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“BAD BLOOD”: RECONCILING THE RECORDING INDUSTRY AND COPYRIGHT PROTECTIONS ON THE INTERNET

Nikki R. Breeland*

The recording industry is dealing with a crisis. Revenues are down, artists are angry, and other recording industry insiders are pushing back against the current system of revenue sharing. The culprit: internet streaming services. With the advent of these websites, the recording industry has found no successful way to fight back against profit hemorrhage. With the creation of the new Music Modernization Act, however, music copyright will again see a change and increase to available protections. This Article delves into the original recording industry revenue sharing infrastructure and the copyright rights that went along with it, while also parsing through the proposed legislation aiming to increase those rights.

I. INTRODUCTION

“Music is art, and art is important and rare. Important, rare things are valuable. Valuable things should be paid for.”

Imagine for a moment that your whole life changed. You went from gleefully playing at neighborhood bars and practicing in your parents’ garage to signing the record deal of your dreams. You’ve grown up knowing that record deals mean stardom, and stardom means money. You’ve beaten the odds and managed to attain stardom—now where’s

* Nikki R. Breeland, J.D., magna cum laude, University of Mississippi School of Law 2018; B.A., summa cum laude in History, Missouri University of Science and Technology 2015; B.A. in Political Science, Mississippi University for Women 2013. The author wishes to thank Professor Stacey Lantagne for her constant support and guidance on internet and entertainment law; the Florida Coastal Law Review for all their efforts; and the most special thank you to my husband, Brennan P. Breeland, for supporting this endeavor and always giving excellent feedback.

1 TAYLOR SWIFT, KENDRICK LAMAR, MAX MARTIN, & SHELLBACK, Bad Blood, on 1989 (Big Machine Records and Republic Records 2015).

the money?

Your recording contract provides that you, not your record label, are responsible for the first project of five songs or more with any advances that your label gives you being immediately charged against your revenue account since, “[t]here are absolutely no ‘free rides’ in the music business, not even at the major label level.” So while you received between a $50,000 to $350,000 advance when you signed, all that means is now, as a teenager with a burgeoning music career, you’re immediately and automatically $50,000 to $350,000 in debt to your label. The dream of buying yachts, mansions, and Bugattis seems like naivety.

As the years pass, you put out a few albums and develop a respectable fan base of a few million teen girls, and you hear your music on the radio. You really did make it—even past the beginner debt and uphill climb to successful stardom. If it was the 1990s, you would sell millions of dollars in albums, merchandise, and concert ticket sales. You would convince your record label to front the cost of a tour, and you would rake in the money of big music. However, 1990 was almost three decades ago and because of this, you meet your new nemesis: internet radio streaming services.

You have been groomed in the industry long enough to know the radio rule in the business: make one-tenth of a penny per song on the radio—it will advertise your other products. However, you now realize you don’t know what other products you are advertising. No one buys albums anymore because of the streaming services. Concert prices are

5 Id.
7 Andrea Swensson, 40 Years of Album Sales Data in Two Handy Charts, THE CURRENT (Feb. 20, 2014), https://blog.thecurrent.org/2014/02/40-years-of-album-
astronomical and many cannot afford it. Meanwhile, putting a concert on is almost cost-prohibitive as it rests on the shoulders of the artist alone, and merchandise has been commandeered by inexpensive foreign companies being sold through websites like Amazon, eBay, or Etsy.

You decide it is time for pushback on the streaming service market that has grown quietly by itself through the minefield of copyright infringement lawsuits to find its safe place as internet radio. Unfortunately, the market has been left alone too long, and consumers—your fans—have decided they control the value of music: you get what they feel is worth paying for.

Many artists struggle with this scenario in the age of internet radio streaming services. Where there was once a market swollen with money, the last twenty-five years has seen a drastic decline in revenues. This Article seeks to delve into the problem of recording industry copyright protections as they relate to internet streaming services. It focuses on how proposed legislation will affect the recording industry, as well as consumers. Part II gives background on the infrastructure the recording industry created to share revenue, and how that infrastructure

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8 Artist Recording Contract Sample, supra note 3.
9 Leanne Bayley, Lady Gaga reveals she was bankrupt at the height of career, GLAMOUR (Mar. 17, 2014), http://www.glamourmagazine.co.uk/article/lady-gaga-bankruptcy-during-monster-ball-tour.
14 Swensson, supra note 7.
15 See supra Introduction.
16 See supra Introduction.
was negatively impacted by internet technologies.\textsuperscript{17} Part III provides the relevant copyright protections extended to music recordings both before The Copyright Act of 1976 ("The Copyright Act") and after.\textsuperscript{18} Part IV establishes the relevant statutes and case law pertaining to music recording copyright at the advent of music on the internet.\textsuperscript{19} Part V details available internet streaming services and the reactions of notable recording artists.\textsuperscript{20} Part VI lays out the proposed legislation to combat the inequitable use of music copyright on the internet.\textsuperscript{21} Lastly, Part VII dictates the purpose of this Article, which is to propose the creation of a better and more equitable streaming service that works with the proposed legislation to provide equitable revenues and protections for those in the recording industry.\textsuperscript{22}

\section{II. Money and the Problem of Recording Industry Infrastructure}

The recording industry was created and flourished under a delicate system of revenue sharing—a system that has in the previous decade fallen into ruin.\textsuperscript{23} Record labels, songwriters, publishers, recording artists, producers, radio services, album retailers, concert venues, etc. all played a part in the revenue sharing system.\textsuperscript{24} The infrastructure worked gracefully until the early 2000s and the intrusion of millennium technology upon the recording industry.\textsuperscript{25} There are several rights involved in the making of music: mechanical rights, performance royalties, foreign royalties and sheet music, recoupment, and synchronization rights.\textsuperscript{26} First, mechanical royalties in the recording industry’s system go to songwriters.\textsuperscript{27} These

\begin{itemize}
  \item[17] See infra Part II.
  \item[18] See infra Part III.
  \item[19] See infra Part IV.
  \item[20] See infra Part V.
  \item[21] See infra Part VI.
  \item[22] See infra Part VII.
  \item[24] \textit{Id.} at 11.
  \item[25] Swensson, \textit{supra} note 7.
  \item[26] Paragano, \textit{supra} note 23, at 11.
  \item[27] \textit{Id.} ("The term ‘mechanical royalties’ is derived from player piano scrolls used in
royalties are “paid to the writers of a composition when it is performed on tape, on records, on compact discs, or affixed in other similar media.”

For an album, all the songwriters that are involved are able to share in the whole album’s success—meaning even if there is only one major hit, all the songwriters involved with the album see an equal share in the entire album’s revenues.

Second, performance royalties are paid through the performance right organizations like Broadcast Music Incorporated (“BMI”) and American Society of Composers, Artists, and Publishers (“ASCAP”). Performance royalties are shared between the composers and the publisher. Unlike the mechanical royalties, performance royalties are weighed on the success of a particular song and are paid out accordingly.

Third, foreign royalties and sheet music are usually managed by assigning territories for certain publishers. This will ensure each publishing “territory” will produce profits for solely for that publisher. For domestic royalties, there is a fifty percent tariff, and foreign nations only receive half of what they would if they were domestic, with the exception of Canada due to its proximity to the United States.

Fourth, recording companies own recoupment rights that allow the company to recover capital from any advances or charges to the artist’s account. Unfortunately, “[g]enerally, record sales are barely sufficient

old-time automated pianos. The scrolls - actually long sheets of paper with holes punched in them - have been around since the late 1800s. Royalties payable to the songwriters were based on a per-scroll rate set by federal law.”.

28 Id.
29 Id.
30 Id.
31 Paragano, supra note 23, at 11.
32 Id.
33 Id.
34 Id. (“It is possible to obtain an 80 percent transaction in Canada because it is ‘almost domestic.’ The songwriter should attempt to get payments in ‘U.S. dollars,’ due to the fluctuating nature of foreign currency.”).
35 Id. (“Often, the record company will attempt to recoup against any monies payable to the artist. Thus, if the artist is also the composer of the
to pay back recoupment, while publishing monies are pure profit from almost the first dollar.  

Fifth, synchronization rights create issues in a variety of different compensation models: commissioned music, pre-existing compositions, compensation for music, film, and television, and lastly, all compensation packages. When music is commissioned, the company commissioning the work usually designates the composer as a work-for-hire. As such, most of the rights will be retained by the commissioning company, although there is a chance that the composer could retain up to fifty percent of the royalty rights attributed to the work. For television and film companies wishing to use pre-existing works, they must create agreements with both the artists/composers as well as the publishers. If the artist intends to produce the work in DVDs or any other reproducible medium, there are two different approaches taken by the recording and film industries: the recording industry claims that each unit is its own reproduction of the work, whereas, the Film Industry argues that the use of the work occurs once, within the creation on the theatrical work itself. Lastly, there are several compensation packages available for the songs, the record company will vigorously argue for a recoupment of recording costs out of all income sources, including publishing (mechanical and performance) royalties.

37 Id. at 11-12.
38 Id. at 12.
39 Id.
40 Id. (“These royalty rights usually include 50 percent of the performance royalties, six cents to 10 cents per sheet for sheet music, a 10 to 12 percent royalty for multiple song folios, together with record production royalties of two to three percent and ‘artist’ royalties of four to seven percent. The latter two categories apply when the writer is also the producer of the song and/or performs as the lead artist.”).
41 Paragano, supra note 23, at 12 (“Mechanical licenses and broad rights licenses are required for the production and distribution/commercial exploitation of music soundtracks. These mechanical licenses provide for payment of the statutory royalties to the copyright holders and publishers.”).
42 Id. (“The newest genre of licensure is the home video license. This type of license gives rise to a disparity of views on the methods of compensation for commercial exploitation. Record companies cling to the notion that each separate video cassette is a “unit” and is entitled to the same royalties as the sale of a recording (e.g., a music cassette, album or compact disk). This concept would provide for a unit sale royalty to the record companies and possibly royalties for each rental of a video cassette. In contrast, motion picture producers view the soundtrack as a “theatrical” performance
film company to offer the artist/composer/publisher.43

The fund/compensation sources for soundtracks, in their simplest forms are:

1) Movie theater performances (flat fee synchronization licenses for U.S. theaters and public performance fees for European theaters).

2) Publishing royalties for re-performance of the compensation.

3) Television/blanket licenses—a form of compensation analogous to ASCAP/BMI blanket license payment structure.

4) Mechanical license fees—paid directly to the copyright owners. In the case of specially ordered/commissioned compositions, the copyright owner would be the motion picture production company. In the case of pre-existing music, the mechanical license fees would flow in the same manner as mechanical license fees for regular sound recordings.

5) Performance license fees—paid for radio and other public performances of the music in forms other than in movie theaters and on television. These fees would follow ASCAP/BMI payment guidelines.

6) Soundtrack album income—here, the motion picture production company is analogous to the “artist” under an exclusive records agreement contract and would receive the “artist” royalty of fourteen to eighteen percent of the suggested retail price. In addition, certain re-use fees and composer/writer fees (usually three to

covered by the flat fee payment for the use of the music. As expected, most negotiations center on developing a hybrid compensation agreement. However, there have been some famous cases where this does not occur.”).

43 Id. at 13.
seven percent of suggested retail price) would apply.\textsuperscript{44}

Even with all of these provisions and protections that the recording industry created to ensure that all parties involved in the creation, reproduction, and distribution of these works received just compensation, when the internet outgrew its modest beginning, this infrastructure was no longer feasible.\textsuperscript{45}

\section*{III. The Recording Industry and the Copyright Act of 1976}

Copyright is not a new phenomenon.\textsuperscript{46} For centuries, countries have sought to protect the rights of creatives by giving them legal control of their creations; however, the rights of recording artists are relatively new additions to this long history.\textsuperscript{47} As a society, we have determined that creative endeavors, like art, literature, films, etc. are an important and valuable part of our culture.\textsuperscript{48} Because of this determination, we have ensured via copyright that creators have agency over their “works,” unless they agree to sign their ownership away for compensation.\textsuperscript{49} The recording industry in particular has a definite vested interest in copyright protection over the several different parts of the album process.\textsuperscript{50} There are different copyright protections for published music, performances, recordings, physical copies of albums, logos, band names, etc.\textsuperscript{51} The rights in this industry for these pieces are split and shared between several different entities.\textsuperscript{52} These protections have evolved, especially after the Copyright Act of 1976.\textsuperscript{53} From no protection for sound recordings and

\begin{itemize}
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Swenson, \textit{supra} note 7.
\item \textsuperscript{46} Craig Joyce, \textit{The Statute of Anne: Yesterday and Today}, 47 Hous. L. Rev. 779 (2010).
\item \textsuperscript{47} Id.
\item \textsuperscript{48} U.S. CONST. art. I, § 8.
\item \textsuperscript{49} Id.
\item \textsuperscript{50} Paragano, \textit{supra} note 23, at 12.
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Id. at 11.
\end{itemize}
insufficient protection for music composition, to better protection for both, the Copyright Act of 1976 was a good faith attempt at increasing rights and protections for the recording industry.\textsuperscript{54} However, as Part IV will show, the Copyright Act of 1976 left gaps in protection that has led to numerous litigious circumstances as a way to figure out the boundaries of available protection.\textsuperscript{55}

\textbf{A. Pre-1970 Copyright Protections}

The copyright protection for creators has for centuries been an important part of the law globally.\textsuperscript{56} In America, our founding fathers cemented the copyright right by creating Constitution Article I, Section 8, which imbues Congress with the right, “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.”\textsuperscript{57} With copyright regulation squarely under the control of the federal government, the legislature was free to enact copyright terms.\textsuperscript{58} It was not until April 20, 1789, that the House of Representatives submitted a proposal to protect the rights of authors and inventors.\textsuperscript{59} It was not until the next year, however, that Congress passed such a bill on May 31, 1790.\textsuperscript{60} This Act was known as the Copyright Act of 1790, and was only a material achievement in American intellectual property law. President George Washington made a statement in favor of the Act of 1790 to Congress, saying, “nothing . . . can better deserve your patronage than the promotion of science and literature.”\textsuperscript{61} The Copyright Act of

\begin{footnotesize}
\textsuperscript{54} Id.
\textsuperscript{56} 8 Anne, ch. 19 (1710).
\textsuperscript{57} U.S. CONST. art. I, § 8, cl. 8.
\textsuperscript{58} 17 U.S.C. § 101 (2010).
\textsuperscript{59} William F. Patry, COPYRIGHT LAW AND PRACTICE 26 (1994) (citing Journal of the House of Representatives, 1st Cong., 1st Sess. 98 (Apr. 20, 1789)) (“On April 20, the House committee favorably reported not only Ramsay and Churchman’s petitions, but also a general bill ‘for securing to authors and inventors the exclusive right to their respective writings and inventions.’”).
\textsuperscript{60} Id. at 30 (citing Act of May 21, 1790, 1st Cong., 2d Sess., 1 Stat. 124.).
\textsuperscript{61} Id. at 28 (citing Journal of the Senate, 1st Cong., 2d Sess. 5-8 (Jan. 8, 1790)); Id.
1790 was a codification of England’s Statute of Anne, and gave bare rights with short terms of protection. To be brief, an author had fourteen

(citing Journal of the House of Representatives, 1st Cong., 2d Sess. 139 (Jan. 12, 1790))

(“The Senate replied first, on January 11, declaring: ‘Literature and science are essential to the preservation of a free constitution; the measures of government should, therefore, be calculated to strengthen the confidence that is due to that important truth.’ The House replied the next day, January 12, concurring with the President’s ‘sentiment that . . . the promotion of science and literature will contribute to the security of a free Government; in the progress of our deliberations we shall not lose sight of objects so worthy of our regard.’”).

62 Id. at 30-33 (citing 1897 Annual Report of the Librarian of Congress at 5; Letter of W. M. Griswold, Chief Clerk of the Copyright Department of the Library of Congress in the October 19, 1892, issue of The Nation, reproduced in the Appendix to the April 27, 1971, issue of the Copyright Office’s Copyright Notices; Act of February 15, 1819, 15th Cong., 2d Sess., 3 Stat. 481; Kilty v. Green, 4 H. & McH. 345 (General Court of Maryland 1799); Nichols v. Ruggles, 3 Day 145 (Conn. Supreme Court of Errors 1808); Judiciary Act of 1789, Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.) (“The Copyright Act of 1790 granted protection to the author or his or her executors, administrators, or assigns of any ‘map, chart, or book’ for 14 years measured from recordation of the printed title of the work before publication in the register book of the clerk’s office of the district court where the author or proprietor resided. A renewal term of 14 more years was provided to the author (or his or her assigns) if the title was again entered and the record published. The renewal term, as in the Statute of Anne, was dependent on the survival of the author throughout the first term. Although affixation of notice on copies of the work was not required, publication of a copy of the registration record within two months in one or more newspapers for four weeks was required. A deposit of a copy of the work in the office of the Secretary of State within six months after publication was also required. The author was given the exclusive right to ‘print, reprint, publish, or vend’ the work, and to prohibit the unauthorized importation of copies. No provision was made for the vesting of copyright initially in an employer or in an individual who specially ordered or commissioned a map, chart, or book. Suits for infringement of published works were to be brought within one year after the cause of action arose. The type of action brought depended on the remedy sought. An action for statutory penalties (set at 50 cents per sheet found in the infringer’s possession) was brought by an action for debt, with the recovery being *qui tam*: half of the penalty recovered went to the author; the other half to the U.S. government. Actions for ‘all damages occasioned by the infringement’ were brought by a special action on the case, with all damages being awarded to the author. There was no provision for injunctive or other equitable relief, although later courts have indicated that even in the absence of a statutory provision providing for equitable relief, such relief is within the inherent powers of the court. Unpublished manuscripts were also protected by the statute, with the infringer liable for ‘all damages occasioned by’ the infringement. The entire amount recovered went to the copyright owner. Protection for both published and unpublished works was limited, however, to American citizens.”).
years of protection once the work was recorded, with an option to renew for an additional fourteen-year term as long as the author was still alive. Approximately forty-five years later, in *Wheaton v. Peters*, the United States Supreme Court determined that the Copyright Act of 1790 created exclusive jurisdiction for copyright issues. While the Copyright Act of 1790 was a progressive step forward, it left a lot lacking in terms of protection for artists. With only twenty-eight years of protection, and no mention of sound recordings, it was a poor statute to bring in to the new digital age.

Almost 100 years later, the United States adopted the Berne Convention for the Protection of Literary and Artistic Works’ standards of copyright protection. The Berne Convention dictated a minimum level of protection necessary for countries to remain a part of the treaty. There are three principles of protection: foreign authors must be treated equally to domestic ones, authors must meet formalities, and protection in one country is not dependent on the protection an author receives in his or her home country. The protections allowed authors under the Berne Convention to relate to “every production in the literary, scientific and artistic domain, whatever the mode or form of its expression,” and included the following rights: translations, adaptations, public performance of dramatic or musical works, public recitation of literary works, public communication of works, broadcasts, reproductions, adaptation to audiovisual media, and moral rights. The duration of 

63 *Id.* at 30-31.
64 *Wheaton v. Peters*, 33 U.S. 591, 592 (1834) (“Congress, by the act of 1790, instead of sanctioning an existing perpetual right in an author in his works, created the right secured for a limited time by the provisions of that law.”).
65 Copyright Act of 1790 §§ 1-7, 1 Stat. 124 (1790).
66 Copyright Act of 1790 § 1, 1 Stat. 124 (1790).
68 *Id.*
69 *Id.*
71 *Id.* (Moral rights are defined as, “the right to claim authorship of the work and the right to object to any mutilation, deformation or other modification of, or other derogatory action in relation to, the work that would be prejudicial to the author’s honor
these rights were meant to last fifty years after the life of the author, unless the author was unknown or used another name, in which case protection is granted for fifty years after the publication date.72

The Copyright Act of 1909 was codified in response to the Berne Convention’s standards.73 The Copyright Act of 1909, again, listed “musical compositions” as protected works, but not “mechanical sound recordings” or anything of that nature.74 When Congress left recordings out of this statute, they were making a statement that they did not believe recorded works to be copyrightable; this is apparent, because the first phonorecords were created and distributed over ten years before Congress enacted the Copyright Act of 1909.75

While The Copyright Act of 1790 and the Berne Convention brought forth increased protections for authors, inventors, and artists, there was clearly still a gap for those in the recording industry.76 The Berne Convention does not elaborate on recording rights for musicians, it does not deal with intersecting and conflicting copyright holders in the recording industry, it does not lend itself to be well used by those who write, perform, or sell music.77 Neither did the Copyright Act of 1909 solve any problems, as it was essentially a codification of the Berne

or reputation.”).
72 Id. (“As to the duration of protection, the general rule is that protection must be granted until the expiration of the 50th year after the author’s death. There are, however, exceptions to this general rule. In the case of anonymous or pseudonymous works, the term of protection expires 50 years after the work has been lawfully made available to the public, except if the pseudonym leaves no doubt as to the author’s identity or if the author discloses his or her identity during that period; in the latter case, the general rule applies. In the case of audiovisual (cinematographic) works, the minimum term of protection is 50 years after the making available of the work to the public (“release”) or – failing such an event – from the creation of the work. In the case of works of applied art and photographic works, the minimum term is 25 years from the creation of the work.”).
74 Id.
75 The History of 78 RPM Recordings, YALE UNIVERSITY LIBRARY, mhttps://web.library.yale.edu/cataloging/music/historyof78rpms (last visited Apr. 22, 2018).
76 See supra Part III.A.
Convention, and did not expand rights for musicians.\textsuperscript{78} For this reason, the United States Congress enacted a new Copyright Act in 1976.\textsuperscript{79}

\textbf{B. An Improvement: Post-1970 Copyright Protections}

The Sound Recording Act of 1971 was Congress’s first attempt to increase the rights of the recording industry.\textsuperscript{80} On October 15, 1971, Congress passed the Sound Recording Act of 1971, and created a copyright right in sound recordings for “the particular series of musical, spoken, or other sounds fixed on a tape or record album and the performance embodied therein.”\textsuperscript{81} This Act was the product of growing concerns of copyright infringement, and in so enacting it, Congress provided the author the right to,

[D]uplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording [but did not] extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.\textsuperscript{82}

Thus, concerns about the copyrightability of sound recordings were quashed, but the rights associated with that copyrightability were unsatisfactory.

A few years later, The Copyright Act of 1976 was an attempt at broadening the protections for creative works, and in the recording industry, it did just that.\textsuperscript{83} The Copyright Act of 1976 added new

\begin{itemize}
\item \textsuperscript{78} 1909 Copyright Act, Pub. L. No. 60-349, 35 Stat. 1075 (Mar. 4, 1909).
\item \textsuperscript{80} Sound Recording Act of 1971 § 1, Pub. L. No. 92-140, 85 Stat. 391 (1971).
\item \textsuperscript{82} Id. at 74 (citing 17 U.S.C. §1(f) (1972); United States v. Taxe, 380 F. Supp. 1010 (C.D. Cal. 1974), aff’d, 540 F.2d 961 (9th Cir. 1976)).
\item \textsuperscript{83} U.S. CONST. art. I, § 8.
\end{itemize}
copyright term limits, expanded the concept of what could be protected, and gave additional protections to art-based works. The Copyright Act of 1976 delineated copyright protection by when a work was either created or published. First, for works published before 1923, authors would not maintain protection after 2003. Second, for works published between 1923 and 1963, the author had twenty-eight years from the date of publication with an option to renew for sixty-seven more years if they met the formality requirements. Third, for works published between 1964 and 1977, authors received a twenty-eight year initial protection from the date of publication and an automatic sixty-seven year renewal term. Fourth, for works created but not published before January 1, 1978, authors received protection for the duration of the author’s life, plus an additional seventy years, or until December 31, 2002. However, if the work was published before December 31, 2002, the copyright lasted until December 31, 2047. Lastly, for works created on or after January 1, 1978, authors received protection from the moment the work was fixed in a tangible medium. The term of protection depends upon the type of authorship. For individual authors, the term is the author’s life plus seventy years; for works made for hire, anonymous works, or pseudonymous works, the term is ninety-five years from the date of publication, or 120 years from fixation, whichever is shorter. Interestingly, because recorded music had not been protected under previous copyright acts until 1972 with the passing of the Sound

84 17 U.S.C. §§ 106-22 (2009) (The Copyright Act of 1976 protected any “tangible medium of expression” that was considered an “original work of authorship.” It also extended the copyright right depending on when the work was created. This standard has created serious problems for the copyright community as “original,” “work,” and “authorship,” have all proven far too ambiguous for the legal community to navigate without judicial oversight.).
85 Id.
86 Id.
88 Id.
89 Id.
90 Id.
Recording Act of 1971,91 the Act of 1976 did not grandfather it in.92 This left a glaring gap in protections for recorded music that has been exploited by the advent of the digital age, and namely, internet streaming services.93

IV. COPYRIGHT MEETS THE INTERNET

The advent of the internet created ripples throughout the intellectual property (“IP”) community. Protecting the rights of IP holders became much more difficult and fluid. In response, Congress introduced the Digital Millennium Copyright Act (“DMCA”) in an attempt to protect IP

91 See supra Part III. A-B.
92 Robert Brauneis, Musical Work Copyright for the Era of Digital Sound Technology: Looking Beyond Composition and Performance, GW LEGAL STUDIES, Research Paper No. 2014-4, at 3 (citing Sound Recording Act of 1971 § 1, Pub. L. No. 92-140, 85 Stat. 391 (1971); 17 U.S.C. §§ 1(a), 1(b), 1(e) (1909); Creation of a Limited Copyright in Sound Recordings, S. Rep. No. 92-72, at 5 (April 20, 1971); Barbara A. Ringer, The Unauthorized Duplication of Sound Recordings, STUDY NO. 26 (citing Studies Prepared for the Subcommittee on Patents, Trademarks; Copyrights of the Committee of the Judiciary, United States Senate, 86th Cong., 2d Sess. (Comm. Print 1961) (study prepared February 1957).) (“[I]n the Sound Recording Act of 1971, Congress extended federal copyright protection to a new type of creative work, the sound recording. However, the scope of protection for sound recordings was limited, and the creation of that limited protection left the distinction between musical composition and performance largely in place. Musical compositions still needed to be fixed in scores to gain copyright protection. Once fixed in scores, the 1909 Act granted them full reproduction, derivative work, and public performance rights, including rights against imitation. By contrast, musical sound recordings were conceptualized largely as captured performances, and received more limited protection in two respects. First, Congress limited the scope of reproduction and derivative work rights for sound recordings to what in the 1950s and 1960s was called ‘dubbing’—mechanical or electronic reproduction that is the sonic equivalent of photocopying. Copyright protection for a sound recording thus ‘do[es] not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.’ Second, the Sound Recording Act of 1971 did not grant sound recordings a public performance right. Thus, whoever counted as an author of a musical work fixed in a score was entitled to receive income whenever that work was publicly performed; whoever counted only as an author of a sound recording fixed in a phonorecord was not.”).
rights and those who provided websites for consumer use. 94 Sometime later, there were software and websites that challenged the line regarding online copyright infringement and the depth of the DMCA’s protection for those sites and programs whose consumers used them almost exclusively for copyright infringement. 95 Napster 96 was the first, and most famous secondary copyright infringement case, followed soon after by Grokster. 97 Each challenged their responsibility under the law for their users’ use of their product—both lost. 98 More importantly, however, both were heavily about music copyright infringement. 99

A. The Digital Millennium Copyright Act (1998)

The DMCA was a response to the pressures the internet put on the copyright rights of creatives. 100 Instead of allowing the internet to continue in Wild West fashion, the DMCA was enacted to protect the rights of copyright holders, and interestingly, the rights of the internet service provider and other website holders. 101 The DMCA provides that if a service provider 102 desires to be protected from secondary copyright infringement, “(1) it must adopt and reasonably implement a policy of terminating in appropriate circumstances the accounts of subscribers who are repeat infringers; and (2) it must accommodate and not interfere with

94 Id.
96 A&M Records, Inc., 239 F.3d 1004.
98 Id. at 918-19; A&M Records, Inc., 239 F.3d at 1013-17.
100 The Digital Millennium Copyright Act of 1998, supra note 93.
101 Id.
102 Id. (“A party seeking the benefit of the limitations on liability in Title II must qualify as a ‘service provider.’ For purposes of the first limitation, relating to transitory communications, ‘service provider’ is defined in Section 512(k)(1)(A) as ‘an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material assent or received.’ For purposes of the other three limitations, ‘service provider’ is more broadly defined in Section 512(k)(1)(B) as ‘a provider of online services or network access, or the operator of facilities therefor.’”).
‘standard technical measures.’

These measures include reasonably priced and agreed upon identification and protection policies. The DMCA has acted as a safe harbor for websites like YouTube, colleges and universities, internet service providers (“ISP”), and many others whose platforms lend themselves to liability for copyright infringement. After slews of litigation, the DMCA decided the standard for those who host websites or provide internet, which is once an ISP or website host receives actual notice of infringing content with specific location information, they are responsible for taking the material down in a reasonably prompt period of time. Failure to meet this standard will strip the ISP or website host of their safe harbor under the DMCA.

