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VOLUME 17

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- ARTICLES -

COLLABORATIVE LAW AND BUSINESS DISPUTES: A MARRIAGE OF EQUALS?

ALEXANDRIA ZYLSTRA, J.D., LL.M.*

In 2011, I authored an article cautioning against the use of collaborative law in family law disputes, absent sufficient research establishing actual benefits to the clients in the collaborative law process. After that piece was published, I began wondering where collaborative law *may* be beneficial, without posing the significant risks it poses to many family law clients, where the parties are often financially disparate and first-time legal consumers. One such area where these risks may be mitigated is within the business field, specifically in some employment and commercial law disputes. However, there is very little written on this topic, beyond a handful of industry newsletters and a few law journal articles, and very few firms offer collaborative law to their business clients. Additionally, no case studies of collaborative law have emerged outside the family law setting.

Why has there been minimal expansion of collaborative law beyond the family law arena? More importantly, could the risks of collaborative law I, and others, have identified be mitigated in some business disputes? This paper re-examines the concerns raised in my 2011 article regarding the use of

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collaborative law to resolve family court disputes, evaluating whether those concerns may be mitigated in certain business disputes.[1] This examination is followed by a review of literature suggesting reasons why collaborative law has not spread to new areas of law. My hypothesis, as so little collaborative law practice and even less research is being conducted in this field, is that collaborative law is likely most beneficial in business disputes involving the need for an ongoing relationship, where the parties are somewhat legally sophisticated, and have similar financial resources, such as labor/management disputes, vendor/supplier disputes, construction disputes, shareholder disputes, and intellectual property disputes (Group A). While some authors advocate for the use of collaborative law in other business settings, such as family business disputes, landlord/tenant disputes, discrimination or disability claims, sexual harassment claims, and medical malpractice cases[2] (Group B), I caution against using it in

[1] Much of the following discussion re-examining the process of collaborative law, and the concerns and case studies regarding collaborative law within the field of family law, was taken from Alexandria Zylstra, *A Call to Action: A Client-Centered Evaluation of Collaborative Law*, 11 Pepp. Disp. Resol. L.J. 547 (2011).

[2] *See, e.g.*, R. Paul Faxon & Michael Zeytoonian, *Prescription for Sanity in Business Restructuring Case*, 5 COLLABORATIVE LAW JOURNAL 2 (Fall 2007), (authors describe the successful use of collaborative law in a family business dispute); Richard A.B. Gleiner, *Using Collaborative Law to Resolve Disputes in Family Businesses*, 5 FAMILY FIRM PRACTITIONER (Nov 2009) (also advocating using collaborative to resolve family business disputes); Lawrence R Maxwell, Jr. & William B. Short, Jr., Collaborative Law: It's Here and the Consensusdocs Are, Too, CONSTRUCTION LAW JOURNAL 30 (Winter 2008) (advocating collaborative law for construction disputes); Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics*, 30 CAMPBELL L. REV. 237 (2008) (advocating collaborative law for medical malpractice cases); Sherrie R. Abney, *The Evolution of Civil Collaborative Law*,

these instances, as this latter group raises some of the same concerns seen in family law cases. That is, this group contains at least one party that may be financially disadvantaged and/or a first-time legal consumer.

I. THE COLLABORATIVE LAW PROCESS

Collaborative law (CL) has spread across the United States and Canada in the past twenty-five years, and most practitioners (and clients) are concentrated in the field of family law.[3] In a typical collaborative case, each party hires separate legal counsel, both of whom agree to limited representation.[4] That is, the attorneys and parties sign an agreement, sometimes called a participation agreement or disqualification agreement, to settle the legal issues solely through cooperative negotiation and without litigation.[5] No court filings are made until the collaborative law process settles all raised issues.[6] Should either party decide to litigate, or even threaten litigation, both collaborative lawyers (and all other hired professionals) are disqualified. Both parties must hire new counsel and new professionals.[7] It is this disqualification provision that defines collaborative law. It is the "one irreducible minimum condition" for CL.[8] CL advocates argue that the

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15 TEX. WESLEYAN L. REV. 495 (2009) (advocating collaborative law for medical malpractice, as well as sexual harassment and discrimination claims).
[3] Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 317 (2004).
[4] PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 3, 4 (2d ed. 2008).
[5] *Id.* at 7.
[6] *See generally id.* at 69 (describing the end stage of collaborative law representation).
[7] *Id.* at 3-4.
[8] *Id.* at 5-6.

disqualification agreement, by closing the door to the courthouse, shifts negotiations toward settlement and away from legal gamesmanship.[9] The CL agreement signed by parties and attorneys generally requires, upon punishment of withdrawal, good-faith negotiation and full and voluntary discovery.[10] Most of the work of CL is done in four-way meetings in which clients and attorneys actively participate.[11] Thus, the goal of CL is an interest-based negotiation involving the dynamic participation of both legal counsel and parties that results in finding "common ground for solutions" without the threat of litigation looming over them.[12]

Collaborative law is the brainchild of Stu Webb, a Minnesota family lawyer who, after practicing traditional family law for nearly two decades, was "approaching burn-out" in the late 1980s.[13] Webb began experimenting with different methods of conflict resolution for dissolution cases until finding that the "most promising model" was attorney as settlement lawyer, meaning one who would withdraw from the case if settlement could not be reached.[14] "I saw the possibility of creating a settlement specialty bar consisting of lawyers who would take cases only for settlement."[15]

Webb's concerns about adversarial litigation are not unique. Extensive literature paints a picture of traditional litigation as "dominated by hard-line positions reflecting zero-

[9] Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from The Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 194.
[10] TESLER *supra* note 4, at 3.
[11] Stu Webb, *Collaborative Law: A Practitioner's Perspective on its History and Current Practice*, 21 J. AM. ACAD. MATRIMONIAL LAW. 155, 162 (2008).
[12] Tesler, *supra* note 3, at 330.
[13] Webb, *supra* note 11, at 156.
[14] *Id.*
[15] *Id.* at 157.

sum assumptions which drive a culture of competition and widespread expectations of zealous advocacy among both lawyers and clients."[16] "Position-taking in litigation . . . tends to reduce creativity and the capacity for accommodation."[17] Such position-taking often leads to denial of allegations detrimental to one's own side, leveling of allegations detrimental to the opposing side, granting of only small concessions, and unpredictable outcomes. In response to this long list of adversarial shortcomings, CL promises a different means to resolve legal disputes. Thus, it is not surprising that many family law practitioners, disheartened by the adversarial model of litigation, are attracted to an option that seems to shut the courthouse doors, at least until all legal issues are settled.

