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Two Ironies of UPL Laws

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It is illegal to practice law without a license, so it would be good to know what practicing law is. Opinions vary. The *Restatement (Third) of the Law Governing Lawyers* says the “definitions and tests employed by courts to delineate unauthorized practice . . . have been vague or conclusory, while jurisdictions have differed significantly in describing what constitutes unauthorized practice in particular areas.”¹ The American Bar Association (“ABA”) attempted a model definition several years ago, but its proposal was criticized by the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”) on the (correct) ground that it reserved too many tasks for lawyers.² The FTC and DOJ noted that, although almost all states “have statutes that purport to define the practice of law, in reality these statutes tend to be vague in scope and contain broad qualifiers.”³

If anything, these comments understate the case. Definitions of the practice of law tend to be embarrassing. Some states offer definitions so general they say little more than that judges or bar officials will know unlicensed practice when they see it, which was Justice Stewart’s definition of obscenity.⁴ Although unauthorized practice of law (“UPL”) restrictions might present “the task of trying to define what may be indefinable,” as Justice Stewart thought obscenity regulations might, the aptness of the comparison is not cause for optimism.⁵ Other states adopt rules that resemble the securities laws in their extensive categorization, but still leave courts and enforcers broad discretion. Judicial

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¹ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. c (2000).

² See *Comments on the American Bar Association’s Proposed Model Definition of the Practice of Law*, U.S. DEP’T. OF JUST. (Dec. 20, 2002), <https://www.justice.gov/atr/comments-american-bar-associations-proposed-model-definition-practice-law> [<http://perma.cc/2KMG-H3HB>].

³ *Id.*

⁴ See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

⁵ *Id.*

opinions often argue that comprehensive definitions are impossible, which does not help much.

The basic problem is one of design and legal craft. If a concept is “indefinable,” there is no point trying to define it. A definition is not the right tool to regulate the provision of law-related services. No definition will distill the “practice of law” to its essence. There is no essence. The “practice of law” is what we say it is. The problem is not just semantics. A definition-based approach suggests to enforcers and judges that regulating legal services can be and should be done with rules, when standards are better suited to consumer protection. The result is often a muddled combination of the least desirable aspects of both rules and standards.

The definitional approach may harm consumers in three different ways. The practice of law may be defined too narrowly, so consumers are exposed to incompetent (or not-yet-competent) sellers, or too broadly, so consumers are denied the benefits of competition from competent, but unlicensed, sellers. In addition, definitional approaches treat licenses as a solution to the problem of competence. To unsophisticated consumers, a license may imply that a seller has skills he or she may not have. Passing the bar exam does not entail practical competence in any particular field. Allowing licensees to tout a credential even partially divorced from practical skill but which authorizes such advertising, risks misleading consumers. UPL restrictions sometimes state that sellers may not hold themselves out to be lawyers if they are not, but licenses can be a form of holding out as well. In each case, the real concern is competence: does the seller’s expression accurately convey their ability to help a buyer with a problem?

A legal services regulation designed for clients and consumers should work more from the bottom up than from the top down. It should not bother with the definitional problem because there is no essence to define; any definition would either be materially incomplete or unhelpfully vague. Such a regulation should include few, if any, categories that are declared off-limits to non-lawyers. Some amount of stipulation is inevitable—notably for tribunals—but it should be kept to a minimum. The regulation should favor standards over rules and use presumptions tied to competence to distinguish permissible from impermissible practice. The regulation should not try to compare the practice of law with some baseline of average or ordinary intelligence, and it should not conflate prohibitions on misrepresentation of a provider’s skill or qualifications, which are always objectionable, with the scope of permissible practice.

If nothing else, I will argue that this approach lessens two ironies that characterize the concept of unlicensed practice. Definitions of the practice of law mark the set of things only lawyers may do, but the definitions often show little evidence of legal craft, and the licenses that satisfy the definition may present risks similar to the “holding out” concerns reflected in many state laws.

I.

A brief survey of state definitions is instructive. Maine illustrates one end of the spectrum. One Maine court noted that its bar rules “do not explicitly state what constitutes ‘the practice of law,’ nor have we ever defined what constitutes ‘the practice of law.’”⁶ The court found no need to try a definition where a lawyer was disciplined for his conduct in trying to negotiate discounts for a client’s medical bills and track down the biological father of her children, all while starting an affair with her.⁷ (The affair ended badly.) The court simply said, “the term ‘practice of law’ is a ‘term of art connoting much more than merely working with legally-related matter.’”⁸

Other states posit general definitions that work outward from relatively specific core cases, such as appearing before a tribunal or preparing a “legal document.” California does this. The California Supreme Court’s opinion in *Birbrower, Montalbano, Condon & Frank v. Superior Court*⁹ defines the term as “the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure.”¹⁰ This definition seems clear (and should not extend to private arbitration, though the court held it did), but California does not stop there. Under California law “any definition of legal practice is, given the complexity and variability of the subject, incapable of universal

⁶ Board of Overseers of the Bar v. Mangan, 763 A.2d 1189, 1193 (Me. 2001). The Court wanted to discipline Mangan, and the case could be written off as a rough justice application of a “holding out” theory: if you call yourself a lawyer, you will be held to that standard. But Mangan was right to say that non-lawyers could have done much, if not all, of what he did. That a desired result may have driven the holding hardly vindicates the definition.

⁷ *Id.* at 1191.

⁸ *Id.* at 1193 (quoting Attorney Grievance Comm. of Maryland v. Shaw, 354 Md. 636, 732 (1985)).

⁹ *Birbrower v. Super. Ct.*, 17 Cal. 4th 119, 128 (1998) (quoting *People ex rel. Lawyers’ Inst. of San Diego v. Merchants’ Protective Corp.*, 189 Cal. 531, 535 (1922)).

¹⁰ *Id.*

application and can provide only a general guide to whether a particular act or activity is the practice of law.”¹¹

Washington has defined the practice of law to include litigating in court but “in a larger sense [it] includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured.”¹² The definition extended to “the selection and completion of form legal documents, or the drafting of such documents, including deeds, mortgages, deeds of trust, promissory notes and agreements modifying these documents,” and may be summarized succinctly: “services that are ordinarily performed by licensed lawyers and that involve legal rights and obligations constitute the practice of law.”¹³ This authority is still cited by Washington courts, but Washington also defines the term for purposes of a criminal statute,¹⁴ and in a rule of court.¹⁵

Some states provide seemingly straightforward definitions that are expanded by judicial caveat. One of New York’s two statutory definitions includes appearing in court or holding oneself out as being entitled to practice in court “or in any other manner,”¹⁶ but the judicial gloss on this definition makes clear that the practice of law includes “legal advice and counsel” as well.¹⁷ “Legal advice and counsel” is not separately defined.

Florida adds two components to its capacious definition, which asks in part whether rights affected by some service are important and which explicitly disclaims the notion that any definition could be fixed in time. In its failed effort to require patent agents to be licensed Florida lawyers, the Florida Supreme Court offered this definition:

[I]f the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such

¹¹ *People v. Landlords’ Prof’l Servs.*, 215 Cal. App. 3d 1599, 1609 (1989) (eviction services constituted UPL).

¹² *Jones v. Allstate Ins. Co.*, 45 P.3d 1068, 1074 (Wash. 2002) (quoting *In re Disciplinary Proceedings Against Droker & Mulholland*, 370 P.2d 242, 248 (Wash. 1962)).

¹³ *Id.*

¹⁴ WASH. REV. CODE ANN. § 2.48.180 (West 2016).

¹⁵ WASH. ST. CT. R. 24 (2015), http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=gr&ruleid=gagr24 [<http://perma.cc/36XR-VRLY>].

¹⁶ N.Y. JUD. LAW § 478 (McKinney 2016).

¹⁷ *Servidone Const. Corp. v. St. Paul Fire & Marine Ins. Co.*, 911 F. Supp. 560, 565–66 (N.D.N.Y. 1995).

services by one for another as a course of conduct constitute the practice of law.¹⁸

The court in *Florida Bar v. Brumbaugh* cited this definition with approval and stated that it “is given content by this Court only as it applies to specific circumstances of each case.”¹⁹ The court agreed with a Michigan court that “any attempt to formulate a lasting, all-encompassing definition of ‘practice of law’ is doomed to failure ‘for the reason that under our system of jurisprudence such practice must necessarily change with the everchanging [sic] business and social order.’”²⁰ Michigan later backtracked on this statement while holding that a bank’s preparation of mortgage documents was not the practice of law. The court held that “the preparation of ordinary leases, mortgages and deeds do not involve the practice of law. . . . They have become ‘so standardized that to complete them for usual transactions requires only ordinary intelligence rather than legal training.’”²¹ Florida, however, remains skeptical,²² as does the definition quoted above from Washington. New York’s second statutory definition reserves part of this cookie-cutter work for attorneys as well.²³

Other states provide broad definitions with exclusions that resemble safe harbors. Texas, which had an early and unproductive encounter with interactive software,²⁴ defines the practice of law to include court work “as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge” and has a typical disclaimer of any limitation on the scope of this definition, which “does not deprive the judicial branch of the power and authority . . . to determine whether

¹⁸ State ex rel. Fla. Bar v. Sperry, 140 So. 2d 587, 591 (Fla. 1962), *vacated sub nom.* Sperry v. State of Fla. ex rel. Fla. Bar, 373 U.S. 379, 404 (1963).

¹⁹ Fla. Bar v. Brumbaugh, 355 So. 2d 1186, 1191 (Fla. 1978).

²⁰ *Id.* at 1191–92 (quoting State Bar v. Cramer, 249 N.W.2d 1, 7 (Mich. 1976), *abrogated by* Dressel v. Ameribank, 664 N.W.2d 151, 158 (Mich. 2003)).

²¹ Dressel v. Ameribank, 664 N.W.2d 151, 156 (Mich. 2003) (quoting Hulse v. Criger, 247 S.W.2d 855, 861 (Mo. 1952)).

²² The Fla. Bar re Advisory Opinion—Medicaid Planning Activities, 183 So.3d 276, 286 (Fla. 2015) (holding the preparation of documents relating to Medicaid planning to be the practice of law).

²³ N.Y. JUD. ACT § 484 (McKinney 2016) (“No natural person shall ask or receive, directly or indirectly, compensation for appearing for a person other than himself as attorney in any court or before any magistrate, or for preparing deeds, mortgages, assignments, discharges, leases or any other instruments affecting real estate, wills, codicils, or any other instrument affecting the disposition of property after death, or decedents’ estates . . .” unless admitted to practice.)

²⁴ Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956 (5th Cir. 1999) (per curiam). I say “unproductive” because Texas’ UPL commission won the case but lost the war, as the definition in the text suggests.

other services and acts not enumerated may constitute the practice of law.”²⁵ But Texas then takes a step back and states that the practice of law does not include written materials such as books or software if the materials “clearly and conspicuously state that the products are not a substitute for the advice of an attorney.”²⁶

Arizona varies this approach. It defines the practice of law broadly through a series of categories that include preparing a document intended to affect or secure legal rights, expressing a legal opinion, representing another in formal dispute resolution (including mediation), or negotiating. Arizona then exempts several specific situations; an employee may designate a personal representative for a board hearing dealing with personnel matters, a corporation may designate an officer or other agent to represent it before the state’s version of the Occupational Safety and Health Administration (“OSHA”), and an ambulance service may do the same for administrative hearings before the Department of Health Services.²⁷ In all, Arizona has twenty-one substantive exceptions.²⁸

Similarly, Connecticut defines the practice of law to include “ministering to the legal needs of another person and applying legal principles and judgment to the circumstances or objectives of that person.”²⁹ The statute provides a non-exclusive list of items, which includes “[g]iving advice or counsel to persons concerning or with respect to their legal rights and responsibilities or with regard to any matter involving the application of legal principles to rights, duties, obligations, or liabilities,” or “drafting any legal document or agreement affecting the legal rights of a person.”³⁰ The statute also includes more specific restrictions on holding out and appearing before a tribunal. It then specifies twelve exceptions, including acting as a real estate agent or broker, acting as an accountant, or “performing such other activities as the courts of Connecticut have determined do not constitute the unlicensed or unauthorized practice of law.”³¹

These definitions vary in detail, but are all, at least in part, defiantly ambiguous. Defiant ambiguity may be a natural response when asked to define the undefinable, to use Justice Stewart’s phrase, but it is not a helpful response.

²⁵ TEX. GOV’T CODE ANN. § 81.101 (West 2016).

²⁶ *Id.*

²⁷ ARIZ. REV. STAT. ANN. SUP. CT. R. 31.

²⁸ *Id.*

²⁹ CONN. PRACTICE BOOK § 2-44A(a).

³⁰ *Id.* § 2.44A(a)(1)–(6).

³¹ *Id.* § 2.44A(b)(1)–(12).

In the 2000s, several states proposed definitions of their own, prompting the ABA's model definition project. The FTC commented on specific state proposals as well as the ABA proposal. Its comments to Connecticut are typical. Connecticut proposed to amend its definition and the FTC weighed in, stating that staff believed "non-attorneys should be permitted to compete with attorneys in areas where no specialized legal knowledge and training is demonstrably necessary to protect the interests of consumers."³² FTC staff recommended that Connecticut add language the District of Columbia had used to narrow its rule.³³ That definition was similar to the Connecticut definition described above, but included language limiting the definition of the practice of law to "the provision of professional legal advice or services where there is a client relationship of trust or reliance."³⁴ The rule then listed categories presumed to constitute the practice of law. The comment to the D.C. rule states that this qualification:

[I]s designed to focus first on the two essential elements of the practice of law: The provision of legal advice or services, and a client relationship of trust or reliance. Where one provides such advice or services within such a relationship, there is an implicit representation that the provider is authorized or competent to provide them; just as one who provides any services requiring special skill gives an implied warranty that they are provided in a good and workmanlike manner.³⁵

Connecticut did not adopt this suggestion (nor did Washington in the rule it adopted), but Nebraska did.³⁶ In comments to Hawaii, the FTC emphasized that the D.C. rule utilized rebuttable presumptions to help clarify its definition.³⁷ The D.C. rule lists six categories of work presumed to be the practice of law—such as "preparing any legal document" or "preparing or expressing legal opinions"—and allows that presumption to be rebutted:

³² Letter, Federal Trade Comm'n, Proposed Section 2–44A of the Rules of the Superior Court entitled "Definition of the Practice of Law" (May 17, 2007), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-mr.carl-e.testo-counsel-rules-committee-superior-court-concerning-proposed-rules-definition-practice-law/v070006.pdf.

³³ *Id.* at 6–7.

³⁴ D.C. CT. APP. R. 49(b)(2) (West 2016).

³⁵ *Id.* cmt. to § 49(b)(2).

³⁶ NEB. REV. STAT. ANN. § 3-1001 (West 2016).

³⁷ Letter, Fed. Trade Comm'n, Comments on Revised Proposed Rule Concerning Unauthorized Practice of Law at 1–2 (Apr. 20, 2009), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-and-department-justice-comment-supreme-court-hawaii-concerning-proposed-definition-practice-law/v080004hiunauthorized-practiceoflaw.pdf.

The presumption that one's engagement in one of the enumerated activities is the "practice of law" may be rebutted by showing that there is no client relationship of trust or reliance, or that there is no explicit or implicit representation of authority or competence to practice law, or that both are absent.³⁸

The D.C. rule therefore uses the presumption and rebuttal structure to clarify the definition, which also incorporates the concept of trust and reliance.

II.

Defiant ambiguity is what comes of the choice to employ a general definition. In this Part, I argue that, as a matter of craft, that choice is unwise. Like patent claims, definitions work well when applied to discrete, concrete objects. They work poorly when applied to abstract ideas. They are no good at all when the definiendum is a diffuse concept that changes over time, as is the case with the "practice of law." Then a definition is the wrong tool to use; it does more harm than good in relation to consumer protection.

The definitions surveyed in Part I too often wind up chasing their tails, often trying to clarify vague terms by reference to equally vague terms, and always using broad language that creates ambiguity and wide discretion for enforcement. This Part addresses craft and poses the question of how a UPL restriction should be built. What elements should it have, and how should they fit together? I turn to substance in Part III.

A. Rule or Standard?

The definitions surveyed in Part I take for granted that the practice of law needs to be defined through a written statement of scope. The "challenge" the ABA perceived as the basis for its efforts was cast in definitional terms; the question was "whether to create a model definition of the practice of law that would support the goal to provide the public with better access to legal services, be in concert with governmental concerns about anticompetitive restraints, and provide a basis for effective enforcement of unauthorized practice of law statutes."³⁹ That is a lot of work for a definition.

³⁸ D.C. CT. APP. R. 49(c)(3) (West 2016).

³⁹ *Task Force on the Model Definition of the Practice of Law Challenge Statement*, AM. BAR ASS'N., http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_challenge.html [http://perma.cc/83QR-WHFB].

Definitions of the practice of law do not work well being judged by the goal of consumer protection or by the criteria one should use to assess the design of a law. Definitions try but largely fail to do the job of a rule. In the attempt they either fail to do the job of a standard, which leads to arbitrary decisions, or they incur the costs of a standard but then truncate analysis in an effort to render a formal rather than a substantive decision, which leads to arbitrary decisions that are costly as well.

1. Distinguishing Rules from Standards

The relevant issues may be framed usefully as a question of rules versus standards. The differences and similarities between these two approaches are complex and are the subject of several excellent analyses.⁴⁰ The literature distinguishes rules from standards based on whether the law is given content *ex ante* or *ex post*.⁴¹ I follow that division here, focusing on the points I think most salient to restrictions on UPL.

Most people think of rules as very specific statements and of standards as very general statements that end up being more a question than a prescription: drive no faster than seventy-five miles per hour is a rule, and “drive safely” is a standard. Analytically this common-sense difference reflects a design decision: should the costs necessary to give content to a law be sunk up front and distilled into concise expression or should the cost be deferred to a later time when an issue arises?⁴²

2. Counting Information Costs

Three general types of costs are relevant to this analysis with respect to restrictions on unlicensed practice: creation costs, transmission costs, and application costs.

Creation costs include the cost of investigating the conduct to

⁴⁰ For a general discussion, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 592–96 (5th ed. 1998); Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J. L., ECON. & ORG. 150 (1995); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

⁴¹ Kaplow, *Rules Versus Standards: An Economic Analysis*, *supra* note 40, at 560. Focusing on when a law is given content differs from a proposed distinction in which rules are formally realized, while standards apply the purposes of the law directly to disputed facts, or, relatedly, between individualism and altruism, interpreted as rhetorical approaches to social issues. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

⁴² This description oversimplifies. In principle, a rule may replicate a standard if enough variables are baked into the rule to allow it to replicate the welfare effects of the standard. (The point is similar to one that may be more familiar—act utilitarianism and rule utilitarianism may be equated if the rule includes exceptions sufficient to produce results equivalent to the sum of act-utilitarian choices.) See, e.g., J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 11 (1973).

be regulated, translating the information learned through investigation into language that expresses the desired regulation, and herding the language through the relevant political process. The amount of these costs depends on many things, including whether the conduct in question is engaged in or affects many people, whether it is easy to understand or requires significant expertise, and whether politically powerful groups have a significant stake in any proposed regulation.

Creation costs are complex. They differ in different situations, and in any given situation they interact in complex ways. For example, take the question whether a building code should approve vinyl conduit for use in new construction. Deciding whether vinyl conduit is durable, fire-proof, and otherwise safe requires some expertise and probably testing. The rule on permissible conduit would be part of a larger building code, so possible interactions between vinyl and other building materials would have to be studied. Legislators and even legislative staff are probably not experts in these matters, so expertise would have to be acquired.

It would make little sense for each county or city that has a building code to replicate this study. Vinyl conduit probably is as safe (or not) in Berkeley as in Bakersfield. Economies of scale probably could be achieved, but then governmental units would have an incentive to free ride on other governmental units. Coordination is possible in different ways, such as regional government consortia, but outsourcing is possible as well. In practice, industry associations, which have a greater per capita stake in studying such things, promulgate model building codes, while many legislatures economize on the cost of rule-creation by enacting those codes into law.

But there is a flip side to the fact that industry players have a stake big enough to make it worth their while to study the merits of vinyl conduit. Incumbent firms who make steel but not vinyl conduit have an incentive to fight approval of vinyl conduit, regardless of the merit of that material. Incumbents might try to use local laws to preclude entry that might lower their prices. Such firms might spend money to fight within the association, as well as before governmental bodies. In this example, manufacturers of steel conduit recruited new members to the National Fire Protection Association, stacked a meeting at which the Association decided whether to amend the Association's National Electrical Code to approve the use of vinyl conduit, and

voted against such use.⁴³ The costs of acquiring information necessary to draft a rule were lower because they could be outsourced to the Association's work, but the cost of translating that knowledge into adoption of an efficient rule were high because the economic interests that made industry players willing to acquire information also inclined them to defend entrenched interests.

In other cases, creation of a rule will be simple. The rule may be joined with a standard in ways that make adoption more palatable, but which defers substantial costs to a later stage in enforcement. Copyright law is like that. The rule that copyright inheres in original expression fixed in a tangible medium of expression is simple and cheap to express, at least so long as the originality requirement is drained of any real content (as it is). But the very thinness that makes this rule relatively simple and easy to adopt invites all sorts of particular objections. To make the rule palatable, a legislature might choose to enact a standards-based defense, such as fair use, making the question of liability far murkier than our examples of the speed limit or approval of vinyl conduit. The defense might deflect objections and thereby ease passage through the political process, but the costs are simply deferred at the expense of clarity.

Transmission costs. This idea refers to the cost people subject to the rule incur in learning the rule. (The cost of reproducing and distributing the rule are included, but these costs will almost always be low.)⁴⁴ The question is whether it is easy to understand the law and to translate that understanding into advice or into application by a tribunal, such as by translating the law into legal advice to a client or into jury instructions. These costs are important to deterrence; if a rule is expected to deter behavior, it needs to specify that behavior well enough for informed persons to obey.

This question, too, is complex. One needs to know how many people the rule will affect and what kind of people they are. A speed limit targets everyone who drives, which in many places is at least most adults, so it has to work for large numbers of very different people—both barely numerate drivers and physicists. A building code will be used mostly by builders, inspectors, and insurers, so it is safe to presume a certain amount of audience sophistication, but code violations might be disputed and adjudicated, so the understanding of a potential tribunal matters,

⁴³ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 496–97 (1988).

⁴⁴ This concept is akin to identifying the illocutionary meaning of an expression of law.

too.⁴⁵ Excessive complexity or opacity risk disregard of the law and the failure of deterrence. Both over-deterrence and under-deterrence count as failure. Artists puzzled by the fair use factors might simply throw their hands up and proceed with an infringing project or abandon a non-infringing project.

Application costs. These are the costs of applying the law to a dispute about whether conduct is lawful. They will include the cost of at least minimal factual inquiry—how fast was the car going, did a builder use vinyl conduit—and the inquiry may be extensive. The point of rules is to make application relatively easy by investing in the important work up front, so adjudication is as simple as in these examples.

Legal expressions are not always reliable guides to this cost. Copyright's fair use defense lists four nonexclusive factors, but one of them (whether the defendant sought profit) matters little in any case in which the defense is plausible, and two others (whether use is transformative and whether it usurped the plaintiff's market) are in many cases just two sides of the same coin. And this supposed multi-factor inquiry may reduce to a fact-finder's intuitions about property—was the defendant just free riding or was she trading in substantial part on her own contributions? That might not be a costly case to try, multiple factors notwithstanding. In contrast, some standards sound costly to implement and probably are costly to implement. In most cases, a malpractice plaintiff must establish the standard of care and show breach, and both issues may require costly and contradictory expert testimony. What is the standard of care for underwriter's counsel in a shelf registered offering? Opinions vary.⁴⁶

Error costs and agency costs deserve particular attention with respect to unlicensed practice. Error costs arise when a rule is applied to cases that do not present the risk a rule guards against; a particularly high-performing car may drive more safely at 90 miles per hour than an economy car does at 75, but the former driver violates a 75 mph speed limit and the latter does not. Each case presents an error, but the expected cost of

⁴⁵ Professor Kaplow provides another good example: rules regulating transport of hazardous waste may be complex and thus costly to learn, but few people are in that line of work, and therefore the sum of such learning costs is likely to be low, at least compared to ordinary driving rules such as the speed limit, which in some areas applies to millions of people. See Kaplow, *Rules Versus Standards: An Economic Analysis*, *supra* note 40, at 563.

⁴⁶ See generally *In re WorldCom, Inc. Sec. Litig.*, 346 F. Supp. 2d 628 (S.D.N.Y. 2004) (discussing the question with respect to underwriter's liability, which may be extended to question of what underwriter's counsel should advise underwriters to do to establish diligence with regard to shelf offerings).

each error is probably low—lower than the cost of inquiring whether either driver was driving safely, all things considered. If the error costs of a rule are high, however, inquiry might be worth the effort. This possibility is sometimes summarized in a rule of thumb (pardon the pun): employ rules when information costs exceed error costs, and employ standards when the reverse is true. Assuming for the moment that we can get a handle on these costs (a big assumption), this idea is common sense. The problem is, as it often is, that measuring such costs is hard. Hunches, rules of thumb, and rent seeking play a greater role in reality than they do in this description.

Agency costs relate to discretion in enforcement. Assuming that consumer protection is the goal of restrictions on unlicensed practice, agency costs could take the form of enforcement actions against sellers who pose no real threat to consumers but who may compete effectively with lawyers. The more capacious the content of a rule, the greater discretion enforcement officials have, and the greater the risk that they will use such discretion to prop up lawyers' income rather than to protect consumers.

3. Mixed Models: The Example of Antitrust

Antitrust law provides a useful example of these costs, and its emphasis on competition is relevant to the design of any UPL regulation.⁴⁷ Antitrust employs a *per se* rule of illegality for practices so likely to harm competition that extensive inquiry is not efficient.⁴⁸ Practices whose net effects are not so obvious are subject to a contextual balancing analysis under the rule of reason, which presents a standard in the form of a question: Does a practice restrict competition unreasonably? The rule of reason analysis takes the form of shifting burdens. A plaintiff must show the defendant's actions harm competition. If the plaintiff does, the defendant must show that those actions produce benefits to competition. If the defendant discharges that burden, the plaintiff must show the benefits could be obtained through less restrictive alternatives or that they are outweighed by losses.⁴⁹

The current doctrine is less categorical than it used to be. Rather than assuming that the *per se* analysis and rule of reason analysis are discrete and different things, courts emphasize

⁴⁷ See, e.g., RICHARD A. POSNER, ANTITRUST LAW 39 (2d ed. 2001).

⁴⁸ See, e.g., Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) (explaining the *per se* rule extends to "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are 'illegal *per se*.'").

⁴⁹ See, e.g., O'Bannon v. NCAA, 802 F.3d 1049, 1070–74 (9th Cir. 2015); United States v. Microsoft, 253 F.3d 34, 58–59 (D.C. Cir. 2001).

context. The result is more a continuum of approaches than a series of categories. The continuum ranges from practices that are condemned on sight (price fixing) to those that are condemned after only a “quick look” (certain refusals to deal) to those that require full rule of reason analysis (NCAA restrictions on payment to athletes). The choice of scrutiny is dynamic; practices may move along the continuum as courts become more familiar with them.⁵⁰ Nevertheless, relative information costs and error costs remain the key factors.⁵¹

Taking context and learning into account when selecting the level of inquiry does not prevent error. In *California Dental Ass'n v. FTC*,⁵² which explicitly endorsed contextual rather than categorical analysis, the Court mistakenly required full rule of reason analysis of a dental association's restrictions on advertising by its members.⁵³ The Court was too timid. It allowed itself to be swayed by arguments that price and quality advertising might work differently for dental markets than for other markets. The result was a false negative, particularly because the Ninth Circuit refused to remand for further fact-finding.⁵⁴ But attentiveness to context can avoid the opposite error. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, the Court held that Broadcast Music's “blanket license” was not unlawful *per se*, even though it effectively eliminated price competition among Broadcast Music members, because the license reduced transaction costs so much that it could be considered a new product and the restraint on (theoretical) price competition would be ancillary to creation of that product.⁵⁵

⁵⁰ See *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999) (“The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principle tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule-of-reason analyses in case after case reach identical conclusions.”); *id.* at 779 (categories of analysis are not fixed and may include hybrid forms such as “quick look” rule of reason analysis); *Polygram Holdings, Inc. v. FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005) (noting continuum approach); *Microsoft*, 253 F.3d at 84 (finding that tying arrangements that involve platform software products are not subject to *per se* rule because there was too little experience with the effects of such agreements).

⁵¹ “Quick look” rule of reason analysis straddles this line and creates a continuum of analysis rather than discrete categories. See POSNER, *supra* note 47, at 39 (*Per se* analysis, which requires courts to generalize about the utility of a challenged practice, reduces the cost of decision-making, but correspondingly raises the total cost of error by making it more likely some practices will be held unlawful in circumstances where they are harmless or even procompetitive.).

⁵² 526 U.S. 756 (1999).

⁵³ *Id.* at 771. In particular, the restrictions precluded advertising low prices or characterizing quality. *Id.* at 762.

⁵⁴ *Cal. Dental Ass'n v. FTC*, 224 F.3d 942, 959 (9th Cir. 2000).

⁵⁵ *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23–25 (1979).

As these examples show, taking information and error costs into account will not solve all problems, but it will solve some. At a minimum, this cost-sensitive approach brings adjudication closer to the purposes of the law—the bad things it is supposed to avoid and the good things it might help achieve. That is more than can be said for formalism (unless a formal approach is the product of such analysis, as is sometimes the case).

4. Costs of UPL Restrictions

Most of the definitions surveyed in Part I fare poorly under analysis based on information and error costs. Maine and Florida sit near one end of the continuum, insisting simultaneously that there is such a thing as the practice of law and that it has not and cannot be defined. California is almost as bad. These vague formulations are not rules because they make so little effort to give content to the notion of the practice of law. The formulations may include a rule—such as the requirement that no one without a license may practice in court—but taken as written, they are not rules but muddles. Because these definitions do not try very hard, their cost of creation is low. It does not take much effort to say that the practice of law consists of appearing in court and doing things that affect the legal rights of persons, or doing things traditionally done by lawyers.

For the same reason, the transmission costs of these prohibitions are high. These vague phrases are cheap to repeat, but they do not inform potential entrants whether a particular service is likely to be prohibited. Do the definitions of Maine, California, Florida, or Michigan preclude real estate agents from helping clients sign form offers? Do they prevent a senior employee from assisting a younger employee in drafting a grievance? These laws do not say. Neither do they provide a principle from which potential entrants could reliably discern the scope of prohibited conduct. So many things affect legal rights that a literal interpretation would be absurd (a driving instructor does not practice law when she tells a student to obey the speed limit), and counter-examples of permitted activity (real estate agents, bank clerks) are plentiful.

A prospective entrant could do some research to get a sense of what bar officials or courts would use to fill in the content of the law, but that would take time and in many cases any conclusion would be uncertain. In holding that an eviction assistance service unlawfully practiced law, a California court commented that “ascertaining whether a particular activity falls

within this general definition [of the practice of law] may be a formidable endeavor,”⁵⁶ and that is as true for prospective entrants as for courts. Hiring a lawyer would be ironic and in many cases would be pointless. Some lawyers would give a clear recommendation based on intuition, but many lawyers would hedge their letters so much that little useful information would survive.

Application costs may be high as well. When a restriction is given so little content up front, tribunals and parties generally will incur costs to create a record and argue about how it fits into the capacious language of the restriction. Florida, for example, took the time to investigate Marilyn Brumbaugh’s “typing service,” in which she helped consumers fill out divorce forms.⁵⁷ A referee heard evidence and issued findings of fact, which the Florida Supreme Court then sifted so it could draw a line: Ms. Brumbaugh could sell legal forms and type them up for clients, “provided that she only copy the information given to her in writing by her clients.”⁵⁸ She could not “make inquiries nor answer questions from her clients as to the particular forms which might be necessary, how best to fill out such forms, where to properly file such forms, and how to present necessary evidence at the court hearings.”⁵⁹ Whatever one thinks about whether this was a good use of anyone’s time, the high *ex post* costs involved are unsurprising given the small effort put into specification *ex ante*.

Application costs need not be high, however. Even if the law gets no content up front, courts may take shortcuts in application. *Birbrower* provides an example.⁶⁰ Rather than asking whether a licensed New York lawyer could provide adequate representation in arbitration in California, thus tying the scope of the UPL restriction to consumer protection, the court simply framed the question as being whether arbitration was an exception to the definition of the practice of law, even though the state’s core definition referred to “performing services in a court of justice,” which is not arbitration.⁶¹ It is at least plausible that the relative informality of arbitration would have eliminated any procedural quirks unique to California, such that an out-of-state lawyer could do as good a job as anyone. Relative to the goal of consumer protection, *Birbrower* is a false positive, and illustrates

56 *People v. Landlords Profl Serv’s.*, 264 Cal. Rptr. 548, 551 (Cal. Ct. App. 1989).

57 *Fla. Bar v. Brumbaugh*, 355 So. 2d 1186, 1189 (Fla. 1978).

58 *Id.* at 1194.

59 *Id.* at 1193.

60 *See generally* *Birbrower v. Super. Ct.*, 17 Cal. 4th 119 (Cal. 1998).

61 *Id.* at 128.

the point that economizing on application through the use of shortcuts poses the risk of high error costs.⁶²

Which brings us to agency costs—the risk that officials will bring enforcement actions to protect lawyers rather than consumers. As in *Brumbaugh*, UPL complaints are often made by lawyers who want to eliminate low-priced competition. The restrictions are then investigated and applied by lawyers—albeit lawyers who act in a different role than the complainants, and who presumably do not compete with the defendant. The concurring opinion in *Brumbaugh* was sensitive to how this might look:

There is a popular notion that every attempt to define the practice of law and restrict the activities within the definition to those who are authorized to practice law is nothing more than a method of providing economic protection for lawyers . . . regardless of motive, any law or rule that stakes out an area “for lawyers only” will result in some incidental benefit to those who are authorized to practice law—a form of serendipity for them.⁶³

The concurrence goes on to argue that this view overlooks the risk that consumers will be harmed by “pseudo-lawyers” who advise “without being competent to do so and without being subject to restraint and punishment if they cause damage to some unsuspecting and uninformed persons in the process.”⁶⁴ This argument itself overlooks the obvious risk that when lawyers rather than clients complain about non-lawyer services, the benefit to lawyers will be the primary object and consumer protection concerns will be “incidental.”

When enforcement officials pursue sellers who have harmed no clients, the costs of enforcement are agency costs, at least as judged by the goal of consumer protection. If the true goal of a UPL restriction is to benefit lawyers, then enforcement officials who pursue that goal are faithful agents and this argument would not apply. However, no restriction claims protectionism as its purpose. Nor could an enforcer avoid the charge by resorting to positivism. Enforcers generally have discretion even when a law is given content *ex ante*. The capacious provisions discussed in Part I leave ample room for discretion, and it is fair to judge

⁶² This point must be qualified by the facts of *Birbrower*: the client accused the lawyers of UPL in order to avoid the client’s fee obligation. *Birbrower*, 949 P.2d at 4. The Court’s holding lowered the client’s bill because the lawyers were allowed to collect only for work done in New York (their licensing jurisdiction) and not California. *Id.* at 13. Notwithstanding this idiosyncratic (and opportunistic) client benefit, one would expect the net client effect of the holding in *Birbrower* to be negative.

⁶³ *Brumbaugh*, 355 So. 2d at 1194 (Karl, J., concurring).

⁶⁴ *Id.*

enforcement by how that discretion is exercised relative to the stated purpose of the law.

The agency cost analysis applies in part to laws such as Arizona's, which are far more specific than Maine's or Florida's. Arizona's extensive list of exemptions provides some *ex ante* content for its laws—a senior employee interested in helping a junior employee dispute a personnel action could read the rule and be assured that she would not be practicing law in doing so—unless she charged a fee.⁶⁵ One might argue that this rule's relation to consumer protection is oblique—the senior employee is no less competent for charging a fee, though the junior employee might be wasting money—but it is clear enough and a bar official enforcing the rule would have a partial defense against any charge that enforcement was at odds with the purpose of the law (the defense would be only partial so long as enforcement of the clear rule is still discretionary).

B. The Baseline of Protection

As noted above, Florida poses the question whether work requires “legal skill and a knowledge of the law greater than that possessed by the average citizen,”⁶⁶ and Michigan distinguishes between “ordinary intelligence” and “legal training.”⁶⁷ These statements are at least compatible with a more standards-based approach. They also squarely present the problem of choosing a baseline for a UPL restriction: should the question be whether an ordinary, untrained person could do the job well; whether only a trained lawyer could do the job well; or something else?

UPL definitions tend to compare lawyers with ordinary persons who lack any legal training. That baseline sets up a false dichotomy, and the restrictions that rest on it are both too broad and too narrow (I discuss narrowness in the next section). Such restrictions are too broad because people learn by doing. Common sense and experience support the point, not to mention an important body of economics⁶⁸ and legal doctrine. The comments to the ABA's Model Rule of Professional Conduct 1.1 (and thus the comments of many adopted rules) state that lawyers who are

⁶⁵ ARIZ. REV. STAT. ANN SUP. CT. R. 31(d)(2) (“An employee may designate a representative, not necessarily an attorney, before any board hearing or any quasi-judicial hearing dealing with personnel matters, providing that no fee may be charged for any services rendered in connection with such hearing by any such designated representative not an attorney admitted to practice.”).

⁶⁶ State ex rel. Fla. Bar v. Sperry, 140 So. 2d 587, 591 (Fla. 1962), *vacated sub nom.* Sperry v. State of Fla. ex rel. Fla. Bar, 373 U.S. 379, 404 (1963).

⁶⁷ Dressel v. Ameribank, 664 N.W.2d 151, 156 (Mich. 2003).

⁶⁸ See, e.g., Kenneth J. Arrow, *The Economic Implications of Learning by Doing*, 29 REV. ECON. STUD. 155, 156–58 (1962).

not competent to handle a matter acquire that competence on the job, either by studying hard or by associating with an experienced lawyer.⁶⁹ Where states are attentive to learning by doing, real estate agents may be allowed to help clients buy and sell houses because they have shown themselves competent to do so, as have tax accountants, car dealers, and others. From a consumer protection perspective, it is perverse to ignore such a basic and easily observed fact of life. As Professor Perlman has written, if we focus “attention on whether the provider is competent to deliver a service, we can more effectively achieve what really matters: protecting the public.”⁷⁰

The definitional approach makes it hard to get away from baselines like this because definitions aim at a supposedly unitary concept—the practice of law. That makes it seem as though a single baseline could be used. But there is no reason to think the varied types of work that might fall within a definition have a single relationship to intelligence or training. The importance of learning by doing counsels that skill and knowledge should be related to the particular task at hand rather than to vague abstractions. The inquiry should be factual, not conceptual. That is how malpractice law deals with the question of competence among lawyers—the standard of care compares a practitioner to a reasonably prudent practitioner who can do the job in question. No other baseline is relevant, but the definitional approach obscures that fact. UPL restrictions and the standard of care both aim to protect consumers, and they should not operate differently. They should be made to work together, pointing toward their common goal.

C. “Holding Out” and the Meaning of a Law License

The ordinary person baseline supports restrictions that are too narrow because licenses do not entail competence. Even if a person of ordinary intelligence could not do a law-related job, it does not follow that anyone with a law license can. Persons of ordinary intelligence, but no legal training, probably would be daunted by the Security and Exchange Commission’s “free writing” prospectus rules, but many, if not most, lawyers would as well. Licenses do not entail competence to help clients with real-world problems.

The need for learning by doing—or “experiential” learning, to use the ugly phrase popular right now—is a premise of many

⁶⁹ MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 2, 4 (AM. BAR ASS'N 2015).

⁷⁰ Andrew M. Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L. REV. 49, 89 (2015).

critiques of legal education. For some years now the media and legal commentators have complained that newly minted lawyers cannot practice law. The theme has been repeated so much it approaches conventional wisdom even within the academy. The point is not that law school teaches nothing about lawyering—most schools do a good job of teaching many skills most lawyers need—but most schools do not teach many skills that matter to clients, and therefore matter to consumer protection. Some sophisticated clients refuse to pay for first or second-year lawyers at all, and their judgment is telling.⁷¹ These clients will not be misled by the implication that a license entails competence, but ordinary consumers, who are most in need of protection both from over-pricing and from incompetence, might be.

Licenses are a form of holding out and, depending on the facts, could mislead consumers just as a non-lawyer's claim to expertise could mislead them. Nevertheless, a newly admitted lawyer does not violate a UPL restriction by holding himself out as qualified to practice law. A licensed lawyer who accepts a matter and plans to learn by doing does not violate any UPL restriction, while an experienced legal assistant who is competent to handle the matter would. Some lawyers might admit to clients that they plan to learn on the job,⁷² but no rule requires such an admission, and few lawyers are likely to stress their inexperience. Licenses thus pose to some degree the same risk commonly attacked by prohibitions on non-lawyers holding themselves out to be lawyers.

Consumer protection is not well served by such formal analysis, which is why a bar card is not a conclusive defense to malpractice. A cogent UPL restriction would address this risk as a way of improving the fit between the restriction and consumer protection. It would not make holding out a part of the definition of the practice of law, but instead tie the concept to competence for both lawyers and non-lawyer providers of law-related services.⁷³

⁷¹ See Ashby Jones & Joseph Palazzolo, *What's A First-Year Lawyer Worth?*, WALL ST. J. (Oct. 17, 2011), <http://www.wsj.com/articles/SB10001424052970204774604576631360989675324>. It is hard to say exactly how widespread this refusal is, either in terms of clients or in terms of the tasks they will not pay to have a junior lawyer perform.

⁷² See, e.g., *In re Fordham*, 668 N.E.2d 816, 819 (Mass. 1996) (attorney admitting to client his inexperience in criminal law before agreeing to the representation).

⁷³ For example, the D.C. definition incorporates holding out into the basic rule. See D.C.R. APP. CT. 49(a).

D. Trust and Confidence

As noted above, the FTC has suggested that UPL definitions may be improved by limiting the practice of law to relationships involving trust and confidence in relation to legal expertise. The FTC's suggestions do improve on the proposed definitions it has reviewed and the FTC should be applauded for doing what it can, but I think these suggestions ameliorate rather than cure the ills that beset the definitional approach to UPL.

The trust and confidence concept the FTC has recommended invokes the law of fiduciary obligations. Not all fiduciaries are lawyers, so the concept of trust and confidence is too broad to help on its own. It has to be tied to the law in a way that clarifies rather than replicates the ambiguity of the definitions it is supposed to limit. That is not as easy as it might seem.

What makes a fiduciary a fiduciary? Categorical definitions provide part of the answer. Trustees, physicians, and lawyers are fiduciaries by judicial declaration. But that fact does not help clarify judicial declarations defining the practice of law. Using one judicial declaration to define another does not bring the law closer to consumer welfare.

Peering beneath such categorical declarations, one sees some complexity. The California Supreme Court made this point in *City of Hope National Medical Center v. Genentech, Inc.*⁷⁴ The case involved a contract relating to the commercialization of patented technology.⁷⁵ The plaintiff claimed the defendant owed it fiduciary duties under a proposed test embodying four elements:

- (1) one party entrusts its affairs, interests or property to another; (2) there is a grant of broad discretion to another, generally because of a disparity in expertise or knowledge; (3) the two parties have an "asymmetrical access to information," meaning one party has little ability to monitor the other and must rely on the truth of the other party's representations; and (4) one party is vulnerable and dependent upon the other.⁷⁶

The court rejected this test as inadequate because these four elements are common to contractual relationships.⁷⁷ It offered an example of a car mechanic:

[T]he four characteristics articulated by *City of Hope* and discussed above are common in many a contractual arrangement, yet do not necessarily give rise to a fiduciary relationship. For example, a person who takes a car to a garage for repairs has entrusted property to

⁷⁴ 43 Cal. 4th 375, 398 (Cal. 2008).

⁷⁵ *Id.* at 380.

⁷⁶ *Id.* at 387–88.

⁷⁷ *Id.* at 388–89.

another (factor 1 of City of Hope's test). Because the garage operator has expertise in the field of automotive repair but the car owner does not, the car owner must grant the garage operator broad discretion to carry out the necessary work (factor 2) and must rely on the truth of the garage operator's representations about what repairs are needed and how they should be done (factor 3), leaving the car owner vulnerable and dependent on the garage operator (factor 4).⁷⁸

The court was right on this score. Taken in their ordinary meaning, trust and confidence are common features of relationships. Adding "with respect to legal matters" to these terms adds nothing meaningful to the definition of the practice of law, which presumes that the services on offer relate to the law. Consumers have trust and confidence in real estate agents, accountants, TurboTax and other forms of interactive software, bank clerks who help fill out forms, and so on. Otherwise they would not transact with such sellers.⁷⁹

This concept may be salvaged in part by modifying the second element in the test recited above and by replacing the fourth element with a new one: the absence of objective criteria to measure the fiduciary's performance. When such criteria exist, a disparity of knowledge does not imply a need for a grant of discretion nor implies that the principal is vulnerable to the agent. The criteria will constrain the fiduciary's performance notwithstanding this disparity. The fiduciary will either follow the dictates of the criteria or be exposed to liability.

Suppose, for example, that a car's brakes are always safe if the pads are at or above a certain thickness and are not safe below that thickness. A driver may know nothing about brakes or about this fact, but the mechanic is constrained to one of two choices nonetheless. She has no discretion on this point because to replace pads above the safe line would be wasteful and not to

⁷⁸ *Id.*

⁷⁹ This point is illustrated by a particularly strained application of UPL restrictions in *Prof'l Adjusters, Inc. v. Tandon*, 433 N.E.2d 779, 781 (Ind. 1982), which held unconstitutional a statute authorizing non-lawyers to act as private adjusters negotiating insurance settlements on behalf of insureds. The court recited a definition of the practice of law that held "[t]he core element of practicing law is the giving of legal advice to a client and the placing of oneself in the very sensitive relationship wherein the confidence of the client, and the management of his affairs, is left totally in the hands of the attorney." *Id.* at 782-83. Disciplinary rules, such as the ABA's Model Rule 1.2(a), require that ultimate decisions regarding the management of a client's affairs, at least with respect to the objectives of representation, rest with the client, not the lawyer. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2015). More to the point raised in the text, as the dissent in *Tandon* noted, insurance companies employed non-lawyer adjusters and seemed to have no trouble forming satisfactory relationships with them. *Tandon*, 433 N.E.2d at 786-87 (Hunter, J., dissenting). The upshot of the Court's decision was to deprive insureds, but not insurers, of the benefits of competition, the exact opposite of what UPL laws are supposed to do.

replace thinner pads would be negligent. Something like this is what Michigan had in mind when it excluded from the definition of the practice of law work that was “so standardized” in forms that completing them “requires only ordinary intelligence rather than legal training.”⁸⁰ That is not quite right—a person might need to be smarter than average to understand the forms—but the point is materially similar.

By focusing on relationships, the FTC’s recommendation presumably excludes written material (including interactive software) from the “practice of law,” and that is good. But from a general point of view, the FTC’s reliance on trust and confidence is best understood as a wise resort to a second-best solution that has a chance of being adopted. That chance justifies the recommendations on the ground that the impossible best should not defeat the possible good, but the trust and confidence recommendation works within the definitional structure and thus suffers from the problems of that structure. It relies on concepts that are too broad, and narrowing those concepts would replicate too much of the debate the recommendation is intended to clarify. There is a better way.

III.

In light of the preceding analysis, I find the appeal of licensing hard to understand.⁸¹ Assuming for present purposes that licensing is here to stay, however, this analysis suggests that a law addressing provision of legal services should: (1) minimize the aggregate costs of information, error, and enforcement; (2) tie the scope of the prohibition to competence; and (3) tie the scope of inquiry to the novelty and complexity of a situation. Each of these features should aim to enhance consumer protection from both incompetence and overpricing. The preceding critique also suggests that such a law should not (4) attempt to define the practice of law; (5) relate legal services to some baseline conception of intelligence; or (6) take a categorical approach to “holding out” violations.

Different structures could accommodate these lessons, but taken together they argue strongly for standards as a default matter, with the selective use of some rules to economize on

⁸⁰ *Dressel v. Ameribank*, 664 N.W.2d 151, 156 (Mich. 2003).

⁸¹ Even so powerful an advocate of increased access to legal services as Professor Rhode envisions non-lawyer provision of services subject to “licensing and certification systems that impose competence qualifications, ethical standards, and effective malpractice remedies.” DEBORAH L. RHODE, *ACCESS TO JUSTICE* 21 (2004). However, Professor Rhode leaves open the possibility of simple registration and voluntary certification regimes, *id.* at 90, which seems to me a more desirable approach.

costs. The following is one such structure. (If you are not interested in the detail, skip to section (B).)

A. A Proposed UPL Law

Title N: Legal service providers

1. Definitions

A. “Adjudicative body” means one or more neutral officials who hear evidence or argument offered by a party or parties and who render a judgment affecting a party’s interests in a particular matter.

B. “Competent,” “competence,” and “competently” refer to possession of the skill of an ordinarily prudent person qualified to perform a service or task and to the exercise of that skill in such performance.

C. “Hold out” and “holding out” refer to any expression that would convey to a reasonable consumer of the services offered that the service provider possesses a level of skill, qualification, or credential.

D. “Lawyer” means a person licensed to practice law in this State.

E. “Provider” means a person or entity, including but not limited to a Lawyer, offering to assist another with respect to any matter involving or affecting legal rights or obligations, regardless whether a fee is sought.

F. “Tribunal” means a court or other adjudicative body created by a governmental entity; the term does not extend to means of dispute resolution established by consent of the parties, such as private arbitration or mediation.

2. Provision of legal services

A. *Holding out:* No Provider shall hold itself out as having any skill, qualification, or credential it does not have at the time the expression constituting holding out is made.

B. *Tribunals:* No Provider may appear before a Tribunal except in accordance with all rules adopted by the Tribunal.

C. *Competence:* No Provider shall offer any service the Provider is not competent to perform at the time the service is to be rendered.

(1) A Lawyer is presumed competent to offer legal services. This presumption may be rebutted by evidence that the Lawyer has offered to perform or has performed services the Lawyer is not competent to perform.

(2) *A non-Lawyer Provider bears the burden of producing evidence that, on its face, tends to show that the Provider is competent to perform the services the Provider offers. Such evidence need not relate solely to the specific Provider whose competence is at issue but may include, without limitation, evidence tending to show that the services the Provider offers are provided competently by other non-Lawyer Providers. A Provider who has met this burden of production shall be presumed competent. This presumption may be rebutted by evidence that the Provider has offered to perform or has performed services the Provider is not competent to perform.*

(3) *A Provider who proposes to become competent in the course of representation violates this subsection unless, prior to retention, the Provider informs the client or customer, in a writing signed by the client or customer, of (i) the Provider's intention to acquire such competence in the course of the representation, (ii) the means by which the Provider proposes to acquire such competence, and (iii) whether the client or customer will be charged for time spent acquiring such competence.*

3. Remedies

(A) *Any Provider who violates Section 2(A) through expression directed to a general audience shall be fined \$[N] per communication. For purposes of this subsection a "communication" refers to the content that constitutes a violation. Repetition or continued display of the same or materially similar content, such as, without limitation, persistent display on a website or multiple publications of the same advertisement, constitutes one violation.*

(B) *Any Provider who violates Section 2(A) through person-to-person communication with a client or consumer shall be fined \$[N] per client or consumer to whom such communication is made, regardless whether the client or consumer hires the Provider for any work. A client or consumer to whom a communication is made in violation of Section 2(A) may sue such Provider for any damages caused by such violation; a client or consumer who prevails in such a suit shall be awarded attorney's fees and costs of suit including, without limitation, expert fees.*

(C) *A Provider who violates Section 2(B) is subject to sanction or other punishment by the Tribunal.*

(D) *[State entity] may sue in any court to enforce Section 2(C). In any such proceeding a court shall have discretion to fine a Provider found to have violated Section 2(C) no more than \$[N] for each violation proved; for each violation the amount*

of such fine shall be proportionate to the risk of harm created by such violation. In any such proceeding the court may enjoin continuing violations of Section 2(C).

(E) Any person harmed by a violation of Section 2(C) may sue to recover any harm caused by such violation and, upon prevailing, shall be awarded attorney's fees and costs of suit including, without limitation, expert fees.

B. Why the Proposed Law Makes Sense

Competence is the central principle of this proposal. Rather than comparing a given activity to a partial definition of the practice of law, with one exception the proposed rule asks only two questions: Is the seller lying about what it is selling, and is the seller competent to do the job undertaken? Competence is defined operationally and mimics the standard of care used in malpractice cases. That standard is basically horizontal; it asks not whether a defendant provided some Platonic ideal of service, but whether the defendant did as good a job as reasonably prudent people in the field would do.

Because the proposal rests on standards, its application costs are high.⁸² I think it is preferable to current approaches, however, on two grounds. First, to the extent definitional approaches avoid the cost of finding out what a defendant is doing and how they are doing it, those approaches will tend to be arbitrary. The definitions themselves provide little notice as to their scope, so there is no reduction in information costs to offset this inevitable arbitrariness. The proposal will tend not to produce arbitrary decisions, though of course some mistakes would be made under this regime as under any other.

Second, to the extent that definitional approaches invite inquiry and the creation of a record, they then compare this record to definitional categories rather than to performance. *Brumbaugh* is a good example of this point. Having spent the time to create a record, the Court did not take the obvious next step and ask whether Ms. Brumbaugh did a good job. Did she pick the right forms? Did she hurt anyone? What bad thing would happen if she were allowed to keep doing what she had been doing? The costs of inquiry should be used to reduce error costs, relative to a baseline of consumer protection, by assessing the record in terms of consumer welfare. Definitional approaches tend not to do that; the proposal does exactly that.

⁸² The only exception pertains to tribunals, which are just taken off the table on the grounds that they will do what they want anyway, and there is no point trying to fight about whether non-lawyers could do as good a job in court as lawyers.

The proposal uses presumptions to limit the costs somewhat. Lawyers are presumed competent by reason of their knowledge though the presumption may be rebutted by proof of the kind commonly submitted in malpractice cases. Competence is contextual, as it should be. In each case the level of inquiry needed would depend on context and experience, as it does with respect to the antitrust inquiries discussed above. Other than tribunals, the proposal does not create *per se* categories, but one would expect courts to develop various versions of “quick look” scrutiny for different types of work.

Holding out is treated as a problem that is distinct from competence and which does not turn on definitions. Lawyers may hold out as well as non-lawyers; judged from the perspective of competence a license should not deflect attention from this fact. To some extent, this provision will overlap with advertising restrictions, but I do not think that is a point against it. The related idea of learning by doing is captured by an affirmative disclosure requirement for lawyers planning to train on the client’s job.

A few follow-up issues should be noted. The proposal effectively opens the door to interstate practice because a lawyer not licensed in a state could do work as a provider, subject to the requirement that he or she not claim to be licensed in the state and that he or she perform his or her work competently. That is currently the case with respect to whatever states exclude from their definitions of unlicensed practice. If the provider needed to learn state-specific procedures, then the learning-by-doing disclosure would apply and the out of state lawyer still would have to deal with tribunals. Agency law would apply to all providers, and I would extend privilege to all providers. Just as a lawyer’s malpractice does not vitiate privilege, a provider found to act incompetently would not vitiate a client’s privilege. Finally, though some rules of professional conduct are simple protectionism, such as the prohibition on lawyers buying claims,⁸³ I would leave in place whatever rules a state might have. One step at a time.

C. Antitrust Enforcement as an Alternative

The Supreme Court’s recent opinion in *North Carolina State Board of Dental Examiners v. FTC*⁸⁴ has suggested to some that current antitrust doctrine might be used to trim some of the anticompetitive aspects of UPL regulations. The *Dental Examiners* opinion applied the Supreme Court’s rule of immunity

⁸³ MODEL RULES OF PROF’L CONDUCT r. 1.8(e) (AM. BAR ASS’N 2015).

⁸⁴ 135 S. Ct. 1101 (2015).

for state-imposed restraints on trade to a letter sent by North Carolina's board of dental examiners that suggested the service of teeth-whitening was the practice of dentistry and therefore could be provided only by licensed dentists.⁸⁵ The rule of immunity traces to *Parker v. Brown*,⁸⁶ and exempts from antitrust scrutiny restraints on trade a state adopts "as sovereign."⁸⁷ If a state delegates regulation to a body staffed by members actively participating in the regulated industry, immunity applies if the body enforces a clear state policy to restrain trade and the body is subject to active supervision by the state.⁸⁸

Most UPL restrictions should satisfy the sovereignty requirement, either because they are expressed in legislation or are adopted by a state supreme court acting in a legislative capacity.⁸⁹ But these restrictions tend to be written generally, as the survey in Part I illustrates. The devil is in the details, and where enforcement of a clear policy is delegated to a board controlled by market participants, the state must "review and approve interstitial policies made by the entity claiming immunity."⁹⁰ This "active supervision" requirement is vague:

Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests."⁹¹

The Court's nonexclusive list of what the requirement entails states that state review must be actual not potential, focus on substance and not form, and that the reviewer have the power to veto a decision by a competitor-controlled board.⁹²

Nothing in these requirements actually keeps a state employee from rubber-stamping anticompetitive restrictions. Particularly in light of the professional courtesy that wisps its way through opinions in this field, I do not see the *Federation of Dentists* decision as promising much in the way of UPL reform. It would be better to focus on the state policies themselves.

⁸⁵ *Id.* at 1110.

⁸⁶ 317 U.S. 341 (1943).

⁸⁷ *Id.* at 352.

⁸⁸ See *Dental Exam'rs*, 135 S. Ct. at 1110; *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631–32 (1992); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

⁸⁹ *Dental Exam'rs*, 135 S. Ct. at 1110.

⁹⁰ *Id.* at 1112.

⁹¹ *Id.* at 1116.

⁹² *Id.*

CONCLUSION

States should stop trying to define the indefinable, and stop trying to treat competence as a deductive, conceptual issue rather than a factual issue. They should not propound vague definitions and pretend the definitions are rules when in fact they convey little information and, even when used well, incur the costs of standards. This approach is wasteful, frustrating, and does a poor job of protecting consumers from the harm of overpricing as well as the harm of incompetence.

An open embrace of standards tied to competence would be preferable. Restrictions on unlicensed practice and the standard of care are both meant to protect consumers. The two concepts should be harmonized and merged. Rather than trying to define a concept in one breath, while proclaiming with the next that definition is impossible, the law should dispense with definitions and keep its eye on consumers, who need protection from both incompetence and over-pricing. Basic antitrust doctrine provides an example of how this goal might be achieved, and the conventional means of comparing rules against standards suggests it should be achieved with respect to the provision of law-related services.



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The Future of Law as a Profession

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For far too many years, lawyers and commentators have debated whether law is a profession or merely a business.¹ The so-called business-profession dichotomy² is somewhat of a misnomer.³ For many, maybe most lawyers, law is clearly a business in the sense that these lawyers seek to maximize their individual wealth as much (or as little) as other business persons.⁴ More importantly perhaps, lawyers in private practice

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¹ See generally Nancy J. Moore, *Review Essay: Professionalism Reconsidered*, 1987 AM. BAR FOUND. RES. J. 773, 774 (1987).

² See, e.g., Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism*, 47 AM. J. LEGAL HIST. 1 (2005). A draft of my paper was presented at a panel organized by Professor Levine for the International Legal Ethics Conference VII, held on July 14–16, 2016 in New York City. The panel was entitled “International Perspectives on the Business/Profession Dichotomy,” drawing on Professor Levine’s seminal article on the topic. See Fordham Univ. Sch. Law, *International Perspectives on the Business/Profession Dichotomy (Program)*, FORDHAM UNIV. SCH. LAW, https://www.fordham.edu/info/25018/globalization_and_the_legal_profession/8033/international_perspectives_on_the_businessprofession_dichotomy_program [<http://perma.cc/PK43-LHLG>].

³ See, e.g., Christopher J. Whelan, *The Paradox of Professionalism: Global Law Practice Means Business*, 27 PENN STATE INT’L L. REV. 465, 465 (2008) (“[L]aw has almost always been an occupation that displays characteristics of *both* business and profession, with changes in emphasis over time.”).

⁴ See, e.g., Russell G. Pearce & Adam Winer, *Destabilizing the Business-Profession Dichotomy: Louis Brandeis on Professionalism and Identity at 1 (Preliminary Draft, Mar. 27, 2017)* (“[E]mpirical studies indicate that many lawyers tend to think of themselves as maximizing profits and as hired guns with little responsibility to the public good in their representation of clients.”) (on file with author). According to Pearce and Winer, Justice Brandeis viewed law as an occupation that “was part of the market,” but one that was not exclusively defined by the market. *Id.* at 14. Indeed, according to Brandeis, “[a] condition of professional success was applying efficiency and excellence to the work to the tasks of lawyers, seeking profit, and earning a high income”; however, he also believed that “a profession was an occupation ‘pursued largely for others and not merely for one’s self . . . in which the amount of financial return is not the [only] accepted measure of success.’” *Id.* at 14–15. Brandeis also believed that “business, too, could be a profession” in that it is “rich in opportunity for the exercise of man’s finest and most varied mental faculties and moral qualities.” *Id.* at 18.

Some commentators are more critical of lawyers who are motivated more by making money than by doing good. See, e.g., Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 706–07 (1998) (describing how “[f]or lawyers, money is increasingly the be-all and end-all” and how “the lives of senior lawyers—particularly those in the elite firms—have become dominated by the pursuit of billable hours”); Kristin L. Fortin, *Reviving the Lawyer’s Role as Servant Leader: The Professional Paradigm and a*

widely acknowledge that adopting improved business practices is critical to providing competent legal services.⁵ The question remains however, whether, unlike some other commercial occupations, law is *also* a profession and if so, what is the future for the professional aspects of legal practice in the United States and elsewhere?

The American Bar Association (“ABA”) Commission on Professionalism concluded that an occupation constitutes a profession when: (1) the “practice requires substantial intellectual training and the use of complex judgments”; (2) “clients cannot adequately evaluate the quality of the service, [and therefore] they must trust those they consult”; (3) “the client’s trust presupposes that the practitioner’s self-interest is overbalanced by devotion to serving both the client’s interest and the public good”; and (4) “the occupation is self-regulating—that is, organized in such a way as to assure the public and the courts that its members are competent, do not violate their client’s trust, and transcend their own self-interest.”⁶ Although other attributes are sometimes noted,⁷ the overriding theme appears to be dedication to serve the public good.⁸

Some believe that to constitute a true profession, members of the occupation must personally serve the public interest by consistently placing the needs of the community above their own selfish interests⁹—in other words, that lawyers and other professionals must be more altruistic than other business

Lawyer’s Ethical Obligation to Inform Clients About Alternative Dispute Resolution, 22 GEO. J. LEGAL ETHICS 589, 595–97 (2009) (describing how financial success has become many lawyers’ only goal).

⁵ See, e.g., Judith A. McMorrow, *In Defense of the Business of Law*, 40 FORDHAM URB. L.J. 459, 461 (2012); Frederick L. Trilling, *The Strategic Application of Business Methods to the Practice of Law*, 38 WASHBURN L.J. 13, 14 (1998).

⁶ A.B.A. COMMISSION ON PROFESSIONALISM, “. . . IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 1, 10 (1986), http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/Stanley_Commission_Report.authcheckdam.pdf [<http://perma.cc/76VW-XLJL>].

⁷ For example, some cite “admission to practice by a qualifying licensure,” as well as “a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace,” as well as “a system of discipline of its members for violation of the code of ethics.” *Freeman v. Freeman*, 311 N.E. 2d 480, 483 (N.Y. 1974).

⁸ See, e.g., A.B.A. COMMISSION ON PROFESSIONALISM, *supra* note 6, at 10 (“The term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service – no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.”).

⁹ See, e.g., Nancy J. Moore, *Implications of Globalization for the Professional Status of Lawyers in the United States and Elsewhere*, 40 FORDHAM URB. L.J. 217, 220 (2012) [hereinafter *Implications of Globalization*] (citing works by Julius Cohen and Tom Morgan).

persons. If so, then there is considerable skepticism that this has ever been the case.¹⁰

In my own writing on professionalism, however, I have focused on the criterion of self-regulation—the fact that professions are permitted to be, if not totally self-governing, at least more self-governing than other occupations.¹¹ True, it is courts and not bar associations that oversee the regulation of legal practice in the United States, including admission to practice and lawyer discipline;¹² however, given both the influence of lawyers on judges, who are themselves lawyers, and the status of judicially adopted codes of conduct as law, lawyers are in fact more self-governing than other U.S. professionals.¹³

Professions are permitted to be more self-governing than other occupations because they have persuaded society that it is in the public interest to allow them to do so.¹⁴ But society can change its mind, as it did in the United Kingdom, when in 2007 Parliament passed the Legal Services Act and dramatically changed the way in which the legal professions are regulated in England and Wales.¹⁵ Among other reforms, the Legal Services Act created an independent agency to oversee the lawyer disciplinary process and to assume primary responsibility for consumer complaints; moreover, this agency is required to have a chairperson and a majority of its members who are nonlawyers.¹⁶

¹⁰ See *id.* at 221 (citing work of Tom Morgan); see also Nancy J. Moore, *Professionalism Reconsidered*, 1987 AMER. BAR FOUND. RES. J. 773, 779 (1987) (“The notion that professions are more likely than other trades to put public interest above self-interest is often met with considerable derision.”).

¹¹ See, e.g., Moore, *supra* note 9, at 222 (“[S]o long as the public permits the occupation to be self-regulating, the occupation would appear, as a matter of descriptive reality, to constitute ‘a profession’”); John Flood, *The Re-landscaping of the Legal Profession: Large Law Firms and Professional Re-regulation*, 59 CURRENT SOC. 507, 509 (2011) (“Self-regulation is traditionally a key component of occupational control and a core objective for professional projects.”).

¹² Outside the United States, lawyers may be subject to more direct regulation by state legislatures; however, local bar associations have control over the investigation and prosecution of lawyer misconduct. See CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE, PROFESSIONAL LEGAL ETHICS: A COMPARATIVE PERSPECTIVE, CEELI CONCEPT PAPER SERIES 7–11 (Maya Goldstein Bolocan ed., 2002).

¹³ See Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. L. 7, 14–15 (1989).

¹⁴ See Moore, *supra* note 10, at 784; see also, e.g., Flood, *supra* note 11, at 509–10 (“Overall professional self-regulation has been seen as part of a broader regulative bargain where the state has granted professions a high degree of autonomy in organizing their own affairs in exchange for the professions’ pledge to guarantee quality and put public interest before their own.”).

¹⁵ See Moore, *supra* note 9, at 224–25.

¹⁶ *Id.* For a detailed description of the regulatory reforms in both the United Kingdom and in Australia, see generally Judith L. Maute, *Global Continental Shifts to a New Governance Paradigm in Lawyer Regulation and Consumer Protection: Riding the Wave*, in ALTERNATIVE PERSPECTIVES ON LAWYERS AND LEGAL ETHICS: REIMAGINING THE PROFESSION 11 (Francesca Bartlett et al. eds., 2011); see also Ted Schneyer, *Thoughts on*

The legislation also overrode prior professional rules by permitting lawyers to collaborate with nonlawyers in the provision of legal or multidisciplinary services.¹⁷

So what is the future of the legal profession in the United States?

Of course, it will be more difficult for society to enact dramatic reforms in the United States than it was in the United Kingdom. This is because U.S. lawyers are primarily regulated by fifty state courts as opposed to state legislatures or the federal government.¹⁸ Congress almost certainly has the authority to regulate lawyers, but so far has not shown the will to do so, except in an occasional, piecemeal fashion.¹⁹

Putting these practical questions aside, what other considerations are likely to affect the future of legal professionalism in the United States?

According to some critics, such as Tom Morgan, lawyer self-regulation has not benefitted the public.²⁰ As a result, these critics believe that right-thinking citizens, including lawyers, should favor a form of deregulation. In other words, let lawyers be viewed as primarily commercial actors and be regulated in the same manner as other commercial actors.²¹

I do not currently favor this position, as I am not yet convinced that lawyer self-regulation has produced more public detriments than benefits. I concede that the legal profession has often put the interests of lawyers ahead of the public,²² but I also

the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Law Practice, 2009 J. PROF. LAW. 13, 14 (2009).

¹⁷ See Moore, *supra* note 9, at 224–25.

¹⁸ See Schneyer, *supra* note 16, at 13–17, 24–25.

¹⁹ See generally Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 337 (1994).

²⁰ See, e.g., THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 66 (2010) (“Law in America is not a profession – and that’s a good thing.”). For a list of other publications by Morgan to the same effect, see Moore, *supra* note 9, at 217 n.2. See also *id.* at 228–29 (describing Morgan’s view that “the concept of law as a profession and lawyers as professionals is good neither for lawyers . . . nor for the public at large”) (footnotes omitted). Of course, Morgan is not alone. See, e.g., CLIFFORD WINSTON, ROBERT W. CRANDALL & VIKRAM MAHESHRI, *FIRST THING WE DO, LET’S DEREGULATE ALL THE LAWYERS* 5 (2011); David Barnhizer, *Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit*, 17 GEO. J. LEGAL ETHICS 203, 207 (2004).

²¹ See Moore, *supra* note 9, at 228–29; see also, e.g., WINSTON ET AL., *supra* note 20; Barnhizer, *supra* note 20; cf. Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 433 (calling for complete deregulation of lawyers except for in-court appearances).

