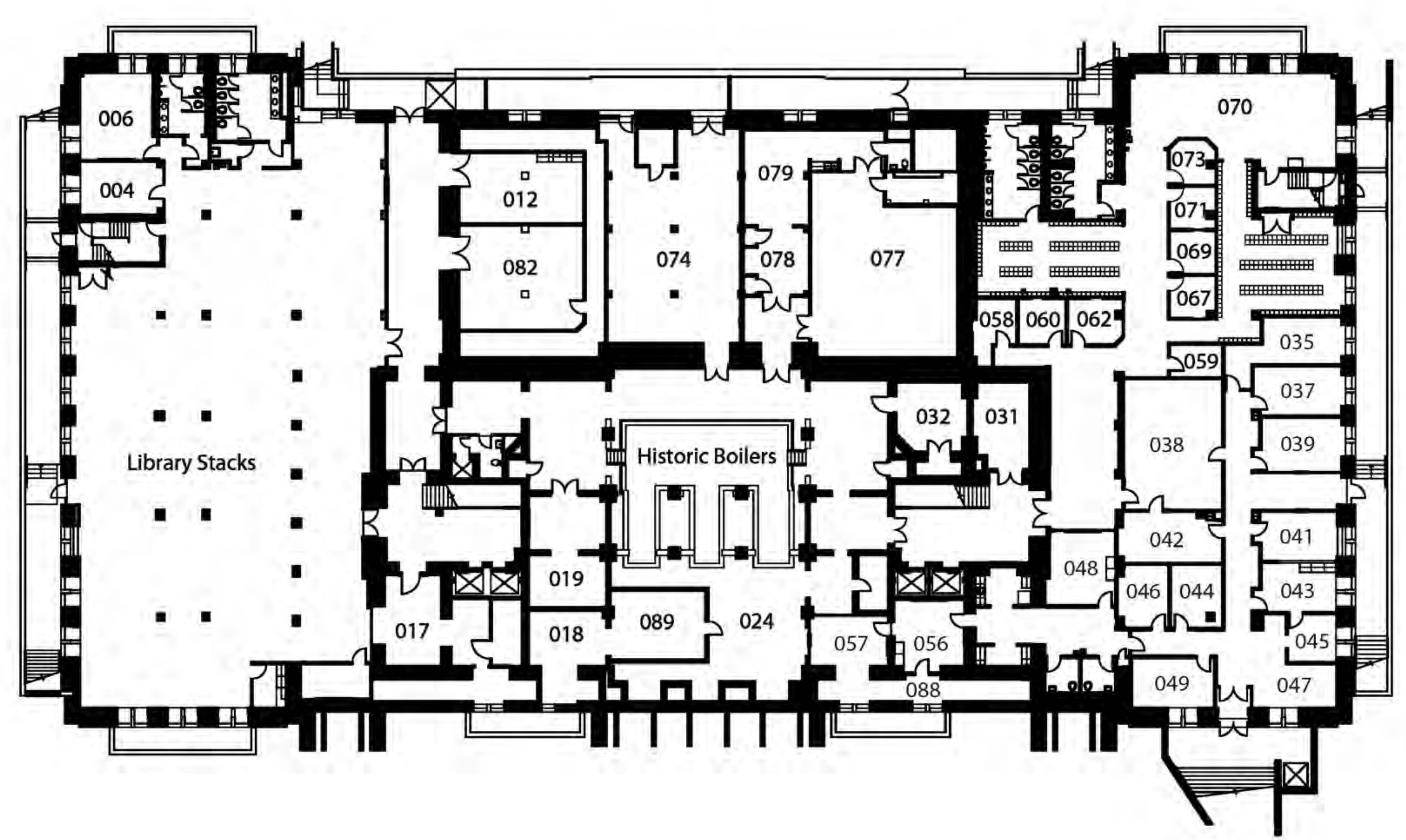

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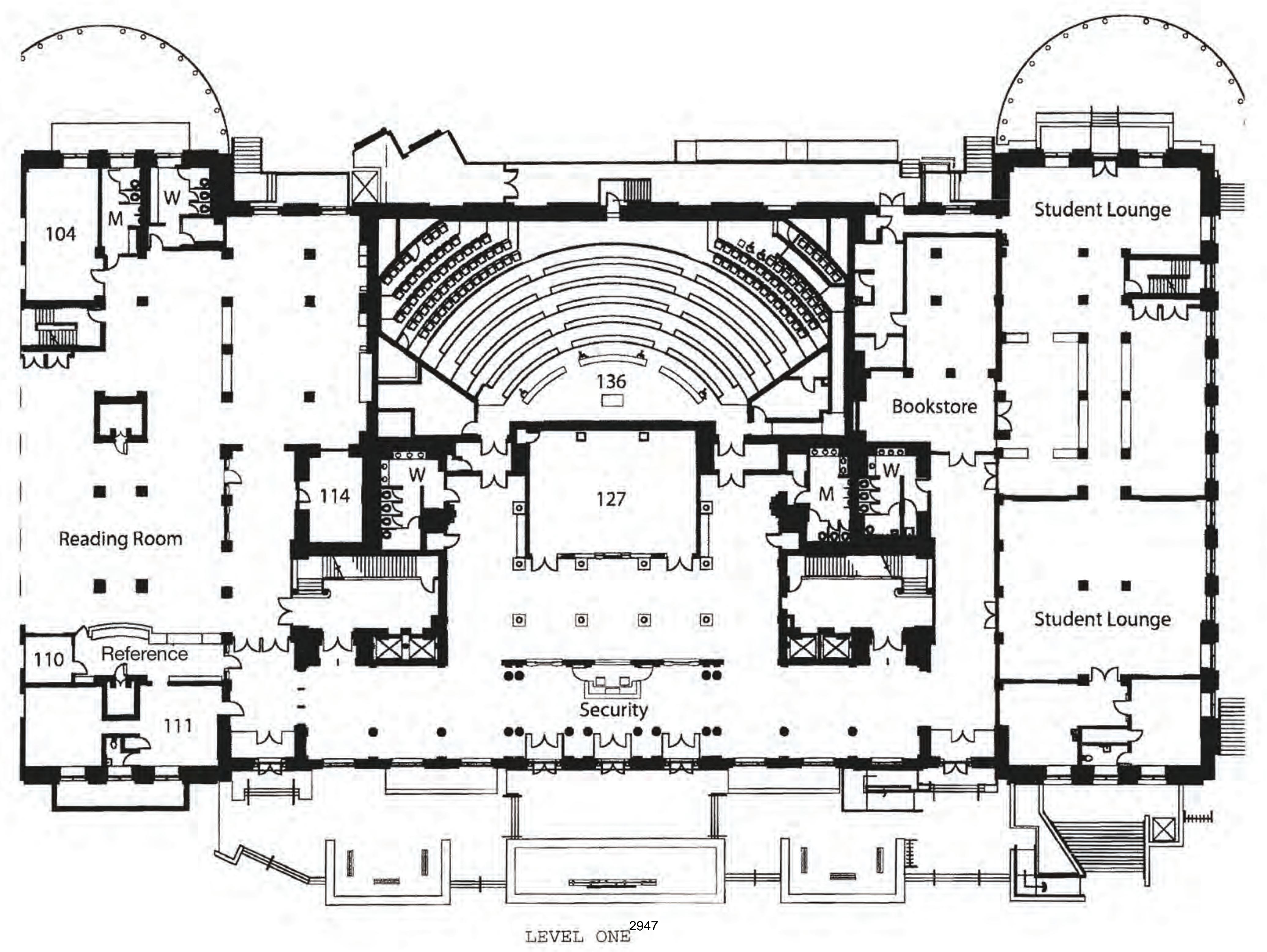

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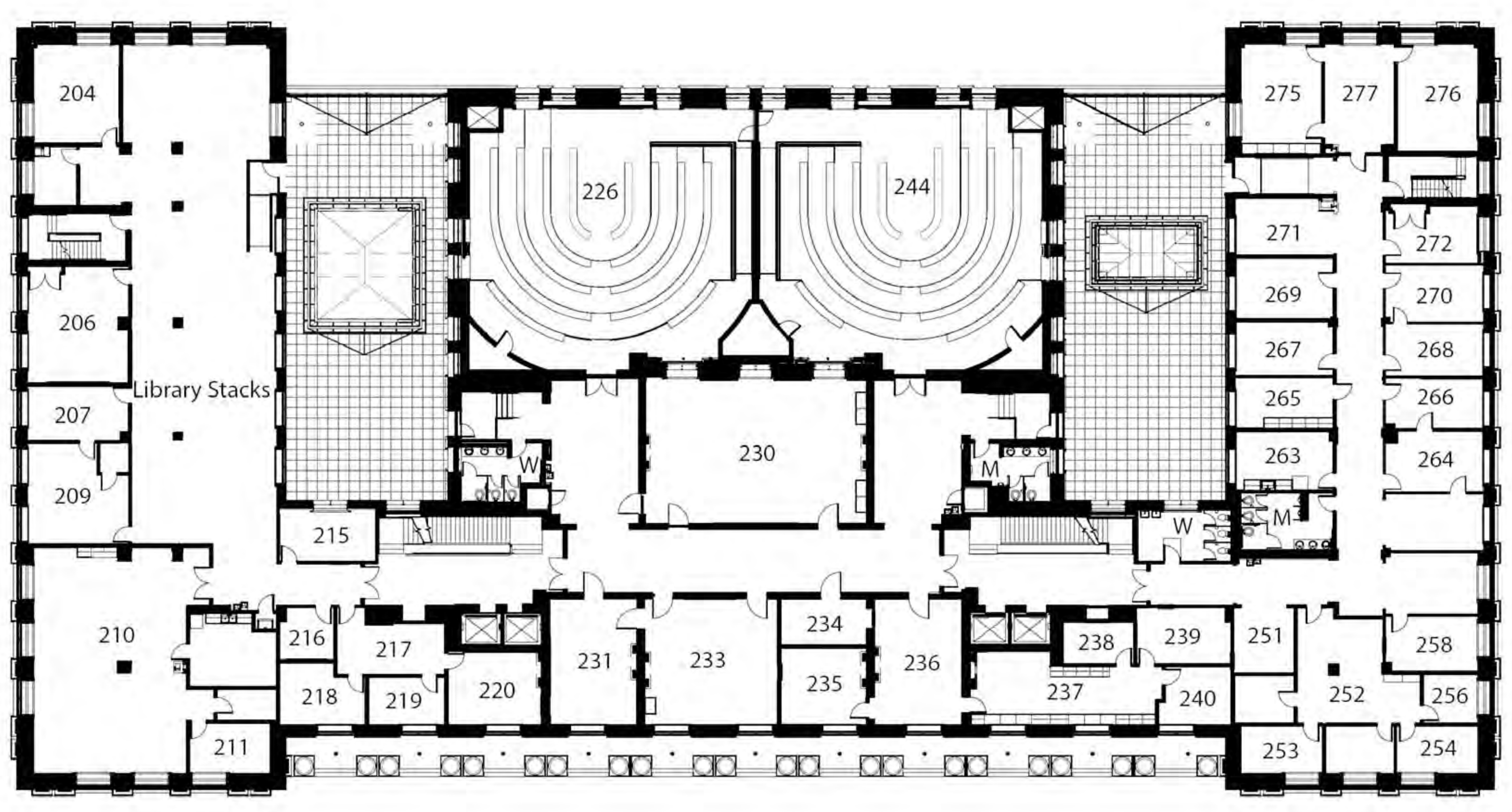