B. Limits to DMCA Protection

After Congress enacted the DMCA in 1998, there was a period of testing the limits and boundaries of the safe harbor provision. File-sharing sites became popular in the early 2000s, with the creation of

103 Id.
104 Id. ("In addition, to be eligible for any of the limitations, a service provider must meet two overall conditions: (1) it must adopt and reasonably implement a policy of terminating in appropriate circumstances the accounts of subscribers who are repeat infringers; and (2) it must accommodate and not interfere with 'standard technical measures.' (Section 512(i)). ‘Standard technical measures’ are defined as measures that copyright owners use to identify or protect copyrighted works, that have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair and voluntary multi-industry process, are available to anyone on reasonable nondiscriminatory terms, and do not impose substantial costs or burdens on service providers.").
107 Id.
108 Id.
Napster, LimeWire, and Grokster, ushering the recording industry into a new age, and subsequently, a new host of problems.\textsuperscript{109} When file-sharing sites became popular, they were purported to exist in the same way that DropBox currently does: they were anticipated to be used by professionals to increase productivity and make the transferring and sharing of work files easier.\textsuperscript{110} As consumers became more comfortable with the product, however, they realized that they could use the site for sharing digital music files, as well as documents.\textsuperscript{111} During this period, the recording industry witnessed a spike in revenues, even though many said that the pirating of music through file-sharing sites was cutting into industry revenue dramatically.\textsuperscript{112} In response to music being shared digitally online, the recording industry pushed back in two landmark cases: \textit{A&M Records v. Napster}, and \textit{Metro-Goldwyn-Mayer Studios Inc. v. Grokster.}\textsuperscript{113}

As one of the most notorious music copyright cases, \textit{Napster} came at the genesis of online music.\textsuperscript{114} Plaintiff A&M Records existed as a record label company that recorded, produced, distributed, and sold music worldwide for its contracted artists.\textsuperscript{115} Napster existed as a file-sharing program where users could upload and share their files freely with others.\textsuperscript{116} Users illegally downloaded millions of songs by sharing music files through the interface with their friends, family, and even

\textsuperscript{111} Gearlog, supra note 109.
\textsuperscript{116} Id. at 901-05.
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strangers. The Ninth Circuit found Napster to be a contributory infringer under the DMCA and forced it to shut down, even though Napster was willing to come to an agreement with A&M Records on how to deal with electronic music, and genuinely tried to arrange a settlement.

Following the downfall of Napster, Grokster, another file-sharing software, sought to corner the market on music copyright infringement, and even advertised and promoted its software as a way to do so. Metro-Goldwyn-Mayer Studios (“MGM”) is, and was, a well-known media studio that engaged in the recording, production, distribution, and sale of their media to consumers. After MGM became aware of the millions of songs that were being illegally burned and downloaded through Grokster’s site, they sued Grokster for copyright infringement damages. The United States Supreme Court found Grokster secondarily liable for the infringement of its users because of the flagrant copyright infringement promotion it had done.

These cases arguably allowed for the recording industry to corner the market on digital music—the problem is, they did not go forward aggressively enough to do so.

As the recording industry pushed to maintain relevancy through hard-copy music mediums, other services and platforms rose to fit a need in a more technological world.

V. THE NEW RADIO: INTERNET STREAMING SERVICES & ARTIST PUSHBACK

You use streaming services when you work out, travel, and at your

117 Id. at 905-11.
120 Id. at 1031-32.
121 Id.
desk at work. Pandora, BandCamp, SoundCloud, Spotify, Tidal—pick your poison. The creation of internet streaming services left providers like iTunes and Windows Media Player and their clunky technology in the mid-2000s. In their wake, the “internet radio” took its place as the top choice of the consumer.\textsuperscript{124} Free or nominal memberships, on-demand song choice, background information, concert ticket opportunities, behind the scenes material, etc. are just some of the reasons that consumers have come to love these services. However, while they began as “internet radio,” what they have become is much more problematic. Some of these websites and apps allow for the saving and downloading of albums, which makes purchases completely pointless.\textsuperscript{125} Internet streaming services have severely harmed the recording industry in recent years.\textsuperscript{126}

\textbf{A. Internet Streaming Services}

Pandora is a personally curated radio streaming service that learns one’s music preferences and plays songs that match.\textsuperscript{127} Pandora has free and paid subscriptions available.\textsuperscript{128} It is the most like an “internet radio” of all of the streaming services, as the customer chooses the song or band they like, and instead of playing that particular song, Pandora will curate a radio station based on the input of that song or band along with your “thumbs up” and “thumbs down” preferences on the songs it plays.\textsuperscript{129} There is neither an on-demand song choice option, nor a save and download album function.\textsuperscript{130}


\textsuperscript{125} Hall, supra note 123.


\textsuperscript{127} Swensson, supra note 7 (In 2000, the recording industry made roughly $15,000,000,000. In 2013, it made approximately $5,800,000,000. That is a reduction in almost 40% of their entire revenue stream.).


\textsuperscript{130} Layton, supra note 128.
BandCamp is a website wherein artists can sell their music and their merchandise.\textsuperscript{131} On each individual artist’s page they can upload their albums for free streaming, as well as providing a medium for their sale.\textsuperscript{132} It is similar to the use and look of iTunes\textsuperscript{133}—where music is available for listening, album artwork is viewable, and the purchase of albums and other merchandise is possible.\textsuperscript{134}

SoundCloud proclaims that it is “renowned for its unique content and features, including the ability to share music and connect directly with artists, as well as unearth breakthrough tracks, raw demos, podcasts and more.”\textsuperscript{135} SoundCloud uses an open platform that allows direct contact between artist and consumers.\textsuperscript{136} This looks and feels a lot like BandCamp, with artists able to curate their own pages and make available their own merchandise.\textsuperscript{137} There is no curating of other artists’ music, no playlists, and no saving and downloading albums without first paying for them.\textsuperscript{138}

Spotify is a desktop/laptop, mobile app and streaming website that allows users to either stream albums or download music to play without using the internet.\textsuperscript{139} Spotify is the most popular streaming service available on the internet.\textsuperscript{140} Spotify has come under fire by several artists in the industry because of the way it distributes royalties for songs played.\textsuperscript{141} The ability to download thousands of albums for a monthly

\begin{itemize}
  \item \textsuperscript{131} Id.
  \item \textsuperscript{132} About Us, BANDCAMP, https://bandcamp.com/about (last visited Aug. 28, 2018).
  \item \textsuperscript{133} See Liza Anne, BANDCAMP, https://lizaanne.bandcamp.com (last visited Mar. 20, 2018).
  \item \textsuperscript{134} See Download, iTUNES, https://www.apple.com/itunes/download/ (last visited Aug. 28, 2018).
  \item \textsuperscript{135} About Us, SOUNDCLOUD, https://soundcloud.com/pages/contact (last visited Aug. 28, 2018).
  \item \textsuperscript{136} Id.
  \item \textsuperscript{137} About Us, BANDCAMP, https://bandcamp.com/about (last visited Aug. 28, 2018).
  \item \textsuperscript{139} SPOTIFY, (Sept. 29, 2018) https://www.spotify.com/us/.
  \item \textsuperscript{140} Ty Pendlebury & Xiomara Blanco, Best music streaming app: Spotify, Apple Music, Tidal, Amazon and Google Play compared, CNET (July 2, 2018), https://www.cnet.com/how-to/best-music-streaming-service/.
  \item \textsuperscript{141} Why Do so Many Musicians Hate Spotify?, SPINDITY (Aug. 23, 2017),
\end{itemize}
subscription cost between $4.99 and $14.99, depending on the number of users and plan selected, makes this the favorite of all internet streaming services.142

Tidal is a streaming service owned by Jay-Z and other recording artists.143 There are several membership plans available to consumers that allow different levels of access to artists, music, and member-only content like concerts and premium music.144 Tidal seems to be the middle ground between artists and consumers, allowing artists an ownership stake in the service while putting fans closer to artists than ever before. However, while this seems like the perfect interface, Spotify still outperforms Tidal.145

B. Artists are Unhappy with Streaming Services

There are several artists who have problems with streaming services.146 Many of them are concerned about the royalty distribution in relation to the amount their music is played and used on these streaming sites.147 Streaming services set prices for memberships without any input from musicians, and because there is a limited amount of money in a monthly membership fee, artists are seeing little to no profit from the use of services like Spotify.148 Most notably, artists like Taylor Swift, Pete Townshend, and the Beatles have spoken up in their distaste for online streaming services, some for economic reasons, and others for

147 Why Do so Many Musicians Hate Spotify?, supra note 141.
148 Id.
the disconnected feel of listening to music through the internet.149

Garth Brooks has been quoted as calling streaming services “the devil,” but is happy to upload his music for sale on his own website, Ghost Tunes.150 Due to disagreements with Capitol Records, Bob Seger has refused to allow his music to be streamed online—in fact very few songs are even available on iTunes.151 Maynard James Keenan said that digital music was, “just this disconnected thing that you can’t touch and feel and experience.”152 Robert Fripp has been critical of digitized music services for a while due to their inequitable royalty payments.153 Pete Townshend is wary of all streaming services, calling them “digital vampire[s]” and refusing to allow his music to be available to consumers.154 Thom Yorke has refused to allow all the music he retains control of to be placed on streaming sites, allegedly saying that Spotify was “the last desperate fart of a dying corpse.”155 The Beatles are and will continue to be a legend, and when the legend refuses, many others will too.156 With the cult following the Beatles have, there is no real pressure to digitize.157

Some artists only have issues with Spotify and not all internet streaming radio services. Taylor Swift was one of the most outspoken advocates against Spotify, due to its royalty distribution system and the “save album/download” function its consumers are able to use.158 Swift believes that music has value, and that consumers and artists must come together to find that balance so that artists are being paid.159 The current joke is that Jason Aldean has decided not to allow his music on Spotify

149 Knopper, supra note 146.
150 Id.
151 Id.
152 Id.
153 Id.
154 Knopper, supra note 146.
155 Id.
156 Id.
157 Id.
159 Knopper, supra note 146.
because Taylor Swift has. However, because he now owns a stake in Tidal, it makes sense that he would be anti-Spotify in an attempt to promote Tidal and his own interests.

VI. PROPOSED LEGISLATION FOR MUSIC COPYRIGHT PROTECTION ON THE INTERNET

There is a definite concern that the current market is undervaluing music. so in response, Congress has proposed four acts as a way to combat the decline in recording industry profits and act as a market correction. The four proposed Acts are as follows: the AMP Act, the Fair Play Fair Pay Act, the CLASSICS Act, and the Music Modernization Act of 2017. These Acts were crafted in conjunction with recording industry insiders and legislators to create sustainable and approved legislation relating to music copyright in the age of the internet. Each Act works to apply the copyright protections and revenues in a different and “fair” way in an attempt to protect the declining recording industry.

A. AMP Act

The Allocation for Music Producers (“AMP”) Act amends federal copyright laws, requiring Copyright Royalty Judges to create a collective which will designate and put a policy in place to allow for a “letter of direction” from the copyright owner in order for another party to perform the work publicly by, a digital audio transmission, or from a recording artist of a such a sound recording, to distribute a portion of royalty payments to a producer, mixer, or sound engineer who was part of the creative process behind the sound recording.
There must be procedures put in place for producer/mixer/sound engineers to also receive royalties for works fixed before November 1, 1995, by “certifying that a reasonable effort has been made to obtain a letter of direction from an artist who owns the right to receipts payable with respect to the sound recording.” The purpose and effect of this act is to add copyright protections for, and to ensure royalty payments to, those who produce or mix sound recordings.

**B. Fair Play Fair Pay Act**

The Fair Play Fair Pay Act (“Fair Play Act”) brings copyright protection to radio play—meaning the age of the “radio exception” will be over. “Currently, sound recording copyright owners have a performance right that applies only to digital transmissions by cable, satellite, and [internet] radio stations.” Due to the current climate, there is no agreed upon royalty amount should this pass. Congress will appoint Copyright Royalty Judges and request them to “(1) distinguish among different types of services, and (2) include a minimum fee for each type of service.” Copyright Royalty Judges will calculate the differences by analyzing “the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or promote consumer purchases of phonorecords.” This is at its most basic, a revision of the original recording industry infrastructure of revenue sharing. As the AM/FM radio stations intended free play as promotional use for album and concert sales, the exception for AM/FM radio no longer seems beneficial to the recording industry as many have stopped buying these commodities.

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168 Id.
169 Cooke, supra note 6.
170 H.R. 1836 (“This bill amends federal copyright law to extend a sound recording copyright owner’s rights to include the exclusive right to perform or authorize the performance of the recording publicly by means of any audio transmission, thereby requiring terrestrial AM/FM broadcast radio stations that play copyrighted sound recordings to pay royalties for the non-digital audio transmissions of the recordings.”).
171 Id.
172 Id.
173 Id.
174 Id.
175 See supra Part II.
176 Erin Nyren, ‘Artists No Longer Thank Radio at the Grammys,’ Says Recording
C. CLASSICS Act

The Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society (“CLASSICS”) Act was drafted in order to “provide Federal protection to the digital audio transmission of a sound recording fixed before February 15, 1972, and for other purposes.” Essentially, the CLASSICS Act looks to put works that were created prior to 1972 on equal footing with works created thereafter. Since the enactment of the Sound Recording Act of 1971 and the Copyright Act of 1976, the debate about the protection of pre-1972 works has been ongoing. The CLASSICS Act is a way to bring all the works that were given less protection under the previous copyright acts back into protection for the remainder of what their term would have been had Congress enacted the Sound Recording Act of 1971 much earlier. One foreseeable problem, among many, with this Act, is whether or not the works and their authors will receive credit for the last forty-two years without protection. If they do receive credit, one wonders whether it will be a one-time damage claim against the United States, a year credit to tack on to their eligibility, or the right to sue all those who have used their works within the last forty-two years without paying royalties. The most likely and least problematic scenario would seem to be allowing for an extension of forty-two years to the protection term for these works.

D. Music Modernization Act of 2017

The Music Modernization Act of 2017 was proposed by Congressmen Doug Collins and Hakeem Jeffries and is meant to update the copyright rights for the recording industry. This Act is meant “to
provide clarity and modernize the licensing system for musical works . . . and to ensure fairness in the establishment of certain rates and fees [among] other purposes.\textsuperscript{182} Under this Act, internet streaming services will be required to pour parts of their profits into a Mechanical Licensing Collective (“MLC”), in return for which they will receive a “blanket license” for the use of recorded songs on their streaming sites and apps.\textsuperscript{183} The MLC will be run by the recording industry, allowing for a more streamlined process of receiving royalties, while also lifting the burden from streaming sites to match songs with artists and others who are owed their royalties from play.\textsuperscript{184} Several music rights organizations, like ASCAP, BMI, Songwriters of North America, Nashville Songwriters Association, and others, have negotiated and bargained this Act. Representatives from those organizations have claimed that the Music Modernization Act of 2017 will effectively mark an end to songwriters and publishers not receiving their owed royalties through the creation of “a private-sector system where money will no longer be lost to inefficiencies and lack of information [and] mechanical royalty rates are calculated by introducing a willing-seller/willing-buyer standard.”\textsuperscript{185}

\textbf{E. The Revised Music Modernization Act}

In April 2018, the House Judiciary Committee passed the new Music Modernization Act (“Act”), which now encompasses the previous four acts altogether.\textsuperscript{186} The Act has garnered great support in the legislature, and is poised to pass in Congress soon as well.\textsuperscript{187} This means that Congress will not pick one of four, or any combination therein, but instead will have to pass the entire grouping of bills created by recording

\textsuperscript{182} H.R. 4706.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{187} Id.
industry insiders and legislators.\textsuperscript{188} Now, either copyright law will remain the same, or the impact of all four of these bills will be felt in the recording industry—and the marketplace. Even with what appears to be resounding support for the bill, there are those within the recording industry who have a hard time believing that the bill is a good idea.\textsuperscript{189} With the passing of the bill, it indemnifies all streaming services for past infringements, and allows those suits commencing after January 1, 2018 only the recovery stated in the bill itself.\textsuperscript{190} Although many are looking forward to increased protections and rights under the bill, the legislature may not have gotten it completely right with artists’ rights lawyers feeling extremely concerned.\textsuperscript{191}

\textbf{F. Impact of the Proposed Legislation}

These four acts encompassed by the revised Music Modernization Act of 2018, if passed, will alter the recording industry in several ways. As the acts were drafted by several different demographics, the recording industry has ensured that they will be more favorably impacted than in previous legislative acts.\textsuperscript{192} However, what is best for the recording industry is not always best for the consumer. As these two groups have competing interests, specifically involving money, it makes sense that these acts will impact each demographic differently.

The Act will increase rights for songwriters, publishers, and mixers, while retracting any rights to free promotion of music by AM/FM radios.\textsuperscript{193} It will also lay a new royalty framework, including the creation of a fund to authorize blanket licenses and a new adjudication structure.\textsuperscript{194} All in all, while there are naysayers in the recording industry...

\begin{itemize}
\item \textsuperscript{188} \textit{Id.}
\item \textsuperscript{190} \textit{Id.}
\item \textsuperscript{191} \textit{Id.}
\item \textsuperscript{193} Chu & Collins, \textit{supra} note 186.
\item \textsuperscript{194} H.R. 4706.
\end{itemize}
industry, this Act was created by compromise and input from recording industry insiders and legislators, and is, at its core, an Act solely for the recording industry’s benefit.\textsuperscript{195}

Consumers will be shocked by the changes coming their way\textsuperscript{196}—as a culture, we are used to the free to nominal amount we spend on streaming services in order to listen and download our music. If this Act passes, there will be more protections for industry insiders, which will translate to more expensive music.\textsuperscript{197} Consumers used to listening and using music created before 1971 will see a change as well, as the copyright owner will likely bring in the reigns on royalty-free use.\textsuperscript{198} The recording industry is getting a much-needed update to the copyright law; however, consumers will likely push back just as artists did, due to higher prices or inability to easily access materials that were once available to them for free.

\textbf{VII. Creating Artist-Owned Streaming Services in Conjunction with the Proposed Act is the Best Solution to the Problem of Massive Lost Revenues for Performers}

While the new Act creates a legal framework for how to deal with streaming services and royalties that are owed, there is still a gap in artist protection. Even considering the fact that the recording industry will be in charge of the Mechanic Licensing Collective, the blanket licenses the Act gives streaming services waters down any profit that an artist would see.\textsuperscript{199} Additionally, the Act ensures that what small profits are seen, are

\textsuperscript{195} Cooke, \textit{supra} note 192.
\textsuperscript{196} It will be interesting to see whether the creation and passing of this Act affects the bargaining for songwriter credit within the recording industry, as this was previously the best way to gain revenue and royalties.
\textsuperscript{197} Cooke, \textit{supra} note 192; Cooke, \textit{supra} note 6.
divided up even more ways than they were beforehand. Now, instead of artists receiving the royalties for their performances recorded and shared, these royalties will be split with producers, mixers, and songwriters. Therefore, the best way to protect artists from such a pay decrease in light of the new legislation is to create a streaming service owned by artists.

Tidal is an example of such a streaming service, although it has several flaws: membership prices are some of the highest for streaming services, material is inconsistent, and Spotify constantly outperforms it in numbers of consumers. The better play is to perform a consumer survey to see what consumers like best about streaming services and what they like the least—particularly Spotify. This will enable artists to create the best platform available. Likely, factors like low or free monthly memberships, access to exclusive content, and saving/downloading of albums would be the most important. Once artists can create a streaming service that works, they are opening themselves up to a better flow of money—they will be the ones ensuring they are paid their royalties. The cuts that are made in traditional streaming services include the service’s own profits. When the entity runs to pay out its owners, there is no underlying entity profit, only usage costs. If the recording industry’s artists could band together and recognize where other services have failed, implement a plan to provide the best service, and negotiate acceptable profit-sharing procedures, artists will be able to do what the recording industry was unable to do in the early 2000s when they attacked Napster. They will be able to establish their own hold on the market where they can pour their royalties back into themselves, and pay those owed under the Act.

VIII. Conclusion

In the age of technology, the recording industry has not fared well. With declining revenues, insufficient copyright protection, and the creation of online streaming services, the recording industry has had to

201 Chu & Collins, supra note 186.
202 Titlow, supra note 145.
fight to receive revenues. While the recording industry began by splitting revenues between artists and themselves, and by allowing little concessions like the radio exemption, the introduction of file-sharing websites and eventually internet streaming services has severely reduced industry profits over the last decade. As the recording industry fights through this decline, they have managed to team up with the legislature to enact the Music Modernization Act, which will broaden their rights and protections, to include restructuring payment requirements and methods from internet streaming services. While new rights for the recording industry will diminish the rights of consumers and artists, both can fight back. Consumers can take steps by boycotting or calling their representatives to ensure the bill does not pass. Artists, however, have an opportunity to create something new. In the battle for whose internet streaming service is best, artists can create their own streaming service combining the best of all the others, and to ensure they can offer the best product on the market. This will effectively increase their own royalty revenues, because they will be paying themselves their royalties—bypassing the new system set up in the Music Modernization Act. There is a wave of change coming with the likely passing of the Music Modernization Act of 2018, and the best solution for artists and consumers alike is to ride it and see where everything shakes out. It is in everyone’s best interest to try and make this new Act work, and the best way would be for artists and consumers to work together so both groups are satisfied with what happens in the recording industry.

The history of the music industry is inevitably also the story of the development of technology. From the player piano to the vinyl disc, from reel-to-reel tape to the cassette, from the CD to the digital download, these formats and devices changed not only the way music was consumed, but the very way artists created it.


ry (last visited May 8, 2018) (quoting, Edgar Bronfman, Jr.).
“MAKING ADMINISTRATIVE LAW STRICT AGAIN” IN THE ERA OF TRUMP: THE FUTURE OF THE CHEVRON DOCTRINE, ACCORDING TO THE JUDICIAL CONFERENCE FOR THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Christian Ketter*

Opinions differed on the wisdom of limiting agency deference at the March 2018 Judicial Conference for the United States Court of Appeals for the Federal Circuit. Consistently, however, panelists suggested that potential Court-generated changes to administrative agency deference are both possible and likely. Since that conference, Justice Kennedy stepped down from the U.S. Supreme Court. The Trump Administration has since appointed Justice Brett Kavanaugh and Court of Appeals Judge Neomi Rao, with more judicial appointments to come, thus leaving administrative law’s Chevron deference more vulnerable to the limitations upon which the judicial conference panel speculated.

WASHINGTON – Federal courts continue to wrestle with the

Christian Ketter, J.D., 2018, cum laude, The John Marshall Law School. He is a Dean’s Scholar of John Marshall Law School in Chicago, Illinois as well as the 2018 Honorable William J. Bauer scholar on behalf of the DuPage Bar Association. Mr. Ketter clerked in an internship at the United States Court of Appeals for the Seventh Circuit under the Honorable Judge William J. Bauer. He worked as the Chief Research Assistant to Associate Dean and author, Samuel V. Jones, in Jones’ scholarship on the national epidemic of sex trafficking. He has been invited to speak as a panelist on academic success and preparation to prospective students at the John Marshall Law School. At John Marshall, Mr. Ketter was the Presiding Magister for Phi Delta Phi International Legal Honors Society- John Paul Stevens Inn, an international academic honors society, as well as the President for the Federalist Society for Law and Public Policy Studies. In addition, he is: a member of Scribes - The American Society of Legal Writers, as well as the Society of Scholars for academic achievement with Phi Alpha Delta. Mr. Ketter is a certified court-mediator and has served respectively as a law clerk for the Illinois Attorney General’s Office, and the DuPage County State’s Attorney’s Office Appellate Division. Mr. Ketter’s article on Second Amendment reform via congressional tax powers recently appeared in Wayne Law Review’s Winter 2019 issue, 64 WAYNE L. REV. 431 (2019). He sincerely thanks Professor Mark E. Wojcik–President of Scribes, and Professor of Law at The John Marshall School of Law–for his helpful remarks on earlier drafts of this article.
amount of deference appropriately afforded to federal administrative agencies. Earlier this year, the topic of agency deference was a prominent concern at the Judicial Conference for the United States Court of Appeals for the Federal Circuit, the nation’s appellate court for patents.¹

The judicial conference was held in Washington D.C. on Friday, March 16, 2018, at the Grand Hyatt.² Chief Justice John G. Roberts addressed the audience, followed by Senator Orrin Hatch (R-UT), the Conference’s keynote speaker.³ Before the speeches, however, the conference hosted a panel of experts in administrative law, assembled “to discuss recent issues involving Chevron.”⁴ For the presentation entitled “Chevron & Auer: Appellate Review of Administrative Determinations,” the panel consisted of Administrator Neomi Rao, Professor Gillian Metzger, and Professor Christopher Walker.⁵ All three have acknowledged the criticisms of the doctrine and the possibility of change that lies ahead.⁶

The Chevron doctrine is taken from the 1984 Supreme Court case of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁷

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² Id.


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Authored by Justice John Paul Stevens, *Chevron* established a presumptive deference for an agency’s interpretation when its authorizing “statute is silent or ambiguous with respect to the specific issue.”8 The court’s question then becomes “whether the agency’s answer is based on a permissible construction of the statute,” or a reasonable interpretation thereof, for which a court will not supplement its own.9 Nonetheless, Neomi Rao echoed her previously published sentiment that “[a]gencies should not assume jurisdiction over issues and policies that cannot fairly be derived from a statutory delegation.”10 Rao serves as Administrator of the Office of Information and Regulatory Affairs, having been appointed by President Donald Trump in 2017.11 Howard Shelanski12 and Cass Sunstein13 have previously held Rao’s position. Since the conference, however, President Trump revealed new plans for Rao.14 On November 13, 2018, Trump announced his judicial nomination for Rao ahead of schedule, and stated, “I won’t say today that I just nominated Neomi to be on the DC Circuit Court of Appeals, the seat of Justice Brett Kavanaugh . . . She’s going to be fantastic—great person.”15 The administrative office Rao

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9 Id. at 843-44.
held, at the time of the conference (created under former President Carter), “approves government data collections and determines whether agencies have sufficiently addressed problems during rule-making.”

For skeptics of agency deference, Rao’s presence on the conference panel was significant, as she has previously spoken before Congress on the subject of revisiting *Chevron* deference. When speaking before Congress, she contended that two problems with the administrative system are that agencies benefit from a “long lag for litigation” and that “agencies often can take actions that affect private industries without going through rulemaking.”

Rao has praised the late Justice Antonin Scalia’s reasoning with regard to deference—that deference encourages Congress to delegate more and “avoid responsibility for difficult choices.”

More simply put, elections should have consequences. Implicitly invoking the constitutional concept of separation of powers, Rao stated that it is ultimately the executive branch’s duty to see that laws are faithfully executed. Interestingly, however, Scalia wrote in 1989 for the *Duke Law Journal* that “[b]road delegation to the Executive is the hallmark of the modern administrative state” and courts yield to the agency, not because of a lack of “constitutional competence to consider and evaluate policy,” but because it addresses the function of administrative law in a practical manner. Therefore, according to Justice Scalia, “[t]he separation-of-powers justification can be


20 *Id.*

21 *Id.* at 1501–02.


23 *Id.* at 521.
rejected."

Moreover, Scalia thought that “Chevron will endure and be given its full scope—not so much because it represents a rule that is easier to follow and thus easier to predict (though that is true enough), but because it more accurately reflects the reality of government, and thus more adequately serves its needs.” Nonetheless, almost thirty years after Scalia’s article, the panelists discussed the murky future of *Chevron*.

The second panelist, Gillian Metzger, a professor at Columbia Law School, stated that *Chevron* deference is a result of the inevitable necessity for Congress to delegate. Metzger believes that among the advantages to *Chevron* are clarity, articulation, deference with political accountability for policy, an agency’s beneficial expertise, and consistency. She acknowledged what she referred to as recent attacks on *Chevron*. Those attacks are composed in part of the belief that the doctrine is at odds with the separation-of-powers concept and that it allows agencies to act in a judicial capacity. Against those who advocate that Article III of the U.S. Constitution dictates that it is the court’s role and only the court’s role to say what the law is, Metzger urged the conference that such attacks on *Chevron* ignore the historical precedents of deference between agencies and courts. Among those precedents are the Supreme Court cases of *Auer v. Robbins* (1997), and *Skidmore v. Swift & Co.* (1944). One can see the deferential wheels of *Chevron* were already conceptually in motion as early as 1944.

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24 *Id.* at 515-16.
25 *Id.* at 521.
27 *Should Chevron Be Overturned?*, NATIONAL CONSTITUTION CENTER (Sept. 20, 2018), https://constitutioncenter.org/debate/podcasts/should-chevron-be-overturned.
28 *Id.*
29 *Id.*
30 *Id.*
31 *Should Chevron Be Overturned?*, NATIONAL CONSTITUTION CENTER (Sept. 20, 2018), https://constitutioncenter.org/debate/podcasts/should-chevron-be-overturned.
In *Skidmore*, Justice Robert Jackson acknowledged that the “Court has long given considerable and in some cases decisive weight” to agency decisions. The *Skidmore* standard of deference provides that an administrative decision’s persuasiveness “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” Nevertheless, the deferential standard of *Auer* does not require that the agency’s interpretation be the best or the only interpretation. *Auer* merely requires that judges shall defer to an agency’s interpretations of its regulations and uphold those interpretations unless the agency’s decision is “plainly erroneous or inconsistent with the regulation.”