II. BENEFITS AND RISKS REGARDING THE USE OF COLLABORATIVE LAW

CL (Collaborative law) practitioners cite many benefits to the clients, including financial and temporal savings, and the preservation of relationships,[18] although few studies of such benefits have been conducted. One of the earliest references to the value of collaborative law beyond family cases is found in a short 2001 Lawyer's Weekly article.[19] A specific reference to the use of collaborative law in business disputes can be found in David

[16] Julie Macfarlane, *Will Changing the Process Change the Outcome? The Relationship Between Procedural and Systemic Change*, 65 LA. L. REV. 1487, 1489-90 (2005).
[17] *Id.* at 1488.
[18] SHERRIE R. ABNEY, AVOIDING LITIGATION: A GUIDE TO CIVIL COLLABORATIVE LAW 21, 34 (2005).
[19] Laurie McMurchie, *Collaborative Law Holds Promise for Areas Other Than Family Law,* LAWYERS WEEKLY (Jan 12, 2001).

Hoffman's 2003 article, in which he suggests that some of the same benefits of collaborative law could apply to many business disputes: common interests, limited resources, need for the preservation of an ongoing relationship, and the desire for private resolution of disputes, among other reasons.[20] Other benefits that may make collaborative law attractive to business litigants include: the opportunity for creative problem solving, the ability for the parties to control the process, and financial savings, especially in cases in which protracted litigation would threaten business relations.[21] Despite the potential benefits of CL, it poses several risks to many family law litigants, and to at least one party involved in the Group B business disputes (family business disputes, discrimination or disability claims, medical malpractice cases, etc.).

A. Informed Consent

The first concern involves informed consent. The CL model has proven so attractive to some family law practitioners they tend to speak about it with an almost religious fervor. "[CL] helps clients and attorneys evolve from their lower-functioning

[20] David A. Hoffman, *Collaborative Law in the World of Business*, THE COLLABORATIVE REVIEW (Winter 2003). *See also*, Kathy A Bryan, *Symposium: Why Should Businesses Hire Settlement Counsel?*, 2008 J. DISP. RESOL. 195, 196-97 (arguing that the use of CL in business disputes can preserve relationships, and result in time and cost savings) and Michael Zeytoonian, *Getting to Collaboration in Business and Employment Disputes*, 2 COLLABORATIVE LAW JOURNAL 1 (Summer 2004) (One of the earliest mentions of collaborative law being used to resolve a business disputes is in a 2004 issue of the Collaborative Law Journal, in which the attorney-author explains how he utilized collaborative law while representing a client involved in a commission dispute with an employer);.

[21] Zeytoonian, *supra* note 20.

isolated selves into higher-functioning integrated people."[22] Pauline Tesler, who has written the leading texts on CL, glows that "collaborative lawyers find themselves becoming members of a healing profession—and in so doing, heal themselves."[23] Such fervor about CL, with only anecdotal and small sample evidence of actual benefits to clients, presents a risk of pressuring clients to choose CL, even if it is not in their best interest. In Julie Macfarlane's four year study of CL, she found this religious conversion-type language with which many CL lawyers speak "fuels a desire to persuade their clients to use the collaborative process."[24]

Given such fervor/passion, several commentators have questioned whether true CL believers, with a mindset that litigation is failure, properly can advise a prospective client about the advantages and disadvantages of litigation versus CL.[25] "If attorneys practicing collaborative law allow their own personal distaste for litigation to cloud their judgment regarding the suitability of collaborative law for their clients, they may be 'selling' a dispute resolution approach to their clients."[26] Even Tesler admits that CL practice tends to flourish among lawyers whose "enthusiasm and conviction about [collaborative practice]

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[22] JANET P. BRUMLEY, DIVORCE WITHOUT DISASTER: COLLABORATIVE LAW IN TEXAS 9 (2004).
[23] Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967, 991 (1999).
[24] JULIE MACFARLANE, CAN. DEP'T OF JUSTICE, EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 17 (2005), *available at* http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2005/2005_1/pdf/2005_1.pdf.
[25] Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 303-04 (2008).
[26] Barbara Glesner Fines, *Ethical Issues in Collaborative Lawyering*, 21 J. AM. ACAD. MATRIMONIAL LAW. 141, 147-48 (2008).

were so genuine and intense that [they simply] could not contain their excitement when they spoke about how collaborative law works."[27] Could such ardent enthusiasm diminish the CL attorney's presentation of material risks, as required by ABA Model Rules when entering limited representation agreements?[28] At least one state ethics committee has identified this risk.[29] Even the best-intentioned, best trained collaborative lawyer may unconsciously—and unfairly—present diminished risks and heightened benefits of CL.[30] "The danger is that a lawyer committed to the collaborative law process may lack the capacity, even unconsciously, to provide a client with a fair representation of the risks and benefits of utilizing such a process."[31] Such unfair presentation of the risks could lead to detrimental consequences for the client.

This risk of pressuring clients may be compounded by the fact that most dissolution clients, and at least one party in the Group B disputes, are often one-time, first-time, legal consumers, with little or no prior interactions with a lawyer or traditional litigation. This places the attorney in a very influential position.

> Attorneys, after all, wield technical expertise, enjoy exclusive or privileged access both to other lawyers and to officials of the state, and bring familiarity and detachment to situations in which clients are

[27] PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 3, 37 (2d ed. 2008).
[28] MODEL RULES OF PROF'L CONDUCT R. 1.0(e) & 1.2(c) (2010).
[29] N.J. Advisory Comm. on Prof'l Ethics, Op. 699 at 8-9 (2005), *available at* http://www.judiciary.state.nj.us/notices/ethics/Opinion699_collablaw_FINAL_12022005.pdf.
[30] Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 161 (2004).
[31] *Id.*

> often frightened, angry, and uninitiated. Often social status and economic class will also give lawyers a standing to which both lawyer and client may feel deference is due.[32]

Beyond the danger of inappropriately "selling" CL to a client is the danger identified in at least one case study—CL clients may not fully comprehend the impact of the CL commitment.[33] For example, Macfarlane's study suggests clients may not understand completely the full and voluntary disclosure commitment requiring disclosure of information the party never believed would be revealed, the extent to which discussions with one's own lawyer will be kept confidential in a team model, and the emotional and financial costs emanating from the termination of the CL process.[34] This study also found a mismatch between the lawyer's values and the client's practical expectations of the CL process. Clients in the study expressed frustration regarding collaborative lawyers' reluctance to give legal advice and not understanding the extent of information that would be required disclosure.[35] If the expectations of attorneys and clients are so dissimilar, does this mark a failure to obtain informed consent?[36]

Lastly, choosing CL requires a certain amount of prognosticating not required in mediation or traditional litigation

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[32] Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 718 (1987).
[33] MACFARLANE, *supra* note 24, at 209.
[34] *Id.* at 209-10.
[35] *Id.* at 207.
[36] Of course, attorney underestimations of negotiating skills are not unique to CL. Negotiators tend to "underestimate the costs to themselves of not reaching agreement and to overestimate the costs to the other side." ROGER FISHER ET AL., BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT 78 (1994). Within CL this underestimation, however, could be significantly more risky to the client than such underestimation in other dispute resolution models.