²² See, e.g., Moore, *supra* note 10, at 786 (detailing some of the dangers of professional self-regulation).

believe that lawyers have enacted and enforced improvements in the rules of professional conduct and other forms of regulation, including the professionalization of the lawyer disciplinary system.²³

If I am right, then deregulation is not necessarily the preferred path for the future.²⁴ And along these lines, I take heart from the fact that the United Kingdom has not removed lawyers from the regulatory process, but rather permits lawyer organizations to function as front-line regulators, albeit with a significant amount of external oversight.²⁵

Similarly, I have no problem with, and would likely support limited regulatory reform in the United States, including having Congress enact certain limited measures to solve various problems that state courts have been unable or unwilling to solve; for example, uniform minimalist standards for lawyer advertising and solicitation and perhaps even uniform standards for confidentiality and conflicts of interest.²⁶

But there are other, perhaps more pressing, problems facing the U.S. legal profession today. For example, will globalization force changes that are already occurring outside the United States, including nonlawyer ownership of law firms and multi-disciplinary practices?²⁷ Advances in technology have

²³ See Moore, *supra* note 9, at 229–32; see also Dana Remus & Frank Levy, *Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law*, 29 GEO. J. LEGAL ETHICS (forthcoming 2017) (organized bar continues to act in altruistic and public-serving ways at the same time it acts in self-interested and protectionist ways).

²⁴ See generally Moore, *supra* note 9, at 232–37 (suggesting several reasons why U.S. lawyers and lawyer organizations should consider “reprofessionalism, along the lines suggested by the current reforms in the U.K. and Australia”); see also, Julian Webb, *The Dynamics of Professionalism: The Moral Economy of English Legal Practice – and Some Lessons for New Zealand?*, 16 WAIKATO L. REV. 21, 37 (2008) (noting that the debate preceding the adoption of the Legal Services Act of 2007 had moved “beyond a crude deregulation agenda” toward regulations designed to be “efficient, systematic, transparent and accountable”).

²⁵ See Moore, *supra* note 9, at 224–27, 228, 233–35. For an argument that maintaining a significant level of professional self-regulation in the United Kingdom was the result of lobbying by English law firms based on their desire to remain competitive in Europe, where professionalism remains a core value among business clients, see Christopher J. Whelan, *The Paradox of Professionalism: Global Law Practice Means Business*, 27 PENN ST. INT’L L. REV. 465, 469 (2008).

²⁶ See, e.g., Janine Griffiths-Baker & Nancy J. Moore, *Regulating Conflicts of Interest in Global Law Firms: Peace in Our Time?*, 80 FORDHAM L. REV. 2541, 2560 (2012) (“[I]t may be time for Congress to impose national standards in selective areas, such as conflict of interest rules for lawyers engaged in multistate or multinational practice.”).

²⁷ See, e.g., Laurel S. Terry, *Putting the Legal Profession’s Monopoly on the Practice of Law in a Global Context*, 82 FORDHAM L. REV. 2903, 2933 (2014) (discussing global pressures on the scope of the legal profession’s monopoly, including “governmental pressure, market developments, or both”); cf. James E. Moliterno, *The Trouble With Lawyer Regulation*, 62 EMORY L.J. 885, 904 (2013) (“[T]he need to compete [with U.K. law firms]” will drive U.S. law firms to lobby the ABA and Congress for the opportunity to compete more effectively in global markets.”); cf. Ray Worthy Campbell, *Rethinking Regulation and Innovation in the U.S. Legal Services Market*, 9 N.Y.U. J.L. & BUS. 1, 38

already lead to a significant presence of online legal services such as LegalZoom in the United States.²⁸ Many of these services are owned and operated by nonlawyers, presumably with the assistance of lawyers in creating the software programs.²⁹

Can lawyer self-regulation survive these changes? Or will lawyers and nonlawyers inevitably become so entangled³⁰ that lawyer self-regulation will become meaningless? This is where U.S. lawyers will need to be the most creative in determining whether the profession can continue to regulate lawyers in a world of increasing integration of legal service providers. Is this possible?

Assume, for example, that U.S. jurisdictions are eventually forced by competition to permit nonlawyer ownership of law firms and multi-disciplinary practices.³¹ Can lawyer self-regulation work in these types of practices? Both the United Kingdom and Australia seem to think so. In these countries, lawyers are still bound by regulations applicable to other lawyers, and there must be at least one lawyer in each of these “alternative business structures” who is responsible for ensuring that the professional rules are followed in the provision of legal services.³²

(2012) (discussing wide range of law and law-related services provided by nonlawyers or by lawyers in combination with nonlawyers, particularly in the corporate sector and the extent to which globalization has increased this trend).

²⁸ See, e.g., Lauren Moxley, Note, *Zooming Past the Monopoly: A Consumer Rights Approach to Reforming the Lawyer’s Monopoly and Improving Access to Justice*, 9 HARV. L. & POL’Y REV. 553, 553 (2015).

²⁹ LegalZoom was created by two lawyers who formerly practiced at Sullivan & Cromwell and Skadden Arps. *Id.* at 556. It makes sense to infer that lawyers play a significant role in product development, although LegalZoom’s website does not say so. Indeed, although the vice-president in charge of Legal Research and Product Development is a graduate of Yale Law School (see Vanessa Davis, LINKEDIN, <https://www.linkedin.com/in/vanessa-davis-0285a74> [<http://perma.cc/NE9V-EEYE>]), the LegalZoom website does not describe her as either a licensed lawyer or a law school graduate. *About Us*, LEGALZOOM, <https://www.legalzoom.com/about-us> [<http://perma.cc/4R57-KM4Y>]. LegalZoom probably chooses not to advertise the role that lawyers play in product development in order to avoid consumers relying on the company as providing legal services. Any such reliance would make it more difficult for LegalZoom to defend against unauthorized practice of law challenges. See generally Moxley, *supra* note 28.

³⁰ See, e.g., Nick Robinson, *When Lawyers Don’t Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism*, 29 GEO. J. LEGAL ETHICS 1, 14 (2016) (“As legal and non-legal work becomes more integrated, and entangled, within the firm employees may also be more likely to engage in the unauthorized practice of law or share confidential client information across different departments of the company.”); Benjamin H. Barton, *Some Early Thoughts on Liability Standards for Online Providers of Legal Services*, 44 HOFSTRA L. REV. 541 (2015) (describing various online legal service providers, possible common law responses to claims of injury, and the role of lawyers in developing software programs).

³¹ See *supra* note 27 & accompanying text.

³² See Moore, *supra* note 9, at 225–27. In the United Kingdom, all employees of a legal disciplinary practice (including practices owned by nonlawyers) are subject to the regulations applicable to lawyers, including all the nonlawyers. *Id.* at 225–26. An alternative business structure (which may provide multidisciplinary services) must have

Many U.S. lawyers have questioned the efficacy of this form of self-regulation in the context of nonlawyer ownership of both law firms and multidisciplinary practices. For example, even if the sole purpose of the firm is to provide legal services, critics have argued that nonlawyer ownership will place undue pressure on the lawyers to increase profits at the expense of client interests.³³ This particular concern is almost certainly overstated, as many lawyers in lawyer-owned firms are “already predominantly driven by this desire.”³⁴ Other concerns include conflicts of interest involving nonlawyer owners who have other commercial interests likely to conflict with client interests.³⁵ These concerns may be stronger in some forms of practice rather than others,³⁶ but it is unclear why these types of conflicts cannot be addressed in the same way that law firms currently regulate conflicts involving the law firm’s financial interest in maintaining ties to its most lucrative clients.³⁷

For example, consider the possibility that Walmart will someday provide traditional legal services through lawyer-employees who work in offices located within a Walmart retail store.³⁸ Conflicts may arise as a result of Walmart’s other commercial interests, including prospective clients who want to

at least one manager authorized to practice law and must appoint a head of legal practice to ensure compliance with the ABS license and to report to the licensing authority any failure to comply with the terms of the license. *Id.*

³³ See, e.g., Robinson, *supra* note 30, at 46 (discussing concerns of others).

³⁴ Robinson, *supra* note 30, at 46.

³⁵ *Id.* at 46–47.

³⁶ See, e.g., *id.* at 47 (discussing a large business process outsourcer with multiple contracts with the U.K. government, which was running both the migrant removal process and a government telephone hotline for indigents to access entitlement to legal aid: author expresses fear over conflicts arising from the concern that confidential information from immigrants who call the legal aid hotline might be shared with employees running the migrant removal process).

³⁷ Further, it should be noted that personal injury defense lawyers have been permitted to practice in a law firm owned by the insurance company that funds the defense even though such a practice appears to violate the letter of ethics rules that prohibit lawyers from practicing in firms owned by a nonlawyer. See, e.g., Nancy J. Moore, *The Ethical Duties of Insurance Defense Lawyers: Are Special Solutions Required?*, 4 CONN. INS. L.J. 259, 260 (1997).

³⁸ Even prior to its passage, the 2007 Legal Services Act was dubbed “Tesco law” because of the possibility that supermarkets like the English chain Tesco would be providing legal services. See, e.g., Katherine H. Reardon, Note, *It’s Not Your Business! A Critique of the U.K. Legal Services Act of 2007 and Why Nonlawyers Should Not Own or Manage Law Firms in the United States*, 40 SYRACUSE J. INT’L L. & COM. 155, 156 (2012). Tesco does indeed provide legal services in the United Kingdom today. See *Legal*, TESCO, <http://www.tesco-careers.com/Jobs-in-our-Office/Career-Path/Legal.aspx> [http://perma.cc/96XY-H82M]. Previously, in the United States, lawyers commonly referred to the specter of legal services being offered by giant retailer Sears, Roebuck & Co. as a consequence of permitting nonlawyer ownership of law firms. See, e.g., Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?* 40 HASTINGS L.J. 577, 578 (1989).

sue one of Walmart's major suppliers. If the lawsuit is related to a matter involving Walmart, then the lawyer may have a material limitation conflict under Rule 1.7.³⁹ If the lawsuit is unrelated to Walmart, then there would not be a directly adverse conflict under that rule (because the supplier is not a "client" of the Walmart law firm);⁴⁰ however, if Walmart has a significant financial interest in not disturbing its relationship with the supplier, then there may be a so-called "punch pulling" conflict,⁴¹ which is yet another form of a material limitation conflict.⁴² Either way, the Walmart lawyers would be expected to identify the conflict and deal with it accordingly, by either refusing the proffered representation or obtaining the informed consent of the client.⁴³

Similarly, lawyers who provide legal services in the context of a multidisciplinary practice should be able to address conflicts of interest and other ethical issues, so long as the legal services are provided in much the same way as in a traditional law firm. Assume, for example, that a lawyer, an accountant, and a social worker form a partnership to provide the different services typically required in family law matters. The lawyer will be in charge of providing the legal services, and will not permit her nonlawyer partners to "direct or regulate the lawyer's professional judgment in rendering such legal services."⁴⁴ If there are conflicts of interest arising from the partners' relationships with their own clients, these conflicts can be identified and addressed as in traditional law firms or law firms owned by nonlawyers, such as Walmart.⁴⁵ To the extent that the nonlawyer partners assist the lawyer in the provision of legal services, they

³⁹ See MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2016) (concurrent conflict exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer").

⁴⁰ See MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(1) (AM. BAR ASS'N 2016) (a conflict of interest exists if "the representation of one client will be directly adverse to *another client*") (emphasis added).

⁴¹ See, e.g., Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 884 n.196 (2005).

⁴² The concern is that the lawyer's financial interest in pleasing the nonclient adverse party "might tempt the lawyer the [sic] 'pull her punches' on behalf of a client." *Id.*

⁴³ See MODEL RULES OF PROF'L CONDUCT r. 1.7(b) (AM. BAR ASS'N 2016). This is precisely what lawyers in England and Wales are currently required to do when practicing in an alternative business structure. See *Alternative Business Structures*, THE LAW SOCIETY, ¶4 <http://www.lawsociety.org.uk/support-services/advice/practice-notes/alternative-business-structures/> ("You may not be able to accept instructions from some clients where aims of different parts of an ABS may conflict with a client's best interests.") [<http://perma.cc/RMCS-BKTM>].

⁴⁴ MODEL RULES OF PROF'L CONDUCT r. 5.4(c) (AM. BAR ASS'N 2016) (concerning persons who recommend, employ, or pay a lawyer to render legal services).

⁴⁵ See MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2016).

would be subject to the supervision of the lawyer, as in any other law firm.⁴⁶

The more difficult challenges will come when lawyers become more integrated with nonlawyers in the provision of services that are not clearly or primarily legal services. For example, consider Richard Susskind's prediction that many future lawyers will become "legal knowledge engineer[s]" working alongside business and computer experts developing standardized working practices and computer systems.⁴⁷ Are they providing legal services or are they providing interdisciplinary services that are not clearly or solely legal?⁴⁸ Should these lawyers be regulated by lawyer codes or are they more like compliance officers, who may or may not have a law degree but who are nonetheless knowledgeable about the law?⁴⁹

Legally trained compliance officers are but one of several "quasi-legal" roles that lawyers have assumed in recent years.⁵⁰ As Tanina Rostain has explained, many lawyers are now serving as "law consultants," working at corporate risk management firms and employment law consulting firms that offer "investigative, compliance, and other law-related services," purportedly "outside the confines of the attorney-client relationship."⁵¹ Thus far, the assumption has been that these

⁴⁶ See MODEL RULES OF PROF'L CONDUCT r. 5.3 (AM. BAR ASS'N 2016) (responsibilities regarding nonlawyer assistants, including nonlawyers "associated with a lawyer").

⁴⁷ See, e.g., RICHARD SUSSKIND, *THE END OF LAWYERS?* 272 (2010). This is the role that lawyers presumably play in companies that provide online legal documents or other forms of online legal or law-related services, such as Legal Zoom. See *supra* notes 28–29 & accompanying text.

⁴⁸ See *supra* note 29 (describing the likely role of lawyers in Legal Zoom's software product development and Legal Zoom's efforts to downplay that role in order to avoid engaging in the unauthorized practice of law). For a discussion of various efforts to characterize Legal Zoom as engaged in the unauthorized practice of law, see, e.g., Moxley, *supra* note 28, at 558.

⁴⁹ See, e.g., Tanina Rostain, *The Emergence of "Law Consultants,"* 75 *FORDHAM L. REV.* 1397, 1410 (2006) ("Recognizing that compliance expertise is not primarily legal, regulations that require the designation of internal compliance personnel as part of a compliance program do not specify that the corporate officer or employee in question be a lawyer or have a law degree."). For a more detailed discussion of the role of compliance officers, see generally Michele DeStefano, *Compliance and Claim Funding: Testing the Borders of Lawyers' Monopoly and the Unauthorized Practice of Law,* 82 *FORDHAM L. REV.* 2961, 2964 (2014).

⁵⁰ Rostain, *supra* note 49, at 1398. See generally Dana A. Remus, *Out of Practice: The Twenty-First Century Legal Profession,* 63 *DUKE L.J.* 1243, 1246 (2014). Another example of a "quasi-legal" service is legal process outsourcing, which includes "not only the repetitive administrative functions associated with legal work and paralegal work, but also the complex work involved in legal research, due diligence, contract negotiations, etc." Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?* 80 *FORDHAM L. REV.* 2791, 2795 n.21 (2012).

⁵¹ Rostain, *supra* note 49, at 1398.

“law consultants” are not practicing law.⁵² Indeed, to avoid any contrary appearance, consulting firms emphasize that they do not provide legal advice and avoid advertising their legally-trained personnel as licensed lawyers.⁵³

One potential benefit of explicitly permitting multidisciplinary practices and other forms of alternative business structures is that at least some of these “law consultants” may choose to acknowledge and embrace the fact that the services they are offering are in fact legal services. If so, then to the extent that they provide these legal services in much the same way as in a traditional law firm, they, too can be “self-regulated” in the manner described above.⁵⁴ However, other “law consultants” may prefer to continue holding themselves out as performing nonlegal services. As Rostain and others have noted, there are benefits to the nonlawyer role, including the “fundamentally contractual nature of the relationship with clients,”⁵⁵ which avoids the imposition of fiduciary duties to clients and special obligations to third persons.⁵⁶ Thus, although some lawyers now beyond the pale of lawyer regulation may opt back into the self-regulatory lawyer system, even more lawyers may now opt out of that system.

What is to be done? Recall that I am positing that these changes *will* occur,⁵⁷ whether we want them to or not.⁵⁸ Rostain

⁵² *Id.* at 1410–11; *see also, e.g.*, Remus, *supra* note 50, at 1261–62.

⁵³ *See* Rostain, *supra* note 49, at 1407 & n.51.

⁵⁴ *See supra* notes 11–13 & accompanying text.

⁵⁵ Rostain, *supra* note 49, at 1398.

⁵⁶ *Id.* at 1420–25; *see also* Remus, *supra* note 50, at 1269–73 (referring to the ability of some corporations to employ “ethical arbitrage” by using law consultants to perform work that would otherwise be done by a lawyer). Rostain also notes the decreasing advantages often thought to accrue as a result of hiring a lawyer in an attorney-client relationship, i.e. the advantages of the attorney-client privilege and work-product doctrine, which she suggests are of less importance today due to pressures on companies to waive such privileges in the context of government investigations. *See* Rostain, *supra* note 49, at 1412–19.

⁵⁷ Commentators have noted that at least the corporate side of the legal services market is already moving toward effective deregulation, including not only the emergence of consulting services, but also the rise of legal process outsourcing. *See, e.g.*, Ray Worthy Campbell, *Rethinking Reg. and Innovation in the U.S. Legal Services Mkt.*, 9 N.Y.U. J.L. & BUS. 1, 47–49 (2016).

⁵⁸ Whether or not to permit either nonlawyer ownership of law firms or multidisciplinary practices has been a continuing topic of debate. *See, e.g.*, ABA COMM’N ON ETHICS 20/20, ISSUES PAPER CONCERNING ALT. BUS. STRUCTURES (2011) (including brief history of ABA’s consideration of nonlawyer ownership of law firms and other forms of alternative business structures). The ABA recently confirmed its firm resistance to any form of alternative business structures by rejecting a modest proposal to permit nonlawyer professionals to participate in the ownership of law firms. *See* ABA COMM’N ON ETHICS 20/20, ABA COMM’N WILL NOT PROPOSE CHANGES TO ABA POLICY PROHIBITING NONLAWYER OWNERSHIP OF LAW FIRMS (2012). For a recent discussion of the pros and cons of nonlawyer ownership of legal services, see Nick Robinson, *When Lawyers Don’t Get All the Profits: Non-lawyer Ownership, Access and Professionalism*, 29 GEO. J. LEGAL

finds it “difficult to envision a successful regulatory strategy to address” the risk that law consultants will use “their expertise and authority in ways that may harm the interests of employees and other third parties.”⁵⁹ Dana Remus proposes that, in order to avoid this form of “ethical arbitrage,”⁶⁰ lawyers in “quasi-legal” roles who want to retain their professional licenses should be forced to accept the “obligations of professional regulation.”⁶¹ This would entail expanded professional rules tailored explicitly to the new law consultant.⁶²

But not all law consultants, including legal knowledge engineers,⁶³ are nefariously seeking to avoid professional regulation.⁶⁴ And it seems highly unlikely that lawyers will succeed in extending their current authority to routinely regulate the lawyers who perform such “quasi-legal” roles.⁶⁵ In situations where there is genuine confusion regarding whether an attorney-client relationship has been formed, then-existing law is probably sufficient to impose current regulatory requirements on these lawyers and their firms.⁶⁶

If and when the use of law consultants raises an unreasonable risk of corporate overreaching or other harm to third persons or the public, then we should trust judges and legislators to regulate these practices in the same way they choose to regulate (or not) other providers of commercial services. Although it is true that the political will is probably lacking to enact any comprehensive regulation of law consulting (or

ETHICS 1, 53–54 (2016) (concluding, contrary to most academic commentators and other competition advocates, that it is unlikely that deregulatory approaches will make legal services more affordable and identifying challenges to professionalism).

⁵⁹ Rostain, *supra* note 49, at 1425.

⁶⁰ See Remus, *supra* note 50 and accompanying text.

⁶¹ Remus, *supra* note 50, at 1276.

⁶² *Id.* at 1277–85.

⁶³ See SUSSKIND, *supra* note 47 and accompanying text.

⁶⁴ See, e.g., Rostain, *supra* note 49, at 1409–10 (detailing how some compliance regimes “require the deployment of multidisciplinary expertise,” including the design of systems that “interweave[] legal, financial, and software expertise”).

⁶⁵ See *id.* at 1425–26 (lawyers might seek to protect third parties by extending the meaning of legal practice to include legal consultants, but “[p]roposing an expanded definition of law practice would also meet significant resistance on a variety of . . . grounds, including its detrimental effects on the capacity of the public to obtain access to the legal system”). *But see* Remus, *supra* note 50, at 1284–85 (acknowledging significant obstacles to these types of reforms, but concluding that such reform is possible if state courts take the lead).

⁶⁶ In determining whether an attorney-client relationship has been formed, “[c]ourts are alert to what a person claiming to be a client might reasonably have believed under the circumstances, especially if the person has given the lawyer confidential information to enable the lawyer to perform a legal service that would benefit that person” STEPHEN GILLERS, REGULATION OF LAWYERS 24 (9th ed. 2012). See generally Susan R. Martyn, *Accidental Clients*, 33 HOFSTRA L. REV. 913, 919 (2005).

consulting generally),⁶⁷ specific problems can be addressed on a piecemeal basis, which is how most businesses are currently regulated. Such a piecemeal approach may not be ideal, but neither is the current regulation of the legal profession, given the many disadvantages of lawyer self-governance.⁶⁸

When lawyers and nonlawyers are truly integrated in a practice, it is probably true that lawyers cannot be regulated in the same manner as lawyers providing more traditional legal services. But this state of affairs does not necessarily mean the end of either lawyers or lawyer self-regulation. Even in Susskind's world of the future,⁶⁹ many, perhaps even most lawyers will continue to provide legal services in more or less traditional attorney-client relationships, although the work may not always be of the customized, or bespoke, variety.⁷⁰ And in this future world, it may well be that lawyer self-regulation, albeit in a somewhat different form, will continue to be both possible and even desirable. We shall see.

⁶⁷ See Rostain, *supra* note 49, at 1426.

⁶⁸ See *supra* note 21 and accompanying text.

⁶⁹ See *supra* note 47 and accompanying text.

⁷⁰ See SUSSKIND, *supra* note 47, at 271.



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Rethinking Self-Regulation: Antitrust Perspectives on Bar Governance Activity

Deborah L. Rhode and Benjamin H. Barton***

In 1975, one of us (Rhode) was a Yale law student working at a New Haven legal aid clinic. Like most legal aid offices, both then and now, the office was under-funded and over-burdened. Because of a flood of needy clients, the lawyers in these offices had no choice but to try to triage, choosing cases of greatest need or greatest impact. Divorce is, and has long been, a particularly acute area of need. The current demand for legal aid divorce services is so great that many offices will only handle divorces where physical abuse is alleged.¹

Self-help is one obvious solution for clients that have gone unserved because of resource constraints. In 1975, the over-worked lawyers of New Haven's legal aid clinic responded by developing a do-it-yourself divorce kit to assist the vast numbers of poor people left without representation. The local bar responded by threatening to sue the clinic for unauthorized practice of law ("UPL"). Precedent at the time suggested that the suit might be successful, and the staff attorneys decided not to distribute the kit.² I was appalled. The bar's self-interest was obvious, as was the public's need for self-help assistance.

Why would the local bar care if a legal aid office helped poor people seek divorces on their own? Because divorce is a bread and butter service for "main street" lawyers (small firm and solo practitioners). Even if many of these folks could not afford a lawyer anyways, some of them might be able to scrape together the fees. Further, even if most legal aid clients could not pay for a lawyer, if do-it-yourself divorce kits help people efficiently

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¹ See Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 OR. L. REV. 945, 971 n.148 (2004).

² For a discussion of the law at the time, see Ralph C. Cavanagh & Deborah L. Rhode, *Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 111–13 (1976).

and effectively, they would eventually enter the market for middle-class customers.

The bar's concern continues. For example, when the Texas Access to Justice Commission tried to move forward with uniform forms for uncontested divorces, it encountered significant opposition from the Family Law Section of the Texas Bar.³ Naturally, the Section did not acknowledge that its members were worried about losing business. Instead, it argued that the forms were misleading and dangerous, and even questioned whether there was an actual need for such assistance. It was not the bar's finest hour, as was apparent in national media coverage in *The Wall Street Journal* and *Bloomberg News*.⁴ Eventually, the Texas Supreme Court stepped in and promulgated the forms over the bar's objections. But the Family Law Section's brazenness in the twenty-first century shows that professional interests still sometimes trump the public interest.

The bar has long claimed that prohibitions on the UPL through kits and services are necessary to protect the public. Evidence for that claim has been notable for its absence. My reaction to the 1975 experience was to spend the next two years of law school working on a law review empirical study that explored the rationale for allowing and increasing *pro se* legal services.⁵ This study found almost no support for the consumer protection rationale, but ample evidence of protectionism.

Over the last several decades, I have returned to the subject with depressing regularity. Although the unauthorized practice doctrine has evolved in progressive directions since the 1970s and *pro se* assistance is now widely available, the bar has continued to attempt to halt this trend. In 2015, I conducted a study with Lucy Ricca on enforcement activities by unauthorized practice committees. Like its predecessor, the study found that

³ See Anna Whitney, *Some Family Lawyers Oppose Creating Divorce Forms*, TEX. TRIBUNE (Jan. 24, 2012), <https://www.texastribune.org/2012/01/24/texas-state-bar-asks-supreme-court-stop-forms-task/> [<http://perma.cc/87WW-XBBL>]. For a description of the controversy, see TEX. SUPREME COURT, ORDER APPROVING UNIFORM FORMS – DIVORCE SET ONE, <http://www.dallascounty.org/distclerk/media/SupOrder.PDF> [<http://perma.cc/Q8Z6-42UZ>].

⁴ Nathan Koppel, *Divorce-By-Form Riles Texas Bar*, WALL ST. J. (Feb. 24, 2012), <http://online.wsj.com/news/articles/SB10001424052970204778604577239480550755826?mg=reno64wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2F%2FSB10001424052970204778604577239480550755826.html&cb=logged0.13556139869615436>; *For an Easy, Affordable, Lawyer-Free Divorce, Check 'Yes,'* BLOOMBERG NEWS (Mar. 4, 2012, 7:00 AM), <https://www.bloomberg.com/view/articles/2012-03-05/for-an-easy-affordable-lawyer-free-divorce-check-yes-view> [<http://perma.cc/S62C-EB5F>].

⁵ Cavanagh & Rhode, *supra* note 2, at 105–07.

most of the current UPL activities seemed more responsive to professional than public interests.⁶

Despite forty years of UPL research and critique, the bar has continued to offer vague and expansive definitions of the practice of law⁷ and to enforce them regardless of consumer harm.⁸ However, the Supreme Court's recent ruling in *North Carolina Board of Dental Examiners v. Federal Trade Commission* suggests that these anticompetitive practices may face new hurdles.⁹ If so, society as a whole will benefit.

The discussion that follows proceeds in four parts. Part I begins by surveying the background of federal antitrust doctrine. Part II turns to the scope and rationale of the *Dental Examiner's* ruling. Part III offers some thoughts on the implications of the decision for bar regulatory activities, including a recent example involving the North Carolina bar's UPL action against LegalZoom. Part IV offers some suggestions about how the bar should proceed going forward.

I.

In 1890, under its power to regulate interstate commerce, Congress enacted the Sherman Act. Its objective was to impose some constraints on anticompetitive activity.¹⁰ The statute did not by its terms encompass practices that were the result of governmental activity. A half-century later, in *Parker v. Brown*, the Supreme Court recognized state action immunity from antitrust liability where states act in their sovereign capacities.¹¹ At issue in the case was California's agricultural price support and marketing program for raisins. In the Court's view, federalism would be compromised if the Sherman Act were to ban every instance in which state policies had anticompetitive effects: "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."¹²

⁶ See Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking the Professional Monopoly*, 82 *FORDHAM L. REV.* 2587, 2595 (2014).

⁷ *Id.* at 2605.

⁸ *Id.* at 2598.

⁹ See *N.C. Board of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101, 1117 (2015).

¹⁰ See 15 U.S.C.A § 1 (West 2016). See generally PHILLIP E. AREEDA & HERBERT HOVENKAMP, *FUNDAMENTALS OF ANTITRUST LAW* (4th ed. 2011).

¹¹ See *Parker v. Brown*, 317 U.S. 341, 351–54 (1942).

¹² *Id.* at 351; see also Ronald E. Kennedy, *Of Lawyers, Lightbulbs, and Raisins: An Analysis of the State Action Doctrine under the Antitrust Laws*, 74 *NW. U. L. REV.* 31, 74

Parker stated a relatively broad exception to antitrust protections, and over the years the Court has gradually clarified and narrowed its test for state action immunity.¹³ In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, the Court made clear that a private actor who invokes the state action exemption must show that the anticompetitive restraint is “clearly articulated and affirmatively expressed as state policy” and is “actively supervised by the State.”¹⁴ This two-pronged test is meant to distinguish private price-fixing arrangements hiding under “a gauzy cloak of state involvement” from programs that are truly state-created and carefully state-managed.¹⁵

For almost a century, the legal profession remained free from federal antitrust liability. Then, in 1975, in a case involving state bar minimum fee schedules, the Supreme Court rejected the claim that the Sherman Act was “never intended to include the learned professions.”¹⁶ The case, *Goldfarb v. Virginia State Bar*, involved home purchasers who could not find an attorney to assist with their title search at a fee lower than the minimum established by the Fairfax County Bar Association.¹⁷ Although the Association did not enforce the fee schedule, the Virginia State Bar, an administrative agent of the Virginia Supreme Court, condoned it. Indeed, one bar opinion indicated that an attorney who habitually charged less than the suggested minimum fee would be presumptively guilty of misconduct.¹⁸ According to the Supreme Court, such activities by the state and local bar should be subject to the Sherman Act.¹⁹ Writing for a unanimous Court, Chief Justice Burger reasoned that “[i]n the modern world it cannot be denied that . . . anticompetitive activities by lawyers may exert a restraint on commerce.”²⁰ In rejecting the bar’s claim of state action immunity, the Court reasoned that the fee schedule was not an implementation of a clearly articulated state policy requiring such anticompetitive

(1979) (“State sovereignty is not injured when the federal government validly acts in the sphere to which it is delimited.”).

¹³ See C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. REV. 1059, 1129 (2000).

¹⁴ Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

¹⁵ See Merrick Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 501 (1987).

¹⁶ *Goldfarb v. Va. State Bar*, 421 U.S. 773, 786 (1975).

¹⁷ *Id.* at 775–76.

¹⁸ *Id.* at 777–78.

¹⁹ *Id.* at 791–92.

²⁰ *Id.* at 788.

action.²¹ Nor was the state particularly involved in overseeing or implementing the schedules.²² Accordingly, it failed both prongs of the modified *Parker* test.²³ On remand to the lower court, the Virginia State Bar and Fairfax County Bar Association settled the case for \$200,000.²⁴

However, a decade later in *Hoover v. Ronwin*, a divided Supreme Court gave greater latitude to the bar's anticompetitive practices. Edward Ronwin failed the Arizona bar examination and brought suit against the Arizona Supreme Court's Committee on Examinations and Admissions under the Sherman Act.²⁵ He claimed that the Committee had "artificially reduc[ed] the numbers of competing attorneys in the State of Arizona" by setting passing scores with reference to the number of new attorneys that the Committee thought appropriate rather than "with reference to . . . some 'suitable' level of competence."²⁶ The Committee on Examinations and Admissions was made up of seven members of the State Bar selected by the Arizona Supreme Court from a list supplied by the Arizona State Bar Association's Board of Governors.²⁷ Thus, the decision-making structure was somewhat similar to the structure found to be non-state action in *Goldfarb*—both relevant state supreme courts delegated substantial authority to an arm of the bar association.

In fact, the Ninth Circuit had held exactly this in denying state action protection in its decision in *Ronwin*.²⁸ However, a divided Supreme Court disagreed and found that the bar admission system did not violate the Sherman Act.²⁹ In the majority's view, Ronwin's failure to gain admission was an act of the state supreme court rather than a state agency or the bar.³⁰ *Parker v. Brown* controlled, and the challenged action was "exempt from antitrust liability regardless of the State's motives in taking the action."³¹

Three justices dissented. They recognized that "[w]hen [state] authority is delegated to those with a stake in the competitive conditions within the market, there is a real risk

²¹ *Id.* at 791.

²² *Id.* at 709.

²³ *Id.* at 790.

²⁴ CHARLES WOLFRAM, MODERN LEGAL ETHICS, 40 n.29 (1986).

²⁵ *Hoover v. Ronwin*, 466 U.S. 558, 564 (1984).

²⁶ *Id.* at 565.

²⁷ *Id.* at 586 (Stevens, J., dissenting).

²⁸ *Ronwin v. State Bar of Ariz.*, 686 F.2d 692, 696–97 (9th Cir. 1981), *as amended on reh'g.*

²⁹ *Hoover v. Ronwin*, 466 U.S. at 573.

³⁰ *Id.* at 588 (Stevens, J., dissenting).

³¹ *Id.* at 580.

that public power will be exercised for private benefit.”³² In fact, the dissent noted that these private parties have “used licensing to advance their own interests in restraining competition at the expense of the public interest.”³³

Ronwin led to a series of lower court opinions upholding ABA or state bar regulations via state action immunity. For example, in *Lawline v. American Bar Association*, Lawline sued the ABA, the Illinois Supreme Court, and various other bar regulatory authorities under antitrust law. The suit claimed that Model Rule 5.4 (which bars lawyers from joining in partnerships with non-lawyers) and Rule 5.5 (which prohibits lawyers from assisting in the UPL) violated the Sherman Act.³⁴

Lawline described itself as a free legal advice service attempting to bridge the access to justice gap:

Lawline [was founded] in 1978 to use law students, paralegals and lawyers to answer legal questions from the public without charge over the telephone and to assist them in representing themselves in routine legal matters. Lawline’s other stated purposes are to refer members of the public without financial resources to agencies providing legal services and to refer them to young lawyers who charge reduced fees, thus creating a “prototype legal delivery system” subsidized by referral fees. In its ten years of existence, Lawline is said to have answered legal questions for more than 500,000 people, particularly in Illinois, Indiana and Wisconsin, and also nationally through a toll-free telephone number.³⁵

The lawsuit arose after Thomas Holstein, the lawyer who founded Lawline, tangled with an Illinois bankruptcy court, as well as the Illinois Supreme Court’s Attorney Registration and Disciplinary Commission, over UPL and other regulatory issues. Lawline and Holstein then brought suit against a host of bar regulators alleging that the Supreme Court of Illinois had adopted UPL rules and other restrictions based on ABA drafts, and that the provisions violated the Sherman Act. The plaintiff lost on a motion to dismiss at the trial court and the Seventh Circuit affirmed. The Seventh Circuit held that any harm to the plaintiff was a result of the actions of the Illinois Supreme Court, not the ABA, and that the state action doctrine applied.³⁶

Another challenge to ABA actions failed in *Massachusetts School of Law v. American Bar Association*. There, the ABA had

³² *Id.* at 585.

³³ *Id.* at 584.

³⁴ *Lawline v. Am. Bar Ass’n*, 956 F.2d 1378, 1381 (7th Cir. 1992).

³⁵ *Id.* at 1381–82.

³⁶ *Id.* at 1384–85.

denied a new Massachusetts law school accreditation.³⁷ The school sued under the Sherman Act, alleging ten restraints of trade:

- (1) [F]ixing the price of faculty salaries;
- (2) requiring reduced teaching hours and non-teaching duties;
- (3) requiring paid sabbaticals;
- (4) forcing the hiring of more professors in order to lower student/faculty ratios;
- (5) limiting the use of adjunct professors;
- (6) prohibiting the use of required or for-credit bar review courses;
- (7) forcing schools to limit the number of hours students could work;
- (8) prohibiting ABA-accredited schools from accepting credit transfers from unaccredited schools and from enrolling graduates of unaccredited schools in graduate programs;
- (9) requiring more expensive and elaborate physical and library facilities; and
- (10) requiring schools to use the LSAT.³⁸

The Third Circuit cited both *Hoover* and *Lawline* and found state action because it was the Massachusetts Supreme Court, not the ABA, which had decided to only allow graduates of accredited schools to sit for the bar.³⁹

Following the *Massachusetts School of Law* case, the Department of Justice (“DOJ”) filed suit against the ABA for its law school accreditation practices, alleging some of the same grounds as the *Massachusetts School of Law*.⁴⁰ The ABA and the DOJ eventually settled the case under a consent decree.⁴¹ The decree limited the ABA’s ability to set minimum salaries for law professors, but left most other accreditation practices alone. In Spring 2006, the DOJ asked the court to hold the ABA in civil contempt over multiple violations of the consent decree. The ABA acknowledged the violations and reimbursed the United States \$185,000 in fees and costs.⁴²

II.

Taken together, these cases reflect the federal courts’ ability, but reluctance, to use antitrust law to set limits on lawyer regulation. In 2002, in an effort to push the doctrine in a more progressive direction, the Federal Trade Commission (“FTC”)

³⁷ *Mass. School of Law at Andover, Inc. v. Am. Bar Ass'n*, 107 F.3d 1026, 1031 (3rd Cir. 1997).

³⁸ *Id.* at 1031–32.

³⁹ *Id.* at 1035–36; *see also* *Staver v. Am. Bar Ass'n*, 169 F. Supp. 2d 1372, 1380 n.7 (M.D. Fla. 2001) (denying an injunction against the ABA for failing to accredit Barry Law School).

⁴⁰ *United States v. ABA*, 934 F. Supp. 435 (D.D.C. 1996).

⁴¹ *Id.*

⁴² *See* Press Release, U.S. Dep’t of Justice, Justice Department Asks Court to Hold American Bar Association in Civil Contempt (June 23, 2006), https://www.justice.gov/archive/atr/public/press_releases/2006/216804.htm [<http://perma.cc/223T-HLFK>]. The decree expired in 2007. Thomas O. Barnett, *Interoperability Between Antitrust and Intellectual Property*, 14 GEO. MASON L. REV. 859, 869 (2007).

convened a State Action Task Force. The Task Force's objective was to "identify opportunities to direct the development of case law in a manner that promotes competition and enhances consumer welfare."⁴³ Among the Task Force's recommendations was that any quasi-governmental entity should be subject to antitrust law if it was composed in whole or in part of market participants or if there was an "appreciable risk that the anticompetitive conduct at issue [was] the result of a deviation from state policy."⁴⁴ At the same time, the FTC also began a focused litigation effort to restrain anticompetitive conduct. Among its targets was the North Carolina Board of Dental Examiners.

Under the governing North Carolina statute, the North Carolina Board of Dental Examiners is an "agency of the State" engaged in the "regulation of the practice of dentistry."⁴⁵ The Board has eight members: six practicing dentists, one dental hygienist, and one consumer representative appointed by the governor.⁴⁶ The Board can promulgate rules and regulations, subject to approval by the North Carolina Rules Review Commission, and can bring lawsuits to enjoin the unauthorized practice of dentistry ("UPD").⁴⁷

In response to complaints from dentists concerning teeth whitening services offered by non-dentists, the Board launched an investigation. Like UPL, most of the UPD complaints on teeth whitening "expressed a principal concern with the low prices charged by non-dentists" as opposed to "possible harm to consumers."⁴⁸ Although there were "[f]ew complaints" of public injury, the Board issued at least 47 cease and desist letters to non-dentists who were offering teeth whitening services.⁴⁹ In addition, the Board persuaded the North Carolina Board of Cosmetic Art Examiners to warn cosmetologists not to offer such services and requested mall operators to consider expelling

⁴³ Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy* (Dec. 10, 2002), <https://www.ftc.gov/public-statements/2002/12/looking-forward-federal-trade-commission-and-future-development-us> [http://perma.cc/SK5R-G6MS].

⁴⁴ FEDERAL TRADE COMMISSION, OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE 3 (Sept. 2003), https://www.ftc.gov/sites/default/files/documents/reports/report-state-action-task-force-recommendations-clarify-and-reaffirm-original-purposes-state-action/stateactionreport_0.pdf (last visited Aug. 19, 2016).

⁴⁵ N.C. GEN. STATE. ANN. § 90-22 (2013).

⁴⁶ *Id.*

⁴⁷ *Id.* at §§ 90-48, 90-40.1.

⁴⁸ N.C. Board of Dental Exam'rs v. Fed. Trade Comm'n, 135 S. Ct. 1101, 1108 (2015).

⁴⁹ *Id.*

them.⁵⁰ When these enforcement efforts proved successful, the FTC filed a complaint. The Board invoked state action immunity, and a divided Supreme Court rejected that defense.

The *North Carolina Board* majority first found that state agencies or boards are “nonsovereign” actors and thus not automatically entitled to state action immunity.⁵¹ When “a controlling number of decisionmakers” on a board are “active market participants in the occupation the board regulates,” the board will not enjoy antitrust immunity unless both *Midcal* requirements are satisfied: clear articulation of state policy and active supervision.⁵² According to the Court, the need for supervision turns not on the “formal designation given by States to regulators but on the risk that active participants will pursue private interests in restraining trade.”⁵³ The majority listed four minimum criteria for state oversight to qualify as active supervision:

[1] [T]he supervisor must review the substance of the challenged conduct, not merely the procedures followed to produce it; [2] the supervisor must have the power to modify or veto particular decisions to ensure they accord with state policy; [3] there must be more than the “mere potential” of state supervision; and [4] the state supervisor may not itself be an active market participant.⁵⁴

Because the North Carolina Board had not received “active supervision” of its efforts to preempt non-dentist provision of teeth whitening services, state-action immunity was not available.⁵⁵

Justice Alito, joined by Justices Scalia and Thomas, dissented. Rejecting the majority’s view of the Board as a non-sovereign entity, the dissent accepted the “agency label” that North Carolina had conferred on the Board by statute.⁵⁶ In the dissent’s view, the majority’s approach created numerous “practical problems.”⁵⁷ First, the decision could encourage states to select nonprofessionals to serve on regulatory boards. This would “compromise the State’s interest in sensibly regulating a technical profession in which lay people have little expertise.”⁵⁸

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 1114.

⁵⁴ *Id.* at 1116–17 (internal citations omitted).

⁵⁵ *Id.* at 1117.

⁵⁶ *Id.* at 1122 (Alito, J., dissenting).

⁵⁷ *Id.*

⁵⁸ *Id.*

The dissent also worried about ambiguities in interpreting terms, such as “active market participant.”⁵⁹

North Carolina Board is one of those ever-rarer cases where the voting coalitions seem reversed from a political standpoint. The FTC investigation of the North Carolina Board started in the administration of George W. Bush.⁶⁰ The conservative-leaning Cato Institute filed an amicus brief supporting the FTC and opposing state immunity.⁶¹ The Goldwater Institute, the American Enterprise Institute, and libertarian groups have all lined up against occupational licensing.⁶² And yet we find the three most reliably conservative Justices dissenting, and the liberal wing, joined by Kennedy and Roberts, dealing a significant blow to many American occupational licensing regimes.

III.

What impact *North Carolina Board* will have on state bar regulation is not yet clear, and the answer will doubtless vary by state. At issue is governance occurring in three major contexts: admission, discipline, and the UPL. State supreme courts control lawyer regulation to a lesser or greater extent in all fifty states.⁶³ These courts typically have demanding caseloads, so they delegate their bar governance authority to other entities. Exactly which entities differs across jurisdictions. In some states, the supreme court has given all three responsibilities to one entity, often a state bar association.⁶⁴ In other states, these regulatory duties are handled by different entities.⁶⁵ Antitrust suits have been brought in all three contexts,

⁵⁹ *Id.* at 1123 (Alito, J., dissenting).

⁶⁰ *See* Muris, *supra* note 43.

⁶¹ Brief for Pacific Legal Foundation and Cato Institute as Amici Curiae Supporting Respondent, *N.C. State Board of Exam'rs v. Fed. Trade Comm'n*, No. 13-534, 2014 WL 3895927, 135 S. Ct. 1101 (2015).

⁶² *See* James Pethokoukis, *The Terrible Economic Burden of Occupational Licensing*, AEI IDEAS (Apr. 21, 2014, 1:45 PM), <https://www.aei.org/publication/the-terrible-economic-burden-of-occupational-licensing/> [<http://perma.cc/C53V-US5F>]; *see also* Stephen Slivinski, *Bootstraps Tangled in Red Tape*, GOLDWATER INST. (Feb. 23, 2015), <http://goldwaterinstitute.org/en/work/topics/free-enterprise/entrepreneurship/bootstraps-tangled-in-red-tape/#.Vbf7ULO51vw.facebook> [<http://perma.cc/BJB2-KF7V>]; *see also* David S. D'Amato, *Occupational Licensing is a Scam*, LIBERTARIANISM.ORG (Sept. 9, 2015), <http://www.libertarianism.org/columns/occupational-licensing-is-scam> [<http://perma.cc/8XPW-5FV3>].

⁶³ BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* 105 (2011).

⁶⁴ *Id.*

⁶⁵ Robert A. Burgoyne & Mark Emery, *State Action Antitrust Immunity in the Wake of North Carolina State Board of Dental Examiners v. Federal Trade Commissioner: What Does it Mean for State Bars and Bar Examiners?*, *THE BAR EXAM'R* 19 (June 2015).

and their success will depend on the composition of those governance bodies and the extent of supervision by the state.⁶⁶

To preempt litigation, some jurisdictions have already modified governance practices. For example, the Washington bar has temporarily suspended its ethics committee's authority to issue advisory opinions that could be viewed as having anticompetitive effects.⁶⁷ The Pennsylvania bar also has temporarily stopped issuing cease and desist letters and has been referring UPL complaints to the attorney general.⁶⁸

Another example of bar regulators proceeding more cautiously in light of *North Carolina Board* comes from North Carolina itself: the settlement of LegalZoom's UPL battle with the state bar. The dispute began in 2003, when the North Carolina bar sent a letter to LegalZoom announcing a UPL investigation.⁶⁹ LegalZoom responded with a letter explaining why the company was in compliance with existing state standards. At this point, the North Carolina bar agreed and dismissed the complaint.⁷⁰

The bar reopened its investigation in 2007, and LegalZoom again argued that it was not engaged in unauthorized practice of law.⁷¹ This time the bar decided otherwise and sent a cease and desist order in 2008. LegalZoom again objected and, most notably, continued to operate in North Carolina without any significant changes to its practices.⁷² For observers familiar with the Internet entrepreneur's playbook, this strategy should not be surprising. From Uber to Airbnb, multiple Internet startups have plowed into legal gray areas, assuming they will be able to grow fast enough that eventually regulatory resistance will become futile.⁷³

⁶⁶ *Id.* at 24.

⁶⁷ Samson Habte, *Washington Bar Suspends Ethics Opinions, Cites Antitrust Fears*, ABA/BNA LAW. MANUAL ON PROF. CONDUCT (Dec. 17, 2015), <http://www.bna.com/washington-bar-suspends-n57982065288/> [<http://perma.cc/8JZD-YV8C>].

⁶⁸ Kelso L. Anderson, *Beware of Boards: Professional Boards Barred From Anticompetitive Conduct*, LITIG. NEWS (Summer 2015), <https://static1.square-space.com/static/577fd873d2b857d5d6ae8164/t/57800a9959cc687a7d59cb71/1468009130123/Beware+of+Boards+from+Litigation+News+Summer+2015.pdf> [<http://perma.cc/ZUW7-JKRR>].

⁶⁹ All of the early, pertinent documents were attached to LegalZoom's initial 2011 complaint. Complaint, *LegalZoom.com v. The N.C. State Bar*, No. 11-CVS-15111 (Wake Cnty. Ct. Sept. 30, 2011) <http://online.wsj.com/public/resources/documents/LegalZoom.pdf> [hereinafter *LegalZoom Complaint*] [<http://perma.cc/FTN9-BZQQ>].

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Jordan M. Barry & Elizabeth Pollman, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. (forthcoming 2017), http://digital.sandiego.edu/cgi/viewcontent.cgi?article=1008&context=law_fac_works [<http://perma.cc/K56B-TEZ8>].

The North Carolina UPL stalemate continued until 2010 when LegalZoom added a “subscription model” of legal advice along with its interactive forms.⁷⁴ Because the subscription model involved pre-payment for legal services, LegalZoom applied to the North Carolina Bar for approval as a Prepaid Legal Plan, as required under North Carolina law. In light of LegalZoom’s continuing presence in North Carolina after a cease and desist letter, the North Carolina Bar considered this new application rather cheeky and denied it based upon the ongoing UPL issues.⁷⁵

After a few more letters and a clear rejection of LegalZoom’s prepaid legal services plan, LegalZoom took the unusual step of transforming from prey into predator. In 2011 it sued the North Carolina Bar under state constitutional law, the Equal Protection Clause, and several common law counts.⁷⁶

This was a gutsy move on LegalZoom’s part, and obviously not a good idea. The company had never sued a state bar, although it had been a defendant and settled several of these cases out of court. In Washington State, LegalZoom paid \$20,000 in costs to the bar regulators;⁷⁷ in Missouri, it paid attorney’s fees and changed some parts of its site for the state’s customers.⁷⁸ The Missouri case was a particularly close call. The District Court there rejected LegalZoom’s summary judgment motion on unauthorized practice of law and concluded that LegalZoom’s interactive forms were very similar to the provision of legal services by a lawyer, and thus were likely unlawful.⁷⁹ Although the company had passively resisted the North Carolina Bar in the past, there is a substantial difference between ignoring cease and desist letters and taking the fight to the courts. If LegalZoom had lost in North Carolina, it would have been a stinging defeat and might have provided a damaging precedent in other states.

Instead, the gamble paid off. As LegalZoom’s 2011 case ground on, the Supreme Court decided *North Carolina Board of*

⁷⁴ LegalZoom Complaint, *supra* note 69.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Daniel Fisher, *Entrepreneurs Versus Lawyers*, FORBES (Oct. 5, 2011, 6:00 AM), <http://www.forbes.com/forbes/2011/1024/entrepreneurs-lawyers-suh-legalzoom-automate-daniel-fisher.html> [<http://perma.cc/32ZM-BTCT>].

⁷⁸ Nathan Koppel, *Seller of Online Legal Forms Settles Unauthorized Practice of Law Suit*, WALL ST. J. (Aug. 23, 2011, 11:47 AM) <http://blogs.wsj.com/law/2011/08/23/seller-of-online-legal-forms-settles-unauthorized-practiced-of-law-suit/>.

⁷⁹ *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1054, 1065 (W.D. Mo. 2011). For an analysis and some key quotes from the case, see Venkat Balasubramani, *Missouri Federal Court Says LegalZoom Could Be Engaged in the Unauthorized Practice of Law – Janson v. LegalZoom*, TECH. & MKTG. L. BLOG (Aug. 15, 2011), http://blog.ericgoldman.org/archives/2011/08/missouri_federa_1.htm [<http://perma.cc/FQ7U-82LQ>].

Dental Examiners. LegalZoom quickly filed a *second* lawsuit against the state bar, this time seeking \$10.5 million in damages and squarely alleging federal antitrust violations based on *North Carolina Board*.⁸⁰ This upped the ante and the state bar suddenly had to decide whether it was willing risk everything in its battle with LegalZoom. If LegalZoom prevailed on its antitrust suit, the bar might lose some or all of its regulatory power. An aggressive application of *North Carolina Board* to lawyers might require removing the bar's regulatory power altogether or demanding that the power be shared with non-lawyers.

Within months, the bar settled both of LegalZoom's suits. The terms were very favorable to the company.⁸¹ LegalZoom agreed to have a licensed North Carolina attorney review its online forms and inform potential customers that its forms are not a substitute for advice from an attorney.⁸² LegalZoom argued that it was already doing that anyway.⁸³ In return, the bar dropped its UPL fight, and even supported a change in North Carolina law to make LegalZoom and other form providers more clearly legal.⁸⁴ Although this settlement was not explicitly linked to *North Carolina Board*, its timing speaks volumes about the impact that the case could have on bar governance. At a minimum, it suggests that regulators will tread more carefully when prosecuting or defining UPL.

North Carolina Board also raises the possibility that the bar will rethink the role that competitive concerns play in the accreditation of law schools. As a consequence, the ABA may find itself between a rock and a hard place because it is also facing criticisms by the Department of Education for being too lax in accreditation.⁸⁵

⁸⁰ Jacob Gershman, *LegalZoom Sues North Carolina Bar*, WALL ST. J. (June 7, 2015, 7:43 PM), <http://www.wsj.com/articles/legalzoom-sues-carolina-state-bar-news-digest-1433720614>.

⁸¹ See Daniel Fisher, *LegalZoom Settles Fight with North Carolina Bar over Online Law*, FORBES (Oct. 22, 2015, 2:16 PM), <http://www.forbes.com/sites/danielfisher/2015/10/22/legalzoom-settles-fight-with-north-carolina-bar-over-onlinelaw/#3caa56a0693e> [<http://perma.cc/FPN8-8A7B>]; Terry Carter, *LegalZoom resolves \$10.5m antitrust suit against North Carolina State Bar*, A.B.A. J. (Oct. 23, 2015, 3:15 PM), http://www.abajournal.com/news/article/legalzoom_resolves_10.5m_antitrust_suit_against_north_carolina_state_bar [<http://perma.cc/4QDE-8WKG>].

⁸² Carter, *supra* note 81.

⁸³ Fisher, *supra* note 81.

⁸⁴ *Id.*

⁸⁵ See, e.g., Stephanie Francis Ward, *ABA threatened with 1-Year suspension of law school accreditation powers*, ABA J. (June 24, 2016, 2:00 PM), http://www.abajournal.com/news/article/aba_threatened_with_1-year_suspension_of_law_school_accreditation_powers [<http://perma.cc/KT38-ZNCM>].

IV.

After a relatively long period of antitrust immunity, the American bar suddenly finds itself facing a new regulatory regime. We have several suggestions for navigation.

First, bar entities should ensure that they are acting in accordance with a clearly articulated state policy that serves the public interest. These entities should follow formal rules adopted by a disinterested body after notice and comment. Bar practices should also be subject to active supervision, preferably by an individual or a body other than the state supreme court.⁸⁶ As both of us have noted, judges share the background and worldview of those they claim to regulate.⁸⁷ After serving their judicial term, many state supreme court justices return to active law practice.⁸⁸ Further, most state judges are elected and depend on lawyers for endorsements, rankings, and campaign contributions.⁸⁹ Even in states where judges are selected through merit processes, state and local bars exercise substantial influence.⁹⁰ The judiciary is also dependent on support from the organized bar concerning salaries and budgets, and is readily accessible to informal lawyer lobbying at conferences, annual meetings, and social gatherings.⁹¹ By contrast, consumer interests rarely have such opportunities for influence. To minimize the risk that bar regulators will be captured by those they regulate, states should not rely on the judiciary for active supervision.⁹²

For example, antitrust experts have proposed that:

States can appoint a single employee of the state government with relevant expertise in a board's subject area to supervise its activities, and/or house boards within the relevant state agency and require the director's approval to adopt rules and regulations, as is done in Rhode

⁸⁶ See Ken Friedman, *Could Dental-Board Decision Unlock Lawyer Control of State Bar Regulations?*, FORBES (Mar. 4, 2015, 7:04 AM), [http://www.forbes.com/sites/danielfisher/2-15/03/04/dental-board-decision-could-unlock-lawyer-control/print/\[http://perma.cc/7BH5-QYTS\]](http://www.forbes.com/sites/danielfisher/2-15/03/04/dental-board-decision-could-unlock-lawyer-control/print/[http://perma.cc/7BH5-QYTS]).

⁸⁷ DEBORAH L. RHODE, *THE TROUBLE WITH LAWYERS* 89 (2015); Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 458 (2008); see also BARTON, *supra* note 63, at 132–40.

⁸⁸ Burgoyne & Emery, *supra* note 65, at 22; Friedman, *supra* note 86.

⁸⁹ Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures or the Market?*, 37 GA. L. REV. 1167, 1185, 1198–1200 (2003); BARTON, *supra* note 87; BARTON, *supra* note 63.

⁹⁰ Kelley Armitage, *Denial Ain't Just a River in Egypt: A Thorough Review of Judicial Elections, Merit Selection and the Role of State Judges in Society*, 29 CAP. U. L. REV. 625, 656 (2002); Barton, *supra* note 89, at 1199–1200.

⁹¹ BARTON, *supra* note 63, at 133; Barton, *supra* note 87, at 458; Barton, *supra* note 89, at 1200.

⁹² Friedman, *supra* note 86.

Island . . . Or states may place their board inside a state agency that oversees the actions of all professional boards in the state, as is done to different degrees by California and Utah.⁹³

Some regulatory functions, such as policing unauthorized practice of law, can be handled by local prosecutors or by states' attorney generals, who have more public accountability than state bar committees.⁹⁴ As Rhode and Ricca's recent survey of unauthorized practice enforcement revealed, many bar committees routinely proceed against lay competitors without evidence of consumer injury.⁹⁵ This should cease, and will be more likely to do so when disinterested decision makers control enforcement priorities.

States should also rethink the composition of governance bodies to prevent active market participants from dictating decisions. No matter how well intentioned, such participants are likely to lack impartiality in appearance if not in fact.⁹⁶ Other nations, such as Great Britain, build in a controlling role for non-lawyers in their bar governance processes and all the available evidence suggests that this approach has worked well.⁹⁷ Although the American bar has historically been reluctant to relinquish regulatory autonomy, *North Carolina Board of Dental Examiners* creates a powerful incentive for it to do so. If active market participants are not controlling members of governance boards, supervision of their processes is not necessary to avoid antitrust liability.⁹⁸

Thirty-five years ago, one of us wrote:

[T]he bar itself has much to gain from abdicating its role as self-appointed guardian of the professional monopoly. Given mounting popular skepticism about unauthorized practice enforcement, prudential as well as policy considerations argue for greater consumer choice . . . If, as bar spokesmen repeatedly insist, the "fight

⁹³ Austin D. Smith, Logan M. Breed & Robert F. Leibenluft, *North Carolina Board of Dental Examiners v. FTC: How States Will Respond to Improve Competition and Accountability in State Regulatory Boards*, CPI ANTITRUST CHRON. 3–4 (Apr. 2015) (bullet points omitted from original).

⁹⁴ See generally Rhode & Ricca, *supra* note 6.

⁹⁵ *Id.*

⁹⁶ For arguments supporting removal of active market participants from control, see Smith, Breed, & Leibenluft, *supra* note 93.

⁹⁷ For discussion of England's disciplinary process, see generally Deborah L. Rhode and Alice Wooley, *Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada*, 80 *FORDHAM L. REV.* 2761 (2012).

⁹⁸ See *supra* notes 57–61 and accompanying text.

to stop lay practice is the public's fight," it is time for the profession to relinquish the barricades.⁹⁹

That time is long overdue. Our hope now is that the Court's decision in *North Carolina Board of Dental Examiners* will supply the necessary nudge.

⁹⁹ Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Perspective on Unauthorized Practice Enforcement*, 34 STAN. L. REV. 1, 98–99 (1981).



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Whither (Wither?) the Unfinished Business Doctrine

*Douglas R. Richmond**

I. INTRODUCTION

Large law firms collapse with alarming frequency. In recent years, for example, Altheimer & Gray LLP; Brobeck, Phleger & Harrison LLP; Coudert Brothers LLP; Dewey & LeBoeuf LLP; Heller Ehrman LLP; Howrey LLP; Thacher Proffitt & Wood LLP; Thelen LLP; and Wolf, Block, Schorr & Solis-Cohen LLP have folded. These high profile failures amply demonstrate the extraordinary fragility of law firm partnerships.¹

Law firm failures may be rooted in competitive pressures, destabilizing internal dynamics, governance or leadership failures, unsatisfactory or unsettling financial prospects or performance, or some toxic combination thereof.² These issues drive major rainmaking partners to leave the firm, often taking groups of productive lawyers with them. One key partner departure leads to another and another, producing a “self-reinforcing spiral of withdrawal” akin to a Depression-era run on a bank.³ A law firm caught in such a “partner run” seldom survives.⁴ Indeed, a firm may go from apparent financial health to dissolution in a few months, and perhaps in even less time.⁵

Dissolving law firms typically have scores of open client matters, many of which are far from completion. Litigation matters may take years to conclude.⁶ Departing partners who

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¹ See John Morley, *Why Law Firms Collapse* 1–2 (Yale Law & Econ. Research Paper No. 521, 2015) (arguing that law firms are “uniquely fragile” and “are made of thin glass”).

² See Edward S. Adams, *Lessons from Law Firm Bankruptcies and Proposals for Reform*, 55 SANTA CLARA L. REV. 507, 509–10 (2015) (exploring select major law firm bankruptcies as a means of identifying common elements in their failures, including economic turmoil, excessive growth and overcompensation, and toxic firm culture and governance).

³ Morley, *supra* note 1, at 2.

⁴ *Id.*

⁵ *Id.* at 1–2.

⁶ ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS § 4.6.1, at 4:63–64 (2d ed. 2016).

intend to continue practicing law often expect to take open client matters with them to new firms. The law firms to which the partners of the dissolved firm relocate are often vitally interested in the dissolved firm's active clients coming along.

At the same time, the dissolving law firm has landlords, lenders, and other creditors to pay. The firm may have financial obligations to retired partners. Pending client matters may be a dissolving law firm's only significant assets.⁷ If the law firm has filed for bankruptcy protection, creditors and any trustee that is appointed will strive to derive value from those assets for the benefit of the bankruptcy estate.⁸ The result is frequently litigation, in which a bankruptcy trustee or other administrator sues the departing partners and the law firms to which they relocate to collect fees earned on the dissolving firm's "unfinished business."⁹ Unfinished business consists of "all matters in progress which have not been completed at the time the firm is dissolved."¹⁰

The "unfinished business" doctrine reflects established partnership law.¹¹ In the law firm world, the unfinished business doctrine is frequently referred to as the *Jewel* doctrine, or the *Jewel* rule, after the seminal California case on the subject, *Jewel v. Boxer*.¹² Regardless of how it is described, the unfinished business doctrine essentially holds that absent contrary agreement, partners in a dissolved law firm must account to the firm and its former partners either for all fees generated from work in progress at the time of the firm's dissolution, or for the profits made on that work (depending on the state's partnership

⁷ Christine Hurt, *The Limited Liability Partnership in Bankruptcy*, 89 AM. BANKR. L.J. 567, 571 (2015).

⁸ See *id.* ("Though the partners of a law firm may have incentives to allow for easy exit of themselves and other partners . . . trustees have incentives to retain those assets. The larger the debt of the distressed firm, the more incentive the trustee has to assert claims against financially well-off third party law firms that reaped the benefit of hourly work for former clients of the debtor.").

⁹ See John W. Edson, Comment, *An Unworkable Result: Examining the Application of the Unfinished Business Doctrine to Law Firm Bankruptcies*, 32 EMORY BANKR. DEV. J. 159, 161 (2015) (explaining that "trustees argue that any post-dissolution work derived from client business started at the bankrupt firm is property of the bankrupt firm's estate").

¹⁰ Rothman v. Dolin, 24 Cal. Rptr. 2d 571, 573 (Cal. Ct. App. 1993).

¹¹ Douglas R. Richmond, *Migratory Law Partners and the Glue of Unfinished Business*, 39 N. KY. L. REV. 360, 420 (2012); see also Scott Fleischer, *The "Unfinished Business" Doctrine in Law Firm Bankruptcies*, NASSAU LAWYER, Dec. 2014, at 7 ("The 'unfinished business' doctrine is not just rooted in one particular section of the UPA or RUPA, but was developed through collective interpretations of many sections.").

¹² 203 Cal. Rptr. 13, 16 (Cal. Ct. App. 1984). A thorough discussion of *Jewel* and its progeny is beyond the scope of this article. For such a discussion, see Richmond, *supra* 11, at 370-87.

law) in accordance with their percentage interests in the firm.¹³ Pending client matters are uncompleted transactions that require winding up after dissolution, and are therefore partnership assets subject to post-dissolution distribution.¹⁴ As the court in *Gull v. Van Epps*¹⁵ explained, “all partners of the dissolved firm are generally entitled to share in fees for pre-dissolution work in progress earned after dissolution, even if the client has exercised [its] right to discharge the attorney or attorneys who are sharing in the fees.”¹⁶ This entitlement exists because dissolution does not terminate the firm’s pre-existing contracts with its clients, so that partners who perform those contracts do so as fiduciaries for the benefit of the dissolved partnership.¹⁷

If partners of a dissolving law partnership stayed together during the wind up of the firm’s business, the unfinished business doctrine would be of no moment. But they do not—they scatter to new law firms, taking open client matters with them. The work they or their colleagues perform on those matters at their new firms produces fees that their new firms wish to collect and retain, and which they do not want to share with, or surrender to, the dissolved firm. As noted earlier, this leaves an administrator or trustee of the dissolved firm or its bankruptcy estate to negotiate or sue for those fees under the unfinished business doctrine. In this way the unfinished business doctrine substitutes for the orderly winding up of partnership affairs by the partners of the dissolved partnership.¹⁸

¹³ As explained in Part II, under the Uniform Partnership Act (“UPA”), a partner, other than a surviving partner, is not entitled to compensation for her services in winding up the dissolved partnership’s affairs other than any sums she will receive for her share in the partnership. See UNIF. P’SHIP ACT § 18(f) (1914). *Jewel* was decided under California’s version of the UPA. California later adopted the Revised Uniform Partnership Act (“RUPA”). Most other states follow RUPA. Under RUPA, the unfinished business doctrine has been modified to permit former partners to deduct overhead and reasonable compensation before remitting to the dissolved partnership any monies earned from completing unfinished business. See *Greenspan v. Orrick, Herrington & Sutcliffe LLP (In re Brobeck, Phleger & Harrison LLP)*, 408 B.R. 318, 326 (Bankr. N.D. Cal. 2009) (explaining California partnership law, which changed after *Jewel* was decided). This allowance of compensation beyond any sums the former partner would receive for her partnership share is often described as “extra compensation” or as “reasonable compensation,” with the latter term being more accurate. *Id.* at 326 n.4.

¹⁴ See *Young v. Delaney*, 647 A.2d 784, 789 (D.C. 1994); *Beckman v. Farmer*, 579 A.2d 618, 636 (D.C. 1990).

¹⁵ *Gull v. Van Epps*, 517 N.W.2d 531 (Wis. Ct. App. 1994).

¹⁶ *Id.* at 536.

¹⁷ See *In re LaBrum & Doak, LLP v. Ashdale*, 227 B.R. 391, 409 (Bankr. E.D. Pa. 1998); *Beckman*, 579 A.2d at 636; *Huber v. Etkin*, 58 A.3d 772, 780 (Pa. Super. Ct. 2012).

¹⁸ Courts have also applied the unfinished doctrine to dissolving law firms organized as limited liability companies (“LLC”), professional associations, and professional corporations. See, e.g., *Vowell & Meelheim, P.C. v. Beddow, Erben & Bowen, P.A.*, 679 So. 2d 637, 640 (Ala. 1996) (involving a firm organized as a professional association);

When a large law firm dissolves, many of the open client matters are billed by the hour. Despite increases in the use of alternative fee structures, most lawyers in large law firms bill hourly.¹⁹ Because the *Jewel* court upheld the unfinished business doctrine in connection with contingent fees,²⁰ partners in dissolved large law firms resisting unfinished business claims have frequently argued that courts should confine the doctrine to contingent fee cases and should not apply it to hourly matters.²¹ For years that argument failed,²² as should have been expected, because the *Jewel* court did not confine its holding to contingent fee matters.²³ Certainly, the unfinished business doctrine applies to contingent fee cases²⁴—but as a matter of partnership law it should apply to other compensation arrangements, including matters billed by the hour.²⁵ Partnership law provides no basis for treating client matters billed hourly as anything other than the unfinished business of a dissolved law partnership. Indeed, since *Jewel* was decided, California courts have applied the

Grossman v. Davis, 34 Cal. Rptr. 2d 355, 356 (Cal. Ct. App. 1994) (noting that the unfinished business doctrine applies to professional corporations); LaFond v. Sweeney, 343 P.3d 939, 945–49 (Colo. 2015) (applying the unfinished business doctrine in a case involving a law firm organized as an LLC); Sullivan, Bodney & Hammond v. Bodney, 820 P.2d 1248, 1250 (Kan. Ct. App. 1991) (observing that the policy reasons supporting the rule in *Jewel* applied to the dissolution of a professional corporation).

¹⁹ See Lucy Muzzy, *Maximizing the Value of Outside Counsel*, FED. LAW., Sept. 2013, at 56, 58 (reporting that large law firms continue to earn approximately eighty percent of their revenue from hourly billing).

²⁰ *Jewel v. Boxer*, 203 Cal. Rptr. 13, 15–20 (Cal. Ct. App. 1984).

²¹ See, e.g., *Rothman v. Dolin*, 24 Cal. Rptr. 2d 571, 572–73 (Cal. Ct. App. 1993) (recognizing, but ultimately rejecting, the argument that *Jewel* and its progeny apply only to contingent fee cases and not to hourly fee matters).