Panelist, Professor Walker, has criticized *Auer*’s low threshold, stating that “[w]hat *Auer* deference allows you to do is get all the benefits of deference you’d get for the regulation, but now for just posting a memo on a website.” Moreover, for Walker, “many of the agency self-delegation criticisms raised against *Auer* deference could apply with some force to agency statutory interpretation and *Chevron* deference as well.”

Metzger carried forth her historical analysis of *Chevron* from 1983 into 2015 to the case of *King v. Burwell*. In *King*, the Supreme Court’s second review of the Affordable Care Act (“ACA”), individuals challenged the insurance provision and the federally created insurance exchanges that supplemented a state’s refusal to do so. *Chevron* deference, in the case of *King*, would have required the Court to defer to the agency (i.e. the Internal Revenue Service, “IRS”) overseeing the tax credits of the ACA. The Court, in its opinion authored by Chief

34 *Id.*
35 *Id.*
36 *Auer*, 519 U.S. at 461.
41 *Id.* at 2482.
42 *Id.* at 2488.
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Justice John G. Roberts, held that *Chevron* deference did not apply.\(^{43}\) In *King*, Roberts found that *Chevron* lacked the “appropriate framework” to address the issue at hand, and that it was “especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting [a] health insurance policy of this sort.”\(^{44}\) One can glean from the decision that if deference had been given to the IRS under the Obama-administration in 2015, the IRS would have interpreted the language to support the ACA, resulting in an effectively identical outcome.\(^{45}\) However, that would have been ineffective to settle the issue. Such deference to the IRS would have left the ACA vulnerable to subsequent administrations that could “interpret” the provisions to eviscerate the ACA.\(^{46}\) Roberts acknowledged that the ACA’s hasty enactment via the reconciliation process resulted in “inartful drafting,” and the Court must read “the words of a statute . . . in their context and with a view to their place in the overall statutory scheme.”\(^{47}\) As an aside, it would not have made sense for Roberts, having previously upheld the constitutionality of the ACA in *National Federation of Independent Business v. Sebelius* (2012),\(^{48}\) to have used this weak opportunity to strike down the Act. After all, this is a Chief Justice who has continually evinced a desire to render unanimous narrow decisions that further the public faith in the Court, rather than undermine it.\(^{49}\) Nonetheless, as reported by Fox News, Roberts “infuriated conservatives when he wrote the *King* opinion to uphold ObamaCare.”\(^{50}\) However, in spite the political backlash from some,\(^{51}\)  

\(^{43}\) *Id.* at 2489.  
\(^{44}\) *Id.* at 2483 (italicization omitted).  
\(^{45}\) See *King v. Burwell*, 135 S. Ct. 2480, 2480 (2015) (holding that the ACA’s key provisions did not merit a *Chevron* review due to its “economic and political significance” however, the Court still held the key tax credit provisions valid upon review of the ambiguous statutory language).  
\(^{46}\) *Id.* at 2496.  
\(^{47}\) *Id.* at 2492.  
\(^{49}\) Sarah Turberville & Anthony Marcum, *Those 5-To-4 decisions on the Supreme Court? 9 to 0 is far more common*, THE WASHINGTON POST (June 28, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/06/28/those-5-4-decisions-on-the-supreme-court-9-0-is-far-more-common/?utm_term=.a722e0a729b0.  
\(^{50}\) Chad Pergram, *Justice Roberts’ ObamaCare ruling could be boon for congressional Republicans*, FOX NEWS (July 19, 2015),
Fox also reported that many Republicans in Congress were secretly thanking Roberts for “saving conservatives from themselves” because any party concession to fix ObamaCare would have angered the “conservative base if they did anything short of scrapping the entire law.”

Professor Metzger expressed her criticisms of Roberts’ decision to the conference audience, stating that she is not convinced by King, and shared her concern that it detracts from the clarity of Chevron. Metzger does not expect the Supreme Court to conduct a dramatic overturning of Chevron, but does anticipate a narrower sphere of Chevron from the Chief Justice. Nevertheless, the author of the King majority opinion himself, Chief Justice Roberts, was to take the stage next to address the audience at the judicial conference following Metzger.

Time will tell if the Roberts Court brings a narrower sphere to deference, but Justice Neil Gorsuch has expressed dissatisfaction with Chevron. In 2016, while on the Tenth Circuit, Gorsuch—then judge—wrote a concurring opinion regarding the Board of Immigration Appeals and Chevron wherein he opined that “[t]ransferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded


52 Justice Roberts’ ObamaCare ruling could be boon for congressional Republicans, supra note 50.
53 Should Chevron Be Overturned?, supra note 27.
54 Should Chevron Be Overturned?, supra note 27.
on judicial functions.” Gorsuch further stated, however, “the problem remains that courts are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them.” Gorsuch referred to Chevron as the “goliath of modern administrative law,” and found its “purpose seemingly at odds with the separation of legislative and executive functions, its effect appears to be as well.” Notwithstanding the foregoing, Metzger believes that in light of City of Arlington, Texas v. F.C.C., wherein Chief Justice Roberts was joined in his dissent by Justices Anthony Kennedy and Samuel Alito, agencies may see a shift in courts to require more specific evidence for authority to gap-fill. In Arlington, Roberts stated that courts “should not defer to an agency until the court decides, on its own, that the agency is entitled to deference,” which starkly contrasted with the majority opinion authored by the then deference-leaning Justice Antonin Scalia.

With Scalia replaced by Justice Gorsuch amidst the current administration and its impending judicial appointments, a higher standard of proof for agencies may indeed be foreseeable. Gorsuch telegraphed this possibility recently when he declined to extend deference in SAS Institute, Inc. v. Iancu, and in writing the majority opinion stated that “under Chevron, we owe an agency’s interpretation of the law no deference unless, after employing traditional tools of statutory construction, we find ourselves unable to discern Congress’s meaning.” Gorsuch further remarked that “whether Chevron should remain is a question we may leave for another day.”

57 Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).
58 Id. at 1153 (Gorsuch, J., concurring) (italics in original).
59 Id. at 1158 (Gorsuch, J., concurring).
60 Id. at 1154 (Gorsuch, J., concurring).
63 Id. at 325-26 (Roberts, J., Kennedy, J., & Alito, J., dissenting).
64 Id. (internal quotations omitted).
Justice Stephen Breyer has been previously noted by Metzger as supporting *Chevron* deference. Indeed Breyer dissented in *Iancu* that he does not believe *Chevron* mandates courts “to treat that case like a rigid, black-letter rule of law, instructing them always to allow agencies leeway to fill every gap in every statutory provision.” Rather, Breyer “understand[s] *Chevron* as a rule of thumb, guiding courts in an effort to respect that leeway which Congress intended the agencies to have.” However, Metzger has noted that Justice Clarence Thomas, who concurred in *Iancu*’s majority, finds *Chevron* to be unconstitutional. Thomas believes, “[w]e seem to be straying further and further from the Constitution without so much as pausing to ask why.”

Like the *Chevron*-fueled speculation that surrounded Justice Gorsuch, President Trump’s newest Supreme Court appointee, Justice Brett Kavanaugh, has drawn similar media attention. Roughly one-third of Kavanaugh’s decisions on the United States Court of Appeals for the District of Columbia Circuit concern administrative law. In May 2017, Kavanaugh, dissented, in *United States Telecom Association v. Federal Communications Commission*, stating, “[i]f an agency wants to exercise expansive regulatory authority over some major social or economic activity . . . an ambiguous grant of statutory authority is not

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67 *Iancu*, 138 S. Ct. at 1364.

68 *Id.*

69 *Id.* at 1352 (concurring in Gorsuch’s opinion with Chief Justice Roberts, Justice Kennedy, and Justice Alito).


73 *Id.*
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enough.”  

He further stated that “Congress must clearly authorize

an agency to take such a major regulatory action.” It appears that

Kavanaugh yearns for a statutory authority more concrete than

Chevron’s deference under permissibility and reasonableness. Among

(thensJudge) Kavanaugh’s offered examples of relevant administrative

exercise for expansive regulatory authority in Telecom were: tobacco

regulation, regulation to ban physician-assisted suicide, elimination of

requirements for telecommunication rate-filling, and greenhouse gas

emissions regulation. President Trump’s judicial nomination and

appointments of Rao, as well as the appointments of both Gorsuch and

Kavanaugh, indicate a goal of the current administration to curb

Chevron’s administrative elasticity.

Metzger has perceived suspicion of administrative deference in top
governmental agencies because of “growing attacks on the administrative state and plaintive complaints about uncontrolled

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74 U.S. Telecom Ass’n v. F.C.C., 855 F.3d 381, 421 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).
75 Id.
76 Id. at 417-435.
77 Id.
78 Cass R. Sunstein, Gorsuch’s Rejection of a Politicized Executive Branch, BLOOMBERG (Oct. 02, 2017),
https://www.bloomberg.com/opinion/articles/2017-10-02/gorsuch-s-rejection-of-a-politicized-executive-branch; John Yoo, Kavanaugh on
Supreme Court is a win for Trump, GOP and America, FOX NEWS (Oct. 06, 2018),
Joan Biskupic, What the case of a killer whale tells us about Brett Kavanaugh, CNN (Aug. 25, 2018),
https://www.huffingtonpost.com/entry/gorsuchs-views-on-administrative-law-could-spell-trouble_us_59ee21d7e4b031d85825708; Ilya Somin, Gorsuch is right about Chevron deference, THE WASHINGTON POST (Mar. 25, 2017),
bureaucrats from the court’s conservative wing.”

Moreover, she has suggested that the Trump Administration will follow “the footsteps of Reagan and subsequent Presidents . . . to seek to achieve deregulation from within the executive branch, as it already has started to do.”

Among the doctrine’s criticisms is that Chevron deference defies the rule of law by giving agencies too much power, which allows agencies to side-step Congress and “undermines the court’s duty to say what the law is.”

Among the flaws that other scholars have identified with regard to agency law, is that agencies may “stretch their authority to meet new challenges” or become forced to “await clear instruction in new statutes passed by Congress.” Additionally, agencies suffer an “absence of clear directives.” These issues are compounded, as “Congress so rarely updates major regulatory statutes, many agencies are stuck implementing outdated laws and are hamstrung . . . in dealing with the challenges of a modern economy and society.”

Nonetheless, in spite of Chevron deference’s well-documented flaws, Metzger believes Chevron “shouldn’t be overturned because the constitutional attacks on it are unfounded” and “because those who attack it really exaggerate what impact it has . . . and ignore the extent to which Chevron . . . is simply a legal framework that will wax and wane over time.”

Metzger is skeptical of criticisms that allege continual executory

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79 Metzger, supra note 66.

80 Metzger, supra note 70.


83 Jamelle C. Sharpe, Toward (a) Faithful Agency in the Supreme Court’s Preemption Jurisprudence, 18 Geo. Mason L. Rev. 367, 373 (2011) (Sharpe is an Assistant Professor of Law and Richard W. and Marie L. Corman Scholar, University of Illinois College of Law).

84 Freeman, supra note 82.

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expansions and maintains that opponents often concede to some extent by “generally accept[ing] the constitutionality of presidential efforts to oversee agency decision making.”\(^{86}\) She believes that exclusion of delegation mechanisms “that enhance rather than check presidential oversight reflects an unjustifiably narrow conception of internal separation of powers.”\(^{87}\) Moreover, Metzger generally criticizes separation of powers analysis for its preoccupation with presidential power, a subject upon which “the Constitution says rather little.”\(^{88}\) Metzger has stated that “[a]gency actions are frequently challenged for not complying with governing procedures,” or because “the agency failed to use notice and comment procedures at all;” thus, when an agency action acts inconsistently with the statute or procedure, it risks failure.\(^{89}\) In addition to the statute serving to check the expansiveness of deference, some scholars have opined that “shifting political commitments” affect the judicial credibility of agencies and risk an agency conceivably creeping into violation of the political question doctrine.\(^{90}\)

Ultimately, Metzger has concerns about cutting back agency deference to the power of the courts, as she has stated that “courts have gradually occluded the APA’s openings for internal administrative law”\(^{91}\) and, furthermore, by “requiring agencies to structure their


\(^{87}\) Id. at 433.

\(^{88}\) Id. at 426.


\(^{90}\) Jonathan Masur, Judicial Deference and the Credibility of Agency Commitments, 60 Vand. L. Rev. 1021, 1062 (2007)(With regard to the doctrine, the theory of justiciability—under the U.S. Supreme Court’s Political Question Doctrine—finds its genesis in Chief Justice John Marshall’s opinion Marbury v. Madison, 5 U.S. 137, 153 (1803). Marbury stands in part for the proposition that “the discretion of a court always means a found, legal discretion, not an arbitrary will,” for “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.” Id. at 170).

discretion through notice-and-comment rulemaking, the courts have
deviated significantly from the APA.’”92 Nonetheless, urging
the judicial conference to see a forest through the trees, Metzger rallied for
consideration of “key features of internal administration—internal
policies, procedures, practices, oversight mechanisms, and the like,”
that “are rarely viewed as part of administrative law.”93 Metzger has
stressed a “need to link administration and administrative law,” and has
credited the work of Elizabeth V. Foote, who has written upon the
preoccupations of post-Chevron statutory interpretation.94 Foote has
stated that modern administrative law is continually “turning nearly
every challenge on judicial review into a question of law as a matter of
‘statutory interpretation.’”95

The third panelist at the conference was Professor Christopher J.
Walker of the Ohio State University Moritz College of Law.96 Walker,
who has dedicated his scholarship to studying Chevron, noted that in the
Federal Circuit Courts there is a demonstrated application of Chevron
deference 74% of the time.97 When applied, Chevron has a 77% agency
success rate.98 However, he noted discrepancies among Circuits with
regard to Chevron application (e.g., 86% of the time in the D.C. Circuit
versus 60% of the time in the Sixth Circuit).99 Walker referenced his
recent Michigan Law Review article “Chevron in the Circuit Courts,”
which he co-authored with Kent Barnett.100 Walker’s premise,

92 Id.
93 Id.
94 Id. (citing Elizabeth V. Foote, Statutory Interpretation or Public
Administration: How Chevron Misconceives the Function of Agencies and Why It
Matters, 59 ADMIN. L. REV. 673, 677 (2007) for the proposition that “Chevron
misunderstands public administration as statutory interpretation.”).
95 Elizabeth V. Foote, Statutory Interpretation or Public Administration: How
Chevron Misconceives the Function of Agencies and Why It Matters, 59 ADMIN. L.
REV. 673, 677 (2007).
96 2018 Conference, United States Court of Appeals for the Federal
Circuit (Oct. 20, 2018), itinerary and notes in possession of the author.
97 Christopher J. Walker et al., Chevron in the Circuit Courts, 116 MICH. L. REV.
1, 29 (2017).
98 Id. at 6.
99 Id. at 7.
100 Id. at 1.
affirming statements previously made by Metzger, is that too much attention is given to *Chevron* at the Supreme Court level, when in reality the circuit courts are where the important law is continually made; a rather fitting point for this Federal Judicial Circuit Conference, and well-taken at that.\(^{101}\) Walker’s article stated that the findings are “meaningful for agencies and litigating parties because circuit courts review far more agency statutory interpretations than the Supreme Court.”\(^{102}\) Ultimately, he feels that the “Supreme Court needs to provide better guidance to lower courts if it seeks to create a stabilizing doctrine.”\(^{103}\)

David Boundy of Cambridge Technology Law, who practices Intellectual Property and Administrative Law, served as moderator of the *Chevron* panel.\(^{104}\) He acknowledged the difficult instances under *Chevron* in which judicial action and gap filling may turn upon an issue of mere semantics, such as whether a university medical resident is a medical student or a medical doctor.\(^{105}\) Boundy noted that under section 533 of the Administrative Procedure Act,\(^{106}\) agencies are able to exercise gap filling and such action is therefore contrastable from “creating law out of thin air.”\(^{107}\) Moreover, he cited the Supreme Court case of *Encino Motorcars, LLC v. Navarro*, in which Justice Anthony Kennedy wrote on behalf of the Court that “[w]hen Congress authorizes an agency to proceed through notice-and-comment rulemaking, that ‘relatively formal administrative procedure’ is a ‘very good indicator’ that Congress intended the regulation to carry the force of law, so Chevron should apply.”\(^{108}\) In *Encino*, the Court held that “*Chevron* deference would not be applied to [a] Department of Labor (DOL) regulation” because “deference is not warranted where the regulation is ‘procedurally defective’—that is, where the agency errs by

\(^{101}\) *Id.* at 1, 14, 18.

\(^{102}\) *Walker, supra* note 97 at 70-71.

\(^{103}\) *Id.*


\(^{107}\) § 553(a).

failing to follow the correct procedures in issuing the regulation.\textsuperscript{109} Nonetheless, since the time of both \textit{Encino} (2016) and the D.C. conference in March 2018, \textit{Encino}’s author, Justice Kennedy, has stepped down from the Court and left concern as to whether notice-and-comment rulemaking is still relatively formal enough for administrative agencies henceforth.\textsuperscript{110}

Ultimately, with regard to whether \textit{Auer} or \textit{Chevron} could be overturned or limited, Professor Walker does not see discussions on limiting or modifying deference as “break[ing] major new ground.”\textsuperscript{111} He has noted that barely half of agency rule drafters even know of \textit{Auer} deference by name.\textsuperscript{112} According to Walker, for those drafters who actually know of \textit{Auer}, it likely serves as an impetus to “attempt to avoid drafting ambiguous regulations;” or, perhaps “Auer is so deferential to an agency’s interpretation of its own regulation,” it may alleviate “worry about being clear and precise, as [drafters] can always clarify and clean up in subsequent guidance.”\textsuperscript{113} As believed by Walker, with Justice Kavanaugh’s confirmation having filled Kennedy’s vacancy, \textit{Auer} deference “is much more likely to go,” and “[Walker] would be surprised if it’s not eliminated in the next year or two.”\textsuperscript{114} Of the present Court, Walker has noted that Justices Alito and Thomas both “indicated an interest in overruling \textit{Auer} deference.”\textsuperscript{115} Consequently, “[o]verturning Auer deference would constrain the... power to reinterpret regulations without going through notice-and-

\textsuperscript{109} \textit{Id}. at 2117-20.


\textsuperscript{113} \textit{Id}.


comment rulemaking.”  

Regardless, Walker criticizes that “Chevron deference encourages members of Congress to delegate broad lawmaking power to federal agencies.” He cautions, however, that considerations of revising the deference doctrine should avoid preoccupation with the U.S. Supreme Court.

Rao is reportedly on President Trump’s short list for a Supreme Court nomination in the event that Justice Ruth Bader Ginsburg retires amid this administration. On March 13, 2019, the Senate confirmed Rao’s appointment, by a vote of 53-46. Nevertheless, prior thereto, Rao faced fervent opposition to her nomination for the U.S. Court of Appeals for the District of Columbia Circuit. According to the Wall Street Journal, she was being “Kavanaugh’d”—seemingly, this era’s renaissance of “Borked.” Among the reasons for pushback, Rao has

116 Id.
118 Walker, supra note 115.
previously stated that judicial deference to agencies “allowed for the expansion of the administrative state outside the checks and balances of the Constitution.”\footnote{123} She has advocated for a “more robust review of regulatory action in the courts,” as she believes that “courts can provide more meaningful checks on agency action and authority, enforcing both statutory and constitutional due process.”\footnote{124} Rao has acknowledged the difficulty of revising agency deference is partly because “independent judgments and judicial review are kind of a complex matter” and “very hard to sort of spell out.”\footnote{125} She has stated, “I do think Skidmore and Chevron present different standards,” as Skidmore “leave[s] more power with the courts.”\footnote{126} However, Rao has demonstrated a hostility towards deference that runs deeper than Court precedent, stating, “if Congress actually wants regulatory action, then they may have to make some changes.”\footnote{127}

Likewise, Metzger cautions against blaming Auer for flaws in administrative law, as “the fault may lie more in other administrative common law doctrines—such as judicial elaboration of the APA’s notice and comment requirements—than with Auer deference itself.”\footnote{128} She advances the “common law character” of Auer, cautioning that “[c]ourts should not pretend that overturning Auer is constitutionally or statutorily compelled.”\footnote{129} As to Chevron, however, once again, Metzger etymology of the word that Robert Bork’s unsuccessful “nomination to the Supreme Court in 1987 was harshly criticized”).

\footnote{123} {Steven Mufson, Trump’s pick for rules czar would hand more power to Trump, The Washington Post (Apr. 20, 2017), https://www.washingtonpost.com/business/economy/trumps-pick-for-rules-czar-is-expected-to-hand-over-more-power-to-trump/2017/04/19/8b33b176-206f-11e7-a0a7-8b2a45e3d84_story.html?utm_term=.df8ac63c12b3.}


\footnote{125} {Examining Agency Use of Deference Part II, supra note 18.}

\footnote{126} {Id.}

\footnote{127} {Id.}

\footnote{128} {Auer as Administrative Common Law, by Gillian Metzger, Yale Journal on Regulation (Sept. 21, 2016), yalejreg.com/nc/Auer-as-administrative-common-law-by-gillian-metzger/.}

\footnote{129} {Id.}
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anticipates a “narrower sphere” of Chevron but not a complete overturn.130

In closing, while Auer’s future may be quite uncertain, Chevron will likely live on, albeit subject to possible limitations in the near future, and Metzger is nonetheless vigilant of Chevron’s overturn, should the Roberts Court be “inclined to move in that direction in the future.”131 With Justice Kennedy retired, and Justice Kavanaugh having taken the mantle, the possibility has increased for stricter applications by the Roberts Court to curb administrative deference in the era of Trump.

130 Should Chevron Be Overturned?, supra note 27.
131 Metzger, supra note 66.
A BRIEF HISTORICAL SKETCH OF AN ANTHROPOLOGICAL ANALYSIS OF THE DEVELOPMENT OF INTERNATIONAL AND COMPARATIVE LAW

Charles Lincoln*

I. INTRODUCTION

Why do different cultures lead to different laws? After all, the way the law operates should be based in logic to be the best and most efficient way for the laws to govern human society to carry out their lives—if it were not so, we would change our patterns of existence.

Culture is normative.1 “Norms” are the socially mandated

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* Charles (Charlie) Lincoln is currently a senior associate in international tax services at Pricewaterhouse Coopers Washington National Tax Service in Washington, DC. Mr. Lincoln graduated with an LL.M. in Taxation at Boston University focusing on U.S. Tax Law; Mr. Lincoln graduated in May 2018 with said degree. That was Mr. Lincoln’s third law degree—Mr. Lincoln received his Advanced LL.M. degree in International Tax Law from the University of Amsterdam (UvA) in The Netherlands in 2017. Mr. Lincoln received his Juris Doctor from the Texas A&M University School of Law in May 2016, after being awarded his undergraduate baccalaureate from Harvard University in May of 2013. Mr. Lincoln would like to thank the late Mayanist anthropologist Dr. Edward Bama Kurjack of Western Illinois University for his mentorship in anthropology. I would also like to thank Dr. Charles Maier of Harvard University—whose Harvard College class titled Global History 1920 class I took as an undergraduate and inspired me to explore ideas in this Article.

1 Robert J. Cottrol, Normative Nominalism: The Paradox of Egalitarian Law in Inegalitarian Cultures—Some Lessons from Recent Latin-American Historiography, 81 Tul. L. Rev. 889, 891–92 (2007) (noting that such an article needs a basis in definition of culture as a premise for use throughout the article).

[From a] historical sociology of law would presumably use law and its history not merely to illustrate the evolution of legal doctrine, or how the law resolved certain controversies, or even how it was influenced by the social currents of different eras. It would do these things of course, but it would presumably do something more. It would use the law as a window into the very civilization being studied. It would recognize that the law, both as stated and as actually applied, in the values expressed and in the promises unrealized, reveals a society and its culture in both its aims and its contradictions. This approach, I would argue, is an especially important one to bring to the study of legal history in Latin America. Many students of Latin-American law have long noted the gap between the law as stated and the law as actually applied. There has been in the history of law in Latin America what might be termed a kind of normative nominalism, a desire to use the law to make important normative statements, followed by often minimalist or nominal enforcement or
behavioral patterns which evolve into and are formalized, or formally expressed, (i.e., linguistically) as law. Law is human extra-somatic adaptation, dependent upon symboling.” Law is application of legal norms.


Social norms are powerful behavioral controllers within an overall hybrid and complex system of social control which relies on the interplay of legal, market and social norm mechanisms for purposes of establishing efficient constraints on the future (in-)actions of individual participants in cooperative endeavors. Such a hybrid system, therefore, also casts a regulatory net over director decision-making behavior and, thus, allows for behavioral constraints on corporate directors for purposes of achieving sufficient levels of board accountability in corporate governance. This Article starts the long-neglected analysis of the intersection of norms and director primacy with one of the central social norms and behavioral controllers in corporate governance and economic cooperation in this regard: trust.


4 Steven D. Smith, Law As Language?, 63 Mercer L. Rev. 891, 893 (2012). [The subtle] contention that law is language may reflect a more Wittgensteinian perspective-one that aspires to be more attentive to the subtle, mysterious workings of language itself. Wittgenstein, after describing a straightforwardly referential account of language-this word refers to that object, and so forth-suggested that this simple referential account leaves out a good deal in the language. He famously offered a different analogy: Our language can be seen as an ancient city: a maze of little streets and squares, of old and new houses, and of houses with additions from various periods; and this surrounded by a multitude of new boroughs with straight regular
symbolic and a particularly ritualistic language.⁵

Why do people around the world persist in continuing with different law structures contrary to the United Nations or Organisation for Economic Co-operation and Development recommendations? And why do other international organizations expect other countries to conform to rules set out by the organizations in terms of basic contract, property, procedural laws, etc.? How can basic laws be replaced by different cultural practices? This Article will take an anthropological approach to this inquiry and the ones above.⁶ All social scientists try to answer such streets and uniform houses.


[The] early functionalist and structuralist theories; “structural-functionalist” approaches that stress the social work of ritual; and cultural analyses that interpret magic and ritual in terms of performance, language, and symbol all reject the necessary opposition of ritual magic and reason. Viewing law as magic from these perspectives produces two important challenges to the Realist view. First, it allows us to see that magic and ritual aspects of adjudication do not necessarily conflict with rational legal decision-making. Second, it suggests some ways that the legal magic the Realists criticized might actually enhance law’s legitimacy and effectiveness.;

cf. Leon Green, The Negligence Issue, 37 YALE L.J. 1029, 1043 (1928) (“[A] ‘scientific’ statement of law has very little if any interest in how they shall treat these terms. The law provides the jury with no table or key by which they can translate these symbols into the terms of human conduct and human qualities. The law recites its ritual and stops.”).

⁶ Menachem Mautner, Three Approaches to Law and Culture, 96 CORNELL L. REV. 839, 841–44 (2011) (explaining that, to answer this question and questions like it, there are essentially three major ways to interpret law and culture and nine altogether different categories).

The first approach, the historical school, arose in German jurisprudence in the first half of the nineteenth century. It views law as a product of a nation’s culture and as embedded in the daily practices of its people. According to the historical school, statutes
are not meant to create law; rather, their function is to reflect existing social practices. And just as each group of nationals has its own language, expressing a unique national spirit, it also has its own distinctive law.

The second approach, the constitutive approach, developed in American jurisprudence in the 1980s. This approach views law as participating in the constitution of culture and thereby in the constitution of people’s minds, practices, and social relations. It thus views the relationship between law and culture as working in an opposite direction from what the historical approach assumes; in both, however, law is an inseparable dimension of social relations.

The third approach, found in twentieth-century Anglo-American jurisprudence, views the law that the courts create and apply as a distinct cultural system. Law practitioners internalize this culture in the course of their studies and professional activity, and this internalization comes to constitute, direct, and delimit the way these practitioners think, argue, resolve cases, and provide justifications. In many cases, however, the legal culture allows for more than one possible solution. Therefore, while there may be objectivity in the law, there is also a degree of inconsistency in its application.

Beyond these three approaches concerning the relationship between law and culture, one can identify at least nine additional approaches. The first, ‘law and anthropology,’ applies anthropological research methods to the study of law. The second, the ‘legal culture’ approach, deals with people’s views on the legal system and beliefs about the feasibility of taking legal action to promote their interests. The third, the ‘legal consciousness’ approach, deals with the legal knowledge that people invoke in the course of their daily social interactions. The fourth, the ‘law and popular culture’ approach, deals with law’s representations in popular culture, its influence over popular culture, and the influence of popular culture on law. The fifth approach deals with the connection between law and the production of cultural artifacts, such as books and music, and naturally focuses on intellectual property law. The sixth approach, ‘law and multiculturalism,’ is a part of the voluminous literature published in the last four decades on multiculturalism and discusses the functions that law plays, and the normative solutions it should adopt, in culturally diversified countries. The seventh approach looks at the connection between law and culture from the perspective of particular legal branches or doctrines. The eighth approach, ‘law and culture in law and development,’ discusses the role of cultural change in legal and economic development processes that are taking place in developing countries. The ninth approach, ‘law as an autopoietic system,’
questions, but anthropologists work through contact with exotic societies and attempt to explain their behaviors. Of course, by explaining the behavior of others, these scientists ultimately try to understand their own societies.