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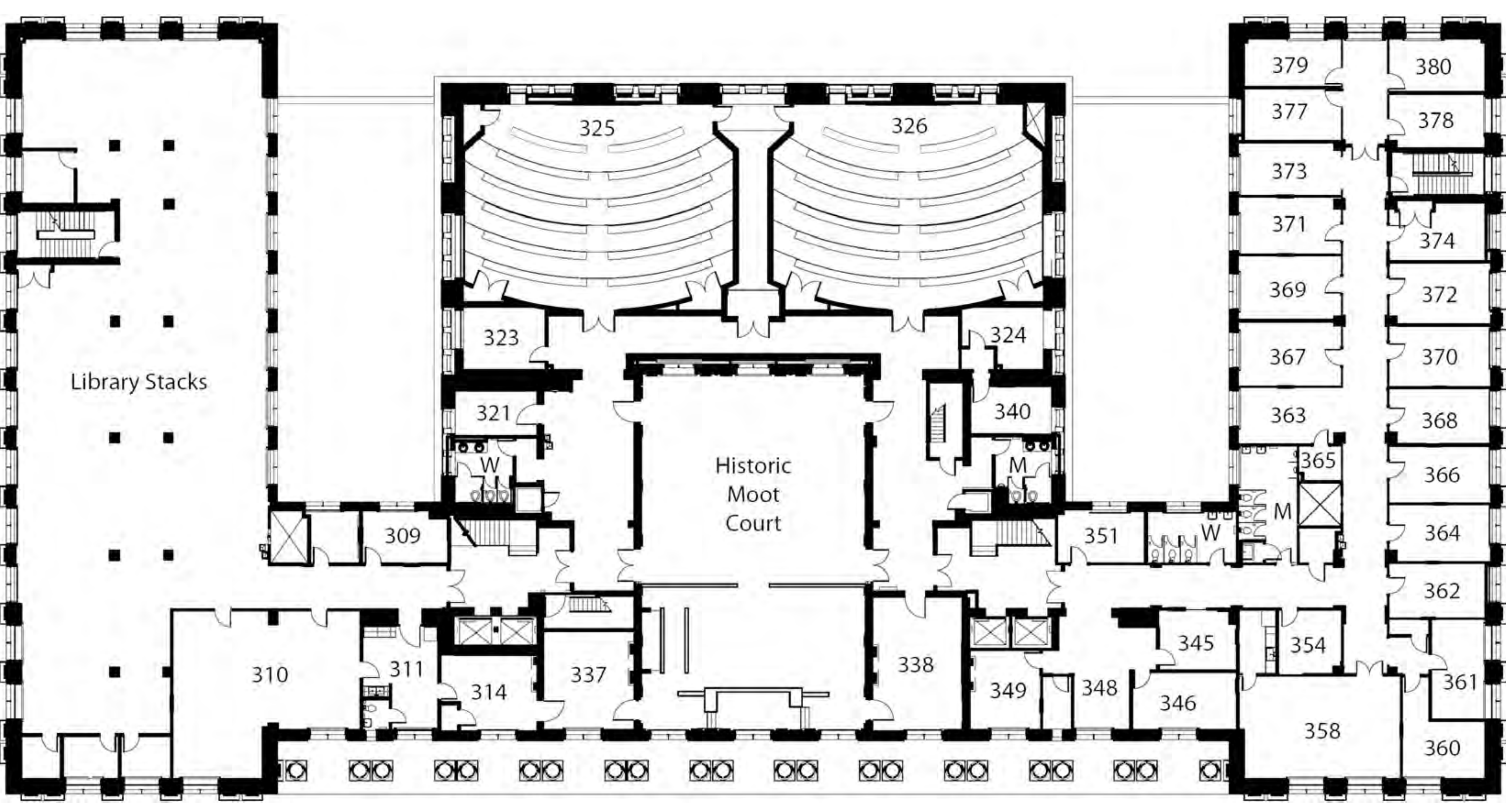

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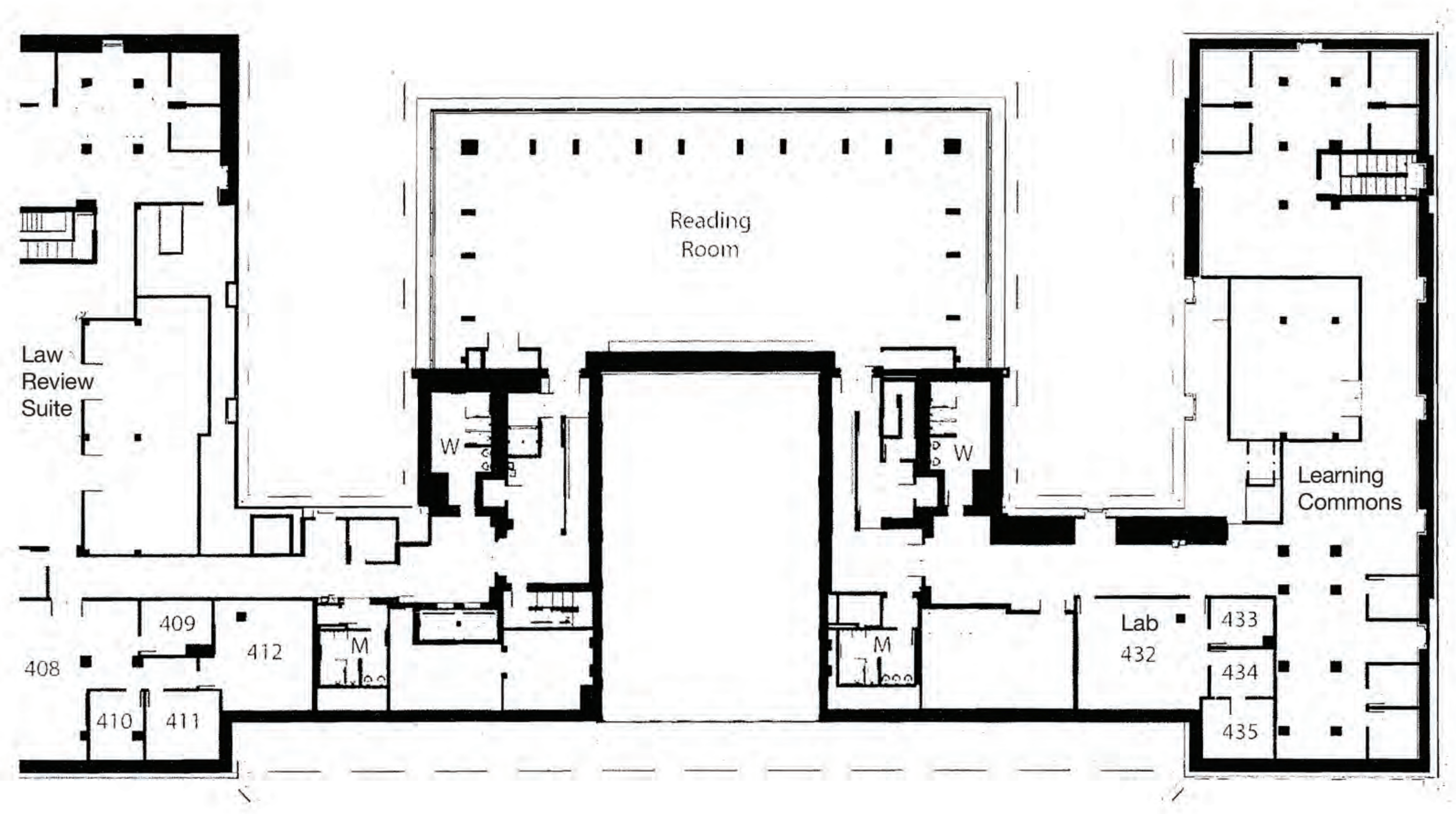

LEVEL FOUR

Cecil C. Humphreys School of Law

Current Students

ALTERNATIVE SPRING BREAK

Memphis Law's Alternative Spring Break program, coordinated and run by PALS, seeks to help low income individuals who need legal representation, while simultaneously providing law students the opportunity to gain experience in the legal field. The University of Memphis program is the only student-led Alternative Spring Break in the country to recruit nationally, taking applicants from any American Bar Association-accredited law school.