²² See, e.g., *Robinson v. Nussbaum*, 11 F. Supp. 2d 1, 4–5 (D.D.C. 1997) (citing and discussing *Beckman v. Farmer*, 579 A.2d 618, 641 (D.C. 1990)); *Grossman*, 34 Cal. Rptr. 2d at 356 (explaining that the unfinished business doctrine applies regardless of “the nature of the compensation agreement with the client”); *Rothman*, 24 Cal. Rptr. 2d at 572–73 (“Neither *Jewel* nor [another case] explicitly states that it is concerned solely with contingency fee cases Moreover, the policy reasons for the rule announced in *Jewel* . . . apply with equal force to both contingency and hourly rate cases.”); see also Thomas E. Rutledge & Tara A. McGuire, *Conflicting Views as to the Unfinished Business Doctrine*, BUS. LAW TODAY, Feb. 2015, at 1 (observing that most courts and commentators have applied the unfinished business doctrine to hourly matters as well as to contingent fee cases).

²³ *Jewel*, 203 Cal. Rptr. at 18–20.

²⁴ See, e.g., *LaFond v. Sweeney*, 343 P.3d 939, 944–49 (Colo. 2015) (applying the unfinished business doctrine to a contingent fee matter in the dissolution of a law firm organized as an LLC); *Huber v. Etkin*, 58 A.3d 772, 780 (Pa. Super. 2012) (concluding that “contingency fees realized post-dissolution are assets of the partnership”).

²⁵ See Peter W. Rogers, Note, *Who Gets the Jewels When a Law Firm Dissolves? The Unfinished Business Doctrine and Hourly Matters*, 108 NW. U. L. REV. 311, 336 (2013) (“Because the unfinished business doctrine is a function of partnership law that upholds fiduciary duties as a partnership winds up, the doctrine does not clash with . . . the UPA, or RUPA, whether it is applied to matters billed by the hour or on contingency.”).

unfinished business doctrine to matters billed by the hour,²⁶ as have courts in other jurisdictions.²⁷

In 2014, however, two decisions from courts on opposite coasts radically altered the unfinished business landscape by rejecting its application to client matters that are billed by the hour. The New York Court of Appeals held in *Geron v. Seyfarth Shaw LLP (In re Thelen LLP)*²⁸ that “pending hourly fee matters are not ‘partnership property’ or ‘unfinished business’ within the meaning of New York’s Partnership Law.”²⁹ *In re Thelen* came to the court on certified questions from the U.S. Court of Appeals for the Second Circuit³⁰ after two Southern District of New York courts predicting New York law reached opposite conclusions on the unfinished business doctrine’s application to hourly matters in cases arising out of separate large law firm bankruptcies.³¹

In *Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP*,³² a California federal court reasoned that California law was “unsettled on the question of whether a law firm may assert a property interest in hourly fee matters pending at the time of its dissolution,”³³ and went on to hold that equity and public policy weighed against application of the unfinished business doctrine in that context.³⁴ The trustee of the bankrupt law firm appealed that decision to the Ninth Circuit, which in July 2016 certified this question to the California Supreme Court: “Under California law, does a dissolved law firm have a property interest in legal matters that are in progress but not completed at the time the law firm is dissolved, when the dissolved law firm had been

²⁶ See, e.g., *Rothman*, 24 Cal. Rptr. 2d at 573 (“[W]e hold that unfinished business simply consists of all matters in progress which have not been completed at the time the firm is dissolved. . . . That one matter is to be compensated at an hourly rate and another on a contingency basis is of no consequence in determining whether a matter is unfinished business.”) (citation omitted).

²⁷ See, e.g., *Robinson*, 11 F. Supp. 2d at 4–6 (applying District of Columbia law).

²⁸ See *Geron v. Seyfarth (In re Thelen LLP)*, 20 N.E.3d 264 (N.Y. 2014).

²⁹ *Id.* at 266–67.

³⁰ *Geron v. Seyfarth (In re Thelen LLP)*, 736 F.3d 213, 225 (2d Cir. 2013) (certifying questions in a case arising out of the Thelen LLP bankruptcy); *In re Coudert Bros. LLP*, Nos. 12-4916(L) et al., 2013 WL 9363394, at *1–2 (2d Cir. Dec. 2, 2013) (certifying questions in a case arising out of the Coudert Brothers LLP bankruptcy).

³¹ *Compare Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld, LLP*, 480 B.R. 145, 159 (S.D.N.Y. 2012) (concluding “that the New York Court of Appeals would, if confronted with the issue, conclude that all client matters pending on the date of dissolution are assets of the firm—regardless of how the firm was to be compensated for the work”), *rev’d in part, vacated in part by In re Coudert Bros. LLP*, 574 F. App’x 15, 16 (2d Cir. 2014), *with Geron v. Robinson & Cole LLP*, 476 B.R. 732, 743 (S.D.N.Y. 2012) (concluding that “under New York law, a dissolved law firm’s pending hourly fee matters are not partnership assets”).

³² See *Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP*, 527 B.R. 24 (N.D. Cal. 2014).

³³ *Id.* at 30.

³⁴ *Id.* at 30–33.

retained to handle the matters on an hourly basis?”³⁵ The California Supreme Court accepted the case and restated the certified question as follows: “Under California law, what interest, if any, does a dissolved law firm have in legal matters that are in progress but not completed at the time the law firm is dissolved, when the dissolved law firm had been retained to handle the matter on an hourly basis?”³⁶ The California Supreme Court’s decision will determine the outcome in *Heller Ehrman*.³⁷

This Article explains why *In re Thelen* and *Heller Ehrman* were wrongly decided. To be sure, the unfinished business doctrine sometimes produces results that lawyers find maddening. The doctrine’s effects are particularly severe in Uniform Partnership Act jurisdictions, as will be explained in the next Part of this article. At a minimum, the doctrine potentially complicates partners’ relocation from failed law firms to new firms. But whatever its perceived flaws, the unfinished business doctrine is an established aspect of partnership law that law firms can contract around by inserting *Jewel* waivers in their partnership agreements. The arguments that some commentators, lawyers, and law firms have mounted against the doctrine to date are unpersuasive. There is no compelling reason to except law firms from the operation of a partnership law doctrine to which all other partnerships are subject.

In explaining why the unfinished business doctrine should be applied to matters billed by the hour, as it does to representations in which lawyers are compensated by other methods, we begin in Part II with a discussion of partnership law principles.³⁸ This includes an overview of partnership dissolution, winding up, and termination, as well as an examination of partners’ fiduciary duties post-dissolution. Part III analyzes *In re Thelen* and *Heller Ehrman* in detail and explains why they are incorrectly decided. Finally, Part IV dissects some of the leading arguments that law firms have made in opposing the unfinished business doctrine’s application.

³⁵ *Heller Ehrman LLP v. Davis Wright Tremaine LLP (In re Heller Ehrman LLP)*, 830 F.3d 964, 965 (9th Cir. 2016).

³⁶ *Heller Ehrman LLP v. Davis Wright Tremaine LLP*, No. S236208, 2016 Cal. LEXIS 7131, at *1 (Cal. Aug. 31, 2016).

³⁷ *In re Heller Ehrman LLP*, 830 F.3d at 973.

³⁸ See generally Richmond, *supra* note 11, at 365–69, which was adapted for Parts II.A and II.B. All text has been updated and remains the author’s original work.

II. AN OVERVIEW OF PARTNERSHIP DISSOLUTION, WINDING UP, AND TERMINATION

Partnerships are voluntary associations.³⁹ They are also creatures of contract.⁴⁰ The relationships between partners and their firm are generally governed by the terms of the partnership agreement.⁴¹ A partnership agreement may be oral or written,⁴² and may also be inferred from parties' conduct,⁴³ although there is obvious potential for confusion and uncertainty if the agreement is not in writing. If there is no partnership agreement or the agreement is silent on an issue, state partnership statutes control.⁴⁴ In other words, state partnership statutes primarily provide default rules.⁴⁵ Regardless, any partnership may dissolve; there is no such thing as an "indissoluble partnership."⁴⁶

A. Understanding Dissolution, Winding Up, and Termination

The Uniform Partnership Act of 1914 ("UPA"), long the foundation for many states' partnership laws and still employed in some states, treats partnerships as aggregates of their members rather than as distinct entities.⁴⁷ The UPA defines "dissolution" as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on . . . of the business."⁴⁸ Under the UPA approach, a partnership dissolves any time a partner permanently leaves the firm, even if the firm outwardly appears to continue.⁴⁹ Again, this is a default rule.⁵⁰ Law firm partnerships in UPA states may avoid this result by including in their partnership agreements (a) a

³⁹ *Loft v. Lapidus*, 936 F.2d 633, 636 (1st Cir. 1991); *Bunger v. Demming*, 40 N.E.3d 887, 903 (Ind. Ct. App. 2015); *Casey v. Chapman*, 98 P.3d 1246, 1252 (Wash. Ct. App. 2004).

⁴⁰ *Husch & Eppenberger v. Eisenberg*, 213 S.W.3d 124, 132 (Mo. Ct. App. 2006).

⁴¹ See LESLIE D. CORWIN & ARTHUR J. CIAMPI, *LAW FIRM PARTNERSHIP AGREEMENTS* § 1.05, at 1–30 (2008).

⁴² *Legacy Seating v. Commercial Plastics*, 65 F. Supp. 3d 542, 551–52 (N.D. Ill. 2014) (applying Illinois law); *Young v. Delaney*, 647 A.2d 784, 789 (D.C. 1994).

⁴³ *Cressy v. Proctor*, 22 F. Supp. 3d 353, 360 (D. Vt. 2014) (discussing Vermont law).

⁴⁴ See CORWIN & CIAMPI, *supra* note 41, § 1.05, at 1–30.

⁴⁵ *Husch & Eppenberger*, 213 S.W.3d at 132; *McCormick v. Brevig*, 96 P.3d 697, 703 (Mont. 2004); *Ederer v. Gursky*, 881 N.E.2d 204, 212 (N.Y. 2007); *Bushard v. Reisman*, 800 N.W.2d 373, 380 (Wis. 2011).

⁴⁶ *Fischer v. Fischer*, 197 S.W.3d 98, 101 (Ky. 2006); *Urbane v. Beierling*, 835 N.W.2d 455, 459 (Mich. Ct. App. 2013).

⁴⁷ See WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* 279 (3rd ed. 2001).

⁴⁸ UNIF. P'SHIP ACT § 29 (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 1914).

⁴⁹ HILLMAN, *supra* note 6, § 4.3.3, at 4:24. The remaining partners may choose to continue the partnership business following the withdrawal of their peer. If so, "the old firm continues until its affairs are wound up and a new partnership is formed, consisting of the remaining members of the old partnership." See also 8182 Md. Assocs., Ltd. P'ship v. Sheehan, 14 S.W.3d 576, 580–81 (Mo. 2000). Any creditors of the old partnership become creditors of the new partnership. *Id.* (citing a Missouri statute).

⁵⁰ *In re Popkin & Stern*, 340 F.3d 709, 714 (8th Cir. 2003) (applying Missouri law).

provision setting the term of the partnership;⁵¹ or (b) an “anti-dissolution” or “continuation” provision differentiating withdrawal from dissolution and recognizing the latter only upon a partnership vote.⁵² The second of these options is common, although its effectiveness is questionable, because “the inherent power of any partner to dissolve a partnership, even in contravention of an agreement, is a central tenet of the UPA.”⁵³ In any event, a partnership agreement may include both types of provisions.⁵⁴

The Revised Uniform Partnership Act (“RUPA”),⁵⁵ which has now been adopted in most states, differs from the UPA in several key respects relevant to dissolution. RUPA establishes that a partnership is an entity separate from its constituent partners.⁵⁶ Like the UPA, RUPA grants partners the right to withdraw from their partnerships at any time.⁵⁷ Unlike the UPA, however, under RUPA, a partner’s withdrawal does not necessarily cause the partnership’s dissolution.⁵⁸ RUPA distinguishes between dissolution and withdrawal through the use of the term “dissociation,” which denotes a partner’s withdrawal from a partnership, whether voluntary or involuntary.⁵⁹

51 HILLMAN, *supra* note 6, § 4.3.2.2, at 4:18. A provision in a partnership agreement specifying a term of partnership does not actually prevent a partner from withdrawing prematurely and thus causing the firm to dissolve. But such a premature dissolution is considered wrongful, and the remaining partners may avoid winding up and continue the business uninterrupted. *Id.* § 4.3.2.2, at 4:19.

52 *Id.* § 4.3.2.3, at 4:19.

53 *Id.* § 4.3.2.3, at 4:20–22 (footnote omitted); *see also* Eskenazi v. Schapiro, 812 N.Y.S.2d 474, 477 (App. Div. 2006) (discussing joint venturers’ and partners’ abilities to repudiate a joint venture or partnership agreement at any time under the New York Partnership Law).

54 *See, e.g., In re Popkin & Stern*, 340 F.3d at 711 (quoting the law firm’s partnership agreement).

55 There is no official “Revised Uniform Partnership Act.” The National Conference of Commissioners on Uniform Laws revised the UPA in 1994 and again in 1996, with the 1996 revisions subsequently published bearing a 1997 date. The 1994 and subsequent revisions to the UPA came to be known as the “Revised Uniform Partnership Act.” HILLMAN, *supra* note 6, § 4.1, at 4:2–3. The official name for what most lawyers call RUPA is the “Uniform Partnership Act (1997).” GREGORY, *supra* note 47, at 262. To avoid confusion, some courts refer to their states’ partnership acts by revision date. *See, e.g., Faegre & Benson, LLP v. R & R Inv’rs*, 772 N.W.2d 846, 852–53 (Minn. Ct. App. 2009) (referring to “the 1994 UPA”).

56 ROBERT W. HILLMAN ET AL., THE REVISED UNIFORM PARTNERSHIP ACT § 201(a) (2015–16 ed.) [hereinafter HILLMAN ET AL., REVISED UNIF. P’SHP ACT] (“A partnership is an entity distinct from its partners.”).

57 *Compare* UNIF. P’SHP ACT § 31(1)(b)(2) (NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS 1914) (discussing dissolutions caused both permissibly and wrongfully), *with* HILLMAN ET AL., REVISED UNIF. P’SHP ACT, *supra* note 56, at § 602(a) (“A partner has the power to dissociate at any time, rightfully or wrongfully, by express will . . .”).

58 HILLMAN, *supra* note 6, § 4.4.2, at 4:46.

59 *Id.*

Under both the UPA and RUPA, dissolution does not halt partnership operations.⁶⁰ Dissolution does not terminate the partnership.⁶¹ “Dissolution” and “termination” are not synonymous.⁶² Rather, the dissolved partnership enters a winding up phase.⁶³ “Winding up” is the time after dissolution and before termination during which all partnership affairs are settled.⁶⁴ Winding up a partnership generally “involves reducing the assets to cash (liquidation), paying creditors, and distributing to partners the value of their respective interests.”⁶⁵ Winding up may also include the prosecution of legal claims belonging to the partnership.⁶⁶ A law firm that is winding up will have to notify its clients and perhaps withdraw from representations, and may further be required to assist clients in securing new counsel. Regardless of the specific tasks involved, winding up is a dissolved partnership’s sole business or purpose.⁶⁷

When the partnership is a large law firm, dissolution and winding up are usually accomplished pursuant to a formal plan of dissolution, and a firm may engage outside professionals, such as accountants and lawyers, to assist it in winding up.⁶⁸ There is no prescribed time within which winding up must be accomplished,⁶⁹ although it should be completed within a

⁶⁰ See UNIF. P’SHIP ACT § 30 (NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS 1914) (“On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.”); HILLMAN ET AL., REVISED UNIF. P’SHIP ACT, *supra* note 56, § 802(a) (providing that after dissolution, a partnership continues for the sole purpose of winding up its affairs and that the partnership is terminated when winding up is completed).

⁶¹ *Disotell v. Stiltner*, 100 P.3d 890, 897 (Alaska 2004); *Chaney v. Burdett*, 560 S.E.2d 21, 22 (Ga. 2002); *Hyta v. Finley*, 53 P.3d 338, 340 (Idaho 2002); *Lai v. Gartlan*, 845 N.Y.S.2d 30, 36 (App. Div. 2007); *Huber v. Etkin*, 58 A.3d 772, 777 (Pa. Super. Ct. 2012).

⁶² *Gast v. Peters*, 671 N.W.2d 758, 762 (Neb. 2003); *see also* *Scholastic, Inc. v. Harris*, 259 F.3d 73, 85 (2d Cir. 2001) (discussing New York law and stating that “[d]issolution is not termination”); 8182 Md. Assocs., Ltd. P’ship v. Sheehan, 14 S.W.3d 576, 580 (Mo. 2000) (“Dissolution, however, is not a termination of the partnership business.”).

⁶³ *Hyta*, 53 P.3d at 340; *Hurwitz v. Padden*, 581 N.W.2d 359, 361 (Minn. Ct. App. 1998); *Lai*, 845 N.Y.S.2d at 36.

⁶⁴ GREGORY, *supra* note 47, § 227.

⁶⁵ *Estate of Matteson v. Matteson*, 749 N.W.2d 557, 567 (Wis. 2008) (quoting *First Nat’l Bank of Kenosha v. Schaefer*, 283 N.W.2d 410, 418 (Wis. Ct. App. 1979)); *see also* *Hyta*, 53 P.3d at 340 (similarly describing the winding up process).

⁶⁶ *Faegre & Benson, LLP v. R & R Inv’rs*, 772 N.W.2d 846, 853 (Minn. Ct. App. 2009).

⁶⁷ *In re Jones & McClain, LLP*, 271 B.R. 473, 478 (Bankr. W.D. Pa. 2001); *Fischer v. Fischer*, 197 S.W.3d 98, 101 (Ky. 2006) (quoting the official commentary to the UPA); *Mortgage Grader, Inc. v. Ward & Olivo, L.L.P.*, 139 A.3d 30, 38 (N.J. 2016).

⁶⁸ See CORWIN & CIAMPI, *supra* note 41, § 7.05[4], at 7–23 (offering a sample plan of dissolution which, among its terms, provides for the retention of professionals to assist in the winding up process).

⁶⁹ *Centerre Bank of Kan. City, N.A. v. Angle*, 976 S.W.2d 608, 618 (Mo. Ct. App. 1998).

reasonable time.⁷⁰ Law firm wind-ups may drag on because they involve bringing to a close all matters pending at the time of dissolution, and litigation matters may take months and even years to resolve.⁷¹ However long winding up may take, the partnership terminates only when the process is complete.⁷²

The UPA and RUPA take quite different approaches to compensating partners for time spent completing a dissolved partnership's unfinished business. Under the UPA, a partner, other than a surviving partner,⁷³ is entitled to no extra compensation for her services in winding up the dissolved partnership's affairs.⁷⁴ "Extra compensation" refers to compensation greater than any sum the partner will receive as her share of the partnership.⁷⁵ The refusal to allow extra compensation is sometimes described as the "no compensation rule."⁷⁶ In contrast, under RUPA, partners are entitled to reasonable compensation for their services in winding up the dissolved partnership, plus the reimbursement of related overhead.⁷⁷

Law firms that do not want their partners to confront the unfinished business doctrine in the event the firm dissolves may avoid that prospect by including so-called "*Jewel* waivers" in

⁷⁰ Daniels Trucking, Inc. v. Rogers, 643 P.2d 1108, 1111 (Kan. Ct. App. 1982); Doting v. Trunk, 856 P.2d 536, 542 (Mont. 1993).

⁷¹ See Robert W. Hillman, *Law Firm Risk Management in an Era of Breakups and Lawyer Mobility: Limitations and Opportunities*, 43 TEXAS TECH L. REV. 449, 465 (2011).

⁷² Creel v. Lilly, 729 A.2d 385, 391 (Md. 1999); Hurwitz v. Padden, 581 N.W.2d 359, 361 (Minn. Ct. App. 1998); Gast v. Peters, 671 N.W.2d 758, 762–63 (Neb. 2003).

⁷³ The term "surviving partner" as used in the UPA refers to "those partners who have survived another partner's death." Bushard v. Reisman, 800 N.W.2d 373, 381 (Wis. 2011).

⁷⁴ See UNIF. P'SHIP ACT § 18(f) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 1914) ("No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs."); see, e.g., Kahn v. Seely, 980 S.W.2d 794, 798–99 (Tex. App. 1998) (applying Texas version of UPA and denying former partner extra compensation for winding up dissolved partnership's affairs).

⁷⁵ Jewel v. Boxer, 203 Cal. Rptr. 13, 16 n.2 (Ct. App. 1984). Under the UPA, partners are entitled to reimbursement for reasonable overhead expenses they incur in completing the dissolved firm's unfinished business. *Id.* at 19. Unfortunately, courts do not agree on how to calculate reasonable overhead expenses for which a partner may seek reimbursement. Hammes v. Frank, 579 N.E.2d 1348, 1353 (Ind. Ct. App. 1991). Under one formulation, "overhead" refers to a lawyer's direct costs, i.e. those costs that can be specifically attributed to a matter without apportionment. See *id.* The other possibility is to include within the definition of overhead indirect costs that cannot be allocated to a particular case or matter, such as rent, library expenses, staff salaries, utilities, and so on. See *id.* (noting the competing approaches).

⁷⁶ See, e.g., LaFond v. Sweeney, 343 P.3d 939, 943–44 (Colo. 2015) (deciding whether to apply the no compensation rule in the dissolution of a law firm organized as an LLC).

⁷⁷ Greenspan v. Orrick, Herrington & Sutcliffe LLP (*In re Brobeck, Phleger & Harrison LLP*), 408 B.R. 318, 326 (Bankr. N.D. Cal. 2009) (discussing California partnership law); HILLMAN ET AL., REVISED UNIF. P'SHIP ACT, *supra* note 56, § 401(h).

their partnership agreements.⁷⁸ A *Jewel* waiver is intended to ensure that the partnership has no property interest in client matters at the time of dissolution so that departing lawyers may take open matters with them without having to account for fees earned on them post-dissolution.⁷⁹ Although a *Jewel* waiver should override the default rules of state partnership laws, to be effective, it must be adopted at a time when it will not be exposed to challenge in bankruptcy as a fraudulent conveyance or transfer of partnership assets.⁸⁰

B. Partners' Fiduciary Duties Post-Dissolution

Partnership is a fiduciary relation, and partners owe fiduciary duties to one another and to their firms.⁸¹ Dissolution alters partners' fiduciary duties in some respects, but it does not entirely extinguish them. Specifically, dissolution erases a partner's loyalty obligation not to compete with the partnership in the conduct of partnership business.⁸² A partner therefore may compete with her former colleagues and dissolved law firm for new business, even if that new business comes from clients that were clients of the firm when it dissolved.⁸³ In all other respects, however, partners' fiduciary duties continue through the winding up phase.⁸⁴ Termination of the partnership terminates the partners' fiduciary duties.⁸⁵

⁷⁸ See Rachel M. Arnett, *Ripping the Jackson Pollock Off the Wall: Reconciling Jewel v. Boxer with the Modern Law Firm*, 26 GEO. J. LEGAL ETHICS 557, 562 (2013) ("A partnership can opt out of the unfinished business rule by including a *Jewel* waiver in its partnership agreement. The effect is simple: partners no longer have any financial obligations to the partnership with regard to fees collected as part of the winding-up phase.") (footnote omitted).

⁷⁹ Hurt, *supra* note 7, at 577–78; Michael D. DeBaecke & Victoria Guilfoyle, *Law Firm Dissolutions: When the Music Stops, Does Anyone Need to Account for Any Unfinished Business?*, 14 DEL. L. REV. 41, 66 (2013).

⁸⁰ See, e.g., *In re Brobeck*, 408 B.R. at 336–47 (involving claims by a dissolved law firm's bankruptcy trustee that the firm's *Jewel* waiver gave rise to fraudulent conveyances).

⁸¹ *In re Rueth Dev. Co.*, 976 N.E.2d 42, 53 (Ind. Ct. App. 2012); RAS AAP, LLC v. Alyeska Ocean, Inc., 358 P.3d 483, 490 (Wash. Ct. App. 2015).

⁸² HILLMAN ET AL., REVISED UNIF. P'SHIP ACT, *supra* note 56, § 404(b)(3) (restricting a partner's duty of loyalty "to refrain from competing with the partnership in the conduct of partnership business *before* the dissolution of the partnership") (emphasis added).

⁸³ *Smith, Keller & Assocs. v. Dorr & Assocs.*, 875 P.2d 1258, 1267 (Wyo. 1994) (quoting *Fraser v. Bogucki*, 250 Cal. Rptr. 41, 45 (Ct. App. 1988)).

⁸⁴ See *Tucker v. Ellbogen*, 793 P.2d 592, 597 (Colo. App. 1989) ("After the dissolution of a partnership, each partner continues to have a *fiduciary duty* to the other partner until the partnership assets have been divided and the liabilities have been satisfied."); *Ruse v. Bleeke*, 914 N.E.2d 1, 11 (Ind. Ct. App. 2009) ("Partners owe a fiduciary duty to one another that continues until final termination of the business of the partnership."); *Miami Subs Corp. v. Murray Family Tr.*, 703 A.2d 1366, 1374 (N.H. 1997) (stating that fiduciary duties continue through winding up and until termination); *Huber v. Etkin*, 58 A.3d 772, 780 (Pa. Super. Ct. 2012) (stating that partners' fiduciary duties continue through winding up); *M.R. Champion, Inc. v. Mizell*, 904 S.W.2d 617, 618 (Tex. 1995) (stating that partners owe each other and their partnership a fiduciary duty in the

In some jurisdictions, the continuation of fiduciary duties may be statutorily prescribed. Under RUPA, for example, partners' duties to account and to refrain from dealing with the partnership on behalf of a party having an adverse interest expressly continue through wind up.⁸⁶ The duty of good faith and fair dealing set forth in RUPA section 404(d) has no durational limit, and therefore should be understood to continue through the winding up phase.⁸⁷ Included among partners' post-dissolution duties that continue during the winding-up phase is the duty to complete the partnership's unfinished business.⁸⁸ The failure to discharge this duty is actionable and is ordinarily remedied by a monetary damage award that can be credited in an accounting.⁸⁹ It is possible to breach this duty by requiring another partner to bear a disproportionate burden of unfinished business to complete.⁹⁰

III. *IN RE THELEN* AND *HELLER EHRMAN* AND THE SHIFTING UNFINISHED BUSINESS TERRAIN

As pointed out earlier, courts have historically applied the unfinished business doctrine to matters billed by the hour.⁹¹

winding up of partnership business); *Inv'r Assocs. v. Copeland*, 546 S.E.2d 431, 436 (Va. 2001) (stating that "partners owe each other a fiduciary duty in winding up the partnership affairs"). *But see 6D Farm Corp. v. Carr*, 882 N.Y.S.2d 198, 201 (App. Div. 2009) (stating that "[t]he 'fiduciary relation between partners terminates upon notice of dissolution, even though the partnership affairs have not been wound up'") (quoting *In re Silverberg*, 438 N.Y.S.2d 143, 144 (App. Div. 1981)). The *6D Farm Corp.* court's blanket statement is dubious, however, since the court in *In re Silverberg*, whose opinion the *6D Farm Corp.* court quoted, was referring only to partners' post-dissolution ability to represent clients who were clients of the firm at the time of dissolution. *In re Silverberg*, 438 N.Y.S.2d at 144. Read properly, *In re Silverberg* expresses only the general rule that dissolution erases a partner's loyalty obligation not to compete with the partnership in the conduct of partnership business, but leaves intact other fiduciary duties. The case certainly does not support the broad rule that the *6D Farm Corp.* court apparently drew from it. Accordingly, courts and lawyers should be very wary of relying on the *6D Farm Corp.* opinion as authority on this issue.

⁸⁵ See *In re Rueth Dev. Co.*, 976 N.E.2d 42, 53 (Ind. Ct. App. 2012) ("Under common law, general partners owe each other and the partnership fiduciary duties until final termination of the partnership."); *Marr v. Langhoff*, 589 A.2d 470, 476 (Md. 1991) (stating that partners' "mutual fiduciary duties cease when the winding up is completed").

⁸⁶ HILLMAN ET AL., REVISED UNIF. P'SHIP ACT, *supra* note 56, §§ 404(b)(1), (2).

⁸⁷ See *id.* § 404(d) ("A partner shall discharge the duties to the partnership and the other partners . . . consistently with the obligation of good faith and fair dealing.")

⁸⁸ *Dickson, Carlson & Campillo v. Pole*, 99 Cal. Rptr. 2d 678, 685 (Cal. Ct. App. 2000); *Kirsch v. Leventhal*, 586 N.Y.S.2d 330, 333 (App. Div. 1992); *Smith, Keller & Assocs. v. Dorr & Assocs.*, 875 P.2d 1258, 1267 (Wyo. 1994) (quoting *Bader v. Cox*, 701 S.W.2d 677, 682 (Tex. App. 1985)).

⁸⁹ *Dickson, Carlson & Campillo*, 99 Cal. Rptr. 2d at 685.

⁹⁰ *Id.*

⁹¹ See, e.g., *Robinson v. Nussbaum*, 11 F. Supp. 2d 1, 4–6 (D.D.C. 1997) (applying District of Columbia law); *Rothman v. Dolin*, 24 Cal. Rptr. 2d 571, 573 (Ct. App. 1993) ("[U]nfinished business simply consists of all matters in progress which have not been completed at the time the firm is dissolved. . . . That one matter is to be compensated at

Courts have reasonably concluded that the unfinished business doctrine should apply to all matters within its scope regardless of lawyers' compensation arrangements with clients.⁹² This conclusion is correct because the unfinished business doctrine is simply an aspect of partnership law that upholds partners' fiduciary duties to one another and to their firm in the event of dissolution.⁹³

In 2014, however, two cases radically altered the unfinished business terrain by rejecting the doctrine's application to client matters that are billed hourly. The New York Court of Appeals held in *Geron v. Seyfarth Shaw LLP (In re Thelen LLP)*⁹⁴ that "pending hourly fee matters are not 'partnership property' or 'unfinished business' within the meaning of New York's Partnership Law."⁹⁵ In *Heller Ehrman LLP v. Davis, Wright, Tremaine LLP*,⁹⁶ a California federal court reasoned that California law was "unsettled on the question of whether a law firm may assert a property interest in hourly fee matters pending at the time of its dissolution,"⁹⁷ and then held that equity and public policy weighed against application of the unfinished business doctrine in that context.⁹⁸ That decision was appealed, and the ultimate outcome in *Heller Ehrman* will now be decided by the California Supreme Court on a certified question from the U.S. Court of Appeals for the Ninth Circuit.⁹⁹ As will be explained below, *In re Thelen LLP* was wrongly decided as a matter of partnership law, and *Heller Ehrman* was wrongly decided in the district court.

A. *In re Thelen*

*Geron v. Seyfarth Shaw LLP (In re Thelen LLP)*¹⁰⁰ arose out of the October 2008 dissolution of the law firm Thelen LLP ("Thelen") and the August 2005 dissolution of the venerable law firm Coudert Brothers LLP ("Coudert").¹⁰¹ Both underlying cases require some discussion.

an hourly rate and another on a contingency basis is of no consequence in determining whether a matter is unfinished business.") (citation omitted).

⁹² See, e.g., *Grossman v. Davis*, 34 Cal. Rptr. 2d 355, 356 (Ct. App. 1994) (stating that the *Jewel* doctrine applies regardless of "the nature of the compensation agreement with the client").

⁹³ *Rogers*, *supra* note 25, at 336.

⁹⁴ 20 N.E.3d 264, 264 (N.Y. 2014).

⁹⁵ *Id.* at 266–67.

⁹⁶ 527 B.R. 24 (N.D. Cal. 2014).

⁹⁷ *Id.* at 30.

⁹⁸ *Id.* at 30–33.

⁹⁹ See *infra* Part III.B.3.

¹⁰⁰ 20 N.E.3d 264 (N.Y. 2014).

¹⁰¹ *Id.* at 267–69.

1. The Underlying Thelen and Coudert Dissolutions and Bankruptcy Cases

First, in connection with Thelen's dissolution in October 2008, the firm's partners adopted a fourth amended partnership agreement and a written plan of dissolution.¹⁰² The new partnership agreement stated that it was governed by California law, and unlike prior agreements, included a *Jewel* or unfinished business waiver.¹⁰³ The waiver provided that:

Neither the Partners nor the Partnership shall have any claim or entitlement to clients, cases or matters ongoing at the time of the dissolution of the Partnership other than the entitlement for collection of amounts due for work performed by the Partners and other Partnership personnel prior to their departure from the Partnership. The provisions of this [section] are intended to expressly waive, opt out of and be in lieu of any rights any Partner of the Partnership may have to "unfinished business" of the Partnership, as the term is defined in *Jewel v. Boxer* . . . or as otherwise might be provided in the absence of this provision through the interpretation of the [California Uniform Partnership Act of 1994, as amended].¹⁰⁴

Following Thelen's dissolution, ten former Thelen partners joined the New York office of Seyfarth Shaw LLP, and another former Thelen partner joined Seyfarth in California.¹⁰⁵ They brought a number of open matters with them from Thelen.¹⁰⁶ They worked on those matters at Seyfarth and Seyfarth billed the clients for their services.¹⁰⁷

In September 2009, Thelen filed for bankruptcy protection in the Southern District of New York.¹⁰⁸ The bankruptcy trustee, Yann Geron, sued Seyfarth to recover the value of Thelen's unfinished business for the bankruptcy estate's creditors.¹⁰⁹ He asserted that the open hourly matters the former Thelen partners took to Seyfarth were the dissolved firm's assets, and that Thelen's partners fraudulently transferred those assets to individual partners when they adopted the partnership agreement with the *Jewel* waiver on the eve of the firm's dissolution.¹¹⁰

¹⁰² *Id.* at 267.

¹⁰³ *Id.*

¹⁰⁴ *Id.* (quoting the partnership agreement).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 267–68.

Seyfarth moved for judgment on the pleadings.¹¹¹ The district court granted the motion.¹¹² In holding for Seyfarth, the district court (1) determined that New York law controlled the dispute; (2) reasoned that under New York law, the unfinished business doctrine did not apply to hourly fee matters; and (3) concluded that a partnership does not retain a property interest in such matters upon dissolution.¹¹³ Recognizing the gravity of its decision, however, the district court certified its order for interlocutory appeal.¹¹⁴ Geron appealed to the Second Circuit as expected.

The Second Circuit agreed with the district court that New York law controlled the dispute, but further recognized the absence of controlling New York authority.¹¹⁵ Given the significance of the issues involved, the court reasoned that certifying appropriate questions to New York's highest court for determination was preferable to deciding the case based on its singular interpretation of New York law.¹¹⁶ The Second Circuit therefore certified two questions to the New York Court of Appeals:

Under New York law, is a client matter that is billed on an hourly basis the property of a law firm, such that, upon dissolution and in related bankruptcy proceedings, the law firm is entitled to the profit earned on such matters as the “unfinished business” of the firm?

If so, how does New York law define a “client matter” for purposes of the unfinished business doctrine and what proportion of the profit derived from an ongoing hourly matter may the new law firm retain?¹¹⁷

Turning now to Coudert, the firm dissolved in line with the terms of its partnership agreement in August 2005.¹¹⁸ On the same day they voted to dissolve, the firm's equity partners adopted a special authorization, which authorized the firm's executive board to:

[T]ake such actions as it may deem necessary and appropriate, including, without limitation, the granting of waivers, notwithstanding any provisions to the contrary in the Partnership Agreement . . . , in order to:

¹¹¹ *Id.* at 268.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *See In re Thelen*, 736 F.3d 213, 224 (2d Cir. 2013).

¹¹⁶ *See id.* at 223–24.

¹¹⁷ *Id.* at 225.

¹¹⁸ *In re Thelen*, 20 N.E.3d 264, 268 (N.Y. 2014).

a. . . sell all or substantially all of the assets of . . . the Firm to other firms or service providers, in order to maximize the value of the Firm's assets and business;

b. wind down the business of the Firm with a view to continuing the provision of legal services to clients and the orderly transition of client matters to other firms or service providers, in order to maximize the value of the Firm's assets and business to the extent practicable.¹¹⁹

Former Coudert partners joined several different law firms, taking open matters with them to their new firms.¹²⁰ They completed all but two of those matters at their new firms on an hourly basis.¹²¹

In September 2006, Coudert filed for bankruptcy protection in the Southern District of New York.¹²² The administrator of Coudert's estate, Development Specialists, Inc. ("DSI"), brought adversary actions against law firms that had hired former Coudert partners.¹²³ DSI alleged that the firms were liable to Coudert for any profits derived from the matters brought to them by the former Coudert partners.¹²⁴ The law firms moved for summary judgment on the basis that the unfinished business doctrine did not apply to hourly matters, and DSI cross-moved for a declaration that the open client matters were Coudert's property at the time of dissolution.¹²⁵ The district court sided with DSI, and held that the former Coudert partners had to account for any profits they earned while winding up the client matters at their new firms.¹²⁶

The district court certified its decision for immediate appeal and, as expected, the law firms appealed.¹²⁷ The Second Circuit then certified to the New York Court of Appeals the same two questions asked in *In re Thelen*.¹²⁸

2. The New York Court of Appeals Decision in *In re Thelen*

The *In re Thelen* court began its analysis of Geron's and DSI's unfinished business claims by noting that the New York Partnership Law (the "Partnership Law") was based on the

¹¹⁹ *Id.* at 268–69 (internal quotation marks omitted).

¹²⁰ *Id.* at 269.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* (quoting *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld, LLP*, 477 B.R. 318, 326 (S.D.N.Y. 2012), *rev'd in part, vacated in part, In re Coudert Bros. LLP*, 574 F. App'x 15 (2d Cir. 2014)).

¹²⁷ *Id.*

¹²⁸ *Id.* (citing *In re Coudert Bros. LLP*, Nos. 12-4916(L) *et al.*, 2013 WL 9363394, at *1–2 (2d Cir. Dec. 2, 2013)).

UPA.¹²⁹ It went on to frame the unfinished business doctrine, explaining that absent contrary agreement, profits attributable to work begun by former partners of a dissolved law firm pre-dissolution are a partnership asset that must be finished for the dissolved firm's benefit.¹³⁰ Under the Partnership Law and the UPA more generally, "because departing partners owe a fiduciary duty to the dissolved firm and their former partners to account for benefits obtained from use of partnership property in winding up the partnership's business, they may not be separately compensated."¹³¹ But critically, the court noted that the Partnership Law does not define partnership property; it sets "default rules for how a partnership upon dissolution divides property as elsewhere defined" under New York law.¹³² As a result, the *In re Thelen* court reasoned the Partnership Law does not control the determination of whether "a law firm's 'client matters' are partnership property."¹³³

Continuing, the court explained that in New York, clients have the unqualified right to terminate an attorney-client relationship at any time with no obligation beyond paying the lawyer for the reasonable value of her completed services.¹³⁴ As a result, law firms cannot have property interests in future hourly fees because such fees are too uncertain and speculative.¹³⁵ Furthermore, prior New York cases on which Geron and DSI relied on had "never suggested that a law firm owns anything with respect to a client matter other than yet-unpaid compensation for legal services already provided."¹³⁶ For instance, courts applying the unfinished business doctrine to contingent fee matters had uniformly held that the dissolved law firm could recover only "the 'value' of its services."¹³⁷

The *In re Thelen* court further reasoned that treating a dissolved law firm's open hourly matters as partnership property "would have numerous perverse effects," would offend "basic principles that govern the attorney-client relationship," and would violate ethics rules.¹³⁸ To allow the former partners of a dissolved law firm to profit from work they did not perform, at

¹²⁹ *Id.* at 270.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* (quoting *In re Cooperman*, 633 N.E.2d 1069, 1072 (N.Y. 1994)) (internal quotation marks omitted).

¹³⁵ *Id.* at 270–71 (quoting *Verizon New England, Inc. v. Transcom Enhanced Servs., Inc.*, 990 N.E.2d 121, 124 (N.Y. 2013)).

¹³⁶ *Id.* at 271.

¹³⁷ *Id.*

¹³⁸ *Id.* at 273.

the expense of a former colleague and her new firm, would grant them an unjust windfall.¹³⁹ Furthermore, because the unfinished business doctrine does not attach to profits earned on open matters that go with former partners who bolt from a struggling firm before it dissolves, Geron and DSI's approach "would encourage partners to get out the door, with clients in tow, before it is too late, rather than remain and work to bolster the firm's prospects. Obviously, this run-on-the-bank mentality makes the turnaround of a struggling firm less likely."¹⁴⁰ Finally, lawyers who linger too long at a failing firm are placed in a precarious position.¹⁴¹ Faced with the prospect of rebating their fees to their former law firm, they might advise their clients that they can no longer afford to represent them, which would disrupt the clients' representations and impose a practical restriction on their right to choose their own counsel.¹⁴² "Or, more likely," the *In re Thelen* court worried that tardy lawyers would find it hard to obtain positions with new law firms because any profits from their work for current clients would go to their old firms rather than their new ones.¹⁴³

Geron and DSI argued that clients do not care which law firm their fees go to as long as their matters are handled properly.¹⁴⁴ The *In re Thelen* court disagreed based on its prior reasoning.¹⁴⁵ Additionally, clients might worry that their hourly fee matters would be neglected if the new law firm could not profit off them.¹⁴⁶ The court ridiculed the idea that firms would hire partners from dissolved law firms or accept client matters without the promise of compensation.¹⁴⁷ "Followed to its logical conclusion," the court reasoned that the plaintiffs' approach would hurt clients, lawyers, and law firms without producing the desired financial rewards for bankrupt firms' estates.¹⁴⁸ Ultimately, applying the unfinished business doctrine to hourly fee matters would contradict New York's strong public policy favoring client choice and lawyer mobility.¹⁴⁹

Finally, the court rejected Geron and DSI's argument that a law firm can avoid the unfinished business doctrine by inserting

¹³⁹ *Id.* (quoting *Geron v. Robinson & Cole LLP*, 476 B.R. 732, 740 (S.D.N.Y. 2012)).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *See id.* (saying that such a position "ignores commonsense and marketplace realities").

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

a *Jewel* waiver in its partnership agreement.¹⁵⁰ From the court's perspective:

This suggestion fails to consider the possibility that classifying clients' pending hourly fee matters as firm property may lead to untoward unintended consequences. For example, the trustees . . . limit their sought-after recoveries to client matters that remain unresolved as of the date of a law firm's dissolution. As Seyfarth pointed out, though, if a client's pending matter is partnership property, why doesn't every lawyer whose clients follow him to a new firm breach fiduciary duties owed his former law firm and partners? In the end, the trustees' theory simply does not comport with our profession's traditions and the commercial realities of the practice of law today, a deficiency beyond the capacity of a *Jewel* waiver to cure.¹⁵¹

Accordingly, the court concluded that the first certified question should be answered negatively.¹⁵² It was unnecessary to answer the second certified question.¹⁵³

3. Analysis

In re Thelen should perhaps be read as rejecting the UPA's no compensation rule, rather than as rejecting the unfinished business doctrine altogether, since many of the court's concerns about the doctrine's effects vanish under RUPA, which permits reasonable compensation for partners who conclude a dissolved law firm's unfinished business.¹⁵⁴ Indeed, the decision should have no persuasive force in jurisdictions that have adopted RUPA. Even in jurisdictions still glued to the UPA, however, the court's reasoning wilts under scrutiny. Courts writing on a blank slate would be justified in disregarding the decision.

First, the position that future hourly fees are too uncertain or speculative to count as partnership property defies logic in practice. If those fees were as uncertain as the court reasoned, no sensible departing partners would take open matters with them to their new firms. No lawyer wants to relocate to a new firm and start that relationship on the wrong foot by delivering uncollectible client matters. Even collecting a security retainer is no protection against a client's termination of a representation.¹⁵⁵ In reality, the clients that lawyers take with them to new firms are almost always reliable payors. Of course, if a lawyer collects fees from matters opened at her former firm at her new firm, the

¹⁵⁰ *Id.* at 274.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See HILLMAN, *supra* note 6, § 4.6.3.2, at 4:74–75.

¹⁵⁵ See Douglas R. Richmond, *Understanding Retainers and Flat Fees*, 34 J. LEGAL PROF. 113, 129 (2009) (explaining that security retainers are refundable until earned).

fees must be the dissolved partnership's property because they are no longer contingent or speculative in that case.¹⁵⁶

Second, allowing a dissolved law firm to profit from work it did not perform at the expense of a former partner and her new firm grants the dissolved firm no windfall.¹⁵⁷ The former partner and her new firm would not have had that matter but for the existence and support of the dissolved firm where the matter originated. The client originally hitched its star to the dissolved firm, not the new firm.

Third, the argument that because the unfinished business doctrine does not attach to profits earned on open matters that go with former partners who bolt from a struggling firm before it dissolves, enforcement of the doctrine post-dissolution "would encourage partners to get out the door, with clients in tow, before it is too late, rather than remain and work to bolster the firm's prospects" is at best exaggerated and speculative.¹⁵⁸ On the other side of the speculation coin, *not* enforcing the unfinished business doctrine might also negatively affect partners' behavior. For example, partners who control key client relationships might delay opening new matters for those clients until they have relocated their practices, or attempt to account for time spent on matters pre-dissolution in ways that will defeat the dissolving firm's right to the associated fees. Besides, other legal principles, such as quantum meruit, serve to police opportunistic conduct in those circumstances.

The second part of this argument—the prospect of a trustee or receiver enforcing the unfinished business doctrine creates a "run-on-the-bank mentality [that] makes the turnaround of a struggling firm less likely"¹⁵⁹—is equally flawed. A partner run typically begins while a firm is profitable, if perhaps not quite as profitable as it was in its best years.¹⁶⁰ In other words, a partner run begins before a firm is "struggling" or requires a "turnaround."¹⁶¹ It begins long before partners perceive the unfinished business doctrine as a professional threat. While partner runs often cause firms to collapse, their origins are not connected to the unfinished business doctrine.

¹⁵⁶ See Rutledge & McGuire, *supra* note 22, at 14 (asserting that fees earned from matters open at the time of dissolution are property of the dissolved partnership).

¹⁵⁷ *In re Thelen*, 20 N.E.3d at 273 (citing *Geron v. Robinson & Cole LLP*, 476 B.R. 732, 740 (S.D.N.Y. 2012)).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Morley, *supra* note 1, at 4.

¹⁶¹ See *id.*; *In re Thelen*, 20 N.E.3d at 273.

Fourth, the concern that lawyers will neglect open matters they take with them to new firms because of the effect of the unfinished business doctrine assumes that those lawyers are willing to violate their ethical duties of competence and diligence.¹⁶² That can't be right. Furthermore, if a lawyer neglects a matter because it is not profitable and the client is harmed as a result, the client has adequate remedies in the form of causes of action for professional negligence and breach of fiduciary duty against the lawyer and her new law firm. More important, the true value that a partner brings to the new law firm generally is not pending matters, but rather the client relationship and expectation of substantial future work from that client. Inattention to unfinished work would destroy the real asset at issue to the obvious detriment of the lawyers looking to transfer the client relationship, as well as to their new law firms.

Fifth, the rationale that enforcing the unfinished business doctrine would limit clients' right to counsel of their choice is deeply flawed. While clients' right to counsel of their choice is certainly important, it has never been unbridled. For instance, a court may disqualify a lawyer from representing a client in litigation regardless of the client's interest in retaining that lawyer's services.¹⁶³ Furthermore, as two commenters have explained in the context of law firm dissolutions:

In the context of a firm dissolution any number of factors may preclude a client [from] following one or more attorneys to a new firm. There may be a conflict that precludes that engagement from transitioning. The new firm may have a fee structure that the client finds undesirable. The client may have had an adverse relationship with that new firm such that they are not willing to transition their files to that firm. For these and any number of other reasons a client may either elect not to transfer an engagement to an attorney's new firm or be precluded from doing so. Simply put, a lawyer leaving one

¹⁶² See MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2016) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); *id.* r. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.")

¹⁶³ See *Martinez v. Cty. of Antelope*, No. 4:15CV3064, 2016 WL 3248241, at *6 (D. Neb. June 13, 2016) ("When considering motions to disqualify, courts must balance public policy concerns and the court's responsibility to uphold the integrity of judicial proceedings with a party's right to select his or her own counsel. In determining whether to disqualify counsel, a court balances the interests and motivations of the attorneys, the clients, and the public."); *Parke v. Cowley Cty.*, No. 15-1372-JTM-TJJ, 2016 WL 2609610, at *2 (D. Kan. May 6, 2016) ("The right to counsel of choice is an important one subject to override for compelling reasons. Even so, this right is secondary in importance to preserving the integrity of the judicial process, maintaining the public confidence in the legal system and enforcing the ethical standards of professional conduct.") (footnotes omitted).

firm is under no obligation to insure that his or her new firm is acceptable to an existing client.¹⁶⁴

Moreover, the concern the *In re Thelen* court expressed is the so-called “lock-out” effect of the unfinished business doctrine; that is, enforcing the doctrine supposedly locks-out clients from lawyers of their choice.¹⁶⁵ Yet, despite the many law firm dissolutions to date, lock-out has never been shown to have occurred.¹⁶⁶ There is no evidence that the phenomenon exists.¹⁶⁷ Additionally, as I have explained elsewhere, “[a]ssuming client worthiness, migrating partners should seek to continue clients’ representations in order to be hired by those clients in new matters. As a general rule, repeat clients face no substantial risk of lock-out.”¹⁶⁸

B. The *Heller Ehrman* Case

1. The District Court Decision

The other recent case, *Heller Ehrman LLP v. Davis, Wright, Tremaine LLP*,¹⁶⁹ traces back to the September 2008 dissolution of the global law firm Heller Ehrman LLP (“Heller”).¹⁷⁰ Heller was made up of several professional corporations (“PCs”) whose lawyer-shareholders served the firm’s clients.¹⁷¹ The PCs voted to dissolve the firm pursuant to a written dissolution plan after the firm’s largest creditor, Bank of America, declared Heller to be in default on the firm’s operational \$35 million line of credit and

¹⁶⁴ Rutledge & McGuire, *supra* note 22, at 13.

¹⁶⁵ See Mark H. Epstein & Brandon Wisoff, Comment, *Winding Up Dissolved Law Partnerships: The No-Compensation Rule and Client Choice*, 73 CALIF. L. REV. 1597, 1617–18 (1985).

¹⁶⁶ Rutledge & McGuire, *supra* note 22, at 13. In *Heller Ehrman LLP v. Jones Day (In re Heller Ehrman LLP)*, the record included internal Heller communications in which shareholders discussed other law firms’ possible reluctance to employ Heller lawyers and staff absent a *Jewel* waiver. *In re Heller Ehrman LLP*, No. 08-32514DM, 2013 WL 951706, at *7 (Bankr. N.D. Cal. Mar. 11, 2013). For example, one shareholder wrote that other firms were “acutely aware of the *Jewel v. Boxer* problem” and would “want some assurance that they won’t get trapped in that net.” *Id.* To suggest otherwise, he speculated, would cause those firms to “simply opt out with no jobs for individuals and nothing for the firm.” *Id.* Of course, none of that private conjecture constitutes evidence of lock-out.

¹⁶⁷ See Rutledge & McGuire, *supra* note 22, at 13 (“[A]s to the argument that clients may be, consequent to the Unfinished Business Doctrine, locked out of the counsel they desire, it is only that, an argument. With a majority of jurisdictions having to date followed *Jewel*, it would be expected that the cases and commentary would recite incidents of lock-out. It is at minimum curious that such a calamitous outcome . . . cannot be shown to have ever occurred.”).

¹⁶⁸ Richmond, *supra* note 11, at 418.

¹⁶⁹ *Heller Ehrman LLP v. Davis, Wright, Tremaine LLP*, 527 B.R. 24 (N.D. Cal. 2014).

¹⁷⁰ *Id.* at 27.

¹⁷¹ *Id.*

seized the firm's bank accounts.¹⁷² Heller's dissolution plan included a *Jewel* waiver that waived any rights and claims under the unfinished business doctrine to fees resulting from hourly fee matters open at the time of dissolution.¹⁷³ Heller filed for Chapter 11 bankruptcy in December 2008.¹⁷⁴

Heller's bankruptcy trustee sued Davis, Wright, Tremaine LLP ("Davis Wright") and other law firms to which Heller's lawyers dispersed.¹⁷⁵ The trustee alleged that the bankruptcy estate was entitled to recover profits from open hourly fee matters because the *Jewel* waiver in the dissolution plan was a fraudulent transfer of Heller's property under either bankruptcy code or California law.¹⁷⁶ The bankruptcy court granted the defendant's summary judgment.¹⁷⁷ The trustee sought review by the district court.

The district court reasoned that it was addressing a question of first impression: "whether a law firm—which has been dissolved by virtue of creditors terminating their financial support, thus rendering it impossible to continue to provide legal services in ongoing matters—is entitled to assert a property interest in hourly fee matters pending at the time of its dissolution."¹⁷⁸ The district court answered this question negatively, and started by shredding the trustee's claim that *Jewel v. Boxer*¹⁷⁹ controlled the outcome in this case.

Jewel is different . . . for five key, related reasons. First, the dissolution of the firm . . . in *Jewel* was voluntary, while Heller's dissolution was forced when Bank of America withdrew the firm's line of credit. This is significant because the partners in *Jewel* could have, but chose not to, finish representing their clients as or on behalf of the old firm. Here, Heller lacked the financial ability to continue providing legal services to its clients, leaving clients . . . no choice but to seek new counsel and Heller [s]hareholders no choice but to seek new employment. Second, in *Jewel*, "[t]he new firms represented the clients under fee agreements entered into between the client and the old firm." . . . Here, the clients signed new retainer agreements with the new firms. Third, in *Jewel*, the new firms consisted entirely of partners from the old firms. . . . Here, [the] [d]efendants are preexisting third-party firms that provided substantively new representation, requiring significant resources, personnel, capital, and

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Heller Ehrman LLP v. Jones Day (In re Heller Ehrman LLP)*, No. 08-32514DM, Adversary No. 10-3221DM, 2013 WL 951706, at *17 (Bankr. N.D. Cal. Mar. 11, 2013).

¹⁷⁸ *Heller Ehrman*, 527 B.R. at 25.

¹⁷⁹ 203 Cal. Rptr. 13 (Cal. Ct. App. 1984).

services well beyond the capacity of either Heller or its individual [s]hareholders. Where in *Jewel*, the departed partners continued to have fiduciary duties to each other and the old firm, here, the third-party firms never owed any duty . . . to the dissolved firm. Fourth, *Jewel* treated hourly fee matters and contingency fee matters as indistinguishable. Here, there are no contingency fee cases at issue. Finally, *Jewel* was decided in 1984 and thus applied the Uniform Partnership Act . . . which the materially different Revised Uniform Partnership Act . . . has since superseded. The RUPA, which applies after 1999 to all California partnerships, allows partners to obtain “reasonable compensation” for helping to wind up partnership business . . . and thus undermines the legal foundation on which *Jewel* rests.¹⁸⁰

The *Heller Ehrman* court observed that cases applying *Jewel* were poorly reasoned, predated California’s adoption of RUPA, or both.¹⁸¹ The California Supreme Court had not addressed the unfinished business doctrine in this context.¹⁸² Because, in the court’s view, California law was unsettled on the issue of a law firm’s property interest in hourly fee matters open when it dissolved, the court felt free to weigh the equities.¹⁸³

The court began its analysis on the “bedrock” idea that lawyers expect to be paid for their services and clients expect to pay the law firm that employs the lawyers who serve them.¹⁸⁴ It was therefore easy to conclude that the firms that did the work at issue should keep the fees earned from it.¹⁸⁵

The trustee argued that the former Heller shareholders owed a fiduciary duty to the firm’s estate to account for profits their new firms earned from the former Heller matters.¹⁸⁶ But, the court noted, the fiduciary duty to account is limited to partnership property,¹⁸⁷ and the equities did not support the recognition of a property interest here.¹⁸⁸ As the court explained:

A law firm never owns its client matters. The client always owns the matter, and the most the law firm can be said to have is an *expectation* of future business. . . . [T]he Trustee was unable to articulate a basis for calculating the value of this expected future business. The Trustee suggested that the value at issue here is “good will,” which does not ordinarily appear on law firm balance sheets which are on a modified cash basis. In California, and beyond,

¹⁸⁰ *Heller Ehrman*, 527 B.R. at 29 (citations omitted).

¹⁸¹ *Id.* at 30.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (citing CAL. CORP. CODE § 16404(b)(1)).

¹⁸⁸ *Id.*

professional law partnerships do not have a “good will” asset. . . . The good will the [t]rustee discussed may be real in one sense: certainly a firm’s reputation is a crucial part of its ability to obtain work. However, good will is not an asset to which a property interest attaches. Moreover, Heller’s bankruptcy did much to undermine the firm’s otherwise stellar reputation and to eviscerate any reasonable expectation of future business.

Obviously, the expectation of future business—if it is “good will”—would disappear as soon as either (1) the client removes business, which it can do at will, or (2) the law firm ceases to be able to perform the work to generate those expected future profits. . . . Here, the client matters at issue ceased to be Heller’s partnership business and became the [d]efendants’ partnership business when the clients terminated Heller and retained new, third-party counsel.¹⁸⁹

The trustee had conceded in bankruptcy court that the departing lawyers’ duty to account for unfinished business was attributable solely to Heller’s dissolution.¹⁹⁰ This puzzled the district court, which saw no reason “why the duties, rights, and property interests at stake . . . should be different simply because Heller dissolved.”¹⁹¹ If dissolution did alter the equitable terrain, it did so in favor of Davis Wright and the other defendant law firms.¹⁹² Once Heller dissolved, it could no longer represent its clients, thereby forcing them to seek alternative representation.¹⁹³ The defendants “came to the rescue of these clients” and agreed to represent them in their existing matters.¹⁹⁴ The former Heller clients entered into new retainer agreements with the defendants, which “provided substantively new representation, requiring significant resources, personnel, capital, and services” that dwarfed the capacity of Heller and its former shareholders.¹⁹⁵

The court recognized that, as in all bankruptcies, the plight of creditors and former employees was “deplorable.”¹⁹⁶ Nonetheless, because the defendant law firms generated the fees at issue, the equities supported the retention of those fees.¹⁹⁷

The *Heller Ehrman* court also reasoned that public policy backed the defendant law firms.¹⁹⁸ The trustee had argued that

¹⁸⁹ *Id.* at 30–31 (citations omitted).

¹⁹⁰ *Id.* at 31.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 32.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

enforcing the *Jewel* no compensation rule prevents partners from wrestling for the most lucrative cases during the life of the firm in the hope of keeping them should the firm dissolve.¹⁹⁹ Second, the *Jewel* rule discourages partners from effectively looting the firm by soliciting existing clients upon dissolution.²⁰⁰ Unfortunately for the trustee, neither issue concerned the court.²⁰¹

Because the profits in question were generated by Davis Wright and the other law firms, any incentive the former Heller shareholders may have had to game their former firm's system was not squarely at issue.²⁰² Furthermore, the former Heller clients chose to engage the defendant law firms, not because any shareholders had physical possession of their files, but because Heller could no longer represent them.²⁰³

Strangely, the trustee could not even provide a workable definition of "winding up" or "unfinished business."²⁰⁴ The court acknowledged that Heller should be paid "for the time its lawyers spent filing motions for continuances, noticing parties and courts that it was withdrawing as counsel, packing up and shipping client files back to the clients or to new counsel, and getting new counsel up to speed on pending matters" on the basis that such tasks are "what winding up unfinished business entails when a firm dissolves in the context of a bankruptcy."²⁰⁵ The court found it incomprehensible that winding up Heller's affairs might encompass litigating matters long after the firm dissolved.²⁰⁶ "Public policy [could not] favor such an outcome."²⁰⁷

Like the *In re Thelen* court,²⁰⁸ the *Heller Ehrman* court believed that enforcing the unfinished business doctrine would perversely "incentivize partners of a struggling firm to jump ship at the first sign of trouble to avoid the kind of suit [the] [d]efendants now [found] themselves in, even if that would destabilize an otherwise viable firm."²⁰⁹ Recognizing the unfinished business doctrine here would further discourage law firms from hiring former partners of dissolved firms and from accepting new clients formerly represented by lawyers in

199 *Id.* (quoting *Jewel v. Boxer*, 203 Cal. Rptr. 13, 18 (Ct. App. 1984)).

200 *Id.*

201 *Id.* (saying that neither issue was "at play here").

202 *Id.*

203 *Id.*

204 *Id.*

205 *Id.* (footnote omitted).

206 *Id.*

207 *Id.*

208 *Geron v. Seyfarth Shaw LLP (In re Thelen LLP)*, 20 N.E.3d 264, 273 (N.Y. 2014).

209 *Heller Ehrman*, 527 B.R. at 32.

dissolved firms.²¹⁰ The court concluded that it was not in the public interest to make it harder for partners leaving a dissolved firm to find new jobs or to limit clients' choice of counsel by preventing firms from profiting off the labor and capital they expend or invest in matters previously handled by a dissolved firm.²¹¹

In the end, the court could not justify recognizing a property interest in Heller's pending hourly matters.²¹² It thus entered summary judgment for the defendants.²¹³

2. Analysis

Heller Ehrman is an unfortunate mix of suspect reasoning, incomplete analysis, unfounded assumptions, insufficient attention to partnership law, and detachment from the reality of large law firm practice. District court decisions are never precedential,²¹⁴ but *Heller Ehrman* is not even persuasive when closely analyzed.

First, in explaining that the former Heller shareholders' fiduciary duty to account to the estate was "limited to partnership property" en route to deciding that equity did not support recognition of a property interest in unfinished business, the court misread the statute on which it relied, California Corporations Code § 16404(b)(1).²¹⁵ This was a fatal error. Section 16404(b)(1), which duplicates RUPA § 404(b)(1), extends the duty to account well beyond partnership property. Section 16404(b)(1) states that a partner's duty of loyalty requires her to account for "any property, *profit, or benefit derived by the partner in the conduct and winding up of the partnership business* or derived from a use by the partner of partnership property or information, including the appropriation of a partnership opportunity."²¹⁶ In short, the former Heller shareholders' duty to account to the estate was clearly *not* limited to partnership property, but plainly extended to the profits the trustee was seeking to recover.

²¹⁰ *Id.* at 33.

²¹¹ *Id.* (citing *Geron v. Seyfarth Shaw LPP (In re Thelen LLP)*, 736 F.3d 213, 223 (2d Cir. 2013)).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ See *Vertex Surgical, Inc. v. Paradigm Biodevices, Inc.*, 648 F. Supp. 2d 226, 231 (D. Mass. 2009) ("As Judges Posner and Easterbrook have repeatedly and accurately observed, with characteristic bluntness, district court decisions are neither authoritative nor precedential.").

²¹⁵ *Heller Ehrman*, 527 B.R. at 30 (citing CAL. CORP. CODE § 16404(b)(1)).

²¹⁶ CAL. CORP. CODE § 16404(b)(1) (West 2016) (emphasis added).

Second, the court's efforts at distinguishing *Jewel* missed the mark. The attempt to do so on the basis that the firm's decision to dissolve in *Jewel* was voluntary and thus the partners could have finished their clients' matters on behalf of the old firm, while Heller was forced to dissolve and thus could not continue serving clients, was poorly aimed. The UPA and RUPA do not distinguish between voluntary and involuntary dissolutions. While Heller, as an entity, could not continue to represent its clients, individual shareholders could—and did. Their doing so at new firms is no basis to differentiate *Jewel* because the partners there also represented the former firm's clients at new firms. To say that the *Jewel* partners, unlike the Heller shareholders, could have stayed together through winding up invites the argument that the unfinished business doctrine is untenable because of the “lock-in” effect—that is, it forces partners to remain together in violation of basic freedom of contract principles to avoid financial disadvantages that may accompany dissolution and winding up.²¹⁷

In terms of perverse effects, to distinguish *Jewel* on the basis that the partners in that case continued to represent their former firm's clients under old engagement agreements, while Heller's clients signed new engagement agreements with the firms to which the Heller lawyers dispersed, is to allow partners of dissolved firms to avoid their fiduciary duties by exalting form over substance. That result is neither equitable nor good public policy.

The attempt to discount *Jewel* on grounds that the partners there “continued to have fiduciary duties to each other and the old firm,” while the defendants in *Heller Ehrman* “never owed any duty, fiduciary or otherwise, to the dissolved firm,”²¹⁸ is a real head-scratcher. While the defendant law firms did not owe any duties to Heller, *the former Heller shareholders* who moved their practices to those law firms certainly did. It is hard to understand how the highly-regarded district judge could have missed this critical and obvious point.

Distinguishing *Jewel* on the basis that the court there similarly treated contingent and hourly fees, while in this case there were no contingent fees in dispute, is mysterious reasoning at best. The *Jewel* court did not distinguish contingent fees from hourly fees, and this case involved hourly fees. The absence of disputed contingent fees in *Heller Ehrman* had nothing to do with anything.

²¹⁷ Richmond, *supra* note 11, at 59.

²¹⁸ *Heller Ehrman*, 527 B.R. at 29.

The only valid basis for distinguishing *Jewel* was California's subsequent adoption of RUPA. But that did not mean Heller's bankruptcy estate was entitled to no recovery from the law firms; rather, the adoption of RUPA simply meant that the estate should have recovered less from those firms than it would have if the UPA's no compensation rule had remained California law. This is because under RUPA, the defendants were entitled to reasonable compensation for their work on the unfinished matters at issue. Heller was entitled to recover the difference between (a) the amount the clients paid for the work at the new law firms, and (b) the reasonable compensation to which those firms were entitled for performing the services.

Third, the court concluded as a matter of equity that the law firms "that did the work [in question] should keep the fees," and that because the fees were produced through the defendants' efforts rather than Heller's, the trustee could not argue that the defendants had received a windfall.²¹⁹ What the court seemingly overlooked was RUPA's allowance of reasonable compensation for lawyers' services in winding up a dissolved firm's affairs.²²⁰ Surely the allowance of reasonable compensation to the law firms for completing Heller's unfinished business would have alleviated the court's concerns about the law firms performing work for which they would not be paid.²²¹

In the same thread, the district court's focus on ownership of client matters was misplaced.²²² Although Heller did not own the client matters that departing shareholders took to their new firms, it did have an enforceable interest in the fees earned by its former shareholders from those matters.²²³ The *Heller Ehrman* court apparently did not grasp this distinction. And while it is true that a client's termination of its relationship with a former Heller lawyer would sever any claim by the bankruptcy estate to profits subsequently earned on the client's matters, the estate had an interest in any fees earned before a particular client took that step. There had to be a reasonable way to calculate profits earned from matters open at the time of Heller's dissolution, apart from the trustee's odd muttering about good will. The court's related discussion of future new business from former Heller clients was hopelessly confused, especially since the

²¹⁹ *Id.* at 30.

²²⁰ CAL. CORP. CODE § 16401(h) (West 2016); HILLMAN, *supra* note 6, § 4.6.3.2, at 4:75.

²²¹ HILLMAN, *supra* note 6, § 4.6.3.2, at 4:75.

²²² See *Heller Ehrman*, 527 B.R. at 30 ("A law firm never owns its client matters. The client always owns the matter, and the most the law firm can be said to have is an *expectation* of future business.")

²²³ Rutledge & McGuire, *supra* note 22, at 14.

unfinished business doctrine does not apply to new matters opened post-dissolution.

Fourth, in weighing the equities, the court's perception that the law firms "came to the rescue" of Heller's former clients in regard to their ongoing matters reflects a basic misunderstanding of large law firm practice in general, and of third party law firms' conduct post-dissolution in particular.²²⁴ Davis Wright and the other excellent law firms involved rescued no one; they accepted as clients those former clients of Heller whom or which they viewed as profitable and as sources of future business. That was perfectly fine—Davis Wright and the other firms were firmly within their rights to make those business judgments. But they acted out of self-interest. They certainly did not lower rescue swimmers or launch lifeboats to bring aboard *all* former Heller clients who might need continued or future representation. They left plenty of former Heller clients adrift for later extraction by trawlers.

Fifth, the court's decision to arbitrarily reconceive or redefine winding-up to shorten this phase of a firm's demise was wrong as a matter of partnership law.²²⁵ Again, winding up is the time after dissolution and before termination during which all partnership affairs are settled.²²⁶ The fact that it takes longer to wind up a law firm's affairs than it does to wind up another business's affairs is an understandable reason to lament the unfinished business doctrine's application to law firm dissolutions, but it does not empower a court to circumscribe this phase for the sake of convenience. The court cited no case law, statutory authority, or secondary authority for its crabbed view of winding-up.

Sixth, the court overreached when it asserted that applying the unfinished business doctrine to hourly fee matters "would discourage third-party firms from hiring former partners of dissolved firms and discourage third-party firms from accepting new clients formerly represented by dissolved firms."²²⁷ In fact, law firms want to admit partners from dissolved firms who can bring desirable business with them. In most cases, firms are less

²²⁴ *Heller Ehrman*, 527 B.R. at 31.

²²⁵ *Id.* at 32 (agreeing "that Heller should bill and be paid for the time its lawyers spent filing motions for continuances, noticing parties and courts that it was withdrawing as counsel, packing up and shipping client files back to the clients or to new counsel, and getting new counsel up to speed on pending matters," and stating that this "is what winding up unfinished business entails when a firm dissolves in the context of a bankruptcy").

²²⁶ GREGORY, *supra* note 47, at 368.

²²⁷ *Heller Ehrman*, 527 B.R. at 33.

focused on the open matters that partners bring with them (beyond clearing conflicts of interest) than they are in establishing a continuing relationship with those clients that will yield substantial future business. Negotiating the resolution of unfinished business claims is a cost of doing business, and a low cost at that. The partners who are in danger of not finding new employment when a law firm dissolves are the so-called service partners who control no meaningful business. But they are not casualties of the unfinished business doctrine; they are victims of a law firm culture that generally values technical skill less than rainmaking ability.