Social scientists interested in the populations of the world have developed different answers to the basic questions: are all humans alike, or are they different? How are they alike, and how are they different? This is the fundamental problem in anthropology. It is easy to see material and cultural differences when encountering different cultures. Using the concepts of culture and cultural relatively that were popularized and made fundamental in anthropology by the students of Franz Boas, this “American School of Anthropology” emphasized the differences between populations. At the same time, most European scholars accepted the psychological unity of mankind—the hypothesis that all humans think alike.

Cultural relativity, the argument that all socially approved behavior views law as an autonomous system whose contents and communications affect social reality in a unique manner, mutually influencing each other and creating law’s contents from within.


8 Id.

9 See id.

10 See id.

11 Neil Hamilton & Jeff Maleska, *Helping Students Develop Affirmative Evidence of Cross-Cultural Competency*, 19 SCHOLAR: ST. MARY’S L. REV. & SOC. JUST. 187, 197 (2017) (“Bennett’s three ethno-centric stages include denial, defense, and minimization. Denial is the stage in which one does not recognize any cultural differences and believes their own culture is “correct.” Second, a person in the defense stage recognizes that other cultures exist, but does not acknowledge that these other cultures are valid. Third, those in the minimization stage tend to overemphasize the universality of their cultural and minimize the actual differences between different culture.”).


can only be understood in the context of its own cultural setting, can be interpreted in a manner that discourages cross-cultural comparison and even negates the notion that all humanity uses the same thinking process.\textsuperscript{14}

Although some credit Herodotus of Halicarnassus as the earliest precursor to anthropological studies,\textsuperscript{15} one of the first encounters between the West and the Americas was recorded in the Franciscan friar Bernardino de Sahagún’s \textit{Historia general de las cosas de la Nueva España} or \textit{Florentine Codex}—a bilingual Spanish and Nahuatl account of the practices of the Native Americans.\textsuperscript{16} That volume earned Sahagún the title of the first Native American ethnographer. Another contrasting example is the great adventure story in Bernal Díaz del Castillo’s \textit{True History of the Conquest of New Spain}.\textsuperscript{17} Díaz del Castillo was reacting to the “Black Legend,” that is the Bishop of Chiapas Las Casas’ accusation that the Spanish conquistadors slaughtered vast numbers of people in the name of the Catholic king of Spain, Charles, V.\textsuperscript{18} The Spanish royal house was very preoccupied with this charge.\textsuperscript{19} The supporters of the monarchy argued against Las Casas, but many church missionaries sided in his favor.\textsuperscript{20} Díaz del Castillo—a soldier who participated in the conquest of Mexico with Hernán Cortés in 1519–1521—insisted that the account of the conquest by Francisco López de

\begin{quote}
\end{quote}
Gómara, Hernán Cortés’s chaplain, was exaggerated. Pro-government scholars emphasized Díaz del Castillo’s descriptions of Aztec human sacrifices, including the dried blood on the walls of the temples and in the hair of the priests. From this description, one can almost smell the stench of these temples. While, in Sahagún’s description of the market at Tlatelolco, when the conquistadors first entered Tenochtitlan—he describes the Spanish as brimming with admiration. In comparison, Sahagún was sympathetic to the people he studied, while Bernal Díaz del Castillo seemed to have admired the natives only as worthy adversaries.

II. EVOLUTIONISM

Social evolutionism was the popular tradition in anthropology during the nineteenth century. These scholars examined the history of humanity as a whole and divided that narrative into a series of stages. Lewis Henry Morgan summarized human cultural evolution in three stages: savagery, distinguished by hunting and foraging economies; barbarism, the stage of early agriculturalists living in villages; and civilization, the era of the first cities, writing and metallurgy.

21 Kimberle S. López, Latin American Novels of the Conquest: Reinventing the New World 44 (2002); see also Francisco González-Hemusillo Adams, El Sometimiento Del Señorío Indígena de Cholula Ante la Corona Española, 3 Signos Históricos 6, 6 (2001); Máximo José Rodríguez Navarri, La Conquista de México 56 (2016).
24 Nick Caistor, Mexico City: A Cultural and Literary Companion 4-6 (2000).
25 Lewis Hanke, Bartolomé de las Casas: An Interpretation of His Life and Writings 6 (2013); see also Miguel León Portilla, Native Mesoamerican Spirituality: Ancient Myths, Discourses, Stories, Doctrines, Hymns, Poems from the Aztec, Yucatec, Quiche-Maya and Other Sacred Traditions 26 (1980).
28 Id.
29 Wright, supra note 27.
Morgan lived in upstate New York in the 1800s and thus, had Iroquois neighbors.30 He even started a literary club in 1841 called the “Order of the Iroquois,” modeled after his understanding of Iroquois social organization at the time.31 Certainly, Morgan’s early work can be considered part of the James Fenimore Cooper and Henry Schoolcraft romantic tradition in the depiction of Native Americans. Morgan’s 1851 book The League of the Iroquois explained Iroquois society while at the same time laying the foundations for his theories on the stages of human cultural evolution.32 As a lawyer, Morgan advocated for the Iroquois Indians trying to protect their lands.33

Meanwhile, some nineteenth-century evolutionists protested the clear record of atrocious behavior against natives, including Edward B. Tylor,34 the first scholar to define culture.35 Tylor insisted that the colonists were those who, after having been exposed to higher levels of morality, could treat native people in such horrible ways.36 Morgan and Tylor were sympathetic to the native people they studied, but other evolutionists who considered themselves sociologists were not.37

III. SOCIAL DARWINISM

Herbert Spencer defined “survival of the fittest” in his Principles of Biology38 and emphasized this idea in his concepts of social evolution.39

33 ENCYCLOPEDIA BRITANNICA, supra note 30.
34 ROBERT H. LOWIE & EDWARD B. TYLOR, AM. ANTHROPOLOGIST 19, 263-64 (1917).
39 Gregory Claeys, The “Survival of the Fittest” and the Origins of Social Darwinism,
Spencer felt that people suffering the consequences of their actions serve the future of society best; for this reason, free education, public health measures such as compulsory vaccinations, and government welfare acted against the future evolution of humanity. Spencer and his followers, known as Social Darwinists, had no sympathy for natives or even the lower classes of their own society. Incidentally, the textbook used by John T. Scopes, of the famous “Monkey Trial,” supported Social Darwinian ideas, such as eugenics, which are no longer considered in the realm of biology.

The history of modern anthropology began with Franz Boas and his students in the late nineteenth and early twentieth centuries. These scholars emphasized the related concepts of culture and cultural relativity. They defined culture as the learned, shared behavior patterns characteristic of a society. In other words, culture for the Boasians was a nonmaterial mental pattern for getting the work of life accomplished. Cultural relativity argues that social acts and forms can only be understood in the context of their own cultural setting.

Some scholars insist that carrying this relativist position to the extreme would maintain that cross-cultural comparisons are futile. This
Boasian, or “American School,” perceived the human mind as a blank slate that became filled with the ideas that governed behavior through the process of enculturation—or in other words, education.\(^{50}\) Ruth Benedict and Margaret Mead, both students of Boas, continued the study of culture by considering early training of children to be a crucial part of the enculturation process.\(^{51}\) Mead studied early child rearing in many parts of the world,\(^{52}\) pointing out differences and interpreting their significance.\(^{53}\) On the other hand, Benedict’s *Chrysanthemum and the Sword* is a national character study of Japan done at a distance during WWII.\(^{54}\) The book acted as a manual for ranking officers and politicians explaining Japanese culture and thought.\(^{55}\) Benedict’s approach involved analyzing patterns of culture to explain how culture forms a system integrated by ideology.\(^{56}\)

There were various responses to this “anti-scientific” approach of the Boas’ American school. The nineteenth-century evolutionists had proposed a unilinear human history in a series of stages, and neo-evolutionists of the twentieth century affirmed this general viewpoint.\(^{57}\) Today, archaeologists still employ the stages termed Paleolithic, Mesolithic, Neolithic, and Bronze Age civilizations to represent universal

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57 ROBERT CHAPMAN, *ARCHAEOLOGIES OF COMPLEXITY* 6 (2003); see also JANET RICHARDS & MARY VAN BUREN, *ORDER, LEGITIMACY, AND WEALTH IN ANCIENT STATES* 3-6 (2000).
IV. DIFFUSIONISM

Culture contact, as British, American, and German diffusionist schools insist, demolishes the veracity of any system of unilinear evolution; that is, the notion that all human societies passed through the same stages of development (but perhaps at different times). For diffusionists, the key feature of human history lies in the way cultural complexes are carried over land and sea from their places of origin to the areas where they are now found. Many diffusionists were colonial administrators trying to defend their governments’ policies. Others were missionaries searching for the origins of civilization. The racism and fantasy of most diffusionists, especially the idea that certain peoples were unequal to the task of assimilating the gift of civilization when it was brought to them, has rendered much of their thinking obsolete.

V. STRUCTURALISM

Structuralists consider all humans to have the same “deep structures” under their cultural veneer; this explains the existence of cross-cultural similarities such as language, reciprocity, and kinship systems, matching concepts of government and evidently closely related religious ideas.

65 Herbert S. Lewis et al., *Current Anthropology* 381-406 (2001).
In other words, they reaffirm Adolf Bastian’s basic argument that all humans think alike.67

VI. FUNCTIONALISM

Functionalists argued that understanding how cultural complexes form systems is more useful than either evolution or diffusion in the study of society.68 While Boaz and his students appear to view different societies to be entities that cannot be usefully compared,69 Bronislaw Malinowski and A. R. Radcliffe-Brown conceived of two functional approaches in the study of societies.70 Malinowski showed that the Kula Ring trade network of the Trobriand Islands, off of eastern New Guinea, is a system of trading partnerships71 that involved dangerous voyages in outrigger canoes to meet with distant partners in order to present highly significant and valuable shell armbands in exchange for coral necklaces.72 Despite the beliefs of the Trobriand Islanders, these Kula articles had no intrinsic value.73 Malinowski observed that the fleet of canoes that set out on Kula expeditions carried secular goods for exchange as well.74 This explained the function of the Kula Ring as a practice that supports ordinary commerce.75

69 CLAUDE LÉVI-STRAUSS, STRUCTURAL ANTHROPOLOGY 35-36 (1963); see also JEROME KIRK & MARC L. MILLER, RELIABILITY AND VALIDITY IN QUALITATIVE RESEARCH 35 (1986).
For Radcliffe-Brown, the Kula Ring had a deeper significance. He noted that the relationships between leading individuals on islands in a large expanse of ocean constituted a substitute for an inter-island government. The trading partnership of Kula Rings, based on reciprocity, allowed safe travel between islands in an area of endemic warfare. Previously, Marcel Mauss had explored reciprocity, insisting

shortcomings of “functionalism is epitomized by Malinowski’s handling of the colonial authorities.”

functionalism is epitomized by Malinowski’s handling of the colonial authorities. For most of the book they are virtually absent, lurking far in the background and exerting little if any influence on traditional Trobriand ways. But in the last 20 pages we see glimpses of the Government Station (the local outpost of the colonial administration), magistrates, and prison sentences, all contaminating and compromising Trobriand law in at least a couple of memorable cases. In one instance, Malinowski reported, in a village ‘adjoining the Mission and the Government Station,’ a former chief’s son had ‘completely ousted the real masters, supported in this by European influence.’ As in so much functionalist work, the reader is left wondering which is the rule and which is the exception.

76 BRONISLAW MALINOWSKI, THEORIES OF MAN AND CULTURE 272 (1973).
77 Glenn Petersen, Indigenous Island Empires: Yap and Tonga Considered, 35 J. of PAC. HIST. 5, 7-27 (2000) (noting that “[s]uch obligations were, of course, reciprocal in nature. A widow engaged in extended public mourning out of obligation to her husband’s relatives; they reciprocated with gifts of food at later ceremonies. Even the epic, inter-island kula voyages gave dramatic emphasis to the ‘sociological ties of an economic nature’ between reciprocally obligated trading partners.”); see Conley supra note 76, at 857.

[M]ore specifically, he argued that Trobriand civil law consisted of “a body of binding obligations, regarded as a right by one party and acknowledged as a duty by the other, kept in force by a specific mechanism of reciprocity and publicity inherent in the structure of their society . . . .” Underlying the enforcement of these obligations was economic reality: a ‘keen self-interest and watchful reckoning . . . ’ a “rational appreciation of cause and effect . . . .” The psychological and cultural manifestations of reciprocity served as reinforcement, appealing to “social and personal sentiments such as ambition, vanity, pride, desire of self-enhancement by display, and also attachment, friendship, devotion and loyalty to kin . . . .” It is clear, though, that Malinowski saw material self-interest as the primary driving force, the chicken rather than
that all humans were programmed to give, receive, and repay gifts. This approach anticipated later structuralist ideas. Mauss argued that the purpose of this reciprocal gifting was to create social ties; in the case of the Trobriand Islands, the Kula Ring integrated the largest form of social organization known to the population there. Malinowski, Mauss, and Radcliffe-Brown all explained the rationale for the dangerous and otherwise unintelligible Kula Ring, which started the study of other strange gift-giving practices, the Potlach, and the frenzied gift buying at Christmas in the United States.

VII. NEO-EVOLUTIONISTS

Today we understand that all societies did not have to progress through all evolutionary stages because diffusion by cultural contact can change a society from a hunting and gathering base directly into civilization. Another problem with nineteenth-century evolutionism is the linking of human physical development to cultural change. Of course, the earliest physical anthropologists and archaeologists did not rely on genetic theory to the extent that contemporary students use these tools, so erroneous ideas about the ancestry of early human populations...
being directly linked to specific contemporary people are associated with the social evolutionism of Herbert Spencer. These scholars condemned social welfare as an act against nature; social evolution requires the “survival of the fittest.” Once again, the purpose of the evolutionists was to explain human differences.

Neo-evolutionists view human culture, as a whole, as constituting everything created by humanity through the use of language or symbolic logic; thus, we can maintain that the way of life of Homo sapiens as a species did advance through the Morgan’s three stages. Neo-evolutionists, especially V. Gordon Childe and Leslie A. White, emphasize this view. White proposes that the evolution of society (human society as a whole) changed by the invention of new energy converters or tools that endowed populations of our species with the use of increased amounts of energy. Childe described the archaeological evidence for a Paleolithic, Mesolithic (two successive stages of hunting and gathering), Neolithic (the stage of agricultural villages), and Bronze Age civilization (characterized by cities, metallurgy, and writing). Of course, individual cultures such as the foraging people of Australia, many of whom make their living as factory workers and teachers, made a quick leap from Mesolithic to contemporary civilization due to contact with the Western world. However, the neo-evolutionists did not consider

87 Christopher S. Henshilwood et al., The Origin of Modern Human Behavior: Critique of the Models and Their Test Implications, 44 CURRENT ANTHROPOLOGY 627, 636 (2003).
89 HARRIS, supra note 85, at 429.
90 Raoul Makarius et al., Ancient Society and Morgan’s Kinship Theory 100 Years After, 18 CURRENT ANTHROPOLOGY 709, 709-11 (1977).
92 HOWARD BRICK, COLD WAR SOCIAL SCIENCE 157 (2012).
94 V. Gordon Childe, Social Evolution in the Light of Archaeology, 4 AUSTRALIAN J. OF ANTHROPOLOGY 175, 177 (1948).
individual societies in their broadest formulations;\textsuperscript{96} they argued that it was the entire human population during the past five million or more years that evolved to greater complexity due to progressively more efficient technology.\textsuperscript{97} The answer to the very different behavior between evolved urban societies and other people is their variations in levels of technology.\textsuperscript{98}

The neo-evolutionists, with this emphasis on technology, may be considered the forerunners of the Materialist School of Anthropology. Leslie A. White, a leading neo-evolutionist,\textsuperscript{99} formulated a universal definition of culture: "Culture is an organization of phenomena—material objects, bodily acts, ideas, and sentiments—which consists of or is dependent upon the use of symbols,"\textsuperscript{100} meaning culture relies on language.\textsuperscript{101} Culture here means human culture—not Japanese or Trobriand Island, but all culture through time.\textsuperscript{102} Instead of mental templates for behavior, culture is a set of more or less material phenomena: acts, objects, ideas, feelings, and language.\textsuperscript{103} White considers the things of the world to be either natural or cultural, and everything cultural takes its form due to the human use of language, which is universally human.\textsuperscript{104} White emphasizes the role of technology in human evolution by arguing that culture changes because humans are more efficient in their use of energy.\textsuperscript{105} In other words, energy converters

\textsuperscript{96} Patrick C. West, Theory of Liberty, Legitimacy and Power 216 (2013).
\textsuperscript{98} Albert Bandura, Social Cognitive Theory: An Agentic Perspective, 52 Ann. Rev. of Psychol. 1, 22-23 (2001); see also Kingsley Davis & Wilbert E. Moore, Some Principles of Stratification, 10 Am. Soc. Rev. 242, 247-48 (1945).
\textsuperscript{99} Abhik Ghosh, Cultural Evolution 16 (2007); see Peter Laska, Left Curve 24 (2000).
\textsuperscript{100} Leslie A. White, Energy and the Evolution of Culture, 45 Am. Anthropologist 335, 335 (1943).
\textsuperscript{101} Sue Savage-Rumbaugh et al., The Emergence of Knapping and Vocal Expression Embedded in a Pan/Homo Culture, 19 Biology and Philosophy 541 (2004).
\textsuperscript{102} Christoph Brumann, Writing for Culture: Why A Successful Concept Should Not Be Discarded, 40 Current Anthropology 1, 5 (1999).
\textsuperscript{103} Clifford Geertz & Michael Banton, Religion as a Cultural System 1 (1966).
\textsuperscript{105} Benjamin S. Orlove, Ecological Anthropology, 9 Ann. Rev. of Anthropology,
tools, such as windmills or cars) use more energy and are better at the use of energy. This approach makes anthropology look more like a natural science and certainly makes White’s approach similar to materialism. Furthermore, White’s anthropology can help interpret elusive concepts, such as the idea of “capital” in economics, in terms of how much energy a person or entity can use.

II. MATERIALISM

Materialists consider economics to be the key to understanding any human society. Moreover, Marvin Harris, a leading materialist, insists that while the study of culture is important, anthropologists should stop accepting the informant’s view of society as the best source of information. Instead of talking with people, the materialist proposes to watch their behaviors and show how that conduct helps the population adapt to the environment. Materialists are at their best when they present explanations of religious practices based on ecology. These include Marvin Harris’s summary discussions of the pork taboos of the Middle East, the great pig feasts of Melanesia, and the sacred cows of India. Harris even suggests that the lack of care that leads to the death of unwanted infants in some parts of Brazil is justified by religious concepts affirming that some babies manifest a strong wish to return as


110 See generally id. (explaining the materialist view through religious mythology).

111 Id. at 57-59, 70.
angels to heaven.112

Claude Levi-Strauss led the French structuralist attack on Boasian thinking.113 The French school, together with its supporters in the United Kingdom and the United States, proposes that under the veneer of culture “deep structures” exist, and due to these unconscious thought patterns, all humans think in the same way, specifically by manipulating permutations and combinations of opposing concepts.114 They support this explanation of the way Homo sapiens think by analyzing myths and kinship structures to show basic combinations of contrasting thoughts.115

Although Levi-Strauss praised and used the results of Franz Boas and his followers, such as Margaret Mead and Ruth Benedict, he viewed his work as a reinterpretation.116 Nevertheless, his argument that “deep structures” are universal throughout humanity and underlie cultural behavior attacks the basic idea of the Boasian school that cultural forms can only be understood in the context of their own cultural setting.117

Another simple idea that has been emphasized and reinterpreted by social scientists is that humans alone are weak and puny, but in groups they can shape their world.118 To explain differences and similarities in human groups, the scientist must understand forms of social organization.119 Most preindustrial social organization is based on different systems of kinship;120 so many anthropologists focus on distinct forms of family and clan organization and their consequences for other

112 Marvin Harris, Theories of Culture in Post Modern Times 46-47 (1999).
113 See Susan Hegeman, Patterns for America: Modernism and the Concept of Culture 9 (1999).
115 Id.
116 See id.
118 See generally Stanley R. Barret, Culture Meets Power (2002) (discussing the social structure of power and the relationship of power to humans).
areas of culture. For example, in societies that are divided into kin groups based on descent through the mother’s line, the child is in the same kin group of the mother’s brother. This relieves the father of economic responsibility for the child and to a certain degree, places the education of a child in the hands of the mother’s kin group. This often results in a very close relationship between the mother and her offspring.

Living together with natives arouses the sympathy of anthropologists for the people they studied. So understanding the point of view of a native became an important priority. The American school promoted fieldwork and learning the language of the natives. As Native American societies changed rapidly during the eighteenth and nineteenth centuries as their populations plummeted, many anthropologists used as informants those older individuals who could explain forgotten aspects of their cultures. This focus on individuals and their life histories led some scholars to invent the field of cultural psychology. Margaret Mead’s study of infants and the ways mothers handle them as they grow up in different cultures results in the formation of personalities.

130 Robert A. LeVine, & Karin Norman, The Infant’s Acquisition of Culture: Early
Mead’s studies are early examples of cross-cultural psychology.\footnote{Nancy Chodorow, \textit{Family Structure and Feminine Personality}, \textit{Feminism in the Study of Religion} 81, 81-105 (Darlene Juschka ed., Continuum 2001); see also Charles M. Super & Sara Harkness, \textit{The Developmental Niche: A Conceptualization at the Interface of Child and Culture}, 9 \textit{Int’l J. of Behav. Dev.} 545, 547 (1986).}

The functionalism of Bronislaw Malinowski also derived from his situation as an enemy alien during World War I;\footnote{Michael W. Young, \textit{Malinowski: Odyssey of an Anthropologist} 1884-1920 (Yale Univ. Press 2004).} caught by the war in Australia, he was exiled to the Trobriand Islands for long enough to learn their language and observe their customs. Through doing so, he learned that their behavior had a systemic quality and an internal rationale.\footnote{Adam Kuper, \textit{Anthropology and Anthropologists: The Modern British School} 1-34 (3rd ed. 1996).}

Prior to Malinowski, most people in the Western world considered the antics of native people to be unintelligible.\footnote{Steven Conn, \textit{History’s Shadow: Native Americans and Historical Consciousness in the Nineteenth Century} 215 (The University of Chicago Press 2004).} Popular anthropology resembled “Ripley’s Believe it or Not” collections of strange customs sometimes explained by reference to Greek and Roman mythology.

**IX. CONCLUSION**

Thus, anthropology—the area of the social sciences specifically involved with the exotic and apparently inexplicable behavior of foreign peoples—has reached the general conclusion that knowing and understanding the different branches of humanity results in an appreciation for their basic humanity.

Governments supported anthropologists in order to learn about potential adversaries.\footnote{David Price, \textit{ Anthropologists as Spies}, \textit{The Nation} (Nov. 2, 2000), https://www.thenation.com/article/anthropologists-spies/.} In all cases, anthropological field workers are at least potential spies that can inform home countries how foreigners act; in the case of a conflict, the government will often debrief individuals
who have worked or traveled in an enemy country.\textsuperscript{136}

Perhaps we should ask: What is the truth about humans? What argument is the key to their similarities and differences? At the moment it appears that all of the ideas discussed are relevant to understanding humanity, even if the positions are contradictory. Social evolution, diffusion, the Boasian emphasis on culture and cultural relativity, functionalism, and structuralism are all necessary aspects of social theory explaining various attempts to understand culture through various interactions in history.

\textsuperscript{136} Id.
ENRON MEETS ACADEMIA . . . ALTERED GRADES, MANUFACTURED TRANSCRIPTS, AND STORE-BOUGHT DIPLOMAS

Harvey Gilmore*

Abstract

As Enron and Bernie Madoff once showed us the depths that people will go to hide who they really are, there are many others out there who have created entire academic profiles. . . and even careers. . . under false pretenses. This is the story of only a few of them.

I. INTRODUCTION

There is no doubt that doing well in school and graduating brings with it a definite satisfaction. Earning a degree, whether undergraduate or graduate, also brings with it a specific image, whether it is one of erudition, polish, intellect, etc. Whatever the case may be, doing well academically is quite a blessing.

I think I can say that most, if not all of us, entertained dreams of being an “A” student. Or, at least the next best thing would be to have grades to at least show off and be proud of. In my own experience, I was just as proud for scoring “B” grades in certain courses as the smattering of “A” grades I scored in certain other courses. At the risk of sounding a touch immodest, admittedly, I got there the hard way. I went from being a failed, demoralized high school dropout all the way to being a college and law school graduate. I was never an honor student or class valedictorian, but I can say that my record in college, graduate school, and law school was at least respectable.

* Professor of Taxation and Business Law at Monroe College in The Bronx, New York; B.S., Hunter College of the City University of New York (1987), M.S., Long Island University (1990), J.D., University of Massachusetts School of Law (formerly Southern New England School of Law) (1998), LL.M., Touro College Jacob D. Fuchsberg Law Center (2005). I wish to thank the marvelous editors for their help, patience, and friendship in bringing this article to fruition.
Once upon a time, academic cheating was as (relatively) simple as copying the answers of the person sitting next to you during an actual exam, or perhaps using some creative calligraphy to change a “D” to a “B”, an “F” to a “P”, or maybe a “60” to an “80” (Or so I have heard). In recent years, some people have truly endeavored to show off stellar academic credentials. Unfortunately, however, these people did not exactly score their grades by taking classes, doing the required coursework, and passing exams. Some of these people have gone so far as to alter their transcripts, make up phony resumes, or even buy a diploma. In some cases, some of these fraudsters never saw the inside of a classroom.

How could something like this actually happen? Sometimes, it is easier than one might think . . . as we will see shortly. Keep in mind that this not a clinic on how to commit academic fraud. Interestingly though, the irony is that if some of these fraudsters had saved their ingenuity for inflating their credentials for legitimate academic pursuits, their grades probably would have been just as sparkling.

II. WHAT IS FRAUD?

In its most basic form, fraud is one party induces another party to enter into a transaction under false pretenses. “Fraud is the type of misrepresentation that is committed knowingly with the intent to deceive.”\(^1\) If a party seeks a remedy from contract fraud, he must be able to prove the following elements:

“1) An untrue assertion of fact was made; 2) The fact asserted was material or the assertion was fraudulent; 3) The complaining party entered into the contract because of his reliance on the assertion; 4) The reliance of the complaining party was reasonable; and 5) Injury – he would have to prove that he had suffered actual economic injury because of his reliance on the fraudulent assertion.”\(^2\)

With the above fraud definition in mind, here’s an example of how I would satisfy each element if I wanted to apply for a professorship at


\(^2\) Id.
XYZ University:

1) **Misrepresentation:** I claim on my resume that I have a Bachelor’s Degree in Accounting from Hunter College, a Master’s Degree in Taxation from Long Island University, and a Juris Doctor from the University Of Massachusetts School Of Law. In reality, however, I dropped out of middle school in the seventh grade, and I have not seen the inside of a classroom since then. My only job since that time is that I twerk . . . I mean work . . . as an exotic dancer at Bonecrusher’s Bar and Grill.

2) **Intent to deceive:** When I tell my phony story about my academic credentials, I did not do it by accident. I knew I was lying when was telling my phony story. “The legal term for this knowledge of falsity, which distinguishes fraud from innocent misrepresentation, is scienter.”

3) **Reliance:** In selling my phony academic credentials, I have to make my story convincing enough to have my potential employer actually believe it. For example, during my job interview, I answer all questions with polish and confidence that would convince my potential employer that I knew what I was talking about. Furthermore, if I had to give a brief teaching demonstration on contract law and my acting skills further convinced the interviewers that I’m the man for the job, then I will most likely receive a job offer. For me, it is mission accomplished!

4) **Injury:** Needless to say, once I start receiving my paychecks every pay period to do a job for which I am both underqualified and overmatched, I am now perpetrating financial harm to my employer merely by cashing those checks. Thus, I am actually stealing my employer’s money as a salaried employee. Not only would my employer likely disaffirm our employment contract, but I would also face multiple criminal larceny charges.

III. **Why Pass Off Phony Grades?**

In financial fraud cases, Criminologist Donald Cressey introduced his theory of the “fraud triangle” as to why some people would commit occupational theft. Cressey defined the three elements of the fraud

3  *Id.*
triangle as 1) pressure, 2) opportunity, and 3) rationalization.

**Pressure:** In financial fraud cases, “one might describe pressure as a deep-seated need to come up with money right away as a result of gambling, alcoholism, divorce, or a high maintenance lifestyle, to name just a few.”4 With academic fraud, the pressure may come in one of several ways. First, a student typically would not want to show his parents a bad grade,5 and then have to listen to his parents endlessly unload on him about how bad he did.6 Presumably, he already knows how bad he did, and to his thinking, his parents would just be piling on. Another possibility could be in having a job offer potentially ride on one’s grades.7 Another pressure might be just simply one’s desire to stay ahead of the competition.8

**Opportunity:** Next, what is opportunity? Opportunity is the occupational fraudster’s sensing that he has a chance to steal company funds while no one is looking and the getting is good.9 That is a financial

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4 Harvey Gilmore, *This is Not a Symposium on How to Commit Fraud – But If It Were*. *J. Bus. & Sec. L.* 199, 210 (2011); see also Kathleen Barney, *This Thing Called Forensic Accounting*, 43 ARIZ. ATTORNEY 34, 38 (2007) (“First, an employee feels the pressure of a financial burden such as a divorce, a gambling problem, alcoholism or an excessive lifestyle. This becomes his or her motivation to steal.”).