Supervised by practicing attorneys and leaders in the Memphis community, law students participate in a variety of specialized tracks throughout the week, with a special keynote address to conclude the weeks activities.

Information about the 2017 Alternative Spring Break Program:

ADVOCATING FOR EDUCATIONAL JUSTICE:BREAKING THE SCHOOL TO PRISON PIPELINE

The eighth annual Alternative Spring Break, sponsored by the University of Memphis Cecil C. Humphreys School of Law and its Public Action Law Society (PALS), will focus on the the "school to prison pipeline," the causes, effects, and solutions. The event's keynote speaker is The Honorable Judge Dan H. Michael of Shelby County Juvenile Court in Memphis, Tennessee.

The "school to prison pipeline" refers to the national trend of students being funneled through public schools and into the juvenile and criminal justice system. The Alternative Spring Break 2017 program will take an in-depth look at this issue through several specialized legal tracks and panel discussions throughout the course of the program.

Sixty-six law students from 4 different law schools will participate in Alternative Spring Break during the week of March 6–10, 2017. Law students from University of Georgia, University of Toledo, and Loyola Law School will join Memphis Law students in seven specialized pro bono tracks.

Supervised by practicing attorneys and leaders in the Memphis community, law students will participate in seven specialized tracks: Advance Directives, Family Law, Immigration, Criminal Defense, Juvenile Justice, a Research and Writing track, and a Veterans' Clinic.

In the spirit of service, this year Alternative Spring Break will add a non-legal related community service component. PALS has teamed up with Clean Memphis to do a survey of graffiti plagued locations in Downtown Memphis. Students will spend an afternoon spotting areas in Downtown Memphis that need attention to report to Clean Memphis so that action may be taken.

For all participants to have a better understanding of how to combat the "school to prison pipeline," a panel discussion will bring several voices to the table to discuss the key issues and possible solutions. The panel will include The Honorable Magistrate Judge Mitzi Pollard, who sits on the truancy docket for Shelby County Juvenile Court, Ms. Mahal Burr, Community Action Coordinator for BRIDGES USA, Mr. Bernard Williams, a Juvenile Services Specialist at Shelby County Juvenile Court, and Mr. Deangelo Mitchell, a recent graduate of Northwest Prep Academy.

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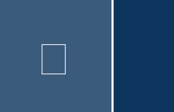
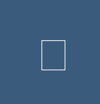
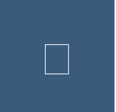
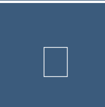
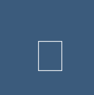
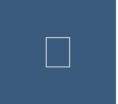

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Cecil C. Humphreys School of Law

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HISTORY OF ALTERNATIVE SPRING BREAK

Alternative Spring Break (ASB) began in the spring of 2010 when fifteen UofM law students traveled to Miami after the Haiti earthquake to help Haitians stranded in the U.S. apply for temporary protected status. These students returned to Memphis motivated to help local Memphians in need of quality legal services.

In the spring of 2011, PALS hosted ASB at the University of Memphis Cecil C. Humphreys School of law. Under the supervision of attorneys, thirty-seven law students from eight law schools served in three areas or tracks: (1) Pro Se Divorce, (2) Advance Directives, and (3) Non-Profit Organizations. Of the thirty-seven students who participated, twenty were from the UofM. In the pro se divorce track, students assisted couples with no joint property or kids to file pro se divorces. In the advance directives track, students traveled to nursing homes and senior centers to prepare legal documents such as powers of attorney, health care surrogacies, and wills. Students participating in the nonprofit advocacy track worked on different law-related projects with Court-Appointed Special Advocates, Literacy Mid-South, and the RISE Foundation.

The Third Annual Alternative Spring Break took place from March 5-23, 2012. PALS hosted sixty-two students, twenty-nine from the UofM, who participated in four tracks: (1) Pro Se Divorce, (2) Advance Directives, (3) Legislative Drafting, and (4) Immigration. The two new tracks, Legislative Drafting and Immigration, were added to directly respond to the need in Memphis and allow more student participation. Students working in the Legislative Drafting Track partnered with three organizations to draft legislation regarding human trafficking, post-civil

commitment proceedings, and predatory lending. The Immigration Track took place over three weeks with the University of Tennessee College of Law and the University of Mississippi College of Law partnering to finish the second and third weeks. Students in the Immigration Track processed U-Visa applications for five victims of serious domestic violence who cooperated with law enforcement.

Morris Dees, the founder of the Southern Poverty Law Center, was the keynote speaker at the 2012 ASB Luncheon. Mr. Dees spoke to the students about his humble roots in rural Alabama, his formative years as a civil rights lawyer, and his current effots to curtail discrimination against immigrants.

The Fourth Annual ASB took place from March 11-15, 2013. This year, ASB added even more tracks, including "Street Court" where students partnered with the Shelby County Public Defender's office to expunge outstanding court fees for homeless individuals. Street Court helped over 70 individuals receive legal counseling so that their issues would not longer be barriers to finding housing and jobs. Over forty-eight law students from seven schools served over 145 clients in ASB. ASB chose a Civil Rights theme, featured an educational series of "hot topics" throughout the week, and hosted keynote speaker Mike Cody, who represented Dr. Martin Luther King when the City of Memphis attempted to stop the sanitation workers' march in Memphis.

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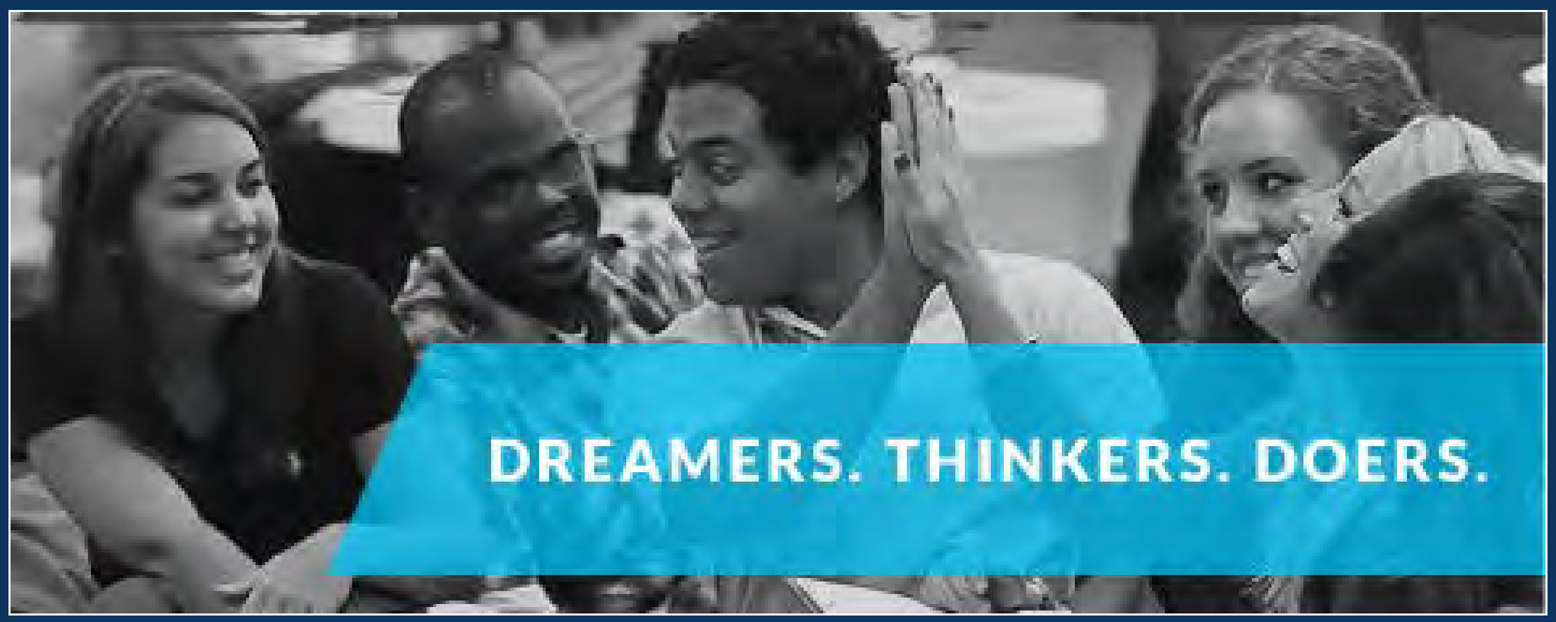

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Cecil C. Humphreys School of Law

Current Students

SBA COMMITTEE INFORMATION

Communication and Program Committees

Wellness Wednesdays: a committee of SBA members that organize a weekly program to instill a sense of self-awareness regarding physical, mental, and emotional health to each student. This will involve student activities, guest speakers, and informational sessions throughout the academic year.

Faculty Presentations: a committee of SBA members that work to provide presentations by professors as an opportunity for the students to learn about the projects and studies of the faculty of Memphis Law.

Community Service Projects: a committee of SBA members that organizes community service projects as detailed by the Community Service Liaison in an official report each semester.

Career Service Office Committee: a committee of SBA members selected to work in cooperation with the law school's Career Service Office to foster open communication between the office and the student body.

3L Graduation Committee: a committee of SBA 3L members selected to work with the law school administration to prepare for the graduation ceremony. The committee will work to ensure the graduating class selects a graduation guest speaker, the professor of the year award, takes composite photos, chooses a 3L student class

speaker, and any other graduation need.

Student Leaders Committee: a committee appointed by the SBA President with the goal of having active and frequent communication between all of the student organizations at Memphis Law. The committee members are the President, or equivalent there of, of each student organization. The Student Leader Committee will attempt to minimize conflicts and ensure the school events calendar works to the benefit of the majority the student body.

Event Committees

1L Class Welcome to Law School: an event at the end of Orientation to welcome the incoming 1L class to law school, and introduce them to the SBA.