As noted in the analysis of *In re Thelen*, there is no evidence that the unfinished business doctrine discourages firms from representing former clients of a dissolved firm. If a migratory partner's new firm declines to represent some of her clients from her former firm, it is more likely because those clients are not viewed as sufficiently profitable, because they do not fit the new firm's practice model in other respects, or because their representation would create conflicts of interest with the new firm's existing clients.

3. The Trustee's Appeal to the Ninth Circuit

Heller's trustee appealed the district court's decision to the Ninth Circuit. After hearing oral argument in June 2016, the Ninth Circuit certified this question to the California Supreme Court in July 2016: "Under California law, does a dissolved law firm have a property interest in legal matters that are in progress but not completed at the time the law firm is dissolved, when the dissolved law firm had been retained to handle the matters on an hourly basis?"²²⁸ The California Supreme Court's decision will determine the outcome of the case.²²⁹

At the time this article was submitted, the California Supreme Court had only recently accepted the case on referral from the Ninth Circuit, in the process restating the certified question to ask: "Under California law, what interest, if any, does a dissolved law firm have in legal matters that are in progress but not completed at the time the law firm is dissolved, when the dissolved law firm had been retained to handle the matter on an hourly basis?"²³⁰ In restating the question as it did, the court appears to have left the focus of the inquiry on the dissolved law

²²⁸ *Heller Ehrman LLP v. Davis Wright Tremaine LLP (In re Heller Ehrman LLP)*, 830 F.3d 964, 965 (9th Cir. 2016).

²²⁹ *Id.* at 973.

²³⁰ *Heller Ehrman LLP v. Davis Wright Tremaine LLP*, No. S236208, 2016 Cal. LEXIS 7131, at *1 (Cal. Aug. 31, 2016).

firm rather than on the obligations of the partners or shareholders of the dissolved firm, which is where the focus should be. This is one of the places where the district court in *Heller Ehrman* became confused. Again, it is critical to recall that *the former Heller shareholders* who relocated their practices to the defendant law firms continued to owe duties to each other and to Heller. To the extent the defendant law firms believe that focusing on the individual shareholders penalizes them for finishing Heller's business, they need to reconsider. Under RUPA, which California adopted after *Jewel*, they are entitled to reasonable compensation for their work on unfinished matters.

It is difficult to criticize the California Supreme Court before it even hears the case, but the question presented might have been better restated along these lines: Must shareholders or partners of a dissolved law firm who transfer hourly matters that were open at the time of dissolution from their former law firm to a new law firm account to their former firm for the profits earned on those matters consistent with their obligation to wind up the dissolved firm's affairs? Restating the question that way clearly would have focused attention on the obligations of the former Heller shareholders.

IV. RECOGNIZING THE UNFINISHED BUSINESS DOCTRINE

The unfinished business doctrine is imperfect. It is a nagging inconvenience for law firms. It potentially produces results in some cases that perhaps are not "the most equitable or logical."²³¹ This is particularly true in jurisdictions that follow the UPA and consequently prohibit partners from receiving extra compensation for their efforts in winding up partnership affairs.²³² This is the strict *Jewel* rule, or the "no compensation" rule.²³³ Fortunately, the seeming unfairness of the ban on extra compensation for time spent on winding up partnership affairs that was enforced in *Jewel* is cured in states that have adopted RUPA, and therefore permit lawyers who perform legal services in the wind-up to receive reasonable compensation for their efforts.²³⁴

At base, the unfinished business doctrine prioritizes partners' fiduciary duties to one another and the dissolved

²³¹ *Sufrin v. Hosier*, 896 F. Supp. 766, 770 (N.D. Ill. 1995).

²³² See UNIF. P'SHIP ACT § 18(f) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 1914) ("No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.")

²³³ *Jewel v. Boxer*, 203 Cal. Rptr. 13, 18–19 (Cal. Ct. App. 1984).

²³⁴ See *supra* Part II.A.

partnership over other competing considerations.²³⁵ It is on these duties that courts must focus. Courts should appreciate the importance of fiduciary duties between partners and between partners and their firms, and they ought to recognize the value in upholding those duties at times when relationships between partners are tested. To the extent the unfinished business doctrine further emphasizes the financial interests of creditors of the dissolved law firm over those of the firms to which the partners of the dissolved firm relocate, that is a simple policy choice.

The unfinished business doctrine is an established aspect of partnership law that applies to all businesses organized as partnerships, including professional practices. Why should law firms be treated differently from other partnerships in connection with matters where they bill by the hour? There is no good answer to this question.²³⁶ The recycled argument that the unfinished business doctrine is unworthy of enforcement because it impairs client choice does not hold water.

Lawyers making this argument contend that applying the unfinished business doctrine to matters billed by the hour creates a financial disincentive for the former partners of a dissolved firm to continue representing their clients when they transition to their new firms.²³⁷ That is, when a partner realizes that she and her new colleagues will have to perform all of the ongoing work but will have to remit a material share of the associated fees to her former firm, she will opt to terminate the representation even though the client may want her to continue.²³⁸ But as explained earlier, the true value that a partner brings to her new law firm generally is not pending matters in their own right, but the client relationship and the expectation of significant future matters from that client. Withdrawal from current matters out of frustration with the unfinished business doctrine would destroy the real asset at issue to the detriment of the lawyers and their new law firms. It is almost certainly for this reason that this claimed risk has never been shown to have occurred.²³⁹

²³⁵ *Sufrin*, 896 F. Supp. at 770.

²³⁶ The unfinished business doctrine certainly applies to contingent fee matters. *See, e.g., Santalucia v. Sebright Transp., Inc.*, 232 F.3d 293, 297–98 (2d Cir. 2000) (quoting *Shandell v. Katz*, 629 N.Y.S.2d 437, 439 (App. Div. 1995)). Indeed, lawyers generally accept the doctrine's application in that context.

²³⁷ *Dev. Specialists, Inc. v. Akin, Gump, Strauss, Hauer & Feld LLP*, 480 B.R. 145, 170 (S.D.N.Y. 2012), *rev'd in part, vacated in part, In re Coudert Bros.*, 574 F. App'x 15 (2d Cir. 2014).

²³⁸ *Id.*

²³⁹ Rutledge & McGuire, *supra* note 22, at 13.

Not surprisingly, courts presented with client choice arguments have repeatedly rejected them.²⁴⁰ Some courts have specifically noted the speculative “sky is falling” nature of these arguments.²⁴¹ As the Colorado Supreme Court aptly observed in *LaFond v. Sweeney*,²⁴² “[h]ypothetical harm, as opposed to actual harm to the client’s ability to choose counsel in [a] case, is not a pertinent consideration when determining the rights and obligations of attorneys to their firms.”²⁴³

For that matter, a variety of factors may deter or prevent a client from following a lawyer from a dissolving firm to another firm.²⁴⁴ A conflict of interest may prevent the lawyer from representing the client at the second firm, or the client may find the second firm’s fee structure unacceptable and therefore seek different representation.²⁴⁵ Lawyers who depart dissolving law firms for new firms have no obligation to ensure that their new firms are acceptable to their existing clients.²⁴⁶

Another common argument against the unfinished business doctrine in the law firm context asserts that because clients are not property and belong to no lawyer²⁴⁷ and can discharge their lawyers at any time for any reason or for no reason at all,²⁴⁸ their open matters cannot fairly be characterized as property of the dissolved firm. But this argument is unsupportable. First, it ignores the fact that the subject clients had not discharged the

²⁴⁰ See, e.g., *Jewel v. Boxer*, 203 Cal. Rptr. 13, 17 (Cal. Ct. App. 1984) (“[T]he right of a client to the attorney of one’s choice and the rights and duties as between partners with respect to income from unfinished business are distinct and do not offend one another. Once the client’s fee is paid to an attorney, it is of no concern to the client how that fee is allocated among the attorney and his or her former partners.”); *Ellerby v. Spiezer*, 485 N.E.2d 413, 416 (Ill. App. Ct. 1985) (“This right of the client is distinct from and does not conflict with the rights and duties of the partners between themselves with respect to profits from unfinished partnership business because since, once the fee is paid to an attorney, it is of no concern to the client how the fee is distributed among the attorney and his partners.”).

²⁴¹ See, e.g., *In re LaBrum & Doak, LLP*, 227 B.R. 391, 409 (Bankr. E.D. Pa. 1998) (“Although the Defendants bluster about the allegedly disastrous public policy of such principles, they are unable to cite any cases from any jurisdictions regarding law firms to the contrary.”).

²⁴² *LaFond v. Sweeney*, 343 P.3d 939 (Colo. 2013).

²⁴³ *Id.* at 947.

²⁴⁴ *Rutledge & McGuire*, *supra* note 22, at 13.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ See *Phil Watson, P.C. v. Peterson*, 650 N.W.2d 562, 565 n.1 (Iowa 2002) (“[C]lients do not ‘belong’ to [a] firm or its individual members”); *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 220 P.3d 333, 341 (Kan. 2009) (“A client is not an article of property in which a lawyer can claim a proprietary interest, which he can sell to other lawyers expecting to be compensated for the loss of a property right.”) (quoting *Palmer v. Breyfogle*, 535 P.2d 955, 966 (Kan. 1975)).

²⁴⁸ *Nabi v. Sells*, 892 N.Y.S.2d 41, 43 (App. Div. 2009); MODEL RULES OF PROF’L CONDUCT r. 1.16 cmt. 4 (AM. BAR ASS’N 2016).

dissolved firm and, indeed, followed their lawyers to their new firms. Second, although the dissolved law firm may not have an enforceable property interest in the client's matter, it does have an enforceable property interest in the proceeds from its lawyers' work.²⁴⁹ In undertaking work for a client, a partner commits that those fees will flow to the firm and be shared among the partners according to the partnership agreement, or in the absence of a partnership agreement, pursuant to the jurisdiction's partnership law.²⁵⁰ Third, the new law firms wanted the dissolved law firm's partners to join them precisely because they would transfer their clients. The relocating lawyers surely promoted their client relationships when negotiating their moves to their new firms. The lawyers and their new firms cannot fairly disclaim the unfinished business doctrine on client choice principles even as they are counting on client loyalty to obtain financial benefits.

The best argument against the unfinished business doctrine is that it must not be worth enforcing because it can be so easily waived. Phrased as a question, if a law firm can circumvent the unfinished business doctrine simply by inserting a *Jewel* waiver in its partnership agreement, what value is there in enforcing the doctrine in the absence of such a waiver? The answer, it would seem, is either "none" or "not much."

As sensible and appealing as this argument is, it is unlikely to carry the day. The trouble is its flipside: a law firm is a sophisticated organization with the ability to avoid the unfinished business doctrine by drafting its partnership agreement accordingly. A treatise on law firm partnerships even offers a sample *Jewel* waiver for lawyers to use when drafting or amending their partnership agreements.²⁵¹ In short, a firm that chooses not to include a *Jewel* waiver in its partnership agreement effectively consents to governance at dissolution by default partnership law and thus submits to application of the unfinished business doctrine.²⁵² Furthermore, the unfinished business doctrine's status as a default rule does not make it undeserving of recognition or enforcement. If that were the case, every jurisdiction would have to abandon its partnership statutes. After all, the UPA and RUPA primarily set default rules.²⁵³

²⁴⁹ Rutledge & McGuire, *supra* note 22, at 14.

²⁵⁰ *Id.* (citing *Ellerby v. Spiezer*, 485 N.E.2d 413, 416 (Ill. App. Ct. 1985)).

²⁵¹ CORWIN & CIAMPI, *supra* note 41, § 6.03[7], at 6-40.4.

²⁵² See Rutledge & McGuire, *supra* note 22, at 9.

²⁵³ *Husch & Eppenberger, LLC v. Eisenberg*, 213 S.W.3d 124, 132 (Mo. Ct. App. 2006); *McCormick v. Brevig*, 96 P.3d 697, 703 (Mont. 2004); *Ederer v. Gursky*, 881 N.E.2d 204, 212 (N.Y. 2007); *Bushard v. Reisman*, 800 N.W.2d 373, 381 (Wis. 2011); see, e.g., HILLMAN ET AL., REVISED UNIF. P'SHIP ACT, *supra* note 56, § 103(a) ("To the extent the

V. CONCLUSION

Law firm failures are disturbingly common. Even brand name law firms collapse with odd frequency. Regardless of the particular firm or reasons for dissolution, failed law firms typically have open client matters. This triggers application of the unfinished business doctrine, which is an entrenched aspect of partnership law. Under the unfinished business doctrine, absent an agreement to the contrary, partners have a duty to account to the dissolved firm and their former partners for either all fees or profits generated from work in progress at the time of the firm's dissolution in accordance with their percentage interests in the dissolved firm.

For years, courts have applied the unfinished business doctrine to all client matters, including those billed by the hour. There seemed to be no doubt that the unfinished business doctrine applied to hourly matters just as it did to contingent fee cases. Then, in 2014, two courts upset the applecart when they rejected the doctrine's application to client matters that are billed hourly. In *Geron v. Seyfarth Shaw LLP (In re Thelen LLP)*,²⁵⁴ New York's highest court held that "pending hourly fee matters are not partnership 'property' or 'unfinished business' within the meaning of New York's Partnership Law."²⁵⁵ In *Heller Ehrman LLP v. Davis, Wright, Tremaine LLP*,²⁵⁶ a California federal court reasoned that California law was "unsettled on the question of whether a law firm may assert a property interest in hourly fee matters pending at the time of its dissolution,"²⁵⁷ and held that equity and public policy weighed against recognition of the unfinished business doctrine in that context.²⁵⁸ The losing bankruptcy trustee appealed to the Ninth Circuit, and the case has now reached the California Supreme Court on a certified question from the Ninth Circuit. The California Supreme Court's decision will determine the outcome in *Heller Ehrman*.

In re Thelen and *Heller Ehrman* were wrongly decided. The principal arguments against the unfinished business doctrine that have been made to date are unpersuasive. But if the California Supreme Court holding compels the Ninth Circuit to affirm the district court's decision in *Heller Ehrman*, it will be fair to wonder whether the unfinished business doctrine will

partnership agreement does not otherwise provide, this [Act] governs relations among the partners and between the partners and the partnership.").

²⁵⁴ 20 N.E.3d 264 (N.Y. 2014).

²⁵⁵ *Id.* at 266–67.

²⁵⁶ 527 B.R. 24 (N.D. Cal. 2014).

²⁵⁷ *Id.* at 30.

²⁵⁸ *Id.* at 30–33.

survive in jurisdictions other than California and New York. It is hard to have any confidence that other courts will reject the reasoning of courts as influential as the New York Court of Appeals and the California Supreme Court, regardless of the strength of any contrary arguments.

None of this is to say that the unfinished business doctrine is perfect or that it does not yield results in some cases that appear unfair to the lawyers involved. But the unfinished business doctrine is a default rule that lawyers can contract around. And whatever unfairness lawyers claim is arguably matched by the unfairness that creditors of the dissolved law firm will feel if the doctrine is abrogated in the hourly fee context. Insofar as law firms that hire lawyers from dissolved law firms go, operation of the unfinished business doctrine is simply a cost of doing business. If they want the client relationships that relocating lawyers are able to deliver, they need to be prepared to either (a) share the fees generated by open matters that are transferred to them; or (b) negotiate some preferable resolution with the dissolved firm's administrator or trustee. Recent experience teaches that law firms can settle unfinished business claims for pennies on the dollar.

In contrast, abrogating the unfinished business doctrine in connection with law firms' hourly representations may come at a cost. For example, it is fair to worry that courts' rejection of the doctrine may lessen some companies' willingness to do business with law firms or will cause them to insist on terms that are disadvantageous to law firms. More broadly, exempting law firms from the doctrine's operation in connection with matters billed by the hour risks creating the impression that courts are favoring lawyers over other partnerships that remain subject to the doctrine.²⁵⁹ The appearance of such self-interest is potentially corrosive to the legal profession.

In conclusion, partnership law requires courts to apply the unfinished business doctrine to client matters that law firms bill by the hour. The California Supreme Court in *Heller Ehrman* should so hold to be consistent with the state's lower appellate courts that have long done so. This is the correct result as a matter of partnership law, even if it is unpopular with lawyers and law firms.

²⁵⁹ See generally Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 454–55 (2008) (stating the hypothesis, later said to be established, that “if there is a clear advantage or disadvantage to the legal profession in any given question of law, the cases are easy to predict: judges will choose the route (within the bounds of precedent and seemliness) that benefits the profession as a whole”).



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A Novel Tool for Teaching Property: Starting With The Questions

*Tim Iglesias**

Gertrude Stein asked, “What is the answer?” . . . and when no answer came she laughed and said: “Then, what is the question?”¹

INTRODUCTION

Generally, property law is taught, along with torts and contracts, as a first-year foundational course introducing students to the common law.² While “property law” consists of legal doctrines, rules, policy justifications, and theoretical perspectives, this essay focuses on common law property rules and doctrine.³ Professors vary on how much doctrine to include in their courses and most are eager to delve into policy and deeper issues. Students often find property law doctrine confusing which hinders their capacity (and appetite) for digging into policy and theory. This essay argues that both professors and students would benefit from an approach that explicitly recognizes the *questions* courts are regularly called upon to address in property cases. It proposes a set of organizing questions as a coherent framework for teaching students property doctrine, while simultaneously opening them up to the profound and fascinating policy and theoretical debates in the field. This framework can be used with any casebook or teaching method.

* Professor, University of San Francisco School of Law. Thanks to my colleagues, especially David Franklyn, Tristin Green, Alice Kaswan, Richard Sakai, and Michelle Travis, and to the participants at the 2012 Association for Property, Law, and Society conference. Special thanks to Ben Barros, Eric Claeys, John Humbach, Peggy Radin, Carol Rose, Pete Salsich, Shelley Ross Saxer, and Laura Underkuffler for comments on earlier drafts. I am particularly grateful to Marc Poirier for his extensive comments and exchanges about this project. Thanks for excellent research and manuscript preparation assistance by USF law students Christina Crosetti, Maya Kevin Grey, Kristin Nichols, and Becky Pinger. Of course, any errors are mine.

¹ Quoted in Judith D. Fischer, *Got Issues? An Empirical Study About Framing Them*, 6 J. ASS'N LEGAL WRITING DIRECTORS 1, 2 (2009).

² To my knowledge, while many law schools have reduced the number of units dedicated to teaching property law, only Yale Law School has made Property Law an elective.

³ I recognize that an important dimension of contemporary property law includes statutes that codify, modify, and supersede the common law, as well as novel legislative enactments creating or revising the property system and property rights. The approach presented in this essay also applies to statutes. *See infra* note 37 and accompanying text.

While many have written on how to teach particular doctrines⁴ or which doctrines should be included in a property course,⁵ few have addressed the problem of teaching a course in which the fundamental concepts are contested and which presents numerous other pedagogical challenges (e.g., a broad array of topics that appear unrelated, still-surviving ancient doctrines, and the need to translate from a dead language—Norman French).⁶ Recent research on teaching property primarily surveys which topics professors choose to teach with fewer units available.⁷

Despite all of the debates surrounding property law, there is an inherent and consistent structure, which can be used to teach the course in combination with the traditional topic organization or other formats. The structure is found in the *questions* that courts are called upon to answer. The questions are:

1. Is there a “property interest” at issue?
2. If it is property, what type of property interest is it?
3. How is this type of property interest created or acquired?
4. Who “owns” the property interest? How are competing ownership claims decided?
5. What “property rights” does ownership in this property entail, and with what limits/scope and duties?
6. What is required to make a valid transfer of this property interest?

⁴ See, e.g., John Martinez, *A Cognitive Science Approach to Teaching Property Rights in Body Parts*, 42 J. LEGAL EDUC. 290 (1992).

⁵ See, e.g., M.C. Mirow, *Globalizing Property: Incorporating Comparative and International Law into First-Year Property Classes*, 54 J. LEGAL EDUC. 183 (2004); Roberta Rosenthal Kwall, *Why Intellectual Property Belongs in the First-Year Property Course*, 54 J. LEGAL EDUC. 504 (2004).

⁶ The primary exceptions are: Peter S. Menell & John P. Dwyer, *Reunifying Property*, 46 ST. LOUIS U. L.J. 599 (2002) (introducing their new casebook); Steven Friedland, *Teaching Property Law: Some Lessons Learned*, 46 ST. LOUIS U. L.J. 581 (2002) (offering alternative ways to teach Property). These articles were part of a special symposium issue on teaching Property. See also Laura S. Underkuffler, *Teaching Property Stories*, 44 J. LEGAL EDUC. 152 (2005).

⁷ See, e.g., Joanne Martin, *The Nature of the Property Curriculum in ABA-Approved Schools and its Place in Real Estate Practice*, 44 REAL PROP. TR. & EST. L.J. 385, 393–94 (2009); Roger Bernhardt & Joanne Martin, *Teaching the Basic Property Course in U.S. Law Schools*, PROB. & PROP., Sept.–Oct. 2007, at 36, 37–38; Peter Wendel & Robert Popovich, *The State of the Property Course: A Statistical Analysis*, 56 J. LEGAL EDUC. 216, 220 (2006); Roberta Rosenthal Kwall & Jerome M. Organ, *The Contemporary Property Law Course: A Study of Syllabi*, 47 J. LEGAL EDUC. 205, 208, 210 (1997). An exception is Keith Sealing, *Dear Landlord: Please Don't Put a Price on My Soul: Teaching Property Law Students That “Property Rights Serve Human Values,”* 5 N.Y. CITY L. REV. 35, 106 (2002) (promoting teaching property law while integrating a social justice dimension).

7. How long does the property interest last? How can the property interest be terminated?
8. How are property rights in this kind of property enforced?

Courts are consistently presented with these same legal questions under the rubric of a “Property Law claim.” The varied *answers* courts give to these questions create the evident pluralism in the substance of property doctrine and fuel theoretical disputes. The framework that I propose helps students identify the important issues and questions at the outset of their study of property law so they are prepared to explore, discuss, advocate for, and develop an understanding of the varied answers that courts give and their normative bases.

The questions listed above are consistently posed and answered in property cases. At the same time, the questions do not presuppose any particular answers; so articulating the set of questions in no way forecloses the rich policy debate that informs the questions’ answers.

The idea that a question does not require a particular answer may seem strange. Certainly, in simple mathematics each question has one correct answer. However, legal questions may have several plausible and appropriate answers because they can be answered from different perspectives. Consider the story of the Three Stonecutters:

A traveler came across three stonecutters and asked each one in turn: “What are you doing?” The first replied, “Isn’t it obvious? I am cutting this stone so that it fits with that one to make a wall.” The second said, “This is my job. I am making a living to support my family.” The third looked up with a visionary gleam in his eye and said, “I am building a cathedral.”⁸

In this story, the same question elicits three distinct answers because each stonecutter heard and answered the question from his own perspective. In the same way, when a case raises a particular property question,⁹ courts interpret and answer the questions from diverse policy perspectives, leading to distinct rules and doctrines associated with the same question. Each

⁸ There are many versions of this story. See, e.g., *Three Stonecutters: On the Future of Business Education*, HARVARD MAGAZINE (Oct. 15, 2008), <http://harvardmagazine.com/breaking-news/three-stonecutters-the-future-business-education> [<http://perma.cc/CB7E-NRJB>]; see also PETER F. DRUCKER WITH JOSEPH A. MACIARIELLO, MANAGEMENT 258 (Rev. ed. 2005) (making the *Parable of the Three Stonecutters* famous). While context usually helps limit and make questions more determinative of the answers that suffice, what counts as “context” is not a given or obvious.

⁹ Of course, the parties before the court will try to persuade the court as to which property question the case raises if they believe that this strategy will give them an advantage.

answer that a court provides to any of these questions could reasonably provoke the follow-up query of: “Why?” The courts’ justifications for the answers they provide to the primary questions inevitably reveal their conceptual and normative commitments.

Thus, property law questions are not determinative of the answers because courts’ consideration of the questions is itself shaped and framed by diverse property perspectives or schools of thought described *infra*. Therefore, there is a range of answers that coherently respond to each question.¹⁰ This fact is most easily seen in Question #1 (Is this a property interest?). Courts’ acceptance or rejection of a proposed extension of what counts as a legally recognized “property” interest inherently relies on (more or less clear) normative visions of property law and can vary widely. Answers to this question operate as an important gatekeeper.¹¹

Questions frame and drive inquiry, particularly legal inquiry.¹² Once western tradition recognized “property” as a *legal* category—not a mere social norm—and, in particular, a legal category distinct from tort or contract law, certain questions evolved which *must* be decided by courts.¹³ The questions express property’s *traditional* core legal doctrinal issues. They will seem familiar to property law professors because we have been using and teaching these questions without necessarily articulating all of them at the same time in a list. The primary contributions of this essay are to call the questions out in their entirety, articulate how they correlate to casebooks’ organization of topics, and demonstrate the usefulness of using the framework of questions in teaching. Finally, the framework advances the goal of contemporary legal education to help students integrate legal

¹⁰ What has been called the “canon” of Progressive Property scholars incorporates judicial answers to the traditional questions in ways that shape doctrine and favor particular normative property views. *See, e.g.*, Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 107, 114 (2013) (expressing some skepticism about the “creative use of outlier cases” such as *State v. Shack* and *Matthews v. Bay Head Improvement Association*). Whether these cases are “outliers” or a part of the core of property law is a normative question well worth pursuing in the classroom.

¹¹ *See, e.g.*, *Moore v. Regents of the University of California*, 51 Cal. 3d 120 (1990) (considering whether a person can have a sufficient legal interest in his own bodily tissues amounting to personal property).

¹² *See* ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 83 (2008) (stating the question presented “may well be the most important part of your brief”). *See generally* BERNARD J. F. LONERGAN, S.J., INSIGHT: A STUDY OF HUMAN UNDERSTANDING (1978) (presenting an epistemology founded on humans’ capacity for questioning).

¹³ *See, e.g.*, Christopher Serkin, *From Social Recognition of Property to Political Recognition by the State: Peter Gerhart’s Property Law and Social Morality and the Evolution of Positive Rights*, 2 TEX. A&M J. REAL PROP. L. 287, 288 (2015) (reviewing book that offers an evolutionary account of how legal property rights emerged from “social recognitions” among potential claimants).

analysis and legal practice¹⁴ because starting with the questions—rather than the answers—is how lawyers actually operate to serve their clients.

This essay's argument is subtle and could be easily misconstrued. It is *not* proposing a Grand Theory of Property, nor is it taking a position on whether such a theory should be pursued. It neither seeks to resolve any of the many important conceptual and normative debates about property law nor to *appear* to resolve them. Rather, it presents the value of an anchoring framework that can be superimposed upon property law doctrine as it is currently structured to facilitate students' learning in the context of profound pluralism and uncertainty in the field. It offers the structure based upon (primarily) *descriptive claims* regarding what questions courts regularly address in the common law tradition of property.¹⁵ It does not endorse these questions as normatively appropriate or complete.¹⁶ It merely contends that students will be better able to explore the radical pluralism of property law if they have a stable framework from which to start.

Professors can introduce students to the questions early in the course and use the questions as reference points to help students recognize the connectedness of the topics. Casebook editors could articulate the questions and explain their relationship to the course topics in a preliminary way in an introduction section. If desired, they could refer to the questions

¹⁴ See, e.g., WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 12–13* (Jossey-Bass 2007).

¹⁵ Since dissolution of the “is-ought” distinction and increasing sophistication regarding epistemology, it is impossible to claim that any statement is “purely descriptive” since some acts of interpretation are involved in every assertion. This essay's claim to be descriptive is limited to the identification of the legal questions that courts ask and answer in cases that are identified as “Property Law” cases. See *infra* Part III B (The Relationships Among the Questions Can Be Complex) where I explain that while parties can disagree about which question is raised by the facts, the only questions that a court will recognize as Property Law questions are the ones I have identified. The author would appreciate any citations to Property Law cases in which a court appears to ask and answer different or additional legal questions than those identified in this essay.

¹⁶ One might think that the claim that courts are always asking the same set of questions in Property Law cases inherently (or implicitly) commits the courts (or this essay's author) to a particular theory of “Property” (in particular, a “thing” or an “ownership” view). See, e.g., Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 316–17 (2006) (describing the “castle model” of property which focuses on the protections of the rights of owners). The ownership view considers property questions solely from the point of view of the owner, neglecting the perspectives of non-owners and the consequences on non-owners of legal recognition of owners' rights. Superficially, the questions identified in this essay appear to validate this view because they seem to beg a specific answer or type of answer. However, in practice, they do not because courts answer the questions from varied policy perspectives as explained *infra* notes 29–32 and accompanying text.

within their coverage of a particular topic or case in order to demonstrate that the courts are indeed asking a limited set of legal questions despite the particular phrasing of a legal issue in any particular case.

This essay proceeds in the following four steps: first, it explicates the problem; second, it articulates the proposed solution—the framework of questions; third, it demonstrates how the framework of questions comprehensively maps onto property law doctrine; and fourth, it explains why the framework is useful and suggests how to use this framework in property law courses.

I. THE PROBLEM: WIDELY-RECOGNIZED CHALLENGES IN TEACHING AND LEARNING PROPERTY LAW

The contents of property law emerged as a montage of ill-fitting subjects, jarringly connected by arcane language and obfuscatory rules. . . . The lack of topical relevance was only outweighed by its apparent lack of unity. The result was cognitive dissonance—a disjointed grouping of unrelated topics.¹⁷

This essay evolved from my own struggles to teach property and to make sense of the cases and relationships among topics, doctrines, rules, policies, and theories.¹⁸ I soon found that I was not alone. Property professors acknowledge this problem openly.¹⁹ Many practicing attorneys bemoan the apparent incoherence of property law as a field and particular property law doctrines (usually giving special mention to future interests, the requirements for the creation of real covenants, and, of course, the reviled Rule Against Perpetuities).²⁰ Even the U.S. Supreme Court has opined in this vein: “[T]he body of property law . . . more than almost any other branch of law, has been shaped by

¹⁷ Friedland, *supra* note 6, at 581 (describing his experience of his property class in law school).

¹⁸ I began teaching Property Law in the fall of 2002.

¹⁹ Menell & Dwyer, *supra* note 6, at 599 (“The property course has become a bundle of topics that professors can liberally mix and match . . . but students suffer when their property course lacks a cohesive framework upon which they can layer other concepts and subjects in advanced courses. Few students . . . are able to retain much from a course that comes across as disconnected bodies of doctrine whose only common element may be that they involve land Property has devolved into a disparate set of doctrinal areas Each Property professor has his or her potpourri of coverage, and most modern property [case] books largely reflect and cater to that eclecticism.”); *see also* Michael Weir, *Ways to Make the Teaching of Property/Land Law More Interesting*, 11 J. S. PAC. L. 107, 107 (2007) (another property professor who writes: “For many students the study of property law can be problematic. That means it is sometimes a problem for the lecturer. Property lawyers revel in the medieval; the arcane, the convoluted but fundamental concepts that abound in property law.”).

²⁰ *See generally* Peter A. Appel, *The Embarrassing Rule Against Perpetuities*, 54 J. LEGAL EDUC. 264 (2004).

distinctions whose validity is largely historical.”²¹ And, so, it is no surprise that bright and hardworking students often have more difficulty synthesizing their Property Law course than other first year foundational courses.²²

Teaching Property Law presents at least two distinct challenges: (1) lack of coherence at the doctrinal level: there are disparate rules and doctrines across many distinct topics that engender the perception among students that neither the topics nor the doctrines “fit together”;²³ and (2) lack of unity/coherence at the policy and theory level: diverse policy and theory perspectives for addressing property questions that are not resolved and may be irresolvable.

Regarding the perceived lack of coherence at the doctrinal level, most casebooks structure the course according to the traditional topics.²⁴ All casebooks give students a sense of the

²¹ *Jones v. U.S.*, 362 U.S. 257, 266 (1960).

²² JAY M. FEINMAN, *LAW 101: EVERYTHING YOU NEED TO KNOW ABOUT THE AMERICAN LEGAL SYSTEM* 205 (Oxford Univ. Press 2000) (“Property law may be the basic subject that most irritates law students. The fundamental principle of property law seems obvious: If you own something it’s yours, and you can do what you want with it. But more than any other subject, property law is burdened with a thousand years of legal history and a plethora of technical distinctions.”). “Students have lamented the truth that property, as traditionally taught, has been merely a sectional presentation of interests relating to land, the relevance and the interconnectedness of which was never clarified, much less emphasized. In short, property was accessible to only a few who ‘got it.’ The remainder, and majority of students, surrendered to the view that property was a monumental memorization task.” Comments on draft of this essay, Richard T. Sakai, Assistant Professor, Co-Director, Academic Support Program, University of San Francisco, School of Law (copy on file with author). And, it is possible that this problem helps account for why so few law students publish notes about Property law. See Steve Clowney, *Property, Student Notes, and Elite Law Schools*, PROPERTYPROF BLOG (Feb. 14, 2011), <http://lawprofessors.typepad.com/property/2011/02/property-student-notes-and-elite-law-schools.html> (citing Andrew Yaphe, *Taking Note of Notes: Student Legal Scholarship in Theory and Practice*, 62 J. LEGAL EDUC. 259, 282 (2012) (finding student Notes dedicated to property account for only 7% of the total at non-elite schools and only 2% at elite schools)) [<http://perma.cc/2CUP-A5MT>].

²³ This perception is particularly likely when students compare Property doctrine with Contracts and Torts, the other common law foundational courses. For example, while the ins and outs of negligent torts may baffle some students, they can all easily grasp the primary elements that structure legal analysis of all negligent torts: duty, breach, causation, and damages. This essay provides a similar structure for the whole range of Property Law issues in the form of a framework of questions.

²⁴ In researching this essay, the author reviewed the following twenty-one Property Law casebooks: JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER & MICHAEL H. SCHILL, *PROPERTY*, (7th ed. 2010); RICHARD H. CHUSED, *CASES, MATERIALS AND PROBLEMS IN PROPERTY*, (3d ed. 2010); JOSEPH WILLIAM SINGER, *PROPERTY LAW RULES, POLICIES, AND PRACTICES*, (5th ed. 2010); EDWARD E. CHASE & JULIA PATTERSON FORRESTER, *PROPERTY LAW CASES, MATERIALS, AND QUESTIONS* (2d ed. 2010); DAVID CRUMP, DAVID S. CAUDILL & DAVID CHARLES HRICIK, *PROPERTY: CASES, DOCUMENTS, AND LAWYERING STRATEGIES*, (2d ed. 2008); BARLOW BURKE, ANN M. BURKHART & R.H. HELMHOLZ, *FUNDAMENTALS OF PROPERTY LAW*, (3d ed. 2010); ROGER BERNHARDT, JOYCE PALOMAR & PATRICK RANDOLPH JR., *PROPERTY CASES AND STUDIES* (2d ed. 2009); THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* (2d ed. 2012);

profound pluralism of Property Law, along with a few limited navigation tools.²⁵ Casebook editors have struggled valiantly and attempted creative solutions to offer a coherent framework to understand the rules and the roles that courts play across the various topics and doctrines.²⁶ But their efforts may still leave students swimming in a sea of apparently unrelated rules which are grouped around a dozen distinct topics.²⁷ The framework of questions reduces the swirling mass of information and issues on at least one dimension. The framework of questions does not “solve” this problem by oversimplifying a complex world, but rather by providing analytical clarity that makes managing the uncertainty easier.

Regarding the perceived lack of unity/coherence at the policy and theory level, there is no currently dominant “theory” of Property Law. Rather, from an intellectual and academic standpoint, at least since Thomas Grey’s famous chapter announcing the “disintegration” of Property,²⁸ scholars have struggled to make sense out of the institution of private property

GRANT S. NELSON, WILLIAM B. STOEBOCK & DALE A. WHITMAN, CONTEMPORARY PROPERTY (3d ed. 2008); JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY, A CONTEMPORARY APPROACH (2009); R. WILSON FREYERMUTH, JEROME M. ORGAN & ALICE M. NOBLE-ALLGIRE, PROPERTY AND LAWYERING (3d ed. 2011); JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE (2001); JAMES CHARLES SMITH, EDWARD J. LARSON, JOHN COPELAND NAGLE & JOHN A. KIDWELL, PROPERTY CASES AND MATERIALS (2d ed. 2008); CALVIN MASSEY, PROPERTY LAW: PRINCIPLES, PROBLEMS, AND CASES (2012); SHELDON F. KURTZ, HERBERT HOVENKAMP & CAROL NECOLE BROWN, CASES AND MATERIALS ON AMERICAN PROPERTY LAW (6th ed. 2012); ERIC T. FREYFOGLE & BRADLEY C. KARKKAINEN, PROPERTY LAW: POWER, GOVERNANCE, AND THE COMMON GOOD (2012); DAVID L. CALLIES, J. GORDON HYLTON, JOHN MARTINEZ & DANIEL R. MANDELKER, CONCISE INTRODUCTION TO PROPERTY LAW (2011) (this casebook replaces J. GORDON HYLTON, DAVID L. CALLIES, DANIEL R. MANDELKER & PAULA A. FRANZESE, PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS (3d ed. 2007)); EDWARD RABIN, ROBERTA ROSENTHAL K WALL, JEFFREY K WALL & CRAIG ANTHONY ARNOLD, FUNDAMENTALS OF MODERN PROPERTY LAW (6th ed. 2011); JON BRUCE & JAMES ELY, JR., CASES AND MATERIALS ON MODERN PROPERTY LAW (6th ed. 2007); JOHN E. CRIBBET, ROGER W. FINDLEY, ERNEST E. SMITH & JOHN S. DZIENKOWSKI, PROPERTY: CASES AND MATERIALS (9th ed. 2008); D. BENJAMIN BARROS & ANNA P. HEMINGWAY, PROPERTY LAW (2105). For lists of which casebooks organize property doctrine in the traditional way and which do not, see *infra* note 103.

²⁵ Many casebooks use some of the questions, e.g., Questions #3 and #4, to organize some topics and doctrines.

²⁶ See, e.g., DWYER & MENELL, *supra* note 24 (this casebook “conceptualizes the course through the comparative analysis of the major institutions—legal, social, market, and political—governing resources”); Peter S. Menell & John P. Dwyer, *Reunifying Property*, 46 ST. LOUIS U. L.J. 599, 601–02 (2002) (introducing the casebook).

²⁷ Note: I am *not* suggesting that casebooks should organize the course according to these questions instead of by topics. See Section IV of this essay for my suggestions on how to use this framework.

²⁸ Thomas C. Grey, *The Disintegration of Property*, in PROPERTY 69, 69 (J. Roland Pennock & John W. Chapman eds., 1980) (“By contrast, the theory of property rights held by the modern specialist tends both to dissolve the notion of ownership and to eliminate any necessary connection between property rights and things.”).

and understand courts' roles in it. The scholarly literature is rife with descriptive, conceptual, and normative conflicts.²⁹ One treatise lists the following leading schools of thought: "Justice, Liberty, or Rights-Based Approaches; Utilitarian or Consequentialist Approaches; Social Relations Approaches; Libertarian and Progressive Approaches."³⁰ More recently, a Virtue Ethics approach to Property Law has joined the conversation.³¹ Others have distinguished between essentialist schools and positivists.³² Even the ubiquitous "bundle of sticks" metaphor is disputed and understood in numerous ways.³³

²⁹ See, e.g., Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 744 (2009) (property decisions involve "plural values" and "cannot be adequately understood or analyzed through a single metric"); Steven J. Eagle, *The Really New Property: A Skeptical Appraisal*, 43 IND. L. REV. 1229, 1229 (2010); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 723–24 (1996) ("[P]roperty is a bundle of rights" asserts the claim that property is a concept without a definable 'essence'; different combinations of the bundle in different circumstances may all count as 'property' and no particular right or set of rights in the bundle is determinative."); HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* (2011); Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE UNIV. L. REV. 617, 617–18 (2009) (reviewing Thomas W. Merrill & Henry E. Smith, eds. *PROPERTY: PRINCIPLES AND POLICIES* (2007)); Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 917 (2012) (proposing "property as a machine" and "property as a conversation" as illuminating metaphors); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 958 (1982); Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 531 (2005); Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property As A Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 281–84 (2002); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 372 (2003); Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239, 239 (1994); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 569 (1983) ("As the property concept was generalized and decorporealized, it faded into the generic concept of right, which in turn proved to be systematically ambiguous (e.g., Hohfeld) if not entirely indeterminate.").

³⁰ JOSEPH WILLIAM SINGER, *PROPERTY* (3d ed. 2010); see SUSAN BRIGHT & SARAH BLANDY, *SURVEY OF PROPERTY LAW ACADEMICS RELATING TO RESEARCH APPROACHES 2013: SUMMARY OF FINDINGS* (2013), https://www.shef.ac.uk/polopoly_fs/1.302966!/file/PR-Survey-Report.pdf (reporting areas of research in the following categories: Property Doctrine/Black Letter for academic audience, Property Doctrine/Black Letter for practitioner audience, Property Theory, Socio-legal, Comparative property law, Empirical, Critical Legal Studies, and noting other approaches such as legal history, law and geography, law and development, and critical race studies) [<http://perma.cc/PSM7-8FGH>]. This study included academics who consider themselves working in the field of property law from the United States and England.

³¹ See, e.g., Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 864–74 (2009).

³² See, e.g., THOMAS W. MERRILL & HENRY C. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 15–16 (2007); Tony Honore, *Ownership*, in *MAKING LAW BIND*, 161, 165–76 (1987) (identifying eleven elements of "full ownership"). See generally Hanoch Dagan, *Pluralism and Perfectionism in Private Law* (Tel Aviv Univ. Legal Working Paper Series, Tel Aviv Univ. Law Faculty Papers, Working Paper No. 128, 2011) <http://law.bepress.com/taulwps/art128/>.

³³ See Symposium, *Property: A Bundle of Rights?*, *ECON JOURNAL WATCH*, Vol. 8, No. 3, (Sept. 2011), <http://econjwatch.org/issues/volume-8-issue-3-september-2011> [<http://perma.cc/9L37-ZLVS>].

While many scholars have proposed solutions to “unify Property” based upon one or another substantive view, none have attracted consensual support or agreement.³⁴ Recent studies of Property courses document how professors mix and match doctrinal topics to fit the number of units available; these studies are further evidence of the lack of unity in Property Law.³⁵ A professor’s personal interests and preferences or what topics are tested on a state’s bar exam appear as likely to determine topic selection as any general theory.

There is very little Property Law literature or commentary that directly or comprehensively addresses these teaching challenges.³⁶ This essay offers a solution to the first challenge. And, while it does not “solve” the second challenge, it offers useful assistance in meeting it.

II. THE FRAMEWORK OF QUESTIONS

The following questions constitute a framework that provides analytical clarity and “grips” to help students cope with the multiplicity and apparent disunity of common law doctrines of Property generally taught in law schools.³⁷

³⁴ At present, property law is not a unified field. Whether it ever was, ever could be, or should be are the focus of a large amount of property law scholarship. *See, e.g.*, publications listed *supra* notes 28–32; *see also* Laura S. Underkuffler, Book Review, Stuart Banner, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* (2011), 61 *J. LEGAL EDUC.* 504, 507–08 (2012) (arguing that property has no “true nature”; “[i]f by property’s ‘true nature,’ we mean that there is an enduring idea of content or configuration of rights that property represents, then property largely (if not completely) fails this test”). This essay addresses a different issue: how to teach property law doctrine in the context of such radical pluralism. In the author’s personal view, property law will never be “unified” in the sense that one theory will encompass all doctrines and rules in a manner that receives consensus. This is because the concept of “property” and its multifaceted and complex roles in our individual and social lives can never be adequately reduced to one meaning. “Property” is an essentially contested concept. Each of the approaches noted above will have something distinct, relevant, and justifiable to say about property law questions, including how they are unnecessarily limiting and biasing. This pluralism makes the subject endlessly fascinating, but it also makes it harder for students to learn.

³⁵ *See supra* note 7.

³⁶ For some exceptions, see publications cited *supra* note 6.

³⁷ This essay focuses on common law property rules and doctrines because they are the core of most property law courses. The framework also applies to statutory property rules and doctrines and constitutional property law. The framework applies to property doctrines created by legislation because these laws address the *same* legal questions as the common law. If we ask *how* any particular regulation of property aims to achieve the regulation’s purpose, we are directed to one or more of the questions. For example, the Recording Acts address Question #4 (ownership) by deciding which title is superior. The federal Fair Housing Act aims to enforce an anti-discrimination principle by primarily addressing Question #5 (property rights entailed by ownership). Constitutional property issues, e.g., concerning whether governmental regulation of property is constitutionally valid as an exercise of either the police power or the power of eminent domain are, of course, distinct. They can be understood as covered by Questions #1 (is it a property interest for constitutional purposes), Question #5 (what are the property rights entailed

1. Is There a “Property Interest” at Issue?³⁸

First, the threshold question: Is the thing (or relationship) of value at issue a legally recognized and protected “property” interest, some other kind of legal right (e.g., a personal right), or merely an expectancy interest?³⁹ Any answer a court provides in such a dispute presumes some at least implied notion of what is “property.” This well-recognized question⁴⁰ reflects an ongoing tension within Property Law regarding continuity and change; and the history of Property Law evinces substantial adjustments to the definition of private property.

More fundamentally, this question asks: What *should* be propertized? Historically, an obvious example is the horrific institution of chattel slavery in which U.S. courts treated some Africans as a recognized type of “property” from the nation’s founding until the adoption of the Thirteenth and Fourteenth Amendments.⁴¹ Another historical example is servitudes. Conflicts regarding courts’ recognition of these interests as *property* interests versus contractual rights extended over a long period.⁴² More recently, *Goldberg v. Kelly* and related cases conceptualized government benefits as a species of property.⁴³ Developing technology often raises this issue. Contemporary examples include *Moore v. Regents of the University of California*.⁴⁴ And while planets and

by ownership), and Question #8 (how are property rights enforced), but it is important to recognize them as constitutional issues not matters of common law property. The degree to which the framework’s questions would assist the teaching of the bulk of the intellectual property material (patent, copyright, and trademark) is beyond the scope of this essay. Clearly, many of the same questions seem initially applicable. However, intellectual property law includes a much more substantive notion of “public domain” as an implied limit on the scope of intellectual property rights. And the tests for infringement of intellectual property rights (e.g., “fair use”) are phrased and operate very differently from other types of property.

³⁸ This essay focuses mostly on privately-owned property.

³⁹ When someone is named as a devisee in a will of a living person, she has only an expectancy interest and has no standing to sue if the person wants to change the terms of the will. *See also* Local 1330, *United Steel Workers v. U.S. Steel Corp.*, 631 F.2d 1264, 1280 (6th Cir. 1980) (rejecting claims that steel workers possessed a property interest in the plants where they had worked).

⁴⁰ *See, e.g.*, SINGER, *supra* note 30, at 185–278; Sealing, *supra* note 7, at 59; Laura S. Underkuffler, Book Review, 61 J. LEGAL EDUC. 504, 504 (2012) (reviewing STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* (2011)) (identifying the question “What is property?” as a primary theme in the book).

⁴¹ *See, e.g.*, *Commonwealth v. Aves*, 18 Mass. (1 Pick.) 193 (1836) (distinguishing Massachusetts laws, which did not consider a child a slave, from Louisiana laws).

⁴² *See* discussion of this historical development in DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 24, at 847–59.

⁴³ *See generally* *Goldberg v. Kelly*, 397 U.S. 254 (1970); Charles Reich, *The Liberty Impact of the New Property*, 31 WM. & MARY L. REV. 295 (1980). *See also* Charles A. Reich, *The New Property After 25 Years*, 24 U.S.F. L. REV. 223 (1990). *But see* *Charland v. Norge Division, Borg-Warner Corp.*, 407 F.2d 1062 (6th Cir. 1969) (finding no legally recognizable property right in a job).

⁴⁴ *See generally* *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479 (1990).

asteroids are not currently subject to ownership claims by states pursuant to international treaties, evolving technology may revise this position.⁴⁵ Environmental conditions may also raise this issue.⁴⁶ Animal rights cases pose this question in a complex way because the proponents are split on the issue of whether or not propertizing animals will best serve advocates' goals.⁴⁷ This issue is critical to a regulatory takings claim because a plaintiff must demonstrate that she owns a recognized property interest in order to bring her claim.⁴⁸

For some things of value, the question is answered absolutely (e.g., a vote is never a property interest), while for others the answer is qualified by purposes and context. Courts sometimes employ a concept of "quasi-property" in situations where something exhibits only limited indicia of property or is considered property only for a limited purpose.⁴⁹ The human body presents an interesting example. In the United States, organs are not "property," but many body products, such as hair, blood, semen, and ova are treated as property.⁵⁰ And some courts recognize

⁴⁵ See, e.g., Kenneth Chang, *A Business Plan for Space*, N.Y. TIMES (Feb. 9, 2015), <http://www.nytimes.com/2015/02/10/science/a-business-plan-for-space.html>.

⁴⁶ See, e.g., Shelley Ross Saxer, *Managing Water Rights Using Fishing Rights As a Model*, 95 MARQ. L. REV. 91, 93 (2011) (arguing that water rights ought not to be considered as property rights).

⁴⁷ See generally collection of articles in 60 J. LEGAL EDUC. (2010).

⁴⁸ A claim under the Fifth Amendment takings clause requires a court to consider a two-part test. First, the court must determine whether there is a "cognizable Fifth Amendment property interest" that is the subject of the purported taking and, second, whether there was an actual taking. *Hearts Bluff Game Ranch, Inc. v. U.S.*, 669 F.3d 1326, 1329 (Fed. Cir. 2012). Compare *id.* at 1333 (holding an opportunity to operate a mitigation bank is not a property interest under the Takings Clause), with *Cty. of San Diego v. Miller*, 532 P.2d 139, 143 (Cal. 1975) (applying a "fairness and public policy" test to find that an unexercised option to purchase land is a property interest for purposes of eminent domain, even though it is not an estate under traditional common law concepts of property). See also Maureen E. Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property* (Va. L. Rev., Working Paper, 2015), <http://ssrn.com/abstract=2673783> (documenting judicial restrictions on regulatory takings by determining what constitutes "property" and state courts' expansion of the definition of private property).

⁴⁹ See, e.g., *Leno v. St. Joseph Hospital*, 302 N.E.3d 58, 59–60 (Ill. 1973) ("The principle is firmly established that while in the ordinary sense, there is no property right in a dead body, a right of possession of a decedent's remains devolves upon the next of kin in order to make appropriate disposition thereof, whether by burial or otherwise."). Courts must also determine if something is property for the purposes of a particular law, e.g., *Cal. Farm Bureau Fed'n v. State Water Res. Control Bd.*, 247 P.3d 112, 117 (Cal. 2011) (addressing whether a water right is a "property right" for purposes of Proposition 218 regarding the two-thirds voting requirement for a tax).

⁵⁰ See, e.g., Lisa Milot, *What Are We—Laborers, Factories, or Spare Parts?: The Tax Treatment of Transfers of Human Body Materials*, 67 WASH. & LEE L. REV. 1053, 1086, 1092, 1104 (2010); Brian Morris, *You've Got to Be Kidneying Me!: The Fatal Problem of Severing Rights and Remedies from the Body of Organ Donation Law*, 74 BROOK. L. REV. 543, 553 (2009); Erin Colleran, Comment, *My Body, His Property?: Prescribing A Framework to Determine Ownership Interests in Directly Donated Human Organs*, 80 TEMP. L. REV. 1203, 1204 (2007); see also *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990).

educational degrees as property in the context of divorce, but not for other purposes.⁵¹

2. If It Is Property, What Type of Property Interest Is It?⁵²

Courts distinguish between different types of property interests, e.g., real and personal property, tangible and intangible property, and public and private property. Courts identify which particular “property interest” has been created by a document, an agreement between individuals, or some other human action.

Scholarship documenting the Doctrine of Numerus Clausus suggests that courts persist in recognizing a limited number of specific types of property interests. If a court has answered Question #1 affirmatively, it must fit the claim into one of several pre-existing categories.⁵³ This is part of what we teach in the classification of estates and future interests section of the course. Courts are regularly asked to decide what property interests are created by a grantor’s ambiguous language, e.g., a fee simple determinable or a fee simple subject to condition subsequent?⁵⁴ When state legislatures abolished the fee tail estate, they directed courts to reinterpret what property interest was created by a document purporting to create a fee tail. When California abolished the possibility of reverter, it directed courts to treat interests that would have been so classified as right of entry/power of termination. Courts decide whether a document referring to itself as a “lease” actually creates a “leasehold estate” or some other kind of property interest (e.g., a license, an easement, or a profit).⁵⁵

Defining a particular property interest will also often define, in turn, a particular “property relationship” between the parties. In our property law tradition, there is not one singular owner—non-owner relationship, but rather a myriad of distinct property relationships, e.g., bailor-bailee, donor-donee, grantor-grantee, concurrent interest

⁵¹ Compare *O’Brien v. O’Brien*, 489 N.E.2d 712, 716 (N.Y. 1985) (interpreting state statute to include an interest in a profession or professional career to be a marital property asset divisible at divorce), with *In re Marriage of Graham*, 574 P.2d 75, 77 (Colo. 1978) (holding that an MBA degree was not subject to division). See *In re Marriage of Spengler*, 6 Cal. Rptr. 2d 764, 771–72 (Cal. Ct. App. 1992) (holding that a right to renew a term life insurance policy could be a property interest divisible at divorce for purposes of California’s Community Property law); see also Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 612 n.418 (2005).

⁵² Note: This question is often answered in conjunction with Question #3 (how is that type of property interest created or initially acquired?), but it is conceptually distinct.

⁵³ For a proposal to reform our estates and future interests, see D. Benjamin Barros, *Toward a Model Law of Estates and Future Interests*, 66 WASH. & LEE L. REV. 3, 6 (2009).

⁵⁴ See, e.g., *Mahrenholz v. Cty. Bd. of Sch. Trs.*, 544 N.E.2d 128 (Ill. App. Ct. 1981).

⁵⁵ See, e.g., *Cook v. Univ. Plaza*, 427 N.E.2d 405, 408 (Ill. App. Ct. 1981) (finding “Residence Hall Contract Agreement” regulating use of university dorms was not a lease). Landlord-tenant relationships are particularly complex because they involve an unresolved mix of property law, contract law, and tort law.

holders, mortgagor-mortgagee, present interest holders-future interest holders, and dominant estate owner-servient estate owner. What specific property rights are entailed by ownership of a particular type of property and a particular property relationship is a distinct question (Question #5, *infra*.) Sometimes the property relationship is tightly linked to the answers to Question #5 (e.g., in most states defining a leasehold interest specifies certain rights and duties between the landlord and the tenant); other times, it is not, functioning only as a label without much pre-set content (e.g., the content of a real covenant will be defined by the text of the covenant).

3. How Is That Type of Property Interest Created or Initially Acquired?⁵⁶

This question is often explicitly covered in casebooks. There are numerous ways that property interests can be created or initially acquired. Property interests are generally created by deliberate human action and agreements, and expressed in documents. But some property interests, e.g., a successful adverse possessor's estate,⁵⁷ certain easements,⁵⁸ and an implied equitable servitude,⁵⁹ can be created by operation of law.

Disputes about creation or initial acquisition of property interests include the test for what constitutes "occupation" of a wild animal and the issue of whether a deed can create an easement in a third party?⁶⁰ Once property is initially owned, subsequent ownership is determined by answers to Questions #4–8.

4. Who "Owns" the Property Interest? How Are Competing Ownership Claims Decided?

Some Property Law casebooks articulate this question explicitly and use it to organize part of the course.⁶¹ Under the rubric of these questions, we teach doctrines such as the Rule of Capture, the Law of Finding, and Adverse Possession and

⁵⁶ This question is distinct from the fundamental property theory issue of how can a private property system be normatively justified which is often an issue raised early in Property Law courses. See, e.g., Emily Sherwin, *Three Reasons Why Even Good Property Rights Cause Moral Anxiety*, 48 WM. & MARY L. REV. 1927, 1927 (2007). American courts assume a private property system and ask this question within that system.

⁵⁷ See, e.g., *Mullis v. Winchester*, 118 S.E.2d 61 (S.C. 1961) (adverse possession). The title acquired by adverse possession is understood to be a new title, not a transfer of a property interest from the previous owner.

⁵⁸ See, e.g., *Strollo v. Iannantuoni*, 734 A.2d 144 (Conn. App. Ct. 1999) (implied easement by necessity); *Bubis v. Kassin*, 733 A.2d 1232 (N.J. Super. Ct. App. Div. 1999) (implied easement by prior existing use); *Melendez v. Hintz*, 724 P.2d 137 (Idaho 1986) (prescriptive easement); *Holbrook v. Taylor*, 532 S.W.2d 763 (Ky. 1976) (easement by estoppel).

⁵⁹ See, e.g., *Sanborn v. McLean*, 206 N.W. 496 (Mich. 1925) (implied equitable servitude).

⁶⁰ At old common law, the answer was an unequivocal "no." *But see generally* Willard v. First Church of Christ, Scientist, 498 P.2d 987 (Cal. 1972).

⁶¹ See, e.g., SINGER, *supra* note 30, at 97–183.

relativity of title.⁶² The common law did not presume a single owner, but included numerous multi-owner forms, such as concurrent interests.

The rules are informed by purpose and context. The elements and rules for adverse possession of an entire lot differ from those pertaining to border disputes,⁶³ and differ again as between a claimant with a defective deed and one without any document purporting to ground an ownership claim.⁶⁴

5. What “Property Rights” Does Ownership in This Property Entail, and with What Limits/Scope and Duties?

While neither courts nor commentators regularly employ Wesley Hohfeld’s categories and terminology,⁶⁵ courts do regularly analyze an ownership interest to identify specific rights it includes.⁶⁶ This may be the most contested area.⁶⁷

Ownership of many types of property entails a familiar group of rights (*viz.* the right to possess/use/control, the right to exclude, and the right to transfer),⁶⁸ but a wide variety of other familiar property interests do not.⁶⁹ An owner of stocks (an intangible property interest) has obvious rights to control,

⁶² *Id.* at 797–98 (capture); *id.* at 800–01 (finding and relativity of title); *id.* at 140–43 (adverse possession); *id.* at 541 (recording acts often reverse the result of a common law analysis of priority of title).

⁶³ *Compare* Manillo v. Gorski, 255 A.2d 258, 262 (N.J. 1969) (articulating and revising elements for adverse possession in a boundary dispute), *with* Mullis v. Winchester, 118 S.E.2d 61, 63 (S.C. 1961) (articulating elements for adverse possession of a parcel).

⁶⁴ *Compare* Norman v. Allison, 775 S.W.2d 568 (Mo. 1989) (claim of title), *with* Mullis, 118 S.E.2d at 66 (color of title).

⁶⁵ A comprehensive formal analysis of jural relations (opposites and correlatives) was articulated in Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28–33 (1913).

⁶⁶ *See, e.g.*, U.S. v. Craft, 535 U.S. 274, 278 (2002) (“A common idiom describes property as a ‘bundle of sticks’—a collection of individual rights which, in certain combinations, constitute property.”); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1936) (“The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots [sticks] and lay the charge distributively.”). Professor Merrill articulates this distinction as between a “discrete asset” (legally recognized property form) and an “incident of property” (power or privilege that belongs to someone who owns the property, but is not a legally recognized form of property itself). Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 974 (2000).

⁶⁷ Commenting on an earlier version of this draft, Professor Peggy Radin remarked that Question #5 is “the big kahuna.” (Email on file with author).

⁶⁸ Examples include ownership of a paperback book or a car. Others have investigated additional “property rights.” *See, e.g.*, Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005); Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355 (2010); Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191 (2010).

⁶⁹ *See, e.g.*, *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 509–10 (1990) (Mosk, J., dissenting) (discussing the typical bundle of rights and exceptions to it).

exclude, and transfer, but she has no meaningful “right to possess.”⁷⁰ Water rights are usually considered to be merely usufruct rights, i.e. rights of use.⁷¹

Property interests with traditionally clear rights may be subject to reexamination in a new context. Usually a spouse owning property held in the tenancy by the entirety form does not have a unilateral right to transfer.⁷² But in *U.S. v. Craft*, the U.S. Supreme Court considered “whether a tenant by the entirety possesses ‘property’ or ‘rights to property’ to which a federal tax lien may attach.”⁷³ And, the meaning and scope of the Public Trust doctrine, through which a state reserves certain property rights to the state and its people, has recently been broadly explored.⁷⁴

Practically speaking, because we live in an interdependent world, all property rights cannot be absolute.⁷⁵ Having a specific right (e.g., the right to exclude) is different from knowing the “scope” or limits of that right. The plaintiffs in right to exclude cases may frame their cases in absolutist terms—as if the issue was having a right to exclude or not—but often courts resolve such disputes by declaring the scope of a recognized right by a recognized owner.⁷⁶

⁷⁰ JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 369 (Aspen Law & Business, 2001) (“The traditional view of the corporation is that it is owned by the shareholders.”). WILLIAM ALLEN ET AL., CASES AND COMMENTARIES ON THE LAW OF BUSINESS ORGANIZATION 58 (3d ed. 2008) (“Thus, a functional two-level ownership structure characterizes partnerships and all business entities: The contributors of equity capital do not ‘own’ the assets themselves but rather own the rights to the net financial returns that these assets generate, as well as certain governance or management rights.”).

⁷¹ See, e.g., Shelley Ross Saxon, *Managing Water Rights Using Fishing Rights As a Model*, 95 MARQ. L. REV. 91, 92 n.5 (2011) (citing authorities). Singer’s explication of three common law rules on surface water (“natural flow,” “common enemy,” and “reasonable use”) demonstrate the range of limited scope of rights and correlative duties the neighboring landowners can enjoy. SINGER, *supra* note 70, at 121–23.

⁷² See, e.g., Long v. Earle, 269 N.W. 577, 581 (1936) (“It is well-settled under the law of this State that one tenant by the entirety has no interest separable from that of the other.”).

⁷³ *U.S. v. Craft*, 535 U.S. 274, 276 (2002). The Court’s phrasing of the issue could be interpreted as asking Question #1 (is this “property”) or Question #5 (what rights are entailed in ownership). This opinion partly depended upon the justices’ interpretation of the relationship between federal law and state law. State courts’ interpretation of their state’s version of the Married Women’s Separate Property Act resulted in a variety of possible understandings of the tenancy by the entirety.

⁷⁴ See, e.g., Gerald Torres & Nathan Bellinger, *The Public Trust: The Law’s DNA*, 4 WAKE FOREST J.L. & POL’Y 281, 283 (2014).

⁷⁵ See Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 329 (1981).

⁷⁶ See, e.g., *Jacque v. Steenberg Homes, Inc.*, 563 N.W. 2d 154, 159 (Wis. 1997) (construing the right to exclude with a broad scope); *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971) (construing the right to exclude more narrowly); *Campbell v. Westdahl*, 715 P.2d 288, 292 (Ariz. Ct. App. 1985) (considering the scope of a tenant’s right to transfer her leasehold estate, this court opines: “The modern trend is to impose a standard of reasonableness on the landlord in withholding consent to a sublease unless the lease expressly states otherwise.”).

Property Law recognizes limits on the property rights of property owners vis-à-vis non-owners as well as vis-à-vis other property owners.⁷⁷ Generally, there are three sources of limits: the common law, grantors, and government regulation. Nuisance law is the paramount example of common law limits between property owners. The legal rules of nuisance are explicitly (and notoriously) contextual. Courts also identify property owners' duties, e.g., the duty to not commit waste⁷⁸ and landowners' duties to those who enter their property.⁷⁹

In practice, the answers to the question, *what "property rights" does ownership in this property entail, and with what limits/scope and duties?*, are determined by courts' answers to four interrelated sub-questions: (a) What specific rights are recognized in this property in this context?;⁸⁰ (b) How are these rights related to each other?;⁸¹ (c) What is the "scope" (limits) of

⁷⁷ See, e.g., *Union Oil Co. v. State Bd of Equal.*, 386 P.2d. 496, 550 (Cal. 1963) ("Ownership is not a single concrete entity but a bundle of rights and privileges as well as of obligations."). See generally Eduardo M. Penalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191 (2010) (uncovering the common law limits on the right to abandon property). KURTZ, HOVENKAMP & BROWN, *supra* note 24, at 178–95, includes a subsection on the obligations associated with bailment. MERRILL & SMITH, *supra* note 24, at 361–499, includes a chapter entitled "Owner Sovereignty and Its Limits," discussing exceptions to (or limitations on) the right to exclude.

⁷⁸ See, e.g., DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 24, at 217–18 (discussion of duty to avoid waste).

⁷⁹ Traditionally, landowners owed different duties to different classes of non-owners depending upon the status of the entrant as trespasser, licensee, or invitee. *Carter v. Kinney*, 896 S.W.2d 926, 928 (Mo. 1995). In the modern time, many courts have combined these into a single "reasonableness" duty. See *Heins v. Webster County*, 552 N.W.2d 51, 52 (Neb. 1996).

⁸⁰ In the concurrent ownership interests context, this question asks: what are the relative rights of the co-owners of the same property?

⁸¹ For example, concurrent interests present formidable challenges to courts in this sub-question. To illustrate, the inherent ambiguity (or arguable incoherence) of the relationship between cotenants' equal rights to use a concurrent interest estate has challenged courts, leading to different jurisdictional default rules (out of possession cotenant's right to rent from cotenant in possession). More generally, current variant answers to this question include: (1) a near-infinitely variable "bundle of rights" (J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712–13 (1996) (describing the "bundle of rights" as the "currently prevailing understanding of property in what might be called mainstream Anglo-American legal philosophy" and attributing this view to Lawrence C. Becker, Stephen R. Munzer, and Jeremy Waldron); see also JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 43 (1st ed. 1888) ("The duller individual among the people knows and understands that his property in anything is a bundle of rights."); (2) a fundamental/basic right of exclusive possession upon which other rights are derived (Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) ("[T]he right to exclude others is more than just 'one of the most essential' constituents of property—it is the sine qua non."); (3) a web of interests (Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property As A Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 281–84 (2002)); and (4) the bucket of water metaphor—that all the rights are thoroughly interconnected and interdependent (Lee Anne Fennell, *Property and Half-Torts*, 116 YALE L.J. 1400, 1441–43 (2007) (citing Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1760 (2004) (quoting WILLIAM MARKBY, ELEMENTS OF LAW 158 (6th ed. 1905) (asserting that

each property right?; and (d) What affirmative obligations (or duties) come with ownership?⁸²

Not every case requires consideration of all of these sub-issues. Unfortunately, when cases do present these sub-issues, courts have neither been self-conscious, consistent, nor transparent about how they reach and answer these sub-issues. Courts neither necessarily answer all of these questions directly, nor in any particular order. And sometimes, courts do not address these sub-issues at all, but merely announce a holding.⁸³

6. What Is Required to Make a Valid Transfer of This Property Interest?

Property Law provides numerous rules defining what is required to make a valid transfer.⁸⁴ Property Law is conventionally distinguished from contract law by the fact that no consideration is required for a valid transfer of a property interest. The rules differ for real property, personal property, and some intangible property.⁸⁵ Rules concerning valid transfer by gift⁸⁶ or by deed⁸⁷ fit under this question.⁸⁸ The Principle of Derivative Title (one cannot transfer greater rights than

ownership “is no more conceived as an aggregate of distinct rights than a bucket of water is conceived as an aggregate of separate drops”)).

⁸² Examples of affirmative obligations include the duties of an owner of a present interest to the owner(s) of a future interest, e.g., duty to not commit “waste.” For one view on affirmative duties, see Robert C. Ellickson, *The Affirmative Duties of Property Owners* Yale Law & Economics Research Paper No. 499 (July 10, 2014), <http://ssrn.com/abstract=2464545> (last visited Jan. 15, 2016) [<http://perma.cc/WY3E-L8VF>].

⁸³ See, e.g., J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 715 (1996) (criticizing the “bundle of rights” metaphor and using cases to demonstrate “the absence of a concern [by some courts] to elaborate the legal concept of property in more than a superficial way” and to “indicate how a court may avoid facing difficult questions about the nature of property, in order to move quickly to consider broader policy issues concerning the legal treatment of things of value”). Cf. *U.S. v. Craft*, 535 U.S. 274 (2002) (offering an unsatisfying explanation why state law understandings of the rights entailed in a tenancy by the entirety are not respected by the federal government) *with* *Matthews v. Bay Head Improvement Ass’n*, 95 N.J. 306 (1984) (explicating carefully the relative rights of the owner and the public under the public trust doctrine).

⁸⁴ See, e.g., NELSON, STOEBUCK & WHITMAN, *supra* note 24, at 230–44.

⁸⁵ Students are often surprised that a transfer of a real property interest does not have to be recorded in the public records in order to be a valid transfer.

⁸⁶ See, e.g., *Westleigh v. Conger*, 755 A.2d 518, 519 (Me. 2000) (requiring present donative intent, delivery, and acceptance).

⁸⁷ Transfers of real property generally require execution of a valid deed, delivery of the deed, and acceptance.

⁸⁸ Rules for transfer by devise and intestate transfer are provided by statute. Importantly, neither adverse possession nor abandonment is a form of “transfer” of property interests. Adverse possession primarily concerns Question #4 (who owns the property interest) as is shown by the contexts in which the doctrine is raised. If an erstwhile adverse possessor is successful, a new title is created by operation of law, not by transfer. Abandonment doctrine addresses how a property interest can be terminated (Question #7), and then become available for someone else to acquire (Question #3).

she possesses) seems clear enough but has common law exceptions derived from equitable estoppel.⁸⁹

Given the contemporary dominance of doctrines favoring alienability, most types of property are transferrable. Whether some property interests should be “market inalienable” or not is a well-established debate.⁹⁰

It seems obvious that someone designated as “an owner” may transfer an interest validly, but a woman who owns property with her husband as a tenant by the entirety could not transfer it alone. It seems equally obvious that *only* an owner may transfer an interest validly, but the common law estate *jure uxoris* (which gave a husband an estate in all of the land owned by his wife at marriage) allowed the husband to sell land titled in his wife’s name to a third party subject to certain limitations.