models. Because of the disqualification agreement, both attorneys and clients must first conclude that the settlement of their issues is best handled outside the adversarial process, a difficult task even for the most seasoned attorney. A failed prediction about CL has significant financial and time consequences to the client because of the disqualification agreement, which calls into question the client's ability to truly give informed consent. Additionally, might attorneys be willing to risk a failed prognostication (thus, disqualification) because family law clients and at least one party in each of the Group B categories are usually one-time clients, rather than repeaters?[37]

All three of the concerns regarding informed consent are predicated on the notion that many clients are rarely litigation savvy consumers. While the zealous fervor with which many CL advocates represent CL to their clients would likely not change within the business setting, the issue of informed consent may be mitigated by the fact that many business parties in Group A (labor/management disputes, vendor/supplier disputes, construction disputes, shareholder disputes, and intellectual property disputes) are not one-time, first time legal consumers, thus, perhaps, the influential power of the attorney is diminished. Thus, these parties may be able to better assess the risks of CL.

B. The Disqualification Agreement

In addition to questions of informed consent, another danger to clients is posed by the very hallmark of CL: the disqualification agreement (DA). The DA is the single most

[37] *See* John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1361 (2003).

identifiable characteristic of collaborative law.[38] CL advocates contend that the DA, by temporarily closing the courthouse doors, can enhance a party's commitment to settlement, create an environment allowing for creative problem solving without the fear of court, and create an equal incentive for all parties to cooperate (as both lawyers must withdraw if one party chooses litigation).[39] The DA "truly creates the energy shift necessary to allow all the creative resources of the parties and counsel to focus squarely on solutions tailored for the parties."[40]

> In my view, the disqualification requirement is the engine that drives collaborative law. The disqualification provision provides the positive settlement tone and a check on the lawyers' mind-set and activities. Disqualification requires the lawyers to act differently. They don't have to be concerned about trial strategies. Without the disqualification rule, the behavior of the lawyer is likely to be influenced by our trial/court instincts.[41]

Despite these claimed benefits, there are at least three potential dangers to family law litigants, and to at least one party in the Group B categories, posed by the DA: client misunderstanding of the meaning and impact of the DA, potential financial and psychological coercion of the DA, and, to a lesser extent, the

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[38] Stu Webb, *Collaborative Law: A Practitioner's Perspective on its History and Current Practice*, 21 J. AM. ACAD. MATRIMONIAL LAW. 155, 168 (2008).
[39] Gary L. Voegele et al., *Collaborative Law: A Useful Tool for the Family Law Practitioner to Promote Better Outcomes*, 33 WM. MITCHELL L. REV. 971, 979 (2007).
[40] SHEILA M. GUTTERMAN, COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION 37, 52 (2004).
[41] Webb, *supra* note 38, at 168.

diminished best alternative to a negotiated agreement (BATNA) resulting from the signing of the DA.

1. Client Misunderstanding of the Meaning and Impact of the DA

Even if a potential CL client understands the meaning of the DA, which at least one study mentioned earlier describes as highly questionable, John Lande noted in his CL study that the client may not *believe* disqualification will happen in his or her case.[42] This underestimation may be fueled by the zealousness of the collaborative lawyer. If disqualification does occur, Lande suggests the client "may have difficulty appreciating in advance what the impact would be when the agreements would be invoked."[43] Invoking the DA requires both parties to seek and hire new lawyers and professionals, pay new attorneys' fees, and educate new lawyers about the case. "Collaborative law . . . can require a significant investment. This investment is no more, perhaps, than litigation costs, but if the negotiation is unsuccessful, this investment is lost and the litigation costs remain."[44] Significant time and emotional investment are lost also if CL fails.

While the added cost of retaining new counsel will impact both Group A and B litigants similarly, parties in Group A that have past legal experience, especially repeated experience with a particular law firm, may be able to understand the risk of disqualification more easily then Group B parties, as these disputes may contain at least one party who is likely to be a first-time legal

[42] Lande, *supra* note 37, at 1358.
[43] *Id.*
[44] Barbara Glesner Fines, *Ethical Issues in Collaborative Lawyering*, 21 J. AM. ACAD. MATRIMONIAL LAW. 141, 146 (2008). In fact, at least one author questions whether invocation of disqualification unfairly prejudices the client's rights. Spain, *supra* note 30, at 162.

consumer. Additionally, the parties in Group A are more likely to be interested in preserving business relations with the other party, as they may have future interactions; thus, the time investment of CL would be less concerning. Yet, the Group B participants often do not have an interest in an on-going relationship, making the time commitment of CL undesirable.

2. The DA's Potential Financial and Psychological Coercion to Settle

Given the significant temporal and financial consequences of the DA, there is clearly a heightened risk of coerced settlement. Parties, mindful of the financial consequences of disqualification, may remain at the negotiating table even when it would no longer be in their best interest.[45] In fact, Macfarlane questions whether the CL investment amounts to "entrapment that prevents clients from withdrawing from the process."[46]

The DA may be particularly burdensome to the party with fewer financial resources. Although the few CL studies conducted do show that CL is utilized almost exclusively by middle to upper income clients, there is, still, often one party with a financial advantage in family law cases or with disputants in Group B. Given the significant investment noted above, financially disadvantaged parties may be forced to concede because of their inability to afford hiring another lawyer if CL is unsuccessful.[47]

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[45] Macfarlane, *supra* note 9, at 194.
[46] MACFARLANE, *supra* note 24.
[47] Susan B. Apel, *Collaborative Law: A Skeptic's View*, 30 VT. B.J. 41 (2004). The Uniform Collaborative Law Rules and Act does permit another lawyer in the firm to continue representation of low-income clients after a failed CL, so long as the participation agreement includes this provision and the CL lawyer is

While there is, of course, a financial incentive to settle in the traditional litigation model as well, the DA adds to that extra cost the price of retaining and re-acquainting a new lawyer with the case, plus additional indirect costs such as lost work, lost time, etc.