Memphis Law Golf Tournament: a fundraising golf tournament hosted by the SBA. The proceeds will go to helping the SBA pay for other events, guest speakers, or student needs.

Trivia Night: a fun event geared towards building morale and relationship between professors and students. SBA provides prizes for the first, second, and third place teams, and for the team with the most creative team name.

Fall Festival: a festival in the fall semester for the student body to celebrate the law school community. Each student organization puts together a booth or activity for the fall festival. Several of the activities include: face-painting; hot apple cider; a chili cook-off; pumpkin carving; "Pie a Professor"; and more!

Auction: a fundraising event for the SBA. Donations from the local Memphis community will be auctioned off in a silent auction followed by a live auction. The live auction will consist of the donations provided by the Memphis Law Professors. The proceeds will go to the SBA to pay for other events, guest speakers, or student needs.

Grizz Night: a night where the student body goes to Fedex Forum together as a student body to cheer on the Memphis Grizzlies! The goal of the event is to foster school spirit, and a sense of community for law students, as well as the city of Memphis.

Barrister's Ball: an annual semi-formal event held to celebrate our law school community in an intimate and elegant setting. The goal of the celebration is to focus on the unification of each member of the student body and foster a spirit of fellowship.

ABA Mental Health Awareness Day: SBA Wellness Wednesday Committee will put together information and activities to bring awareness of the very real concerns of mental health.

Flaw Review: an annual event always free to the student body. It is a celebration of the academic year. Each class, 2L, 3L, 1L Section 11, 1L Section 12, and the faculty/administration will create and perform a skit poking fun and joking about things that occurred through out the year. The skits are filled with jokes aimed at good, clean fun to laugh at ourselves and enjoy each others company.

Race Judicata: an annual 5K held by the SBA as a community service fundraiser with the proceeds going to an organization or group in need.

3L Class Graduation Celebration: a party for the graduating class hosted by SBA to celebrate and honor the achievements of the class, and to acknowledge their contributions to the law school.

For more up-to-date information regarding SBA news, events and announcements, please visit the SBA TWEN page by clicking HERE.

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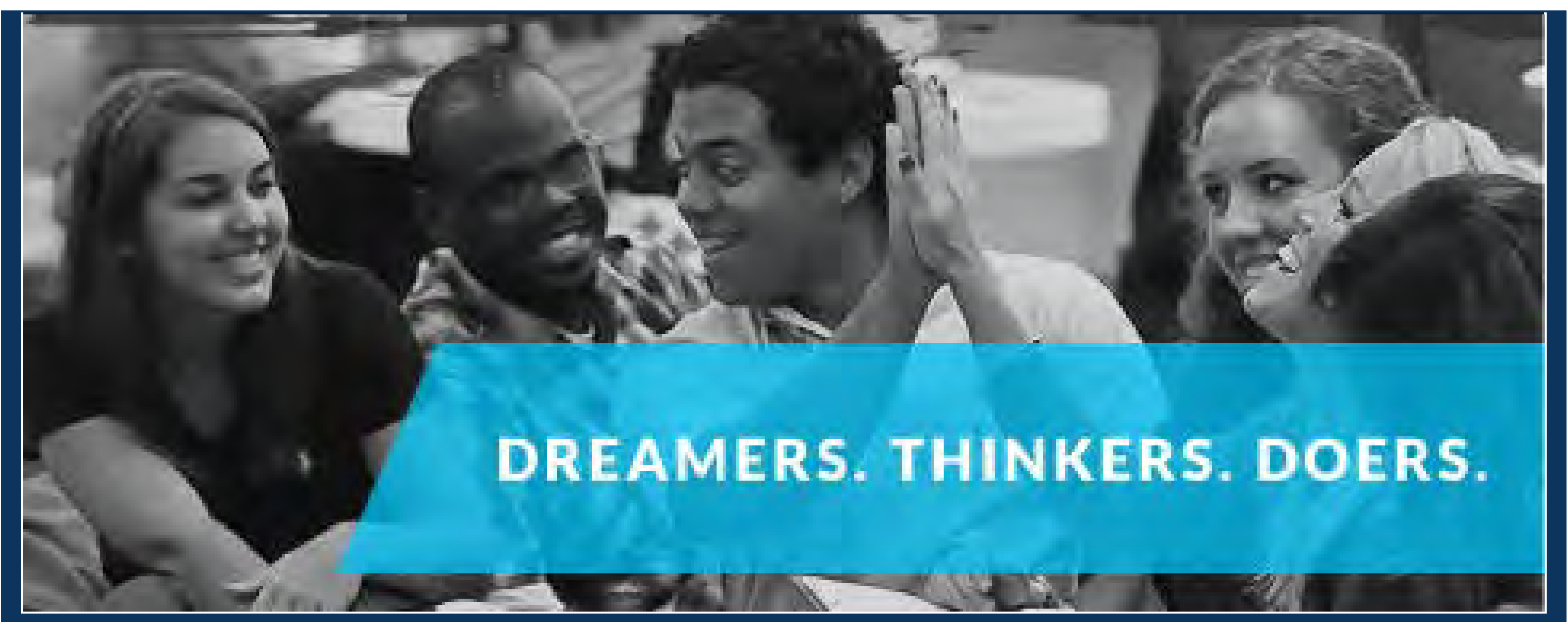

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CONSTITUTION

UNIVERSITY OF MEMPHIS CECIL C. HUMPHREYS SCHOOL OF LAW

STUDENT BAR ASSOCIATION

ARTICLE I

NAME

The name of this organization shall be The University of Memphis Cecil C. Humphreys Student Bar Association, herein referred to as the SBA.

ARTICLE II

PURPOSES

SECTION 1. The purposes of this organization are to bring all of the students of The University of Memphis Cecil C. Humphreys School of Law into one body in order to foster a spirit of fellowship and cooperation and to advance the aims and purposes of the School of Law.

SECTION 2. These purposes shall be carried out:

A. By providing and conducting a forum for the discussion and resolution of student problems.

B. By providing and conducting a forum for the planning of student activities.

C. By cooperating with other departments of the University and other organizations for the advancement of common interests.

ARTICLE III

MEMBERSHIP

SECTION 1. All students enrolled in the University of Memphis School of Law shall be members of the SBA.

SECTION 2. The members of the SBA shall be entitled to all rights and privileges afforded by this Constitution.

SECTION 3. All members of the SBA are invited to attend the regular weekly meetings of the Administrative Council, at a time and place to be published on the SBA bulletin board one week before such meeting. All members are also invited to attend such charitable, social, and educational activities as planned by the Administrative Council.

ARTICLE IV

ADMINISTRATIVE COUNCIL

SECTION 1. The Administrative Council.

A. (1) The Administrative Council shall be comprised of two boards: the Executive Board and the Board of Bar Governors.

(2) The Administrative Council shall direct the policies, activities, and general business of the SBA in pursuance of the purposes of this organization as set forth in Article II of this Constitution.

(3) All members of the Administrative Council shall make a good faith effort to meet weekly, in accordance with Article V, § (4).

(4) All decisions of the Administrative Council shall be by a majority of the current

members of the Administrative Council.

(a) Exception: An exception to the majority requirement shall be triggered in the following three situations: (1) to enact a By-Law; (2) to propose a Constitutional Amendment; and (3) to recall an elected official according to either Article IV, § (1) (B) (2) or Article V, § (4) (B). In each of those three situations, a two-thirds (2/3) vote of the current members of the Administrative Council shall be required.

(5) Proxy voting will only be allowed on specific issues and must be given in writing to another member of the Administrative Council stating the specific issue and it must be signed by the absent member. There shall be no general proxies.

(6) Decisions of the Administrative Council that are handled outside of the scheduled meeting time shall be made by email and require a majority of the current members of the Administrative Council.

B. The Administrative Council shall have the authority and the responsibility to enact such legislation as is necessary for the best interest of the SBA. This shall include:

(1) The power to adopt and amend By-Laws and to propose Constitutional amendments.

(2) The power to move for the recall of any elected officer.

(3) The power to approve or disapprove the budget of any proposed item. If such budget is disapproved, no SBA funds shall be spent until a revised budget is approved.

(4) The power to compel the attendance of its own members.

(5) The power to conduct hearings and investigations deemed necessary by a majority of the Administrative Council and to form such committees as it deems necessary.

SECTION 2. The Executive Board.

A. The Executive Board shall share legislative authority with the Board of Bar Governors. The Executive Board shall execute the directives of this Constitution, the By-Laws, and the legislation of the Administrative Council.

B. The Executive Board shall consist of a President; Vice-President; Executive Director; Secretary; Treasurer; Bar Associations Representative; Director of Student Academic Affairs; Director of Student Events; Director of Communications; Community Service Liaison; and any other office that may be provided through the By-Laws or the exercise of Article IV, § (2) (L) (2).

C. The President. The President shall preside over all functions of the SBA and shall work with other officers to coordinate the affairs of the SBA. The President shall have the authority to appoint and remove such committees as deemed necessary. The President shall possess all powers granted by this Constitution.

(1) The President shall oversee the execution of all Administrative Council policies, activities, and general business .

(2) The President shall submit, at the first Administrative Council meeting of his term in office, a report of the programs and activities that the SBA should strive to obtain under his leadership. The President shall direct the Secretary to maintain a copy of this report at all times and to make the copy available to any student that wishes to view it.

(3) The President shall recommend needed legislation and resolutions to the Board.

(4) The President shall call meetings of the Administrative Council.

(5) The President shall post and maintain a schedule of regular office hours, which shall not be less than five (5) hours per week.

(6) In the event of a permanent vacancy of any elected position, the President shall appoint a successor, subject to confirmation by a majority vote of the Administrative Council.

(7) The President shall break all tie votes of the Administrative Council.

(8) The President shall have the power to veto any vote of the Administrative Council. This veto may be overturned by a two-thirds (2/3) vote of the Administrative Council.