Most transfers of property interests are deliberate and intentional. But sometimes they can occur by operation of law, e.g., when title passes to the holder of a possibility of reverter when the defeasing condition is violated.

7. How Long Does the Property Interest Last? How Can the Property Interest Be Terminated?

Because property interests may or may not last indefinitely, courts need rules to determine how long an interest lasts and how an interest can be terminated. For example, if a grantor has correctly created a fee simple determinable, then the violation of the condition terminates the present interest and the holder of the possibility of reverter now owns the property. A cotenant in the common law joint tenancy can destroy the “right of survivorship” with ease. In contrast, a cotenant in a tenancy by the entireties cannot unilaterally do the same; the right of survivorship in a tenancy by the entireties can only be terminated by the spouses’ joint action or divorce.

When grantors do not provide expressly how or when a property interest lasts, the modern presumption is that it lasts as long as the interest conveyed can last. Courts have developed various other rules to decide this question, from the doctrine of

⁸⁹ See FREYERMUTH, ORGAN & NOBLE-ALLGIRE, *supra* note 24, at 146–48.

⁹⁰ Most property interests can be bought and sold in the market; they are “market alienable.” However, some property interests (e.g., one’s organs) are treated as “market inalienable”—they may be transferrable as gifts but not for economic consideration. See e.g., Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1849–50 (1987); Walter Block, *Market-Inalienability Once Again: Reply to Radin*, 22 T. JEFFERSON L. REV. 37, 37 (1999); Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1406 (2009).

abandonment⁹¹ to the Doctrine of Changed Conditions.⁹² This area is not free of dispute. The *Pocanos* case can be read as a tragicomic story of how difficult it can be for an owner to abandon a real property interest under the law.⁹³

8. How Are Property Rights in This Kind of Property Enforced?

Questions concerning enforcement of property rights are both important and complex. The critical sub-questions are: Has a property right been violated? Against whom can the owner(s) enforce the property right? What defenses can be raised against enforcement? And, what remedies are available if a violation is proven?⁹⁴

There are a wide variety of rules determining if a property right has been violated and what defenses are available (e.g., whether any defense to unauthorized use is available). Liability rules range from bright line rules, to various standards, to elements tests and factor tests. Rules defining which party bears the burden of proof can be outcome-determinative.⁹⁵ Common law jurisprudence is a primary source for these rules, but the terms of an inter-vivos grant or a will may also determine how a particular property right may be enforced.

Regarding the sub-question “against whom can the owner(s) enforce the property right,” many property rights are “in rem”—enforceable against all non-owners. However, some

⁹¹ Abandonment concerns how a true owner can terminate her ownership interest unilaterally without transfer to another person or entity. It is therefore not an answer to Question #6 because while it is a relinquishment (ending of a property ownership in Question #7), it is not a transfer of this interest to another owner. The consequence of successful abandonment raises Question #3—how the (possibly) valuable property can be acquired by someone else, e.g., a finder.

⁹² For example, the Doctrine of Changed Conditions is applied in the context of interests that run with the land, e.g., easements, real covenants, and equitable servitudes. See, e.g., *Western Land Co. v. Truskolaski*, 495 P.2d 624 (Nev. 1972) (recognizing the doctrine but refusing to apply it to a single-family subdivision). The RESTATEMENT (THIRD) OF PROPERTY, SERVITUDES § 7.10(1) (2000) would apply the doctrine of changed conditions to all “servitudes.” The Marketable Title acts provide a statutory basis for terminating property interests. See FREYERMUTH, ORGAN & NOBLE-ALLGIRE, *supra* note 24, at 756–57.

⁹³ See *Pocono Springs Civic Ass’n v. MacKenzie*, 667 A.2d 233 (Pa. 1995). In this case, the owners of a tract of undeveloped real property in a common interest community found out it was undevelopable, but were still required to continue to pay homeowner association fees. They attempted to rid themselves of the property in numerous ways unsuccessfully. *Id.*

⁹⁴ For example, in *Alby v. Banc One Financial*, 128 P.3d 81, 83 (Wash. 2006), the court must decide whether a condition included in the deed was enforceable, whether the condition was violated, and, if so, what is the remedy.

⁹⁵ See discussion of *Melendez v. Hintz*, 111 Idaho 401 (1986) in Note 2 in FREYERMUTH, ORGAN & NOBLE-ALLGIRE, *supra* note 24, at 548–49.

commonly recognized property rights—cotenants in concurrent interest, easements, and real covenants/equitable servitudes—only bind some specified others with whom one is in a particular property relationship.⁹⁶

Regarding remedies, the famous Calabresi and Melamed article distinguishing “property rules” from “liability rules” addressed what remedies courts should make available to wronged property owners from an economic perspective.⁹⁷ Courts’ answers to these questions vary by the type of property and the context.⁹⁸ And, the answers have changed over time. At common law, property was reflexively protected by “property rules,” but in modern times, courts have brought a more flexible approach to this issue, sometimes employing property rules and sometimes liability rules to protect property rights. This flexibility is demonstrated in some nuisance cases⁹⁹ and in some minor encroachment cases.¹⁰⁰ There is also a modern trend to deny property owners “self-help” remedies that were traditionally available to them under common law to enforce their property rights.¹⁰¹

⁹⁶ Cotenants in concurrent interests have certain rights and duties toward each other. The *Swartzbaugh v. Sampson*, 54 P.2d 73, 74 (Cal. Ct. App. 1936) case formally raises Question 8 (can a cotenant sue to cancel a lease in a joint tenancy which she has not joined), but its answer exemplifies the difficulty courts have had in answering Question #5 regarding the scope of rights created in concurrent interests. See also DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 24, at 847–51, 857 (discussing legal requirements for enforceability of Real Covenants and Equitable Servitudes).

⁹⁷ Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules and Alienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1097 (1972). “An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule.” *Id.* at 1092. Thus, if a property interest is protected by a “property rule” and someone is found to interfere with it, a court will typically issue injunctive relief to protect the owner’s interest, but if the property interest is protected by a “liability rule” and someone is found to interfere with it, a court will typically issue an award for money damages.

⁹⁸ *Id.* at 1093 (“Taney’s house may be protected by a property rule in situations where Marshall wishes to purchase it, by a liability rule where the government decides to take it by eminent domain”). In contrast, “[t]he bailee has an absolute duty to redeliver the object of the bailment to the bailor.” DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 24, at 144; see Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1034 (1996) (arguing that while property is a special right, the special characteristics of property “demand that property protection be give a far more complex—and contingent—interpretation than other constitutionally protected rights”).

⁹⁹ See, e.g., *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 872 (N.Y. 1970).

¹⁰⁰ See, e.g., *Mannillo v. Gorski*, 54 N.J. 378, 382, 389 (1969) (“[I]f the innocent trespasser of a small portion of land adjoining a boundary line cannot without great expense remove or eliminate the encroachment, or such removal or elimination is impractical or could be accomplished only with great hardship, the true owner may be forced to convey the land so occupied upon payment of the fair value thereof . . .”).

¹⁰¹ See, e.g., *Berg v. Wiley*, 264 N.W.2d 145, 149–50 (Minn. 1978).

III. MAPPING THE QUESTIONS ONTO THE PROPERTY COURSE

A. The Framework of Questions Encompasses Property Law

The framework captures the material covered by the Property Law course because there is a tight congruence between the framework of questions and the doctrines and topics presented in Property Law casebooks. Quite simply, these questions are what courts in common law Property cases ask and then answer in their opinions.¹⁰² This section maps the questions onto the traditional topics and cases.

Most casebooks are organized according to a traditional ordering of topics and doctrines.¹⁰³ The cases included in this traditional array of topics present, *albeit* implicitly, all of the questions. This brief overview will demonstrate the congruence

¹⁰² I derived these questions from my own extensive study of the cases and teaching experience. While conducting research for this essay, I found that this articulation of questions also finds some support in Property Law scholarship, including by authors who do not share the same philosophical or theoretical perspectives on Property Law. *See, e.g.,* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 531 (2005). In this article, the authors present their theory of Property based upon “the value inherent in stable ownership.” “This Article begins by demonstrating that any coherent and comprehensive property theory must address four legal questions: (1) [w]hat things are protected by property law; (2) vis-à-vis whom; (3) with what rights; and (4) by what enforcement mechanism?” *Id.* Here these authors identify issues that I have labeled as Questions #1, 4, 5, and 8. In my view, they did not articulate all of the relevant questions “that any coherent and comprehensive property theory must address.” However, they recognized the value of identifying Property Law’s critical questions in their project of search for a substantive theory of Property Law. *See also* Daniel Klein & John Robinson, *Property: A Bundle of Rights? Prologue to the Property Symposium*, ECON JOURNAL WATCH, Vol. 8, No. 3, 193, 195 (Sept. 2011), <https://econjwatch.org/articles/property-a-bundle-of-rights-prologue-to-the-property-symposium> [<http://perma.cc/VDC2-A2ZZ>]. Professors Daniel Klein and John Robinson wrote:

In waving an exclusion banner, we mean . . . that exclusion or dominion is central, even though it is not all that “property” signifies. The exclusion idea does not itself provide the justification of property; nor speak to how unowned things become property; nor clearly imply which things are amenable to ownership (or propertization); nor clearly imply specific delimitations of “exclusion,” “dominion,” or “messing with.”

In this quote, the authors acknowledge that the concept of exclusion does not address all of the important questions of Property Law. And, they specify four additional issues. The first question (the justification of a private property system) is not part of the framework because it is a *normative* foundational issue which is assumed in the common law. The other issues they identify correspond to Questions #1, 3, and 5 in the framework I have articulated.

¹⁰³ I analyzed twenty-one Property casebooks to identify patterns in the structures they use to organize the course. The following casebooks present topics completely or substantially in the traditional order described: DUKEMINIER ET AL., CHASE & FORRESTER, BURKE ET AL., BERNHARDT ET AL., NELSON ET AL., SPRANKLING ET AL., FREYERMUTH ET AL., SMITH ET AL., MASSEY, KURTZ ET AL., BRUCE & ELY, CRIBBET ET AL., BARROS & HEMINGWAY, *supra* note 24.

The following casebooks organize the course in a non-traditional order: CHUSED, DWYER & MENELL, MERILL & SMITH, SINGER, CALLIES ET AL., CRUMP ET AL., FREYFOGLE & KARKKAINEN, RABIN ET AL., *supra* note 24.

between the questions in the framework and the topics included in traditional Property Law casebook coverage.

Many casebooks begin with a section on “first acquisition,” usually covering doctrines such as the Rule of Discovery, the Right of Capture, and Acquisition by Creation. They then present the Law of Finding, Adverse Possession, and the Law of Gift as examples of “subsequent acquisition.” These topics and the section headings more or less explicitly raise Questions #2 (types of property interests), Question #3 (how acquired), and Question #4 (who owns property) because the cases included in these sections present conflicting claims of ownership in which that issue is resolved by courts’ decisions about what constitutes the required acts for acquisition of that type of property.¹⁰⁴ The Acquisition by Creation cases can also raise Question #1 (is it a “property interest”).¹⁰⁵ The Law of Gift also concerns Question #6 (how to transfer property), and some casebooks headings make this explicit.¹⁰⁶ At this point, the traditional casebook arrangement of topics presents Estates and Future Interests, which address Questions #2 (types of property interests), Question #3 (how acquired), Question #5 (property rights entailed by ownership), Question #7 (termination of property rights), and Question #8 (enforcement of property rights).¹⁰⁷ Traditional coverage then moves

¹⁰⁴ For capture, see *Pierson v. Post*, 3 Cai. R. 175, 175 (N.Y. 1805); for acquisition by creation, see *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990); for rule of finding, see *Armory v. Delamirie*, (1722) 93 Eng. Rep. 664 (holding finder’s possession grounds an ownership claim against subsequent possessors); for adverse possession, see *Mullis v. Winchester*, 118 S.E.2d 61 (S.C. 1961); for gift, see *Newman v. Bost*, 29 S.E. 848 (N.C. 1898) (articulating and applying the rule that a gift *causa mortis* requires an intention to make a gift and delivery). As discussed *infra* in notes 117–121 and accompanying text, the *M’Intosh* case in the Rule of Discovery section covers additional questions. *Johnson v. M’Intosh*, 21 U.S. 543, 572 (1823).

¹⁰⁵ See *Moore*, 793 P.2d 479 (considering whether a person can have “a sufficient legal interest in his own bodily tissues amounting to personal property”).

¹⁰⁶ See *e.g.*, FREYERMUTH, ORGAN & NOBLE-ALLGIRE, *supra* note 24 (“Chapter 4. Transferring Property by Gift”).

¹⁰⁷ For Question #2, see *Mahrenholz v. Cty. Bd. of Sch. Tr. of Lawrence Cty.*, 417 N.E.2d 138 (Ill. App. Ct. 1981); for Question #5, see *Baker v. Weedon*, 262 So.2d 641 (Miss. 1972), characterized in FREYERMUTH, ORGAN & NOBLE-ALLGIRE, *supra* note 24, at 254 (“Rights and Duties of a Life Tenant (The Law of Waste)”); for Question #7, see DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 24, at 191 (“A fee simple may endure forever; a life estate, for the life of a person; a term of years, for some period of time measured by the calendar. . . . The estate system is designed to make clear who is transferring what to whom—not just what physical parcel of land or item of personal property, but also what sort of ownership, measured in duration of the transferee’s interest.”); for Question #8, *Woodrick v. Wood*, 1994 WL 236287, at *2 (Oh. Ct. App. 1994) (finding that the destruction of a barn on a life tenant’s estate does not constitute waste and therefore does not violate the rights of future interest holders); see DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 24, at 223 (if the condition subsequent incorporated into a fee simple determinable or fee simple subject to executory limitation is violated, the holder of the future interest has an immediate right to possession); in contrast, if the condition subsequent incorporated into a fee simple subject to condition subsequent is violated, the holder of the future interest has a right to possess, but must

to Concurrent Interests which raise Questions #2, 3, 5, 6, 7, and 8.¹⁰⁸ The law of Landlord and Tenant, another complex set of doctrines engaging Questions #2–8 generally follows.¹⁰⁹ Next comes the law of Servitudes, which implicates all of the questions.¹¹⁰ After Servitudes,

take affirmative action to gain possession. *DUKEMINIER, KRIER, ALEXANDER & SCHILL, supra* note 24, at 224–25.

¹⁰⁸ For Question #3, see *DUKEMINIER, KRIER, ALEXANDER & SCHILL, supra* note 24, at 319–21 (explicating creation requirements of tenancy in common, joint tenancy and tenancy by the entirety); for Question #5, see *DUKEMINIER, KRIER, ALEXANDER & SCHILL, supra* note 24, at 338 (stating rule that cotenants of tenancies in common and joint tenancies have a unilateral right to partition, but cotenants in a tenancy by the entirety do not); *Spiller v. Mackereth*, 334 So.2d 859 (Ala. 1976) (recognizing cotenant in possession has a duty to not commit “ouster” against cotenant); for Question #6, see *Riddle v. Harmon*, 162 Cal. Rptr. 530 (Cal. Ct. App. 1980) (holding, *inter alia*, that traditionally one could not validly convey a property interest to oneself); for Question #7, see *Riddle*, 162 Cal. Rptr. at 530 (holding, *inter alia*, that a joint tenant can terminate a joint tenancy and destroy the right of survivorship unilaterally by conveying to herself as a tenant in common); for Question #8, see *Delfino v. Vealencis*, 436 A.2d 27 (Conn. 1980) (enforcing traditional common law rule favoring partition in kind over partition by sale); *Swartzbaugh v. Sampson*, 54 P.2d 73, 79 (Cal. Ct. App. 1936) (holding cancelation of leases is not a remedy available to cotenant when other joint tenant entered into the leases unilaterally and without her consent).

¹⁰⁹ For Questions #2 and 7, see *DUKEMINIER, KRIER, ALEXANDER & SCHILL, supra* note 24, at 421–23 (presenting three types of leasehold estates term of years, periodic tenancy and tenancy at will) and requirements for notice to terminate; *Garner v. Gerrish*, 473 N.E.2d 229 (N.Y. 1984) (deciding “whether a lease . . . creates a determinable life tenancy on behalf of the tenant or merely establishes a tenancy at will”); *Ernst v. Conditt*, 390 S.W.2d 703, 706 (Tenn. Ct. App. 1964) (determining whether language in a lease created an assignment or a sublease interest); for Question #5, see *Hannan v. Dusch*, 153 S.E. 824, 825 (Va. 1930) (considering “whether [in a lease] without an express covenant there is nevertheless an implied covenant to deliver possession”); *Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984) (holding that an implied warranty of habitability exists in every residential lease); for Question #6, see *DUKEMINIER, KRIER, ALEXANDER & SCHILL, supra* note 24, at 430 (stating rule that a lease creating an leasehold interest that will last longer than a year must be in writing); for Question #8, see *DUKEMINIER, KRIER, ALEXANDER & SCHILL, supra* note 24, at 465–81 (cases and discussion of landlord remedies for defaulting tenants); *Berg v. Wiley*, 264 N.W.2d 145, 150–51 (Minn. 1978) (holding “self-help” not available to landlords as remedy); *Reste Realty Corp. v. Cooper*, 251 A.2d 268, 275 (N.J. 1969) (finding landlord breached covenant of quiet enjoyment substantially and that tenant merited “constructive eviction” remedy).

¹¹⁰ For Questions #1 and 2, see *DUKEMINIER, KRIER, ALEXANDER & SCHILL, supra* note 24, at 764 (“The law of servitudes is a study of how the tides of urbanization and the demands of the market for efficient control of externalities swept around the artificial barriers limiting one form of servitude and forced courts to recognize and develop other forms.”); *Tulk v. Moxhay*, 2 Phillips 774, 41 Eng. Rep. 1143 (recognizing an equitable servitude as a property interest); for Question #3, see *Holbrook v. Taylor*, 532 S.W.2d 763, 764 (1976) (“As to the issue of estoppel, we have long recognized that a right to use of a roadway over the lands of another may be established by estoppel”). In the servitude context, Question #4 (who owns the property interest) is generally determined by an answer to Question #3 (was a servitude created); for Question #5, see *Raleigh Avenue Beach Ass’n v. Atlantis Beach Club*, 879 A.2d 112, 123–24 (2005) (defining the scope of public rights under the public trust doctrine). See generally *Preseault v. U.S.*, 100 F.3d 1525 (1996) (considering scope of easements). For Question #6, see *Willard v. First Church of Christ, Scientist*, 498 P.2d 987, 991 (1972) (holding that a grant may reserve an interest in an easement in a third party); *Miller v. Lutheran Conference & Camp Ass’n*, 200 A.646, 652 (1938) (holding that easements in gross can be assigned by a grant). For Question #7, see *Preseault*, 100 F.3d at 1556 (finding that certain easements have terminated by abandonment). For Question #8, *Preseault*, 100 F.3d at 1556 (finding that the U.S. government is subject to a takings claim); *Brown v. Voss*, 715 P.2d 514, 518 (1986)

most casebooks cover land transactions, zoning, eminent domain, and regulatory takings, topics that primarily involve statutory and constitutional law except for the doctrine of nuisance.

The framework includes all of the various topics, but not every question applies to every topic.¹¹¹ The Law of Capture focuses on Questions #2 (types of property interests), Question #3 (how acquired), and Question #4 (who owns the property).¹¹² Coverage of Estates and Future Interests primarily addresses Question #2 (types of property interests), Question #3 (how created/acquired), Question #4 (property rights entailed by ownership), Question #6 (termination of property rights), and Question #7 (enforcement of property rights).¹¹³ As explained in note 110 *supra*, the Law of Servitudes requires consideration of all of the questions, except Question #4 (who owns the property).

B. The Relationships Among the Questions Can Be Complex

The questions have their own complexity. They are conceptually distinct, but in practice are often interrelated. The questions are all interdependent and are not serial. Often courts will answer one question which is the primary legal issue presented in a case by answering one or more other questions. There is not a one-to-one relationship between a question and a property doctrine. Some doctrines (e.g., adverse possession and servitudes) involve several questions; others (e.g., finding) only involve a few. The answer to

(denying injunction despite misuse of easement). Note that *Appendix A* demonstrates that all of the doctrinal material covered in the servitudes section of PROPERTY comfortably fits into the proposed framework of questions.

¹¹¹ For example, the requirements for a valid transfer of a property interest (Question #6) are not usually covered in the Law of Finding because they do not arise in that context.

¹¹² For example, while the procedural posture of *Pierson v. Post* is an appeal from a nonsuit, the property law question is “whether Lodowick Post, by the pursuit with his hounds in the manner alleged in his declaration, acquired . . . a right to, or property in, the fox”. *Pierson v. Post*, 3 Cai. 175, 177 (N.Y. Sup. Ct. 1805). Similarly, the property issue in *Ghen v. Rich* is whether Ghen “claims title to the whale” by virtue of the prevailing whaling customs. *Ghen v. Rich*, 8 F. 159, 160 (D.C. Mass. 1881). *Popov v. Hayashi* concerns contested claims between attendees for a baseball in a stadium. *Popov v. Hayashi*, 2002 WL 31833731, at *1–3 (Cal. Sup. Ct. 2002).

¹¹³ See, e.g., *White v. Brown* 559 S.W.2d 938, 941 (1977) (finding will created a fee simple absolute rather than a life estate); *Baker v. Weedon*, 262 So. 2d 641, 644 (1972) (finding life estate holder can force future interest holders to sell, i.e. terminate their property rights in land); *Mahrenholz v. Cty. Bd. of Sch. Tr. of Lawrence Cty.*, 417 N.E.2d 138, 145 (1981) (holding that a deed created a fee simple determinable followed by a possibility of reverter); *Alby v. Banc One Fin.*, 128 P.3d 81, 84 (2006) (holding that deed conveyed a fee simple determinable with an enforceable restraint on alienation); *Kost v. Foster*, 94 N.E.2d 302, 304 (1950) (“The principal question involved is whether or not the interest of Oscar Durant Kost was a vested remainder at the time of the purported sale by the trustee in bankruptcy.”). Estates are largely defined by how they are created (Question #3) and how long they last/how they can be terminated (Question #7).

one question may tend to provide a particular answer to another question, but they are not determinative.¹¹⁴

Property Law includes a wide variety of doctrines and rules. These doctrines and rules are all answers to the property questions, but there are several distinct ways that doctrines and rules function as answers. Some doctrines or rules respond *directly* to one of the primary questions for a particular type of property, e.g., the elements for a valid inter-vivos transfer of real property addresses Question #6 (requirements for valid transfer). Other rules are *elemental* in the sense that they provide part of an answer to a question, e.g., horizontal privity rules provide part of what is required to create a Real Covenant (Question #3). Yet other doctrines are *instrumental*; they assist the court in answering certain other questions. For example, courts apply the Rules Against Unreasonable Restraints on Alienation and the Rule Against Perpetuities to decide whether to enforce a grantor's intended conditions in order to determine what property interests have been created by a grant, ultimately addressing Questions #2 and 3 (types of property interests and how acquired).

Of course, not every case addresses all of the questions. Some cases straightforwardly concern one question. For example, the narrow holding in *Pierson v. Post* technically only decides that "mere pursuit" is insufficient to constitute "occupancy" of a wild animal in a wasteland, and therefore does not give acquisition. This holding creates a rule responding to Question #3 (how acquired) which decides the underlying conflict in the case, Question #4 (who owns the property).¹¹⁵ Others are primarily about one question, but the consequence of resolving it may answer other questions.¹¹⁶ For example, adverse possession is ultimately about Question #4 (who owns the property), but the application of the doctrine to any given set of facts in a case gives an answer to Question #2 (types of property interests), to Question #3 (how acquired), and to Question #7 (termination).

Some particularly complex cases, e.g., *Johnson v. M'Intosh*, engage numerous questions. While the stated issue in that case

¹¹⁴ Some libertarians consider the identification of a property interest in Question #2 to essentially determine the answers to Questions #5 and 8, thus conflating these three questions, but courts have held them to be distinct.

¹¹⁵ *Post*, 3 Cai. at 175. The broader holding offers a complete rule for "occupancy."

¹¹⁶ For example, in the *Mahrenholz* case, the issue before the court is Question #4, but to answer that question it needs to answer Questions #3 and #6. See generally *Mahrenholz*, 417 N.E.2d.

sounded in Question #5¹¹⁷ (the scope of the Native American's right to transfer property), the ultimate issue in this action for ejectment was Question #4: who owned the land as between the plaintiffs (who traced their title to two grants from Native American tribes) and the defendants (who traced their title to a government patent). The Court's path to answering that question began by justifying the "Rule of Discovery" as a rule for acquiring property interests (Question #3),¹¹⁸ then elaborating the specific property rights entailed by title/ownership by discovery (Question #5),¹¹⁹ then tracing the chain of title of the disputed lands from Cabot's discovery of the continent of North America to the defendants (Question #6).¹²⁰ Finally, comparing defendants' title to plaintiffs' title, the Court held that "the plaintiffs do not exhibit a title which can be sustained in the Courts of the United States" (Question #6) because the property interest owned by the Native Americans did not include a broad right of transfer, so their purported transfer of a fee interest was invalid.¹²¹ Therefore the Court recognized defendants as the owners of the disputed land (Question #4).

This framework of questions articulates the primary *legal* issues which courts address in Property Law cases. All of the common law cases, doctrines, and rules in Property Law casebooks fit into this framework of questions. Therefore, this framework of questions provides a relatively simple but comprehensive structure within which all property doctrines can be encompassed. Admittedly, this is a strong claim. I am not suggesting that there are no interpretative issues. There could be debates over which questions are (or should be) raised in any particular case. And there could be debates about how the questions are interrelated. (To be clear, I am not arguing that the ordering of the questions presented in this essay has any significance.) However, I contend that these debates would not

¹¹⁷ "The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country." *Johnson v. M'Intosh*, 21 U.S. 543, 572 (1823). The Court first states that "the question is, whether this title can be recognized in the Courts of the United States?" *Id.* at 572. The underlying issue of the authority of U.S. Courts to recognize a title by Native Americans that would be inconsistent with that claimed by the U.S. government is not a "property law" issue, but rather a constitutional and, at the time, a practical issue.

¹¹⁸ *Id.* at 572–80.

¹¹⁹ Discoverers gained an exclusive right to appropriate the land occupied by Native Americans either by purchase or by conquest as well as the right to convey its title subject only to the Native American right of occupancy. The Native Americans only had a right of occupancy, and, impliedly, a right to transfer their title in that interest only to the U.S. government or its authorized representative. *Id.* at 587.

¹²⁰ *Id.* at 576.

¹²¹ *Id.* at 604–05.

identify *different or additional primary doctrinal questions* that the courts actually answer.

For example, Professor Singer argues (and I agree) that “systemic and distributive norms” are inherent in our property system.¹²² Issues related to these norms are raised and resolved by courts through answering one or more of the questions in the framework. For example, antidiscrimination norms typically find their expression in courts’ decisions about what rights are entailed in ownership, Question #5. When courts address distribution of property assets or wealth issues, they do so via answers to the questions in the framework. Allocation and distribution of property interests or property rights is often a *result* of application of the rule but usually not directly the object of the rule.¹²³ In contrast, the marital property doctrines *jure uxoris* estate, curtesy, and dower are the most prominent common law rules dealing *directly* with distribution of assets. In this context of the special relationship of marriage, the courts distribute property assets by answering Question #2 and #5.¹²⁴

Similarly, when courts decide cases in which property rights conflict with other kinds of rights (e.g., the First Amendment right to freedom of speech), courts construe and resolve this conflict through deciding one or more of the questions in the framework. For example, in *PruneYard Shopping Center v. Robins*,¹²⁵ the California Supreme Court interpreted its state constitution to require that the shopping center owner allow individuals to enter its property to collect signatures for a political petition. The court resolved this conflict by

¹²² JOSEPH SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 140–78 (2000) (“Some of the most important sets of rules in property law serve to ensure that the property system as a whole operates well.”).

¹²³ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 254 (1970) (finding that government benefits were “property” (answering Question #1) effected a significant redistribution of property rights); *United Steel Workers v. U.S. Steel Corp.*, 631 F.2d 1264, 1264 (6th Cir. 1980) (finding that workers’ longstanding relationship with U.S. Steel did not create a recognizable property right (answering Question #1) and prevented a redistribution of property rights).

¹²⁴ One could argue that Property law courts *should* address issues of allocation and distribution of property assets *directly*, for example by inquiring: “Is this distribution of property fair/efficient/etc. . . ?” perhaps as an element in a rule deciding Question #4, (Does one claimant already have enough property or does the other claimant lack some essential property?) Currently, there are few, if any, cases denominated as 1L “Property law” cases which ask these questions. The closest perhaps are nuisance cases in which Law and Economic scholars would urge courts to assign entitlements to parties based upon economic efficiency. Questions like these appear in property-related courses, such as Antitrust Law which concern systemic issues. Of course, other non-Property laws (e.g., marriage) also determine access to property assets. See, e.g., *U.S. v. Windsor*, 570 U.S. 12 (2013) (holding that the limitation of “marriage” and “spouse” in federal law to heterosexual unions by Section 3 of the Defense of Marriage Act (“DOMA”) is unconstitutional under the Due Process Clause of the Fifth Amendment).

¹²⁵ *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 80–81 (1980).

finding that state-protected rights of free expression and petition limited the shopping center's right to exclude, a response to Question #5.¹²⁶

IV. HOW TO USE THE FRAMEWORK IN THE CLASSROOM

A. One Professor's Experience

I want to teach Property Law in a manner that offers its diversity and complexity so that students can enjoy the variety and intellectual stimulation without becoming unnecessarily confused or overwhelmed. A few years ago, I started offering this framework to my students as a consistent structure that students can then apply to differing doctrinal areas, as an overlay to the topic structure the casebook offered. Many students appreciated it. Since then I have used this framework as a regular reference point during the course to help my students orient the topics, doctrines, and cases, and to offer a structure which they can use to get their arms around the course.

As part of the first assignment in my Property course, I require the students to write brief answers to a version of the questions in the framework *before* they do any reading.¹²⁷ I reassure them that this is not a "test" but rather a means to help them recognize what they already know about Property Law. Pedagogically, I am also attempting to "implant" these questions for their consideration during the course. Year after year, students' answers demonstrate that these questions are familiar as "Property Law" questions even to non-lawyers because even without any particular context they regularly mention the same property law doctrines and rules as answers to the same questions.¹²⁸

During the course, when we begin to consider a case I often ask: What property question(s) does this case address? I hope to train the students to perform this exercise themselves. The questions and this practice help the students orient themselves to a case, anchor a case in the framework, and relate the cases (doctrines and rules) across topics.

¹²⁶ *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899, 908–11 (1979) *aff'd sub nom.* *Pruneyard Shopping Ctr.*, 447 U.S. 74. On appeal, the United States Supreme Court held that the California Supreme Court's holding did not constitute a regulatory taking under the federal constitution. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 79 (1980).

¹²⁷ Following are the questions students are required to answer: (1) What is "property"?; (2) What is *not* "property"?; (3) What does it mean to "own" property?; (4) How do we know who is the "owner" of property?; (5) What is a "property right"?; (6) Do property owners have any "duties" or obligations by virtue of their property ownership? If so, what duties and to whom?; (7) Why do we (society and courts) recognize and enforce "property rights"?

¹²⁸ For example, many students will identify "people" as an answer to "what is not property?" noting that chattel slavery was outlawed; or they will mention air or planets.

Periodically during the course, I provide students with a handout that tracks which questions we have studied for each topic or doctrine.¹²⁹ At the end of the course, I invite students to revisit their first essays to take stock of what they have learned. And, I offer the framework of questions as a supplement to the traditional exam outline organized by the topics.

B. Why Use This Framework in Your Course?

Most casebooks use *some* of these questions to organize part of the course, and use other means (primarily doctrines or topics) to organize the remainder. The framework of questions is an additional organizing tool that professors can use. This framework solves the first teaching problem (perceived lack of connection between property doctrines and rules) and provides substantial assistance for the second one (perceived lack of unity in Property policy and theory). It also contributes to helping students integrate legal analysis with legal practice.

Laying out the questions all together in a list offers a conceptual container for Property doctrine. It demonstrates that there are not an unlimited number of issues (just as there are not an unlimited number of property interests). The framework of questions demonstrates that property law is not disparate by demonstrating its connectedness via the questions courts ask and answer. It provides useful grips.¹³⁰ This reduces unnecessary anxiety, confusion, and distraction among students.

When students use the questions, they can read and understand cases more efficiently since the questions provide analytical clarity, allowing them to follow the court's reasoning because they understand what question the court is answering.¹³¹

In addition, the framework provides an easy entry into policy and theory questions and encourages a critical perspective. Knowing the questions suggests points of comparison and contrast instead of seeing rules and doctrines in isolation as unconnected. When students see that several rules are only different answers to the same questions in different contexts/topics, they instinctively inquire:

¹²⁹ See Appendix B: *Where Are We Now?*

¹³⁰ The best-selling Property Law casebook, PROPERTY, by Dukeminier, Krier, Alexander & Schill (8th ed. 2010) covers servitudes in Part V of the book called "Land Use Controls" in a section entitled "Private Land Use Controls: The Law of Servitudes." This is perfectly reasonable and makes sense in terms of grouping the topics and doctrines. Yet, it would be helpful to students, and would not compromise any pedagogical objectives, to also point out that these doctrines are responsive to the same set of questions as the Law of Finding or Estates and Future Interests. *Appendix A* tracks the doctrinal material covered in the servitudes section of PROPERTY and demonstrates that it comfortably fits into the proposed framework of questions.

¹³¹ See, e.g., *Johnson v. M'Intosh*, 21 U.S. 543, 572 (1823).

why use rule A to answer Question #2 in that topic but rule B to answer the same question in another topic? Seeing the troubles courts have in answering questions raises policy and theory questions, e.g., the relationship of property rights to each other (Question #5). Students see that the different rules are informed by different policies/theories/purposes and contexts, e.g., efficiency or fairness. And they see how they can change over time, so they appreciate the dynamism of property. The framework helps students integrate legal analysis with legal practice because starting with the questions that Property Law addresses places students in the place where their future clients will be—asking questions about how to accomplish a task or solve a problem. For example, what do I need to do to transfer my house to my daughter? Does my neighbor have a right to let her tree grow over my property?

This framework is pedagogically useful because it is *comprehensive*, *coherent*, *neutral*, *educationally fertile*, and *versatile*.

It is *comprehensive* because it organizes all of the common law doctrines and can be applied to every case. Some cases address only one or two questions; others address several questions. While there can be legitimate debates about which questions in the framework a particular case addresses, no case addresses a different or additional question that is not included in the framework.

The questions provide students with a *coherent*, stable framework in which to discuss and debate the full range of competing policy perspectives. Students can appreciate how each policy perspective leads to a different set of answers to the same basic Property Law questions.¹³² When a professor provides several policy perspectives, or regularly references policy arguments without an intervening framework to relate the policy perspectives, students might find it difficult, like comparing apples to oranges. The questions provide a structure within which students can compare and contrast answers to the questions, and see which questions are ignored or de-emphasized by one policy perspective compared to another.

This framework of questions is *neutral*; it does not take a position on any of the critical issues in Property theory, e.g., whether property rights are natural rights or positivist or what scope of individual protection ownership of property confers. The framework only surfaces and makes explicit the legal questions that courts are regularly called upon to answer—and must

¹³² See Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 531 (2005) (arguing that coherent policy perspectives have a general answer to all of the questions or at least offer principles and values by which to answer them).

answer—in Property Law.¹³³ The mere articulation of this framework suggests that several positions can be taken on each issue. The questions, in effect, mediate between theoretical conflicts and doctrine.

The approach is *educationally fertile*. Given that Property is a first year fundamental course, Property professors may want to both teach the students to “think like a lawyer,” and teach doctrine and policy. Using the framework of questions, we can do both because the framework links obscure property doctrines to the fundamental structure of *legal* issues which courts address. In service to a common pedagogical goal in first year courses, the framework increases students’ tolerance for ambiguity and offers opportunities to teach advocacy skills. Moreover, it teaches students to think in terms of overarching structure, rather than merely content—a push toward abstract thinking that is critical to higher, more theoretical applications of the law.

The framework of questions sets the stage in which important interpretative issues can be raised and engaged. Further, the framework of questions together with policy arguments and policy perspectives provides opportunities for students to advocate for certain rules over others as well as to explore the policy reasons for the development of the rules. Two advocates (or students) working from the same set of facts can argue that they raise different questions demonstrating the strategic importance of framing issues.¹³⁴ This approach helps students make sense of Property in the context of first year “foundational” courses focused on teaching the common law—learning law as it emerges from lawsuits—because it can demonstrate how effective lawyering includes successful framing of an issue to the court, and how courts exercise discretion in framing disputes by selecting which question(s) they will decide.

This approach is also *versatile*. It can be employed with any casebook and any teaching style or approach to Property Law—any

¹³³ This argument is consistent with the view that property law is an ongoing social conversation. See Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095 (1996); Steven J. Eagle, *The Really New Property: A Skeptical Appraisal*, 43 IND. L. REV. 1229 (2010) (contrasting “imposed top-down social change with Burkean and Oakeshottian gradual change derived from conversation with our legal and cultural tradition”). On this metaphor, this essay specifies the subject matter of that conversation when it is conducted in the courts. In particular, it articulates the *questions* that courts are regularly asked to *answer* in this legal conversation.

¹³⁴ For example, in *State v. Shack*, 58 N.J. 297 (N.J. 1971), the issue is usually discussed as a dispute about the “scope” of the right to exclude. However, Mr. Tedesco (the plaintiff) could be understood to be arguing like the plaintiff in *Jacque v. Steenberg Homes, Inc.*, 563 N.W. 2d.154 (Wis. 1997), that anything less than an unlimited right to exclude is no right to exclude at all.

variation on the Socratic method, problem-based course, practical lawyering based courses as well as more conceptual or theoretical approaches. It allows professors to continue to select which topics they will teach in the time available without sacrificing coherence.

There are an abundance of difficult problems, doctrines, and rules in Property Law that students must struggle to understand and apply to novel fact situations. While the framework avoids some unnecessary confusion, it does not simplify or wring the difficulty out of Property Law. In fact, the framework actually makes this complexity and uncertainty manifest. It merely provides a useful structure upon which to hang the difficulties.

CONCLUSION

This essay argues that even though Property theory is thoroughly contested, law professors can offer students a coherent structure for learning the doctrines and rules of Property Law. For purposes of teaching, the questions provide a structure for understanding the issues Property Law addresses. Without a framework students can get lost in the thicket of topics, doctrines, and rules.

Using the framework of questions presented in this essay, Property professors can orient students to the course, particular doctrines, and rules. Then they can use the questions as a regular point of reference for students to link doctrines and topics together. Further, they can demonstrate how different policy perspectives would approach and answer a particular question in a given case, and explore deeper theoretical issues.

Students can use these sets of questions to organize the issues, doctrines, and rules while keeping open to—indeed *revealing* in pedagogically helpful ways—the arenas of contemporary conflict in Property Law. The framework of questions creates a conceptual “tree” upon which students can hang doctrines and rules and explore controversies.

Appendix A: Comparing Coverage of Servitudes in Dukeminier, Krier, Alexander, and Shill, PROPERTY (7th ed.) with the Framework of Questions

Dukeminier et al., PROPERTY	Questions
Easements	
Historical Background and Some Terminology	Q #1 & 2
Creation of Easements <ul style="list-style-type: none"> • <i>Willard</i> • <i>Holbrook</i> • <i>Van Sandt</i> • <i>Othen</i> • <i>Raleigh Avenue</i> 	Q #3
Assignability of Easements <ul style="list-style-type: none"> • <i>Miller</i> 	Q #5
Scope of Easements <ul style="list-style-type: none"> • <i>Brown</i> 	Q #5 & 8
Termination of Easements <ul style="list-style-type: none"> • <i>Preseault</i> 	Q #7
Negative Easements	Q #1
Conservation and Other Novel Easements	Q #1, 2 & 3
Covenants Running with the Land	
Historical Background (RC and EE) <ul style="list-style-type: none"> • <i>Tulk</i> 	Q #1 & 2
Creation of Covenants <ul style="list-style-type: none"> • <i>Sanborn</i> 	Q #3
Validity and Enforcement of Covenants <ul style="list-style-type: none"> • <i>Neponsit</i> 	Q #8
Discriminatory Covenants <ul style="list-style-type: none"> • <i>Shelley</i> 	Q #5
Termination of Covenants <ul style="list-style-type: none"> • <i>Western Land</i> • <i>Rick</i> • <i>Pocono</i> 	Q #7
Common Interest Communities <ul style="list-style-type: none"> • <i>Nahrstedt</i> • <i>40 West 67th Street Corp.</i> 	Q #5 & 8

Appendix B: Where Are We Now? Handout

PROPERTY LAW
PROFESSOR IGLESIAS

Where Are We Now?

In our first class, we discussed the eight sets of questions that courts regularly answer in property law cases. This handout categorizes the property doctrines we are learning by reference to the primary questions we will cover when we learn that doctrine.

1. Is there a “property interest” at issue?
 - Servitudes
2. If it is property, what “type of property interest” is it?
 - Rule of Discovery
 - Doctrine of Adverse Possession
 - Estates & Future Interests
 - Concurrent Interests
 - Landlord-Tenant
 - Servitudes
3. How is this type of property interest created or acquired?
 - Rule of Discovery
 - Doctrine of Adverse Possession
 - Estates & Future Interests
 - Concurrent Interests
 - Landlord-Tenant
 - Servitudes
4. Who “owns” the property interest? How are competing ownership claims decided?
 - Rule of Discovery
 - Law of Capture
 - Law of Finding
 - Doctrine of Adverse Possession
 - Recording Acts

5. What “property rights” does ownership in this property entail, and with what limits/scope and duties?
 - Rule of Discovery
 - Estates & Future Interests
 - Concurrent Interests
 - Landlord-Tenant
 - Servitudes
 - Regulatory Takings

6. What is required to make a valid transfer of this property interest?
 - Law of Gift
 - Deeds

7. How long does the property interest last? How can the property interest be terminated?
 - Doctrine of Adverse Possession
 - Estates & Future Interests
 - Concurrent Interests
 - Landlord-Tenant
 - Servitudes
 - Power of Eminent Domain
 - Regulatory Takings

8. How are property rights in this kind of property enforced?
 - Estates & Future Interests
 - Concurrent Interests
 - Landlord-Tenant
 - Servitudes
 - Power of Eminent Domain
 - Regulatory Takings



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An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings

William J. Migler*

INTRODUCTION

“Colleges Face Legal Backlash from Men Accused of Sex Crimes.”¹ “In Battling Sexual Misconduct, Colleges Build a Bureaucracy.”² “UC President Napolitano to keep close tabs on Berkeley’s actions against sexual Misconduct.”³ “Biden, Gaga team up to raise awareness of sexual assault.”⁴

These headlines were taken from news stories regarding on-campus sexual assaults published within just one week, March 23, 2016 to March 30, 2016, by several mainstream news outlets. This recent level of headline volume tracks the rising public interest in the topic of on-campus assaults, with internet searches on the topic peaking around November 2015 and maintaining a high level of searches up to the time of writing.⁵

Spurred on by such media attention and public awareness of the issue, many universities have recently implemented new

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¹ Associated Press, *Colleges Face Legal Backlash From Men Accused of Sex Crimes*, N.Y. TIMES (Mar. 23, 2016, 1:57 PM), http://www.nytimes.com/aponline/2016/03/23/us/ap-us-universities-sexual-assault.html?_r=0.

² Anemona Hartocollis, *In Battling Sexual Misconduct, Colleges Build a Bureaucracy*, N.Y. TIMES (Mar. 30, 2016), <http://www.nytimes.com/2016/03/30/us/colleges-beef-up-bureaucracies-to-deal-with-sexual-misconduct.html>.

³ Teresa Watanabe, *UC President Napolitano to keep close tabs on Berkeley’s actions against sexual misconduct*, L.A. TIMES (Mar. 26, 2016, 2:46 PM), <http://www.latimes.com/local/lanow/la-me-ln-napolitano-sexual-misconduct-20160326-story.html> [<http://perma.cc/6UJ8-5H66>].

⁴ Josh Lederman, *Biden, Gaga team up to raise awareness about sexual assault*, BOS. GLOBE (Mar. 30, 2016), <http://www.bostonglobe.com/arts/2016/03/30/biden-gaga-team-raise-awareness-about-sexual-assault/eoCroOODVMwiZ1D9aZHy3L/story.html> [<http://perma.cc/L5KN-PSCJ>].

⁵ See GOOGLE TRENDS, <http://www.google.com/trends/> (last visited May 10, 2016) (search “campus sexual assault,” “college sexual assault,” “university sexual assault policies”). All three search terms show a low in and around June 2013 followed by acceleration in interest peaking around November 2015 with only a moderate decline through April 2016.

policies and procedures addressing sexual assault claims on their campuses.⁶ While many of these policies have created new departments or procedures to counsel victims and offer psychiatric help and other accommodations,⁷ many of these policies altered universities' procedures relating to the investigation and adjudication of sexual assault complaints. These alterations include varying types of procedural safeguards available to accused students in an accompanying disciplinary hearing.⁸ Critics of these policies have expressed concern that universities have overreached in their attempts to address this issue and that universities now give the accused too little protection with few procedural safeguards.⁹

This Note examines an accused student's right to one such procedural safeguard in a university disciplinary proceeding: the cross-examination of adverse witnesses. In Part I, this Note addresses the current magnitude of sexual assault on U.S. university campuses and also presents a survey of current university policies addressing this issue.

Part II discusses the relevant considerations in assessing whether an accused student should be permitted to cross-examine adverse witnesses, including the complainant, in a sexual assault case, either personally or through a representative, including counsel. This discussion includes studies on the effectiveness of cross-examination in general and the potential further harm vigorous cross-examination may inflict on a sexual assault victim in particular.

Lastly, Part III discusses the two primary sources of law governing university disciplinary proceedings, Title IX of the Education Amendments of 1972 ("Title IX") and an accused student's rights under the Due Process Clause.

⁶ See *infra* Part I(A).

⁷ As an example, the University of Washington makes available online brochures, a 24/7 hotline, and several counseling centers for sexual assault victims, available at Title IX – Resources, UNIV. OF WASH., <http://compliance.uw.edu/titleIX/resources> [<http://perma.cc/J42K-FDBE>]. Many universities offer similar services.

⁸ See *infra* Part I(B).

⁹ See, e.g., Hans Bader, *Proof and Campus Rape: Standards for Campus Disciplinary Proceedings*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (July 8, 2014), <http://www.thefire.org/proof-and-campus-rape-standards-for-campus-disciplinary-proceedings/> [<http://perma.cc/3WNQ-WEQH>]; Stuart Taylor Jr. & KC Johnson, *The New Standard for Campus Sexual Assault: Guilty until Proven Innocent*, NAT'L REV. (Dec. 30, 2015, 4:00 AM), <http://www.nationalreview.com/article/428910/campus-rape-courts-republicans-resisting> [<http://perma.cc/UC56-M97Y>].

I. THE PRESENT STATE OF UNIVERSITY DISCIPLINARY PROCEEDINGS

A. Magnitude of Sexual Assault on U.S. Campuses

Under federal law, both private and public universities receiving federal financial assistance must collect and publicize campus crime statistics annually.¹⁰

In 2014, the last year in which data was available at the time of writing, 11,688 forcible sexual offenses were reported to have occurred either on U.S. university campuses or in university student residence facilities.¹¹ Divided into separate categories, 8122 rapes¹² and 3566 other forcible sexual assaults were reported.¹³ It is important to note, however, that these numbers are likely far lower than the actual incidents of rape and sexual assault on campus, both of which are notoriously underreported crimes.¹⁴

Sexual assault has also been under-investigated on U.S. campuses. A recent report by Senator Claire McCaskill's office found that 41% of universities surveyed did not conduct one investigation into a sexual assault claim within the past five years, and 21% of responding schools had made fewer investigations than reported incidents of sexual assault on their campuses.¹⁵

There have been other recent attempts to better quantify the frequency of sexual assault on U.S. campuses. A 2015 survey by the Association of American Universities found that 27.2% of

¹⁰ 20 U.S.C. § 1092(f) (2016) (popularly known as the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act) [hereinafter Clery Act]. The database for these statistics is available at *Campus Safety and Security*, U.S. DEP'T. EDUC., <http://ope.ed.gov/campussafety/#/> (last visited May 12, 2016) [<http://perma.cc/F8ZV-32LM>]. This database allows an end-user to filter Clery Act data by year, type of crime, public or private university, on-campus or off-campus, etc.

¹¹ *Campus Safety and Security*, *supra* note 10 (follow "DICT" hyperlink). The Department of Education defines forcible sexual offenses to encompass "Forcible Rape," "Forcible Sodomy," "Sexual Assault with an Object," and "Forcible Fondling."

¹² *Id.* The Department of Education defines rape for Clery Act purposes as "the penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." *Id.*

¹³ *Id.* This number reflects what the Department of Education has called "forcible fondling." *Id.* Fondling is defined as "[t]he touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity." *Id.*

¹⁴ In 2014, only 33.6% of rapes/sexual assaults were reported to the police. Jennifer L. Truman & Lynn Langton, *Criminal Victimization, 2014*, BUREAU OF JUST. STAT. (2015), <http://www.bjs.gov/content/pub/pdf/cv14.pdf> [<http://perma.cc/3APC-AHDF>].

¹⁵ CLAIRE MCCASKILL, SEXUAL VIOLENCE ON CAMPUS 8–9 (2014), <http://www.mccaskill.senate.gov/imo/media/doc/SurveyReportwithAppendix.pdf> [<http://perma.cc/N8XM-3UZ3>].

responding female seniors attending U.S. universities had been subjected to some form of sexual assault.¹⁶ Separate surveys have found 90% of sexual assaults were perpetrated by individuals the victim knew before the assault,¹⁷ and about 50% of on-campus sexual assaults involved the use of alcohol.¹⁸ Alcohol, liberally available on college campuses, is known to reduce judgment and impulse control, and impair physical faculties, often leading to non-consensual sexual encounters.¹⁹

Numerous universities and student activist groups have, in recent years, intensified their efforts to illuminate the vulnerability of college students to sexual assault on campus.²⁰ As a response, many U.S. universities have introduced new policies, or revamped existing ones, to better combat this problem.²¹ This heightened awareness may also be due to several high profile on-campus sexual assault news stories²² and

16 Richard Pérez-Peña, *1 in 4 Women Experience Sex Assault on Campus*, N.Y. TIMES (Sept. 21, 2015), <http://www.nytimes.com/2015/09/22/us/a-third-of-college-women-experience-unwanted-sexual-contact-study-finds.html>; David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, WESTAT (Sept. 21, 2015), http://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf [<http://perma.cc/T7MN-4U9Q>].

17 *Victims and Perpetrators*, NAT'L INST. FOR JUSTICE (Oct. 26, 2010), <http://www.nij.gov/topics/crime/rape-sexual-violence/pages/victims-perpetrators.aspx> [<http://perma.cc/V7SU-G9QY>].

18 Antonia Abbey et al., *Alcohol and Sexual Assault*, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, <http://pubs.niaaa.nih.gov/publications/arh25-1/43-51.htm> [<http://perma.cc/U5HG-A7KK>].

19 *See College Drinking*, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM (Dec. 2015), <http://pubs.niaaa.nih.gov/publications/CollegeFactSheet/CollegeFactSheet.pdf> (noting that about 60% of college students drink alcohol once a month and about two-thirds of those engaged in binge drinking during that time) [<http://perma.cc/M8GD-33M7>].

20 *See, e.g.*, Sarah Ortlip-Sommers, *Students Start Sexual Assault Awareness Group After SoCo*, STANFORD DAILY (Oct. 23, 2015), <http://www.stanforddaily.com/2015/10/23/students-start-sexual-assault-awareness-group-after-soco/> [<http://perma.cc/59CV-YLYC>]; Micaela Corn, *New Pitt Initiatives Address Sexual Assault and Misconduct, Aim to Promote Safety and Awareness*, PITT CHRONICLE (Sept. 14, 2015), <http://www.chronicle.pitt.edu/story/new-pitt-initiatives-address-sexual-assault-and-misconduct-aim-promote-safety-and-awareness> [<http://perma.cc/E9MH-WCHS>].

21 *See, e.g.*, Madison Mills, *Harvard creates new sexual assault policy*, USA TODAY (July 4, 2014, 11:35 AM), <http://college.usatoday.com/2014/07/04/harvard-creates-new-sexual-assault-policy/> [<http://perma.cc/WDJ5-R5T4>]; Samantha Cooney, *Columbia unveils new sexual assault policy*, COLUMBIA SPECTATOR (Aug. 15, 2014, 12:08 PM), <http://columbiaspectator.com/news/2014/08/15/columbia-unveils-new-sexual-assault-policy> [<http://perma.cc/QWY6-426M>]; Alison Fu & Sophie Ho, *University of California releases new sexual harassment and violence policy*, THE DAILY CALIFORNIAN (Mar. 10, 2014), <http://www.dailycal.org/2014/03/07/university-california-releases-new-sexual-assault-violence-policy/> [<http://perma.cc/TVY8-NDYE>].

22 There are several notable examples. In the “Duke Lacrosse Case,” three members of the Duke Lacrosse team were accused of rape and other sexual offenses in 2006. Duke University maintains a website chronicling both the news reports and public reaction to the story. *See, e.g., Looking back at the Duke Lacrosse Case*, DUKE OFFICE OF NEWS & COMM., <http://today.duke.edu/showcase/lacrosseincident/> [<http://perma.cc/AZY8-5RDT>].

lawsuits filed against universities, some resulting in six and seven-figure settlements.²³

On-campus sexual assault has also garnered state and federal governmental scrutiny. In 2014, the Department of Education launched a probe into 55 universities' practices regarding how they conduct campus sexual assault claim investigations.²⁴ Separate from this probe, the Department of Education's Office of Civil Rights ("OCR") has issued several publications directing universities receiving federal financial assistance on how to comply with Title IX's requirements for investigating and adjudicating sexual assault complaints.²⁵

Another example is the University of Virginia Rolling Stones magazine article. The magazine ultimately had to retract and apologize to the school for its erroneous reporting of an alleged gang rape of a woman named "Jackie" by members of a UVA fraternity. *See, e.g.,* Roger Yu, *Rolling Stone backs off from U. Va. Rape story*, USA TODAY (Dec. 6, 2014, 8:09 AM), <http://www.usatoday.com/story/money/business/2014/12/05/rolling-stone-retracts-uva-story/19954293/> [<http://perma.cc/U5PC-3S7Y>].

Lastly, many news outlets chronicled the story of Emma Sulkowicz, known to some as the "Mattress Girl." Sulkowicz carried around a mattress wherever she went to protest Columbia University's allegedly inadequate response to her complaint that she was raped by a fellow student. *See, e.g.,* Vanessa Grigoriadis, *Meet the College Women Who Are Starting a Revolution Against Campus Sexual Assault*, NYMAG.COM (Sept. 14, 2014, 9:00 PM), <http://nymag.com/the-cut/2014/09/emma-sulkowicz-campus-sexual-assault-activism.html> [<http://perma.cc/UWW3-295R>].

²³ *See* Marc Tracy, *Florida State Settles Suit Over Jameis Winston Rape Inquiry*, N.Y. TIMES (Jan. 25, 2016), http://www.nytimes.com/2016/01/26/sports/football/florida-state-to-pay-jameis-winstons-accuser-950000-in-settlement.html?_r=0 (stating that plaintiff and defendant university agreed to a \$950,000 settlement over a claim that the university did not adequately investigate plaintiff's rape complaint); Allison Sherry, *CU settles case stemming from recruit scandal*, DENV. POST (Dec. 6, 2007, 1:00 AM), <http://www.denverpost.com/2007/12/05/cu-settles-case-stemming-from-recruit-scandal/> (reporting that University of Colorado settled with a former student for \$2.85 million after she was gang raped at a party held for University of Colorado football recruits) [<http://perma.cc/SX4K-7NJZ>]; Anita Wadhvani & Nate Rau, *Sweeping sex assault suit filed against University of Tennessee*, TENNESSEAN (Feb. 14, 2016, 4:34 PM), <http://www.tennessean.com/story/news/2016/02/09/sweeping-sexual-assault-suit-filed-against-ut/79966450/> (reporting that six plaintiffs filed a complaint against University of Tennessee, alleging the university failed to adequately respond to claims of sexual assault) [<http://perma.cc/98E6-8VRS>]; Andrew M. Duehren & Daphne C. Thompson, *Recent Graduate Sues Harvard Over Sexual Harassment Case*, HARV. CRIMSON (Feb. 18, 2016, 2:15 AM), <http://www.thecrimson.com/article/2016/2/18/lawsuit-sexual-harassment-2016/> (reporting that plaintiff filed suit for, among other Title IX violations, a failure to "follow federal guidance on university sexual harassment investigations") [<http://perma.cc/4CWY-ELMS>].

²⁴ *Press Release: Education Institutions with Open Title IX Sexual Violence Investigations*, U.S. DEPT OF EDUC. OFF. FOR CIVIL RIGHTS (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i> [<http://perma.cc/ZW6J-FC4Q>].

²⁵ *See Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEPT OF EDUC. OFF. FOR CIVIL RIGHTS (Jan. 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<http://perma.cc/EW26-57Y9>]; Russlynn Ali, *Dear Colleague*, U.S. DEPT OF EDUC. OFF. FOR CIVIL RIGHTS 1, 4 (Apr. 4, 2011), www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter *2011 Dear Colleague Letter*] [<http://perma.cc/F87R-ZK74>]; Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEPT OF EDUC.

Additionally, California and New York have recently passed new “affirmative consent” legislation that raises the standard for what constitutes consent in an on-campus sexual encounter.²⁶

B. Current University Policies

There is no Clery Act equivalent when it comes to reporting how many university disciplinary proceedings have arisen from alleged sexual assaults, though it has been posited that the amount of such disciplinary proceedings numbers in the thousands per any given year.²⁷ Universities are not obligated by federal law to track and report how many disciplinary proceedings they perform a year or how they conduct said proceedings.²⁸ There have been three surveys regarding how universities conduct their disciplinary proceedings within the past two decades.²⁹ According to the 1999 Berger & Berger article survey, 86.2% of responding schools allowed an accused student to cross-examine or otherwise confront “witnesses”³⁰ for an academic misconduct charge.³¹ Senator McCaskill’s survey, specifically assessing university policies pertaining to sexual assault, found that 67% of responding schools allow a student

OFF. FOR CIVIL RIGHTS (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<http://perma.cc/J5MX-FNSF>].

²⁶ See CAL. EDUC. CODE § 67386(a)(1) (West 2016) (“Affirmative consent means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.”); N.Y. EDUC. CODE § 6441 (McKinney 2016) (substantially similar to the California statute).

²⁷ See Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 50 (2013).

²⁸ While one may think that Clery Act statistics would be a good proxy for disciplinary proceedings data, that is not the case. The Clery Act requires disclosure of all crimes committed on-campus, including those perpetrated by non-students. Additionally, Clery Act statistics do not track the eventual university disposition, if any, of a reported crime.

²⁹ See Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 295–96 (1999); MCCASKILL, *supra* note 15, at 10–12.

³⁰ The term “witnesses” is vague in both the Berger & Berger article and the McCaskill report because it is not clear whether this includes the complainant, which technically a complainant is a witness, or if it only means other witnesses called by the complainant or university. See Berger & Berger, *supra* note 29, at 297–300; MCCASKILL, *supra* note 15, at 108.

³¹ Berger & Berger, *supra* note 29, at 356–58. According to this survey, 93.1% of public institutions afforded students the right to cross-examine witnesses, contrasted against 81.8% of private institutions. *Id.* Note that the Berger & Berger article was concerned only with adjudicating academic misconduct and not sexual misconduct.

accused of sexual assault to “question and call witnesses.”³² And in a recently published article, Professor Tamara Rice Lave surveyed the top fifty “flagship” U.S. universities regarding their disciplinary procedures and found that only 10% of those surveyed afford an accused student an unlimited right to cross-examination, while 72% allow for some questioning through a panel or investigator.³³

For this article, the author has conducted a separate survey³⁴ examining publicly available university student handbooks and codes of conduct to determine what schools, based on their stated policies, allow an accused student to cross-examine their accuser and other adverse witnesses. The vast majority of these policies are current through the 2015–16 academic year.

According to their stated policies, 29% of universities explicitly allow an accused student to directly question the complainant or other adverse witnesses.³⁵ Furthermore, 27% of universities do not allow for direct cross-examination of the complainant by the accuser or his/her representative, but do allow for some questioning through either written submissions or via an intermediary party, such as the members of a hearing panel.³⁶ Lastly, 44% of universities either do not allow

³² MCCASKILL, *supra* note 15, at 108. Similar to the Berger & Berger survey, the McCaskill survey found public institutions offered cross-examination more readily than private institutions. 87% of responding public schools offer the ability to question witnesses, while only 67% of private not-for-profit schools do so.

Unfortunately, and similarly to the Berger & Berger article, it is ambiguous as to who constitutes a “witness” and what constitutes “questioning” for the purposes of the McCaskill study. As will be noted in the footnotes below, “questioning” may take the form of either the accused student’s representative directly questioning witnesses or the accused student being required to first pose questions through the hearing administrators, who will then ask the questions they deem appropriate to a given witness. It is also unclear from the McCaskill survey if the witnesses the accused student is allowed to question are adverse witnesses or only the witnesses the student calls on his behalf.

³³ Tamara Rice Lave, *Ready, Fire, Aim: How Universities are Failing the Constitution in Sexual Assault Cases*, 48 ARIZ. ST. L.J. 637, 658 (2016).

³⁴ See *infra* App. A for the details of this survey’s sampling and research methodology.

³⁵ See *infra* App. B for the list of universities. It is important to note that this number only includes those schools that allow the accused or his/her representative to directly ask witnesses questions or do not have explicit language to the contrary. This is different than merely allowing the accused and the complainant to be in the same room during a hearing.

³⁶ See *infra* App. C for the list of universities. See, e.g., *Code of Student Rights, Responsibilities & Conduct*, IND. UNIV. (2016), <http://studentcode.iu.edu/procedures/iu-wide/sexual-misconduct.html> (“No one other than the hearing panel members, the complainant, and the respondent may pose questions during the hearing. The complainant and respondent may not directly question each other, but may submit questions to the Chair, to be asked of the other party. The Chair or other panel members will review questions prior to posing to the other party to prevent questioning that is not permitted under these proceedings.”) [<http://perma.cc/9NP2-MZQ4>].

questioning of witnesses of any kind or do not explicitly give accused students the ability to pose questions to adverse witnesses, be it directly or through a panel.³⁷ It is necessary to note that these statistics reflect only the stated policies of these universities; some schools allow administrators to adjust the procedures given the facts of a particular case.³⁸

In summation, this survey found 56% of schools, in their stated policies and procedures, allow an accused student some form of questioning, while 44% do not. This is a number lower than those found in the McCaskill and Lave surveys.³⁹

There may be several reasons for these discrepancies.⁴⁰ First, the McCaskill survey was conducted in 2014, a time at the relative beginning of the recent heightened awareness of this issue and before many universities had instituted their new policies.⁴¹

Second, this Note's survey relied solely on the language of the sampled universities' stated policies and procedures, whereas both the McCaskill and Lave surveys relied on answers given by the universities.⁴² It is possible a school which does not provide for an accused student to question witnesses in their stated policies may still, in practice, allow for questioning.

Lastly, the most likely compelling reason for the discrepancies between this Note's survey and the McCaskill and Lave surveys is due to statistical sampling. The McCaskill survey divided the university population into various strata based on enrollment size and equally distributed sampling in those

³⁷ See *infra* App. D for the list of universities. This number includes universities that, in their stated policies, allow the adjudicating body to ask questions of, or interview, the accused, the complainant, and other witnesses, but does not give that right to the accused in any form. See, e.g., *Procedures for Handling Complaints Involving Students Pursuant to the Sexual and Gender-Based Harassment Policy*, HARV. UNIV. (2014), http://hls.harvard.edu/content/uploads/2014/09/harvard_sexual_harassment_procedures_student1.pdf (allowing only the university's "Investigative Team" to conduct interviews of the accused, complainant, and other witnesses) [<http://perma.cc/36K6-D64X>].

³⁸ See, e.g., *Student Conduct System*, BOS. COLLEGE § 5.4 (2016–17), http://www.bc.edu/publications/student_guide/judicial.html ("The Dean of Students or designee has the discretion of what format a formal hearing will take based upon the complexity of the case, availability and type of evidence, and the sensitivity of the incident.") [<http://perma.cc/4YB8-2VUB>].

³⁹ See *supra* notes 32, 33 and accompanying text.

⁴⁰ Because the creators of both the McCaskill and Lave surveys obtained their information on the basis of anonymity, the surveys leave the identities of the responding schools confidential. It is thus impossible to know exactly how a given school responded and to verify if a given school responded to the survey in the same manner this Note's survey has found. MCCASKILL, *supra* note 15, at 4; Lave, *supra* note 33, at 654.

⁴¹ Several high-profile universities announced their new sexual assault policies after the commencement/publication of the McCaskill survey. See *supra* note 21 and accompanying text for several examples.

⁴² MCCASKILL, *supra* note 15, at 3; Lave, *supra* note 33, at 654.

strata.⁴³ The McCaskill survey also specifically included the top fifty most-attended public U.S. institutions and the top forty most-attended private U.S. institutions in its survey, thus giving these schools an outsized weight in the survey's results.⁴⁴ Similarly, the Lave study solely included responses from the fifty "flagship" U.S. universities, as defined by the *Journal of Blacks in Higher Education*.⁴⁵ This Note's survey made no similar limitation on sampling of the U.S. college and university population and gave no special weight to the top fifty public and forty private universities.

II. CONSIDERATIONS BEARING ON THE USE OF CROSS-EXAMINATION IN UNIVERSITY DISCIPLINARY PROCEEDINGS INVOLVING ALLEGED SEXUAL ASSAULT

The right to counsel, the right against self-incrimination, and the preponderance of the evidence standard in the context of university disciplinary proceedings have been examined thoroughly by other commentators.⁴⁶ This Part focuses on the cross-examination of witnesses in such proceedings adjudicating sexual assault claims, and examines both the possible virtues and disadvantages of requiring universities to give the accused student some use of this venerable fact-finding instrument.

A. Cross-examination as a Test of Credibility

The process of cross-examination has been dubbed the "greatest legal engine ever invented for the discovery of truth"⁴⁷ and is one of the main points of distinction between Anglo-American common law trials and continental civil law proceedings.⁴⁸ A criminal defendant's right to confront and

⁴³ *Id.* at 3–4.

⁴⁴ *Id.* at 4.

⁴⁵ Lave, *supra* note 33, at 654.

⁴⁶ See Douglas R. Richmond, *Students' Right to Counsel in University Disciplinary Proceedings*, 15 J.C. & U.L. 289, 298–302 (1989) (discussing a student's Due Process right to have counsel present at a disciplinary proceeding); Paul E. Rosenthal, *Speak Now: The Accused Student's Right to Remain Silent in Public University Disciplinary Proceedings*, 97 COLUM. L. REV. 1241, 1260–68 (1997) (discussing whether a student's silence during a university disciplinary proceeding should be allowed as evidence against him); Barclay Sutton Hendrix, *Feather on One Side, a Brick on the Other: Tilting the Scale against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 610–15 (2012) (discussing the implications of the preponderance of the evidence standard in university disciplinary proceedings, particularly in sexual assault cases after the 2011 Dear Colleague Letter).

⁴⁷ *Lilly v. Virginia*, 527 U.S. 116, 124 (1999) (quoting *California v. Green*, 399 U.S. 149, 158 (1970)); see also JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 1967 (1904).

⁴⁸ See *Crawford v. Washington*, 541 U.S. 36, 43 (2004) ("The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.").

cross-examine his accuser is enshrined in the Sixth Amendment to the U.S. Constitution,⁴⁹ and all U.S. jurisdictions generally allow for cross-examination of opposing witnesses in adversarial civil litigation.⁵⁰

The main purported function of cross-examination is to test the veracity of a witness, be it on the stand or at a deposition.⁵¹ This allows the examining party not only a chance to “catch” a witness in a falsehood or half-truth,⁵² but it also allows the trier-of-fact to observe the demeanor of the witness and to gauge body language, inflection, and other potential indicia of untruthfulness that comes only with contemporaneous observation.⁵³ The need for the fact-finder to both listen to and physically observe the testifying witness during questioning is one of the justifications advanced for the rule barring the use of hearsay evidence.⁵⁴

An accused student in a university disciplinary proceeding could benefit from cross-examining his accuser in several ways. First, the only practical defenses to a charge of sexual assault are an outright denial of the underlying facts or consent from the victim to the encounter.⁵⁵ Because most sexual assaults occur in a place of seclusion, the complainant may be the only person (other than the perpetrator) with knowledge or information as to the existence of the incident or the identity of the attacker.⁵⁶ As

49 U.S. CONST. amend. VI. (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

50 See, e.g., FED. R. EVID. 611(b); CAL. EVID. CODE §§ 711, 773 (West 2016).

51 See *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (“Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.”); *Crawford*, 541 U.S. at 61–62 (“[O]pen examination of witnesses . . . is much more conducive to the clearing up of truth.”) (quoting SIR WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 373 (13th ed. 1800)); Dan Simon, *Adjudicating the Guilty Mind: More Problems with Criminal Trials: The Limited Effectiveness of Legal Mechanisms*, 75 L. & CONTEMP. PROBS., 167, 171 (2012) (“[C]ross examination could improve the diagnosticity of the trial . . . by exposing mistakes or lies in the course of [the] cross-examination itself.”).