Some authors have even questioned the appropriateness of CL for *any* financially disparate clients.[48] At least one commentator questions whether the DA may even violate Model Rule 1.2 in cases of financially disparate parties:

> It seems likely that in some circumstances such [disqualification] provisions are not 'reasonable under the circumstances.' For example, if retaining new counsel imposes extremely asymmetrical costs on the two parties—one party can do it cheaply, the other only at great expense—then these limited-retention agreements may work serious strategic disadvantage on the cost-sensitive party.[49]

Note, however, that Macfarlane's study did not find that CL resulted in weaker parties "bargaining away their legal entitlements," although only eleven cases that reached final resolution were followed in this study.[50]

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isolated from the case following the failed CL. Uniform Collaborative Law Rule and Uniform Collaborative Law Act (amended 2010), Rule 10, *available at* http://www.law.upenn.edu/bll/archives/ulc/ucla/2010_final.htm

[48] Scott R. Peppet, *The Ethics of Collaborative Law*, 2008 J. DISP. RESOL. 131, 157. *See also* Rebecca A. Koford, *Conflicted Collaborating: The Ethics of Limited Representation in Collaborative Law*, 21 GEO. J. LEGAL ETHICS 827, 838 (2008) (arguing CL should not be recommended to any client who cannot afford the risk of employing a second lawyer to start the process over).

[49] Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 489-90 (2005).

[50] MACFARLANE, *supra* note 24.

In fact, the DA itself may become an extremely powerful coercive tool, as one party's ability to fire the other party's lawyer can mean one party's financial ruin. "[W]hile the agreement purports to remove litigation as an alternative, it does not. Its possibility remains a powerful threat that can be strategically used by one party to foul the process."[51] Lande echoes this concern. "Although the disqualification agreement is undoubtedly helpful in many cases, it also can invite abuse by inappropriately or excessively pressuring some parties to settle when it would be in their interest to litigate."[52] Lande expresses further concern that the DA may "actually undermine some clients' interests in cooperative negotiation if the other party will act reasonably only in response to a credible threat of litigation . . . ."[53]

The coercion to settle within CL may not just come from the parties' financial risk. Even with relatively equal financial resources, CL parties may feel unique pressure from the lawyers. "Unlike any other kind of family law representation, the risk of failure is distributed to the lawyers as well as to the clients in collaborative law."[54] As Lande has pointed out, this could potentially risk a good settlement in favor of any settlement. He writes, "CL theory calls for interest-based negotiations, but the disqualification agreement increases the incentive to continue negotiations and reach any agreement, not merely agreements

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[51] Apel, *supra* note 47, at 43.
[52] *See* John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1361 (2003). Lande goes further by suggesting the DA may in fact violate ethics rules, which the Colorado Bar Association later agreed with. *Id.* at 1329.
[53] *Id.* at 1360.
[54] TESLER, supra note 4, at 11.

satisfying the parties' interests."[55] Despite such concerns, William Schwab's CL study (mentioned later in this article) found that over fifty percent of CL participants said the DA "did not keep them in negotiations when they otherwise would have left," although this study involved only twenty-five client surveys.[56] Additionally, at least one CL advocate believes that, because disqualification is so rare, and settlement rates with CL so high, the actual lost revenue from utilizing CL would be a nominal risk.[57]

As for business disputes, again the parties in Group A may be more able to bear the financial risk involved due to the disqualification agreement, as both parties are likely to have similar financial resources. Further, the psychological coercion may be lessened in this group if both parties are legally savvy, thus understanding the risks of litigation as compared to the risk of disqualification. Lastly, Group A business parties are often already skilled negotiators, and this risk of coercion may be diminished. Note, however, even in Group A business disputes, the DA itself may become an extremely powerful coercive tool, as a savvy business party has the ability to fire the other party's lawyer, potentially causing the other party's financial ruin. A savvy party may utilize this in a business dispute quite easily against an unsophisticated negotiating party.

3. Diminishing the Client's Best Alternative to a Negotiated Agreement (BATNA)

[55] Lande, *supr*a note 52, at 1364. In fact, Macfarlane echoes his concern, especially for the weaker party who may be "pressured to agree to an outcome that does not recognize their needs." MACFARLANE, *supra* note 24, at 59.
[56] William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 379-80 (2004).
[57] Sherrie R. Abney, *The Evolution of Civil Collaborative Law*, 15 TEX. WESLEYAN L. REV. 512 (2009).

A final and significant concern posed by the DA is the diminishment of a client's negotiating ability. If, as advocates claim, the purpose of CL is interest-based negotiations in hopes of finding "common ground for solutions," then credible analysis of CL must involve assessment of the parties' negotiating positions within CL as compared to other forms of conflict resolution.[58] Utilizing Fisher and Ury's seminal book in this field, *Getting to Yes*, determining each party's negotiating ability depends, in large part, upon assessment of each party's best alternative to a negotiated agreement (BATNA); in other words, the party's best option should negotiation fail (walking away, litigation, etc.).[59] The stronger a party's BATNA, the less likely that party will be to make a bad agreement.[60] "Whether you should or should not agree on something in a negotiation depends entirely upon the attractiveness to you of the best available alternative."[61]

In a typical legal dispute, the parties hire lawyers who attempt to negotiate an agreement, or perhaps the parties try mediation to resolve the issues, knowing that their BATNA is litigation, an unattractive, but sometimes necessary, way of settling legal disagreements. Despite the many disadvantages of litigation, with this traditional model, the parties, at least, know that their lawyers will, if necessary, pursue litigation, having already been retained and knowledgeable about the issues. If the parties choose CL, however, the lawyers demand that the parties sign away this BATNA. In fact, CL is designed to "diminish the value of both parties' BATNA in an effort to

[58] Tesler, *supra* note 3, at 330.
[59] ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 97 (2d ed., Penguin Books 1991).
[60] *Id.* at 102.
[61] *Id.* at 101.

keep them at the table."[62] This seems to be counterintuitive to Fisher and Ury's argument that the best way to ensure a settlement in a party's best interest is to *improve*, not diminish, one's BATNA.[63] This diminished BATNA could force acceptance of any settlement rather than risk loss of attorneys and experts.

This loss of the litigation alternative is particularly onerous for family law clients, as most of these disputes (divorce, custody, and paternity) require court intervention. Unlike many business disputes, most family law issues cannot be resolved without judicial approval. Thus, litigation for family law clients is not only a BATNA, but is really the *only* alternative to a negotiated agreement. If the parties cannot reach consensus, whether through CL, mediation, or litigotiation (negotiation with the threat of looming/pending litigation), then litigation becomes necessary. Thus, by signing a DA and closing the courthouse gates, even temporarily, CL imposes a significant encumbrance to case resolution should CL fail that is not present in many other areas of the law. Such risks posed by the DA have caused several authors to question its value. After concluding her research, Macfarlane asked whether the DA is "essential to produce the cooperative characteristics" claimed by the CL advocates.[64]

Clearly, however, this risk is diminished in most business disputes, as they can often be resolved without legal intervention. Thus, the reduced BATNA may not pose such a significant financial and legal risk to parties in both business groups A and B, as it does for family law litigants.

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[62] Schwab, *supra* note 56, at 359.
[63] FISHER & URY, *supra* note 59, at 103.
[64] Macfarlane, *supra* note 9, at 200.