5 *See.* e.g., Samantha Harris, *How to Tell Your Parents You Got a Bad Report Card*, WE HAVE KIDS (Oct. 2, 2017), https://wehavekids.com/misc/How-to-Tell-Your-Parents-You-got-a-Bad-Report-Card (“Report card day. If you are anything like I was growing up, this is the most dreaded day of the whole semester. If you’re reading this, you are most likely in a position where you wish you could just crumple up your grades, throw them away, and pretend like the whole semester never happened.”).

6 *See.* e.g., The 5 Stages of Grief of Telling Your Parents You Failed a Class, THE BLACK SHEEP (Nov. 20, 2014), https://theblacksheeponline.com/vcu/the-5-stages-of-grief-of-telling-your-parents-you-failed-a-class (“Even worse than that, they have to mentally prepare for the shitstorm their parents will drop on their heads the minute they get back for Thanksgiving break.”)


definition of opportunity.\textsuperscript{10} In the academic fraud sense, opportunity can be a person sitting down at his computer in the privacy of his own home while creating phony transcripts on his computer in peace and quiet.\textsuperscript{11} 

\textbf{Rationalization:} In my opinion, the rationalization part of the fraud triangle is probably the biggest part of the reason why some would resort to academic fraud. According to Dr. Cressey’s theory, rationalization is where the fraudster attempts to explain why his bad act was not really so bad.\textsuperscript{12} Whether the infraction is cheating on a test, altering a transcript, blowing an exam, failing a course, or whatever, an individual could say something along the lines of “I didn’t kill anybody,” or “I didn’t rob people blind like Enron\textsuperscript{13} or Bernie Madoff,\textsuperscript{14} or simply “What’s the big deal? It’s just a stupid class I’ll never use in real life.”\textsuperscript{15} (I used that last one myself a zillion times as I was flunking out in my senior year of high school.) The bottom line is whether academically, financially, or otherwise, the fraudster did misrepresent what he is and manipulated the facts for his benefit . . . and someone else’s harm.

\textbf{IV. ALTERING LAW SCHOOL GRADES: MATHEW MARTOMA}

Imagine, if you will, being a first-year student at Harvard Law School and scoring the following grades: Civil Procedure (B), Contracts (B+), Criminal Law (B), Torts (B+), Property (A), and Negotiation (A-). 

\begin{itemize}
\item \textsuperscript{10} \textit{Id.}
\item \textsuperscript{11} See generally, \textit{ALLEN EZELL \& JOHN BEAR, DEGREE MILLS: THE BILLION-DOLLAR INDUSTRY THAT HAS SOLD OVER A MILLION FAKE DIPLOMAS} (2012) (describing the rising problem of fake universities and counterfeit degrees).
\item \textsuperscript{12} Gilmore, \textit{supra} note 4, at 210.
\item \textsuperscript{13} See, \textit{e.g.}, \textit{BETHANY MCLEAN \& PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON} (2003).
\item \textsuperscript{15} See, \textit{e.g.}, Dana Goldstein, \textit{Advanced math is pointless and only causing our students to fail}, \textit{DALLAS NEWS} (Mar 10, 2016), https://www.dallasnews.com/opinion/commentary/2016/03/10/dana-goldstein-advanced-math-is-pointless-and-only-causing-our-students-to-fail; see also Rayn Samson, \textit{School is Pointless}, \textit{MEDIUM} (Oct. 16, 2017), https://medium.com/the-emperor-has-no-clothes/school-is-pointless-615cd94b2047.
\end{itemize}
I would certainly live happily ever after, and would never entertain the thought of altering those grades. For me, altering perfectly respectable grades like those would be the same as throwing away three aces in a poker hand trying to draw to an inside straight.

Amazingly, a former Harvard law student did just that. ¹⁶ A recent insider trading case revisited the very incident where the defendant had altered his grades during his time at Harvard Law School.¹⁷ Mathew Martoma was a hedge fund manager at SAC Capital who was eventually convicted on charges of insider trading.¹⁸ During the trial, the prosecution had evidence of the fact that Martoma had altered his Harvard Law School transcript fifteen years earlier.¹⁹

According to his records at Harvard Law School, Martoma, then known as Ajai Mathew Thomas, changed his grades in the following first year courses: Civil Procedure (from B to A), Contracts (from B+ to A), and Criminal Law (from B to A).²⁰ He claimed he wanted to show his altered transcripts only to his parents,²¹ but the problem was further complicated when his twenty-three applications for federal clerkships included his altered transcripts.²² Eventually, Harvard Law School

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¹⁶ Govt’s Mot. In Lim. to Admit Evid. Concerning Def. Expulsion from Harvard Law School in Resp. to Potential Defenses 3 (Jan. 9, 2014), available at http://online.wsj.com/public/resources/documents/010914martoma.harvard2.pdf (“According to undisputed evidence presented to the Ad Board, Martoma used computer software in December 1998 to create forged Harvard Law School transcript, one that altered the first year grades reported on his official transcript by changing several B grades to As.”).


¹⁸ Kevin McCoy, Martoma convicted in insider trading case, USA TODAY (Feb. 6, 2014), https://www.usatoday.com/story/money/business/2014/02/06/martoma-verdict/4958709/.

¹⁹ Goldstein & Stevenson, supra note 17.


²¹ Id.

²² Id. at 3.
expelled Martoma in 1999.23

V. MATHEW MARTOMA’S ACADEMIC FRAUD, VOLUME 2

Obviously, getting expelled from law school is bad enough in and of itself. While it is quite embarrassing, one hopes that one can come to terms with what happened, take responsibility for what happened, and eventually move on.

After leaving Harvard, Mathew Martoma applied for and, was accepted, into the MBA program at Stanford University in 2001.24 He graduated in 2003 without incident.25 However, during his insider trading trial, his falsifying his law school transcript became public knowledge, and it was then that Stanford decided to further investigate his record. In reviewing his application for admission, the Stanford administration discovered that Martoma never disclosed that he had been expelled from Harvard Law School for altering his grades.26 Consequently, Stanford revoked his MBA degree on the grounds that his nondisclosure of his Harvard history helped him get admitted under false pretenses.27

In every admission application I ever filled out, they all had a similar

23 Goldstein & Stevenson, supra note 17, at 1.
25 Id.
27 Byrne, supra note 24.
question that asked something along the lines of: “have you ever been expelled from, or subjected to discipline from, any academic institution you attended?” 28 Naturally, I had to disclose my disastrous time in high school, resulting in my academic dismissal. Happily, I was able to get accepted in all the institutions that I graduated from. Surely, flunking out of high school is nowhere near failing to disclose a law school dismissal for altering grades, as in Mathew Martoma’s case, but this unfortunately shows the lengths someone will go to just to make one’s record look better than it actually is.

VI. MORE LAW SCHOOL GRADE ALTERATIONS: PHILIP C. PROTHRO

In the case of Philip C. Prothro, he attended Rutgers Law School from September 2001 until May 2004. 29 His official transcript showed that he earned B grades in Torts and Legal Research and Writing in the fall 2001 semester and a C+ grade in Constitutional Law in the spring 2002 semester. 30 However, when Prothro applied for a summer associate’s job with the law firm of Sills Cumins in 2002, he submitted a manufactured transcript showing B+ grades in both his Torts and Legal Writing courses 31 (instead of the B grades he actually scored). Had it been me, I would have taken those two B grades and ran for my life (although I did get a B in Legal Writing in my first semester)!

When Prothro applied for a summer associate’s job with Sills Cumins in 2003, he submitted another manufactured transcript to the firm. 32 In addition to his inflated first year grades, this transcript showed


30 Id. at 3.

31 Id. at 3.

32 Id.
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a B- grade in Constitutional Law (instead of his actual C+ grade).\textsuperscript{33} 

Now this gets even worse. In October 2008, Prothro started a new job at the firm of Herrick, Feinstein, LLP.\textsuperscript{34} Instead of submitting official copies of his law transcript, he submitted a transcript photocopy which now included an A in Constitutional Law.\textsuperscript{35} When he finally submitted an official copy of his transcript, he affixed a Post-it note to someone named, Elise, and his writing on the post-it, in black marker ink, hid his actual Constitutional Law grade on the transcript.\textsuperscript{36} 

Prothro was finally caught when another employee at the firm held up his official transcript to the light and saw the hidden, correct C+ grade in Constitutional Law on the transcript.\textsuperscript{37} The firm, exercising due diligence, confirmed Prothro’s actual grade with Rutgers Law School.\textsuperscript{38} After the firm’s managing director fired Prothro, he also reported Prothro to the state’s disciplinary board.\textsuperscript{39} After the board split on whether to suspend Prothro’s license or merely censure him, the board ultimately decided to censure him.\textsuperscript{40} Needless to say, I think Prothro was very lucky here. He learned the hard way that an honest “C” is far better than any dishonest “A.”  

VII. \textbf{WHY TAKE CLASSES IF I CAN JUST MAKE UP MY GRADES?}  

Let’s go back to my earlier hypothetical of my scoring a college law professor’s teaching gig despite the slight detail that I never finished middle school. (Remember friends, the operative word here is HYPOTHETICAL.) Since my job requires that I have both a college  

\textsuperscript{33} \textit{Id.} at 8, 12.  

\textsuperscript{34} \textit{Id.} at 3.  

\textsuperscript{35} Prothro, Docket No. DRB 11-061 at 3.  

\textsuperscript{36} \textit{Id.} at 3, 4.  

\textsuperscript{37} \textit{Id.} at 4.  

\textsuperscript{38} \textit{Id.}  

\textsuperscript{39} \textit{Id.}  

degree and a law degree, that would also require that I go to school for several years to legitimately earn both degrees. A full-time undergraduate student would normally need at least four years to complete a Bachelor’s Degree (approximately 120-128 credits) and a full-time law student would need at least three years to complete a Juris Doctor Degree (approximately 90 credits).

That would be fine if I wanted to take the time and take the legitimate route to academic success. Then again, why should I waste all that time in actual classes when there might be an “easier” way for me to get my degrees? If I have a good enough idea to manufacture my academic credentials, and have good enough acting skills to convince people that I can do the job . . . then why not?

How could I possibly pull this off? For openers, I would create some phony transcripts. “First, I could go to Staples or Office Max and purchase a more expensive, fancier type of paper. Next, while I’m there, I can order a special stamp that approximates the official seal of each school that I allegedly graduated from. After that, I put the special paper into my printer and I can make up a transcript showing what courses I’ve taken in which semesters, as well as the grades that I received in each course. Last, I visit the schools I graduated from, procure some letterhead envelopes, and I mail my transcripts from the nearest post office which will have the postmark from my schools’ nearby location.”41

Thus, as long as I am making up a genuine looking transcript (albeit totally false), I will also make myself look both attractive and erudite by putting in enough fictitious grades to manufacture an overall grade point average of about 3.8 . . . good enough for me to graduate magna cum laude.42 As long as nobody asks any questions . . .

**VIII. Marilee Jones and the M.I.T. Admissions Scandal**

While the above hypothetical is obviously facetious about creating a fictitious academic profile, unfortunately there are those who built entire careers on such a lie. One well publicized example of this involved

41 Gilmore, *supra* note 4, at 207.
Marilee Jones, the former dean of admissions of the Massachusetts Institute of Technology ("M.I.T."). She had started her career at M.I.T. working in the admissions office in 1979. "So when she put together her resume, she lied about her education."\(^{43}\) She claimed that she had degrees from Albany Medical College, Union College, and Rensselaer Polytechnic Institute.\(^{44}\) Unfortunately, as it turned out, she did not graduate from any of those places. "A spokesman for Rensselaer said Ms. Jones had not graduated there, though she did attend as a part-time nonmatriculated student during the 1974-75 school year. The other colleges said they had no record of her."\(^{45}\)

Admittedly, she rationalized her initial resume fraud by thinking M.I.T. would not give her application a second thought: "At the time I thought, ‘In a million years they’d never hire me,’ so I said I went to one college when, in fact, I went to another college."\(^{46}\) Sure enough, her resume got her that first job. "I just slid that under the door, and honestly, I forgot all about it. It just got me in the door, and that was good for me, and off I went."\(^{47}\) Obviously, one can make a compelling argument that M.I.T. does not have clean hands here and cannot exactly claim moral superiority here. Why? A simple lack of due diligence . . . the school apparently never conducted any kind of background check. "Nobody tried to verify her credentials and she got the job."\(^{48}\)

The tragic irony of Jones’ situation was that she was good in her job, and the students that she worked with absolutely loved her.\(^{49}\) Over the next twenty-eight years at M.I.T., Jones worked her way up the ranks and eventually scored the top job as the dean of admissions.\(^{50}\) By the time the popular Jones became the dean in 1998,\(^{51}\) she realized that the little


\(^{45}\) Id.

\(^{46}\) Id., supra note 43.

\(^{47}\) Id.

\(^{48}\) Id.

\(^{49}\) Id.; see also Lewin, supra note 44.

\(^{50}\) Id.; see also Gilmore, supra note 4, at 208.

\(^{51}\) Sarah H. Wright, Jones is new dean of admissions, MIT NEWS (Dec. 17, 1997),
white lie that jumpstarted her career to its peak was now on its way to becoming unsustainable. She had the pressure of living up to her new job and simultaneously worrying that her false resume would eventually catch up to her. “Soon thereafter she started having arrhythmias and waking up with chest pains. She could not shake the thought that her lies had been unnecessary: her first job at MIT apparently did not require a degree.”

On the one hand, Jones rationalized her going for the dean’s position as a response to several doubters that M.I.T. would never hire a woman for that position. However, as time went on, Jones became acutely aware that her position was precarious, given how she originally got her foot in the door. Thus, the undeniable pressure for Jones to co-exist with her conscience, her job and her resume . . . and hold it all together . . . might become a possible heart attack right around the corner: “The pressure of that secret, became too much to bear.” Moreover, Jones even realized the possibility that she might not (mortally) survive the experience if she did not face up to her predicament: “There was a moment where, in my office, I had a direct knowingness that I was going to die, if I didn’t clear this.”

Ultimately, the truth of Jones’ resume surfaced in 2007 after M.I.T. received an anonymous tip regarding certain possible inconsistencies in Jones’ resume. It was then that M.I.T. finally investigated her academic background and discovered that Jones never graduated from any of the institutions she claimed on her resume. Jones finally admitted the falsification of her resume to the administration and resigned immediately. This was a terrible, sad end to Jones’ otherwise brilliant career as an academician.

53 Id.
54 Martin, supra note 43.
55 Id.
56 Id.
57 Id.
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After Jones’ spectacular crash and burn, one final bizarre twist to her story seemingly came out of nowhere. Yes, she never graduated from the institutions she claimed. Yet, she actually received an undergraduate degree from the College of Saint Rose in 1973—but she never included it on her resume.58 What could have possibly compelled Jones to fabricate three degrees on her resume but not include the actual college she graduated from? How much different would her career be if she had only put that degree on her original resume? Sadly, we will never know.

I understand that some people will always think of Marilee Jones as just another fraudster who “gamed the system” to ultimately score a deanship. I also understand the argument that she deliberately sat on her “original sin” for nearly thirty years and only got caught because her employer responded to an anonymous tip. In addition, no matter how good she had been at her various jobs at M.I.T., she certainly could not have kept her deanship in the face of what eventually happened. After all, a dean’s position at most colleges presumably requires a doctoral degree as a condition precedent for a party to hold the position.

I admit here that I may be in the minority regarding Marilee Jones. I agree what she did is far beyond a silly mistake such as two plus two equals five. This was a horrendous, indefensible lapse in judgment. At the same time, I would not be so quick to lump Marilee Jones in with so many other fraudsters whose sole purpose was to take whatever they could get, no matter who got hurt.59 She did what she could to ease the burden of freshman applicants. She spoke out against the frenzy for student applicants to try to meet unrealistic goals for perfection. She urged students to simply relax. She did her job well. Are these the acts of a serial fraudster? I think not. I believe to an extent that Marilee Jones became stuck in the middle of a perfect storm. A little white lie, plus an employer’s lack of due diligence, plus occupational success, grew into an


unstoppable monster called \textit{STARDOM!} And after a perfectly improbable twenty-eight year sequence of events, Marilee Jones found herself in such an untenable position that only full disclosure could finally rescue her from it.

\textbf{IX. ADAM WHEELER’S MASSIVE IVY LEAGUE SCAM}

One of the most spectacular academic scams in recent memory involved would-be Harvard “student” Adam Wheeler. In creating his academic profile, he did just about everything under the sun, including:

Plagiarizing essays on his Harvard Admission Application.

Manufacturing near perfect scores on his SAT (“Scholastic Aptitude Test”) exam.

Forging a letter of recommendation from a high school counselor.

Misrepresenting that he was attempting to transfer to Harvard from M.I.T., a school that he never attended as he attended Bowdoin College.

Winning a summer abroad to attend a special program at Oxford, then following up with winning the Hoopes Prize, Harvard’s most prestigious undergraduate writing award. He won both with fabricated, plagiarized essays.

Plagiarizing an essay written by a Harvard English professor, and including it as part of his application for a Rhodes scholarship.

Where do we begin? Wheeler’s story begins when he was a high school senior who applied to Bowdoin College.\footnote{\textit{Id.} at 13.} Before Wheeler started formulating his personal essays on his applications, he came across a book called “50 Successful Harvard Application Essays.”\footnote{\textit{Id.} at 11.} Rather than write about his own experiences prior to college, Wheeler instead decided to appropriate essays written by others as he needed them.\footnote{\textit{Id.} at 12 (“[H]e found these essays to be a good batch to imitate – or to just plain steal.”).} At the end, Wheeler’s completed application included five completed essays—none
of them his. But, he was in.

In his second semester, at Bowdoin, Wheeler won a poetry writing contest at the college with a piece called “Hay.” Unfortunately, the contest judges completely missed that Hay had been actually written by a Pulitzer Prize winning poet named Paul Muldoon. Later, Wheeler enrolled in a philosophy class in which he routinely plagiarized his writing assignments. Eventually, he decided to transfer from Bowdoin and take his talents to Harvard.

In his application to Harvard, Wheeler wrote a completely phony personal essay in which he liberally stole lines from writers James Engell, Stephen Greenblatt, George Whitesides, Charles Maier, and Jorge Dominguez, all of whom were Harvard professors at one time or another. Next, he sent Harvard manufactured grade reports that showed he scored a near perfect score on his SAT exam, scoring 1,580 out of a possible 1,600. Finally, he submitted made-up transcripts that showed he was transferring not from Bowdoin, but from M.I.T. While his Harvard application was pending, Wheeler was hit with a one semester suspension from Bowdoin and failure of his philosophy class after his professor discovered his plagiarism. No worries, though. Wheeler was on his way to Harvard.

Now that Wheeler was in Harvard, his creativity continued unabated. In what was chronologically his junior year, he faked his way into the

63 Id. at 13-15 (“Two copied essays were not enough for Wheeler... Wheeler decided to send in three extra personal statements. And all three came from The Crimson’s essay book.”).
64 ZAUZMER & YU, supra note 59, at 14-16.
65 Id. at 21.
66 Id. at 21.
67 Id. at 26-27.
68 Id. at 27.
69 ZAUZMER & YU, supra note 59, at 29-30.
70 Id. at 33-34.
71 Id. at 44-47.
72 Id. at 52-56.
73 Id. at 76. (“In late spring, Wheeler received his letter. He was in.”)
prestigious Bread Loaf summer program at Oxford University, and also won the Hoops Prize, Harvard’s award for the best undergraduate written paper. Needless to say, Wheeler won the Hoops award with work that was not his. What a surprise.

Wheeler’s phony joy ride through college life finally derailed after he submitted Professor Greenblatt’s stolen passages as part of Wheeler’s applying for a both a Rhodes scholarship and a Fulbright scholarship. Professor James Simpson, a colleague of Professor Greenblatt’s, caught Wheeler before Greenblatt began his scheduled interview of Wheeler as part of the Fulbright process, recognizing Wheeler’s paper as Greenblatt’s copied verbatim. Thus began the sequence of events that eventually undressed Wheeler and finally exposed him for the fraud he surely was.

Once Wheeler received notice that Harvard’s university disciplinary board was going to diligently investigate the plagiarism allegation, Wheeler took the coward’s way out—he made a run for it: he sent an email to the dean who first notified him of the plagiarism: “Dear Dean Smith, I am writing to let you know that I choose not to appear at the Ad Board hearings, and to request immediate withdrawal from the college. Thank you. Yours, Adam.” (What a stand-up guy.) Eventually, Harvard learned all about Wheeler’s chicanery, from his phony essays to his manufactured SAT scores to his phony transcripts, and everything else in between. Consequently, Harvard took great steps to firmly disassociate itself from Adam Wheeler. First, the university rescinded his acceptance and expelled him. The administration let him know in no uncertain terms: “To be very clear: you are no longer a student at Harvard College, nor may you ever represent yourself as ever having been a student at Harvard College.”

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74 ZAUZMER & YU, supra note 59, at 102-104.
75 Id. at 106.
76 Id. at 105-108.
77 Id. at 112-122.
78 Id. at 123-127.
79 ZAUZMER & YU, supra note 59, at 132.
80 Id. at 149.
In addition to Wheeler’s expulsion, Harvard also took the additional step to expunge Wheeler’s records so there is no evidence that he was ever accepted, admitted, or enrolled. There is also no record of any grades Wheeler might have earned, legitimate or otherwise.\textsuperscript{81} Finally, Harvard also pursued criminal charges against Wheeler: larceny, identity fraud, pretending to hold a degree, among other counts.\textsuperscript{82} The court originally sentenced Wheeler to ten years’ probation.\textsuperscript{83} He was also ordered by the court to repay Harvard over $45,000 in restitution for all of the financial aid, grants, and other rewards he had received under false pretenses.\textsuperscript{84} For all that he did to defraud Harvard, Wheeler got off pretty cheaply to get ten years’ probation without any jail time.

This should have been the end of Wheeler’s story but for these two final postscripts. First, after his “escape” from Harvard, he applied to and was accepted by Stanford University. For obvious reasons, he never attended.\textsuperscript{85} Secondly, he violated one of the terms of his probation by putting his Harvard attendance on his resume.\textsuperscript{86} This finally got Wheeler a year in jail.\textsuperscript{87} Presumably, Wheeler has kept a low profile since then. However, should he entertain thoughts about applying for college again, I hope he never applies to mine.

\textbf{X.\textsuperscript{88} CAIYVA CHANDRA’S INFLATED STORY}

Cayva Chandra first applied to Cornell University for the fall 2008 semester, but the university rejected her application.\textsuperscript{88} She also applied

\textsuperscript{81} Id. (“Today, there is no official testament to the fact that Wheeler spent more than two years at Harvard. The classes he took, the grades he received, the house he lived in, the prizes he won – these have all been erased. According to the institutional record, those years just did not happen.”)
\textsuperscript{82} Id. at 168-169.
\textsuperscript{83} Id. at 186.
\textsuperscript{84} ZAUSZER \& YU, supra note 59, at 186.
\textsuperscript{85} Id. at 150, 160.
\textsuperscript{87} Id.
to Carnegie Mellon University ("Carnegie Mellon"), and included in her application a forged letter of recommendation, supposedly from one of her high school teachers.\textsuperscript{89} Carnegie Mellon accepted her application, and Chandra enrolled in the fall 2009 semester.\textsuperscript{90} Chandra was also able to receive financial aid and student loans.\textsuperscript{91}

The next year, Chandra again applied to Cornell, this time as a transfer student.\textsuperscript{92} In her application, she supplied a phony transcript in which she reported a grade point average (GPA) of 4.0. In actuality, her GPA was 2.79.\textsuperscript{93} She also included a false high school transcript as well as another forged letter of recommendation, supposedly from one of her high school teachers.\textsuperscript{94}

Unaware of the falsity of Chandra’s statements, Cornell accepted Chandra as a transfer student for the fall 2010 semester.\textsuperscript{95} Chandra went on to send Cornell a false transcript of inflated grades from her second semester at Carnegie Mellon.\textsuperscript{96} Once at Cornell, Chandra was able to receive a total of $130,000 in financial aid.\textsuperscript{97} The court eventually found that if Cornell knew the truth of Chandra’s record, Cornell would not have accepted her application for admission and would not have given her financial aid.\textsuperscript{98}

In 2013, while still at Cornell, Chandra began applying to medical school through the American Medical College Application Service ("AMCAS").\textsuperscript{99} Continuing her practice of making her record look more attractive than it really was, Chandra submitted false transcripts from

\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{99} Id.
both Carnegie Mellon and Cornell.\textsuperscript{100} Her manufactured Cornell transcript showed an overall GPA of 4.0, but her GPA was actually 1.983.\textsuperscript{101} Needless to say, a 1.98 GPA is not exactly a ringing endorsement of someone claiming to be a good student.

Chandra’s scheme fell apart when AMCAS notified Cornell that it suspected a forged transcript from Chandra, and Cornell immediately began an investigation into her record.\textsuperscript{102} Cornell ultimately discovered that Chandra’s record was phony and confronted her with its findings.\textsuperscript{103} After Chandra admitted to her fraud, Cornell expelled her from the college.\textsuperscript{104}

Similar to Adam Wheeler’s story, Cayva Chandra’s story does not end with her expulsion from Cornell. After leaving Cornell, Chandra next applied for admission as a transfer student to Indiana University-Purdue University Indianapolis (“IUPUI”).\textsuperscript{105} If Chandra’s misrepresentation of grades (which she also did on this application)\textsuperscript{106} was not enough, she must also have misrepresented her standing as a transfer student. Why? Because a transfer student application package must include verification that the student is currently in good standing at the institution from which he or she wants to transfer from.\textsuperscript{107}

Chandra was not only accepted into IUPUI, but IUPUI even gave Chandra transfer credit for courses she had neither taken nor passed while at Cornell.\textsuperscript{108} Chandra ultimately graduated from IUPUI in 2015, but IUPUI rescinded her degree the next year.\textsuperscript{109} Chandra eventually pleaded

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\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{109} Id.; see also Girisha Arora & Nicholas Bogel-Burroughs, Expelled Cornell
guilty to federal student loan fraud. The court sentenced her to pay a $1,000 fine, pay over $70,000 in restitution to Cornell, and put her on five years’ probation.

XI. CLASSES? WE DON’T NEED NO STINKING CLASSES!!

In light of what we have just seen, it is fairly easy to picture how someone could feel some compulsion to manufacture their grades, transcripts, resumes, etc. Amazingly, there are those who will even complete their academic profile by purchasing “degrees” that are not worth the paper they are printed on. “There are more than 3,300 unrecognized universities, worldwide, many of them outright fakes, selling bachelor’s, master’s, doctorates, law, and medical degrees to anyone willing to pay the price.”

Why would any presumably self-respecting individual want to take the chance and buy a degree that would be worthless? “For some, it is a persuasive reason to short-circuit the process by purchasing a degree in the hope of getting away with it.”

Of course, there are legitimate reasons that justify getting a degree,

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112 01Minimalist, Blazing Saddles We don’t need no stinking badges, YOUTUBE (Feb. 1, 2012), https://www.youtube.com/watch?v=Pl9jFp0cnig.


114 EZELL & BEAR, supra note 11, at 11.

115 Id. at 104.
and doing the actual work that comes with it. John Bear, co-author (along with Allen Ezell) of the book on phony credentials, “Degree Mills,” had a consulting service in which he advised clients who wanted to earn a degree. To this end, Bear provided prospective clients with a questionnaire that asked, among other things, why the client wanted a degree. The questionnaire provided the following responses, of which the clients can choose one or more:

“1) My employer/potential employer says I must have a degree.

2) I plan to look for a new job, and the degree will help.

3) I would like to advance/get higher pay in my current job.

4) I wish to learn more about my field of interest.

5) I plan to start or expand a business, and I want my customers or clients to have more confidence in me.

6) For personal satisfaction, and/or to earn the respect of others.”

In my own life experience, I had legitimate reasons for pursuing higher education. I went to college to become an accountant, and also to stick it to my old high school by being successful and graduating. I pursued a Master’s Degree because I wanted to specialize in taxation. That was because I scored an A in Federal Income Tax when I was in college, and I always say that was my finest hour as an undergraduate accounting major. I went to law school because I wanted to teach taxation and business law courses, and I knew that a law degree would help me reach my goal.