52 Simon, *supra* note 51, at 170.

53 See *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496 (1951) (“[M]aterial facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct . . .”); FED. R. EVID. 804(b)(1) advisory committee’s note (“[O]pportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination.”).

54 See FED. R. EVID. Article VIII advisory committee’s note (“Emphasis on the basis of the hearsay rule today tends to center upon the condition of cross-examination The belief, or perhaps hope, that cross-examination is effective in exposing imperfections of perception, memory, and narration is fundamental.”).

55 See LYNDA LYTLE HOLSTROM & ANN WOLBERT BURGESS, *THE VICTIM OF RAPE: INSTITUTIONAL REACTIONS* 171 (1974); LAURIE L. LEVENSON & ALEX RICCIARDULLI, *CALIFORNIA CRIMINAL LAW § 7:24* (2015) (noting that aside from consent or denial of the events, there are very few other practical defenses to sexual assault).

56 Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 *FORDHAM L. REV.* 263, 299 (2002). *But see* Susan Estrich, *Rape*, 95 *YALE L.J.* 1087, 1088

to the question of the complainant's consent (or lack thereof), the complainant has particular knowledge as to her state of mind leading up to, during, and after the alleged assault.⁵⁷ Allowing the accused the opportunity to question the complainant about any contradictory words or actions of the complainant related to the issue of her consent before, during, and after the alleged assault may buttress the accused's defense. Cross-examination would also allow the accused to bring out any potential bias or ulterior motives of the complainant or other adverse witnesses.⁵⁸

Additionally, many schools have adopted a preponderance of the evidence standard for determining liability in sexual assault cases,⁵⁹ tracking the Department of Education's guidance.⁶⁰ Given the typical lack of physical evidence or other eyewitness testimony, allowing the accused the ability to vigorously question the complainant's testimony may be, in some cases, the best way for the accused to show it is more likely that he did not commit the alleged sexual assault.⁶¹

(1986) (recounting her own rape, the author notes that she could not easily identify her rapist later because “[n]o one had ever told me that if you’re raped, you should not shut your eyes and cry for fear that this really is happening. You should keep your eyes open focusing on this man who is raping you so you can identify him when you survive.”).

⁵⁷ See Charlow, *supra* note 56, at 299 (“[T]he dynamics of intimate social interaction between the sexes, in which one’s desires may be mixed and are frequently unspoken, only adds to the complexity of the problem, as it often may not be clear whether or not sex was desired.”); Alan Wertheimer, *What is Consent? And is it Important?*, 3 BUFF. CRIM. L. REV. 557, 559 (2000) (noting that individuals have their own internal perceptions as to what events are taking place in a sexual encounter).

⁵⁸ See *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (“A more particular attack on the witness’ credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness . . . ‘is always relevant as discrediting the witness and affecting the weight of his testimony.’”) (internal citation omitted); *State v. Texter*, 594 A.2d 376, 377–78 (R.I. 1991) (finding it was error to preclude defendant, on cross-examination, from questioning the victim as to the potential that she and her husband fabricated a sexual assault claim in retaliation for the defendant accusing the husband of theft).

⁵⁹ The vast majority of those schools cited to in Appendices B, C, and D use the preponderance of the evidence standard for sexual assault claims. See, e.g., *Sexual Violence and Sexual Harassment*, UNIV. OF CA. 1, 12 (Dec. 18, 2015), <http://policy.ucop.edu/doc/4000385/SVSH> (“For all other matters the report will include an analysis and determination by the investigator of whether this [sexual assault] *Policy* has been violated. The investigator will apply the preponderance of evidence standard.”) [<http://perma.cc/7YAY-97D9>].

⁶⁰ 2011 *Dear Colleague Letter*, *supra* note 25, at 11 (“[P]reponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.”).

⁶¹ See Barclay Sutton Hendrix, *A Feather on One Side, a Brick on the Other: Tilting the Scale against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 617 (2012) (arguing that given the lower evidentiary threshold of a preponderance of the evidence standard, cross-examination is a means to “reduce the risk of an erroneous finding of guilt”).

Lastly, a study found that a witness's susceptibility to common cross-examination "techniques," such as leading questions and double negative questions, can be mitigated if the witness is made aware, even minimally so, of what to expect during cross-examination, improving the witness's ability to accurately testify.⁶²

B. Cross-Examination May Actually Hinder Fact-Finding in a Sexual Assault Case

There are numerous potential issues with applying courtroom-style cross-examination to a university disciplinary proceeding in general and to cases involving sexual assault victims in particular. By not allowing cross-examination of student sexual assault complainants, issues inherent to cross-examination and issues arising from psychological trauma could be avoided.

1. General Issues with Cross-Examination

The first issue is that cross-examination, despite the reverence it receives in the American legal system, is not as effective at finding "the truth" as believed. Research, which virtually all speaks against cross-examination's effectiveness, suggests several things. First, cross-examination does little to affect the testimony of a prepared and/or skillful lying witness.⁶³ Due to an observed phenomenon known as the "probing effect,"⁶⁴ a trier-of-fact may gain false confidence in the testimony of an inaccurate witness when it observes the witness deftly answer questions posed to him/her, despite the witness's actual inaccuracy.⁶⁵

Relatedly, cross-examination does little to affect the testimony of witnesses with mistaken memory.⁶⁶ Cross-examination will not be effective in eliciting the "truth" from a witness who honestly, yet mistakenly, believes their memory and relies on that false

⁶² Jacqueline M. Wheatcroft & Louise E. Ellison, *Evidence in Court: Witness Preparation and Cross-Examination Style Effects on Adult Witness Accuracy*, 30 BEHAV. SCI. & L. 821, 833–36 (2012). The authors note that witness accuracy rose dramatically even when the "preparation" was something as simple as a guidance leaflet detailing what happens during cross-examination. *Id.*

⁶³ Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 MICH. L. REV. 241, 249 (2006).

⁶⁴ *Id.* at 249. The "probing effect" "suggest[s] that watching a potential liar being probed causes [triers-of-fact] to become falsely confident that they can distinguish truth from falsity, thereby creating a 'truth bias' that leads them to assume—because they are focusing on the wrong cues—that the liar is telling the truth." *Id.* at 249–50 n.45.

⁶⁵ *Id.* at 249.

⁶⁶ See Simon, *supra* note 51, at 170.

memory for their testimony.⁶⁷ This is further exacerbated if the witness is the only witness to a particular fact.⁶⁸ In a sexual assault case, cross-examination would do little to derive the truth of an assailant's identity or the grant of consent if the complainant is a skillful liar who has plotted a plausible (but inaccurate) version of the facts or is relying on an honest but false memory.

Second, cross-examination itself may often force witnesses to change their testimony only because of the pressure put on them by the cross-examining attorney.⁶⁹ In a 2011 study, 73% of participating witnesses recanted at least one accurate fact stated in their testimony after forceful questioning,⁷⁰ 84% of the witnesses conceded at least once that they may have been mistaken as to one fact about which they were actually correct, and 68% of the witnesses conceded they may have been mistaken as to two or more facts.⁷¹ Many commentators note that the use of common cross-examination techniques, such as leading questions, negative feedback,⁷² and double or triple negative questions, lead either to confusion, memory distortion, or the witness just relenting and agreeing with the examining attorney.⁷³

It is not difficult to imagine that on cross-examination a student sexual assault complainant may become confused and change her testimony if she is subjected to a "rapid-fire mode of questioning" and forced to give quick answers without

⁶⁷ *Id.* ("Memory research indicates that people tend to trust their memories, regardless of the accuracy of those memorial accounts. Given that mistaken witnesses perceive themselves to be accurate, they are unlikely to be deterred from recounting their (actually false) memories any more than accurate witnesses would be deterred from recounting their (truly correct) ones.").

⁶⁸ *Id.* at 171.

⁶⁹ It is important to note that a cross-examining attorney is not always trying to elicit the "truth." Rather, he/she is trying to further the interests of his/her client. See Sara D. Schotland, *Rape Victims as Mockingbirds: A Law and Linguistics Analysis of Cross-Examination of Rape Complainants*, 19 *BUFF. J. GENDER L. & SOC. POLY* 1, 28 (2010) (noting that a cross-examining criminal defense attorney has "no reason or duty to be polite: rather, the attorney's duty of loyalty requires that (s)he take all ethical steps to secure acquittal").

⁷⁰ Tim Valentine & Katie Maras, *The Effect of Cross-Examination on the Accuracy of Adult Eyewitness Testimony*, 25 *APPLIED COGNITIVE PSYCHOL.* 554, 557–59 (2011) (finding 36% of mock witnesses changed their answer to one fact, 23% changed two answers, and 14% changed three answers, although none of the witnesses changed all four answers).

⁷¹ *Id.* at 559.

⁷² Negative feedback in the Valentine & Maras study took the form of the examining attorney "feigning disbelief" as to what the witness just testified to or accusing the witness of lying because they had contradicted another (non-existent) witness. *Id.* at 558–59.

⁷³ *Id.* at 559; Simon, *supra* note 51, at 172; Mark R. Keibell & Shane D. Johnson, *Lawyers' Questioning: The Effect of Confusing Questions on Witness Confidence and Accuracy*, 24 *LAW & HUM. BEHAV.* 629, 634, 637 (2000); Jacqueline M. Wheatcroft et al., *The Influence of Courtroom Questioning Style on Actual and Perceived Eyewitness Confidence and Accuracy*, 9 *LEGAL & CRIMINOLOGICAL PSYCHOL.* 83, 83 (2004).

being able to thoroughly explain facts that help support her side of the story.⁷⁴

2. Cross-examination of Sexual Assault Complainants

Allowing cross-examination of a sexual assault complainant raises issues separate than those relayed above—it may cause further psychological harm to the complainant.⁷⁵ This harm may then cause the complainant to provide inaccurate testimony.⁷⁶ It has been posited that cross-examination is one of the reasons sexual assault is vastly underreported,⁷⁷ both on campus⁷⁸ and in the general population.⁷⁹

It is undebatable that rape is “without question one of the most terrifying crimes in which the victim survives. Its consequences remain with the victim for many years or perhaps a lifetime, often accounting for deep psychological problems.”⁸⁰ Rape Trauma Syndrome (“RTS”) is a form of posttraumatic stress disorder set off by a sexual assault or attempted sexual assault.⁸¹ There are two phases of RTS: the acute phase⁸² and the

⁷⁴ Schotland, *supra* note 69, at 28.

⁷⁵ See *State v. Sheline*, 955 S.W.2d 42, 44 (Tenn. 1997) (“It has been said that the victim of a sexual assault is actually assaulted twice—once by the offender and once by the criminal justice system.”); Linda Mohammadian, *Sexual Assault Victims v. Pro Se Defendants: Does Washington’s Proposed Legislation Sufficiently Protect Both Sides?*, 22 CORNELL J.L. & PUB. POL’Y 491, 493 (2012) (noting that cross-examination may cause “revictimization” because it forces a complainant to “relive” the assault).

⁷⁶ See *Maryland v. Craig*, 497 U.S. 836, 857 (1990) (citing *Coy v. Iowa*, 487 U.S. 1012, 1032 (Blackmun, J., dissenting) (noting that face-to-face confrontation between the accused and a child abuse victim disserves the truth-seeking ends of the Confrontation Clause because the confrontation might so overwhelm the witness as to “prevent the possibility of effective testimony”)).

⁷⁷ See Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1357 (2005) (“[V]ictim’s willingness to report crimes varies inversely with their fear of embarrassment during cross-examination.”); Mohammadian, *supra* note 75, at 503 (“Sexual assault victims . . . fear the legal system because the trial often forces the victims, who may already suffer from psychological trauma, to relive the experience of the attack.”).

⁷⁸ MCCASKILL, *supra* note 15, at 4 (citing to Department of Justice statistics, stating that less than 5% of on-campus rapes are reported to law enforcement).

⁷⁹ In 2014, only 33.6% of rapes/sexual assaults were reported to the police. Truman, *supra* note 14.

⁸⁰ Mohammadian, *supra* note 75, at 502–03.

⁸¹ See Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 425–26 (1986).

⁸² The acute phase occurs immediately after the attack and is usually indicated by feelings of “shock, fear, humiliation, vulnerability, powerlessness, anxiety, and disgust” as well as physical reactions, such as sleeping disorders, general soreness, headaches, fatigue, gastrointestinal irritability, and genitourinary disturbances. *Id.* at 426–27. The acute phase may last between three and four months. Fiona Mason & Zoe Lodrick, *Psychological Consequences of Sexual Assault*, 27 BEST PRAC. & RES. CLINICAL OBSTETRICS AND GYNAECOLOGY, 27, 31 (2012).

long-term reorganization phase.⁸³ The symptoms of RTS may manifest differently in each individual sexual assault victim,⁸⁴ and it is these disparate manifestations that may sometimes result in behavior that triers-of-fact may not “expect” from a sexual assault victim.⁸⁵

These RTS symptoms may also affect the ability of the complainant to testify. Because of the trauma, complainants may give contradictory or incomplete testimony that appears to be at odds with their accusations.⁸⁶ Such issues may only compound if the complainant’s alleged assailant is in view.⁸⁷

Another issue is that in many sexual assault adjudications, the defense’s best strategy is to shift the trier-of-fact’s attention away from the defendant and onto the complainant, exposing every personal flaw possible in order to undermine her credibility.⁸⁸ Such evidence is typically only used to attack the credibility of the complainant and does not necessarily aid the trier-of-fact in determining the truth about what actually occurred.⁸⁹ This hard-charging exploration into the sexual assault victim’s personal life, as well as the general inference

⁸³ In the long-term reorganization phase, the sexual victim is trying to reorganize her life but may develop anxiety, depression, sexual and interpersonal dysfunction, and may experience “traumatophobias”—defensive avoidance reactions to the circumstances of their sexual assault. Massaro, *supra* note 81, at 426–28.

⁸⁴ See Mason, *supra* note 82, at 31.

⁸⁵ For instance, during an assault, many women do not resist their assailant and many do not immediately report the assault due to disbelief or denial, which is contrary to how most people believe they would react under similar circumstances. *Id.* at 29–30, 32. Additionally, while some women are emotionally demonstrative in the immediate hours and days after their assault, many others remain calm and controlled. *Id.* at 31; Massaro, *supra* note 81, at 425.

⁸⁶ See Mason, *supra* note 82, at 32 (arguing that while a sexual assault complainant’s inconsistent or incomplete testimony is typically misinterpreted to be evidence of fabrication, the inverse should be inferred given the nature of PTSD).

⁸⁷ See *id.* at 33 (noting that being reminded or required to recount their sexual assault in a courtroom setting, where their assailant is likely to be, may exacerbate symptoms of PTSD); Lininger, *supra* note 77, at 1360 (noting that a trial may be a complainant’s first face-to-face encounter with her assailant and that she may perceive cross-examination as another attack on her through the defense counsel); see also Mohammadian, *supra* note 75, at 493–94 (recounting a case where a sexual assault complainant contemplated suicide rather than be cross-examined by her alleged assailant who was a *pro se* defendant).

⁸⁸ See Lininger, *supra* note 77, at 1361 (noting that cross-examination of a sexual assault witness is akin to “public psychoanalysis” of the complainant because cross examination may explore “[h]er most private affairs—including her past romantic relationships, her sexual mores, her psychological fortitude, and her loyalty to family members . . .”); Jennifer L. Hebert, *Mental Health Records in Sexual Assault Cases: Striking a Balance to Ensure a Fair Trial for Victims and Defendants*, 83 TEX. L. REV. 1453, 1461 (2005) (noting that the character of a sexual assault complainant is heavily emphasized by the defense because the issue at trial “is not whether a rape actually occurred, but whether people believe a rape occurred”).

⁸⁹ See Lininger, *supra* note 77, at 1360 (noting that defense attorneys will explore any real or perceived character flaws of the complainant during cross-examination).

that she is either lying or willingly brought about the acts she claims was an assault, may only lead to further trauma.⁹⁰

III. LEGAL ISSUES SURROUNDING UNIVERSITY DISCIPLINARY PROCEEDINGS

There are several sources of law that bear most directly on the procedural safeguards afforded to accused students in university disciplinary proceedings. A student may have contractual rights to be dealt with in accordance with good faith and fair dealing,⁹¹ or he may have rights under state law.⁹² Two other sources of law, and those examined in Part III, are Title IX and the Due Process Clause of the Fourteenth Amendment.

A. Title IX Rights of Both the Accused and the Complainant

Title IX states “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”⁹³ Assuming they are enrolled in a university that receives federal funding, both the complainant and accused student have the same general right to be free from sex discrimination by their university. How their respective Title IX rights can be implicated in the context of a university disciplinary proceeding, however, is vastly different.

1. Complainant’s Rights Under Title IX

Title IX provides student complainants a private cause of action against their universities when the university has been “deliberately indifferent” to their sexual assault,⁹⁴ thereby subjecting complainants to a “hostile environment” on account of

⁹⁰ See Mason, *supra* note 82, at 33 (noting that some women suffer severe anxiety when recounting their sexual assault).

⁹¹ See, e.g., Berger & Berger, *supra* note 29, at 313–17, 331–37 (arguing, *inter alia*, that Due Process is a contractual right private university students have under the doctrine of good faith and fair dealing). This theory may be available provided that there is no direct, express policy governing disciplinary proceedings.

⁹² Several states have passed statutes on what types of procedures schools and universities must use in disciplinary proceedings. 22 PA. CODE § 505.3 (2016); S.C. CODE ANN. § 59-63-240 (2016); WASH. ADMIN. CODE § 478-120-095 (2016). Additionally, courts in several states have judicially determined what level of safeguards are required in disciplinary proceedings. See *infra* Part III(B).

⁹³ 20 U.S.C. § 1681(a) (1972).

⁹⁴ Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999) (concluding that Title IX grants students a private cause of action against their school for student-on-student sexual harassment when the school “act[s] with *deliberate indifference* to known acts of harassment,” so long as the harassment is “so severe, pervasive, and objectively offensive” that it effectively bars the victim’s access to an education) (emphasis added).

their gender.⁹⁵ A student complainant may suffer a deprivation of her Title IX rights if the university fails to timely adjudicate, or improperly adjudicates, her sexual assault claim.⁹⁶

The OCR has addressed the use of cross-examination in university disciplinary proceedings in one of its “Dear Colleague” letters, a series of publications addressed to universities which offer guidance⁹⁷ on Title IX compliance.⁹⁸ In the 2011 Dear Colleague Letter, the OCR stated it “strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing.”⁹⁹ The OCR’s reasoning is that “[a]llowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”¹⁰⁰ The 2011 Letter was later supplemented by a 2014 “Questions and Answers on Title IX and Sexual Violence” FAQ which,

⁹⁵ In this context, a “hostile environment” is one in which a university’s deliberate indifference to the sexual harassment of a student causes the student to suffer a constructive deprivation of his or her education. There is a split amongst the authorities as to what constitutes a sufficient level of harassment “so severe, pervasive, and objectively offensive” to create a hostile environment. In *Davis*, the Court, in dicta, theorized that, while one incident of student-to-student harassment could be said to implicate Title IX, “it [is] unlikely Congress would have thought such behavior sufficient to rise to this level.” *Id.* at 652–53.

Some courts, however, have held that a single incident of rape or violent sexual assault was sufficient to create a hostile environment. *See Jennings v. U. of N.C.*, 482 F.3d 686, 720–21 (4th Cir. 2007); *Albiez v. Kaminski*, No. 09-CV-1127, 2010 WL 2465502, at *6 (E.D. Wis. June 14, 2010) (one incident of sexual assault by the plaintiff’s resident advisor sufficient to create hostile environment); *S.S. v. Alexander*, 177 P.3d 724, 741 (Wash. App. 2008) (plaintiff “did not have to be raped twice before the university was required to appropriately respond to her requests for remediation and assistance. In the Title IX context, there is no ‘one free rape’ rule.”).

⁹⁶ 2011 *Dear Colleague Letter*, *supra* note 25, at 4 (“If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.”); *see also Davis*, 526 U.S. at 633–35, 653–54 (finding a school may be liable for money damages under Title IX for failing to timely address numerous reports of a student’s repeated acts of sexual harassment upon the plaintiff).

⁹⁷ One very important aspect to note is that these guidance “Letters” are not binding law or even controlling regulations. They are likely to be seen by courts as having *Skidmore* deference—courts can refer to them as a source of persuasive authority but are under no obligation to follow them. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944) (“We consider that the rulings, interpretations and opinions of the [Wage and Hour Division] Administrator . . . while not controlling upon courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”).

⁹⁸ All of the OCR’s “Dear Colleague Letters” and other guidance publications are available at *Sex Discrimination*, U.S. DEPT OF EDUC. <http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html> [<http://perma.cc/L24Z-UMZR>].

⁹⁹ 2011 *Dear Colleague Letter*, *supra* note 25, at 12.

¹⁰⁰ *Id.* Under the OCR’s guidance then, allowing the accused to cross-examine the complainant directly would open up the university to potential liability under Title IX.

among other topics, reiterated the OCR's position on cross-examination,¹⁰¹ but offered a potential alternative:

A school may choose, instead, to allow the parties to submit questions to a trained third party (e.g., the hearing panel) to ask the questions on their behalf. OCR recommends that the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case.¹⁰²

It should be noted that according to this Note's survey, this is the approach that 27% of schools have taken with their disciplinary proceedings.¹⁰³

As of right now, these OCR publications are only guidance documents and are not binding on any university.¹⁰⁴ However, it is likely within the authority of the Department of Education to promulgate binding regulations¹⁰⁵ on how universities can conduct their disciplinary proceedings, despite the plain language and legislative history of Title IX being silent on the matter. In the plurality decision of *Guardians Ass'n v. Civil Service Comm'n of the City of N. Y.*,¹⁰⁶ the U.S. Supreme Court held that an implementing regulation exceeding the original scope of its statute is valid, so long as it is consistent with the underlying purpose of that statute.¹⁰⁷ In *Guardians*, the Court held that while Title VI itself did not proscribe unintentional racial discrimination, regulations that Title VI implemented to that effect were valid because they were consistent with Title VI's purpose of proscribing racial discrimination in general.¹⁰⁸ As applied to this issue, a Department of Education regulation proscribing cross-examination in disciplinary proceedings for sexual misconduct would likely also be held valid. While Title IX, modeled after Title VI,¹⁰⁹ itself may not address the procedures of

¹⁰¹ Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP'T EDUC. 31 (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<http://perma.cc/9JZC-BKQ4>].

¹⁰² *Id.*

¹⁰³ See *supra* note 36 and accompanying text.

¹⁰⁴ Indeed, as Part I(B) demonstrates, 29% of schools sampled currently allow an accused student to directly question the complainant, which the OCR has directly advised against. See *supra* note 35 and accompanying text.

¹⁰⁵ A regulation promulgated by an executive branch agency and codified in the Code of Federal Regulations is due deference as long as it is reasonably in furtherance of the statute it is interpreting. See *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 843–44 (1984).

¹⁰⁶ 463 U.S. 582 (1983).

¹⁰⁷ See *id.* at 591–92.

¹⁰⁸ *Id.* at 582, 590. The majority opinion of Justice White based this holding on the fact that Title VI provided the Department of Labor “sufficient discretion to enforce the statute,” so long as such regulations were “not inconsistent with the purpose of Title VI.” *Id.* at 591–92.

¹⁰⁹ See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979) (noting that Title IX was modeled after Title VI).

university disciplinary proceedings, if the Department of Education can show that these (as of yet hypothetical) regulations further the goal of proscribing sex-based discrimination, such regulations would likely be upheld under *Guardians*.

2. Accused Student's Rights Under Title IX

Under Title IX, an accused student does not have an analogous deliberate indifference/hostile environment cause of action that would otherwise be available to a complainant if a university fails to properly address her sexual assault claim. Rather, an accused student can bring an “erroneous outcome discrimination” claim under Title IX which requires he show that, in the course of his discipline, he was the victim of: (1) a flawed procedure, that (2) led to an adverse and erroneous outcome with (3) “particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding.”¹¹⁰ To support the third element, the accused student must present more than conclusory allegations that the university found against him because of his gender, a standard many accused students fail to meet.¹¹¹ While other causes of action may exist for a flawed adjudication process, for an accused student to have a claim under Title IX, he must show a causal link between his gender and his punishment.¹¹² Thus, if a school

¹¹⁰ *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994). “Such allegations [of gender bias] might include . . . statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender.” *Id.*

¹¹¹ *See, e.g., Mallery v. Ohio Univ.*, 76 Fed. Appx. 634, 639–40 (6th Cir. 2003) (holding there was no erroneous outcome discrimination where accused student plaintiff unsuccessfully argued that the school focused on the complainant’s ability to consent rather than other potentially exculpatory evidence); *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 476–77 (S.D.N.Y. 2015) (holding that there was no erroneous outcome discrimination where the school did not give great weight to Facebook messages the complainant sent to the accused student the day after the assault); *Doe v. Univ. of Mass.-Amherst*, No. 14-30143-MGM, 2015 WL 4306521, at *8 (D. Mass. July 14, 2015) (finding that, while the plaintiff’s pleaded facts may suggest his university “treated [the complainant] more favorably than the Plaintiff,” he had not alleged facts showing the unfavorable treatment “was *because of Plaintiff’s sex*”) (emphasis in original). *But see Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 768 (D. Md. 2015) (holding that the male accused plaintiff pleaded sufficient facts to state an erroneous outcome discrimination cause of action where he alleged that the university’s sexual assault awareness program, influenced in part by the OCR’s policy guidance, may have led Salisbury University administrators to conduct a disciplinary proceeding that did not follow the university’s stated procedures).

¹¹² To further illustrate this point, imagine the following scenario:

A university has a policy of adjudicating sexual assault complaints solely by way of coin-toss. On Monday, the university flips a coin as to Complainant A’s sexual assault complaint against B. B wins the coin toss, and therefore the university finds that B did not commit a sexual assault and he is due no discipline. On Tuesday, the university flips a coin as to Complainant C’s sexual assault complaint against D. C wins the coin toss, and the university therefore finds D has committed a sexual assault and expels him.

does not allow an accused student, male or female, the right to some form of cross-examination in a disciplinary proceeding, a male student has no claim to it under an erroneous outcome discrimination theory under Title IX.

B. Accused Student's (Potential) Due Process Right to Cross-Examination

Because a university disciplinary proceeding is not a criminal prosecution, an accused student has no Sixth Amendment right to cross-examination in such a proceeding.¹¹³ Rather, constitutional claims lie in the Due Process Clause of the Fourteenth Amendment, which reads in pertinent part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."¹¹⁴

A procedural Due Process claim requires the plaintiff to have either a liberty or property interest at issue, a deprivation of that interest by a State, and that such deprivation occur pursuant to inadequate government procedures.¹¹⁵ A liberty or property interest can arise not only from the U.S. Constitution, but also from a person's rights under a state law entitling them to some benefit.¹¹⁶

In *Goss v. Lopez*,¹¹⁷ the U.S. Supreme Court held that students in a state's public school system have a property interest in the education to which they are entitled, pursuant to a state statute.¹¹⁸ The Court went on to find that students have a

Complainant A likely has a claim under Title IX because the school has been deliberately indifferent to her complaint by leaving their investigation and adjudication up to mere chance. Conversely, D likely does not have a Title IX erroneous outcome discrimination claim. Because the university adjudicates all sexual assault complaints via coin-toss, D cannot say that the procedures and outcome, as clearly flawed as they are, were done on account of his gender.

¹¹³ "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI.

¹¹⁴ U.S. CONST. amend. XIV, § 1.

¹¹⁵ See Erwin Chemerinsky, *Procedural Due Process Claims*, 16 *TOURO L. REV.* 871, 871 (2000).

¹¹⁶ See *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

¹¹⁷ 419 U.S. 565 (1975). *Goss* involved a class action lawsuit brought by nine Ohio public school students who were suspended up to ten days for non-academic misconduct. *Id.* at 568–69. Ohio law granted a school principal the right to suspend a student for ten days or expel a student without any form of hearing or notice to either the student or the student's parents. The students in *Goss* were suspended immediately after their alleged misconduct with no hearing as to the underlying facts surrounding each suspension. *Id.* at 570.

¹¹⁸ *Id.* at 573–74 ("The authority possessed by the State to prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.")

liberty interest in having their reputation free from inaccurate charges of misconduct.¹¹⁹ While never explicitly holding as such, the U.S. Supreme Court has assumed the existence of such constitutional protections for students attending public universities.¹²⁰ Such constitutional protections, however, have not been found to exist for students enrolled in private institutions.¹²¹

There are two Supreme Court cases that guide a court's determination as to what process is due to an accused student when charged with non-academic misconduct: *Goss v. Lopez*¹²² and *Mathews v. Eldridge*.¹²³ In *Goss*, the Court held that when a student is facing a short-suspension (ten days or less), Due Process requires at a minimum that "the student be given oral or

¹¹⁹ *Id.* at 575 ("If [charges of misconduct are] sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.") (internal footnote omitted).

¹²⁰ See *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 84–85 (1978); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 222–23 (1985). Several lower federal courts and state courts have explicitly held public university students have a constitutional right to their education. See, e.g., *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961); *Woodis v. Westark Cmty. Coll.* 160 F.3d 435, 440 (8th Cir. 1998); *Nickerson v. Univ. of Alaska Anchorage*, 975 P.2d 46, 52 (AK 1999); *Danso v. Univ. of Conn.*, 919 A.2d 1100, 1106 (Conn. Super. Ct. 2007).

¹²¹ See Holly Hogan, *The Real Choice in a Perceived "Catch-22": Providing Fairness to Both the Accused and Complaining Students in College Sexual Assault Disciplinary Proceedings*, 38 J.L. & EDUC. 277, 278 n.2 (2009) ("Private colleges generally are not state actors for purposes of due process.").

A private university could be liable for a Due Process claim only if it was found to be a "state actor." While there are several tests for determining whether a private entity becomes a "state actor" based on the underlying facts of a given case, the test most relevant to a private education institution is the "fair attribution" test laid out in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). A private entity performs a state action when they have acted in accordance with a "rule of conduct imposed by the State or by a person whom the State is responsible," and the entity can "fairly be said to be a state actor" because it "has acted together with or has obtained significant aid from state officials." *Id.* at 937. The mere fact that a private entity acts in accordance with a state rule or regulation does not mean they become a state actor, however. *Id.* Therefore, even in the instance where a private university follows the OCR's guidance and does not allow for cross-examination, it is unlikely that a court would find a private university has become a state-actor based solely on this fact.

However, it is not difficult to see a future scenario wherein the OCR or another government entity actively puts pressure, via threat of lawsuit, on private universities to limit procedural protections afforded accused students. Such pressure may meet the "acted together" prong of the *Lugar* test.

Several commentators have argued that an equivalent to the right to Due Process in private university disciplinary proceedings may be founded on theories of contract law or associations law. See, e.g., Berger & Berger, *supra* note 29, at 313–17, 331–37 (arguing, *inter alia*, that Due Process is a contractual right private university students have under the doctrine of good faith and fair dealing).

¹²² 419 U.S. 565 (1975).

¹²³ 424 U.S. 319 (1976).

written notice of the charges against him,” an “explanation of the evidence the authorities have [against him],” and the “opportunity to present his side of the story.”¹²⁴ In these short-suspension instances, cross-examination and other trial-type procedures would impose too much of a burden on schools.¹²⁵ The *Goss* Court did posit, though, that in situations where a student was facing a longer suspension or expulsion, Due Process “may require more formal procedures.”¹²⁶

However, despite this language, the Court has not considered all long-term punishments deserving of “more formal procedures.” In two post-*Goss* cases, *Board of Curators of University of Missouri v. Horowitz*¹²⁷ and *Regents of University of Michigan v. Ewing*,¹²⁸ the Courts held that students facing permanent expulsions for failing to meet academic standards were not due any more than the *Goss* requirements of notice and opportunity to be heard.¹²⁹ What can be inferred from *Horowitz* and *Ewing* then is that it is not only the length of the punishment that determines what procedural protections are due, but also the length of the punishment coupled with whether the decision to discipline turns on subjective evaluative information or objective fact-based determinations.¹³⁰ *Horowitz* and *Ewing* control those cases in the former, while *Goss* controls those in the latter, where there is some dispute of fact that requires fact-finding.

The Court’s decision in *Mathews v. Eldridge* provides a separate analytical framework to determine how much process is

¹²⁴ *Goss*, 419 U.S. at 581; see also *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158–59 (5th Cir. 1961) (fourteen years before *Goss*, the court held that college students were due notice of the accusations against them and an investigative hearing wherein the university could hear and weigh facts from both sides).

¹²⁵ *Goss*, 419 U.S. at 583. This concern of overburdening schools and universities has been cited by many state appellate courts and lower federal courts as a reason not to extend more trial-type protections beyond what *Goss* requires. See, e.g., *Dixon*, 294 F.2d at 159; *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988); *Scanlon v. Las Cruces Pub. Sch.*, 172 P.3d 185, 191–92 (N.M. Ct. App. 2007).

¹²⁶ *Goss*, 419 U.S. at 584.

¹²⁷ 435 U.S. 78 (1978).

¹²⁸ 474 U.S. 214 (1985).

¹²⁹ *Horowitz*, 435 U.S. at 85–86 n.2 (“We stop short, however, of requiring full trial-type procedures in [academic disciplinary proceedings] . . . [A]n informal give-and-take between the student and the administrative body dismissing him . . . would, at least, give the student the opportunity to characterize his conduct and put it in what he deems the proper context.”) (internal citations omitted); *Ewing*, 474 U.S. at 227.

¹³⁰ See *Horowitz*, 435 U.S. at 89–90 (“Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full-hearing requirement . . . [T]he determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking [sic].”).

due to an accused student in a disciplinary proceeding.¹³¹ In *Eldridge*, the Court articulated a three-factor test for courts to determine whether administrative procedures comport with due process requirements: (1) the private interest that will be affected; (2) the risk of “erroneous deprivation” of the private interest through the use of the administrative procedures; and (3) the government’s interest in using its set procedures.¹³² The Court has applied these factors to a myriad of cases where the central issue was what level of due process protection was sufficient.¹³³ Aside from Justice Marshall’s concurrence and dissent in part in *Horowitz*, the Court has yet to apply the *Eldridge* factors to the question of due process in university disciplinary proceedings.

Lower federal courts and state courts have applied both *Goss* and *Eldridge* (or similar reasoning behind these cases) to the question of whether cross-examination is a due process requirement in university disciplinary proceedings, resulting in a split amongst the jurisdictions. Among the states that have directly decided on the issue,¹³⁴ courts in eleven states have held that an accused student has the right to some form of cross-examination of witnesses.¹³⁵ Likewise, the Ninth Circuit

¹³¹ In his concurrence in part and dissent in part to the *Horowitz* decision, Justice Marshall argued that *Eldridge* supplied a better means to analyze the issue of what due process was required when a student faces an expulsion, rejecting the majority’s “academic” versus “disciplinary” distinction. *Id.* at 99–100, 103–07 (Marshall, J., concurring in part and dissenting in part).

¹³² *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

¹³³ *See, e.g., id.* at 335–47 (applying the three-factor test to the Social Security Administration’s appeals process); *Santosky v. Kramer*, 455 U.S. 745, 758–69 (1982) (applying the *Eldridge* factors to determine the standard of proof in parental rights termination proceedings); *Ake v. Oklahoma*, 470 U.S. 68, 77–83 (1985) (applying the factors to the question of an indigent criminal defendant’s access to expert psychological testimony); *Wilkinson v. Austin*, 545 U.S. 209, 224–30 (2005) (applying the factors to the procedures Ohio used to classify prisoners for placement in “Supermax” prison facilities).

¹³⁴ The following states, along with the District of Columbia, have yet to have a court directly address this issue: Alabama, Alaska, Arizona, California, Florida, Hawaii, Idaho, Iowa, Louisiana, Maine, Minnesota, Nebraska, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Wisconsin, and Wyoming. Several of these twenty-three states have had decisions in which cross-examination is briefly mentioned in a list of procedures the accused student was afforded, but the courts in such cases generally gave a conclusory statement that the student’s due process rights were protected without determining what listed procedures were actually constitutionally required. *See, e.g., Burch v. Moulton*, 980 So. 2d 392, 400–01 (Ala. 2007); *Shuman v. Univ. of Minn. Law Sch.*, 451 N.W.2d 71, 75 (Minn. Ct. App. 1990); *Braesch v. DePasquale*, 265 N.W.2d 842, 846 (Neb. 1978).

¹³⁵ *Nichols ex rel. Nichols v. DeStefano*, 70 P.3d 505, 508 (Colo. App. 2002) (holding that a student’s inability to question students who gave statements against him amounted to a denial of an “opportunity to be heard”); *Bd. of Educ. of New Castle Cty. Vocational Tech. Sch. Dist. v. Clark*, 1988 WL 47096, at *1 (Del. Super. Ct. May 3, 1988) (holding that because student was facing expulsion, *Goss* minimum requirements were expanded and student had right to cross-examine witnesses to fully present his case); *Colquitt v. Rich Tp. High Sch. Dist.* No. 227, 699 N.E.2d 1109, 1116 (Ill. App. Ct. 1998)

and district courts in the First, Second, Third, and Eighth Circuits have held accused students have the right to some form of cross-examination.¹³⁶

Conversely, courts in sixteen states,¹³⁷ the First, Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits, and district

(“[I]n expulsion proceedings, the private interest is commanding, the risk of error from the lack of adversarial testing of witnesses through cross-examination is substantial, and the countervailing governmental interest favoring the admission of hearsay statements is comparatively outweighed.”); *Smith v. Miller*, 514 P.2d 377, 387 (Kan. 1973) (holding that cross-examination is required “when the outcome is directly dependent on the credibility of two witnesses (possibly including the student threatened with expulsion) whose statements are directly conflicting, then cross-examination is imperative in establishing the truth, absent compelling reasons for dispensing with it”); *Ryan v. Hofstra Univ.*, 328 N.Y.S.2d 339, 341 (Sup. Ct. 1972) (finding that a student in a private university had the right to cross-examine witnesses against him in a disciplinary proceeding); *Alexander v. Cumberland Cty. Bd. of Educ.*, 615 S.E.2d 408, 415 (N.C. Ct. App. 2005) (holding that students are due the right to cross-examination if school seeks to impose “long-term suspensions”); *Ruane v. Shippensburg Univ.*, 871 A.2d 859, 862 (Pa. Commw. Ct. 2005) (in a case where the accused student was charged with sexual assault, noting that a Pennsylvania state statute, 22 PA. CODE § 505.3, mandates universities to allow the accused student to question witnesses); *Stinney v. Sumter Sch. Dist. 17*, 707 S.E.2d 397, 399 (S.C. 2011) (noting that South Carolina state statute § 59-63-240, which allows accused student to cross-examine witnesses at an expulsion hearing, is “constitutionally sufficient”); *Texarkana Indep. Sch. Dist. v. Lewis*, 470 S.W.2d 727, 736 (Tex. Civ. App. 1971) (holding that cross-examination may be required in situations where witness credibility is at issue); *Stone v. Prosser Consol. Sch. Dist. No. 116*, 971 P.2d 125, 128 (Wash. Ct. App. 1999) (weighing *Eldridge* factors in favor of accused student and finding that cross-examination is required in an expulsion hearing); *North v. W. Va. Bd. of Regents*, 233 S.E.2d 411, 417 (W. Va. 1977) (holding that accused student has the right to cross-examine witnesses in a university expulsion hearing).

¹³⁶ *Black Coalition v. Portland Sch. Dist. No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973) (holding that members of a black student union had the right to cross-examine witnesses in their expulsion hearings); *Marin v. Univ. of Puerto Rico*, 377 F. Supp. 613, 623 (D.P.R. 1973) (including cross-examination in a list of procedures that should be afforded to students before being suspended or expelled); *Gomes v. Univ. of Maine System*, 365 F. Supp. 2d 6, 16 (D. Me. 2005) (holding student accused of sexual assault and facing expulsion had the right to cross-examine complainant and other witnesses); *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D. N.Y. 1997) (holding that because sexual assault cases turn on credibility of complainant, accused university student had the right to question complainant in some form during expulsion hearing); *Furey v. Temple Univ.*, 730 F. Supp. 2d 380, 396 (E.D. Penn. 2010) (finding that student had the right to question police officer whom he allegedly got into an altercation with, particularly after hearing panel aggressively questioned accused student); *Fielder v. Bd. of Educ. of Sch. Dist. of Winnebago*, 346 F. Supp. 722, 730 (D. Neb. 1972) (while not concluding that cross-examination is a constitutional requirement, the court held that affording accused student the right to cross-examination is “good technique”); *Hardie v. Churchill Cnty. Sch. Dist.*, No. 3:07-CV-310-RAM, 2009 WL 875486, at *4 (D. Nev. Mar. 30, 2009) (recognizing *Black Coalition* affords students facing expulsion the right to cross-examine witnesses).

¹³⁷ *Smith v. Denton*, 895 S.W.2d 550, 559 (Ark. 1995) (holding that cross-examination in disciplinary proceeding was not required “in this context”); *Danso v. Univ. of Conn.*, 919 A.2d 1100, 1108 (Conn. Super. Ct. 2007) (citing *Dixon*, the court held that due process is met as long as accused has an opportunity to review statements of accusers and offer a rebuttal); *Life Chiropractic Coll., Inc. v. Fuchs*, 337 S.E.2d 45, 48 (Ga. Ct. App. 1985) (holding implicitly that there was no right to cross-examination because plaintiff could not show his case would have benefited from it); *Reilly v. Daly*, 666 N.E.2d 439, 444–45 (Ind. Ct. App. 1996) (holding, in an academic disciplinary proceeding, “all that is required is that the student have an opportunity to elicit the truth about the facts and events at

courts in the Seventh and Eighth Circuits,¹³⁸ have found that cross-examination is not required to protect a student's Due Process rights in a disciplinary proceeding.

Parsing through these decisions reveals two important aspects to note. The first is how some courts applied the *Eldridge*

issue" and cross-examination is not required for that purpose); *Stathis v. Univ. of Kentucky*, No. 2004-CA-000556-MR, 2005 WL 1125240, at *3 (Ky. Ct. App. May 13, 2005) (finding that due process was not lacking when student was not allowed to directly cross-examine witnesses); *Miller v. Bd. of Educ. of Caroline Cnty.*, 690 A.2d 557, 560–61 (Md. Ct. Spec. App. 1997) (construing strictly *Goss* and finding that a student is only due notice and an informal hearing); *Ding ex rel. Ding v. Payzant*, No. 03-5847, 2004 WL 1147450, at *12 (Super. Ct. Mass. May 20, 2004) (holding that the *Goss* minimum requirements are sufficient to protect an accused's due process rights); *Lee v. Univ. of Michigan-Dearborn*, No. 284541, 2009 WL 1362617, at *4 (Mich. Ct. App. May 12, 2009) (finding that the plaintiff failed to [explain] why cross-examination was required in her case given the burden it would have imposed on the university); *Hinds Cnty. Sch. Dist. Bd. of Tr. v. R.B.*, 10 So.3d 387, 400–401 (Miss. 2008) (holding that due process requires only notice of statements against the accused student and not direct confrontation and cross-examination); *Knapp v. Junior C. Dist. of St. Louis Cnty., Mo.*, 879 S.W.2d 588, 592–93 (Mo. Ct. App. 1994) (finding no state authority that cross-examination is a due process requirement); *State v. Clapp*, 263 P. 433, 437 (Mont. 1928) (holding, in a case decided almost fifty years before *Goss*, that expulsion was not arbitrary and plaintiff had no right to confront and cross-examine accusing witnesses because university president had no subpoena power); *Rockwell v. William Paterson U.*, 2015 WL 9902440 (Super. Ct. N.J. App. Div. Jan. 25, 2016) (noting that *Goss* provided the "definitive interpretation" of a student's due process rights and accordingly held that cross-examination is not required because *Goss* did not hold so); *Scanlon v. Las Cruces Public Sch.*, 172 P.3d 185, 191–92 (N.M. Ct. App. 2007) (citing its concern for the burden cross-examination would place on schools and the potential for retaliation against witnesses, court held there is no right to cross-examination); *Anderson v. Stanton*, No. E2009-01081-COA-R3-CV, 2010 WL 2106218, at *8 (Tenn. Ct. App. May 26, 2010) (holding the only requirements for due process are the *Goss* minimum requirements); *Nzuve v. Castleton State C.*, 335 A.2d 321, 324 (Vt. 1975) (citing *Dixon*, held that cross-examination is not required because a student is not entitled to a "full-dress judicial hearing"); *Woods v. Winchester Sch. Bd.*, No. 98-213, 1999 WL 33732641, at *7 (Va. Cir. Ct. July 15, 1999) (holding that only *Goss* minimum requirements are required to protect due process).

¹³⁸ *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988); *Winnick v. Manning*, 460 F.2d 545, 549–50 (2nd Cir. 1972) (holding cross-examination was generally not "essential" in university disciplinary proceedings, but did leave open the possibility it may be required if there is an issue as to witness credibility); *Henson v. Honor Comm. of U. Va.*, 719 F.2d 69, 73–74 (4th Cir. 1983) (holding that cross-examination is not required in expulsion hearing due to failure to meet university academic requirements); *Dixon v. Ala. State Bd. of Ed.*, 294 F.2d 150, 159 (5th Cir. 1961) (holding that only notice and an informal hearing is required, and a student is not entitled to a "full-dress judicial hearing" in a disciplinary proceeding); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005) (finding cross-examination not required in case where student could not show issue of witness credibility); *B.S. ex rel. Schneider v. Bd. of Sch. Tr., Fort Wayne Cmty. Sch.*, 255 F. Supp. 2d 891, 899–900 (N.D. Ind. 2003) (holding that student facing expulsion due sexual assault claim had no right to cross-examination complainant because school administrators could judge the veracity of the witness through her statements to them); *Caston v. Benton Public Sch.*, No. 4:00CV00215WKU, 2002 WL 562638, at *4–5 (E.D. Ark. Apr. 11, 2002); *Brown v. Univ. of Kansas*, 599 Fed. Appx. 833, 837–38 (10th Cir. 2015) (*Goss* requirements sufficiently protected due process rights of law student expelled for falsifying information in application); *Nash v. Auburn Univ.*, 812 F. 2d 655, 664 (11th Cir. 1987) (holding that ability of accused student to present his own case through his own witnesses was sufficient to protect student's due process rights and cross-examination was not required).

factors to this issue.¹³⁹ While there is disagreement on the ultimate outcome, the courts applying *Eldridge* generally were in agreement on what constituted the competing interests. The accused student's private interest is the continuation of their education and the benefits derived from it, as well as their interest in not bearing the label of a sexual assaulter.¹⁴⁰ The second factor is cross-examination's propensity to be a hedge against erroneous fact-finding.¹⁴¹ Lastly, the third factor is the university's interest in applying its set procedures and limiting additional administrative costs.¹⁴²

The second noteworthy aspect of this survey is the general treatment of cross-examination itself. In all of the cited cases, not a single court questioned cross-examination's ability to aid a fact-finder, nor made any reference to social science studies similar to those cited in Part II(B) illuminating cross-examination's flaws. Rather, the courts mostly towed the line of rhetoric cited in Part II(A) of cross-examination's unassailable ability to elicit the truth. The courts that held against a right to cross-examination did so mostly out of concern for practical considerations of administering cross-examination,¹⁴³ and a recognition that a

¹³⁹ In the above cited cases, the following decisions applied the *Eldridge* factors to the question of cross-examination of witnesses in university disciplinary proceedings: Bd. of Educ. of New Castle Cty. Vocational Tech. Sch. Dist. v. Clark, 1988 WL 47096, at *1-2 (Del. Super. Ct. May 3, 1988); Stone v. Prosser Consol. School Dist., 971 P.2d 125, 126-27 (Wash. Ct. App. 1999); Gomes v. Univ. of Maine Sys., 365 F. Supp. 2d 6, 16 (D. Me. 2005); Furey v. Temple Univ., 730 F. Supp. 2d 380, 396 (E.D. Pa. 2010); Hinds Cty. Sch. Dist. Bd. of Trustees v. R.B., 10 So. 3d 387, 399-401 (Miss. 2008); Rockwell v. William Paterson Univ., 2015 WL 9902440, at *8-9 (N.J. Super. Ct. App. Div. Jan. 25, 2016); Scanlon v. Las Cruces Pub. Sch., 172 P.3d 185, 191 (N.M. Ct. App. 2007); Gorman v. Univ. of Rhode Island, 837 F.2d 7, 16 (1st Cir. 1988); Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 641 (6th Cir. 2005); B.S. ex rel. Schneider v. Bd. of Sch. Trustees, Fort Wayne Cmty. Sch., 255 F. Supp. 2d 891, 899-900 (N.D. Ind. 2003); Caston v. Benton Pub. Sch., No. 4:00CV00215WKU, 2002 WL 562638, at *5 (E.D. Ark. Apr. 11, 2002); Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987).

¹⁴⁰ See, e.g., *Gomes*, 365 F. Supp. 2d at 16 (finding the accused student's private interest "compelling" because the charges could have "a major immediate and life-long impact on their personal life, education, employment, and public engagement") (internal citations omitted).

¹⁴¹ See, e.g., *Stone*, 971 P.2d at 127 (noting that cross-examination would allow an accused student to test a witness's credibility).

¹⁴² See, e.g., *Scanlon*, 172 P.3d at 191 ("Under the third [*Eldridge*] factor, we weigh the burden that the practice of allowing cross-examination of student witnesses would place on [schools]. The burdens on a school district of having to hold trial-like disciplinary hearings in which they must employ the technical rules of evidence are significant, and could potentially have serious consequences both for school administration and for the safety of the student body.").

¹⁴³ See, e.g., *id.* ("Under the third [*Eldridge*] factor, we weigh the burden that the practice of allowing cross-examination of student witnesses would place on [schools]. The burdens on a school district of having to hold trial-like disciplinary hearings in which they must employ the technical rules of evidence are significant, and could potentially have

school disciplinary proceeding does not require similar treatment as trial courts due to a lesser amount of interests at stake.¹⁴⁴

CONCLUSION

This Note has shown there is no consensus as to whether an accused student should have the right to cross-examine adverse witnesses in a university disciplinary proceeding, and that many considerations, both legal and psychological, converge on this issue.

While there is seemingly no scientific evidence supporting the notion that cross-examination is the “greatest legal engine” for determining the truth, it is an unquestioned institution in the American adversarial legal system. Its absence or restriction in proceedings that are adversarial in all but name and whose outcome could determine the course of a young person’s life, is quite striking. At the same time, however, forcing a complainant to directly answer questions from the very individual who may have assaulted her is a prospect that rightly makes reasonable people hesitate.

It is unfortunate then, that the legal discussion regarding the right to cross-examination has largely failed to truly explore the costs and benefits of affording an accused student the right to cross-examination in a disciplinary proceeding given the evidence presented by this Note. The numerous opinions cited in this Note are resoundingly conclusory in their reasoning for allowing cross-examination or denying it. Much of the discussion of a right to cross-examination in this context has focused more on the nature of the proceeding itself and the implications of its outcome rather than whether cross-examination, with the limitations presented by this Note, would actually help or hinder the fact-finding aspect of such proceedings.

The increasing significance of the question of how to properly adjudicate campus sexual assault claims requires a far more thorough examination. Universities have become more strident in their investigations and adjudications of these claims, and at the same time, more accused students are arguing that the procedural safeguards afforded them are lacking. Courts, university officials, legislators, and litigants must make note of the sensitivities of the accused and the complainant implicated

serious consequences both for school administration and for the safety of the student body.”).

¹⁴⁴ See, e.g., *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150, 159 (5th Cir. 1961) (holding that only notice and an informal hearing is required, and a student is not entitled to a “full-dress judicial hearing” in a disciplinary proceeding).

by this issue and construct proper legal reasoning, informed in part by the evidence cited in Part II, for why cross-examination should or should not be allowed in disciplinary proceedings.

This Note makes no judgment on what outcome ultimately should be reached after such a thorough examination has taken place; this Note has only sought to present and discuss the legal and psychological considerations bearing on this issue in order to help guide university officials, litigants, and courts to a well-reasoned outcome. However, for the benefit of both the accused students and the complainants, the dissonance between the legal system's veneration of cross-examination and the actual scientific evidence regarding its fact-finding accuracy must be ended, and a true consideration of whether it is proper for a student accused of sexual assault of another student to cross-examine the victim and other adverse witnesses must finally occur.

APPENDIX A: SURVEY METHODOLOGY

Study Population: The population for this study consisted of 1062 universities, colleges, and community colleges, representing those institutions of higher learning with enrollment of at least 5000 students as of 2014, the last year data is available. This list was derived from the Department of Education's Clery Act statistic database, wherein a Microsoft Excel Spreadsheet of schools with an enrollment exceeding 5000 students was downloaded, resulting in a list of 3794 schools. Excel's "Remove Duplicates" feature was used to remove the many duplicate entries contained in the list (it appears that the Clery Act database creates a new entry for each different mailing address for a given university), resulting in the list of 1062 unique school entries.

Sampling Methodology: Each school entry was alphabetically assigned a whole number. Then, using Excel's "RANDBETWEEN" function, a random whole number between 1 and 1062 was produced in a separate Excel cell. The author would then use that number to find the correspondingly numbered school. The author followed these steps to produce the 100 school population used in this study.

Research Methodology: Once the school was identified, the author would perform an internet search for that school's student handbook/code of conduct, which the entirety of the 100 schools sampled had available online, looking particularly for a school's disciplinary proceeding procedures and/or procedures on investigating and resolving sexual misconduct claims.

APPENDIX B

List of sampled schools that allow direct cross-examination
of witnesses

School Name	Web Address of Source
Alabama A&M University	http://www.aamu.edu/campuslife/studentresources/Documents/Code%20of%20Conduct.pdf
Bentley University	http://www.bentley.edu/files/2015/09/22/SAF.423.15%20UG%20Student%20Handbook_R5.pdf
Central Washington University	http://www.cwu.edu/student-rights/student-rights-appeals
Cincinnati State Technical and Community College	http://catalog.cincinnati.state.edu/studentrightsandresponsibilities/studentresponsibilities/
Colorado Christian University	http://www.ccu.edu/uploadedFiles/Pages/Campus_Life/handbook.pdf
Cuyamaca College	http://cctest.cuyamaca.edu/campus-life/student-affairs/discipline/disc-hearprocess.aspx
Davenport University	http://www.davenport.edu/system/files/STUDENT_CODE.pdf
Eastern Michigan University	http://www.emich.edu/policies/policy.php?id=124
El Centro College	http://pol.tasb.org/Policy/Download/358?filename=FMA%28LOCAL%29.pdf
Everett Community College	https://www.everettcc.edu/files/students/student-activities/student-rights-responsibilities-and-policies.pdf
Gaston College	gaston.edu/student-code-of-conduct/
Indian River State College	https://www.irsc.edu/uploadedFiles/Admissions/DatesandDeadlines/Student-Handbook.pdf
Joliet Junior College	jjc.edu/academic-behavior-standards/Pages/code-of-conduct.aspx
Norco College	http://www.rccd.edu/administration/board/New%20Board%20Policies/5520AP.pdf

School Name	Web Address of Source
Norfolk State University	https://www.nsu.edu/student-affairs/student-judicial/student-conduct-process
North Central Texas College	http://nctc.smartcatalogiq.com/en/2011-2012/Catalog/North-Central-Texas-College-Student-Handbook/Section-II/Discipline-and-Penalties-Discipline-Hearing-Procedure/Hearing-Committee
Northeastern University	https://issuu.com/northeasternuniversity/docs/code_of_conduct_5-29?e=2831976/13566121
Roane State Community College	http://www.roanestate.edu/?9244-RSCC-Policy-SA-06-01-Student-Discipline
Stockton University	http://intraweb.stockton.edu/eyos/ossr_site/content/docs/Campus%20Conduct%20Code.pdf
The City University of New York - Lehman College	http://policy.cuny.edu/bylaws/article_xv/text/#Navigation_Location
The Community College of Baltimore County	http://catalog.ccbcmd.edu/content.php?catoid=26&navoid=1574#protections
University of California-Irvine	http://www.dos.uci.edu/conduct/students/code-of-student-conduct-discipline-procedures.php
University of Houston	http://www.uh.edu/dos/pdf/student_code_of_conduct.pdf
University of Louisiana - Monroe	http://catalog.ulm.edu/content.php?catoid=21&navoid=2540
University of Missouri	https://www.umsystem.edu/ums/rules/collected_rules/programs/ch200/200.020_rules_of_procedures_in_student_conduct_matters
University of Montana	http://www.umt.edu/vpsa/documents/Student%20Conduct%20Code%20PDF-%20FINAL%208-27-13.pdf
University of North Georgia	http://ung.edu/dean-of-students/student-code-of-conduct/article-4-procedures.php#Rights
University of Wisconsin (System)	https://www.students.wisc.edu/doso/reporting-allegations-of-sexual-assault-datingdomestic-violence-and-stalking/
Winston-Salem State University	http://www.wssu.edu/administration/legal-affairs/policies/students/student-code-of-conduct.pdf

APPENDIX C

List of sampled schools that allow for questioning via disciplinary panel/investigation team

School Name	Web Address of Source
Angelo State University	http://www.angelo.edu/student-handbook/code-of-student-conduct/conduct-procedures-student.php
Arkansas State University	http://www.astate.edu/a/student-conduct/files/Student+Handbook+1.8.16.pdf
Bloomsburg University of Pennsylvania	http://www.bloomu.edu/policies_procedures/4790
Boise State University	https://deanofstudents.boisestate.edu/scp-codeofconduct/scp-codeofconduct-section5/
Boston College	http://www.bc.edu/publications/studentguide/judicial/boardprocedures.html
California State University (System)	http://www.csus.edu/student/Policies_Procedures/Student%20Conduct%20Procedures.html
Chapman University	http://www.chapman.edu/students/policies-forms/student-conduct/student-conduct-procedures.aspx
Columbia University in the City of New York	http://sexualrespect.columbia.edu/files/sexualrespect/content/080-03147%20Gender%20Based%20Misconduct_JL_v3.pdf
Community College of Allegheny County	https://www.ccac.edu/Academic_Rules_and_Regulations.aspx
Hofstra University	https://www.hofstra.edu/StudentAffairs/DeanOfStudents/commstandards/commstandards_policies_sexualassault.html
Illinois Institute of Technology	https://web.iit.edu/student-affairs/handbook/fine-print/conduct-discipline
Indiana University	www.studentcode.iu.edu/procedures/iu-wide/sexualmisconduct.htm
Kennesaw State University	http://scai.kennesaw.edu/procedures/sexual-misconduct/formal-resolution.php
Marquette University	http://www.marquette.edu/osd/policies/conduct/conduct_procedures.shtml#Conduct_Hearing_Procedures

School Name	Web Address of Source
Missouri State University – Springfield	http://www.missouristate.edu/studentconduct/12331.htm#Article6
Modesto Junior College	https://www.yosemite.edu/trustees/board_policy/5500%20Standards%20of%20Student%20Conduct.pdf
North Dakota State University	https://www.ndsu.edu/fileadmin/policy/601.pdf
Rowan University	http://www.rowan.edu/studentaffairs/communitystandards/documents/StudentCodeofConduct09-10Web1.pdf
Rutgers University	https://slwordpress.rutgers.edu/studentconduct/wp-content/uploads/sites/46/2016/03/StudentPolicyProhibitingSexualHarassment.pdf
State University of New York (System)	http://system.suny.edu/sexual-violence-prevention-workgroup/policies/response/
Temple University	http://policies.temple.edu/PDF/394.pdf
Texas Christian University	http://www.studenthandbook.tcu.edu/student_handbook.pdf
UC Berkeley	http://policy.ucop.edu/doc/2710641/PACAOS-Appendix-E
University of Central Oklahoma	http://www.uco.edu/student-affairs/conduct/files/codeofconduct.pdf
University of Cincinnati	https://www.uc.edu/conduct/Code_of_Conduct/nonacademic-misconduct.html
University of New England	http://www.une.edu/sites/default/files/Student%20Handbook_8-5-15_FINAL.pdf
University of Toledo	http://www.utoledo.edu/policies/main_campus/student_life/pdfs/3364_30_04_Student_code_of_conduct.pdf

APPENDIX D

List of sampled schools that do not (explicitly) afford the right to question witnesses

School Name	Web Address of Source
Auburn University	https://sites.auburn.edu/admin/universypolicies/Policies/CodeofStudentDiscipline.pdf
Benedictine University	https://www.ben.edu/student-life/student-handbook.cfm#Disciplinary-and-Counseling-Records-Procedure
Blinn College	http://pol.tasb.org/Policy/Download/1204?filename=FMA%28LOCAL%29.pdf
California Baptist University	http://www.thezonelive.com/SchoolStructure/CA_CaliforniaBaptistCollege/handbook.pdf
Central Connecticut State University	http://web.ccsu.edu/studentconduct/codeofconduct.asp
Cerritos College	http://cms.cerritos.edu/uploads/Board/Board%20Policies/Chapter%205/AP_5520.pdf
College of San Mateo	collegeofsanmateo.edu/collegepolicies/disciplinaryprocedures-step2.aspx
College of William and Mary	http://www.wm.edu/offices/compliance/policies/proposed_policies/student_misconduct_procedure/index.php#vi
Daytona State College	https://www.daytonastate.edu/files/Student_Handbook.pdf
Florence-Darlington Technical College	www.fdtc.edu/academics/registrar/student-code-of-conduct-manual-august-2015.pdf
Frederick Community College	http://frederick.edu/jobs-hr/policies-and-procedures/policyproceduredocuments/code-of-student-conduct.aspx
Frostburg State University	http://www.frostburg.edu/fsu/assets/File/titleix/Procedures.pdf
Gadsden State Community College	http://www.gadsdenstate.edu/SexualMisconductPolicy.pdf
Harvard University	http://titleix.harvard.edu/files/titleix/files/harvard_student_sexual_harassmnt_procedures.pdf?m=1441919500

School Name	Web Address of Source
Indiana Institute of Technology	http://registrar.indianatech.edu/wp-content/uploads/sites/13/Student-Handbook.pdf
Kansas State University	https://policy.ku.edu/IOA/sexual-harassment-sexual-violence-procedures
Kutztown University of Pennsylvania	http://www.kutztown.edu/about-ku/administrative-offices/student-conduct/policies-and-procedures.htm
Lewis University	http://www.lewisu.edu/welcome/offices/hr/sexualmisconduct.htm
Luzerne County Community College	http://www.luzerne.edu/studentlife/LCCC2014-15StudentHandbook.pdf
Madison Area Technical College	http://madisoncollege.edu/harassmentdiscrimination
Millersville University of Pennsylvania	http://www.millersville.edu/services/judicialaffairs/files/Student%20Code%20of%20Conduct.pdf
Monmouth University	http://www.monmouth.edu/uploadedFiles/Content/University/student-life/student-services/SexualMisconductPoliciesAndProcedures.pdf
Nashville State Community College	http://www.nsc.edu/content/resources/Student_Code_of_Conduct_Policy.pdf
Pitt Community College	http://www.pittcc.edu/experience-pcc/student-services/forms-and-documents/Student-Code-of-Conduct-Policy.pdf
Pulaski Technical College	http://www.pulaskitech.edu/current_students/student_handbook.pdf
Rowan-Cabarrus Community College	https://www.rccc.edu/catalog-2015-2016/wp-content/uploads/sites/74/2012/06/Title-IX-Reporting.pdf
Salt Lake Community College	http://www.slcc.edu/policies/docs/Student_Code_of_Conduct.pdf
Southwest Tennessee Community College	http://catalog.southwest.tn.edu/content.php?catoid=8&navoid=417
Stephen F. Austin State University	http://www.sfasu.edu/policies/2.13_Sexual_Misconduct_-_dcd_edits_-_updated.pdf

School Name	Web Address of Source
Syracuse University	https://issuu.com/syracuseosrr/docs/student_conduct_system_handbook_fin
The City College of San Francisco	https://www.ccsf.edu/en/student-services/StudentAffairs/Conduct/_jcr_content/col2parsys/documentlink_1/file.res/Student%20Code%20of%20Conduct%20&%20Due%20Process.pdf
Touro College	https://www.touro.edu/title-ix-policy/
Tufts University	http://oeo.tufts.edu/wp-content/uploads/Sexual-Misconduct-Adjudication-Process-12182015.pdf
University of Alaska Anchorage	https://www.uaa.alaska.edu/deanofstudents/studentconduct/judicialreview.cfm#CP_JUMP_1635105
University of Hawaii (System)	studentaffairs.manoa.hawaii.edu/policies/conduct_code/
University of Maryland	http://umuc.edu/policies/studentpolicies/stud15100.cfm
University of Minnesota-Duluth	http://regents.umn.edu/sites/regents.umn.edu/files/policies/Student_Conduct_Code.pdf
University of Texas at Austin	http://www.policies.utexas.edu/policies/prohibition-sexual-discrimination-sexual-harassment-sexual-assault-sexual-misconduct#responsibilities-procedures
University of the Cumberlands	https://www.ucumberlands.edu/downloads/students/handbook.pdf
West Georgia Technical College	http://www.westgatech.edu/catalog/studenthandbook.pdf
Worcester Polytechnic Institute	https://www.wpi.edu/Images/CMS/CampusLife/code-of-conduct.pdf
Worcester State University	http://www.worcester.edu/Student-Conduct/
Yavapai College	https://www.yc.edu/v5content/policies/docs/4-student/4.01.pdf
York Technical College	https://www.yorktech.edu/uploadedFiles/Pages/Campus_Life/_content/Student%20Code.pdf



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How Long Do We Keep *Frye*?: The Future of Expert Scientific Evidence in California

Kerri N. Polizzi*

I. INTRODUCTION

The screening of expert scientific evidence at trial is anything but a new issue. However, changes in the law and science may now be calling for a new solution. The number of modern cases involving expert evidence is staggering. One study found that ninety-two percent of federal civil trials involved expert testimony with nearly eight percent of experts in those trials representing scientific fields.¹ This already striking number is exacerbated by the fact that the result of a hearing under either the *Kelly-Frye* or *Daubert* test is very often determinative of the survival and ultimate success of a case.² In addition to these factors, it has been found that in federal courts “[m]ore evidence is being challenged, more excluded, and more summary judgments are being granted post-*Daubert*. Pretrial admissibility hearings are now a common occurrence in civil cases.”³ Given the strong policy interest in deciding cases on the merits, the current state of these affairs only adds to the importance of making these determinations under the best standard available.

* J.D. candidate, Chapman University Dale E. Fowler School of Law, anticipated May 2017. I would like to thank my friends and family for their unending love and support in every challenge that I take on. Specifically, none of this would have been possible without the help of my mother, Chantel Polizzi, my father, Paul Polizzi, and my advisor, Professor Mario Mainero. These three incredible people taught me everything I know about writing, hard work, and Evidence, respectively.

¹ Carol Krafka, Meghan A. Dunn, Molly Treadway Johnson, Joe S. Cecil & Dean Miletich, *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL. PUB. POL’Y & L. 309, 318–20 (2002).

² NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., DISCUSSIONS OF THE COMMITTEE ON DAUBERT STANDARDS: SUMMARY OF MEETINGS 1 (2006) (“In short, decisions on the admissibility of expert testimony can often determine the outcome of litigation.”).

³ Erica Beecher-Monas, *Expert Testimony in Civil Cases*, in THE FUTURE OF EVIDENCE: HOW SCIENCE & TECHNOLOGY WILL CHANGE THE PRACTICE OF LAW, 39 (Carol Henderson & Jules Epstein eds., 2011).

California courts currently apply the *Kelly-Frye* test, requiring “general acceptance” in the relevant scientific community of a novel scientific technique upon which expert evidence would be based.⁴ In applying this test, a trial judge’s role is to simply tally up the number of members of the relevant scientific community who accept the validity of a novel technique and weigh that directly against the number of members who reject it. One prominent problem with this bean-counting approach is determining whether a given scientific technique is novel, such that the test must be applied, or has been sufficiently established such that it is no longer novel. Bright lines rarely exist, and this preliminary determination is further complicated as scientific communities continue to rapidly advance. *Kelly-Frye* also presents concerns about defining the relevant scientific community to which a given technique belongs.⁵ This problem is particularly prevalent where multiple scientific communities claim a technique as their own. For example, a trial judge may first have to determine whether he should be considering members of the molecular genetics community, the forensic science community, or the statistics community when a party seeks to introduce evidence based on DNA fingerprinting techniques.

In light of these concerns, many scholars urge California courts to follow the pattern of widespread state adoption of the federal *Daubert* standard. This test requires judges to act as gatekeepers to ensure that expert evidence is not only accepted, but also substantively reliable.⁶ The *Daubert* standard does this by making the acceptance test required under *Kelly-Frye* just one of a number of flexible guidelines that the trial judge may consider when reaching his admissibility decision. In addition to this familiar prong, other non-exclusive guidelines include: (1) whether the technique can be tested; (2) whether the technique has been subjected to peer review and publication; and (3) the known or potential rate of error and the existence and maintenance of standards controlling the technique’s operation.⁷

However, this approach presents problems of its own, mostly stemming from the simple fact that judges are not scientists, nor are they jurors. Since they are not scientists, judges are not equipped with the empirical, methodological, and often particularized knowledge necessary to determine whether a given technique is substantively reliable. Furthermore, judges may be infringing upon the province of juries by making these determinations. While under any standard, a judge is required to

4 *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

5 *See generally infra* Part II.B.