(9) The President shall have the power to spend no more than one hundred dollars ($100.00) per month, non-cumulative, without prior Administrative Council approval.

(10) The President shall set an agenda for every meeting and shall provide this agenda to all present at the weekly scheduled meeting.

(11) The President shall have such other powers as are necessary to carry out the duties of the office.

(12) The President shall take attendance at every meeting of the Administrative Council and make note of which members of the Administrative Council did not notify the President or delegated officer of their absence in advance.

D. The Vice-President. There shall be a Vice-President who, with the President, shall equitably divide the committee assignments.

(1) In the temporary absence of the President, the Vice-President shall serve in the place of the President.

(2) If the office of President should become permanently vacant, then the Vice-President shall become President and the office of Vice-President shall be elected by a majority vote by the Administrative Council, as provided in Article VI, § (5) of this Constitution.

E. The Executive Director. There shall be an Executive Director appointed by the SBA President to assist the SBA President.

(1) The Executive Director shall act as an advisor to the President and ensure the effective operation of the Administrative Council.

(2) The Executive Director shall be the custodian of this Constitution and ensure compliance with this Constitution by the Administrative Council and all members of SBA.

(3) The Executive Director will serve as an ex-officio member of all non-standing SBA committees and shall be responsible for the effective operation of such committees.

F. The Secretary. The Secretary shall be chief reporter and correspondent of the SBA. The Secretary shall keep the records and minutes of the Administrative Council. These minutes shall be available to any SBA member to view upon request.

G. The Treasurer. The Treasurer shall keep a record of the expenses and the financial condition of the SBA, which shall be submitted to the new Treasurer at the end of the

term of office. The Treasurer shall have all financial information pertaining to the SBA for any SBA member to view upon request.

(1) The Treasure shall update the Administrative Council on the state of SBA's finances during each weekly meeting.

(2) The Treasurer shall have such other duties as are delegated by the President.

H. Bar Associations Representative. The Bar Associations Representative shall represent the SBA at all meetings of local and national bar associations, including the Memphis Bar Association, the Tennessee Bar Association, and the American Bar Association Law Student Division. The Bar Associations Representative shall be one of the University of Memphis' official voting delegates, along with the President, at the Circuit and National ABA–LSD meetings. This officer is responsible for promoting student membership in all bar associations and for distributing information about the bar associations to the student body. The Bar Associations Representative shall act as Election Commissioner as outlined in Article VI, § (1).

(1) The Bar Associations Representative shall make an oral or written report to the Administrative Council within one week of attendance of any bar association meeting. This report shall include all propositions and the Bar Associations Representative's vote on the issues.

(2) The Bar Associations Representative shall have such other duties as are delegated by the President.

I. Director of Student Academic Affairs. The Director of Student Academic Affairs shall investigate all academic issues that come before the Administrative Council and shall be

the SBA's delegate to the University of Memphis's Student Government Association at the main campus.

(1) The Director of Student Academic Affairs shall be responsible for overseeing and assisting in all speaking events, all academic issues, all Student Government Association issues that concern the Law School student body, graduation, as well as working with other academic organizations at the Law School that request SBA's assistance.

(2) The Director of Student Academic Affairs shall have other duties as are delegated by the President.

J. Director of Communications. The Director of Communications shall be responsible for approving and publishing all emails, statements, memos, flyers, and posters coming from the Administrative Council.

(1) The Director of Communications will work with the Secretary and the Law School's Director of Communications to keep all parties aware of policies, activities, and general business of the SBA.

(2) The Director of Communications shall work with the other members of the Administrative Council to ensure the SBA is updated on all communications.

(3) The Director of Communications shall have other duties as are delegated by the President.

K. Director of Student Events. The Director of Student Events shall be responsible for supporting and promoting all of SBA's annual events, including, but not limited to, Orientation, Golf Tournament, Barristers' Ball, Auction, Race Judicata, and Flaw Review.

(1) The Director of Student Events shall promote all SBA events, in-person, prior to each event and solicit student feedback regarding each event. They will report student feedback to the Administrative Council after each event.

(2) The Director of Student Events shall communicate with the chair of the committee for each event and support in any additional tasking for each event, e.g. soliciting donations and arranging for event sponsors.

(3) The Director of Student Events shall have other duties as are delegated by the President.

K. Community Service Liaison. The Community Service Liaison shall be responsible for coordinating and publicizing community service opportunities for SBA members.

(1) The Community Service Liaison shall organize one (1) community service project in both the fall and spring academic semesters and solicit the participation of the general SBA membership in those projects.

(2) The Community Service Liason shall have other duties as are delegated by the President.

L. Other Executive Officers.

(1) The Administrative Council may create new executive offices through the By-Laws. The name of the office, the duties of the officer, the term of office, the means of assuming office and whether the officer is to have a vote in the business of the Administrative Council shall be specified in the By-Laws and approved by a vote of the Administrative Council.

(2) The President shall retain the right to appoint any other member of the SBA to the Executive Board, if a position is deemed necessary for the success of the SBA.

Any member appointed by the President under this part must be approved by a majority vote of the Administrative Council.

SECTION 3. Board of Bar Governors.

A. The Board of Governors shall share Legislative authority of the SBA with the Executive Board. The Board of Bar Governors shall resolve questions of interpreting this Constitution and its By-Laws.

B. The Board of Bar Governors shall be comprised of four (4) representatives from the 3L class and four (4) representatives from the 2L class, along with two (2) representatives each from Section 11 and Section 12 of the 1L class.

ARTICLE V

QUALIFICATION OF OFFICERS

SECTION 1. Administrative Council General Requirements. No person shall serve in any office of the Executive Board of Bar Governors unless qualified as follows:

A. Every candidate must have a minimum of a 2.0 grade point average on a 4.0 scale at the time of election for a position.

B. Nomination by filing a petition with the required number of signatures at the proper time and place with the Bar Associations Representative, acting as Election Commissioner, as specified by the election rules.

C. Every candidate shall certify to the Bar Associations Representative, acting as Election Commissioner, a good faith pledge which indicates that in the event of being elected to office, the candidate will continue to be enrolled as a student of the Law School during

the entire term of the office. Application for early graduation will result in the immediate termination of the officer's term.

SECTION 2. Qualification for Executive Board Officers. In addition to the general qualifications for all other Administrative Council officers, the Executive Board officers shall also meet these additional qualifications where applicable:

A. The SBA President. Each candidate for SBA President must be a rising 3L.

B. The ABA/LSD Representative. Each candidate for ABA Representative shall meet the requirements of said office by complying with the applicable rules of the ABA, which rules are incorporated herein by reference.

C. Other Executive Offices Created Through the By-Laws. Other executive officers may be created through the By-Laws, which shall enumerate the qualifications for each office.

SECTION 3. Qualifications for Board of Bar Governors. In addition, to the general qualifications for all other Administrative Council officers, the Board of Bar Governors shall also meet these additional qualifications where applicable:

A. The Candidates for 3rd Year Bar Governors shall be students who have successfully completed thirty-six (36) hours.

B. The Candidates for 2nd Year Bar Governors shall be students who have successfully completed twelve (12) hours.

C. The Candidates for 1st Year Bar Governors shall be newly enrolled students who have completed zero (0) hours.

SECTION 4. Attendance and Participation Requirements of Executive Board Officers and Bar Governors. All members of the Administrative Council, including all Executive Board officers and all Bar Governors, are required to make a good faith effort to attend all meetings of the Administrative Council and to make a good faith effort to participate in all SBA events and activities. Failure to do so can result in the recall of the Executive Board officer or the Bar Governor per Article IV, § (1) (B) (2) . Such a good faith effort includes notifying the President or delegated officer of any absence prior to an Administrative Council meeting or SBA event.

A. A strike shall be automatically dispensed by the President to any Executive Board officer or Bar Governor that fails to attend an Administrative Council meeting(s) or an SBA event(s) and does not provide a valid reason for his or her failure to attend the meeting(s) or SBA event(s) prior to the meeting(s) or SBA event(s).

B. When any member of the Administrative Council accumulates three (3) strikes, the Administrative Council must hold a recall vote in accordance with Article IV, § (1) (A) (4) (a).

ARTICLE VI

ELECTIONS

SECTION 1. Election Commissioner. The Bar Associations Representative shall be responsible for scheduling and conducting all SBA elections and referenda. The determination of any and all matters and rules pertaining to such election shall be within the jurisdiction of the Bar Associations Representative and its decision, subject to the approval of the SBA President, shall be final.

SECTION 3. Election of Executive Board Officers. Executive Board officers shall be elected for a period of one (1) year and shall take office upon graduation day. Executive Board officers, with the exception of appointed officers, shall be elected as follows:

A. The election of Executive Board officers shall be held in the Spring General Election.

B. Executive Board officers shall be elected by the general membership of the SBA.

C. The candidate for each Executive Board office who receives a majority of votes cast shall be elected.

D. In the absence of one candidate receiving a majority of the votes cast, a run-off election shall be held between the two candidates who have received the most votes. The candidate receiving a majority of the votes in the run-off election shall be elected.

E. In the case of a run-off tie, the position will be determined by a vote of the present Administrative Council.

SECTION 4. Election of the Board of Bar Governors. The Governors of the Board of Bar Governors shall be elected for a period of one (1) year and shall take office at graduation with the exception of First Year Bar Governors who shall serve from fall until the following year's graduation. The Governors of the Board of Bar Governors shall be elected as follows:

A. The election of the Board of Bar Governors shall be held in the Spring General Election, except that First Year Bar Governors shall be elected within the first three (3) weeks of the Fall Semester.

B. Each member of the SBA shall be entitled to vote for the Bar Governors representing his or her division.

C. Each voter shall be entitled to cast one vote for each of the Bar Governor seats for his or her division, but no voter shall cast more than one vote for any candidate.