III. AVAILABLE ANALYSES OF COLLABORATIVE LAW

Despite more than two decades of CL (collaborative law), "[t]here is as yet no empirical research that compares client outcomes and perceptions in collaborative cases with those in other dispute-resolution modalities."[65] Examining the few available studies of CL confirms this.

1. William Schwab published his CL study in 2004 involving surveys of both CL clients and lawyers. While the lawyer sample included seventy-one respondents, the client sample consisted of only twenty-five respondents.[66] In the survey, lawyers were asked about CL training, the number of CL cases handled and withdrawn, and hours spent on CL cases.[67] Clients were asked how they learned about CL and their experiences with CL, including cost, whether the DA (disqualification agreement) affected the negotiation, and satisfaction with the process.[68]

Schwab's study found 87.4% of CL cases settled, averaging 6.3 months to reach settlement, with an average cost of $8,777 per case.[69] Schwab's small sample of clients was "white, middle-aged, well educated, and affluent."[70] Of the clients who reached settlement in CL, 54.5% said the disqualification provision did not keep them at the

[65] TESLER, *supra* note 4, at 8.
[66] Schwab, *supra* note 56, at 370-71.
[67] *Id.* at 369.
[68] *Id.*
[69] *Id.* at 375-77.
[70] *Id.* at 373.

negotiating table, while 45.5% said it did,[71] suggesting more than half did not find the DA coercive, but this was a very small sample size and involved no control group.

2. Carl Michael Rossi collected data in 2004 primarily from attorneys, in addition to a handful of coaches and financial advisors who were involved in 160 collaborative cases.[72] His study examined client income, settlement rates, and the cost of CL as compared to projected costs of litigation, among other issues.[73] Where client income was provided, 93% of the clients had combined annual incomes (for the divorcing couple) over $50,000.[74] Approximately 85% of cases reached agreement or the parties reconciled.[75] Of the 138 cases in which fees were provided, 50% of the cases cost the client $10,000 or less for attorneys and all other professionals.[76] Lastly, respondents were asked to project what the estimated cost for each client would have been if the case had been litigated. Of the 133 responses, 68% reported that they believed litigation would have cost the client more than CL.[77]

3. The most comprehensive study of CL, conducted by Julie Macfarlane, involved 150 interviews conducted between 2001 and 2004 with U.S. and Canadian

[71] *Id.* at 379.
[72] Carl Michael Rossi, Collaborative Practice Case Reporting Data (2004) (on file with author). Clients were not interviewed as part of Rossi's research..
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*

collaborative lawyers, collaborative clients, and other collaborative professionals.[78] These interviews were conducted at various stages of the case, and, although involving a significant amount of time, included only sixteen CL cases and failed to include a control or comparison group.[79]

Her study found that the primary motivation for clients choosing CL was cost and time savings, cautioning that some clients may be "bitterly disappointed with their final bill and disillusioned by how long it has taken for them to reach a resolution."[80] However, Macfarlane concluded, "To date, evidence suggests that the collaborative process fosters a spirit of openness, cooperation, and commitment to finding a solution that is qualitatively different, at least in many cases, from conventional lawyer-to-lawyer negotiations."[81] But she questioned whether this is because of the DA, the hallmark of CL or simply because of "the need to commit to a particular period of negotiation outside litigation, rather than an absolute commitment not to litigate."[82]

4. David Hoffman examined 199 family law cases that his own law firm (Boston Law Cooperative) handled between 2004 and 2007.[83] The information he collected was taken from billing records, and thus only examined CL

[78] MACFARLANE, *supra* note 24.
[79] *Id.*
[80] *Id.* at 25.
[81] Macfarlane, *supra* note 9, at 200.
[82] *Id.*
[83] David A. Hoffman, *Colliding Worlds of Dispute Resolution: Towards a Unified Field Theory of ADR*, 2008 J. DISP. RESOL. 11, 27.

cost, time, and contentiousness (as estimated by lawyers or paralegals).[84] Hoffman concluded that mediation cost one-third what collaborative practice cost at his firm, but both were substantially less than litigotiation (negotiation with the threat of looming/pending litigation) and litigation.[85] Hoffman found that contentiousness levels among divorce mediation (scoring 2.5), CL (2.3), and litigotiation (2.9) varied by only 0.6 on a scale of 1 (lowest contentiousness) to 5 (highest contentiousness).[86] Hoffman concluded that the "data suggest that most of these processes are quite similar in the measures that clients seem to care about—i.e., cost, contentiousness, and delay."[87] Note, however, that this study involved a very narrow sample—cases from a single law firm—and had no comparison or control group.[88]

5. Lastly, John Lande's 2007 study (published in 2008) of CL was based on a very small number of interviews, surveys, and data collected from *cooperative* lawyers at Wisconsin's Divorce Cooperation Institute.[89] Cooperative law is similar to CL but does not include the DA. Lande looked at why lawyers seek or reject CL, how cooperative practitioners view the DA used in

[84] *Id.* at 28.
[85] *Id.* at 30-34.
[86] *Id.* at 32.
[87] *Id.* at 34.
[88] *Id.* at 27.
[89] John Lande, *Practical Insights From an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 J. DISP. RESOL. 203, 207.

CL, and how CL is viewed differently from cooperative law.[90]

The cooperative lawyers surveyed expressed two sets of criticisms about CL: that the DA is problematic and that CL is "more cumbersome, rigid, and expensive than necessary."[91] Cooperative lawyers also pointed to the time consuming nature of CL, particularly the overuse of four-ways.[92]

As for client concerns, 83% of those who practice cooperative law only (not CL) "believed that a substantial number of parties in Collaborative cases are likely to feel abandoned by their lawyers if they need to litigate and that the Collaborative process is not appropriate for parties who cannot afford to hire litigation attorneys if they do not reach agreement in Collaborative law . . . ."[93] Half of cooperative-only attorneys felt "[c]ollaborative process puts too much pressure on a substantial number of parties, especially weaker parties . . . ."[94] Lande concluded "[c]ollaborative practitioners [should] seriously consider concerns and criticisms expressed by Cooperative practitioners."[95] Note, however, this study is also a very small, and narrow, sample of surveys.

[90] *Id.* at 206.
[91] *Id.* at 217.
[92] *Id.* at 222-23.
[93] *Id.* at 218.
[94] *Id.*
[95] *Id.* at 207.