For all the legitimate reasons to earn degrees, there are, sadly, any number of individuals who have bastardized those legitimate reasons and

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116 Id. at 103-104.
117 Id. at 103.
118 Id.
119 Id. at 103-104.
121 Id. at 288.
took the short cut to phony degrees (if any), often to their discredit (pun intended). 122 Bear and Ezell give examples of some of those “students:”

1) A self-styled automotive engineer who testified on behalf of an auto manufacturer that the brakes “could not have failed” in a fatal accident. This man was exposed on the witness stand as having bought his engineering degree from a notorious degree mill. 123

2) Prominent dancer Lan-Lan Wang, who had been on the faculty of three major universities, resigned when it became known that she did not earn either of her two claimed degrees. 124

3) The president of Toccoa College, Georgia, resigned when the student newspaper reported that he did not receive the master’s degree listed on his resume. 125

4) The former provost of Cheyney University, Pennsylvania, had no choice but to resign when her claim of an Oxford doctorate was found to be false. 126

5) The chief financial officer of the very large Veritas Software Company was fired when it was learned that he had neither the Stanford MBA nor the Arizona bachelor’s degree that he listed on his resume. 127

XII. WHO REALLY GETS HURT BY PEOPLE WITH FAKE CREDENTIALS?

Additional rationalizations by some of those with phony credentials could range anywhere from “I did my best to help,” to “Nobody really got hurt. What’s the big deal?” In response to those self-serving questions, how might one feel if he finds out that his proctologist never went to college or medical school, never worked in a hospital as a resident or intern, and never passed the state medical licensing exams, but “did

122 Ezell & Bear, supra note 11, at 104-105.
123 Id. at 237.
124 Id.
125 Id. at 238.
126 Id.
127 Id. at 241.
2019] Gilmore 265

stay at a Holiday Inn Express last night?"128 Or the client who discovers that the lawyer representing her does not have a law degree? Or the married couple on the edge of divorcing who finds out that their marriage counselor/sex therapist just...isn’t?129 Just what does one say to those clients after a shock like that? I dare say the clients in those situations were genuinely and seriously harmed.

Let us assume that I hold myself out to the public as an experienced tax attorney. I advertise that I offer services in tax preparation, tax consultation and audit representation. A client retains me to represent him at an upcoming IRS audit. We agree to a payment arrangement of $1000, plus five percent of any refund resulting from the audit.

I go over the client’s books and records and I am confident that I can prove that my client does not owe the IRS any additional taxes, penalties, and interest. During the course of the audit, instead of my client owing any money to the IRS, the IRS actually owes my client a refund of $300,000. What could possibly be wrong with a result like that?

When the client returns to my office to pay my $16,000, the client happens to see my law school transcript in the midst of all of the clutter on my desk. My first semester grades were as follows: Torts (F), Contracts (F), Property (F). Happily, I did not fail Civil Procedure (I withdraw), and my best grade was a D+ in Legal Writing. My second semester grades were: Constitutional Law (F), Criminal Law (F), Evidence (F), Wills & Trusts (D), and Federal Income Tax...supposedly my area of specialization...a D+.

Needless to say, grades like those did not get me to a second year. I was academically dismissed, meaning I have no law degree and am ineligible to take my state’s bar exam. How does this affect my client? Well, although I did my job well enough to get my client a large refund, this is a void contract. Thus, my client will not get his refund, and the client will have to retain the services of a legitimate attorney and start all

129 EZELL & BEAR, supra note 11, at 119-120 ("[O]r the couples who divorced following their ‘treatment’ at a New York ‘sex therapy’ clinic run by a high school dropout whose only degree was a PhD purchased from a California degree mill.")
over again. And the client will probably not have a high opinion of a snake like me.

Again, I am emphasizing the point with another self-deprecating, over-the-top hypothetical. Yet, there are obviously some dire consequences resulting from transactions with those whose false credentials manufactured fiduciary relationships with unsuspecting clients/victims. Cases in point:

1) Gainesville, Florida immigration lawyer Fines Casado turned out to have no law degree. While on probation for this offense, he continued practicing law and authorities arrested him again.\textsuperscript{130}

2) In North Carolina, a court convicted Laurence Perry, who bought his MD from the fake British Virgin Islands School of Medicine, after a child he took off insulin, in favor of an uncontested product, died.\textsuperscript{131}

3) A man with fake medical credentials was employed as a psychiatrist at a medical center. Authorities arrested the man after he prescribed a lethal medication to a woman with a history of suicide attempts who did, in fact, kill herself.\textsuperscript{132}

4) “A California heart surgeon with a fake medical degree stopped a patient’s medication. When she died, it turned out she . . . left him half a million dollars.”\textsuperscript{133} (I bet he did not get the money.)

5) A Texas man who did not have a dentistry license performed an eight hour dental surgery on a patient in his home.\textsuperscript{134}

\textbf{XIII. Conclusion}

People going into professional life with phony credentials are more

\textsuperscript{130} \textit{Id.} at 248.

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} \textit{Id.} at 250.

\textsuperscript{133} \textit{Id.}

pervasive . . . and potentially dangerous . . . than people might realize. Imagine a contractor, after submitting the lowest bid to win a bridge construction contract (that is another story in and of itself), hires an engineer to oversee the bridge building operation. How would the public at large feel about the safety of the bridge once it discovers that the engineer who built the bridge pulled an Adam Wheeler and bluffed his way through engineering school? Or purchased an engineering degree without ever taking an engineering class? Or imagine a medical patient going to her gynecologist for what she hopes to be a routine medical exam only to find out her doctor really is not one?

These, in addition to the stories discussed above, are but a few of the instances of parties who wrongfully passed off their phony credentials as legitimate. The harm that such phony credentials inflict is quite palpable. Flashing phony credentials is far from a victimless crime. The academic victims of Bowdoin, Harvard, Carnegie Mellon, and Cornell are proof of that. In addition to the academic victims of credential fraud, let us not forget countless other victims: clients, patients, and employers who were unfortunately taken in by the smooth-talking con artist. In addition, those students who would have rightfully been admitted in to Bowdoin, Harvard, Stanford, Cornell, and the rest were robbed of that opportunity by academic fraudsters like Adam Wheeler, and Cayva Chandra. In this atmosphere of taking short cuts and getting something for nothing, due diligence is everything! Thus, it is more imperative than ever for admissions offices, potential employers, and those who would invite guest speakers to confirm that people are who they say they are. This will save a lot of embarrassment and angst for all concerned.

Finally, keep in mind that for every individual that claims phony credentials, there are those of us who did the legitimate work to earn our degrees. Our grades and degrees are legitimately ours and we claim ownership of them. When anyone asks us to verify our credentials, we have nothing to prove, and more important, even less to hide! Truth is always one’s best defense. I’ll say it again: an honest “C” is far better

than a dishonest “A.”
A Modern and Psychological Perspective on the Court’s Lenient Requirements for a Finding of Qualified Immunity in Cases of Local Police Misconduct and Its Effect on the Abuse of Police Discretion

Nicholas M. Catania*

“The men who are to protect the community against violent aggression easily turn into the most dangerous aggressors. They transgress their mandate. They misuse their power for the oppression of those whom they were expected to defend against oppression. The main political problem is how to prevent the police power from becoming tyrannical. This is the meaning of all the struggles for liberty.”

— Ludwig von Mises

INTRODUCTION

As more coverage is provided on high-profile killings by local police officers, more and more individuals prompt discussions about the current laws that police the police departments. The modern laws allow local police officers to avoid prosecution for egregious acts by providing local police officers with a cushion of “wide discretion to use deadly force” and by setting a heightened “threshold for prosecution.”

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* Nicholas M. Catania is a third-year law student at Florida Coastal School of Law. Nicholas currently holds a position as a law clerk for Robert R. Underwood, II, at Underwood Law, LLC, and is the Managing Editor for the Florida Coastal Law Review. Before pursuing his legal endeavors, he attended Pace University in Downtown Manhattan and received a B.A. in Psychology with a minor in History. Nicholas will be practicing in New York City after graduating law school in May 2019 and taking the New York bar exam.


3 Id.
The Supreme Court, by implication, gives permission to police officers to “shoot first and think later,” while the Court implicitly tells the public that “palpably unreasonable conduct [by police officers] will go unpunished.” This implication essentially allows local police officers to make reckless mistakes, use qualified immunity as an excuse for their conduct, and escape prosecution as a result.

The doctrine of qualified immunity provides an “immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial.” Very rarely are local police officers ever prosecuted. Even if they use “excessive force” and are sued civilly for abusing their police discretion, local police officers are able to escape civil liability through qualified immunity. Qualified immunity attaches when “an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known” (e.g., it is within his “police discretion”).

Police discretion plays an important role in protecting society, yet the abuse of police discretion is deadly. The seemingly endless number of egregious acts disregarded by the courts as “police discretion” contributes to the mass fear of local police officers among the American public.

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5 Id. at 1155.
9 See also Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (stating “[b]ecause the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct).
10 See Collins, supra note 2 (discussing how the abuse of police discretion is deadly because police officers usually escape prosecution for offenses like murder because the courts afford local police officers a wide amount of discretion when deadly force is used).
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For instance, a police cruiser pulls-up behind a woman while she is driving to work and, although she has done nothing wrong, her heart sinks into her stomach upon appreciation of the fact that there is a police cruiser following her. Almost all Americans experience that instantaneous “jumpy” feeling upon the realization that a police vehicle is directly behind them.\textsuperscript{12} This same fear arises because of mere police presence in general, which should be a strong hint that there is a problem with local law enforcement and the modern criminal justice system.\textsuperscript{13}

Would local police departments rather be “feared or loved?” When it comes to the modern criminal justice system, it is apparent that local police officers prefer to use the prior “feared” approach to law enforcement because it is an “easier” approach with similar results in the short-term.\textsuperscript{14} However, the results significantly vary over the long-term.\textsuperscript{15}

\begin{footnotesize}
what-you-gonna-do.

\textsuperscript{12} \textit{Id.}

\textsuperscript{13} \textit{Id.}


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One policy underlying the “feared” approach dates back to Niccolò Machiavelli. Machiavelli answered the “feared or loved” inquiry by stating: “[o]ne should wish to be both, but, because it is difficult to unite them in one person, it is much safer to be feared than loved.” Niccolò Machiavelli reasoned that, in general, men are “ungrateful, fickle, false, cowardly, covetous, dissimulating, hungry for profit, and quick to evade danger” naturally. Thus, under Machiavelli’s view, fear is a better motivator than love because a person’s loyalty as a result of “love” is not as trustworthy and reliable as a person’s loyalty as a result of “fear.” In other words, it is much easier to police society when the local law enforcement is “feared” because societies loyalty would be constant, so long as the fear of law enforcement is constant. However, while it may be easier to be “feared” than “loved,” the modern criminal justice system treats citizens who make mistakes, repay their debts to society, and reasonably deserve a second chance as “second-class citizens,” which unearths a deviation from the United States’ founding principles.

Modern law enforcement deviates from our country’s founding principles because local police officers continuously abuse the wide amounts of discretion entrusted upon them by the Congress, the Court, and the American public. This article aims to shed some light on a small portion of the abuse present in the modern criminal justice system. Specifically, this article will focus on the privilege almost every police officer abuses at the forefront of any arrest: police discretion.

Initially, Part II provides a background of the modern criminal justice system, psychological studies of conformity, and the Stanford Prison Experiment. Next, Part III discusses the police personality and

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16 MACHIAVELLI, supra note 14.
17 Id.
18 Id.
19 Id.
20 This Article will focus on three major areas of police discretionary abuse; however, police discretion is abused in every which way possible and may only be covered in a textbook series or some other similar voluminous series, which is beyond the scope of this article.
21 See infra Part II.
the process of becoming a police officer.\textsuperscript{22} After that, Part IV discusses a few issues regarding the modern abuses of police discretion and their potential remedies.\textsuperscript{23}

**II. BACKGROUND**

**A. Development of the Modern Criminal Justice System**

The modern criminal justice system “takes young people who make mistakes... and traps them [with] in an endless cycle of marginalization and punishment.”\textsuperscript{24} The United States makes up 5\% of the world’s population; however, the United States incarcerates nearly 25\% of the world’s prisoners.\textsuperscript{25} Thus, the population behind bars within the jails of the United States is higher than the top thirty-five (35) European countries combined, which substantially exceeds prison populations of not only Western allies, but also countries like Russia and Iran.\textsuperscript{26}

America’s modern criminal justice system dates back to early colonial days where citizens were still subject to the laws and rule of the British.\textsuperscript{27} William Penn began to promote reform at the end of the seventeenth century and soon after, the drafting of the Constitution occurred.\textsuperscript{28} The Constitution guarantees certain inalienable rights and freedoms; however, a deprivation of these inalienable rights and freedoms could occur on a daily basis.\textsuperscript{29} It is not likely that local police officers would be criminally prosecuted for their egregious actions, and

\textsuperscript{22} See infra Part III.

\textsuperscript{23} See infra Part IV.


\textsuperscript{25} Id.

\textsuperscript{26} Id.

\textsuperscript{27} Id.

\textsuperscript{28} Id.

\textsuperscript{29} Id.; see generally, U.S. CONST.; e.g., Emma Anderson, *When Your Constitutional Rights Are Violated but You Lose Anyway*, ACLU (Jul. 11, 2018), https://www.aclu.org/blog/criminal-law-reform/when-your-constitutional-rights-are-violated-you-lose-anyway.
it is much less likely that local police officers would be subject to civil
liability for their egregious conduct, which leaves persons deprived of
their civil rights a sole civil remedy under 42 U.S.C. § 1983: an
extremely limited civil claim for deprivation of civil rights.30

A majority of the time, police officers are “let off the hook” too
easily.31 For instance, Terence Crutcher, an unarmed black male,
attempted to acquire help with his broken-down car on the side of a
highway.32 When Terence Crutcher sought help from local police
officers, one officer tased Terence Crutcher while the other officer shot
Terence Crutcher dead.33 As a result of the death of Terence Crutcher,
other American citizens took drastic measures and terroristic
approaches to the important criminal justice issue of allowing local
police officers to continuously avoid prosecution for their egregious
conduct.34

How did America mutate “police discretion” into a local police
officer’s “get out of jail free card”?35 During the high-crime periods of
the 1980s and 1990s, political parties highly encouraged the push for
stricter laws, longer sentences, and more vigilant policing.36
Unfortunately, the uneven distribution of those extremely intrusive
policies are still in effect today without the same “high-crime”
circumstances.37

32 Darby, supra note 31.
33 Id.
34 See U.S. v. Stevens, 881 F.3d 1249, 1252 (10th Cir. 2018).
35 Harriot, supra note 31 (stating that police killed more people than the total number of U.S. soldiers killed in action around the world in 2017).
36 Obama, supra note 24, at 819.
37 Id. at 818-19.
Today, revenue drives local police departments instead of the safety needs of the public.38 Through the court’s relaxed standard for police discretion, local police officers can essentially act any way they feel like while policing and making arrests each day.39 Since local police officers pretty much have no filter for their conduct, they may make as many arrests as they like, no matter how unreasonable, with essentially no individual penalty for themselves.40 The amount of arrests and police activity in a year that involving a local police department correlates to potential higher budget allocations for involved local police departments for the following year.41 This is because it appears that local police officers are highly active, when in fact, local police departments inflate this number through frivolous arrests and quota requirements made for the purpose of receiving higher budget allocations.42 For example, according to the Bureau of Justice Statistics, the total U.S. cost for incarceration, including state and local levels, is an astonishing $81,000,000,000.0043 If $81 billion is only the cost for detaining the individuals that police officers arrest, imagine the budget allocations local police departments receive to actually perform those arrests.

Aside from law enforcement’s money-driven motives, local police departments generally do not see the population that they police as the people that they are; rather, local police departments generally dehumanizes society.44 As a result of the modern criminal justice system and the efforts of local law enforcement, 70,000,000 Americans, nearly one-third of adults, have some sort of documented criminal record, which suggests that the current criminal justice system is a failing or that too many frivolous arrests are being made by local law

39 See, e.g., id.
40 See, e.g., id.
41 Id.
42 Id.
43 Obama, supra note 24, at 818.
enforcement.45

B. Conformity & The Stanford Prison Experiment

The temptation to conform is exponentially greater than the human desire to be individually happy and self-aware in modern America.46 In some instances, the human desire to be individually happy derives from an individual’s acceptance, or nonacceptance, by society. This principle dates back to Stanley Milgram’s study of “conformism.”47

Stanley Milgram is a social psychologist who discovered that a majority of people were capable of causing extreme harm to others when a figure of authority told those people to do so.48 Throughout his career, Stanley Milgram worked extensively with Solomon Asch, a gestalt psychologist,49 on Milgram’s conformity based psychological studies.50 While working together, they discovered that persons will agree with the decisions of a group, even if they knew that the group was acting irrationally or unethically.51

The most notable and well-known experiment of Stanley Milgram’s career is one where he had a man that would be electrically shocked whenever Milgram instructed the person, separated from the victim by a divider, to do so.52 Milgram discovered that the experiment’s subjects almost always followed an authoritative figure’s instruction to press a button and electrocute another human-being; the subjects of the experiment were capable of performing acts they

45 Obama, supra note 24, at 818.
46 Catherine Collin, et. al., THE PSYCHOLOGY BOOK 224 (Amy Osbourne et al. eds., 2015).
47 See generally Stanley Milgram, BEHAVIORAL STUDY OF OBEDIENCE (1963).
48 Id.
49 A “gestalt psychologist” attempts to understand the laws behind the ability to acquire and maintain meaningful perceptions in an apparently chaotic world. Dr. C. George Boeree, Gestalt Psychology, WEBSPACE, 2000, http://webspace.ship.edu/cgboer/gestalt.html.
50 Collin, supra note 46.
51 See id.
52 See generally Milgram, supra note 47.
otherwise would not perform but for their instruction to do so.\textsuperscript{53} The subjects were likely unsympathetic because the subjects were on one side of the divider with Milgram, while the person being “shocked” was on the other side of the divider. This psychological finding is significant because it frames a pellucid picture of the modern world: a world where people are longing for acceptance and are readily able to speak and act in ways that conflict with their own ethics, ideals, and sense of self.\textsuperscript{54} After the conformity studies performed by Stanley Milgram and Solomon Asch, Philip Zimbardo executed the “Stanford Prison Experiment” in 1971.\textsuperscript{55} Essentially, Philip Zimbardo looked at how people behaved when put into a “position of authority.”\textsuperscript{56}

The Stanford Prison Experiment began when Philip Zimbardo assigned twenty-four mentally healthy middle-class college students the role of either “guard” or “prisoner.”\textsuperscript{57} The assignment of “guard” or “prisoner” was completely random.\textsuperscript{58} The “guards” would be armed with fake weapons and dressed as prison guards; the “prisoners” would be stripped of all possessions, were unarmed, and were dressed as prisoners.\textsuperscript{59}

On Sunday morning of that same week, the “prisoners” were “arrested” in their own homes, booked at a real police station, and transferred to the “prison,” also known as the basement of the Stanford University Psychology Department.\textsuperscript{60} Philip Zimbardo took extensive measures to make sure that the prison experience felt palpable and as close to “real-life” as possible.\textsuperscript{61}

To the researchers’ amazement, the environment became so hostile that the experiment prematurely ceased after six days because every

\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Zimbardo, supra note 44.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 3-4.
\textsuperscript{60} Zimbardo, supra note 44, at 1-2.
\textsuperscript{61} For example, to dehumanize the “prisoners,” the “guards” were only able to refer to the “prisoners” by their prison numbers, not their actual names. Id. at 3.
college student assigned the role of “guard” became abusive to the other students assigned the role of “prisoner.” The “guards” assaulted and battered the “prisoners” starved the “prisoners”; and “chained-and-hooded” the “prisoners” while the “guards” made them clean the dirty toilet bowls by hand. As a matter of fact, one “prisoner” had to leave thirty-six hours into the experiment because the college student, “prisoner,” experienced “uncontrolled crying, fits of rage, and severe depression” as a result of the “guards’” treatment toward the “prisoners.”

The Stanford Prison Experiment paints a pellucid picture of society where a good-hearted person may easily be induced into behaving in a deviant manner by taking advantage of the strong human desire for acceptance, as opposed to not conforming, being an individual, and potentially being labeled as “weird” or “crazy.” Philip Zimbardo explained: “[a]ny deed that any human being has ever done, however horrible, is possible for any of us to do—under the right or wrong situational pressures.”

In short, Philip Zimbardo depicted through the Stanford Prison Experiment: individuals with power over others develop an authoritarian power complex that causes them to dehumanize the very citizens they are entrusted to protect.

Philip Zimbardo’s psychological discovery along with Solomon Asch and Stanley Milgram’s research depicting that persons are capable of performing egregious acts that conflict with their morals, beliefs, and sense of self, coalesce into the modern mentality of police officers in the current American criminal justice system, which may be coined as the “police personality.”

III. BECOMING A POLICE OFFICER AND DEFINING POLICE

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62 Id. at 16.
63 The “guards” also used the prisoners as their “playthings” by making them take part in degrading games. Id. at 11.
64 Id. at 8.
65 Zimbardo, supra note 44, at 17.
66 Id.
67 See id.
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DISCRETION

A. Qualifications to Become a Police Officer in the United States

1. The Police Personality Requirement

When the American public described how local law enforcement acts, some of the most common terms used were: destructiveness, cynicism, projectivity, anti-intracceptive, authoritarian aggressor, and conventionalists; however, the term “reasonable,” what should be the bedrock of the proper exercise of police discretion, is not commonly used to describe the acts of police officers.\(^{68}\) According to Robert Balch, the most common terms that consistently emerge in regard to a local police officer’s discretion: suspicion, conventionality, cynicism, prejudice, and distrust of the unusual.\(^{69}\)

It becomes increasingly apparent that the “police image” is tainted with distrust and bias, but is it a result of the training police officers must go through? Or maybe it is the result of like-minded individuals becoming attracted to law enforcement professions due to similar upbringings, genetics, or other reasons?

Hogan and Kurtine’s research on the use of the California Psychological Inventory (“CPI”), a psychological test used in selecting recruits for the police academy\(^{70}\), provided substantial evidence of three specific points: (1) the model personality of police; (2) the personality characteristics commonly associated with persistence in police work; and (3) the personality traits related to effective performance.\(^{71}\) The most interesting results of Hogan and Kurtine’s research are the differences between unsuccessful local police applicants and local police officers: (1) the unsuccessful group of applicants were a reasonably-sound group in terms of personal effectiveness; (2) the unsuccessful applicants and the police officers were significantly different on nine (9) out of the nineteen (19) CPI

\(^{68}\) DeVega, supra note 15; Balch, supra note 15, at 106 (describing the typical police man as cynical, suspicious, conservative, and thoroughly bigoted).

\(^{69}\) Balch, supra note 15, at 106.

\(^{70}\) For more information on the CPI see http://johnsonroberts.com/cpi.html.

\(^{71}\) Hogan, R. & Kurtines, W., Personological Correlates of Police Effectiveness, 91 THE JOURNAL OF PSYCHOLOGY 289-95 (1975).
scales; (3) the police officers were more assertive than the unsuccessful applicants; (4) the police officers had more potential for social mobility; (5) the police officers had more self-confidence and social poise; (6) the police officers had a more pronounced sense of self-worth and more self-acceptance than unsuccessful applicants; (7) the police officers had a stronger need for independent achievement; (8) the police officers had more functional intelligence; and (9) the police officers acted more masculine than the unsuccessful applicants.72

Overall, police officers generally surround themselves in “image armor” and perceive the expression of any emotion as a weakness.73 This is likely because they themselves are suspicious individuals, who find it hard to trust and confide in others, which leads them to isolate their feelings and become somewhat detached from their humanity so that they may become “more effective” at their policing.74

2. Pre-Requisites to Becoming a Police Officer

Aside from having the “police personality,” the qualifications required to become a local police officer and obtain the power to ruin or take someone’s life are barely higher than the educational requirements for a high school diploma.75 The minimum requirements to attend the police academy require that the: (1) applicant have a high school diploma or equal equivalent;

(2) applicant is a U.S. citizen; (3) applicant is at least eighteen or twenty-one years of age depending on the jurisdiction; and (4) applicant has no felonies.76 This is an extremely low bar to set for individuals entrusted with a chance to obtain the power of the badge, police discretion, and various firearms and weapons, which are now “military-grade” firearms and weapons.77 All that is required after the

72 Id.
74 “More effective” meaning more likely to perform their job egregiously in order to obtain an arrest. Id.
75 How to Become a Police Officer, LEARN HOW TO BECOME, https://www.learnhowtobecome.org/police-officer/ (last visited Apr. 5, 2018).
76 Id.
77 Id.; see infra Part IV(A).
minimum pre-requisites are met is one passing score on an police academy entrance exam and graduation from that police academy, which usually takes about six months and is not much longer than one semester of undergraduate college.\textsuperscript{78}

As depicted above, the requirements for becoming a local police officer armed with a gun, a badge, and wide discretion for the use of deadly force, are extremely minimal for the amount of power and responsibility that they receive.\textsuperscript{79}

\textbf{B. What Is Police Discretion?}

Local police officers are able to escape prosecution through “qualified immunity.”\textsuperscript{80} Qualified immunity provides immunity for a local police officer’s egregious acts.\textsuperscript{81} Essentially, a local police officer satisfies the requirements for “qualified immunity” if he can show his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known (e.g., it is within his “police discretion”).\textsuperscript{82} A showing that the egregious act was within the local police officer’s discretion is commonly used to shield the officer from the responsibility for his egregious conduct and grant the officer immunity from suit.

“Police discretion” is completely subjective in nature.\textsuperscript{83} Police discretion is influenced by: personal biases; how a person appears; how a person acts; how the officer’s day is going; and endless other factors encompassing the police officer’s past experiences, both public and private.\textsuperscript{84} When local police officers use their discretion, they do not only consider the law and probable cause, local police officers also consider factors such as their “quota” or other practical implications that

\textsuperscript{78} How to Become a Police Officer, supra note 75.

\textsuperscript{79} Id.

\textsuperscript{80} Pearson v. Callahan, 555 U.S. 223, 231 (2009).

\textsuperscript{81} Id.

\textsuperscript{82} Id.

\textsuperscript{83} See generally Alafair Burke, Policing, Protestors, and Discretion, 40 Fordham Urban L. J. 999, 1000 (2016).

may be unethical to consider during a police encounter. However, instead of limiting the amount of discretion a local police officer is allowed to exert to a reasonable amount, the Supreme Court’s holding in *Atwater v. City of Lago Vista* did the opposite and significantly increased the power of police discretion.

Under *Atwater*, local police officers get a free pass to detain anyone as long as some minor criminal infraction occurred, including misdemeanors and traffic violations. Essentially, local police officers have the power to arrest someone because they are having a bad day and the accused is acting somewhat irrationally, or just because they feel like it. However, the local police officer would have to show that it was within the scope of her duty as a police officer, which is not hard to prove based on the courts’ current standard for “qualified immunity” and finding almost every act is within a police officer’s discretion. If a local police officer can come up with some simplistic and basic justification for arresting someone for littering then no deprivation of civil rights occurred; thus, no relief for the individual who angered the officer, and suffered a harm as a result, because of the heavy deference to police discretion or “police expertise” by the courts.

The courts’ treatment of police discretion in regard to qualified immunity becomes a massive issue for the American public because persons may be detained and incarcerated until they make bail, if the incarcerated person can actually afford to make bail. Not only can these situations ruin a young person’s future, tear families apart, and contribute to poverty, the detained person essentially has no recovery because of how likely it is that the local police officer will be granted

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86 See generally *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (holding that when an officer has probable cause to believe that the individual committed an offense, no matter how minor, the officer may arrest the individual without violating the Fourth Amendment).
87 Id.
“qualified immunity” for his acts. When the courts provide mass deference to something as subjective as “police discretion,” it becomes abused and develops into a problem.

IV. Issues Relating to Court Deference to Police Discretion for Qualified Immunity for Local Police Officers

A. Police Militarization Empowers the Abuse of Police Discretion

1. The Problems with Police Militarization

Supplying one who has six months of training in a police academy with a badge, a police vehicle, and a firearm is enough, on its own, to propel the abuse of qualified immunity and police discretion further; however, a majority of local police departments are militarizing their police forces, with the support of the federal government. These modern federal programs supply local police departments with surplus military equipment in addition to the department’s own purchases. These programs provide police officers with excessive firepower that is often far-beyond what is appropriate for the typical police encounter. However, while some communities are more dangerous than others, a typical suburban community is unlikely to require a local police officer to need bulletproof juggernaut suits, mine-proof vehicles, and an endless surplus of firepower so that they can break-up a few house parties, give out a few speeding tickets, and sweep a few small-time drug dealers off of the suburban streets. However, not every local

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89 Erlanger A. Turner, PhD & Jasmine Richardson, Racial Trauma is Real: The Impact of Police Shootings on African Americans, PSYCHOLOGY BENEFITS SOCIETY (July 14, 2016), https://psychologybenefits.org/2016/07/14/racial-trauma-police-shootings-on-african-americans/.


91 Id.

92 Id.

police department is heavily armed with surplus military equipment, there are disparities throughout the country.

Towards the end of August 2017, President Donald Trump revoked President Obama’s Executive Order 13688, which limited the scope of the federal program providing local police departments with military-grade equipment free-of-charge. Specifically, local police departments received excess military gear such as: bayonets, grenade launchers, camouflage uniforms, weaponized aircrafts, ammunition above .50 caliber, and tracked armored vehicles, i.e., tanks. President Trump’s executive order also removed the requirements local police departments had to satisfy before they would be eligible to obtain “helicopters, planes, riot helmets, batons, police-use drones, weaponized drones, armored cars, tactical vehicles, explosives, and pyrotechnics.” Obama’s prior restrictions required local police departments to: (1) receive affirmations from the local government; (2) complete training; and (3) give a “persuasive” reason why the local police department needed surplus military equipment. The policy behind Obama’s Executive Order 13688 was to “ensure that police departments had a guardian, not warrior, mentality, and that it was important for law officers not to treat communities as war zones.” However, since the revocation of Obama’s Executive Order 13688, these logical and rational requirements no longer exist and local police departments may obtain military equipment without adequate safeguards.