D. For each division, the candidates receiving the most votes shall be elected.

E. In the case of a tie, a run-off election shall be held between the tied candidates.

F. In the case of a run-off tie, the position will be determined by a vote of the present Administrative Council.

SECTION 5. Uncompleted Terms of Office.

A. If the office of President should become permanently vacant, then the Vice-President shall become President and the office of Vice-President shall be elected by a majority vote by the Administrative Council.

B. In the event of permanent vacancy in any other office, besides the President, in the Administrative Council, the President shall appoint a successor, subject to a majority vote of the Administrative Council's approval.

ARTICLE VII

FINANCES

SECTION 1. Funds for the organization shall be raised through donations, fundraisers, support of the Law School, or other means adopted by the Administrative Council.

SECTION 2. Upon dissolution of the SBA, any remaining funds shall be donated to the University of Memphis Foundation for use by the Law School at the Dean’s discretion.

ARTICLE VIII

REFERENDUM

SECTION 1. There is reserved in the general membership of the SBA the right to petition the Administrative Council for a referendum election. The referendum shall be to recall an official, change the Constitution, or change the By-Laws.

SECTION 2. The procedure to be followed is hereinafter set forth.

A. The petition calling for a referendum election is to be initiated and signed by ten percent (10%) of the general membership.

B. The petition should be submitted to the Administrative Council at a regular or specified special meeting.

SECTION 3. Upon submission to and verification of said petition by the Administrative Council, the President of the SBA shall direct the Bar Associations Representative, as Election Commissioner, to hold an immediate general election.

SECTION 4. A two-thirds (2/3) affirmative vote by the voting membership of the SBA is required to pass and adopt the said proposal.

ARTICLE IX

BY-LAWS

SECTION 1. The Administrative Council shall adopt such By-Laws as it deems necessary to carry out the purpose of the SBA.

SECTION 2. By-Laws of the SBA shall be adopted by the Administrative Council by a two-thirds (2/3) vote of the entire Council membership. In adopting the By-Laws, the following procedure shall be followed:

A. The proposed By-Law shall be submitted to the Secretary and posted in a conspicuous place by the Secretary at least forty-eight (48) hours prior to the first reading.

B. The proposed By-Law shall be submitted to the Administrative Council and if it receives a two-thirds (2/3) vote of the entire Administrative Council membership, it shall be tabled to be read a second time at the next meeting.

C. The Secretary shall publish the proposed By-Law subsequent to its passage at the first reading.

D. After the second reading, there shall be requires a two-thirds (2/3) affirmative vote of the Administrative Council membership to approve and enact a By-Law.

SECTION 3. To amend a By-Law, the same procedure established in Section 2 of this Article shall be followed.

ARTICLE X

AMENDING THE CONSTITUTION

SECTION 1. Amendments to the Constitution of the SBA must be proposed by members of the Administrative Council or by petition signed by ten percent (10%) of the general SBA membership.

SECTION 2. The Constitution shall be amended when:

A. The proposed amendment is passed by two-thirds (2/3) of the entire Administrative Council, or signed by the percent (10%) of the general SBA membership, and,

B. The proposed amendment has been posted conspicuously for at least (2) weeks prior to the ratification vote, and,

C. The proposed amendment is ratified by a two-thirds (2/3) of those voting in the election in which the proposed amendment appears. A non-vote is to be considered an abstention and is not to be included in the two-thirds (2/3) necessary for passage.

ARTICLE XI

IMPLICATION

SECTION 1. This Constitution shall take effect as of May 11, 2014.

First-Year Scholarships

Due to the generosity of friends of the School of Law, alumni, and state appropriations, the University of Memphis Cecil C. Humphreys School of Law offers a number of scholarships to entering first-year law students. These scholarships include academic merit awards, diversity awards, and awards for students with demonstrated financial need. In addition, there are scholarships funded by private donations based on specific criteria. Most scholarships are based on the information in the application, although some require additional information. To be considered for scholarships for which financial need is a factor, applicants must complete the Free Application for Federal Student Aid (FAFSA).

Some scholarship awards are based on the information in the application for admission, while others require additional information. All applicants are encouraged to complete the optional questions on the application and submit any required addenda. With the exception of the Memphis Access and Diversity Law Scholarship, all admitted applicants are considered for scholarships. The Memphis Access and Diversity Law Scholarship is only available to Tennessee residents and applicants must complete the optional questions and submit the required separate statement. To be considered for scholarships, applications must be completed by the March 1 deadline. Recipients will be notified as soon as possible of their scholarship award, usually by May 1.

Scholarships are funded in varying amounts ranging from partial to full in-state tuition awards. Many of the awards are renewable for all three years of law school, while others are limited to one year only. If you do not receive scholarship assistance as an entering student, you can apply for second- and third-year scholarships in the spring of each year. Returning student scholarship awards are based upon a variety of criteria, including academic performance in law school, service to the law school and community, and financial need.

LIST OF FIRST-YEAR SCHOLARSHIPS

The Average Student Scholarship will be awarded to an entering student who meets the following minimum criteria: (1) the student's LSAT score and undergraduate GPA do not exceed the median of the student's incoming class; (2) the student's résumé reflects consistent employment as an undergraduate student; and (3) the student has an undergraduate degree in business.

Lydia & Rehim Babaoglu Book Scholarship is a one-year award, funded by Memphis Law alumni Lydia and Rehim Babaoglu. It is valued at $1,000. The scholarship is given to a first-year, non-resident law school student to assist in expenses associated with textbooks.

Claude T. Coffman Memorial Scholarship is named in honor of the late Professor and former interim Dean of the Cecil C. Humphreys School of Law. The scholarship is made available through the donations of the Coffman family and friends of Professor Coffman. All students are eligible for consideration with selection based upon academic merit and financial need.

C. Cleveland Drennon, Jr. Memorial Scholarshipis funded by Humphrey E. Folk, Jr. and the Drennon family and friends. All full-time students are eligible for this award, with special consideration given to student-athlete graduates of The University of Memphis or Vanderbilt University.

The **Dean Emeritus James R. Smoot Endowed Scholarship** is named in honor of Dean Emeritus James R. Smoot. Dean Emeritus Smoot joined the law school faculty in 1990, left for a brief period to teach at Valparaiso University School of Law, and rejoined the faculty of the Cecil C. Humphreys School of Law in 1998. His courses included banking law, business organizations, contracts, corporate finance, international finance and securities regulations. From 2004-2008 he served as Dean and it is in this leadership position that he had an instrumental role in the relocation of the law school to the former U.S. Custom House, Court House, and Post Office. A scholarship will be awarded to a student who exemplifies academic merit.

Faculty Emeritus Scholarship is funded by the **University of Memphis Foundation**, a non-profit foundation in Memphis, Tennessee. The **University of Memphis Foundation** works to support students who demonstrate financial need. This scholarship will be awarded to first-year students who have demonstrated academic merit and financial need.

Federal Court Bench and Bar Scholarships are awarded to economically disadvantaged law students from the Middle District of Tennessee. The recipients must be in good academic standing at the law school or the most recent school attended, but this is not intended to be a merit or academic achievement based scholarship. The goal is to broaden the Middle District of Tennessee bar through expanded opportunities for law students from all backgrounds. The recipients must have demonstrated financial need and must have either graduated from a high school in, or resided for the previous three years as a non-full time student in, one of the following Tennessee Counties: Cannon, Cheatham, Clay, Cumberland, Davidson, DeKalb, Dickson, Fentress, Giles, Hickman, Houston, Humphreys, Jackson, Lawrence, Lewis, Macon, Marshall, Maury, Montgomery, Overton, Pickett, Putnam, Robertson, Rutherford, Smith, Stewart, Sumner, Trousdale, Wayne, White, Williamson, or Wilson. The recipient does not become ineligible for this scholarship merely by moving from the Middle District to the Western or Eastern District to attend law school. The following students are ineligible for this scholarship: Judges and employees of the United States courts and their family members, and Nashville Bar Association employees or Board members and their family members. "Family member" shall include any person covered by Canon 3C(1)(d) or (3)(a) of the Code of Conduct for United States Judges.

The **First Tennessee Law Scholars Scholarship** was established with donations from the First Tennessee Foundation to assist deserving students at the University of Memphis School of Law. This three-year scholarship will be awarded to a full-time diverse student with competitive academic credentials. The recipients will also demonstrate strong academic or professional achievement and show potential for an outstanding legal career.

Herbert Herff Presidential Law Scholarships are funded by the Herbert Herff Trust. The trust was created by a combination of funds from the Herbert Herff Estate, state appropriations, and University funds. The School of Law awards several Herff Scholarships each year to students who have demonstrated high academic or professional achievement and who show potential for an outstanding law career. These scholarships can be renewed for an additional two years if the recipient maintains full-time status and earns a law grade point average of 2.67.

Judge William B. Leffler Scholarship is awarded to a student who has demonstrated both academic merit and financial need. The award is funded through the Leffler family, the donations of friends, and proceeds from the annual bankruptcy law seminar in Judge Leffler's memory.

H. H. McKnight Memorial Scholarship is awarded to a veteran of the United States Armed Forces with financial need and who is interested in pursuing a career in criminal law. Two scholarships are awarded annually, one to an entering student and one to a returning student. Final selection is made by the donor committee.

Memphis Access and Diversity Law Scholarship. The Tennessee Board of Regents has allocated funds for a diversity scholarship program at the University of Memphis Cecil C. Humphreys School of Law. If you are interested in applying for this diversity scholarship, you must complete the scholarship portion of the application and attach a separate statement explaining in detail the circumstances that qualify you to be considered for this scholarship. To the extent possible, you should attach corroborating information to document an economic or educational disadvantage. Applicants must be a Tennessee resident or a resident of Mississippi (De Soto, Marshall, Tate, and Tunica) and Arkansas (Crittenden) Counties.