Each of these studies[96], while producing beneficial observations used in this paper and elsewhere, lacks at least one of two criteria for effectively evaluating CL: a sufficient sample size or scope, and control groups. By using a small sample, or a very narrow sample (i.e., a single law firm or only cooperative lawyers), these studies amount to no more than anecdotal evidence. Without the use of a control group participating in some other form of conflict resolution, particularly in studies of CL client opinions and outcomes, it is impossible to discern which views or outcomes can be attributed to CL independently. Absent controlled studies, professionals and clients would have great difficulty determining whether CL is as beneficial, or more beneficial, than other methods, or whether it is simply "a creative way for attorneys to charge their clients more than necessary for legal matters."[97] Several CL authors have highlighted this lack of evidence. "[T]here has been very little detailed assessment of outcomes resulting from the use of collaborative law processes."[98] Even staunch supporters, such as Tesler, acknowledge, albeit in a footnote, that claims of enhanced problem-solving and communication skills, as well as other benefits espoused in the first few pages of her book, are entirely derived anecdotally.[99]

[96] A sixth study just published in 2014, involving an international survey of collaborative law, will be briefly discussed in the next section of this paper.
[97] *See* Elizabeth F. Beyer, Comment, *A Pragmatic Look at Mediation and Collaborative Law as Alternatives to Family Law Litigation*, 40 ST. MARY'S L.J. 303, 309 (2008). Macfarlane concluded from her sample of eleven cases that there simply did not appear to be much difference between the outcome reached from CL and what would have been expected in litigotiation. MACFARLANE, *supra* note 24, at 57.
[98] Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 BAYLOR L. REV. 141, 154 (2004).
[99] TESLER, *supra* note 4, 8 n.20.

However, Tesler later downplays the significant lack of critical CL research, stating "[CL] has not been shown to have harmed any clients and that seems to serve remarkably well the interests of those who have chosen it."[100]

Examining two of the claimed CL client benefits highlights the dangers of advocating benefits without supporting research. In Tesler's book *Collaborative Law*, the client handbook offered in the appendix assures prospective clients that CL will cost between one-third and one-fifth the cost of traditional litigation.[101] But this claim of cost (and time) savings has yet to be proven, as Macfarlane points out.[102] Additionally, the lack of judicial deadlines increases the length of the CL process, often leading to client frustration. Macfarlane's study found, "With negotiations removed from any case management requirements or constraints imposed by the court or other parties' pretrial motions, the process sometimes slows down further than one or both parties desire."[103] Her study also found CL client frustration with the length of time CL takes to get to substantive issues and with attorneys who were not willing to "hurry up" the stalling party.[104] This slowdown "may raise problematic legal issues in custody cases, where the stalling party wishes to establish a pattern of custody, or in relation to the date of a divorce agreement for the purpose of calculating

[100] *Id.* at 147.
[101] *Id.* at 354.
[102] MACFARLANE, *supra* note 24, at 26. ("Whether CL proves to be cheaper and faster in such cases is still unproven.") *Id.* Thus, Macfarlane cautions, "[T]he CFL movement should generally be cautious in making such [time and cost] claims and especially when using them as a basis for obtaining consent to participate in CFL." *Id.*
[103] Macfarlane, *supra* note 9, at 199.
[104] *Id.* at 211.

assets."[105] At a minimum, such frustration likely detracts from any client-perceived cost and time savings.

A second benefit many CL advocates cite is the high settlement rates achieved by CL—often between 85% and 90%.[106] While this number is high, other forms of alternative dispute resolution for business disputes boast high settlement rates, as well; suggesting CL settlement success is on par with other methods.[107] Additionally, examining settlement rates alone can be deceptive, as CL by definition "encourages" parties to stay at the table until settlement is reached or acknowledge "failure."

Consequently, CL advocates often point to the difference in settlement *quality*. Tesler emphasizes that, while nearly all traditionally litigated family law cases do settle, "those settlements generally have taken place on the courthouse steps . . . after most of the damage of litigation has occurred[,] inflammatory court papers have been filed[,] . . . positions have polarized, clients have been encouraged to believe the black-and-white oversimplifications of reality[,] . . . large sums of money have been spent, and the children have been at best forgotten . . . ."[108] Thus, courthouse-step settlements are often viewed as being limited in scope and creativity because of court rules, deadlines, and

[105] *Id.* at 199.
[106] NANCY J. CAMERON, COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE 18 (2004).
[107] *See*, e.g., Equal Employment Opportunity Commision, EEOC Mediation Statistics FY 1999 through FY 2014, *available at* http://www.eeoc.gov/eeoc/mediation/mediation_stats.cfm (mediation settlement rate of 76.7% for EEOC disputes mediated in 2014). *See also*, Financial Industry Regulatory Authority Dispute Resolution Statistics, *available at* https://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics (FINRA mediation settlement rate of 82% in 2014).
[108] TESLER, *supra* note 4, at 1.

unaddressed emotional issues.[109] While these observations are possibly true, this does not necessarily prove that CL agreements encompass scope, creativity, and emotional acknowledgement, at least not without proper study.

IV. EXPANSION OF COLLABORATIVE LAW TO GROUP A DISPUTES

Despite the lack of research in this field, the benefits of CL (collaborative law) for some business disputes, and the reduction of the risks discussed in this paper for litigants in Group A, suggest that many business parties could greatly benefit from this alternative dispute resolution model. As advocacy for using CL in business disputes has been published for over a decade now, why has CL not spread more rapidly? This lack of expansion is not unique to the U.S.. Dr. Paola Cecchi-Dimeglio and Peter Kamminga recently published a study based on surveys of 226 collaborative law practitioners in 19 countries. Of the respondents, 86.7% reported that family law is the primary use of collaborative law in their country. Other areas included: labor relations, real estate, tort law, healthcare law, insurance law, environmental law, and financial disputes, but all in much smaller percentages of practice.[110]

One reason CL has grown rapidly in family law, but not in other areas, according to one collaborative law working group, is because family practitioners have been exposed to alternative dispute resolution, such as mediation, for many more decades than

[109] *See* Tesler, *supra* note 3, at 326-28.
[110] Dr. Paola Cecchi-Dimeglio & Peter Kamminga, *The Changes in Legal Infrastructure: Empirical Analysis of the Status and Dynamics Influencing the Development of Collaborative Law Around the World*, 38 J. Legal Prof. 191, 217 (2014).

any other area of law.[111] Exposure time may, in fact, play a significant role in acceptance of new models of legal practice. The Cecchi-Dimeglio study found that 90% of respondents "reported that collaborative law is perceived negatively or is a practice unknown to other members of the legal community."[112] But the study also found that "the longer a collaborative professional is active in the field of collaborative law, the more positive the professional perceives the environment [meaning the perception of CL in the legal community]."[113]

In addition to lack of exposure, CL may be growing more slowly because, unlike mediation, courts cannot mandate that parties participate in collaborative law, as this would require parties to sign a contract (the DA) potentially against their wishes.[114] Without the backing of the courts, this voluntary process will likely see slower growth rates than court-ordered forms of ADR.