6 *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 589 (1993).

7 *Id.* at 593–94.

determine the admissibility of evidence, it is the function of the jury to determine and weigh the credibility of witnesses, which the *Daubert* standard explicitly requires judges to do.

In light of these standards and the concerns each presents, this article considers whether California should retain the *Kelly-Frye* test for the admissibility of novel expert scientific evidence, adopt the federal *Daubert* standard, or implement a new method. While no small number of scholars have analyzed each standard, and many other articles have advanced new approaches to evaluating expert scientific evidence in this or other states, ultimately, each of these propositions fails to fully address the criticism raised, exacerbates one or more of those issues, or creates an entirely new set of concerns.

This article advocates for the use of an existing program—the American Association for the Advancement of Science’s Court-Appointed Scientific Experts (“CASE”)—in a novel and widespread way.⁸ Currently, the program experts’ participation in expert scientific evidentiary hearings serves as an optional resource available to judges at their election. This resource should instead be mandated under a new second prong of the *Kelly-Frye* test. This additional prong would require a trial judge to consult with a CASE expert before making any decision on the admissibility of expert scientific evidence. This approach in no way requires the judge to follow the advice of the CASE member, leaving the ultimate decision fully in the judge’s hands. Instead, this requirement injects the knowledge of an independently vetted, unbiased member of the scientific community at the pre-trial stage. Involving neutral experts at this stage allows the trial judge to gain a deeper understanding of both the scientific community’s acceptance or rejection of a given technique and its substantive reliability without making scientific judgments the judge is likely unqualified to make and uncomfortable with making.

Part II of this article looks into the establishment of California’s *Kelly-Frye* test through a triad of cases—*Frye v. United States*, *People v. Kelly*, and *People v. Leahy*—before delving into the most prominent criticism the *Kelly-Frye* test has since faced. This is then accompanied by an illustration of what it takes to meet the demands of the standard through the history of attempts to introduce DNA evidence and its eventual acceptance under *Kelly-Frye*.

⁸ *Court Appointed Scientific Experts (CASE)*, AM. ASS’N FOR THE ADVANCEMENT OF SCI., <http://www.aaas.org/page/court-appointed-scientific-experts-case> [http://perma.cc/RUU6-6E3E].

Part III explores the federal *Daubert* test, again taking note of the trilogy of cases comprising its background—*Daubert v. Merrell Dow Pharmaceuticals*, *General Electric Co. v. Joiner*, and *Kuhmo Tire Co. v. Carmichael*. The section then examines the major critiques of both its formulation and application that have arisen since its inception, and questions whether application in California courts would be desirable, or even viable.

Part IV considers changes that the standards themselves may have undergone over the years by scrutinizing a 2012 California Supreme Court case, *Sargon Enterprises Inc. v. Merrell Dow Pharmaceuticals*. In this case, the court called upon trial judges to engage in an inquiry that determines whether a study relied upon by an expert is valid as a matter of common sense. Prominent commentators have suggested that this case conflates the California and Federal standards, arguably reflecting the state's move toward becoming a *Daubert* jurisdiction.⁹ They note the court's use of "gatekeeper" language and argue that the opinion seems to be framed around the more complex *Daubert* standard rather than the simple *Kelly-Frye* single-prong test.¹⁰ However, this section ultimately concludes that any similarity between *Sargon* and the *Daubert* cases has been overstated, and that the *Kelly-Frye* test remains alive and well in California.

This article concludes with Part V, which begins in section A with a discussion of emerging alternatives and modifications to each of the current standards that seek to solve or mitigate their associated problems. These include the use of artificial intelligence, the move to a "substantial acceptance" test, and the adoption of a more flexible procedure, rather than the current static tests. These suggestions, taken together, make abundantly clear that the flaws in the current systems are cause for concern and, furthermore, that a solution is not likely to be found through stubborn adherence to either of these dated standards. Instead, in section B, this article ultimately advocates for the widespread incorporation of Court-Appointed Scientific Experts in all hearings regarding the admissibility of scientific expert evidence in California, and explains how this allows for the substantive reliability analysis envisioned by the *Daubert* court without requiring ill-equipped trial judges to make these determinations based on scientific knowledge they generally do not possess.

⁹ See *infra* Part IV.

¹⁰ See *id.*; *Sargon Enter., Inc. v. Univ. of S. Cal.*, 288 P.3d 1237, 1239–40, 1251 (Cal. 2012).

II. CALIFORNIA'S *KELLY-FRYE* TESTA. Three Core Cases Establishing and Strengthening the *Kelly-Frye* Test

In 1923, the Court of Appeals for the D.C. Circuit decided *Frye v. United States*, which reviewed James Alphonzo Frye's appeal of his conviction for murder in the second degree.¹¹ His single point on appeal was the lower court's denial of the admission of expert witness testimony relaying the results of a systolic blood pressure deception test, the predecessor to the modern polygraph test.¹² In affirming the judgment, the appellate court held that the evidence was properly excluded at trial because such a test was not "sufficiently established to have gained general acceptance in the particular field in which it belongs."¹³

The California Supreme Court then formally adopted the *Frye* holding in its 1976 decision, *People v. Kelly*.¹⁴ In reversing Robert Kelly's conviction for extortion, the court held that the state had not met its burden of establishing the reliability of the novel technique known as "voiceprint"¹⁵ by introducing the testimony of a single witness whose impartiality was questionable.¹⁶ The court referenced other cases considering the admissibility of voiceprint evidence and emphasized that in these cases, the trial courts were expected to undergo a "lengthy and comprehensive" preliminary hearing on the "general acceptance" issue.¹⁷

From this opinion, a set of guidelines has emerged for evaluating the general acceptance of a novel scientific technique.¹⁸ Pursuant to these guidelines, a court should: (1) consider the relevant qualifications of testifying experts, in particular whether the purported expert is himself a scientist or is instead a technician or law enforcement officer;¹⁹ (2) be careful not to overvalue the testimony of a single witness;²⁰ and (3) be careful not to overvalue the testimony of experts too close to the technique to assess it

¹¹ *Frye*, 293 F. at 1013.

¹² *Id.*

¹³ *Id.* at 1014.

¹⁴ *People v. Kelly*, 549 P.2d 1240, 1244 (Cal. 1976).

¹⁵ *Id.* at 1251.

¹⁶ *Id.* at 1248–49.

¹⁷ *Commonwealth v. Lykus*, 327 N.E.2d 671, 676 (Mass. 1975).

¹⁸ See MIGUEL A. MENDEZ, EVIDENCE: A CONCISE COMPARISON OF THE FEDERAL RULES WITH THE CALIFORNIA CODE 678–79 (2014) (summarizing guidelines and collecting cases in which they were established).

¹⁹ *Kelly*, 549 P.2d at 1250.

²⁰ *Id.* at 1248; see also *State v. Cary*, 230 A.2d 384, 389 (N.J. 1967) ("something more than the bare opinion of one man, however qualified, is required").

fairly and impartially—especially where an expert is the leading proponent of the technique.²¹

Almost twenty years later, in *People v. Leahy*, the California Supreme Court affirmed the Court of Appeal's reversal of William Leahy's conviction for driving under the influence of alcohol.²² Leahy's conviction had been based on testimony relating the results of defendant's horizontal gaze nystagmus field sobriety test.²³ In so holding, the court expressly refused to follow the new federal *Daubert* standard,²⁴ and instead reaffirmed the use of the *Kelly-Frye* test.²⁵ Notably, the court also clarified that under *Kelly*, general acceptance is defined as "a consensus drawn from a typical cross-section of the relevant, qualified scientific community."²⁶

B. Major Criticisms of *Kelly-Frye* and Its Continued Application

When properly applied, the *Kelly-Frye* test adds reliability and predictability to the admission of expert scientific evidence. However, determining the proper application of the test has become a widespread problem in and of itself. This key challenge can be broken down into the trouble presented by: (1) deciding whether the scientific technique at issue is novel and potentially misleading, and therefore subject to the test; and (2) defining the nature and breadth of the scientific community implicated by that evidence. As each of these components is crucial to the standard functioning properly, an inability to make these determinations consistently undermines the predictability that *Kelly-Frye* was designed to provide.

1. Is the Scientific Technique at Issue Novel or Established?

Because the *Kelly-Frye* test applies only to novel scientific techniques,²⁷ it is critical to distinguish "novel" from "established" techniques. This is often easier said than done. As the Illinois Supreme Court has recognized, "a 'new' or 'novel' scientific technique is not always easy to identify, especially in light of constant scientific

²¹ *Kelly*, 549 P.2d at 1249.

²² *People v. Leahy*, 882 P.2d 321 (Cal. 1994) (determining the admissibility of evidence based on this then-new field sobriety test, which purports to test a subject's intoxication based on involuntary eye movements caused by the inability of his eyes to maintain visual fixation as they are turned from side to side).

²³ *Id.*

²⁴ See generally *infra* Part III.

²⁵ *Leahy*, 882 P. 2d at 331.

²⁶ *Id.* at 337.

²⁷ See, e.g., *People v. Webb*, 862 P.2d 779, 798 (Cal. 1993); *People v. Stoll*, 783 P.2d 698, 710 (Cal. 1989); *Kelly*, 549 P.2d at 1244.

advances in our modern era.”²⁸ As scientific methodologies, studies, and communities advance at rapid paces, it becomes increasingly difficult to determine on which side of the novelty line a given technique falls, particularly for those outside of the relevant scientific communities.

This problem is in some ways alleviated by the guidance provided in additional case law following the landmark decisions discussed above. In *People v. Stoll*, the court acknowledged that the rule did not provide a clear definition of a “new scientific technique,” but identified two prominent themes that have emerged from the application of the test.²⁹ The first is that *Kelly-Frye* only applies to “that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is *new* to science and, even more so, the law.”³⁰ The court stated that a key factor in determining a technique’s novelty for *Kelly-Frye* purposes is “repeated use, study, testing and confirmation by scientists or trained technicians.”³¹

The second theme is that the test only applies to those techniques that carry a “misleading aura of scientific infallibility” that leaves the jury effectively blindsided by the testimony.³² This potential for a misled jury, one of the primary motivations for the *Frye* court’s initial adoption of a conservative approach to admissibility, is just as strong today as it was in 1989. For example, a 2010 study found that a random sample of 1201 potential California jurors ranked “science-based” evidence an average of almost three times more reliable than police, victim, or eyewitness testimony.³³

Finally, the court in *People v. McDonald* noted, without explanation for the distinction, that *Kelly-Frye* has never been applied to expert medical testimony.³⁴ Subsequent cases have

²⁸ Donaldson v. Cent. Ill. Pub. Serv. Co., 767 N.E.2d 314, 325 (Ill. 2002).

²⁹ *Stoll*, 783 P.2d at 710.

³⁰ *Id.*

³¹ *Leahy*, 882 P.2d at 606 (Cal. 1994) (noting that this factor would be more significant in determining whether a technique was “new” than long-standing use by police officers).

³² *Stoll*, 783 P.2d at 710–11; *see also* *Huntingdon v. Crowley*, 414 P.2d 382, 390 (Cal. 1966).

³³ Deborah R. Baskin & Ira B. Sommers, *Crime-Show-Viewing Habits and Public Attitudes Toward Forensic Evidence: The “CSI Effect” Revisited*, 31 JUST. SYS. J. 97, 102–03 (2010). The study used data collected by the Field Research Corporation’s survey of California’s registered voters. The sample group was contacted by telephone and instructed to use a reverse-coded four-point scale to rank various types of evidence from four, indicating “not at all reliable,” to one, indicating “extremely reliable.” Collectively, the scientific types of evidence received an average 1.18 rating while the testimony types averaged a 3.07 rating. *Id.*

³⁴ *People v. McDonald*, 690 P.2d 709, 724 (Cal. 1984). *But see In re Lockheed Litigation Cases*, 192 P.3d 403 (Cal. 2007), in which the California Supreme Court certified the issue of the scope of a trial court’s power to evaluate medical opinion

echoed this proposition,³⁵ further narrowing the scope of techniques that must be evaluated for their novelty. These considerations ameliorate concerns about the difficulty of distinguishing novel from established scientific techniques in many cases, but the concepts themselves still must be applied in rapidly advancing areas that may not always fit nicely onto either side of this dividing line.

2. Which Scientific Field Applies?

Once it has been determined that the test should, in fact, be applied, a new obstacle arises in determining the “relevant” scientific community implicated by the purported evidence. The choice is not always self-evident, leading some trial courts to rely on “meta-experts”—groups of individuals from a variety of disciplines who, in turn, evaluate the validity of the claims made by other experts.³⁶ These groups must attempt to find some “rational, empirical standpoint” from which to judge the claims.³⁷ In this way, the court’s inability to identify which scientific community may be the most relevant to the proffered evidence can, in stark contrast to the test’s goals, serve to remove that community entirely from the validity determination.

Selection of the appropriate field may not only prove troublesome to a court, but may also be dispositive of the case, making this particular problem far more important than it is tricky.³⁸ Certain scientific communities may readily accept a new technique based not on its validity, but rather on its furtherance of the community’s overall objectives.³⁹ On the other hand, more conservative scientific communities may be biased against association with any technique seen as radical, regardless of

testimony but later withdrew its grant of certiorari, citing conflicts of interest for a majority of the justices. This decision resulted in a lack of guidance on the proper standard for admission of expert medical testimony. See CYNTHIA H. CWIK & CLIFTON T. HUTCHINSON, SCIENTIFIC EVIDENCE REVIEW: ADMISSIBILITY AND USE OF EXPERT EVIDENCE IN THE COURTROOM, MONOGRAPH NO. 8 507–08 (2008).

³⁵ See, e.g., *People v. Ward*, 83 Cal. Rptr. 2d 828, 831 (Cal. Ct. App. 1999); *People v. Mendibles*, 245 Cal. Rptr. 553, 562 (Cal. Ct. App. 1988).

³⁶ Simon A. Cole, *Out of the Daubert Fire and into the Fryeing Pan? Self-Validation, Meta-Expertise and the Admissibility of Latent Print Evidence in Frye Jurisdictions*, 9 MINN. J.L. SCI. & TECH. 453, 456–58 (2008).

³⁷ *Id.*

³⁸ See Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half Century Later*, 80 COLUM. L. REV. 1197, 1208 (1980); see also *United States v. Williams*, 583 F.2d 1194, 1198 (2d Cir. 1978) (“Selection of the ‘relevant scientific community,’ appears to influence the result.”).

³⁹ See Andre A. Moenssens, *Requiem for the “General Acceptance” Standard in Forensic Science – Some Whimsical Thoughts on the Battle of Frye v. The Federal Rules of Evidence*, in 1982 LEGAL MED. ANN. 275, 276 (C. Wecht ed., 1982).

whether it is supported by reliable underlying methodology.⁴⁰ Modern techniques can further exacerbate this problem by implicating elements of a variety of disciplines, especially where no single community “claim[s] the novel process as its own.”⁴¹

A subset of this conundrum is determining the breadth of a given community. If too broad a field is selected, many members of that wide community may not even be aware of the particular method being employed by a subset of its scientists.⁴² However, if too narrow a field is chosen, “the judgment of the scientific community becomes, in reality, the opinion of a few experts.”⁴³ The difficulty of this choice was illustrated in *People v. Quintanilla* where, after much debate, the court found that the relevant community for the DNA method upon which the prosecution’s expert sought to base his testimony, polymerase chain reaction, was not limited to forensics, but rather extended to the entire scientific community employing that method.⁴⁴

C. DNA Fingerprinting Evidence and the Extensive Process It Underwent to Rise to the Level of General Acceptance

Many of these problems can be best illustrated by a look into the process that deoxyribonucleic acid (DNA) fingerprinting⁴⁵ evidence underwent to reach the level of general acceptance required by the test. Before 1989, DNA fingerprinting went “essentially unchallenged”⁴⁶ in the United States, despite its introduction in at least eighty murder and rape trials alone.⁴⁷ During that time, one judge referred to the evidence as “the single greatest advance in the ‘search for truth’ . . . since the

⁴⁰ See *id.*

⁴¹ See Andre A. Moenssens, *Admissibility of Scientific Evidence—An Alternative to the Frye Rule*, 25 WM. & MARY L. REV. 545, 548 (1984); see also DAVID L. FAIGMAN, DAVID H. KAYE, MICHAEL J. SAKS & JOSEPH SANDERS, *SCIENCE IN THE LAW: FORENSIC SCIENCE ISSUES* § 11-2.7.4 (2002) (dedicating an entire section to determining what the relevant scientific community for a given piece of DNA evidence might be, with conclusions including: molecular genetics, biotechnology, biology, statistics, population genetics, and forensic science).

⁴² See, e.g., *People v. Williams*, 331 P.2d 251, 253–54 (Cal. App. Dep’t Super. Ct. 1958) (finding that because the “medical profession generally [was] unfamiliar with the use of Nalline” the test could not have satisfied *Frye* if the entirety of the medical profession were the relevant scientific community).

⁴³ Giannelli, *supra* note 38, at 1209–10.

⁴⁴ *People v. Quintanilla*, No. C-23691 (San Mateo County Super. Ct. Aug. 16, 1991). This community is made up of scientists in the fields of human genetics, molecular biology, biochemistry, population genetics, and demographics. *Id.*

⁴⁵ See *People v. Axell*, 1 Cal. Rptr. 2d 411, 415–18 (Cal. Ct. App. 1991) for an explanation of the science underlying DNA and the technique of DNA fingerprinting.

⁴⁶ Leonard J. Deftos, Daubert & Frye: *Compounding the Controversy Over the Forensic Use of DNA Testing*, 15 WHITTIER L. REV. 955 (1994).

⁴⁷ Jerry E. Bishop, *Reliability of DNA ‘Fingerprinting’ Challenged in New York Murder Case*, WALL ST. J., May 22, 1989, at B4.

advent of cross-examination.”⁴⁸ Later that year, however, the evidence faced its “first serious legal challenge” in a New York case, *People v. Castro*,⁴⁹ with several experts testifying for the first time in a pretrial hearing on the reliability of the test’s procedures and interpretation.⁵⁰ A statement was eventually issued by both parties who came to the out-of-court agreement that if the data were subjected to peer review, “it would not be accepted”⁵¹ and the evidence was subsequently excluded.⁵² Three years later, the court in *People v. Barney*⁵³ specifically cited a report by the National Research Council, which recommended that a pro-defendant mathematical formula be used at trial until there was an improvement of technical procedures to improve the forensic value of the method,⁵⁴ as “indicative of a lack of general acceptance for the current statistical methods of interpreting DNA data.”⁵⁵ Though fear, spurred by its potential failure to measure up to the *Kelly-Frye* general acceptance standard, triggered an increase in challenges,⁵⁶ by 1996, the admissibility of DNA fingerprinting evidence had been upheld by twenty-eight state supreme courts.⁵⁷ This shift was due in part to a subsequent finding by a National Academy of Sciences panel that the usual methodology was sound.⁵⁸ Though each new method of analyzing the data brings new *Kelly-Frye* challenges, many of the more commonly used methods have now been determined by the courts to carry general acceptance.⁵⁹

This history demonstrates how the specific scientific community, when considered and consulted in evaluating novel scientific evidence, can dramatically shift the level of acceptance. The early evaluations reflected a community eagerly embracing the technique, but this focus was tilted when the first National Research Council report cast doubt on acceptance by a wider

⁴⁸ *People v. Wesley*, 533 N.Y.S.2d 643, 644 (Albany Cnty. Ct. 1988).

⁴⁹ *People v. Castro*, 545 N.Y.S.2d 985, 986 (N.Y. Sup. Ct. 1989).

⁵⁰ *Id.*; see also Alison Priske Adema, Comment, *DNA Fingerprinting Evidence: The Road to Admissibility in California*, 26 SAN DIEGO L. REV. 377, 388–89 (1989).

⁵¹ Harold M. Schmeck, Jr., *DNA Findings Are Disputed by Scientists*, N.Y. TIMES, May 25, 1989, at B1, B12.

⁵² Deftos, *supra* note 46, at 956.

⁵³ *People v. Barney*, 10 Cal. Rptr. 2d 731, 738–39 (Cal. Ct. App. 1992).

⁵⁴ See generally NAT’L RES. COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE (1992).

⁵⁵ Deftos, *supra* note 46, at 964–65. But see John McCabe, *DNA Fingerprinting: The Failings of Frye*, 16 N. ILL. U. L. REV. 455, 461–62 (1996) (arguing that *Kelly-Frye* was extended to the statistical interpretation of the DNA data in this case based only on a faulty analogy and bare policy considerations).

⁵⁶ See McCabe, *supra* note 55, at 461–62. See generally DAVID H. KAYE, THE DOUBLE HELIX AND THE LAW OF EVIDENCE (2010).

⁵⁷ See McCabe, *supra* note 55, at 455 n.3 (collecting cases).

⁵⁸ See FAIGMAN ET AL., *supra* note 41, at 671; NAT’L RES. COUNCIL, THE EVALUATION OF FORENSIC DNA EVIDENCE 36 (1996).

⁵⁹ See FAIGMAN ET AL., *supra* note 41, at 669–73.

community. In this case, the issue was ultimately resolved within the institution itself, lending further support to the argument that the *Kelly-Frye* test places these decisions in the right hands by allowing scientific communities to apply their own best practices for vetting the validity of novel techniques over time.⁶⁰

III. THE FEDERAL *DAUBERT* STANDARD

A. The Three Key Cases of the “Daubert Trilogy”⁶¹

In 1993, *Daubert v. Merrell Dow Pharmaceuticals, Inc.* brought before the United States Supreme Court the issue of determining the standard for the admissibility of scientific expert evidence in federal court.⁶² The Court first noted the recent increase in criticism of the *Kelly-Frye* test based on difficulties with determining the proper scope and application of the test relative to different types of evidence and different scientific communities. It then held that it need not weigh in on that debate because the test had been superseded by the 1975 adoption of the Federal Rules of Evidence.⁶³

The Court found that the rigid general acceptance test would be at odds with the “liberal thrust” of the Federal Rules’ “general approach of relaxing the traditional barriers to ‘opinion’ testimony.”⁶⁴ The Court then interpreted Rule 702 to require that scientific expert evidence must be “not only relevant, but reliable.”⁶⁵ Ensuring that these requirements were met would require a trial judge to act as a “gatekeeper” in screening an expert’s testimony to determine the reliability of the scientific methodology and reasoning underlying his opinion.⁶⁶ In doing so, the judge must determine whether the evidence is supported by scientifically valid reasoning or methodology.⁶⁷

While this inquiry can implicate a number of factors, the opinion also sets forth “flexible,”⁶⁸ non-exclusive guidelines for trial judges to apply in assessing the validity of a scientific technique: (1) whether it can be, or has been, tested;⁶⁹ (2) whether it has been

⁶⁰ See generally *supra* Part II.B.

⁶¹ Margaret Berger, *The Supreme Court’s Trilogy on the Admissibility of Expert Testimony*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2d ed. 2000).

⁶² *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 585 (1993).

⁶³ *Id.* at 586, 589; see also BRUCE D. SALES & DANIEL W. SHUMAN, EXPERTS IN COURT: RECONCILING LAW, SCIENCE, AND PROFESSIONAL KNOWLEDGE 31 (2005) (finding it curious that the Federal Rules made no mention of *Frye*).

⁶⁴ *Id.* at 588 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1998)).

⁶⁵ FED. R. EVID. 702; *Daubert*, 509 U.S. at 589.

⁶⁶ *Daubert*, 509 U.S. at 589 n.7.

⁶⁷ *Id.* at 591–92.

⁶⁸ *Id.* at 594.

⁶⁹ *Id.* at 593.

subjected to peer review and publication;⁷⁰ (3) the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation;⁷¹ and finally, (4) whether it has attained general acceptance in the relevant scientific community.⁷² Rather than displacing the *Kelly-Frye* test entirely, the Supreme Court chose to list it as one among several factors to be considered in making the determination.⁷³ Because a trial judge is armed with several more substantive factors that may overcome a deficiency revealed at the "bean-counting" stage, this more expansive test can be more liberally applied to admit evidence that a *Kelly-Frye* court would be forced to exclude.

Just four years later, the United State Supreme Court had the occasion to clarify a number of key *Daubert* issues in *General Electric Co. v. Joiner*.⁷⁴ First, the Court held that a trial judge's decision to admit or exclude scientific evidence under the *Daubert* test is to be reviewed under the standard of abuse of discretion, such that it will not be overturned unless it is "manifestly erroneous."⁷⁵ This standard gives great deference to a trial court's admissibility decision. The Court then held that the district court judge had not abused her discretion in excluding scientific expert testimony and reiterated that the focus under *Daubert* is on methodology and techniques employed by the expert, not on the ultimate conclusion he reaches.⁷⁶ However, the Court acknowledged that "conclusions and methodology are not entirely distinct from one another," and as such, a trial judge may properly exclude the evidence where there are significant analytical gaps between an expert's methodology and his proffered opinion.⁷⁷

Most recently, *Kuhmo Tire Co. v. Carmichael* established that *Daubert's* gatekeeping obligation is not limited to scientific

⁷⁰ *Id.* (noting that while publication does not guarantee validity, it remains a relevant consideration in that by subjecting the work to scrutiny of other experts in the field it becomes more probable that problems or inconsistencies would have been discovered and subject to commentary).

⁷¹ *Id.* at 594; see KENNETH R. FOSTER & PETER W. HUBER, JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS 69 (1997) ("Errors can affect either the reliability of a measurement . . . or its validity . . .").

⁷² *Daubert*, 509 U.S. at 594.

⁷³ DAVID H. KAYE, DAVID E. BERNSTEIN, & JENNIFER L. MNOOKIN, THE NEW WIGMORE: A TREATISE OF EVIDENCE - EXPERT EVIDENCE 327-29 (2d ed. 2011) ("General acceptance, in other words, is relevant to the admissibility of scientific evidence because it is circumstantial evidence of validity.")

⁷⁴ See generally *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

⁷⁵ *Id.* at 142 (quoting *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879)).

⁷⁶ *Id.* at 146; see also *Daubert*, 509 U.S. at 595 ("The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.")

⁷⁷ *Joiner*, 522 U.S. at 146.

testimony, but rather, extends to expert testimony of any kind.⁷⁸ The Court based this finding on the language of Federal Rule of Evidence 702 that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact . . . , a witness qualified as an expert . . . may testify thereto in the form of an opinion,” noting that the statute makes no distinction between the differing categories of knowledge.⁷⁹ In addition, the Court reiterated that the guidelines established in *Daubert* are flexible aids, rather than a “definitive checklist.”⁸⁰ In any given case, the court may, but need not necessarily, give consideration to those factors that are reasonable reliability measures in the context of the issue, the particular area of expertise, and the subject matter of the expert’s testimony.⁸¹ The combination of the guidelines’ flexibility and the limited review under the abuse of discretion standard results in a trial court’s wide latitude in choosing to admit or deny scientific evidence.⁸²

B. Prominent Criticism of the *Daubert* Standard

Just as there was significant opposition to the *Kelly-Frye* formulation, the *Daubert* test has not been immune to criticism of its own. Critics have long expressed doubt about the confidence with which the court in *Daubert* stated that “federal judges possess the capacity to undertake this review,”⁸³ noting that there is little to no basis for believing judges are equipped with the scientific understanding to do so. Furthermore, many scholars argue that even if we were to assume that judges possessed the knowledge to make these decisions, by doing so they would be usurping determinations properly made by the jury.⁸⁴

1. Judges Are Not Scientists

At the time the *Daubert* decision was handed down, its earliest critique was that judges were not and are not scientists by profession and that our evidence standards should not require them to be. Writing for himself and Justice Stevens, Chief Justice Rehnquist delivered *Daubert*’s dissenting opinion cautioning the Court that it had gone too far,⁸⁵ and stated, “I do not doubt that Rule 702 confides

⁷⁸ *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). In this product liability action, the expert in question was an engineer. *Id.*

⁷⁹ *Kuhmo Tire*, 526 U.S. at 147; see FED. R. EVID. 702.

⁸⁰ *Kuhmo Tire*, 526 U.S. at 150 (quoting *Daubert*, 509 U.S. at 593).

⁸¹ *Id.* at 141.

⁸² For example, the Eleventh Circuit has applied this standard in affirming “the lower courts’ *Daubert* rulings in over 70% of published cases since the beginning of this decade.” W. RANDALL BASSETT, ET AL., *Evidence*, 67 MERCER L. REV. 907, 915 (2016).

⁸³ *Daubert*, 509 U.S. at 593.

⁸⁴ See *infra*, Part II.B.2.

⁸⁵ *Id.* at 598 (Rehnquist, C.J., concurring in part and dissenting in part).

to the judge some gatekeeping responsibility . . . but I do not think it imposes on them either the obligation or the authority to become amateur scientists.”⁸⁶ Scholars have echoed these same concerns. For example, Professor Rebecca Harris has argued that judges and scientists are “two very different creatures.”⁸⁷ As evidence of this proposition, she distinguishes between the neutrality and authority that are the hallmarks of the judicial role, and the precision and sterility that comprise the “scientific reputation.”⁸⁸ She notes that these two very different worlds are forced to collide when judges, as gatekeepers, must “determine which scientific ‘strangers’ shall be admitted into the halls of justice.”⁸⁹

Similar concerns are also raised by proponents of the *Kelly-Frye* method, who point out that “the requirement of general acceptance in the scientific community assures that *those most qualified to assess the general validity of a scientific method* will have the determinative voice.”⁹⁰ Professor David Faigman argues that judges “have little training in, knowledge of, or inclination to learn science,” but in the twenty-first century, *Daubert* has made it a job requirement that judges become amateur scientists.⁹¹ In fact, an extensive survey of studies found that “judges may be no better than laypeople in identifying flawed or questionable expert methodologies.”⁹² By requiring trial judges, generally untrained in science of any kind, to determine the reliability of the particular scientific issues before them, we are taking that determinative voice out of the hands of the far more qualified scientific community.

In addition, Professors Caudill and LaRue argue that even if judges had an understanding of the scientific methodologies on which they were ruling, this knowledge would not be enough.⁹³ Instead, a number of reversals of *Daubert* decisions on appeal reveal that judges need to know about the social, institutional, and rhetorical aspects of science as well.⁹⁴ In light of the review

⁸⁶ *Id.* at 600–01.

⁸⁷ REBECCA C. HARRIS, *BLACK ROBES, WHITE COATS: THE PUZZLE OF JUDICIAL POLICYMAKING AND SCIENTIFIC EVIDENCE* 1 (2008).

⁸⁸ *Id.*

⁸⁹ *Id.* at 7.

⁹⁰ *United States v. Addison*, 498 F.2d 741, 743–44 (D.C. Cir. 1974) (emphasis added); see also NAT’L RES. COUNCIL, *supra* note 2, at 11 (“Scientists, nevertheless, generally recognize the limits of their methods and have developed best practices for addressing them . . .”).

⁹¹ David L. Faigman, *Judges as “Amateur Scientists,”* 86 B.U. L. REV. 1207, 1207–09 (2006).

⁹² Marta M. Chlistunoff, *Expert Testimony and the Quest for Reliability: The Case for a Methodology Questionnaire*, 94 TEX. L. REV. 1055, 1061 (2016).

⁹³ See David S. Caudill & Lewis H. LaRue, *Why Judges Applying the Daubert Trilogy Need to Know About the Social, Institutional, and Rhetorical – And Not Just the Methodological – Aspects of Science*, 45 B.C. L. REV. 1, 51–52 (2003).

⁹⁴ *Id.* at 1.

of these determinations under the relatively lax abuse of discretion standard, these reversals indicate serious problems underpinning the lower courts' admissions.

Professor Sheila Jasanoff has identified six characteristics of scientific knowledge of which judges need to be aware when making admissibility determinations: (1) social construction; (2) contingency; (3) inscription; (4) deconstruction; (5) experimenters' regress; and (6) boundary work.⁹⁵ The first of these characteristics, social construction, reflects the view that facts presented by scientists are socially constructed "by human agency through the institutions and processes of science" rather than direct reflections of nature.⁹⁶ The contingency characteristic means that scientific claims are dependent upon background features through which they are produced, like the experimental conventions within the relevant scientific community.⁹⁷ Inscription is the process by which science is transformed into written texts.⁹⁸ The fourth characteristic, deconstruction, is the process by which the socially constructed scientific facts become untangled from their personal components during a controversy, particularly during adversarial litigation processes.⁹⁹ Experimenters' regress is a name given to the common pattern of deconstruction whereby claims are only tested so long as scientists remain motivated to challenge one another. Once these motivations cease, a consensus is said to form and such "black boxed" claims find themselves at the core of scientific knowledge.¹⁰⁰ Finally, boundary work is the tendency of a scientific community to resist criticism from outsiders in order to maintain the stability of its findings.¹⁰¹

Though Professor Jasanoff's additional knowledge requirements vary from those presented by Professors Caudill and LaRue, each of these scholarly writings makes clear that some deeper understanding of science on the part of the judiciary is necessary. Only with this added knowledge can a trial judge appreciate the scientific field's goals and limitations while avoiding a conflation of authority for reliability that leads to the idealization of science rather than a decision grounded in scientific reality.¹⁰²

⁹⁵ See Sheila Jasanoff, *What Judges Should Know About the Sociology of Science*, 77 JUDICATURE 77, 77–78 (1993).

⁹⁶ *Id.* at 77; see also FOSTER & HUBER, *supra* note 71, at 195.

⁹⁷ See Jasanoff, *supra* note 95, at 78.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*; see also Sheila Jasanoff, *Watching the Watchers: Lessons from the Science of Science Advice*, THE GUARDIAN (Apr. 8, 2013, 7:30 AM), <https://www.theguardian.com/science/political-science/2013/apr/08/lessons-science-advice> [http://perma.cc/UL6T-X6TV].

¹⁰² See Caudill & LaRue, *supra* note 93, at 5.

Perhaps most tellingly, concerns about judges' limited scientific knowledge have emerged from trial judges themselves. In *State v. Cauthron*, the court admitted that it "lack[ed] the scientific expertise to either assess or explain the methodology" on which it was asked to.¹⁰³ In *Craig v. Boren*, Justice Brennan proclaimed it "unrealistic to expect . . . members of the judiciary . . . to be well versed in the rigors of experimental or statistical technique."¹⁰⁴ In *United States v. Cline*, Senior District Judge Crow admitted "those of a 'scientific' bent certainly can take issue with whether the judges and lawyers have the education or training to engage in 'scientific' testing."¹⁰⁵ In a 2001 survey of 400 state court judges in jurisdictions applying both *Frye* and *Daubert*, about half admitted that they were not adequately prepared to evaluate the range of scientific evidence proffered in their courtrooms.¹⁰⁶ These admissions and results make abundantly clear that trial judges are anything but comfortable with the scientific role the *Daubert* rule has thrust upon them.

Further argument against this trend is found in the discussion records of the National Research Council of the National Academies' Committee on *Daubert* Standards. The Committee noted the striking cultural differences between science and the law, particularly in the system of values for which each discipline strives.¹⁰⁷ On the one hand, science values precision and accuracy, which take time, with research and testing often extending over a period of years and relying on the collaboration of many scientists and technicians to achieve these goals. In stark contrast, the law values "pragmatic justice at a particular point in time so that people can get on with their lives."¹⁰⁸ Moreover, the law attempts to resolve questions in an adversarial setting.¹⁰⁹ These differences may help explain why qualified, academic scientists are often hesitant to testify as expert witnesses,¹¹⁰ and why lawyers and judges should not be required to act as amateur scientists.

¹⁰³ *State v. Cauthron*, 846 P.2d 502, 517 (Wash. 1993).

¹⁰⁴ *Craig v. Boren*, 429 U.S. 190, 204 (1976).

¹⁰⁵ *U.S. v. Cline*, 188 F. Supp. 2d 1287, 1294 (D. Kan. 2002).

¹⁰⁶ Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW & HUM. BEHAV. 433, 441-442 (2001).

¹⁰⁷ NAT'L RES. COUNCIL, *supra* note 2, at 17; see also SALES & SHUMAN, *supra* note 63, at 38; FOSTER & HUBER, *supra* note 71, at 17-19.

¹⁰⁸ Mark S. Frankel, *The Evolving Role of Scientific Experts in the Courts*, 1 J. OF PHIL., SCI. & L. (2001), <https://jpsl.org/archives/evolving-role-scientific-experts-courts/> [http://perma.cc/498S-9XPM].

¹⁰⁹ NAT'L RES. COUNCIL, *supra* note 2, at 17.

¹¹⁰ *Id.* at 18.

2. The Gatekeeping Role May Infringe on the Jury

Even assuming judges are qualified to make these scientific determinations, critics argue that doing so improperly infringes on the province of the jury¹¹¹ to make determinations about the credibility of witnesses.¹¹² The nation's most cited Evidence law scholar,¹¹³ Edward J. Imwinkelreid, asserts that the language in the *Daubert* opinion limiting the trial judge's inquiry to the methodology, rather than the conclusion it generates, acknowledges this concern about taking evidence from the jury.¹¹⁴ He worries that in the modern era of expanded expert testimony, "[t]he fundamental issue is the allocation of factfinding power between the trial judge and jury."¹¹⁵ Under *Daubert*, the trial judge is explicitly asked to evaluate the credibility of the experts on either side of the scientific argument, impermissibly taking this power away from the jury.

One such critic, Krista M. Pikus, vigorously argues that it should be entirely within the role of the jury to decide the reliability of expert testimony because such a determination "primarily entails questions of fact."¹¹⁶ She goes on to assert that taking these questions of fact from the jury upsets the balance of power in a world where increasingly fewer issues are left to juries.¹¹⁷ For these reasons, she supports the guidelines established by the *Daubert* Court, but believes that it is the jury, not the judge, who should be acting as the gatekeeper by applying these factors.¹¹⁸ While this approach eliminates concerns about infringing on the jury, it raises an entirely new set of concerns because, much like trial judges, jurors are not scientists. Therefore, the scientific community is still not being given a powerful voice in decisions it is most qualified to make.

¹¹¹ *See id.* at 9–10 ("Several concerns have been raised about the courts handling of scientific evidence and expertise, in particular . . . [w]hether judges, by excluding too much evidence, are intruding on the constitutional role of the jury to resolve disputed facts.").

¹¹² *See, e.g.,* Sparf v. United States, 156 U.S. 51, 89 (1895) (noting that questions of fact belong to the jury, while it is questions of law that a judge is to decide); *see also* United States v. Brown, 511 F.2d 920, 924 (2d Cir. 1975) (finding that it is the jury's role to judge the credibility of witnesses).

¹¹³ Brian Leiter, *Most Cited Law Professors by Specialty, 2000-2007*, BRIAN LEITER'S LAW SCHOOL RANKINGS (Dec. 18, 2007), http://www.leiterrankings.com/faculty/2007faculty_impact_areas.shtml#Evidence [<http://perma.cc/PHW3-9GVXI>].

¹¹⁴ *See* Edward J. Imwinkelreid, *Trial Judges – Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Evidence Without Invading the Jury's Province to Evaluate the Credibility and Weight of the Testimony?*, 84 MARQ. L. REV. 1, 4–5 (2000).

¹¹⁵ *Id.* at 6–7.

¹¹⁶ Krista M. Pikus, Note, *We the People: Juries, Not Judges, Should Be the Gatekeepers of Expert Evidence*, 90 NOTRE DAME L. REV. 453, 455 (2014).

¹¹⁷ *Id.* at 460–61 (discussing the impact of arbitration agreements, settlements, and waiver of jury trials, and how they are further impacted by *Daubert*-style decision-making).

¹¹⁸ *See id.* at 474.

IV. BRIDGING THE GAP: *SARGON ENTERPRISES INC. V. UNIVERSITY OF SOUTHERN CALIFORNIA*

Before examining the proposed changes to the existing standards, it is useful to look into how the *Kelly-Frye* and *Daubert* standards themselves have changed over the years, and how some scholars argue they may no longer be as distinct from each other as originally thought.¹¹⁹ As discussed below, that argument is somewhat overstated.

In 2012, the California Supreme Court decided *Sargon Enterprises Inc. v. University of Southern California*,¹²⁰ a breach of contract suit brought against the university by a dental implant manufacturer. The court upheld a trial judge's exclusion after an eight-day evidentiary hearing of expert evidence regarding lost profits as improperly supported.¹²¹ The rejected testimony rested on a "market share" approach,¹²² under which the expert declared the small company would have become "extraordinarily successful" had the university completed the five-year clinical study for which it had contracted.¹²³ Under this approach, to calculate Sargon's lost profits, the expert relied not on any of the company's previously realized profits, but on the market's "Big Six" leaders' profits.¹²⁴ Notably, the court held that the trial court had not erred in excluding the testimony because the "trial court has the duty to act as a 'gatekeeper' to exclude speculative expert testimony."¹²⁵

David L. Faigman and Edward J. Imwinkelreid, the authors on whose previous article the *Sargon* opinion repeatedly relied,¹²⁶ proclaim this case to be "arguably the most important expert testimony decision that [the California Supreme Court] has rendered in at least two decades."¹²⁷ The pair goes on to argue that while the decision marks California's move closer to the

¹¹⁹ See, e.g., David E. Bernstein, Frye, Frye, *Again: The Past, Present, and Future of the General Acceptance Test*, 41 JURIMETRICS J. 385, 388–89 (2001) (arguing that "case law under *Frye* is slowly converging with *Daubert* jurisprudence").

¹²⁰ *Sargon Enter, Inc. v. Univ. of S. Cal.*, 288 P.3d 1237 (Cal. 2012).

¹²¹ *Id.* at 1239–40.

¹²² The expert testified that he selected this approach because "the methodology had been used in complicated patent cases, antitrust cases, and unfair competition cases." *Id.* at 1241.

¹²³ *Id.* at 1239.

¹²⁴ *Id.* at 1243. The expert certified public accountant, James Skorheim, testified that Sargon's lost profits "ranged from \$220 million to \$1.18 billion" based almost entirely on his opinion that the innovative product would have allowed the company to quickly command a significant market share. *Id.*

¹²⁵ *Id.* at 1239.

¹²⁶ See *Sargon*, 288 P.3d at 1251–52.

¹²⁷ David L. Faigman & Edward J. Imwinkelreid, *Wading Into the Daubert Tide: Sargon Enterprises, Inc. v. University of Southern California*, 64 HASTINGS L.J. 1665, 1665 (2013).

Daubert standard, the extent of that move is not yet clear.¹²⁸ The authors note that the *Sargon* opinion is framed around *Daubert*¹²⁹ and yet also “formally reiterated California’s commitment to *Frye*.”¹³⁰ The authors venture that because the two tests are not mutually exclusive, in fact noting that general acceptance remains one factor to be considered under *Daubert*, “the two tests may exist side by side in California courts.”¹³¹

Finally, Faigman and Imwinkelreid conclude that although the case marks a “major stride” toward *Daubert*’s test, there are still “significant differences” between applications of the two tests, even after this case.¹³² While the court in *Sargon* paid homage to *Daubert*, it did not go as far as expressly adopting the procedures or factors established by the federal test.¹³³ The *Sargon* opinion requires only that a trial judge engage in an inquiry that determines whether, “as a matter of logic,” the expert’s cited studies support a finding that the underlying theory or technique is valid.¹³⁴ This remains a far cry from *Daubert*’s requirement that the judge weigh the testimony offered by both sides, taking into consideration, if the judge wishes, the credibility of the witnesses, and make a reliability determination by a preponderance of the evidence.¹³⁵

All of this makes clear that despite what some commentators believe, California remains just as much a *Kelly-Frye* jurisdiction as it was before the *Sargon* opinion was announced. While the *Sargon* court did employ *Daubert*’s “gatekeeper” language, it did so only in regard to excluding “unduly speculative” evidence, making no mention of an entire inquiry into the evidence’s reliability.¹³⁶ Rather than reflecting a jump toward *Daubert*-style gatekeeping, the opinion merely reflects that such speculative evidence is not the type reasonably relied upon by experts in the relevant scientific community.¹³⁷ If there remained any doubt as to the true alignment of the court’s test, a critical footnote in

¹²⁸ *Id.*

¹²⁹ In addition to the “gatekeeper” language, the opinion cites with approval all three cases that make up the *Daubert* trilogy. *See, e.g., Sargon*, 283 P.3d at 722.

¹³⁰ Faigman & Imwinkelreid, *supra* note 127, at 1669–70.

¹³¹ *Id.* at 1689–90.

¹³² *Id.* at 1670.

¹³³ *Id.* at 1690.

¹³⁴ *Sargon*, 288 P.3d at 1252 (quoting Edward J. Imwinkelreid & David L. Faigman, *Evidence Code Section 802: The Neglected Key to Rationalizing the Law of Expert Testimony*, 42 LOY. L.A. L. REV. 427, 449 (2009)).

¹³⁵ Faigman & Imwinkelreid, *supra* note 127, at 1691.

¹³⁶ *Sargon*, 288 P.3d at 1240. In particular, the court noted “[u]nder Evidence Code section 801, the trial court acts as a gatekeeper to exclude *speculative or irrelevant* expert opinion.” *Id.* at 1251 (emphasis added).

¹³⁷ CAL. EVID. CODE § 801(b).

Sargon concludes “nothing we say in this case affects our holding in *Leahy* regarding new scientific techniques.”¹³⁸ The *Sargon* opinion may don *Daubert*’s terminology in announcing a gatekeeping role for California trial judges, but the test itself has not been given such a cloak and *Kelly-Frye* remains just as much the standard in California as it was before this case.

V. EMERGING METHODS

Given the problems created by each of the tests, it is hardly difficult to argue that it is time for a change. In fact, several scholars have suggested new methods, ranging from acknowledging the acceptance of a recognized minority of the scientific community to the introduction of “expert robots.”

A. Innovative Proposals Advanced by Scholars

Arguing that the general acceptance standard under *Kelly-Frye* excludes too much valid evidence, scholars and courts alike have argued there is no need for universal or even majority acceptance and instead set forth a substantial, rather than general, acceptance standard.¹³⁹ Leading Evidence professor Michael H. Graham explains: “The difference between the ‘general acceptance test’ and the ‘substantial acceptance test’ is that while general acceptance implies acceptance by a majority if not a significant majority of those experts in the particular field, the substantial acceptance clearly permits admissibility when acceptance is by a recognized minority segment.”¹⁴⁰

Similarly, the court in *United States v. Torniero* recognized that unanimity is rare and instead required only that the lower court “make a discretionary determination that the hypotheses relied upon have substantial acceptance in the discipline”¹⁴¹ The court first made this explanation in light of the admissibility of mental health diagnoses which are not covered by the *Kelly-Frye* standard, but the language it employed has also been applied in the context of novel scientific evidence. In *State v. Hennem*, the court echoed *Torniero* in finding that battered woman syndrome had “gained a *substantial enough* scientific acceptance to warrant admissibility.”¹⁴²

¹³⁸ *Sargon*, 288 P.3d at 1252 n.6.

¹³⁹ See, e.g., *United States v. Torniero*, 735 F.2d 725, 731 (2d Cir. 1984); *United States v. Gould*, 735 F.2d 725, 727 n.6 (4th Cir. 1984); Lisa Gonzalez, *The Admissibility of Scientific Evidence: The History and Demise of Frye v. United States*, 48 U. MIAMI L. REV. 371, 382–84 (1993); CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 203, at 873 (John W. Strong ed., 4th ed. 1992).

¹⁴⁰ MICHAEL H. GRAHAM, MODERN STATE AND FEDERAL EVIDENCE: A COMPREHENSIVE REFERENCE TEXT 329 (1989).

¹⁴¹ *Torniero*, 735 F.2d at 731.

¹⁴² *State v. Hennem*, 441 N.W.2d 793, 798–99 (Minn. 1989) (emphasis added).

Courts have avoided explicitly stating that the same evidence would not have met the general acceptance standard. They have instead determined that they need not decide the issue because the evidence can be properly admitted under a substantial acceptance standard. For example, in *United States v. Williams*, the court first noted divided persuasive authority and evidence presented on the issue of general acceptance within the relevant scientific community for stenographic voice identification. It then dodged the general acceptance determination and found that acceptance “by a *substantial section* of the scientific community concerned” was enough to mandate admission of the evidence.¹⁴³ By applying this standard the court was able to admit evidence that may well have been excluded under the general acceptance standard without having to make that explicit determination.

Despite this evolution of the substantial acceptance standard and widespread criticism of *Kelly-Frye* as too conservative, one scholar argues that even this more stringent rule “does not adequately screen novel scientific techniques.”¹⁴⁴ To solve this problem, Professor and Forensic Consultant Andre Moenssens places a strong emphasis on the need to establish a flexible procedure, rather than a static test, to directly replace *Kelly-Frye* in dealing with the admission of novel scientific evidence.¹⁴⁵ The key to this procedure is emphasizing reliability over consensus at three distinct stages of litigation: discovery, pretrial hearing, and decision-making.¹⁴⁶ This can be achieved by: (1) requiring expert reports subject to discovery to contain information regarding the underlying methodology employed and the people involved in employing it, rather than merely conclusions reached;¹⁴⁷ (2) allowing increased deposition of opposing witnesses;¹⁴⁸ (3) increasing systematic use of, and judges’ active participation in, the motion *in limine* to resolve admissibility issues prior to trial;¹⁴⁹ and (4) employing a number of concrete factors to aid judges in admissibility decisions.¹⁵⁰

¹⁴³ *U.S. v. Williams*, 443 F. Supp. 269, 273 (S.D.N.Y. 1977) (emphasis added).

¹⁴⁴ Moenssens, *supra* note 39, at 547.

¹⁴⁵ *Id.* at 564.

¹⁴⁶ *Id.* at 568.

¹⁴⁷ *Id.* at 568–71.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 571–73.

¹⁵⁰ The eleven suggested factors are:

- (1) [T]he potential error rate in using the technique, (2) the existence and maintenance of standards governing its use, (3) presence of safeguards in the characteristics of the technique, (4) analogy to other scientific techniques whose results are admissible, (5) the extent to which the technique has been accepted by scientists in the field involved, (6) the nature and breadth of the inference adduced, (7) the clarity and simplicity with which the technique can be described and its results explained, (8) the extent to which the basic data are verifiable by the court and jury, (9) the availability of other experts to test

By employing these methods, the options available to judges and overall flexibility of the approach can be increased, allowing the focus to center on underlying reliability.

Finally, in one very recent solution, Professor Pamela Katz incorporates the use of artificial intelligence (“AI”) to help judges in making pretrial *Daubert* admissibility decisions.¹⁵¹ She begins by taking note of the legal community’s tendency to fear emerging technology, particularly where it relates to the substance of the law rather than merely the efficiency of its practice.¹⁵² Then, however, she explains how her solution would provide critical assistance to a judge but leave the ultimate decision in the judge’s hands.¹⁵³ Armed with both legal and scientific databases, the AI machine would probe published scientific literature in the relevant field exploring that discipline’s chosen methodologies and supported reasoning.¹⁵⁴ It would then evaluate the proffered testimony in light of these databases and its programmed rules to decide whether the evidence complies with the *Daubert*, and other, factors before ultimately displaying its results to the judge.¹⁵⁵

While this novel approach to addressing *Daubert*’s shortcomings adds much to the discussion, the introduction of these machines also exaggerates these concerns. The use of these robots implicates an additional layer of inquiry—before allowing the machines to be used, it would be necessary for the court to determine whether the databases and algorithms employed by the machine in question are themselves reliable and scientifically valid. This puts the trial judge back in his or her original position, left to apply the same test, with the same challenges¹⁵⁶ this innovative approach was designed to overcome. Furthermore, prominent concerns about infringing on the fact-finding province of the jury¹⁵⁷ apply with equal, if not greater, force when the

and evaluate the technique, (10) the probative significance of the evidence in the circumstances of the case, and (11) the care with which the technique was employed in the case.

Id. at 573–74 (quoting Mark McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879, 911–12 (1982)).

¹⁵¹ See generally Pamela S. Katz, *Expert Robot: Using Artificial Intelligence to Assist Judges in Admitting Scientific Expert Testimony*, 24 ALB. L.J. SCI. & TECH. 3 (2014) (explaining that AI machines can follow directions, but can also “determine whether the instructions are correct, whether there is a better method to reach the desired results, or if the process had been used successfully before”).

¹⁵² *Id.* at 3.

¹⁵³ *Id.* at 36–37.

¹⁵⁴ *Id.* at 37.

¹⁵⁵ See *id.* at 39.

¹⁵⁶ See generally *supra* Part II.B.

¹⁵⁷ See *supra* Part II.B.2.

infringing entity is no longer a trier of fact in any form, but rather an artificial device and the algorithms it employs.

B. A New Approach Altogether: Expanding the Use of the American Association for the Advancement of Science's Court-Appointed Scientific Experts Program

Ultimately, the proposals discussed above either go too far or do not go far enough—each either does not fully confront the criticism of the current standards or infringes too deeply on the parties' rights. What California needs is a middle ground between these various extremes. This article now proposes such a solution that comes in the form of imposing an additional prong to the *Kelly-Frye* test. This new prong would require trial judges to consult with Court-Appointed Scientific Experts in determining the admissibility of novel expert scientific evidence.

Justice Blackmun himself, in the *Daubert* majority opinion, noted that, in part, the majority's confidence "that federal judges possess the capacity to undertake this review" was derived from their authority to appoint experts under Federal Rule of Evidence 706.¹⁵⁸ The Rule sets forth a number of procedures, including those for appointment, assignment of duties, reporting of findings, and compensation of experts.¹⁵⁹ A judge additionally has the broader, inherent authority to appoint experts "necessary to permit the court to carry out its duties, including authority to appoint a technical advisor to consult with the court during the decision-making process."¹⁶⁰

Over twenty years ago, researchers Joe Cecil and Thomas Willging of the Federal Judicial Center conducted a mail and telephone survey of 425 then-active federal judges to inquire into the frequency of and reasons for appointment of experts under such sources of authority.¹⁶¹ The results of this survey revealed that appointments were made much more frequently than previously suspected based on a low rate of reference to such experts in published opinions.¹⁶² From these results, two primary reasons a judge would invoke an expert emerged: (1) to aid decision-making on the merits of the litigation; and (2) to aid settlement.¹⁶³ Critically, the study revealed almost unanimous

¹⁵⁸ *Daubert*, 509 U.S. at 595.

¹⁵⁹ FED. R. EVID. 706.

¹⁶⁰ Joe S. Cecil & Thomas E. Willging, *Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L.J. 995, 998 (1994).

¹⁶¹ *Id.* at 997 n.7.

¹⁶² *Id.* at 1004–05. The eighty-six judges who responded that they had made one or more such appointments in fact made approximately 225 appointments. *Id.*

¹⁶³ *Id.* at 1009–15.

satisfaction on the part of those judges that had previously made appointments, with only two of the sixty-five responding to this question failing to indicate that they were “pleased with the services provided.”¹⁶⁴

As such, it is clear that no one questions the ability and authority of a judge to appoint such an expert if he or she so chooses.¹⁶⁵ Despite the judges’ own satisfaction with the experts, several critics have questioned whether they would be prudent in so doing.¹⁶⁶ This criticism centers around the lack of parameters provided for a judge in the process of appointing,¹⁶⁷ supervising,¹⁶⁸ and paying¹⁶⁹ such experts. In light of these claims, the logical response is to establish such parameters, not to give up an apparently otherwise satisfactory process entirely.

Enter the Court-Appointed Scientific Experts (“CASE”) Project. Under this service, the American Association for the Advancement of Science (“AAAS”), an international non-profit organization,¹⁷⁰ assists both federal and state judges “in identifying highly qualified scientists, engineers, and healthcare professionals to serve as scientific experts.”¹⁷¹ Started as a demonstration project in 2001, as a result of the report of the National Conference of Lawyers & Scientists Task Force on Science & Technology in the Courts,¹⁷² the project serves as a link between the courts and scientific communities.¹⁷³

¹⁶⁴ *Id.* at 1008.

¹⁶⁵ See FED. R. EVID. 706 advisory committee’s note (“The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned.”).

¹⁶⁶ Note, *Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence*, 110 HARV. L. REV. 941, 942, 946–49 (1997).

¹⁶⁷ See, e.g., JOE S. CECIL & THOMAS E. WILLGING, COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706 23 (1993), [http://www.fjc.gov/public/pdf.nsf/lookup/experts.pdf/\\$file/experts.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/experts.pdf/$file/experts.pdf) [<http://perma.cc/5YGS-LEB8>].

¹⁶⁸ See, e.g., 29 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 6261 (1st ed. 1997).

¹⁶⁹ See Cecil & Willging, *supra* note 160, at 1055–56 (noting that the need for guidance is exacerbated where one of the parties is indignant).

¹⁷⁰ AAAS is the largest multidisciplinary scientific society in the world. Mark S. Frankel, *Considering Advances in Neuroscience Through the Lenses of Law and Human Rights*, 1 J.L. & BIOSCI. 215, 216 (2014), <http://jlb.oxfordjournals.org/content/1/2/215.full> [<http://perma.cc/R2JE-6GES>].

¹⁷¹ *Court Appointed Scientific Experts (CASE)*, AM. ASS’N FOR THE ADVANCEMENT OF SCI., <http://www.aaas.org/page/court-appointed-scientific-experts-case> [<http://perma.cc/S69F-JTGG>].

¹⁷² AAAS-ABA NAT’L CONFERENCE OF LAWYERS & SCIENTISTS TASK FORCE ON SCIENCE & TECHNOLOGY IN THE COURTS, ENHANCING THE AVAILABILITY OF RELIABLE AND IMPARTIAL SCIENTIFIC AND TECHNICAL EXPERTISE TO THE FEDERAL COURTS: A REPORT TO THE CARNEGIE COMMISSION ON SCIENCE, TECHNOLOGY, AND GOVERNMENT (1991).

¹⁷³ *CASE: History*, AM. ASS’N FOR THE ADVANCEMENT OF SCI., <http://www.aaas.org/page/case-history> [<http://perma.cc/J43G-PUJK>].

As part of the CASE project, AAAS assists judges by: (1) locating and recommending experts in a variety of scientific and technical fields; (2) independently evaluating the qualifications and potential biases of scientists proposed by one or more parties to serve as court experts; (3) advising on the management of litigation involving experts recommended through the project; and (4) assisting judges in refining the scope of the need for the expert and determining what kinds of experts are most appropriate to address those needs.¹⁷⁴ This proposal focuses primarily on AAAS's role in formally and thoroughly vetting the qualifications and neutrality of experts in order to ensure that the recommendations made to the trial judges regarding the admissibility of the evidence are themselves reliable. This independent evaluation is conducted by the Recruitment and Screening Panel, focusing on the purported experts' "scientific merit, reputation, and the ability to communicate highly technical information to non-scientific audiences."¹⁷⁵

The goal of the Task Force was "to create a system that could 'find an expert who would provide the judge independent and reliable advice that would be free from taint,'" and the CASE program seems to be doing just that.¹⁷⁶ Currently, the program has been used by judges in sixteen jurisdictions, including three of the four federal districts in California, as well as the Department of Health and Human Services Departmental Appeals Board.¹⁷⁷ Much like the surveyed federal judges using court-appointed experts generally, many judges using the CASE program have expressed satisfaction with the experience.¹⁷⁸ One such judge from the Central District of California using the service proclaimed, "[t]he judges [in this District] would benefit from a presentation about the fine services that AAAS makes available."¹⁷⁹ This satisfaction is due in part to the ease of

¹⁷⁴ *Court Appointed Scientific Experts (CASE)*, AM. ASS'N FOR THE ADVANCEMENT OF SCI., <http://www.aaas.org/page/court-appointed-scientific-experts-case> [<http://perma.cc/S69F-JTGG>]; *CASE Experience*, AM. ASS'N FOR THE ADVANCEMENT OF SCI., <http://www.aaas.org/page/case-experience> [<http://perma.cc/6U5W-2PKK>].

¹⁷⁵ *CASE: Recruitment and Screening Panel*, AM. ASS'N FOR THE ADVANCEMENT OF SCI., <http://www.aaas.org/page/case-recruitment-and-screening-panel> [<http://perma.cc/DBW3-PMUU>].

¹⁷⁶ Tom Price, *Explaining Science in the Courtroom*, OPTICS & PHONICS NEWS, Nov. 2007, at 16–17, <http://www.osa-opn.org/Content/ViewFile.aspx?id=10904> (quoting Carnegie Institution President Richard Meserve) [<http://perma.cc/DBW3-PMUU>].

¹⁷⁷ *CASE Experience*, AM. ASS'N FOR THE ADVANCEMENT OF SCI., <http://www.aaas.org/page/case-experience> [<http://perma.cc/6U5W-2PKK>].

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* A Nebraska judge extending his thanks to the AAAS director, stated that "[y]our assistance allowed me to offer to the parties a totally objective examination of the case by qualified and competent experts. . . . The CASE project is an incredibly valuable tool to federal judges." *Id.*

administration provided by AAAS through uniform procedures contained in two handbooks—one for the appointing judges and one for the appointed expert. These handbooks set forth the additional information critics and judges alike had previously found lacking in the power to appoint under Federal Rule 706.¹⁸⁰

In terms of the issue at hand, the CASE program can be implemented on a widespread scale to assist judges during the process of making pretrial admissibility determinations. The expert's services would be used by the judge on a consultation-only basis during the hearing. The expert would address concerns including whether the necessary level of consensus has been reached and whether there is a significant minority whose objections merit consideration in weighing that consensus. Restricting the program expert to a consulting role, rather than allowing the experts to testify at trial, ameliorates concerns about the effect on a jury of the status of the expert as "court-appointed."¹⁸¹ Furthermore, by introducing these neutral experts at the pretrial stage of a civil case, the parties may be motivated to settle the litigation, preventing the need for a trial altogether.¹⁸² In this way the proposed solution could not only help ensure that *Kelly-Frye*- or *Daubert*-style rulings are correctly decided, but could also serve the public policies of encouraging settlement and conserving valuable judicial resources.

In addition, this implementation of the program can address several concerns raised by critics regarding the need for increased guidelines and uniformity of use. For example, the American Bar Association has already begun to promulgate such guidelines.¹⁸³ These standards for court-appointed experts allow testimony only in "exceptional cases" and prefer that the testimony play no role in jury trials. If such testimony is allowed in a jury trial, the jury should usually not be told that a testifying expert was appointed by the judge.¹⁸⁴ Such a disclosure, an author of the standards argues, could subvert the adversary system "if a

¹⁸⁰ See generally AM. ASS'N FOR THE ADVANCEMENT OF SCI., COURT APPOINTED SCIENTIFIC EXPERTS: HANDBOOK FOR JUDGES (2002), <http://www.aaas.org/sites/default/files/migrate/uploads/handbookjudges4.pdf> [<http://perma.cc/SXG9-W69V>]; AM. ASS'N FOR THE ADVANCEMENT OF SCI., COURT APPOINTED SCIENTIFIC EXPERTS: A HANDBOOK FOR EXPERTS (2002), <http://www.aaas.org/sites/default/files/migrate/uploads/handbookexperts3.pdf> [<http://perma.cc/M3GU-KZQ5>].

¹⁸¹ See Price, *supra* note 176, at 17.

¹⁸² See *id.* at 176 ("The mere prospect of testimony from an independent expert seems to spur settlement"); Deborah C. Runkle, *Court-Appointed Scientific Experts: Providing Objective Scientific Advice to the Judiciary*, in SCIENTIFIC EVIDENCE REVIEW: CURRENT ISSUES AT THE CROSSROADS OF SCIENCE, TECHNOLOGY AND THE LAW 19, 24 (Cynthia H. Cwik & Helen E. Witt eds., 2006).

¹⁸³ A.B.A., CIVIL TRIAL PRACTICE STANDARDS 8 (2007).

¹⁸⁴ *Id.* at 9.

jury gives more credence to the testimony of an independent expert simply because he was appointed by the judge.”¹⁸⁵ Limiting the use of these experts to pretrial consultation avoids these issues of jury influence.

This approach also avoids a key concern that neutral court-appointed experts take away the parties’ ability to choose their own experts. This issue is not implicated by the use of CASE program experts as consultants to trial judges in making admissibility decisions because each party remains free to select its own experts, not only for the *Kelly-Frye* hearing, but also for testifying at trial. The court-appointed expert simply serves as an aid to the judge in evaluating the reliability of the evidence presented by those adversary-appointed experts before it can be admitted. While some authors have suggested that these experts replace party experts, neither the program itself nor this article advances such an approach. Rather, the CASE program envisions “only the use of court experts as a supplement to party experts.”¹⁸⁶ In this way, the CASE program expert is merely another resource for the trial judge to consult in making his or her reliability determination.

Finally, while this proposal would require a trial judge to confer with and consider the recommendation of the CASE program’s expert, the judge is not to be bound by that decision. The admissibility determination made following the hearing and consultation remains fully in his or her hands. This ensures not only the autonomy of the judge in issuing his or her ruling, but further provides litigants an order appealable in the same manner and to the same extent as it would have been absent the required participation of the CASE program expert.

In short, the use of the CASE program would take *Kelly-Frye* a step closer to becoming a comprehensive procedure based on cooperation between the legal and scientific communities. The appointed scientific experts would additionally serve a similar role to Katz’s “Expert Robot,” without the need to introduce an element of technology both uncomfortable to judges and carrying precisely the “misleading aura of scientific infallibility” from which the tests seek to free the jury. Finally, CASE experts would serve a similar role to experts appointed under Federal Rule 706 without the accompanying concerns related to a lack of guidelines and the need for vetting bias because AAAS has already taken care of both of these aspects long before the expert is ever presented to the judge.

¹⁸⁵ Price, *supra* note 176, at 17.

¹⁸⁶ Runkle, *supra* note 182, at 23.

VI. CONCLUSION

By mandating the use of experts under CASE or a similarly designed state program, California could confront the shortcomings of *Kelly-Frye* head on without running head-long into the problems plaguing *Daubert*. In this context, the CASE program would serve two primary functions: (1) identification of the relevant community to evaluate a novel scientific method; and (2) evaluation and recommendation of one or more qualified, unbiased experts to be appointed by the court to testify to such an evaluation. By working with appointed scientific experts on a pre-trial basis, the trial judge can directly consult the relevant scientific community to determine whether that community generally accepts the validity of a given methodology beyond the simple head-counting required under what would now become the first of two prongs of California's test. In this way, the judge is asked to work with an actual scientist rather than to become an amateur one. Through this procedure, the expert would first offer guidance on whether the proffered technique was, in fact, novel. He or she could then help to both define and provide valuable insight into the relevant community. After these determinations are made, the CASE role would end before trial began, eliminating concerns without imposing any misleading aura on, or infringing on the providence of, the jury.

In a system where a significant majority of civil jury trials involve expert testimony, and where the result of either a *Kelly-Frye* or *Daubert* hearing is very often outcome determinative, the shortcomings of the current alternatives can no longer be ignored. By incorporating the best of each test and modifying problem areas, California courts can act as legal trailblazers once again in the quest to ensure the validity of the expert scientific evidence that plays such an increasingly prominent role in our modern trials.



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Death with Dignity and Assistance: A Critique of the Self-Administration Requirement in California's *End of Life Option Act*

Amanda M. Thyden*

In 2015, California passed the End of Life Option Act (“ELOA”).¹ This Act enables Californians to end their lives if they have less than six months to live, are not clinically depressed, and are able to self-administer a life-ending prescription.² This Note will specifically address the self-administration requirement of California's ELOA and explain how it unreasonably limits the options for Californians approaching the inevitable end of their lives. Not only does this requirement limit much needed access to life-ending medications, but also, in practice, the self-administration requirement is unnecessary because of its broad interpretation.

This Note comes at a time when one's right to choose the timing of his or her own death is being heavily debated in the United States.³ In 1994, Oregon voters passed the Death With Dignity⁴ ballot initiative, the first of its kind.⁵ Since then, three

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¹ It was originally passed as ABx2-15 (2015), but is now CAL. HEALTH & SAFETY CODE §§ 443.1–22 (West 2016). See 2015 Cal. Legis. Serv. 3045–58 (West). For information regarding the law's voting history, passage margins, and effective date, see *AB-15 End of Life*, LEGINFO (Oct. 5, 2015), https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520162AB15 [<http://perma.cc/F2XF-GMX3>].

² Commonly prescribed end-of-life medications in Oregon are secobarbital and pentobarbital—medications that, when taken in small doses, help patients sleep. See OREGON DEATH WITH DIGNITY ACT: 2015 DATA SUMMARY, OREGON HEALTH AUTHORITY (Feb. 4, 2016), <https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/year18.pdf> [<http://perma.cc/DWK9-P5JQ>].

³ See Taylor E. Purvis, *Debating Death: Religion, Politics, and The Oregon Death with Dignity Act*, 85 YALE J. BIO. MED. 271, 271–72 (2012) (discussing the ongoing public debate regarding Oregon's 1994 legislation). See generally SCOTT C. SHERSHOW, *DECONSTRUCTING DIGNITY: A CRITIQUE OF THE RIGHT-TO-DIE DEBATE* (2014).

⁴ When this Note refers to “right to die,” “death with dignity,” or “physician-assisted suicide,” it refers to a patient's choice to end his or her life through a legal physician-prescribed medication.

⁵ OR. REV. STAT. ANN. § 127.880 (West 1997). The Act was passed in 1994, but not enacted until 1997 due to a temporary injunction that was granted and then later lifted.

other states have followed suit.⁶ When California joined this movement, it included in its legislation the common requirement of self-administration.⁷ Simply put, self-administration requires a patient to administer the medication to him or herself.