Out-of-State Tuition Waiver Scholarship. The University of Memphis has a non-resident tuition waiver scholarship available for students whose credentials exceed the median of their entering class or who bring diversity to the law school. Applicants selected for this award will have their out-of-state tuition waived and will pay at the in-state rate. Up to five awards are offered annually. If selected, the applicant must remain in good academic standing for the out-of-state tuition waiver to be renewed. Only non-residents are eligible to apply and the waiver would only apply to law school tuition. Interested candidates should contact the Law Admissions Office.

Donald & Susan Polden Dean's Scholarship supports deserving law students who have demonstrated a commitment to community or public service or who express their desire to serve their community during or following law school. Preference is given to minority students. Dean Donald J. Polden was dean of the law school from 1993 - 2003.

Amy E. Spain Memorial Scholarship was established by the family and friends of Amy Elizabeth Spain who, at age 30, died in a car accident in 1995. A 1989 graduate of the Cecil C. Humphreys School of Law, Ms. Spain was an Assistant U.S. Attorney in Memphis, Tennessee, served as a judicial clerk for U.S. District Court Judge James Todd in Jackson, Tennessee, and was an adjunct professor of Legal Methods and Writing at the Cecil C. Humphreys School of Law. The Attorney General authorized a posthumous award of superior performance in honor of Ms. Spain. The scholarship is given to a law student who has demonstrated academic merit, a commitment to community/professional service, and personal industriousness.

Wyatt, Tarrant & Combs, LLP, Dr. Benjamin L. Hooks Scholarship, in memory of Dr. Benjamin L. Hooks is made possible by the law firm of Wyatt, Tarrant & Combs, LLP. This scholarship will be offered every three years to a full-time student attending the Cecil C. Humphreys School of Law at the University of Memphis, with a preference given to a Tennessee resident. This gift is made with the intention of enhancing and assisting the School of Law in achieving its goal of greater diversity in its classes, by making it financially possible for highly qualified applicants from underrepresented racial or ethnic populations to choose the Cecil C. Humphreys School of Law at the University of Memphis. The recipient must have a minimum GPA of 3.00 and a minimum LSAT score of 153. The recipient must maintain a cumulative law school grade point average that places him/her in the top 50% of the class. The law firm will be involved in the final selection of the candidate. Should the recipient meet the law grade point average requirement, **Wyatt, Tarrant & Combs, LLP Scholarship, LLP** will provide a summer associate opportunity following the recipient's first academic year.

The Robert A. Wampler Law Scholarship was established by Robert A. Wampler. This scholarship was provided by Mr. Bobby Wampler, who is a double graduate of the University of Memphis. He graduated in 1972, from law school, and in 1969, with a BBA in Business Management. Mr. Wampler is currently a partner at Wampler and Pierce, where his practice is focused on domestic relations and contract litigation. The scholarship will be awarded to a law student who is enrolled full-time and has strong academic credentials and financial need

Law Alumni Board Scholarship Award is awarded by The Law Alumni Scholarship Committee who makes the final selection. Factors reviewed by the committee include financial need, undergraduate grade point average, law school grade point average, law school activities, and personal statement. Additional consideration is given to candidates who are current members of the University of Memphis Alumni Association, are legacies, and have been involved with alumni events. The recipient is invited to, and recognized at, a Law Alumni Board meeting and expected to attend future law alumni activities.

The Springfield Family Scholarship is made possible by an endowment fund established by Mr. and Mrs. Springfield. One scholarship is awarded annually to an entering student who is a graduate of Rhodes College. Mr. Springfield, a retired executive vice-president and general counsel of Union Planters National Bank, earned his law degree in 1960 from The University of Memphis Law School after receiving his B.A. degree with distinction in economics in 1951 from Rhodes College (formerly Southwestern at Memphis). Mrs. Springfield attended The University of Memphis in 1971.

Kathy and J.W. Gibson Scholarship was established to support deserving students who demonstrate high academic or professional achievement and who show potential for an outstanding law career. Additional consideration is given to those who demonstrate past engagement with their community and a propensity to engage in the Memphis/Shelby County community.

3L Scholarship is a discretionary award provided to a student who demonstrates a commitment to academic excellence.

Pauline A. Weaver Scholarship is awarded to a diverse student or students who are pursuing a career in the Public Defender's Office. Pauline A. Weaver graduated from Cecil C. Humphrey's School of Law in 1979. Pauline worked for years as an advocate for health and human services and was a public defender in Alameda County, California for over 29 years. Having faced the challenges that come with being a female student during a critical time in higher education, this scholarship seeks to honor and support students in similar circumstances.

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Returning 2nd and 3rd Year Law Students

The School of Law annually awards scholarships to outstanding students on the basis of academic performance, leadership, character, personal achievements, and financial need. The scholarships listed below are funded through private donations and are administered by the law school. They are open to all University of Memphis School of Law students who meet the specified criteria and complete the application process. Visiting law students are not eligible for these scholarships.

RETURNING STUDENT SCHOLARSHIPS

Tillie B. Alperin Scholarship is named in honor of the late Tillie Blen Alperin, a 1935 graduate of the old University of Memphis Law School and one of the first women to practice law in Tennessee. Female law students who have successfully completed their first year with a B average, have demonstrated a commitment to the legal profession, and have financial need are eligible. Preference will also be given to applicants who have overcome significant obstacles in pursuit of their education.

Black McLaren Jones Ryland & Griffee Judicial Endowment Fund is a scholarship given by the law firm of Black McLaren Jones Ryland & Griffee, P.C. to a deserving and qualified student who is a member of the editorial staff of the Law Review at the University of Memphis Cecil C. Humphreys School of Law. The Editor-in-Chief and the Associate Editor are excluded from eligibility for this award.

C. Cleveland Drennon, Jr. Memorial Scholarship is funded by Humphrey E. Folk, Jr. and the Drennon family and friends. All full-time students are eligible for the award, with special consideration given to applicants who were student-athletes graduates of The University of Memphis or Vanderbilt University.

Deal Cooper Holton PLLC Award for Excellence in Trial Advocacy was established by the law firm of Deal, Cooper & Holton, PLLC. This award will be given to the student with excellent performance in the School of Law course entitled *Trial Advocacy.*

Dinkelspiel Family Scholarship is made possible by Robert and Elizabeth Ann Dinkelspiel to support University of Memphis law students. The award is given annually to a student who has distinguished himself or herself academically, without regard to consideration of financial need.

Tennessee Judicial Conference Foundation Scholarships are made possible by a grant from the Tennessee Judicial Conference Foundation. Three scholarships are awarded annually to a second- or third-year student who has demonstrated community involvement and/or a commitment to public service. The first scholarship honors Dr. Benjamin L. Hooks, the minister, attorney, NAACP director, and civil rights leader from Memphis. The second scholarship honors Judge William H. Williams of Tennessee. The third scholarship honors Judge Don Ash, Senior Judge for the State of Tennessee. The scholarship recipient may be required to attend and

participate in the annual Tennessee Judicial Conference. The recipient's travel, meals, and lodging expenses will be provided by the Tennessee Judicial Conference Foundation. While the scholarship is awarded annually, the requirement to attend the annual Tennessee Judicial Conference rotates among the other law schools in the state.

Evans & Petree Law Firm Scholarship in Honor of Percy Harvey, Esq. was established by this Tennessee law firm to demonstrate their commitment to increasing access for minority students to the legal profession. One scholarship is awarded annually, with preference given to a returning African American student with financial need. Final selection is made by the donor committee.

Evolve Bank & Trust Scholarship is given in memory of E. James House, Jr. to a new or returning law student with an undergraduate degree or interest in business and an aptitude for banking and finance. Additional consideration will be given to a student who has overcome adversity or demonstrated personal industriousness with a preference given to students who are graduates of Vanderbilt University.

Federal Bar Association – Memphis Mid-South Chapter Award is an award made possible through the Memphis Mid-South Chapter of the Federal Bar Association to recognize student achievement and support the study of the federal court system. The award is presented to the student who receives the highest grade in the Federal Courts course at the School of Law. In the case of a tie, the award shall be divided between students.

Federal Court Bench and Bar Scholarships are awarded to economically disadvantaged law students from the Middle District of Tennessee. The recipients must be in good academic standing at the law school or the most recent school attended, but this is not intended to be a merit or academic achievement based scholarship. The goal is to broaden the Middle District of Tennessee bar through expanded opportunities for law students from all backgrounds. The recipients must have demonstrated financial need and must have either graduated from a high school in, or resided for the previous three years as a non-full time student in, one of the following Tennessee Counties: Cannon, Cheatham, Clay, Cumberland, Davidson, DeKalb, Dickson, Fentress, Giles, Hickman, Houston, Humphreys, Jackson, Lawrence, Lewis, Macon, Marshall, Maury, Montgomery, Overton, Pickett, Putnam, Robertson, Rutherford, Smith, Stewart, Sumner, Trousdale, Wayne, White, Williamson, or Wilson. The recipient does not become ineligible for this scholarship merely by moving from the Middle District to the Western or Eastern District to attend law school. The following students are ineligible for this scholarship: Judges and employees of the United States courts and their family members, and Nashville Bar Association employees or Board members and their family members. "Family member" shall include any person covered by Canon 3C(1)(d) or (3)(a) of the Code of Conduct for United States Judges.

The Professor W. Walton Garrett Scholarship was established in 1978 and is awarded annually to the Student Bar Association President. Garrett taught at Memphis Law from 1961 until his retirement in 1985. He taught classes in many subject areas of the curriculum, most enjoying Family Law. His wife, Marion, encouraged him to establish this scholarship to support

the President of the SBA; he and his now-deceased wife fund over eleven scholarships at various religious organizations and education institutions.