Trump’s military-grade arsenal upgrade for local police departments puts weaponry, designed for “actual warfare,” not for the policing of a common community, into the hands of local police officers.


96 Id.

97 Id.

98 Id.
who are not qualified to use military-grade weapons. The prevalence of excessive firepower provides a higher probability that someone will die in an unnecessary police encounter; excessive force, combined with law enforcement’s current “feared” approach to policing, allows local law enforcement to sit upon armored vehicles with high-caliber, military-grade sniper rifles, while pointing them at civilian heads in broad daylight.99

All that is likely to amount from local law enforcement’s new inheritance of a “military-grade” arsenal are “inflamed tensions” between the local police department and the community.100 If local police departments keep militarizing under the belief that bigger weapons initiate fear and will lead to easier population control, then local law enforcement is “adding fuel to the fire,” so to speak. This is because the more radical citizens, usually members of the criminal underground that shoot back at police officers, will unquestionably have the need for bigger weapons as well. Therefore, local police militarization is intimidating not only the general public, but to the criminal underground as well, which will inevitably lead to more violence and casualties because violence feeds violence.

2. Potential Remedies for the Issues Resulting from Police Militarization

Using common sense, military-grade weaponry belongs to the military, not in the hands of local law enforcement. While it is easy to argue why every community needs a strong local law enforcement, the massive military-grade upgrades local law enforcement receive is superfluous. Police departments do not need tanks and grenade launchers to police their local communities. More often than not, the officers in these local police departments are not trained to even use the military-grade weapons and equipment provided to them by President Trump.101 Excessive force is already the most frequently reported abuse of power by police officers, so how would supplying local police

99 Id. (stating that police officers sat upon armored vehicles while pointing military-grade sniper rifles at civilian heads in broad daylight).
100 Id.
101 Reilly, supra note 95.
departments with more excessive force fix the problem? The answer is simple, it does not fix the problem, it magnifies it.

Instead of excessive firepower, local law enforcement needs more intellectuals, less bullies, and a stronger educational curriculum. Local police officers are already afforded “wide amounts of discretion” by the courts, and with the rise of police militarization, local police departments should require higher educational qualifications for acceptance into the police academy as a result. The heightened educational qualifications should require a minimum of four semesters of law-school-level legal study while enrolled at the police academy in order to ensure that the individuals policing the streets have a plethora of legal knowledge, not merely basic legal knowledge, which leaves plenty of room for “police error.” Additionally, police officers should have required “Continuing Legal Education” (“CLE”) hours every year, similar to attorneys and their CLE credit requirements.

The purpose behind the heightened educational requirements for becoming a police officer is that society requires a heightened educational standard for its police officers. Similar to that of an attorney or doctor, a police officer is responsible for the fate of an individual, the resulting effects on that individual’s family, and the resulting effects on the relationships with other people close to that individual. As a result of supplying police officers with heightened training and rigorous educational programs, local police officers would make more intelligent and thought-out decisions, which would overall lower the use of excessive force and police discretionary abuse, and allow courts to provide harsher penalties for local police officers that act recklessly, negligently, or with an intent malum in se.

As a result of higher educational requirements for employment at a local police department, there will be officers with varying levels of legal and practical knowledge. This requires the local police

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103 See supra Part III(B).

104 Along with a program like the CLE credit system attorneys must adhere to.

105 See supra Part III(A)(2).
departments to classify the officers in a tier-based system based on their level of knowledge and educational qualifications. The lowest tier, comprised of the most educationally unqualified officers who lack in both experience and educational intelligence, could only utilize rubber bullets and non-lethal weapons only. The purpose behind the first tier having rubber bullets and non-lethal weapons is because the lowest tier officers would be the most likely to accidentally kill someone during a police encounter. The middle tier officers would have some experience and higher educational qualifications than the lowest tier. As a result of the heightened experience and educational qualification of the middle tier officers, they could use basic lethal weapons, such as pistols. The highest tier officers would have the most experience, higher educational qualifications, and training to use military-grade weapons. The highest tier officers are deserving of the advanced military-grade weaponry and would be less likely to make a mistake while using them.

The rationale behind this tier-based system is that the level of weaponry a local police officer would have is determined by: (1) the officer’s educational qualifications, (2) the officer’s history of error or abuse, and (3) the rate of crime in the area. For instance, a wealthy suburban community will hardly, if ever, require a police department with a tank, drones, and other military-grade weaponry on hand at all times.

Therefore, local police officers should receive grants of weaponry and power equal to their experience and educational level, while also requiring those officers to keep up with that education through Continuing Legal Education or “CLE” programs. This will ensure that only the most-qualified local police officers will have access to the military-grade weapons.

**B. Racially-Motivated Conduct Dismissed as “Police Discretion”**

1. Issues Resulting from Racially-Motivated Conduct Dismissed as “Police Discretion”

In addition to the issues resulting from police militarization are the tragedies resulting from the courts’ relaxed view on police discretion and its effect on minorities. Seemingly endless amounts of research depict that, for similar offenses, members of Hispanic and Black
communities are more likely to be stopped, searched, arrested, convicted, or sentenced to harsher penalties for similar offenses than other racial communities. As a matter of fact, the rates for parental incarceration are two-to-seven times higher for African American and Hispanic ethnicities; however, approximately one-in-twenty African American men are under correctional supervision. Racially motivated conduct in local law enforcement is extremely prevalent and civilian retaliation has resulted in many retaliatory movements. The best way to depict the modern horror that is racism in America’s local law enforcement is by example.

Take Eric Garner, a heavy-set, built, black male who was breaking up a fight when Officer Pantaleo arrived on scene and tackled him to the ground. Although Garner was the anti-aggressor in this situation, Officer Pantaleo automatically pinned Eric Garner as the aggressor because of his appearance and local law enforcement immediately treated him as such. Almost instantaneously, Officer Pantaleo apprehended Garner and put him into a chokehold while Garner pleaded through his muffled voice, “what did I do wrong?” Eric Garner died, while he was in the Officer Pantaleo’s chokehold, on July 17, 2014.

108 As well as the competing “blue lives matter” movement, which is much less relatable to the American public at large.
110 Id.
111 Id.
112 Id.; see J. David Goodman, Eric Garner Died in a Police Chokehold. Why
However, Officer Pantaleo is still employed by the New York City Police Department and a grand jury decided against indicting him.\textsuperscript{113} The grand jury reasoned that Officer Pantaleo did not do anything illegal and acted within his discretion.\textsuperscript{114}

Next, consider Tamir Rice, a twelve-year-old boy killed by two local police officers, Officer Loehmann and Officer Garmback, two seconds after arriving to the scene.\textsuperscript{115} This tragedy occurred when neighbors told the 911 dispatchers that a juvenile male was pointing a “gun” at people in a nearby park.\textsuperscript{116} However, the neighbors told the dispatchers that the gun was most likely fake because a young boy likely possessed it.\textsuperscript{117} When the two local police officers spotted twelve-year-old Tamir Rice with a pellet-gun, Tamir panicked, like any twelve-year-old would, and went to show the pellet-gun to the police officers, which would have proved that he was not a threat.\textsuperscript{118} However, Tamir Rice was swiftly shot down by Officer Loehmann less than two seconds after the police vehicle arrived.\textsuperscript{119} Like Officer Pantaleo, who killed Eric Garner, both Officer Loehmann and Officer Garmback were not indicted after a grand jury hearing and suffered minimal consequences after killing a twelve-year-old Tamir Rice.\textsuperscript{120}

Third, consider Victor Steen, a seventeen-year-old male who rode his bike on the streets of Pensacola, Florida, when an officer chased him down, tased him from the patrol car window, and proceeded to run-over Victor Steen with the police cruiser.\textsuperscript{121} The dash-cam footage from this


\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.; Vira, supra note 115.
\textsuperscript{120} Vira, supra note 115.
\textsuperscript{121} Darcel Rockett, \textit{‘Aren’t You That Guy That Got Shot?’: Victim Talks About
horrific incident was never shown to the public because it was considered “part of the FDLE’s ongoing investigation.” The officer was not charged, returned to duty, and the city paid Victor Steen’s family a $ 500,000.00 settlement. The local Pensacola police officer used police discretion as a familiar guise once again.

Finally, consider Robert Tolan, who was shot by Police Sergeant Jeffrey Cotton in a predominantly white city on New Year’s Eve in 2008. This situation arose when Officer John Edwards ran the license plates of the vehicle Tolan was riding inside of. However, Officer Edwards entered in the license plate information incorrectly. The incorrect vehicle information came up as stolen and Officer Edwards called for back-up immediately. Soon after calling for back-up, Sergeant Cotton arrived on the scene. Tolan complied with all of the police sergeant’s demands and while on the floor of his parents’ porch, Sergeant Cotton grabbed Tolan’s mother’s arm and threw her against the garage in an aggressive manner. Tolan exclaimed “get your fucking hands off my mom,” and Sergeant Cotton shot at him three times, with one shot puncturing Tolan’s chest. Tolan filed suit

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122 Victor Steen (17) Died When He Fled From Police, Was Tasered, Crashed His Bicycle and Was Run Over by Police Cruiser, MYDEATHSPACE (Oct. 9, 2009), http://www.mydeathspace.com/article/2009/10/09/Victor_Steen_17_died_when_he_fled_from_police__was_tasered__crashed_his_bicycle_and_was_run_over_by_police_cruiser.

123 Rockett, *supra* note 121.

124 Victor Steen (17) Died When He Fled From Police, Was Tasered, Crashed His Bicycle and Was Run Over by Police Cruiser, *supra* note 122


126 *Id.*

127 *Id.* at 1863-65; *See supra* Part IV(A)(2) (regarding higher educational standards for police academy admission and graduation to lower the rate of accidental death and errors during police encounters).

128 Tolan, 134 S. Ct. at 1863-65.

129 *Id.*

in 2009 alleging civil rights violations and claimed that Tolan, who is black, came under suspicion because the police department has a history of racially profiling people of color.\textsuperscript{131} According to the documents admitted to the court, more than a dozen Texas residents lined up to testify about harassment, physical attacks, threats, and wrongful detention by Bellaire police officers, including Sergeant Cotton, on people of color in the city.\textsuperscript{132} However, the city asserted that Sergeant Cotton was “immune” from suit because he qualified for qualified immunity.\textsuperscript{133}

The prior-mentioned examples are just a few of the mass amounts of racially-driven abuses of power by reckless local police officers, who also escape penalty through “police discretion” and “qualified immunity.” One thing all the abuses have in common is that no one should have died, or suffered severe injuries, during any of the prior-mentioned police encounters. Two children and one adult, out of four of the total people mentioned above, died as a result of the racially-driven police encounters.

2. Potential Remedies for Racially Motivated Conduct Dismissed as “Police Discretion”

A potential remedy for racially motivated abuses of police power is through integration in the workplace. It is fair to say that the more skills a person acquires, the more talented that person gets. That same concept may be applied to officers partnered together within a local police department.

As a practical matter, officers within a local police department should be paired-up with a partner from a different racial or ethnic


\textsuperscript{132} \textit{Id.}

\textsuperscript{133} \textit{Id.}
background. By diversifying partners, each with different experiences, cultures, and skills than one-another, a more collaborative solution will arise during police encounters due to the multicultural perspectives and realities peacefully intertwining. Not only would common stereotypes decrease, racism would decrease as a result.

More integrated team-building activities would also help to spread cultural awareness around local police departments. However, this does not mean the typical “three-legged race” during the “annual employee team-building day” at the police station; rather, events such as a night out with members of the local police department. In order for the “night out” to work, all officers not on duty would have to be required to show up to ensure that people of different cultures will participate. The purpose here is simply this, the more diverse each situation at a local police department becomes, the more likely each experience will reduce the ignorance that is currently present in America’s local police departments.

The last potential remedy for acts motivated by racism and stereotypes guised as police discretion are harsher penalties for local police officers. These harsher penalties will actually hold local police officers accountable for the lives that they have ruined and their racially motivated conduct. However, there is strong argument against this potential remedy. Justice Scalia stated in Town of Castle Rock v. Gonzales, “if police discretion is restricted or qualified immunity from suit becomes more narrowly tailored, then a police officer’s ability to act becomes inhibited.”134 While this argument is valid when viewed through two extremes, it may be properly executed only once it is properly limited in scope. Police abuse is reliant on how the courts treat police discretion in the qualified immunity analysis. By limiting where qualified immunity may be used as an absolute immunity for local police officers, they will be much more responsible for their actions.

C. The Impact of the Abuse of Police Discretion on Women

1. Issues Relating to the Abuse of Police Discretion’s Effect on Women

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The Supreme Court ruled on Monday April 2, 2018, for an Arizona police officer that shot a woman who posed no objective threat of harm to the officer or others, outside of her home in Tucson.\textsuperscript{135} Although the opinion was \textit{per curiam}, Justice Sonia Sotomayor believed the majority had gone badly astray and stated: “[i]t’s decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public, it tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.”\textsuperscript{136}

However, one of the most disgusting and egregious abuses of police discretion is sexual misconduct towards unsuspecting and unconsenting women. “Sexual assault by police officers against women is extremely prevalent . . . [i]t’s been reported that it’s the second most frequently reported form of police misconduct, after excessive force.”\textsuperscript{137}

In San Antonio, male officers approached Natalie D. Simms and asked to search her vehicle, while she waited for her boyfriend on the side of the road.\textsuperscript{138} The officers stated that they had reason to believe that Natalie Sims had illegal drugs on her.\textsuperscript{139} Natalie Simms voluntarily consented to a search of her car while she waited for her boyfriend.\textsuperscript{140} The lawsuit alleges that the male officers called in a female officer, Mara Wilson, to search Natalie Simms’s person.\textsuperscript{141} According to the court records, Officer Wilson had an issue with Natalie Simms’s clothing and Officer Wilson began stripping the lower half of Natalie

\textsuperscript{135} See generally Kisela v. Hughes, 138 S. Ct. 1148 (2018) (holding the officer qualified for qualified immunity for his actions).
\textsuperscript{136} Id.
\textsuperscript{137} Blades, supra note 102 (stating “police are perpetrators more often than [they] talk about”).
\textsuperscript{140} Medina, supra note 138.
\textsuperscript{141} Id.
Simms while she laid on the side of a public road. Soon after, Officer Wilson began searching Ms. Simms’s vaginal cavity without her consent. Officer Wilson then pulled out a feminine hygiene product that was covered in blood out of Natalie Simms’s vaginal cavity and started waving it around while other male officers were present. Ms. Simms asked why the local police officers searched on the side of the road and not at the police station and Wilson replied: “Which police station? We got a bunch of them.” After the Officer Wilson and the other local police officers violated and embarrassed Ms. Simms, no evidence of illegal contraband was found after Ms. Simms was sexually violated on the side of a public road.

In Mount Vernon, Illinois, a police corporal, Nicholas Gaines, used a police database to obtain a Mount Vernon woman’s phone number and address so that he could invite himself over and grope the woman against her will. While working at the Mount Vernon Police Department, Corporal Gaines stated that he saw the victim driving and had reason to believe that her license was suspended, so he pulled her over to the side of the road. After the confrontation was over, the report states that the victim smiled at Corporal Gaines before she left. Corporal Gaines then used Mount Vernon Police Department records to find the victim’s phone number. Corporal Gaines contacted the victim and asked about the “smile,” he also told the victim that he wanted to return to her home to discuss the contraband left in her garage by drug offenders during a previous matter. Corporal Gaines arrived

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142 Id.
143 Id.
144 Spectrum News Staff, supra note 139.
145 Id.
146 Medina, supra note 138.
148 Id.
149 Id.
150 Id.
151 Id.
at the victim’s home while on duty, in a police cruiser, and with a full police uniform on. Soon after Corporal Gaines arrived, he began to help himself and grope around the victim’s chest and buttocks area while manipulating her clothes. Corporal Gaines pulled up her shirt to see her bra, then he turned her around and pulled down her pants so that he could see the brand of underwear she was wearing. This is where the victim began to feel uncomfortable, began to panic because she did not ask to be touched, and attempted to walk out of the garage away from Corporal Gaines. “[Corporal] Gaines grabbed her, prevented her from leaving the garage, pulled [the victim] back to him, and [stated] that ‘he was not done.’” As the victim struggled she bumped the two-way radio on Corporal Gaines’ belt, causing a “squelch break.” While he responded to a “status check,” as a result of the “squelch break,” the victim escaped. Corporal Gaines was never criminally charged for these egregious acts of sexual assault.

However, his was not Corporal Gaines’s first sex-related infraction. A major complaint was sustained against him for sexual harassment while attending the Illinois State Police Academy for K-9 training. The basis of this complaint was that Corporal Gaines continuously asked to meet with an Illinois State Police employee after work hours to the point of making her uncomfortable enough to lodge a complaint. Corporal Gaines was so well known by other women employed by the Illinois State Police Department that he was given the nickname “Creepy Nic.” Corporal Gaines was not criminally charged for any of these events. Although these occurrences were

152 Smith, supra note 147.
153 Id.
154 Id.
155 Id.
156 Id.
157 Smith, supra note 147.
158 Id.
159 Id.
160 Id.
161 Id.
162 Smith, supra note 147.
163 Id.
164 Id.
already part of the public record, Gaines was still hired by the Frankfort Police Department in January 2017, where he groped a victim in her own home.  

2. Potential Remedies to the Abuse of Police Discretion’s Effect on Women

Aside from local police officers having more cultural diversity when partnered up with another officer, male officers and female officers should be partnered together wherever and whenever possible to ensure that at least one member of each gender is present for almost every police civilian encounter. This is an effective remedy for the impact of police discretionary abuse in most instances because having more than one woman present, who also has a badge and gun, will drastically drop the chances of a male officer being able to perform egregious acts upon an innocent woman.

By maintaining a quota of female police officers at each police station with a variable deviation depending on the population of the locus and the size of the police department in any given area, the abuse of women by local police officers will likely diminish. The caveat with this remedy is that, as of 2013, 88.4% of full-time law enforcement are males; leaving 15.6% of full-time police officers being female. However, by encouraging more women to become employees of law enforcement the percentage of women per police encounter should naturally rise.

However, female police officers can use police discretion to abuse women as well, as seen in Natalie D. Simms’s case. For situations

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167 See Matt Agorist, `Cops Rip Out Innocent Woman’s Tampon, Vaginally`
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like Ms. Simms’s situation, the presence of more than one woman may have helped to stop this situation from happening. People are influenced heavily by their environment, so it is not shocking that female police officers are generally less sympathetic to other women due to the imbalanced ratio of male and female police officers at local police departments. Therefore, by having more women in the field there will be less unreported rapes and sexual abuse instances because women, naturally, will not hesitate to stop or prosecute an officer who used his or her police discretion to abuse a woman’s sexual privacy.

VI. CONCLUSION

The lenient requirements for “qualified immunity” by the courts and its resulting police discretionary abuse affects every American citizen and non-citizen on a daily basis. A handful of the problems derivative of police discretionary abuse are: (1) psychological impacts; (2) abuse of police militarization; (3) stereotyping; (4) racism; and (5) maltreatment towards women, inter alia. The proposed remedy for police officers who abuse their discretion is to hold police officers accountable for their actions: (1) by implementing more-restrictive requirements for “qualified immunity”; (2) limiting the amount of discretion police officers currently possess; and (3) applying race and gender integration throughout local law enforcement. Implementing these three changes, could drastically reduce the abuse of police discretion.

CONSENT TO INJURY: MODERN MEDICINE’S UNCONSCIONABLE SHIELD FROM LIABILITY FOR MEDICAL PRACTITIONERS THROUGH THE DOCTRINE OF INFORMED CONSENT

Michael McKee*

I. INTRODUCTION

Modern medicine—exactly what does that mean? It may be surprising to find out that the term modern medicine does not have a definition. 1 It is unknown whether the term includes the recent practices and procedures of administering medical care to patients, or whether it only does so at the discretion of, and to the benefit of the physician. 2 Many patients are unaware of the standard practices of medicine, or the evolution of techniques that should be employed in their care, and rely on gaining this understanding from their physician. 3 For example, in the nineteenth century patients considered anesthesia modern medicine, yet a reasonable patient in the twentieth century would likely find it unreasonable to undergo surgery with nothing more than whiskey to drink, and a bullet to bite. 4 Today, medical knowledge on the part of the patient is simply not required to receive anesthesia during surgery, nor is it required that the patient have any knowledge of anesthesia to receive sufficient information to consent to its use. 5 Although drinking whiskey and biting on bullets were common at the time, the use of this technique is likely unreasonable in the eyes of the twentieth century patient. The use of X-ray imaging is another technique that at one time people considered modern, however a reasonable patient in the twentieth century likely expects the utilization of X-ray imaging technology developed in 1928 during their procedure,

*Michael McKee, Esq. J.D. Cum Laude, Florida Coastal School of Law. Admitted to The Florida Bar 2019.

2 See infra Part III.
3 See infra Part II.
4 See infra Part II-III.
5 See infra Part II-III.
especially if it will prevent a severe permanent injury such as paralysis.  
Using a spinal fusion as an example, the necessity of anesthetic and 
intraoperative X-ray is hardly arguable. Yet other technologies that are 
commonly available in preventing some of the most common and 
severe injuries sustained during spinal surgery, such as paralysis 
resulting from a brachial plexopathy, are not commonly employed. A 
brachial plexopathy often results in transient or permanent paralysis of 
an upper extremity, and patients often consent to this injury without 
knowledge that the injury is preventable with the use of intraoperative 
neuromonitoring.

Imagine that you are a patient suffering from a brachial plexopathy, 
and you were simply uninformed of the mainstream medical techniques 
that could have prevented your paralysis before surgery. Consider 
further that the modern doctrine of informed consent does not regard a 
brachial plexopathy a usual, foreseeable, or preventable injury—even 
though the injury is so common that it has plagued surgery patients for 
over a century. Now imagine that you had to live the rest of your life 
knowing that your signature on the informed consent meant that you 
simply consented to the paralysis, and your only option was to sue 
under a negligence theory for malpractice. This Article examines 
whether the doctrine of informed consent has evolved and modernized 
along with medicine, or whether medicine has evolved and expanded 
without the doctrine of informed consent, thus rendering it nothing 
more than an unconscionable consent to injury.

This Article first examines the history of the doctrine of informed 
consent, and its evolution alongside recent medical practices. The 
second part of this Article examines the reasonable person’s 
derstanding of medicine, raising important issues about the impact of 
medicine evolving past conventionally understood meanings.

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6 See Infra Part III.
7 See Infra Part III.
8 See Infra Part III.
9 See Infra Part III.
10 See Infra Part II-III.
11 See Infra Part III.
12 See Infra Part II-III.
13 See Infra Part II.
third part of this Article examines whether the informed consent adequately informs the patient of the current standard of care as commonly understood, or whether the vicissitudes of the medical industry have morphed the informed consent into an unconscionable and deliberate attempt to keep patients uninformed.  

II. BACKGROUND

A. History of the Doctrine of Informed Consent

1. Medicine’s Evolution into the Era of Legal Consent

The doctrine of informed consent is an evolution of the era of consent, with its relevance developing out of clinical care in the surgical context. The horrors associated with undergoing awake surgical treatment explain the relevance of the doctrine’s history. There are three relevant eras: the pre-consent period that lasted until 1905; the period of consent that began in 1905; and the period of informed consent that began in the late 1950’s, and continues today. As the science of medicine improved over the years, and the art of medicine’s practice evolved, the invasiveness and horror of surgery followed along with it. When put in this context, it is patently observable that the patient’s right to be informed birthed out of the personal nature of surgery in its early stages. Accordingly, it was the patient who suffered the injury, the patient who consulted the physician, the patient who endured the gruesome and awake surgical procedure, and the patient who underwent a healing process that often resulted in infection. The intimate nature of selecting a physician included communicating with the physician for the purpose of gaining trust in his advice, and through this interaction making a reasonable determination of whether conveyance of sufficient information yielded an

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14 See Infra Part III.


16 Id.

17 Id. at 171.

18 Id. at 185-86.

19 Id.

understanding that then allowed the patient to make an informed decision on the course of treatment. 21 As the science of medicine evolved and the public learned of scientific advancements such as the option to undergo surgery while utilizing anesthesia, it is easy discernable that the face to face interaction and the decisions being made by the patient were essential in making a reasonable assessment on the competence of the doctor, as well as on the availability of scientific advancements. 22 To some degree, all eras of medical treatment include the agreement between the patient and the doctor, the discussion between the patient and the doctor about the risks involved, and the patient’s balancing of the risks in the process of deciding between treatment options. 23

2. The Era of Consent

The era of consent began roughly in 1905 with the increased use of hospitals and concern for infection, and continued until approximately 1930. 24 During this period the courts begin to step in and develop a body of common law that transformed the natural right of the patient to a legal one. 25 Medical malpractice suits eventually led to the current era of informed consent, and are derived from Justice Cardozo’s opinion in Schloendorff v. Society of New York Hospital. 26 In the medical world, the Schloendorff holding marks a period in time were legal actions and protections for the patient, doctor, and hospital arose. 27 Most consent-based discussions center around medical malpractice and reference Schloendorff as a time when causes of action were clearly identified, however, the focus of this Article is more narrowly tailored to the practical evolution of medicine as it is compared to the doctrine of informed consent, without framing the discussion in the complete context of medical malpractice liability. The significance of the Schloendorff holding in this context is that the common law sets forth a requirement that directly benefits the patient, and all other benefits are

21 Id. at 186, 215-16.  
22 Id. at 185-86.  
23 Id. at 171, 189, 191, 193.  
24 Id. at 171, 175-76.  
25 Szczypiöl, supra note 15, at 171, 175, 183-85.  
26 Id. at 176, 185-88.  
27 Id. at 186-87.
indirect. It does not solely rest on the notion that Schloendornf is the first case on record that identifies a new cause of action for the tort of trespass, and it is not based entirely on negligence. In Schloendornf, the patient only agreed to undergo an invasive medical examination under anesthesia. During the procedure, the surgeon chose to commence in a full operation to remove a tumor, which exceeded the scope of the consent. The patient developed gang green, and as a result needed to have several of her fingers amputated. The court’s holding set the precedent that a patient has the right to be in control of her treatment, and a patient not only must consent to the exact surgical procedure, the surgeon must follow the limited scope of the patients specific consent. During this period, the lack of oversight in the medical community meant that patients relied on their personal understanding gained from the surgeon; however, the lack of formal rules and effective enforcement lead to loose standards on disclosing information to the patient.

The underlying rationale behind the disclosure of information remained patient self-determination. The self-determination rationale caused a change in case law fact patterns from those that focused on total non-disclosure or misrepresentation, to those that centered on the patients overall understanding. The threshold question became, “whether the patient was given enough information to decide intelligently on the use of treatment.” Eventually this era created a body of case law that required the legal consent of a patient when undergoing a specific surgical procedure, or the surgeon would risk committing the tort of trespass. Although a new legal requirement

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29 Id.
30 Id.
31 Id. at 93.
32 Id. at 93.
33 Id. at 93.
34 Szczygiel, supra note 15, at 183-89.
35 Id. at 189.
36 Id.
37 Id.
38 Id. at 187.
emerged, practical terms and reasonableness created its foundation. The breadth of consent was limited in scope and sparked little controversy. Not many Americans disagreed with the idea behind making an agreement with a physician for a specific surgical treatment, and having the agreement followed. At this point the courts began enforcing compliance with the accepted professional norm of obtaining consent for each procedure. Framed in contract law, the basis of this legal analysis is the conventional agreement made with the physician through patient self-determination. The evolution of the conventional agreement into contract law illustrates the continuation of the pre-consent era rationale, into the consent era. Schloendorff narrowly defined the lawful consent requirement. The narrow requirement stated that legal consent of the patient to a specific surgical procedure is mandatory; it must be acquired before the start of the procedure and the administration of anesthesia; and the surgeon must adhere to the specific procedure indicated on the legal consent during the procedure. One can easily see how little dispute could arise from a rule that simply required the surgeon to respect the decision of the patient, and perform only the exact procedure within the scope authorized by the patient. Of significant importance is that the era of consent marked a shift in the courts holdings from not only making policy, but to enforcing compliance. This shift was pragmatic and reasonable because it continued protecting the personal nature embodied within a patient making the decision to have surgery.

3. The Era of Informed Consent

The era of informed consent began around 1957, and continues to the present day. In the period before 1957, early informed consent

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39 Szczyciel, supra note 15, at 188.
40 Id. at 185.
41 Id. at 188.
42 Id. at 189.
43 Id.
44 See generally, Schloendorff v. Soc’y of N.Y. Hosp., 105 N.E. 92, 92-95 (1914).
45 Szczyciel, supra note 15, at 186, 188-205.
46 Id. at 188.
47 Id. at 187.
48 Id. at 189.
doctrines applied only to medical professionals, and were limited to the lack of a meaningful disclosure of the risks inherent to the specific medical treatment. The courts interpreted the standard of disclosure from the current professional customs, or “what a reasonable physician would have done in similar circumstances.” Beginning in 1972 the law saw a dramatic shift in the standard of disclosure due to public criticism of the professional custom standard. The shift was due to a change in the use of the doctrine of consent from one that protected the patient, to one that protected the medical professional. State legislatures responded to the public outcry and began codifying disclosure standards between 1975 and 1977. The new statutes required disclosing specific information to patients, and had the purpose of discouraging the use of certain medical procedures that resulted in significant harm to the patient, but were previously justified on the standard of professional custom. Courts further strengthened patient oriented standards by adopting a reasonable person standard when not preempted by statute, which importantly recognized patient autonomy as a time honored core value.