The voluntary nature of this process may be further hampered by what David Hoffman refers to as a "reverence for trial as the lawyer's ultimate test."[115] That is, the trial litigator still is often revered as the ultimate status in a law firm, as opposed to "lesser" settlement counsel. Lawyer mindset may impact the growth of CL in other ways as well. The adversarial bias, "or the need 'to be right'" has been cited by the collaborative law working

[111] J. Herbie DiFonzo, *A Vision for Collaborative Practice: The Final Report of the Hofstra Collaborative Law Conference*, 38 HOFSTRA L. REV. 569, 602 (2009).
[112] Cecchi-Dimeglio & Kamminga, *supra* note 110, at 192.
[113] *Id.*
[114] Sherrie R. Abney, *Moving Collaborative Law Beyond Family Disputes*, 38 J. LEGAL PROF. 277, 290 (2014).
[115] David A. Hoffman, *Collaborative Law in the World of Business*, 6 THE COLLABORATIVE REVIEW 1 (Winter 2003).

group mentioned above as indicating a lack of attorney training and comfort with CL, another potential hindrance to its growth.[116] Additionally, fear that the disqualification agreement would cost a law firm a significant business client if the CL process fails, may discourage many law firms from offering CL to business clients.[117] However, Sherrie Abney dismisses this fear, arguing the DA (disqualification agreement) would only disqualify the law firm from representing the client in the specific matter at issue in the CL case. It would not prevent representation of that client in other matters.[118]

Further, attorney reticence to adopt and expand CL may be the result of the lack of statutory framework for implementing CL in non-family cases. Only a handful of states have state statutes creating such a framework for CL, and a few other states have court rules allowing for CL. Without such a statutory or judicial framework, some authors contend attorneys are reluctant to pursue a new model of practice.[119]

However, not all of the reluctance to adopt this new practice may be attributed to the bar. Several authors suggest that business clients may be reluctant to use CL. Just as attorneys have not had significant exposure or training in CL, members of the business community also are unfamiliar with CL.[120] Additionally,

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[116] DiFonzo, *supra* note 111, at 602.
[117] *Collaborative Law Applied to Disputes as Alternative to Litigation*, HR FOCUS (June 2013) at 10.
[118] Sherrie R. Abney, *The Evolution of Civil Collaborative Law*, 15 TEX. WESLEYAN L. REV. 511 (2009).
[119] ABNEY, *supra* note 18, at 21.
[120] Lawrence R Maxwell, Jr. & William B. Short, Jr., *Collaborative Law: It's Here and the Consensusdocs Are, Too*, CONSTRUCTION LAW JOURNAL (Winter 2008) at 36. *See also*, Zeytoonian, *supra* note 20 (citing lack of education among both attorneys and business persons as a roadblock to expanding collaborative law to business disputes).

the disqualification agreement may discourage business clients from utilizing CL. "[B]usinesses often have well-established relationships with attorneys who routinely represent them in a variety of matters… Such firms may be understandably wary of a process requiring them to risk discharging familiar counsel…"[121] Fear that the DA will cause the dismissal of their law firm likely poses a significant deterrent for some business clients. However, the same collaborative law working group citing this concern also dismisses it, finding that given most CL cases end successfully, disqualification would occur very rarely.[122] Despite such dismissal, at least one industry periodical suggests that this fear is real, and that a need to retain separate settlement and litigation counsel (to protect against disqualification) could potentially double a business' costs.[123]

V. CONCLUSION

The causes of collaborative law's slow growth outside family law can be easily alleviated. Attorney training in collaborative law could expand via CLE or other offerings, as it will be the practitioners who will drive collaborative law into these new legal areas. Granted, changing the common attorney mindset that favors litigation can be difficult, yet we saw just such a shift when mediation proved a valuable dispute resolution tool. Changing opinions among business persons will likely also occur slowly, with education from attorneys and colleagues, and experience with the process itself.

[121] DiFonzo, *supra* note 111, at 603.
[122] *Id.*
[123] *Collaborative Law Applied to Disputes as Alternative to Litigation*, *supra* note 117.

Finally, analysis of the risks of collaborative law suggests that the process is most beneficial to business disputants that need to preserve business relations, are somewhat legally sophisticated, and are on similar financial footing as the opposing party. Thus, disputes such as labor/management disputes, vendor/supplier disputes, construction disputes, shareholder disputes, and intellectual property disputes seem to be the best fit for collaborative law, as, oftentimes, both parties to these disputes fit this profile. Many of the contracts produced within these contexts already contain mandatory mediation or arbitration clauses, a sign the business community is eager to utilize alternatives to costly, time-consuming litigation. Thus, the assessment of whether collaborative law may provide more beneficial outcomes can be easily addressed in the future drafting of such documents.

However, proper assessment of those risks would be greatly aided by comprehensive, controlled studies of collaborative law to assess actual costs, risks, and benefits, which, as identified here, is quite lacking. Yet, this impediment is also easily resolved, given the twenty years of collaborative law case history and the rising number of collaborative practitioners. Studies are needed, not just comparing collaborative law to other dispute resolution models, but also seeking client-centered answers to the practical and ethical concerns expressed here and elsewhere.

FLIPPING A LAW CLASS SESSION: CREATING EFFECTIVE ONLINE CONTENT AND REAL WORLD IN-CLASS TEAM MODULES

PERRY BINDER*

INTRODUCTION

Every college professor faces the possibility of missing a class and finding a colleague to cover it. If that course meets once a week, this request poses a time burden on the willing person and makes it challenging to test students on material if that professor teaches the subject in a different manner. Given the author's need to miss a Master of Business Administration (MBA) class,[1] and the substantial time commitment for a substitute professor, the former experimented with a *hybrid*,[2] *flipped*[3]class session.

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[1] In the author's university MBA program, some student cohorts meet every other week for a night class lasting four-plus hours and every other Saturday for two classes lasting eight-plus hours.

[2] Hybrid or *blended* courses

> combine face to face classroom instruction with online learning. A significant portion of the learning activities take place online, and time spent on instruction that traditionally occurs in the classroom is reduced but not eliminated. This allows the student much more flexible scheduling, while maintaining the face to face contact with the

Flipping a class involves the creation of online content for out-of-class viewing, that helps "students to engage in hands-on activities, discussions, writing exercises, or other tasks" in class.[4] Also referred to as an *inverted* classroom, this pedagogical model is "supported by theories of active learning that replaces the traditional in-class lecture format with predelivered *[sic]* instructional materials and an in-class learning lab."[5] There is no single model for flipping a class session.[6] In fact, many business law professors already follow a flipped principle, by forgoing lectures and facilitating law school style critical thinking exercises

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> instructor and classmates that is typical of a more traditional course. The division of online and classroom instruction for each blended course will vary depending on the course content and the instructor preference.

Univ. of Wis.-Milw., *Frequently Asked Questions about Online Learning*, http://www4.uwm.edu/future_students/online/faq.cfm (last visited July 1, 2015). *See also* Michael Sharnoff, *More good news for the hybrid learning model*, ECAMPUS NEWS, Jan. 30, 2014, http://www.ecampusnews.com/top-news/hybrid-learning-highered-444/.