Kimberly and Stephen Hale Endowed Fund was established by Kimberly and Stephen Hale. This scholarship will be awarded to Cecil C. Humphreys School of Law students who have demonstrated exceptional academic ability, both as undergraduates and law students. Mr. Hale was a native Memphian who attended both Raleigh-Egypt and Christian Brothers High School and a received his B.A.in political science and economics from the University of Memphis. Mr. Hale was a 1982 graduate of the University of Memphis School of Law who started his legal career as a Deputy Prosecuting Attorney in Mississippi County, Arkansas. He practiced as a civil litigator with several firms before forming the Hale Law Group. He was admitted to practice in Tennessee and Arkansas, United States Court of Appeals for the Sixth, Eighth, Tenth, and Eleventh Circuits, and numerous federal district courts. His practice was nationally recognized in consumer and commercial bankruptcies and commercial litigation. This scholarship is given to students who have maintained at a minimum a 3.0 GPA in both undergraduate and law school.

Harris Shelton Hanover Walsh Scholarship is made possible by the law firm of Harris Shelton Hanover Walsh, PLLC to support University of Memphis law students. The award is given annually to a student who has distinguished himself or herself academically, without regard to consideration of financial need.

Robert and Elaine Hoffmann Memorial Scholarship is named in honor of the late Chancellor Robert Hoffmann and his sister Elaine. All students are eligible for consideration, with selection based upon academic merit. Two awards are available, one to a second-year and one to a third-year law student.

Kathryn Hookanson Law Fellowship was established by Ms. Hookanson, her family, friends and colleagues. Kathryn Hookanson was Legal Counsel for The University of Memphis, a member of the law faculty, and a practicing member of the Memphis Bar. All students are eligible to apply. Preference may be given to female students and those in financial need.

John C. "Jack" Hough Memorial Law Scholarship is named in honor of the late John C. "Jack" Hough, a former member of the Shelby County Public Defender's Office. The scholarship is available to a second- or third-year law student who demonstrates financial need and is working either for compensation, as a volunteer or in a law school externship in the office of the Shelby County Public Defender. Preference will also be given to applicants who express an interest in a career in government service as a public defender or prosecutor, or in the field of criminal law.

Cecil C. Humphreys Law Fellowships are funded through a grant from the Plough Foundation. The fellowships are awarded to students who have demonstrated outstanding academic performance, leadership, good citizenship, and scholarship achievement. Fellows engage in activities under the direction of law faculty for 15 hours per week. Recipients can not engage in outside employment. Fellowships are only awarded to second-and third-year students.

The Honorable David S. Kennedy Bankruptcy Achievement Award Fund was established to recognize an excellent student and support the study of bankruptcy law at the Cecil C. Humphreys School of Law. It was established by an alumnus who has great admiration and respect for his bankruptcy professor, Judge David S. Kennedy.

Littler Mendelson Labor Law Award was established by the law firm of Kiesewetter, Wise, Kaplan & Prather, PLC. This award provides scholarship assistance to the student with the highest grade in the School of Law course entitled Labor Law. In the event of a tie for the highest grade, the professor teaching the course will determine the recipient.

The Law Alumni Board Honor Student Scholarship was established by the Law Alumni Board of Directors for a student who reflects the Law School's commitment to excellence and demonstrates an ability to succeed in the legal profession through leadership, scholarships, community service, or other attributes or achievements. The recipient of this $1,000 annual scholarship is an entering student accepted to the University of Memphis Cecil C. Humphreys School of Law. The scholarship is renewable for each of the three years, provided that the student maintains a 3.0 GPA and exhibits the high standards of conduct expected of the recipient of the Honor Student award. Recipients are invited to various Law Alumni events where they will be recognized.

The Jackson Lewis Firm Scholarship was established at the University of Memphis School of Law to recognize a second-year student who has a demonstrated interest in, or aptitude for, labor and employment law. Other factors that are considered are the applicant's prior work experience or class work. Additionally, the recipient must have performed well academically during their first year of law school, and preference will be given to awarding the scholarship to someone underrepresented in the legal community.

The Judge John Martin Scholarship is presented annually to a student in recognition of Judge Martin's contributions to the federal judiciary and to the community. Judge Martin was a United States District Judge for the Western District of Tennessee from 1935-1941, and served both as judge and Chief Justice on the United States Court of Appeals for the Sixth Circuit from 1941 until his death in 1962. The scholarship is presented to the Chief Justice of the University of Memphis Moot Court Board.

H. H. McKnight Memorial Scholarship is awarded to a veteran of the United States Armed Forces with financial need and who is interested in pursuing a career in criminal law. Two scholarships are awarded annually, one to an entering student and one to a returning student. Final selection is made by the donor committee.

Memphis Access and Diversity Law Scholarship. The Tennessee Board of Regents has allocated funds for a diversity scholarship program at the University of Memphis Cecil C. Humphreys School of Law. If you are interested in applying for this diversity scholarship, you must complete the scholarship application and explain why you qualify. Applicants must be a Tennessee resident or a resident of Mississippi (Desoto, Marshall, Tate, and Tunica) and Arkansas (Crittenden) Counties.

The Joe A. Moore Award is named in honor of former law professor Joe A. Moore and is granted to a graduating student who has excelled in oral advocacy. Recipients are selected by the law dean and faculty.

Sam A. Myar, Jr. Law Scholarship provides scholarship assistance to the Editor-in-Chief and the Managing Editor of the University of Memphis Law Review. Sam A. Myar, Jr. was a highly regarded Memphis attorney and Professor of Law who passed away at the untimely age of 39 in 1959. Mr. Myar was a partner at McCloy Myar & Wellford, where his concentration was in Corporate and Tax Law. His friends and partners established a scholarship in his name due to his generosity of spirit, wisdom, and dedication to pursuing justice for all. This scholarship was established in 1960 at Southern Law University, which is now known as the Cecil C. Humphreys School of Law. Mr. Myar was a graduate of the University of Virginia and received his law degree from the University of Chicago.

Pillars of Excellence Law Alumni Scholarship Endowment Fund provides scholarship assistance to a second- or third-year law school student based on financial need, undergraduate and law school grade point average, law school activities, and scholarship statement. Preference will be given to student members of the University of Memphis Alumni Association. The Law School Honors & Awards Committee screens the applications, selects the top three, and forwards them to the Law Alumni Scholarship Committee. The Law Alumni Scholarship Committee makes the final selection. The recipient will be invited to, and recognized at, a Law Alumni Chapter meeting or event.

Joseph Henry Shepherd Scholarship is made possible by an endowment fund established by Dorothy S. Shepherd. It is awarded on the basis of academic performance and financial need. Three scholarships are awarded annually, one to a member of each class.

Christian D. Soronen Award for Excellence in Oral Advocacy was established in memory of Christian Soronen, a 2007 graduate of University of Memphis Cecil C. Humphreys School of Law. The scholarship will be awarded to a third-year law student in good academic standing. The student must have been a member of a moot court travel team or selected to be a member of such a team during his or her third year. Third-year students who have been or will be a member of a mock trial team, alternative dispute resolution team and have competed in the Advanced Moot Court Competition are also eligible. Preference will be given to students who have excelled in inter-school and in-school competitions, members of the Moot Court Board, students enrolled in the Certificate in Advocacy program, and students who have otherwise demonstrated a commitment to the law school's advocacy program.

Ratner and Sugarmon Scholarship is awarded annually to a second- or third-year student who, in the opinion of the Honors and Awards Committee, best exemplifies a commitment to the needs of the underrepresented in society.

The Judge Kay Spalding Robilio, Victor, Sr., and Cecilia R. Robilio Law Scholarship is awarded annually to a third-year law student.

Jerome Rosengarten Scholarship is made possible by an endowment fund established by Sheldon, Shelli and Anna Rosengarten, the son, wife, and granddaughter of Jerome Rosengarten. Mr. Rosengarten's legal career included service in the Judge Advocate General Corps during World War II and 62 years as an attorney in Memphis, TN. This scholarship is awarded to a second- or third-year student with a minimum grade point average of 3.0, with preference given to a student who is interested in pursuing a career in property or real estate law.

BankTennessee John S. Wilder Law School Scholarship is funded by BankTennessee, and named in honor of Tennessee's late Lt. Governor John S. Wilder. Mr. Wilder graduated from the University of Memphis School of Law in 1957, served for forty-four years in the Tennessee Senate, including thirty-six years in the dual office of lieutenant governor and speaker, from January 1971 to January 2007. The scholarship in his name will be awarded to a third-year law student who, in the spirit of John S. Wilder, has a demonstrated commitment to public service and to enhancing the common good, is a resident of the State of Tennessee, and has been elected as a Section Editor for the Law Review of the Cecil C. Humphreys School of Law.

Wilford Hayes Gowen Scholarship Fund was established in memory of Wilford Hayes Gowen, through the Community Foundation of Western North Carolina, in memory of Wilford Hayes Gowen. Hayes Gowen, a graduate of Southern Law School in the late 1930's, founded the Law and Real Estate division for the U.S. Army Corps of Engineers. This scholarship is awarded to a second- or third-year law student on the basis of academic performance, financial need, and personal industriousness.

Tennessee Bar Foundation IOLTA Scholarship will be awarded to a third year student who is a Tennessee resident and in good academic standing. Additional consideration will be given to students with a demonstrated concern for public interest law.

Rice Amundsen & Caperton, PLLC Family Law Scholarship is given to a returning student who exemplifies academic merit and has excelled in the course Family Law. In addition, the recipient will be offered a paid summer intern position with Rice, Amundsen & Caperton PLLC for the summer following the awarding of the scholarship.

Nahon Saharovich & Trotz PLC Law Firm Scholarship is given to a student who has shown an interest and desire to advocate for personal injury victims. Recipients must be in the top third of their class and/or a member of Law Review and/or past, present, or prearranged service in a judicial office. Preference is given to rising 3L's.

Applicants may be requested to appear for an interview with representatives of the law school and the donors who provide the scholarship funding. Every attempt will be made to notify scholarship recipients by May 1 for the following academic year.

For additional information or questions about scholarships, please contact:

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