III. ANALYSIS

A. TO CONSENT, OR TO UNDERSTAND: WHAT IS THE PURPOSE?

1. Modern Medicine

In beginning teasing out what the reasonable patient may expect when consenting to medical treatment, we must first examine what medical treatment means to the reasonable person. Medical treatment is referred to in the context of modern medicine, conventional medicine, and traditional medicine. Before we can understand what type of medical treatment the reasonable patient may believe they are consenting to, we must first seek to define these vague terms. Medicine

49 Id. at 191.
50 Szczygiel, supra note 15, at 191.
51 Id. at 189-91.
52 Id. at 191-93.
53 Id. at 193.
54 Id. at 191-93.
55 Id.
is the “scientific study and practice of preserving health and treating disease or injury . . . [and the] science and art of preventing, curing and alleviating sickness or affliction.” 56 Modern involves recent techniques, methods or ideas. 57 When combining the words it forms a somewhat common, yet undefined and vague term: modern medicine. Although lacking a true definition, the term modern medicine creates the reasonable understanding that the medicine referenced involves recent techniques, methods or ideas. 58 Thus modern medicine could be defined as the recent developments of scientific study and the practice of preserving health and treating disease or injury, of which employ recent techniques, methods or ideas in the practice thereof. 59 At this point one may ask, “Why does this matter, and why am I reading this?” The answer is that in this day and age the reader of this Article, as well as the common public, have likely never considered the word medicine to be independent of the word modern. In legalese, the reasonable person does not consider the words medicine and modern to be mutually exclusive.

When referencing medicine as conventional medicine, or traditional medicine—neither of which have a specific definition—further vagueness arises. To understand what meaning both terms convey, we look to what their most reasonable, common understanding may be. Conventional is defined as something that is “customary . . . traditional, depending on, or arising out of the agreement of the parties.” 60 Traditional is defined as “past customs and usages that influence or govern present acts or practices.” 61 Conventional medicine can therefore be defined as customarily practiced techniques that derive from the customs, traditions and agreements between the parties. 62 Although vague, a reasonable person would interpret conventional medicine as referring to the type of medicine that is dependent on the

56 Medicine, BLACK’S LAW DICTIONARY (10th ed. 2014).
58 Id.
59 Id.; Medicine, BLACK’S LAW DICTIONARY (10th ed. 2014).
60 Conventional, BLACK’S LAW DICTIONARY (10th ed. 2014).
61 Tradition, BLACK’S LAW DICTIONARY (10th ed. 2014).
62 BLACK’S supra note 59; BLACK’S supra note 60.
customary, individual agreement made with the physician for medical services.\textsuperscript{53} Traditional medicine could be defined as the present practice of medicine as derived from its past custom and use.\textsuperscript{64} In the modern day, a reasonable person would likely understand that consenting to medical treatment would mean consenting to any presently practiced and sufficiently recent medical techniques, as derived from the past customs and use, that are dependent on the individual agreement with the physician.

At the root of this analysis is reasonableness. In this context, reasonableness refers to the common understanding that society has of medical treatment. Reasonableness is a concept that is defined by the currently prevailing social views, conditions and beliefs.\textsuperscript{65} A reasonable, common understanding of medical treatment may derive from a conventional, customary, or traditional use of the term, in the modern day.\textsuperscript{66} A reasonable person in the modern day would most likely expect to benefit from the developments of medicine when treatment is needed, and would likely expect that only those treatments that are so new that they are untested or unproven, would be excluded from their treatment.\textsuperscript{67} Present day medical treatment cannot be so narrowly viewed as to consider the traditional and foundational practices of medicine obsolete.\textsuperscript{68} Nor can it be so narrowly viewed as to exclude commonly available modern advancements.\textsuperscript{69} Present day medical treatment must therefore be viewed through a broader lens if the present day understanding is to reasonably comport with the present understanding of what medical treatment entails. Just as it is inappropriate to expect a reasonable person to rely on a traditional medical treatment if a safer, modern variant is commonly available, it is also inappropriate to expect a reasonable person to depart from their understanding of medical treatment, as it is commonly, and customarily

\begin{itemize}
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{64} BLACK’S supra note 59; BLACK’S supra note 61.
\item \textsuperscript{65} Bun Soh, supra note 1, at 813.
\item \textsuperscript{66} See Szczygiel, supra note 15, at pg 191.
\item \textsuperscript{67} \textit{Id.} at 183.
\item \textsuperscript{68} Bun Soh, supra note 65, at 812.
\item \textsuperscript{69} \textit{Id.}
\end{itemize}
understood to mean. In the modern reality of 2019, it is hardly reasonable to expect that any method used for medical treatment is one that is devoid of recent, modern practices, and solely reliant on some unreasonable, undefinable, or narrow definition thereof.

a. Health Law Interpretation

How does a reasonable, ordinary person interpret health law? This is perhaps the most important factor when examining the doctrine of informed consent because the main purpose of the informed consent is to benefit the patient. For the purposes of clarification and laying out the current paradigm of interpretation, the reader of this Article is reminded that a reasonable person henceforth is the idealistic American reasonable person. This is important because ironically, the American reasonable person is often left off this discussion. Almost hypocritically, those involved in academic and philosophical discussion on health law usually frame their points as being in favor of patient care, when in fact the immutable effect of either side’s views upon the patient is ultimately unfavorable. Ironically, the opposing sides of health law related discussions claim that their position is better framed in protection of the patient. This is ironic because this argument is as old, and new, as the United States itself. Perhaps this is more appropriately framed as an everlasting riddle that our legal system has yet to resolve. The United States Constitution was written, framed, conceptualized, determined, tabulated, penned or whatever word you choose to use, by people who adopted and spoke the American language. Perhaps enumerated is the most commonly used word regarding the constitution, however constitutionalism reflects a fundamental paradox of what the constitution meant to the people who wrote it down, what it means today, and the proper way to decipher this

70 Id.
71 Id.
75 Id.
meaning.76 Those who make this constitutional argument, the esteemed United States Supreme Court Justices, created the legal framework for constitutional interpretation with Marbury v. Madison,77 The debate is rooted in the approaches of originalism and non-originalism, and although a middle ground or hybrid may have sprouted, it is more accurately framed as the present day status of the same debate.78

Constitutional interpretation is an important entrance to this age-old discussion because the Court provided the framework of its evolution, and indicates that we must frame our inquiry on the foundation of statutory interpretation.79 The Supreme Court delivered the method of interpretation in National Federation of Independent Business v. Sebelius,80 holding that the Affordable Care Act should be examined using statutory interpretation.81 With its holding in Burwell v. Hobby Lobby,82 the Court indicates that it will continue to apply this framework in all related cases in the future.83 In understanding the evolution of health law, one must realize that its historic definition stems from state and local governments, as well as the medical profession itself.84 Thus, the current view is that the body of health law is derived from the common law, which focuses on the self-regulation of the medical field alongside statutory regulations imposed by the locality.85 In fact, the predominant theory taught in academia is that health law is a type of “private law” that has evolved from the ground up, and focuses on the regulation of relationships between private parties.86 On this point, it is appropriate referencing our aforementioned definition of conventional medicine, for at the heart of health law rests

76 Id.
77 Id.
79 Gluck, supra note 73, at 323, 325, 328.
81 Gluck, supra note 73, at 327-328.
83 Gluck, supra note 73, at 323, 328.
84 Id. at 324.
85 Id.
86 Id.
the common understanding of the word conventional. Modern viewpoints on the evolution of health law begin their discussion on this very point. It is here that we find the first bit of the riddle untethered, because any definition of the perspective that the reasonable person may have, at a minimum includes the definition of conventional.

The Supreme Court lends support to this line of analysis with its holding in Sebelius, where it reasoned that the financial penalty imposed on individual Americans for not obtaining health care under the Affordable Care Act “may reasonably be characterized as a tax.” Although the focus of the Court’s analysis was on the constitutionality of the individual mandate, it is hard imagining the discussion absent the word “individual,” and the words “reasonably characterized.” After all, the founders penned the constitution and separated the powers of government, and this basic premise is practically undisputed. Building on this point is the basic constitutional premise that the founders intended to separate the powers, in its broadest sense, in the benefit of the people. “That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected.” Although this reasoning is applied in the framework of constitutional power, it is clear that the Court—at a minimum—regards the subjective reasonableness of the individual American’s perspective sufficiently important for consideration in its legal reasoning, albeit couched in a broad, subjective sense of happiness. It is therefore hard to conclude that the Court has ever made a single holding that disregards the reasonable American’s perspective, for the very fabric of America would unfold if it were viewed otherwise.

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87 Id.
88 Supra Part III(A)(1).
90 Brennan, supra note 78.
92 Id. at 176.
93 Id.
94 Id.
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people, is akin to untethering the premise of every decision made, by every single person since the inception of American democracy. Rather, in terms of reasonableness, it continues on the rationale that this method of reasoning attributes some meaning and insight in understanding the reasonableness of the individual American. The premise is therefore synthesized that black curtains cannot be drawn on the fate of reasonableness with a smile.

2. Preventable Injury and Avoidable Risk

The question of whether an informed consent adequately informs patients of the difference between preventable injuries, and complications from surgery, is difficult to answer. This Article examines this issue from the perspective of societal custom, rather than through the lens of proving a cause of action in negligence under tort law.

Today, every state has adopted an informed consent doctrine, however due to the narrow focus on medical malpractice, the direct impact on quality clinical medicine is limited.\textsuperscript{95} This narrow focus has a limited impact because it uses the legal principle of deterrence, which negatively reinforces substandard practice with threat of liability for damages.\textsuperscript{96} As a result of the use of the deterrence principle, inherent in the current doctrines of informed consent are issues that shift the protections again away from the patient and back to the medical provider.\textsuperscript{97} Proof of this shift can be seen in the difficulty of the patient in compiling necessary evidence to file suit, and restrictions on the patient’s ability to bring a cause of action for lack of informed consent, unless the patient has suffered a significant disability because of surgery.\textsuperscript{98}

Specific problems associated with the burden of proof, usual vs. unusual injury, and coconscious vs. unconsciousness during medical procedures, relate back to watershed cases such as \textit{Ybarra v. Spangard}, which is historically known for the doctrine of \textit{res ipsa loquitur}, and not

\textsuperscript{95} Szczygiel, \textit{supra} note 15, at 191-93, 214.
\textsuperscript{96} \textit{Id.} at 214.
\textsuperscript{97} \textit{Id.} at 191-93, 200-15.
\textsuperscript{98} \textit{Id.} at 214.
for consent. In Ybarra, the patient underwent an unconscious surgical procedure to remove his appendix, and after awakening from surgery he suffered paralysis of his left arm. The paralysis that Ybarra suffered is commonly known as a brachial plexopathy. Although Ybarra is mostly referenced in the malpractice sense to satisfy the burden of proof, more importantly for our purposes it will serve to illustrate the evolution of an unusual injury in 1944, to a usual injury in the modern day. This is significant because as medicine has evolved, injuries sustained in Ybarra are not unusual due to modern medicine yet the doctrine of informed consent treats them as unusual, and informs the patient of such risk. In fact, brachial plexus injury has become so common that almost all brachial plexopathy injuries sustained during surgery can be prevented with commonly available medical techniques, such as intraoperative neurological monitoring.

Despite these commonly available medical techniques, there is currently no standard of disclosure that would provide sufficient information to the patient which would afford the proper balancing of risk analysis to occur. To illustrate this problem, consider the following question: If you were deciding to have surgery in which brachial plexopathy posed a serious risk, would you want to be informed that commonly available technology and clinical practices could be utilized to prevent the injury, but your surgeon does not use them? In contrast, would you find yourself sufficiently informed that brachial plexopathy is a risk that your surgeon is aware of and considered, simply because it was indicated on your consent? After losing the ability to use your arm, wouldn’t you be upset to learn that readily available medical techniques

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100 Id. at 688.
101 Id.
that have been commonly utilized for over forty years to prevent your exact injury were simply not utilized because the surgeon didn’t feel like using them, and the surgeon didn’t have to utilize them because it is not considered a standard of care to utilize these reliable techniques? Would you be upset to learn that surgeons commonly do not utilize these widely available techniques because they can simply get your consent to such injury through the informed consent? Would you be surprised to know that due to the informed consent a patient’s remedy is limited to bringing a malpractice suit, and the doctors know this is weighs in the doctor’s favor?104

When bringing a malpractice suit the injured patient generally introduces evidence in the form of expert testimony to establish the current standard of care.105 After establishing a standard of care, the traditional elements of negligence (duty, breach, causation, injury) must be proven by the preponderance of the evidence.106 Thus, without the patient undergoing the burden of establishing a standard of care, the surgeon had no duty that could be breached, and could not reasonably be the cause of the injury.107

It is easy to see the relation of this issue to negligence and medical malpractice, and is easy to lead the discussion into the abyss of modern medical standards of care. However, the focus of this Article is less on the establishment of a standard of care for proving negligence, and more on the failure to modernize the informed consent doctrine in timely succession with the science and art of medicine. The illusory concept of standard setting is relevant as applied within the framework of the informed consent, because in the case of a preventable injury such as a brachial plexopathy, a cause of action is not available to the patient for failing to disclose.108 Whether a surgeon is negligent for failing to utilize readily available modern medical techniques is not central to this discussion. The central premise is that due to the advancements of medical techniques over the past several decades, a patient should not

104 Brook & Irle, supra note 102., at 449.
105 Id.
106 See id.
107 Id.
108 Id. at 450.
be considered sufficiently informed of the risks of surgery based on surgical injuries that are no longer considered uncommon, and could be prevented in nearly every case.

Nor can the argument be raised that further disclosure would overwhelm the patient with technical jargon, because simple language indicating that paralysis is avoidable if a common medical technique is used, and unavoidable if it is not used, does not qualify as overly sophisticated language. Both the legislature and the courts, in the realm of the informed consent doctrine, consider words like paralysis to be common language.\(^{109}\) If the legislatures and courts of the country find that “paralysis” is a commonly known term, and Americans are sufficiently aware of not only the meaning of paralysis but the implications thereof, then we cannot ignore the following general concept: Americans expect that sufficiently modern medical techniques which can be readily employed to avoid serious injury will not be withheld from their care due to the lack of the modernization of the informed consent doctrine. No reasonable person would consider avoidable paralysis a consentable injury and force the patient to follow a cause of action under a negligence theory, when absence of such common knowledge is a major departure from both the conventional and traditional concepts of patient self-determination. It is devoid all logic to consider a patient informed of a preventable and foreseeable injury when the patient has not been informed well enough to develop a sufficient understanding of the risks, and avoidable risks of undergoing the specific medical treatment. Persisting, is the conventional agreement between the patient and the surgeon developed through the era of consent, to the current era of informed consent.\(^{110}\) When comparing the history of consent with the current doctrine of informed consent, the current doctrine cannot be considered as reasonably protecting the patient’s right to self-determination because the doctrine itself bars the patient from performing the necessary inquiry.

3. Standard of Care

The standard of care methodology that is integral to the paradigm of medical malpractice is centered on negligence and has little relevance

\(^{109}\) Szczygiel, supra note 15, at 212.
\(^{110}\) See id.
in the doctrine of informed consent.\textsuperscript{111} The employment of this standard beyond a narrow framework centered on negligent or complete disclosure, completely obscures the value in protecting the patient through the fundamental and traditional reasoning behind even the most basic understanding of consent.\textsuperscript{112} The competing and prevailing interests of medical providers, insurance companies, employers, and state governments are conflating treatment standards and confabulating a paradigm that is beyond the traditional and conventionally accepted lexicon of consent.\textsuperscript{113} This view has roots in the same utilization review standards employed by Medicare law, which focuses on administrative oversight and statistical quality control measures to examine the processes and outcomes of surgery.\textsuperscript{114} The concept is centered on “moving mainstream medical care toward [the] best available practices, in contrast with a previous emphasis that focused on correcting unusually bad care.”\textsuperscript{115}

To establish a standard of care under a negligence theory in an informed consent lawsuit, “the [patient] has the burden of providing the existence and likelihood of occurrence of the complication produced by the medical intervention.”\textsuperscript{116} Evidentiary standards taken from negligence theories in medical malpractice suits are supplanted in this legal framework; requiring the patient to tackle hearsay law and persuade the court to admit assertive statements made by the physician into evidence because they qualify as admissions by the physician,\textsuperscript{117} or by using testimony of an expert witness.\textsuperscript{118}

Most statutory informed consent doctrines base their causes of

\textsuperscript{111} See id.
\textsuperscript{112} See id.
\textsuperscript{113} Id. at 233, 242.
\textsuperscript{114} Szczygiel, supra note 15, at 242.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 224.
\textsuperscript{117} See, e.g., Fed. R. Evid. 801(d)(2)(A) notes of advisory committee on 1972 proposed rules ("[a]dmisions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule . . . [a] party’s own statement is the classic example of an admission.").
\textsuperscript{118} Szczygiel, supra note 15, at 224.
action on two main rationales. The first rationale is the “material risk or reasonable patient standard” which does not require expert medical testimony, and the other is the professional standard, which requires the application of more evidence. Some courts adopt a modern variation of the former view, which was first expressed in *Canterbury v. Spence*. Under this view, the patient balances the patient’s need for information against the discretion exercised by the doctor. This view is rationalized on the notion that it benefits the patient because the doctor has a fiduciary duty to disclose material information, even if the patient does not ask any questions about it.

This modern formulation is far too narrow when considering the concept of self-determination as it has evolved in case law because the “information the doctor must disclose, depends on what a reasonably prudent patient would deem significant in determining whether to proceed with the proposed procedure.” This narrow view places the burden on the patient to establish a prima facie case of negligence, and prove that a reasonably prudent patient in the patient’s position would have declined to undergo the treatment if the physician had provided information of the risks of the procedure. The burden of proof under the modern formulation of this theory is an example of how it misses the point of the reasonable person standard, and how it is more entwined with a hybrid of the professional standard. The modern formulation superficially addresses the patient’s right to self-determination, and does not extract the essential principles behind the patient oriented self-determination theory that previous precedent in cases like *Ybarra, Schloendorff*, and *Canterbury*, attempted to convey in their reasoning.

The professional standard adopted by several states did so on either the “accepted standard of disclosure in the medical community, or the

119 *Id.* at 227.
120 *Id.* at 242.
122 *Id.*
123 *Id.*
practice expected of a reasonable and prudent practitioner.”

These rationales are based on national standards of practice drafted by the American Medical Association. The problems inherent in this view, as well as the inconsistent adaptation of the historic patient right to self-determination are illustrated in *Culbertson v. Mernitz*.

In *Culbertson*, both the surgeon and the patient agreed that the post-operative injury incurred from surgery was not disclosed to the patient by the surgeon through the informed consent, either verbally or written. The court, relying on the national standard of care determined by the American Medical Association, used a medical review panel to determine whether the physician adhered to the standard of disclosure. The danger of this model is illustrated with the determination of the medical review panel. The board concluded, “such non-disclosure does not constitute a failure to comply with the appropriate standard of care, as such complication is not considered a risk of surgery requiring disclosure to the patient,” and the court adopted the view. The court’s adoption of this standard is against patient interests because by using the rules promulgated by the American Medical Association, it also adopts a perspective that is inherently biased in favor of the physicians.

The *Culbertson* court held that “a risk is thus material when a reasonable person, in what the physician knows or should know to be the patient’s position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forgo the proposed therapy.” The court adopted a reasonably prudent physician standard, and concluded that “expert testimony is not necessary to inform a lay jury of what a reasonable prudent physician would disclose,” which is “in [contrast] to the traditional view,” because “the

128 *Id.*
130 *Id.* at 98-99.
131 *Id.* at 98-99, 100-02.
133 *Culbertson*, 602 N.E.2d at 98-99.
lay jury was in just as good a position as a physician to determine whether the physician had informed the patient of the facts such a patient would ‘need to know’ in order to arrive at a decision.”\textsuperscript{136} This view articulates the standard that a patient must establish a prima facie case and pursue a cause of action under a negligence theory.\textsuperscript{137} The patient is thus required to (1) suffer a severe injury; (2) use expert testimony to establish a standard of care; (3) prove that the surgeon breached that standard of care, and; (4) prove that the surgeon’s breach of that standard of care caused the patients injury.\textsuperscript{138} The bias in favor of the surgeon, and the double standard created under this view is realized when considering how the standard changes when the surgeon must prove the standard of care. When the surgeon is burdened with evidencing the standard of care, a medical review board’s view is sufficient to establish the standard and expert testimony is not required—not even to inform the lay jury of the appropriate standard.\textsuperscript{139}

On its face, this view creates a double standard that disadvantages the patient—a standard that clearly places the surgeon in a stronger position than the patient. This view can hardly be considered reasonable by any definition of the word. Intrinsically, the view, when considered alone, serves as obvious evidence of the dangers inherent in adopting standards that regulate the medical profession, which are set by the medical profession itself.\textsuperscript{140} This view is akin to a system that would allow all tortfeasors to get together and tabulate some governing rules that the legislature and courts would simply adopt, while deferring to the judgment of the tortfeasors for their ethical efficacy.

When considering that self-determination is the foundation of the informed consent doctrine, it is illogical to adopt the professional standard because it adopts American Medical Association ethical code standards—which the physicians author themselves—and these standards are often codified by legislatures as the rules governing physicians.\textsuperscript{141} Furthermore, the same rationale applies to the current

\textsuperscript{136} Id. at 98-99, 101.
\textsuperscript{137} Howard v. Univ. of Med. & Dentistry of N.J., 800 A.2d 73, 79 (2002).
\textsuperscript{138} Id. at 77-79.
\textsuperscript{139} Szczygiel, supra note 15, at 229-30.
\textsuperscript{140} Id.
\textsuperscript{141} Id. at 225.
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application of the “material risk or reasonable patient standard.”

It is not feasible to consider the traditional model of patient self-determination as the foundation of modern informed consent law because the laws adopted are mostly rules of self-governance written by the physicians themselves. Furthermore, the entire purpose of the informed consent doctrine is based on the common law evolution of patient self-determination, and self-determination forged the very idea that the law, through the courts and the legislature, need to create and enforce a consent doctrine to protect the patient from the physicians.

Approximately one-half of the jurisdictions in the United States incorporate duty to disclose standards articulated by the medical profession when drafting statutes, and when reasoning in the courtroom. In addition, the established informed consent doctrines are consistently revised to reflect the values of the medical-professional community, which therefore transforms a body of law that is historically private, into public law that reflects the sole values of the medical professionals—not the patient. The promulgation of this circumstance will incorporate the national professional codes adopted and drafted by the medical professionals, and will eliminate the discrepancy between the professional and reasonable person standard.

At one time deviation from the standard of care was a cause of action for negligence under medical malpractice, and a cause of action for lack of informed consent was a cause of action based on the intentional tort of battery. Today, most courts hold that the evolution of the informed consent doctrine is a clear indication that courts should analyze informed consent causes of action under a negligence theory—a view that is also prevailing among most legislatures. Regardless of the formulation, the current doctrines of informed consent have not evolved alongside medicine in the benefit of the patient, and each modern formulation plainly illustrates how the informed consent

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144 Szczygiel, supra note 15, at 225.
145 Id.
146 Id.
148 Id. at 78-79.
doctrines is infected with bias that riddles the entire paradigm.

4. Unconscionable or Informative?

Health law is evolving from private law to public law. The term private law is a field of law focused on regulating relationships among private parties, and is made from the ground up. Health law historically fits into the definition of private law because the body of health law does not have a federal origin, and is derived from the “states, local governments, and the medical profession itself.” Public law is a term used to describe the law controlled by the federal government, such as the Affordable Care Act, Medicare, and Medicaid. Scholars contend that the modern mission of health law is better identified by looking at it for what it has evolved into—public law. Recognizing this important categorization is essential to understanding the paradigm shift that is arguably underway, and without recognizing the shift into public law, students, practitioners, and professors may be ill prepared for the future. The proponents of this shift reason that it is first necessary to identify the quintessential key players in order to understand how the law will be shaped, as well as to understand what specific standards will guide its shaping. For example, the quintessential key players involved in the Affordable Care Act are Congress, federal agencies, the states, and the federal courts. Recognizing that healthcare has evolved into public law is therefore a necessary step to properly interpret the law in this context. Using the Affordable Care Act as a guide, we see that Congress passed a large and complex federal statute that was tried in federal court. The Act survived the constitutional challenge, and set the future standard that the rest of the Affordable Care Act cases will be statutory interpretation.
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cases.\textsuperscript{159}

Although the shift into public law seemingly makes sense, again we have legal scholars missing the point. In what scholars describe as the \textit{modern mission} of health law, the \textit{quintessential key players} mentioned do not include the individual.\textsuperscript{160} As stated, the reasonably construed modern mission of healthcare does not incorporate the individual patient’s self-determination, the reasonable patient, or even the reasonable physician. Although the scholastic point of articulating this perspective is not necessarily put forth to encourage the shift, and is focused on preparing the legal community on how to interpret health law in the future,\textsuperscript{161} there are negative repercussions for recognizing the shift.\textsuperscript{162} For example, if the courts or legislature formally recognize the shift into public law, certain minority groups will likely suffer the greatest impact.\textsuperscript{163} Historical evidence shows that a complete paradigm shift of this nature will have a negative effect on urban areas with a diverse cultural mix.\textsuperscript{164}

The future of the patient-provider relationship is heavily dependent on the political issues and policy implications as the health law is slowly federalized.\textsuperscript{165} Budgetary constraints, availability of resources, distribution of resources, distribution of funds, funding of medical studies, and several administrative agencies will have increasing control over medical care, which are just a few of the problems inherent in a public law system that has historically disadvantaged minority groups.\textsuperscript{166} Also, with the American Medical Association already having a significant lobby in Washington, the adaptation of policies that minimize malpractice lawsuits and benefit the provider will continue

\textsuperscript{159} \textit{Id.} at 323-25, 328, 340-46.
\textsuperscript{160} \textit{Id.} at 323.
\textsuperscript{161} \textit{See} Gluck, \textit{supra} note 73.
\textsuperscript{162} Szczygiel, \textit{supra} note 15, at 253.
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.} at 191-251.
\textsuperscript{166} \textit{Id.} at 247-51.
infect the law.\textsuperscript{167} Additionally, for risk management purposes and ultimate financial impact, the common conditions and standards of practices will vary according to what best suits the provider.\textsuperscript{168} As one commentator noted, “it is not stretching things too far to say that whoever controls practice policies controls medicine.”\textsuperscript{169} Due to the existing and historic nature of politics, the major financial players will have the attention of the legislators and will be able to heavily influence policy, as well as oversee policy execution.\textsuperscript{170} Put into different terms, the financial and political elite will expand their control over what has been for the better part of a century, private law.\textsuperscript{171} Evaluating the problem under the Affordable Care Act, one can see the negative effect that preferred provider networks has on populations without access to an array of providers.\textsuperscript{172} Looking at the matter pragmatically, this means that the minority view, and the minority population who have historically been the victims of poor federal policy making, will continue to see further restrictions on not only the availability of health care, but health law that serves their benefit.\textsuperscript{173} Further reinforcing this point is that under the cost-conscious “efficient care” approach taken by the federal government in managing healthcare, urban areas with diverse cultural mixes traditionally represent the unconventional patients who are treated poorly.\textsuperscript{174} This serves to highlight the point that real problems that do not forcefully evolve into political issues will continue being ignored and overlooked.\textsuperscript{175}

\textbf{IV. Conclusion}

In the historical perspective of patient rights, framed in the context of the modern informed consent doctrine, it seems that a sufficient argument can be made that the doctrine itself is completely infected by policies imposed by the very people that it is supposed to protect the

\textsuperscript{167} Szczygiel, \textit{supra} note 15, at 253.
\textsuperscript{168} \textit{Id.} at 191-93.
\textsuperscript{169} \textit{Id.} at 249.
\textsuperscript{170} \textit{Id.} at 249-50.
\textsuperscript{171} \textit{Id.}
\textsuperscript{172} Szczygiel, \textit{supra} note 15, at 249-50.
\textsuperscript{173} \textit{Id.} at 253.
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} \textit{Id.} at 249-50.
public against.\textsuperscript{176} This perspective serves merely as a proxy for more elusive methods of disclosure and the sharing of responsibility.\textsuperscript{177} “[T]he informed consent doctrines are premised on independent physicians, or other providers, substituting their judgment for that of the patient,”\textsuperscript{178} and the shift into federal regulation will serve to further the role by elusively using their self-made rules to remove the patient from the consent process.\textsuperscript{179} Once administrative choices replace the patient’s self-determination, the informed consent doctrine becomes completely illusory by supplanting the “administrative decision” in the place of the patients decision.

\textsuperscript{176} \textit{Id.} at 254.
\textsuperscript{177} Szczygiel, \textit{supra} note 15, at 254.
\textsuperscript{178} \textit{Id.} at 255.
\textsuperscript{179} \textit{Id.}