While this requirement may silence some critics, and is said to protect a patient's right to self-determination, it excludes anyone who cannot physically self-administer medication from taking advantage of the rights granted by the ELOA.⁸ Many terminally ill patients with mobility issues may want to end their lives on their own terms and should not be excluded from this legislation.⁹

Looking at the practices of states with the self-administration requirement, it is evident that it is not strictly enforced and has been rendered essentially powerless; patients receive administration assistance, and their assistants have not been prosecuted.¹⁰ Knowing this, why do states continue to require self-administration? Is it not sufficient to require a patient's verbal and physical manifestation of assent and a desire to ingest the life-ending medication? Would assisted-administration really lead to the litany of societal ills suggested by its opponents?¹¹

This Note will address the aforementioned questions, and propose the removal of self-administration as a requirement from the ELOA. Part I addresses the history, development, and expansion of right-to-die legislation. Part II discusses the current state of

See *Lee v. Oregon*, 891 F. Supp. 1429, 1431, 1434 (D. Or. 1995) (identifying the arguments for and against Oregon's Death With Dignity Act).

⁶ *Death with Dignity Acts*, DEATH WITH DIGNITY, <https://www.deathwithdignity.org/learn/death-with-dignity-acts/> (reporting that although four states currently have similar legislation—Vermont, Washington, Oregon, and California—five overtly permit life-ending prescriptions; Montana is the fifth state law and its law came about through a 2009 state supreme court decision) [<http://perma.cc/5WXH-7KTU>].

⁷ CAL. HEALTH & SAFETY CODE § 443.1 (West 2016).

⁸ The Oregon law clarifies that self-administration of a life-ending medication is not to be considered suicide. OR. REV. STAT. § 127.880 (1997); see also JAMES ORLANDO, CONN. GEN. ASSEM. OFFICE OF LEGIS. RESEARCH, 2012-R-0477, RIGHT TO DIE LAWS (2012), <https://www.cga.ct.gov/2012/rpt/2012-R-0477.htm> (saying that patients are protected through the self-administration requirement) [<http://perma.cc/KAH6-AGLJ>].

⁹ Some of the most common conditions that are known to limit a patient's ability to move, yet cause bodily pain include: Parkinson's Disease, brain cancer, bone cancer, genetic disorders, and motor vehicle accidents. See, e.g., HOWARD BALL, AT LIBERTY TO DIE: THE BATTLE FOR DEATH WITH DIGNITY IN AMERICA 1–11 (2012) (discussing various illnesses and genetic disorders that cannot be effectively treated); Lisa Lezzoni et al., *Mobility Difficulties Are Not Only a Problem of Old Age*, 16 J. GEN. INTERN. MED. 235, 235–43 (2001) (describing various diseases and conditions that result in mobility limitations).

¹⁰ See *infra* note 88.

¹¹ See, e.g., Mary E. Harned, *The Dangers of Assisted Suicide: No Longer Theoretical*, in AM. UNITED FOR LIFE, DEFENDING LIFE 513, 514 (2012) (“[T]he dangers inherent in the legalization of physician-assisted suicide range from untreated depression to elder abuse to the slippery slope of outright euthanasia.”); Margaret K. Dore, “*Death With Dignity*”: A Recipe for Elder Abuse and Homicide (*Albeit Not By Name*), 11 MARQ. ELDER'S ADV. 387, 399 (2010) (discussing the likelihood of physician-assisted suicide leading to homicide and a decrease of patient choice).

right-to-die legislation, focusing primarily on California's recently passed End of Life Option Act. Part III analyzes the purpose and practice of self-administration requirements in the United States and Europe. It also notes that under California's current law, people will likely be able to obtain administration assistance, negating the self-administration requirement. Finally, Part IV proposes the removal of the self-administration requirement from California's ELOA legislation, essentially allowing a patient to access lethal medication if he or she meets all other requirements.

I. DEVELOPING ONE'S RIGHT TO CHOOSE LIFE OR DEATH

Over the last twenty years, the United States Supreme Court and various states have made significant strides regarding one's right to die with dignity.¹² Although the United States federal government remains hesitant to legalize a patient's right to die, states have begun to normalize the protection of a patient's right to a dignified death.¹³ The justification for such state legislation includes patient autonomy and self-determination, prevention of undignified and painful deaths, and advocacy efforts from residents of various states.¹⁴

States have long served as laboratories of democracy for the development of new and innovative laws.¹⁵ In serving as laboratories for experimentation, the states enact new legislation, test it on their residents, and then, if successful, inspire other states to follow suit. It is essential to note that the states are not acting entirely on their own; the Supreme Court has set a baseline standard regarding one's right to die.¹⁶ Many countries

¹² See Brian Hawkins, *The Glucksberg Renaissance: Substantive Due Process since Lawrence v. Texas*, 105 MICH. L. REV. 409, 410 (2006) (discussing the right to substantive due process as it was interpreted in *Lawrence* and *Glucksberg*); see also Lee v. Oregon, 891 F. Supp. 1429, 1434 (D. Or. 1995) (outlining the state's interest in death with dignity legislation, including: preventing people from painful suicide attempts, prolonged medical treatments, and preserving the right of mentally competent adults to make their own healthcare decisions).

¹³ See Thomas A. Eaton & Edward J. Larson, *Experimenting with the "Right to Die" in the Laboratory of the States*, 25 GA. L. REV. 1253, 1253 (1991) (discussing the view of the federal government that the right to die should be determined through the laboratories of the states rather than through the federal government).

¹⁴ Anjali Shastry, *Maryland State Senator Withdraws Right to Die Bill, Facing Defeat in Key Committee*, WASH. TIMES (Mar. 3, 2016), <http://www.washingtontimes.com/news/2016/mar/3/maryland-state-senator-withdraws-right-to-die-bill/> (quoting Massachusetts State Senator Young who said, "I think it's an individual choice and that's how it should be done.") [<http://perma.cc/JHB9-AJSC>]; Elizabeth Woods, *The Right to Die with Dignity with the Assistance of a Physician: An Anglo, American and Australian International Perspective*, 4 ILSA J. INT'L COMP. L. 817, 818–19 (1998); see Lee, 891 F. Supp. at 1434.

¹⁵ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

¹⁶ *Washington v. Glucksberg*, 521 U.S. 702, 705–07, 727–35 (1997).

throughout Europe have also passed laws legalizing one's right to die with dignity.¹⁷

A. The Supreme Court

In the 1997 case *Washington v. Glucksberg*, the Supreme Court assessed one's right to commit (assisted) suicide.¹⁸ In that case, the plaintiff was a physician who counselled patients on suicide and challenged the constitutionality of a Washington law¹⁹ that banned assisted suicide.²⁰ The Supreme Court held that one does not have a right to commit assisted suicide because the Court found that it was not a fundamental liberty interest.²¹ If this right had been deemed a fundamental liberty interest, assisted suicide would have been protected under the Fourteenth Amendment of the Constitution. The Court said that it was rational for a state to want to protect human life, and upholding a ban on assisted suicide would achieve the state's rational objective.²²

However, Justice O'Connor stated in a concurring opinion that if a patient were suffering from untreatable pain and on the verge of death, that patient may have the right to die on his or her own terms.²³ In fact, she stated that "[t]he parties and *amici* agree that in these States a patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death."²⁴ Here, a Supreme Court Justice acknowledged that it may be appropriate for doctors to prescribe medication that would hasten the death of one of their patients, appealing to the interests of both the physicians and the State.²⁵

In the same year, a similar situation occurred in *Vacco v. Quill*, a Supreme Court case involving a group of New York physicians that brought an action challenging the constitutionality of a law that banned them from assisting someone in committing or attempting to commit suicide.²⁶ The Court held a state's prohibition of assisted suicide did not violate the Equal Protection Clause, adding however, that a doctor may provide a patient with palliative

¹⁷ *Where to Go to Die*, ECONOMIST (July 19, 2014), <http://www.economist.com/news/international/21607888-small-group-countries-helping-someone-die-not-crime-where-go-die> (discussing right-to-die laws in various European countries) [<http://perma.cc/8LZ4-LAPD>].

¹⁸ *Glucksberg*, 521 U.S. at 728.

¹⁹ WASH. REV. CODE § 9A.36.060(1) (1994).

²⁰ *Glucksberg*, 521 U.S. at 707–08.

²¹ *Id.* at 728.

²² *Id.* at 730.

²³ *Id.* at 736–38 (O'Connor, J., concurring).

²⁴ *Id.* at 736–37.

²⁵ *Id.*

²⁶ *Vacco v. Quill*, 521 U.S. 793, 797–98 (1997).

treatment that may result in a patient's hastened death.²⁷ The Court highlighted the difference between a physician actively killing someone and a physician letting someone die—the doctor's intent.²⁸ In her concurrence, Justice O'Connor said it should be up to the states to decide whether one has a right to die.²⁹

Seven years before the *Vacco* decision, the Supreme Court held that patients have the right to refuse treatment if they so desire; it is not for another person, nor the state, to make that decision for them.³⁰ Further, the Court held states can require clear and convincing evidence of one's desire to end life-sustaining treatment before actually ending such treatment.³¹ Although this is different than permitting assisted suicide, it is noteworthy because it reveals the Court's respect for a patient's choice regarding end-of-life options.

Through the aforementioned cases, the Court acknowledged the importance of one's right to choose his or her own destiny, centering around the continuance or discontinuance of medical treatment. As the Supreme Court has not yet directly ruled upon whether legislation permitting a doctor to prescribe life-ending treatment is constitutional, the States have taken to legislating the issue themselves.

B. The States

As the Supreme Court handed down these decisions, some states began to pass legislation to create and protect patients' right to die with dignity. In 1997, Oregon was the first state to legalize physician-assisted suicide through a voter initiative.³² Oregon's Death with Dignity Act allows terminally-ill residents to request life-ending medication from their doctors, and permits

²⁷ *Id.* at 802; *Glucksberg*, 521 U.S. at 737–38 (“There is no dispute that dying patients in Washington and New York can obtain palliative care, even when doing so would hasten their deaths.”).

²⁸ *Vacco*, 521 U.S. at 802 (commentators agree there is a stark difference between a doctor hastening a patient's death for a valid purpose, such as honoring the patient's wishes or decreasing a patient's persistent pain, and a doctor having the intent to commit homicide); see Frederick R. Parker, Jr., *Washington v. Glucksberg and Vacco v. Quill: An Analysis of the Amicus Curiae Briefs and the Supreme Court's Majority and Concurring Opinions*, 43 ST. LOUIS L.J. 469, 491 (1999) (clarifying that when a doctor prescribes a medication that would aid a patient in dying, the doctor does not necessarily have the intent to affirmatively bring about the death of a patient).

²⁹ *Glucksberg*, 521 U.S. at 737.

³⁰ See *Cruzan v. Dir. Mo. Dep't. of Health*, 497 U.S. 261, 280 (1990) (“We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death.”).

³¹ *Id.* at 280–82 (“In our view, Missouri has permissibly sought to advance these interests through the adoption of a ‘clear and convincing’ standard of proof to govern such proceedings.”).

³² See OR. REV. STAT. §§ 127.800–.897 (1999).

doctors to prescribe life-ending medications to their patients.³³ To ensure the utmost protection for patients, the Death With Dignity Act requires numerous steps for patients who want to end their lives.

Anyone applying for assistance under the Act must have Oregon residency.³⁴ The doctor and patient must have a candid conversation about the patient's status, which must include that the patient likely has less than six months to live.³⁵ The patient must also submit two requests—one written and one oral—to his or her doctor requesting the medication.³⁶ If the patient's doctor finds any indications that the patient may be suffering from a psychiatric illness, then the doctor must refer the patient to a counselor. The statute specifically states “[n]o medication to end a patient's life in a humane and dignified manner shall be prescribed until the person performing the counseling determines that the patient is not suffering from a psychiatric or psychological disorder or depression causing impaired judgment.”³⁷ Finally, the patient must be able to self-administer the medication.³⁸ There is no requirement to supervise a patient when he or she ingests the life-ending medication.³⁹

Oregon also mandates that state regulatory agencies provide annual reports reflecting Oregonians' use of this end-of-life

³³ *Id.* §§ 127.800–.815.

³⁴ *Id.* § 127.860.

³⁵ *Id.* § 127.815.

³⁶ *Id.* § 127.840.

³⁷ *Id.* § 127.825.

³⁸ DEP'T. HUMAN SERV., EIGHTH ANNUAL REPORT ON OREGON'S DEATH WITH DIGNITY ACT 7 (2006) (indicating that self-administration is a requirement of the Act).

³⁹ On January 1, 2014, twenty-nine-year-old Brittany Maynard was diagnosed with an inoperable brain tumor, and in her case, the self-administration requirement alone was coercive in convincing her to pass before she was fully ready. Brittany Maynard, *My Right to Death with Dignity at 29*, CNN (Nov. 2, 2014), <http://www.cnn.com/2014/10/07/opinion/maynard-assisted-suicide-cancer-dignity/> [<http://perma.cc/559X-M93W>]. Her brain tumor resulted in seizures, pain, and a fear of her inevitable death. Dan Diaz & Amanda Thyden, INTERVIEW WITH DAN DIAZ (2016). After doctors informed her that she had less than six months to live, she chose to move to Oregon and end her life using the Death With Dignity law. *Id.* She chose the day of her death, in large part because of Oregon's self-administration requirement; she felt that she needed to self-administer before she lost the physical capability. *Id.*; see also Stacey Kennelly, *Death With Dignity: Brittany Maynard's Husband Carried on the Right to Die Fight*, DIABLO MAG. (Oct. 5, 2015), <http://www.diablogmag.com/October-2015/Death-With-Dignity-Brittany-Maynards-husband-carries-on-the-right-to-die-fight/> [<http://perma.cc/FXR8-QHZW>]. She had experienced her most severe seizure a few days prior and knew that if she did not take the life-ending medication soon, she would not be able to fulfill Oregon's requirement that one self-administer any life-ending medication. See Jonathan LaPook, *Should the Terminally Ill Control How They Die?*, CBS NEWS (Mar. 13, 2016), <http://www.cbsnews.com/news/60-minutes-aid-in-dying-lapook/> (her husband reported to CBS that his wife's “[p]ain was just constant.”) [<http://perma.cc/9FRR-6QEL>]. Although she passed before the tumor killed her due to her own fear of losing the ability to self-administer, she passed before she was entirely ready. Dan Diaz & Amanda Thyden, INTERVIEW WITH DAN DIAZ (2016).

option.⁴⁰ Doctors must inform the State Registrar within seven days of prescribing the medication.⁴¹ Then, within ten days of the patient ingesting the medication and dying, or dying from natural causes, the physician must notify the Registrar and must complete the “Oregon Death with Dignity Act Attending Physician Interview” form.⁴² To ensure public awareness, all of this information is available on the Oregon Health Authority’s website.⁴³

The Oregon Health Authority maintains these forms, the records of all Oregonians who receive a prescription, and the personal information about all of the patients who die from ingesting the medication.⁴⁴ In 1998, the Death With Dignity Act’s first year, twenty-four people received the medication and sixteen ingested it, ending their lives.⁴⁵ Five years later, in 2003, sixty-eight people received the medication and forty-two ingested it.⁴⁶ From 2007 through 2010, the numbers increased slightly, but still, less than one-hundred people each year received the medication, while approximately sixty each year ingested it.⁴⁷ In 2015, as technology and awareness of this option have improved, and particularly after Brittany Maynard’s case made the national news, the numbers have increased but still remain low: 218 Oregonians received the medication, and 132 ingested it.⁴⁸

Following Oregon, two more states, Vermont and Washington, adopted legislation permitting physician-assisted suicide. Washington passed its Death With Dignity Act in 2008 through the voter initiative process,⁴⁹ and Vermont passed its Patient Choice at End of Life Act in 2013 through the legislature.⁵⁰ Both state laws essentially utilized the model Oregon adopted. Both require multiple requests within fifteen days of each other,⁵¹ residency in the state providing the medication,⁵² self-administration,⁵³ and physician reporting when the medication is prescribed to

40 OR. ADMIN. R. 333-009-0020 (2009) (requiring a Record Review and Annual Report).

41 *Id.* at 333-009-0010 (requiring various physician reporting requirements).

42 *Id.*

43 OR. HEALTH AUTH., *Oregon Revised Statute*, <https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/ors.aspx> [<http://perma.cc/2QTH-5ALL>].

44 *Oregon Death with Dignity Act: 2015 Data Summary*, *supra* note 2, at 2–4.

45 *Id.* at 2.

46 *Id.*

47 *Id.*

48 *Id.*

49 WASH. REV. CODE. § 70.245.903 (2009).

50 VT. STAT. ANN. tit. 18, § 5281 (2013).

51 VT. STAT. ANN. tit. 18, § 5283 (2015); WASH. REV. CODE. § 70.245.110 (2009).

52 VT. STAT. ANN. tit. 18, § 5281 (2013); WASH. REV. CODE. § 70.245.010 (2009).

53 VT. STAT. ANN. tit. 18, § 5283 (2015); WASH. REV. CODE. § 70.245.020 (2009).

patients, so that the relevant statistical information regarding use of the end-of-life option remains available to the public.⁵⁴

Taking a different approach, Montana's highest court authorized the use of physician-assisted suicide in 2009 in the landmark case, *Baxter v. State*.⁵⁵ That case involved a terminally-ill man with lymphocytic leukemia who argued that patients in Montana should have the right to commit suicide under the state's Constitution.⁵⁶ The Montana Supreme Court said:

[A] physician who aids a terminally ill patient in dying is not directly involved in the final decision *or* the final act. He or she only provides a means by which a terminally ill patient *himself* can give effect to his life-ending decision, or not, as the case may be. Each stage of the physician-patient interaction is private, civil, and compassionate. The physician and terminally ill patient work together to create a means by which the patient can be in control of his own mortality.⁵⁷

The court held that physician-assisted suicide was protected by the Montana Constitution and was not contrary to public policy.

C. Europe

End-of-life options like those mentioned above, are not unique to the United States; European countries including the Netherlands,⁵⁸ Belgium,⁵⁹ and Switzerland⁶⁰ all permit physician-assisted suicide.⁶¹ In fact, in Switzerland, an organization known as EXIT allows employees and volunteers to assist people in pursuing their right to a self-determined life and death.⁶²

⁵⁴ VT. STAT. ANN. tit. 18, § 5283 (2013); WASH. REV. CODE. § 70.245.150 (2009).

⁵⁵ *Baxter v. State*, 224 P.3d 1211, 1222 (Mont. 2009).

⁵⁶ *Id.* at 1214.

⁵⁷ *Id.* at 1217 (emphasis added).

⁵⁸ *Wet toetsing levensbeëindiging op verzoek en hulp bij zelfdoding* [Termination of Life on Request and Assisted Suicide (Review Procedures) Act], Wet van 1 apr. 2002, Stb. 2002.

⁵⁹ *Wet betreffende de euthanasie* [A Belgian Act on Euthanasia] of May 28, 2002, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], June 22, 2002, 28515. For one patient's experience with the Belgian legislation, see *The Right to Die: An Inside Look at the World's Most Liberal Euthanasia Law*, PBS (Jan. 17, 2015, 11:30 AM), <http://www.pbs.org/newshour/bb/right-die-belgium-inside-worlds-liberal-euthanasia-laws-2/> [<http://perma.cc/A9GC-F6XV>].

⁶⁰ VERLEITUNG UND BEIHILFE ZUM SELBSTMORD [Inciting and Assisting Someone to Commit Suicide] [STGB] [CRIMINAL CODE] Jan. 1, 1942, SR 311.0, art. 115 (Switz).

⁶¹ Additional countries that permit physician-assisted suicide include Colombia, Luxembourg, England, Wales, Quebec, and most recently Canada, but the specific details of Canada's law are to be determined. *Assisted Suicide Law Reform*, ASSISTED SUICIDE (Oct. 15, 2015), http://www.assistedsuicide.org/suicide_laws.html [<http://perma.cc/S3Q8-6X3U>]. For a discussion of assisted suicide laws in Switzerland, the Netherlands, and Oregon, see Georg Bosshardt et al., *Open Regulation and Practice in Assisted Dying: How Switzerland Compares with the Netherlands and Oregon*, SWISS MED. WKLY. 123, 527–534 (2002).

⁶² *EXIT—Self-Determined Living and Dying*, EXIT, <https://www.exit.ch/en/en/> (explaining how EXIT permits volunteers to assist in the coordination of patients' life-ending medications) [<http://perma.cc/S3Q8-6X3U>].

EXIT has been in existence since 1982 and not only helps Swiss citizens with physician-assisted suicide, but also with living wills and public education regarding end-of-life options.⁶³ EXIT works in conjunction with its foundation, Palliatura, which aims to improve patient treatment and coordinate palliative care.⁶⁴ This organization highlights an important distinction between palliative care and physician-assisted suicide. If a patient does not wish to take advantage of the country's assisted suicide law, then he or she can work with Palliatura and receive palliative care to make his or her last months or years as comfortable as possible. The organization emphasizes a key phrase: self-determined. Those who utilize physician-assisted suicide may ask for assistance from EXIT employees or volunteers, but the decision remains in the patient's hands regarding whether to follow through with ingesting the medication. It is worth noting that from 1998 through 2009, the number of assisted suicide cases in Switzerland did not exceed 300.⁶⁵

The Netherlands has taken its law one step further, permitting physicians to administer life-ending medications.⁶⁶ Patients have an option of either euthanasia, where a doctor performs the final act, or physician-assisted suicide, where a patient may perform the final act him or herself.⁶⁷ The Netherlands, like Switzerland, has an organization, NVVE, which educates the public about the law and helps those who opt to die on their own terms.⁶⁸ The organization's motto is "[a] dignified life, deserves a dignified death."⁶⁹ Its website explains that "it is not an offence for physicians to perform euthanasia, provided they comply with the due care criteria" and "the

⁶³ *Who is EXIT?*, EXIT, <https://www.exit.ch/en/en/who-is-exit/> [<http://perma.cc/4K6W-K5KW>]. Like Oregon, California, and other state laws, Switzerland requires a person to administer the medications to him or herself, saying "[u]p to this point, the person wishing to die may abort the process any time." *FAQ*, EXIT, <https://www.exit.ch/en/en/faq/> [<http://perma.cc/7VSS-NCX3>].

⁶⁴ *Our Commitment*, EXIT, <https://www.exit.ch/en/en/what-exit-fights-for/our-commitment/> [<http://perma.cc/K55E-RKF6>].

⁶⁵ *Cause of Death Statistics 2009: Assisted Suicide and Suicide in Switzerland*, NEUCHÂTEL (Mar. 2012), <https://www.bfs.admin.ch/bfs/en/home/statistics/catalogues-databases/publications.assetdetail.345104.html>.

⁶⁶ *Wet toetsing levensbeëindiging op verzoek en hulp bij zelfdoding* [Termination of Life on Request and Assisted Suicide (Review Procedures) Act], Wet van 1 apr. 2002, Stb. 2002.

⁶⁷ For more information on the development, rationale, and success of the Dutch law, see *Euthanasia, Assisted Suicide, and Non-resuscitation on Request*, GOVERNMENT OF THE NETHERLANDS, <https://www.government.nl/topics/euthanasia/contents/euthanasia-assisted-suicide-and-non-resuscitation-on-request> [<http://perma.cc/ES9T-JFLU>].

⁶⁸ NVVE stands for "Nederlandse Vereniging voor een Vrijwillig Levensende," which means "Dutch Association for a Voluntary End of Life." *About NVVE*, NVVE, <https://www.nvve.nl/about-nvve> (describing the goal of NVVE and providing an explanation about the euthanasia/right to die law) [<http://perma.cc/9TY5-6VX5>].

⁶⁹ *Id.*

physician must, among other things, be satisfied that the patient's request for euthanasia is voluntary and well-considered.⁷⁰

Finally, Belgium's law on euthanasia is the most liberal in the world and allows physicians to euthanize terminally ill patients, depressed citizens, and terminally ill children.⁷¹ This is by far the most extreme law when it comes to right-to-die legislation worldwide; it is likely that few in the United States would not support such extreme legislation.

Since these laws have become more well-known, and as assisted suicide has become accepted throughout Europe, it does not have the same stigma, nor does it spark the same controversy that it does in the U.S.⁷² As legalization of one's right to die with dignity continues to spread throughout the United States, it will likely continue to gain acceptance.

II. THE PROBLEM WITH SELF-ADMINISTRATION IN CALIFORNIA'S END OF LIFE OPTION ACT

Following the acceptance of the right-to-die movement in Oregon, Vermont, Washington, and Montana, California passed its own End of Life Option Act.⁷³ This Act mirrors those passed in Oregon, Vermont, and Washington. It requires Californians to request the life-ending medication verbally or in writing twice, at least fifteen days apart, to ensure that they have the opportunity to reflect on the decision they have made to end their lives.⁷⁴ It also requires a physician to refer a patient to a counselor if the physician believes that the patient may require a psychological evaluation.⁷⁵ Finally, it requires that a patient have the capacity to self-administer.⁷⁶ This requirement puts the final act of medication consumption in the hands of the patient.

⁷⁰ *Id.*

⁷¹ Wet betreffende de euthanasie [A Belgian Act on Euthanasia] of May 28, 2002, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], June 22, 2002. For an example of the permissibility of depressed patients to die under Belgian law, see Eilish O'Gara, *Physically Healthy 24-year-old Granted Right to Die in Belgium*, NEWSWEEK (June 29, 2015, 7:17 PM), <http://europe.newsweek.com/healthy-24-year-old-granted-right-die-belgium-329504> [<http://perma.cc/N7BE-TCVK>].

⁷² Joachim Cohen et. al., *European Public Acceptance of Euthanasia: Socio-demographic and Cultural Factors Associated with the Acceptance of Euthanasia in 33 European Countries*, 63 SOC. SCI. MED. 744, 747 (Aug. 2006) (discussing a greater rate of acceptance of euthanasia in Western Europe).

⁷³ 2015 Cal. Legis. Serv. 3045 (West).

⁷⁴ CAL. HEALTH & SAFETY CODE § 443.3 (West 2016).

⁷⁵ *Id.* § 443.5.

⁷⁶ *Id.* § 443.1.

Legislators' purpose in passing the ELOA was to prevent Californians from having to suffer miserable deaths.⁷⁷ The objective was to provide Californians with an option at the end of their lives: they now may choose to die naturally or on their own time.

A notable requirement of the ELOA, and the requirement upon which this Note is centered, is that a person who receives any death-inducing prescription must be able to self-administer said medication.⁷⁸ The ELOA defines self-administration as "a qualified individual's affirmative, conscious, and physical act of administering and ingesting the aid-in-dying drug to bring about his or her own death."⁷⁹ It was introduced into the ELOA, as well as other right-to-die legislative initiatives to prevent murder, mercy killings, and euthanasia.⁸⁰ If a patient is required to administer his or her own life-ending medication, then another person cannot be blamed for the patient's resulting death. The predominant factor in any self-administration requirement is that a patient must manifest his or her own desire to die through *ingesting* the life-ending medication.⁸¹ Beyond requiring a patient to ingest the medication on his or her own, clarification regarding the exact parameters of "self-administration" has not yet been provided by the California legislature.

The only commentary regarding assistance came through the introduction of the ELOA, which says that it grants "immunity from civil or criminal liability solely because the person was present when the qualified individual self-administered the drug, or the person *assisted* the qualified individual *by preparing the aid-in-dying drug* so long as the person did not assist with the ingestion of the drug"⁸² However, by permitting assistance in preparation of the drug, lingering questions remain: How far does "preparation" extend? Does it include mixing the medication into a food or liquid? Putting a straw in a patient's drink? Helping a patient drink from a glass filled with the medication? Spoon-feeding the medication to the patient? When has an assistant gone too far? The inherent ambiguity in the language of the statute and a lack of oversight in the administration process,

⁷⁷ See Rob Bonta, Chair, ABx2-15, Assemb. Public Health and Developmental Servs., cmt. 1 (Sept. 1, 2015), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520162AB15.

⁷⁸ CAL. HEALTH & SAFETY CODE § 443.1 (West 2016).

⁷⁹ *Id.* Although self-administration as a term is defined, other terms used in the definition are not further defined. Thus far, there are no further definitions of "administering" and "ingesting."

⁸⁰ See Bonta, *supra* note 77, at 6.

⁸¹ See CAL. HEALTH & SAFETY CODE § 443.1(i)(4) (West 2016).

⁸² 2015 Cal. Legis. Serv. Ch. 1 3046 (West) (emphasis added).

make the administration requirement nearly unenforceable; there is no bright-line rule to indicate when an assistant may have crossed the line.⁸³

III. THE IMPRACTICAL AND UNNECESSARY REQUIREMENT OF SELF-ADMINISTRATION

Legislators and healthcare scholars have said that the goal of self-administration is to ensure that patients are not coerced into taking the medication if they change their minds as their end-of-life reality nears.⁸⁴ State legislatures that have enacted right-to-die legislation empower qualified patients with the ability to maintain control over their lives and end them with dignity.⁸⁵ By permitting people to pass when they are ready, they are not forced to endure the pain and suffering that is often associated with many types of death. They can choose the date, time, and location of their death, and ensure that their support system is present to help them die with ease and love.

In addition to promoting patient autonomy, self-administration prevents loved ones from having to endure the emotional torment that may follow after assisting in the suicide of someone they know.⁸⁶ It could be understandably traumatic to administer medication to a loved one that resulted in their death. However, even if states were to permit assistance, this Note is not advocating for forced assistance. A patient applying for a life-ending prescription is making a choice; agreeing to assist someone in administration is no different.

Although these may be some of the goals of self-administration, to understand how it has been interpreted thus far, and how it will likely be interpreted in California, one must look to other states in which similar statutes have been enacted. In Oregon, for example, 991 patients have died by ingesting doctor-prescribed

⁸³ Due to a lack of clarification regarding the meaning of self-administration and a lack of oversight in the actual act of administration of the medication, the self-administration requirement achieves no actual objective. See CAL. HEALTH & SAFETY CODE §§ 443.1–.22 (West 2016) (mentioning no regulatory agency that will check to make sure that there is no evidence of assistance in the medication administration).

⁸⁴ See Kathryn L. Tucker, *In the Laboratory of the States: The Progress of Glucksberg's Invitation to States to Address End-of-Life Choice*, 106 MICH. L. REV. 1593 (2008) (discussing that scholars have found no evidence of coercion due to key safeguards in aid in dying legislation).

⁸⁵ “Dignity” and “dignified” are mentioned five times in the two documents that patients are required to complete pursuant to California’s End of Life Option Act. CAL. HEALTH & SAFETY CODE § 443.11 (West 2016). In Washington’s Death With Dignity Act, “dignified” is mentioned twenty-four times. WASH. REV. CODE. § 70.245 (2008).

⁸⁶ See generally Woods, *supra* note 14 (discussing how right-to-die legislation forces the government to weigh society’s desire to prolong life against a patient’s right to self-determination).

life-ending medications.⁸⁷ Oregon's law broadly interprets self-administration to apparently permit third-parties to hand a patient's pills, mix the prescribed drugs into a liquid, insert a straw into that liquid, and even put the life-ending medication into a patient's gastrointestinal tube to be ingested.⁸⁸ The only clear requirement under the Oregon law is that the patient has to conduct the last overt act of ingesting the medication.⁸⁹

No cases have yet been brought forward charging an assistant with murder in Oregon despite its requirement for self-administration.⁹⁰ All indications show that California intends to follow Oregon's interpretation of self-administration.⁹¹ However, with no realistic enforcement mechanism and no negative repercussions from third-party assistance, the requirement serves no purpose. Furthermore, as there has been minimal analysis of the self-administration requirement by legal and medical professionals alike, it would seem that the requirement has been included in California's ELOA simply because it was included by Oregon, Vermont, and Washington.

⁸⁷ This statistic reflects the total number of patients from the time legislation was passed in 1997 to 2015. See OREGON DEATH WITH DIGNITY ACT: 2015 DATA SUMMARY, *supra* note 2, at 2.

⁸⁸ See Jennifer Frey, *A Death in Oregon: One Doctor's Story*, WASH. POST (Nov. 3, 1999), <https://www.washingtonpost.com/archive/lifestyle/1999/11/03/a-death-in-oregon-one-doctors-story/eb7ab050-f6af-482a-9d20-3eff99d0baa6/> (detailing how Barbara Houck's son spoon-fed her the prescribed life-ending medication, while under the supervision of her doctor) [<http://perma.cc/ZWK2-Z8ZP>]; HARRY S. MARGOLIS, *Health Care Decision Making in an Elder Law Practice*, in ELDER LAW PORTFOLIO (Aspen 1995) (discussing the "help" that Joe Hayes provided to his brother, Patrick Matheny, when it came time to administer the medication, but was not prosecuted); Elizabeth Landau, *Choosing Death Can Be Like a 'Birth,' Advocates Say*, CNN (Aug. 30, 2011, 2:24 PM), <http://www.cnn.com/2011/HEALTH/08/30/assisted.suicide.oregon/> (referring to aid-in-dying volunteer, Katy Powell, "[s]he knows how to mix the medication so the family of the person who is hastening doesn't have to.") [<http://perma.cc/268V-SLF4>]; DEMETRA M. PAPPAS, THE EUTHANASIA/ASSISTED-SUICIDE DEBATE 129–30 (Greenwood eds., 2012) (mentioning a volunteer who helped mix a patient's end-of-life medications and confirmed with him that he was ready to die before giving it to him); see also Rita Marker, *Euthanasia, Assisted Suicide & Health Care Decisions: Protecting Yourself & Your Family*, PATIENT RTS. COUNCIL, <http://www.patientsrights.council.org/site/euthanasia-assisted-suicide-health-care-decisions/> ("[P]atients who cannot swallow would need to have an NG tube or G tube placement.") [<http://perma.cc/LFU4-Z7BR>].

⁸⁹ PAPPAS, *supra* note 88, at 130.

⁹⁰ In 2004, Dr. Kristina Hedberg, an epidemiologist who was instrumental in the implementation and supervision of the Oregon Death With Dignity Act, said, "we were not given the resources to investigate . . . when we have talked to our lawyers and others, not only do we not have the resources to do it but we do not have any legal authority to insert ourselves." SELECT COMMITTEE ON THE ASSISTED DYING FOR THE TERMINALLY ILL BILL, VOL. II: EVIDENCE, 2004-5, HL PAPER 86-II, at 266 (UK), <http://www.publications.parliament.uk/pa/ld200405/ldselect/ldasdy/86/86ii.pdf> [<http://perma.cc/2ZK9-6BSJ>]; see LaPook *supra* note 39 ("Ninety percent of the time here in Oregon there's no doctor present. So there's really a shroud of secrecy under this whole thing.")

⁹¹ Niraj Chokshi & Fenit Nirappil, *California Adopts 'Right-to-Die' Law Allowing Assisted Suicide for Terminally Ill Patients*, WASH. POST (Oct. 5, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/10/05/california-adopts-right-to-die-law-allowing-assisted-suicide-for-terminally-ill-patients/> ("California's law is modeled off Oregon's assisted suicide system, which was first approved by voters in 1994.") [<http://perma.cc/4RA5-9Q2V>].

In looking to these other states, none have yet clarified the exact meaning of “self-administration” when it comes to right-to-die laws. The general definition, although indicative of the necessity for a physical manifestation of a patient’s desire to ingest the life-ending medication, does not in fact dictate any type of administration requirements, nor does it disallow any particular administration methods.⁹² Whether or not a patient can ingest the life-ending medication entirely on his or her own appears to be irrelevant in practice, rendering the self-administration requirement essentially moot. Further, with the current lack of enforcement mechanisms, self-administration has become nearly unenforceable. Although the goals of self-administration may be noble, they do not actually serve the purpose for which they were intended if they are not enforced by any regulatory authority.

If California follows Oregon’s lead, then self-administration will likely include the delivery of the medication by a third party.⁹³ Third party administration should be (and has been) permitted as long as the clear intent of the patient is to take the medication to end his or her life. Numerous diseases and disorders result in patients’ immobility, and therefore inability to self-administer medications.⁹⁴ There are already sufficient requirements in the ELOA ensuring that a patient wants to die, and as long as those aspects of the law are rigorously applied, it will remain clear that a patient is not being coerced or manipulated.

As the States, including California, are serving properly in their roles as laboratories of democracy, it is now incumbent upon the public as observers and participants in the legal process to determine the success or failure of the ELOA and bills like it.⁹⁵ As there are serious inconsistencies between the definition and implementation of self-administration, it should be removed as a requirement, but left as an option. One should be able to self-administer if desired, or delegate the administration of the medication to a person of their choosing.

⁹² CAL. HEALTH & SAFETY CODE § 443.1(p) (West 2016).

⁹³ See Frey, *supra* note 88; MARGOLIS, *supra* note 88; see also Landau, *supra* note 88.

⁹⁴ See generally BALL, *supra* note 9; Lezzoni, *supra* note 9.

⁹⁵ California’s End of Life Option Act is currently facing challenges in the courts from physicians who do not believe it should have become law. See, e.g., Transcript, AHN v. Hestrin, No. RIC 1607135 (Aug. 26, 2016), <https://www.compassionandchoices.org/wp-content/uploads/2016/08/AHN-vs-HESTRIN-8-26-16.pdf> (finding that the physicians in this case did not have standing to challenge the new law, thus it was not decided on the merits) [<http://perma.cc/LN4V-PULL>]. Although this law may continue to be challenged in the court system, the California Attorney General has agreed to defend the law as it currently stands. *Id.* (listing the California Department of Justice, Office of the Attorney General, for the State of California).

IV. EXPLICITLY ALLOWING ASSISTED-ADMINISTRATION MOVING FORWARD

If one has not been diagnosed with depression, is capable of making his or her own decisions, and is going to die within the next six months, then a third party should be able to help in the administration of a prescribed life-ending medication. As right-to-die laws currently stand, in Oregon in particular, residents have been implicitly permitted to receive assistance in self-administration because the requirement is not rigorously enforced and no criminal prosecutions have resulted against those who have provided assistance. Questions to ask ourselves about the reality of this situation include: What difference exists between a patient accepting a cup from a loved one and putting it to his or her own lips, versus a family member bringing the cup to the patient's lips for them to drink? Why require patients to administer when they can give a loved one permission to administer instead? If patients have been receiving assistance, and it has worked thus far, why continue with current laws that disallow assistance?

A. Allowing Assisted-Administration

It is critical to understand that what this Note calls "assisted-administration" is already practiced in Oregon without any resulting negative repercussions. Because assisted-administration is already the practice, explicitly requiring self-administration is no longer necessary nor relevant. The idea behind physician-assisted suicide, right-to-die, and death with dignity movements is to provide patients with autonomy and choice. Electing to have someone assist in the *preparation* of medication is currently a part of a patient's choice, but how much the person may assist remains unclear. The law says that one must self-administer, yet provides such a broad definition of self-administration that it leaves the door open for interpretation regarding its actual meaning.

Because this concept lacks clarification, California should seek to simplify and normalize it. There is no clear rule regarding how much help is *too much help* in the preparatory process of medication administration. A simple set of requirements should continue to include, at a minimum: (1) a patient's written or verbal desire to die through the use of physician-prescribed medication, heard or read by a physician; (2) documentation by a physician that the patient does not have depression or a similar diagnosis that would impair the patient's ability to make an informed and rational decision regarding death; and (3) a diagnosis estimating that the patient has less than six months to live.

Regarding medication administration specifically, supervision at the time of ingestion is currently not required so it cannot be said that no one will assist; the legislature chose not to require supervision.⁹⁶ Without required supervision in Oregon, the law has survived and people have continued to successfully obtain and ingest the medication without issue; the murder rate has not changed and in fact remains far lower than many other states'.⁹⁷ If states received claims that people were misusing the drugs to terminate the lives of those who did not want to die, this would need to be addressed in the legislation, but that is simply not the case. The current system is successful, despite no supervision requirement. Those who have ingested the drug have done so voluntarily and their families are not suing for the voluntary deaths. Similar statistics have been obtained throughout the European Union, where death with dignity is gaining acceptance.⁹⁸ In fact, in the Netherlands, where euthanasia and assisted administration are permitted, the murder rate has remained one of the lowest in the world; people have accepted that someone who faces an impending death should be able to choose their own death at their own time.⁹⁹ There, assisted administration has not resulted in a diminution in the value of life. Further, as discussed *infra*, even when there is assistance, the only repercussions are deaths that were desired by the decedents. As such, there is no demonstrable need for the self-administration requirement.

It cannot be said that the murder rate has lowered because death with dignity laws have permitted a type of murder. Murder requires intent to take the life of another in a manner

⁹⁶ Upon reading California and Oregon's laws, noticeably missing from both is a requirement for physician supervision over one's administration of the life-ending medication. If there is no supervision, then there is currently no realistic way to assure that one is not obtaining assistance in the administration. See CAL. HEALTH & SAFETY CODE §§ 443.1–.2 (West 2016).

⁹⁷ For more information about nationwide crime statistics, which show no indication that states with Death With Dignity laws have increased murder rates, see *Crime in the United States*, FBI: UNIFORM CRIME REPORTING (2012), https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.2012/tables/5tabledatadecpdf/table_5_crime_in_the_united_states_by_state_2012.xls (providing comparative crime reports for all fifty states through 2012) [<http://perma.cc/X2L7-QAAW>]. For more detailed information on Oregon's crime rates from 1995 through 2014, see *Oregon Annual Uniform Crime Reports*, OREGON.GOV, https://www.oregon.gov/osp/CJIS/Pages/annual_reports.aspx [<http://perma.cc/3MTQ-KUFP>].

⁹⁸ For additional information on European crime statistics, see *Eurostat Crime Statistics*, EUROPA (Jan. 2014), http://ec.europa.eu/eurostat/statistics-explained/index.php/Crime_statistics [<http://perma.cc/U3FM-UEK2>].

⁹⁹ *Murder Rate: Countries Compared*, NATIONMASTER, <http://www.nationmaster.com/country-info/stats/Crime/Murder-rate> [<http://perma.cc/BA73-CZBV>].

that is not otherwise legally allowed.¹⁰⁰ Suicides permitted under right-to-die legislation, even when achieved with assistance, are done with the patient as the driving force of the application for the life-ending medication.

One assertion as to why patients should have to self-administer is that assistance may lead to murders of those who do not have capacity over their bodies.¹⁰¹ However, as discussed prior, even as it stands now, there is no mechanism through which to confirm that someone actually self-administered. Current laws act as a blank check of sorts where a patient receives a prescription, and society is then supposed to believe that the patient is going to administer with no assistance. However, we already know that patients obtain assistance in preparing, mixing, and delivering the medication. The medical screenings, psychological exams, and general processes set in place provide a level of proactive screening and reporting to prevent any medication from getting into the wrong hands.

Along a similar line, proponents of self-administration claim that by requiring a patient to commit the final act, the patient has full control up until the last moment and can choose not to lift the glass or drink from the straw.¹⁰² However, self-reporting is the only manner in which a breach would be discovered under the current laws. By permitting assisted administration, it is not likely that the crime rate would increase because each patient would still be required to request the medication, visit doctors, and go to any psychological referrals that may be deemed necessary.

Self-administration, although well-intended to protect terminally ill patients from murder, in fact removes many patients' right to autonomy.¹⁰³ A California court has held that a physician could permit a woman to stop all medical treatment and starve herself even when she could have lived another fifteen or twenty years—demonstrating a respect for choice.¹⁰⁴ The same court also said that “[n]o criminal or

¹⁰⁰ Oregon's statute criminalizing murder requires an intentional killing of another. OR. REV. STAT. § 163.115 (1997).

¹⁰¹ See Zara Aziz, *We Need Better Palliative Care, Not Assisted Dying*, GUARDIAN (Sept. 9, 2015 10:00 PM), <http://www.theguardian.com/society/2015/sep/09/better-palliative-care-not-assisted-dying> (“There is the real possibility of coercion – whether implied or expressed – by friends, family and even health professionals when patients are seen to be a burden.”) [<http://perma.cc/3Z72-JZJC>]; see also Dore, *supra* note 11.

¹⁰² Benjamin Schechtman, *Freedom and Compassion for All: The Physically Incapacitated Have a Right to Assisted Death*, 24 TEMP. INT'L & COMP. L.J. 507, 526 (2010).

¹⁰³ Jodi B. Gabel, *Release from Terminal Suffering?: The Impact of AIDS on Medically Assisted Suicide Legislation*, 22 FLA. ST. U. L. REV. 369, 421–30 (1994) (discussing proposed legislation in which a doctor would be permitted to assist patients suffering from AIDS in the administration of medications).

¹⁰⁴ *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1143–45 (1986) (“Here, if force fed, petitioner faces 15 to 20 years of a painful existence, endurable only by the constant administrations of morphine. Her condition is irreversible.”).

civil liability attaches to honoring a competent, informed patient's refusal of medical service"—demonstrating a respect for autonomy.¹⁰⁵ If a patient cannot move, yet remains in an uncontrollable amount of pain, then under the current law, it would appear that she must remain in that amount of pain until she dies while her mobile counterpart—someone with the physical capability of self-administering—may take advantage of California's ELOA to end her life on her own terms. This does not make sense as it does not protect a patient with a disease or disorder that has caused the loss of motor function who should have an equal right to die with dignity, and thus should be changed.

B. Palliative Care is Not Enough

Commentators have proposed various alternatives to a patient killing him or herself including more rigorous use and promotion of palliative care, pain management, and palliative sedation.¹⁰⁶ However, none of these options result in the autonomy, humanity, and choice that would result if assisted-administration of medication was adopted as an option for patients at the end of their lives.

The World Health Organization says that “[p]alliative care improves the quality of life of patients and families who face life-threatening illness, by providing pain and symptom relief, spiritual and psychosocial support to from diagnosis to the end of life and bereavement.”¹⁰⁷ Though this may be the goal of palliative care, there is a misperception in modern society that palliative care and strong pain relief drugs can resolve nearly any pain a patient may suffer.¹⁰⁸ There is also an underlying fear among those against right-to-die legislation who claim that palliative care will falter if right-to-die legislation is implemented.¹⁰⁹ However, the contrary has been found; palliative care and pain management discussions improve after the

¹⁰⁵ *Id.*

¹⁰⁶ These options could be used if a patient is not able to qualify under death with dignity acts because they are not able to self-administer. See David A. Pratt, *Too Many Physicians: Physician-Assisted Suicide after Glucksberg/Quill*, 9 ALB. L.J. SCI. & TECH. 161, 166 (1999) (mentioning critics' concerns regarding death with dignity legislation thwarting palliative care options).

¹⁰⁷ *Palliative Care*, WHO, <http://www.who.int/cancer/palliative/definition/en/> [http://perma.cc/6F93-HRDZ].

¹⁰⁸ See Pratt, *supra* note 106, at 205–07 (“Palliative care experts believe that the number of patients with unavoidable and intolerable pain is very small.”).

¹⁰⁹ But, as the medical industry is currently regulated, it is already difficult to obtain the necessary pain medication for many patients. See generally Amy J. Dilcher, *Damned If They Do, Damned If They Don't: The Need for a Comprehensive Public Policy to Address the Inadequate Management of Pain*, 13 ANNALS HEALTH L. 81 (2004).

implementation of right-to-die measures.¹¹⁰ This is true in both the United States and Europe; “Belgium and Holland have some of the best palliative care in Europe,” and both countries permit doctor-assisted suicide.¹¹¹

The reality of pain is that some patients are forced to suffer through immeasurable pain because of the illnesses they have, and modern medication cannot provide relief.¹¹² This is one of the key reasons California passed the ELOA.¹¹³ Some painful diseases may eventually prevent patients from being able to bring water to their mouths, prevent them from being able to swallow, or prevent them from being able to load their own gastrointestinal tubes with medication. These patients are no less deserving of the right to die with dignity than any other person with a painful and life-threatening disease. Whether from multiple sclerosis,¹¹⁴ brain cancer,¹¹⁵ spinal cord injuries,¹¹⁶ phantom pain due to a nerve injury,¹¹⁷ or the unremitting pain associated with Parkinson’s disease,¹¹⁸ countless people in our

¹¹⁰ See U.S. GOV. ACCT. OFF., REP. TO HON. RON WYDEN, U.S. SENATE, END-OF-LIFE CARE: KEY COMPONENTS PROVIDED BY PROGRAMS IN FOUR STATES 14 (2007), <http://www.gao.gov/new.items/d0866.pdf> (“Representatives of a palliative care program operated by a health care system we interviewed stated that passage of [Oregon’s Death With Dignity] act helped create an environment in Oregon where end-of-life issues are discussed more openly.”) [<http://perma.cc/4EYG-TQTH>].

¹¹¹ *The Right to Die*, ECONOMIST (June 27, 2015), <http://www.economist.com/news/leaders/21656182-doctors-should-be-allowed-help-suffering-and-terminally-ill-die-when-they-choose> [<http://perma.cc/LLY5-LPDJ>].

¹¹² See Michael Cohn, PhD, et al., *Transitions in Care for Patients with Brain Tumors: Palliative and Hospice Care*, UCSF MED. CTR. (Regents of Univ. of Cal. 2014), https://www.ucshealth.org/pdf/transition_of_care_handbook.pdf (describing the stages of brain cancer, including uncontrollable pain and loss of motor skills) [<http://perma.cc/5NKB-LQXM>]; Brian L. Schmidt et al., *Mechanism of Cancer Pain*, 10 MOLECULAR INTERVENTIONS 3, 164–68 (2010) (explaining the untreatable pain that often comes with cancer of any kind); see also Dilcher, *supra* note 109 (describing the difficulties that many doctors go through to get patients the opioid pain medication they need).

¹¹³ See Bonta, *supra* note 77, cmt. 2(d) (“While palliative care is generally agreed to be the standard of care for the dying, in some cases some patients who are very ill do not respond to pain medications or may be suffering in other ways that make comfort impossible.”).

¹¹⁴ See, e.g., Nicola Slawson, *MS Sufferer Should be Allowed to Die, Says Judge in Landmark Ruling*, GUARDIAN (Nov. 19, 2015), <http://www.theguardian.com/society/2015/nov/19/ms-sufferer-should-be-allowed-to-die-judge-landmark-ruling-multiple-sclerosis> [<http://perma.cc/UC7Q-LQ9U>].

¹¹⁵ Maynard, *supra* note 39.

¹¹⁶ Jeanine M. Rundquist, *The Right to Die—Ethical Dilemmas in Persons with Spinal Cord Injury*, 19 SCI NURSING 7, 7–8 (2002) (discussing the ethical issues posed regarding patients who have suffered spinal cord injuries).

¹¹⁷ See A. Kovindha, *The Right to Die of a High Quadriplegic in a Developing Country: Case Report*, 28 PARAPLEGIA 272, 272 (1990) (detailing the story of a young paraplegic man who had to endure assisted respiration even though he wanted to die).

¹¹⁸ See Michael S. Rosenwald, *NPR Host Diane Rehm Emerges as a Key Force in the Right to Die Debate*, WASH. POST (Feb. 14, 2015), https://www.washingtonpost.com/local/npr-host-diane-rehm-emerges-as-a-key-force-in-the-right-to-die-debate/2015/02/14/12b72230-ad50-11e4-9c91-e9d2f9fde644_story.html (describing Diane Rehm’s husband’s pain from

society are suffering from untreatable diseases and deserve the option of relief in their last months. Even palliative sedation, a procedure in which a doctor puts a patient in a comatose state in an attempt to prevent pain, is not always painless.¹¹⁹

With all of this in mind, California's legislators have reasoned that Californians near the end of their lives should not have to endure unnecessary and untreatable pain, but have not included clear options for those who require assistance in taking their medication.¹²⁰ Based upon polls of Americans, specifically Californians, discussed *infra*, it is likely that a broadening of the ELOA would be supported.¹²¹ California should create additional methods to make physician-assisted suicide available to those who want to pass on their own terms, but do not have the luxury of mobility.

C. The Polls Support an Individual's Right to Choose Death

National polls indicate overwhelming support of right-to-die legislation. In a recent 2015 Gallup poll, nearly 68% of Americans supported going one step further than doctor-assisted suicide and supported euthanasia.¹²² Although there may be more dangers if euthanasia is legalized, this statistic shows that Americans are in favor of patient autonomy and self-determination in deciding the course of their lives.

Following Brittany Maynard's decision to utilize Oregon's Death With Dignity law, the Harris Poll found that 74% of

Parkinson's as "Parkinson's had ravaged his body and exhausted his desire to live.") [<http://perma.cc/C254-5BW3>].

¹¹⁹ On *60 Minutes*, the family of Jennifer Glass discussed the pain and torture that she went through while under palliative sedation: foaming at the mouth, gurgling on fluids, suffering a slow death, all while her family helplessly watched. LaPook, *supra* note 39; see also Bonta, *supra* note 77, at 11 ("[Death] may not happen for days or weeks . . . patients reject [terminal sedation] because they believe their dignity would be violated if they have to be unconscious for a prolonged period before they die, or that their families suffer unnecessarily while waiting for them to die.").

¹²⁰ See Bonta, *supra* note 77, at 9; see also Greg Botelho, *California Governor Signs Right to Die Bill*, CNN (Oct. 6, 2015, 5:20 AM), <http://www.cnn.com/2015/10/05/us/california-assisted-dying-legislation/> (quoting Governor Jerry Brown as saying, "I am certain, however, that it would be a comfort to be able to consider the options afforded by this bill And I wouldn't deny that right to others.") [<http://perma.cc/H9R4-Y4J7>].

¹²¹ See Maclayal *infra* note 126.

¹²² Andrew Dugan, *In U.S., Support Up for Doctor-Assisted Suicide*, GALLUP (May 27, 2015), http://www.gallup.com/poll/183425/support-doctor-assisted-suicide.aspx?utm_source=Politics&utm_medium=newsfeed&utm_campaign=tiles [<http://perma.cc/K42S-GQUF>]. The question asked during the poll was, "When a person has a disease that cannot be cured and is living in severe pain, do you think doctors should or should not be allowed to assist the patient to commit suicide if the patient requests it?" *Id.* In this poll, "euthanasia" was defined as "ending a patient's life by some painless means." *Id.* One notable reference missing from this question is whether the person has six months left to live, indicating that people may sympathize with those who are in untreatable pain, despite their life expectancy.

Americans supported the right-to-die movement.¹²³ Only 15% of those polled opposed physician-assisted suicide.¹²⁴ When the polls are broken down, “[s]upport for the right-to-die movement cut[s] across all generations and educational groups, both genders, and even political affiliation”¹²⁵ In California alone, the Institute of California Statistics found that 75.5% of Californians supported legislation promoting life-ending medication.¹²⁶ The same poll found bipartisan support for California’s ELOA, with 70% of democrats and 55% of republicans supporting the legislation.¹²⁷

This is not to say that this movement does not have very strong opponents. The Catholic Church has spoken out vehemently against right-to-die legislation. In fact, Los Angeles Archbishop Jose Gomez has said, “[i]n a for-profit health care system driven by financial concerns, doctor-assisted suicide will not be a ‘choice’ for minorities, the poor and those without health care. It will become their only ‘option.’”¹²⁸ While Catholic leadership may have this view, the fact remains that over 60% of Catholics are generally in favor of death with dignity legislation, including California’s Jesuit governor, Jerry Brown.¹²⁹ In California, 55% of Catholics supported the ELOA.¹³⁰

Support for physician-assisted suicide is growing and its opposition is quickly shrinking. From these numbers, it is likely that explicit allowance of assisted-administration would also receive overwhelming support.

D. Safeguards to Prevent Euthanasia

There is a distinction to be made between euthanasia and what this Note proposes when it describes “assisted-administration.” Assisted-administration requires patients to request medication

¹²³ Dennis Thompson, *Most Americans Agree with Right-to-Die Movement*, HARRIS POLL (Dec. 5, 2014, 12:00 AM), http://www.theharrispoll.com/health-and-life/Most_Americans_Agree_With_Right-to-Die_Movement.html [<http://perma.cc/3W74-D3DW>].

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Kathleen Maclayl, *IGS Poll: Californians Support Medical Aid in Dying for Terminally Ill*, IGS (Sept. 3, 2015), <https://igs.berkeley.edu/news/igs-poll-californians-support-medical-aid-in-dying-for-terminally-ill> [<http://perma.cc/Q4PA-QT5Y>]; see Mark DiCamillo, *Strong Voter Support for the “End of Life Option Act,”* FIELD (Oct. 16, 2015), <http://field.com/fieldpollonline/subscribers/Rls2512.pdf> [<http://perma.cc/7TQR-DBRE>].

¹²⁷ *Id.*

¹²⁸ Alejandro Lazo, *California Senate Passes Right-to-Die Legislation*, WALL ST. J. (Sept. 11, 2015, 10:13 PM), <http://www.wsj.com/articles/california-senate-passes-right-to-die-legislation-1442013579>.

¹²⁹ Goodwin Simon Strategic Research & Probosky Research, *Significant Majority of California Voters Support End-Of-Life Option Act Allowing Terminally Ill People to Legally Access Medical Aid-in-Dying*, COMPASSION AND CHOICES (June 22, 2015), <https://www.compassionandchoices.org/wp-content/uploads/2014/10/PUBLIC-MEMO-EOL-OPTIONS-ACT-JUNE-2015.pdf> [<http://perma.cc/63KD-LBDN>].

¹³⁰ DiCamillo, *supra* note 126.

from their physicians, go through mental and physical exams, be fully competent, and perhaps most importantly, requires them to ingest the medication voluntarily. Unlike assisted-administration, which leaves the choice in the hands of the patient, through euthanasia “*the individual loses control of the decision*” and the decision is left to the healthcare provider.¹³¹ Additionally, euthanasia is outlawed in forty-four states¹³² and cannot be funded by federal dollars.¹³³

In honoring physicians’ self-identified roles in society as those who cure and treat illnesses,¹³⁴ this Note does not advocate for physician-assisted administration or euthanasia; physicians resoundingly do not want to actively aid a person in dying.¹³⁵ It is

¹³¹ Robin Marantz Henig, *Despite Sweeping Death With Dignity Law, Few Will Have That Option*, NPR (Oct. 7, 2015, 5:48 PM) (emphasis added), <http://www.npr.org/sections/health-shots/2015/10/07/446631786/despite-sweeping-death-with-dignity-law-few-will-have-that-option> [<http://perma.cc/88PN-VSYX>].

¹³² Alabama: ALA. CODE § 22-8A-10 (1997); Alaska: ALASKA STAT. § 11.41.120 (2001); Arizona: ARIZ. REV. STAT. ANN. § 13-1103 (1993); Arkansas: ARK. CODE ANN. § 5-10-104 (1987); Colorado: C.R.S. § 18-3-104 (2006); Connecticut: CONN. GEN. STAT. §§ 53a–56 (1969); Delaware: DEL. CODE ANN. § 632 (1995); Florida: FLA. STAT. § 782.08 (1992); Georgia: GA. CODE ANN. § 16-5-5 (1996); Hawaii: HAW. REV. STAT. § 707-702 (1993); Idaho: IDAHO CODE § 18-4017 (2011); Illinois: ILL. COMP. STAT. 12-34-5 (1961); Indiana: IND. CODE § 35-42-1-2 (1996); Ind. Code § 35-42-1-2.5 (1996); Iowa: IOWA CODE § 707A.2 (2011); Kansas: KAN. STAT. ANN. § 21-5407 (1995); Kentucky: KY. REV. STAT. ANN. § 216.302 (1994); Louisiana: LA. STAT. ANN. § 32.12 (1997); Maine: ME. STAT. ANN. § 204 (1983); Maryland: MD. CODE ANN., Assisting Another to Commit or Attempt Suicide, § 3-102 (2005); Massachusetts: MASS. GEN. LAWS § 201D-12 (2012); Michigan: MICH. COMP. LAWS § 750.329a (1997); Minnesota: MINN. STAT. § 609.215 (2012); Mississippi: MISS. CODE ANN. § 97-3-49 (1972); Missouri: MO. REV. STAT. § 55.023.1 (2000); Nebraska: NEB. REV. STAT. § 28-307 (1995); Nevada: NEV. REV. STAT. § 449.670 (1995); New Hampshire: N.H. REV. STAT. ANN. § 630:4 (1996); New Jersey: N.J. STAT. ANN. § 2C:11-6 (1995); New Mexico: N.M. STAT. ANN. § 30-2-4 (1996); New York: N.Y. PENAL § 125.15 (1967); North Carolina: N.C. GEN. STAT. §§ 14–17.1 (1973) (it is unclear as to whether suicide, as it has been abolished, includes assisted-suicide); North Dakota: N.D. CENT. CODE § 12.1-16-04 (1991); Ohio: OHIO REV. CODE ANN. § 3795.01–.03 (2013); Oklahoma: OKLA. STAT. § 21-817 (2014), § 21-818 (2014), § 63-3141.1 (2014); Pennsylvania: Causing or Aiding Suicide, PA. STAT. ANN. § 2505 (1983); Rhode Island: R.I. GEN. LAWS § 11-60-3 (1996); South Carolina: S.C. CODE ANN. § 16-3-1090 (1998); South Dakota: S.D. CODIFIED LAWS § 22-16-37 (2005); Tennessee: TENN. CODE ANN. § 39-13-216 (1993); Texas: TEX. PENAL CODE ANN. § 22.08 (1994); Utah: UTAH CODE ANN. § 75-2a-122 (2007); Virginia: VA. CODE ANN. § 8.01-622.1 (1998); West Virginia: W. VA. CODE R. § 16-30-14 (2015); Wisconsin: WIS. STAT. ANN. § 940.12 (1977); Wyoming: WYO. STAT. ANN. § 6-1-201 (1982).

¹³³ Assisted Suicide Funding Restriction Act, 111 Stat. 23 (1997) (outlawing federal funding for euthanasia, mercy killings, and assisted suicide).

¹³⁴ DEREK HUMPHREY & MARY CLEMENT, FREEDOM TO DIE: PEOPLE, POLITICS, AND THE RIGHT-TO-DIE MOVEMENT 60 (2000) (“Medical schools are organized to prepare students ‘to treat disease, to cure, to stave off death.’”). See generally Transcript, *AHN v. Hestrin*, No. RIC 1607135 (Aug. 26, 2016), <https://www.compassionandchoices.org/wp-content/uploads/2016/08/AHN-vs-HESTRIN-8-26-16.pdf> (California physicians challenging the End of Life Option Act) [<http://perma.cc/LN4V-PULL>].

¹³⁵ See Diane E. Meier, MD, et. al., *A National Survey of Physician-Assisted Suicide and Euthanasia in the United States*, 338 NEW ENG. J. MED. 1193 (1998) (indicating that a great minority of physicians do not support physician-assisted suicide, even if it were to be made legal); see also Steven Reinberg, *Most Doctors Oppose Physician-Assisted Suicide, Poll Finds*, US NEWS: HEALTH (Sept. 11, 2013, 5:00 PM),

argued that “[t]ermination of treatment, which thereby allows a patient to die, is vastly different from providing a lethal drug to enable a patient to kill himself.”¹³⁶ The argument is that a healthy patient will not die if taken off of a respirator, and since a doctor cannot know with 100% certainty that someone will die when taken off of a respirator, it is different than actively causing their death.¹³⁷ However, realistically, a doctor may still know with 90% certainty that someone will die when taken off of a respirator, yet that remains acceptable. There is no concrete percentage of certainty at which a doctor becomes criminally liable. Presumably, this is how doctors are able to emotionally distance themselves from the situation when taking someone off of a respirator. Similarly, when prescribing a life-ending medication, a doctor cannot know with 100% certainty that the patient will take it, therefore doctors should not be held liable.

To the contrary, if a doctor were to administer the medication, then he or she would know with certainty that the patient would die, which could alter the primary perception of doctors as healers. This could further expose doctors to malpractice claims and lawsuits.¹³⁸ To quell the concerns of physicians that assisted-administration may lead to physician-administered euthanasia, California, as well as other states, should enact safeguards to prevent just that. California could require documentation, reported to the state, regarding who has been granted permission to provide assistance with administration. Additionally, the assistant could be required to call or in some way notify a doctor before the actual administration to ensure transparency in the process. Requiring a form with two witnesses’ signatures could demonstrate that a patient ingested medication voluntarily. Although this may appear insensitive given the emotionally-charged nature of suicide, a measure like this may be necessary to ensure proper legal standards are followed. California could further require that any assistant go through a

news/news/articles/2013/09/11/most-doctors-oppose-physician-assisted-suicide-poll-finds (reporting that “[s]ome [physicians] said assisting a suicide violates a physician's oath to do no harm . . .”) [http://perma.cc/88QT-ADTW]; Dr. Kevin Fitzpatrick, *Euthanasia: We Can Live Without It . . .*, CNN (Nov. 27, 2013, 12:29 PM), <http://www.cnn.com/2013/11/27/opinion/opinion-anti-euthanasia-kevin-fitzpatrick/> (“Killing someone by lethal injection is not an act of medicine: it comes when medicine apparently has nothing left to offer.”) [http://perma.cc/V5EJ-Y2A6]. There are websites for doctors to reach out and connect with other anti-physician-assisted suicide doctors. See e.g., *Doctors as Healers*, LIFE, <http://www.life.org.nz/euthanasia/euthanasiamedicalkeyissues/doctors-as-healers/> [http://perma.cc/6XDQ-4J56].

¹³⁶ Susan R. Martyn & Henry J. Bourguignon, *Physician-Assisted Suicide: The Lethal Flaws of the Ninth and Second Circuit Decisions*, 85 CAL. L. REV. 371, 386 (1997).

¹³⁷ *Id.*

¹³⁸ See CAL. PENAL CODE §§ 187, 189, 192 (West 1872) (defining the various degrees of murder and manslaughter); CAL. CIV. CODE § 3333.1 (West 1975) (allowing patients to sue healthcare providers for negligent care).

class and/or discussion with the prescribing physician. In such a class, the physician could explain how to administer and verify that the patient is voluntarily going to ingest the medication. Finally, if a patient chose to receive assistance, California could require the supervision of a doctor to ensure proper procedures are followed without requiring doctors to actually administer.

Although doctors are thought to be healers and fixers, people must accept that many patients cannot be “fixed” by medicine. For Brittany Maynard, whose brain cancer was irreversible and immeasurably painful, the most viable option was to relieve her of a life that was too agonizing to endure. By requiring self-administration, patients like Brittany are not only required to rely on physicians’ calculations of when they have less than six months to live, but are also forced to estimate on their own when they may lose the ability to self-administer. This takes away potential quality time patients have left with their families. It should not be on the patient to determine when the time may come that they will lose the ability to self-administer. Patients should be able to delegate the physical act of administration to a person of their choosing.

In the case of Barbara Houck, a terminally-ill Oregonian suffering during the terminal stages of ALS, her son mixed her prescribed life-ending medications into a bowl of pudding and spoon-fed it to her as per her request.¹³⁹ She had the right to tell him not to give her the medications, but they had been prescribed, and she made the conscious choice to die on her own terms.¹⁴⁰ He was merely a vessel that aided her in her wish to die through legal means. He did not inject her with anything; he did not insert anything into her. He merely carried forth her wishes to pass on her own terms. His actions were no different and no more deserving of punishment than any other family member who has been permitted to mix the life-ending medication into a liquid, but does not actually assist in the delivery of the food or drink to the patient’s mouth. The intent of a loved one when offering assistance is to honor the desire of the patient, much in the same manner that a doctor who prescribes the medication does so out of empathy and compassion.¹⁴¹ Brittany Maynard’s doctor said it

¹³⁹ Frey, *supra* note 88.

¹⁴⁰ *Id.*

¹⁴¹ LaPook, *supra* note 39 (statement of the son of a woman who plans to end her life in Oregon) (“There isn’t a day where I won’t wish that there would be more time. But there will very easily be a day where I wish there was less suffering.”). See generally Howard Brody, *Physician-Assisted Suicide: Family Issues*, 1 MICH. FAM. REV. 19 (1995) (clarifying that ultimately the choice to die is left to a patient and not a family member).

best: “Shouldn’t I be able to help [patients] when they’re suffering, and the burden of living becomes intolerable to them?”¹⁴²

V. CONCLUSION

If California’s End of Life Option Act follows the precedent that its predecessor, Oregon, has established, then the self-administration requirement that is currently written into the law will serve no real purpose. This requirement should be removed for a lack of realistic enforceability. There is no practical way to legally enforce the self-administration requirement unless a third party captures on video camera or photograph illegal assisted-administration or through self-reporting mechanisms. There is documentation of patients receiving assistance in the administration of their life-ending medications, yet there have been no instances of criminal charges. The self-administration requirement has become nothing more than a line in a bill to silence critics who fear improbable outcomes, including murder and coercion.

In no way does this Note intend to imply that euthanasia is the answer. The simple solution is this: make it explicitly legal for a patient to receive assistance in mixing, ingesting, and ultimately, administering prescribed life-ending medications, and implement realistic safeguards to protect patients. There are people who do not want to die, but are dying, some of whom cannot self-administer.¹⁴³ Mobile or not, those in untreatable pain with only months left to live deserve the right to a dignified and humane end-of-life option. Providing patients with an option to receive help may allow them peace of mind in their final days, knowing that when the time is right, someone will be there to help them pass in peace.

¹⁴² LaPook, *supra* note 39. Doctor Walsh also gave descriptive insight into how to categorize the emotions that go along with prescribing a life-ending medication to a patient: “You know, we categorize tears into a single adjective. Tears of joy, tears of sorrow, tears of regret. But actually in the physician aid-in-dying these are tears that contain all of those adjectives.” *Id.*

¹⁴³ “I do not want to die. But I am dying.” Maynard, *supra* note 39.