[3] A flipped class typically has online lecture content and "seeks to preserve the value of lecture (expertise and custom delivery), while freeing up precious in-person class time for active learning strategies." Univ. of Wash. Ctr. for Teaching and Learning Resource Page, *Flipping the Classroom*, http://www.washington.edu/teaching/teaching-resources/flipping-the-classroom/ (last visited July 1, 2015).

[4] Nancy Lape, Rachel Levy & Darryl Yong, *Can Flipped Classrooms Help Students Learn?*, FUTURE TENSE, Apr. 25, 2014, http://www.slate.com/articles/technology/future_tense/2014/04/flipped_classrooms_can_they_help_students_learn.html.

[5] Catherine. A. Lemmer, *A View from the Flip Side: Using the 'Inverted Classroom' to Enhance the Legal Information Literacy of the International L.L.M. Student*, 105:4 LAW LIBR. J. 461, 463 (2013).

[6] *Id*. at 465. *See also infra* notes 19 and 20.

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in class. Thus, the inverted classroom has been described as the "Socratic Method for the new millennium."[7]

After finding somewhat positive research[8] on flipping, and recognizing the growing use of such classes at the graduate level,[9]

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[7] Brad Keywell, *Flipping The University: A Young Entrepreneurs Guide*, FORBES, Feb. 18, 2014, *available at* http://www.forbes.com/sites/groupthink/2014/02/18/flipping-the-university-a-young-entrepreneurs-guide/.

[8] For a brief discussion on research and/or the effectiveness of flipped classes, see Latala Payne Hodges, *Classrooms are 'flipped' at PHCC*, MARTINSVILLE BULLETIN, May 9, 2014, *available at* http://www.martinsvillebulletin.com/news/local/classrooms-are-flipped-at-phcc/article_1708c4c3-3b49-537e-9fbc-adffcb5d242b.html (Since professors at Patrick Henry Community College "moved all the notes outside the classroom, there's no formal note taking in the class," [they are] able to focus on deeper problems. … The knowledge isn't always coming from the teacher; it's being generated within the groups, which is really cool."); Carl Straumsheim, *Still in Favor of the Flip*, INSIDE HIGHER ED, Oct. 30, 2013, http://www.insidehighered.com/news/2013/10/30/despite-new-studies-flipping-classroom-still-enjoys-widespread-support#sthash.ygwz0Ddl.dpbs (Supporters and even skeptics say that the discussion of flipped classes is positive.); and Robert Talbert, *Three things I learned through teaching a flipped class*, CHRON. OF HIGHER EDUC., Dec. 4, 2012, *available at* http://chronicle.com/blognetwork/castingoutnines/2012/12/04/three-things-i-learned-through-teaching-a-flipped-class/ (College mathematics professor describes the experience as exhausting in a good way, magical, and that students are ready to be taught this way.). *But see* Lape, *Can Flipped Classrooms Help*, *supra* note 4, where professors at Harvey Mudd College are in the middle of a long term study of flipped classes in three disciplines: chemistry, engineering, and mathematics. Preliminary study results did not show "any appreciable difference in student learning between traditional and flipped courses." *Id.* Finally, at the K-12 level, flipped classroom teaching techniques have reached mainstream status accordingly to a survey. D. Frank Smith, *How Flipped Classrooms are Growing and Changing*, EDTECH, June 12, 2014, http://www.edtechmagazine.com/k12/article/2014/06/how-flipped-classrooms-are-growing-and-changing.

the author created seventy-five minutes of original online lecture content for students to view any time prior to class, coupled it with a case video (forty-five minutes), and then required students to attend class for two-plus hours (135 minutes) instead of four-plus hours (255 minutes). In that live session, student teams led the classroom activities built into business modules developed by the author. These presentations were video captured for the professor's later viewing and feedback.

This paper discusses the teaching and learning experience of flipping a business law and ethics class session in a hybrid format. While this experiment was done at the graduate level, the lessons are easily applicable to and adaptable for use at the undergraduate level. Part I discusses the online video content (law topics covered are listed in Appendix A); the coordination of university technology personnel to create the video; the software platform to capture material and password protect it; and the intellectual property issues relating to that content. Part II provides a description of each team module, the tasks that students completed outside of class for the modules, and specific instructions on team presentations in class. These *real world* business scenarios provided an integrative approach for teaching law and ethics, and are included in Appendix B: (1) Breach of Contract Module; (2) Products Liability Module; and (3) Discovery Ethics and Attorney-Client Privilege Module. In addition, students completed an anonymous feedback form, included in Appendix C. Finally, Part III of this paper details what the author learned through the flipped classroom process, and what

[9] Louis Lavelle, *Columbia Launches Revamped MBA Curriculum*, BLOOMBERG BUSINESSWEEK, Aug. 28, 2013, *available at* http://www.businessweek.com/articles/2013-08-28/columbia-launches-revamped-mba-curriculum.

he would do the same or differently for the next time he flips a class session.

I. FLIPPING A CLASS SESSION AND CREATING DYNAMIC VIDEO CONTENT

While some universities jumped quickly onto the *MOOC*[10] bandwagon, recently there has been thoughtful discussion of whether to go down that online path.[11] For example, Harvard

[10] *MOOC* is an acronym for *Massive Open Online Course*, offered by universities on the internet for free and/or for college credit. ECONOMIST, *Creative destruction*, June 28, 2014, *available at* http://www.economist.com/news/leaders/21605906-cost-crisis-changing-labour-markets-and-new-technology-will-turn-old-institution-its (*subscription req'd*). For a general discussion of MOOCs, see Antonio Fini, *The Technological Dimension of a Massive Open Online Course: The Case of the CCK08 Course Tools*, 10:5 IRRODL (Nov. 2009), *available at* http://www.irrodl.org/index.php/irrodl/article/view/643/1402; Keith Fowlkes, *MOOCs: Valuable Innovation or Grand Diversion?*, INFO. WEEK EDUC., Feb. 5, 2013, http://www.informationweek.com/education/online-learning/moocs-valuable-innovation-or-grand-diver/240147875?itc=edit_in_body_cross; Jenna Johnson, *What in the world is a MOOC?*, WASH. POST, Sept. 24, 2012, *available at* http://www.washingtonpost.com/blogs/campus-overload/post/what-in-the-world-is-a-mooc/2012/09/24/50751600-0662-11e2-858a-5311df86ab04_blog.html; and Tamar Lewin, *Instruction for Masses Knocks Down Campus Walls*, N.Y. TIMES, Mar. 4, 2013, *available at* http://www.nytimes.com/2012/03/05/education/moocs-large-courses-open-to-all-topple-campus-walls.html?pagewanted=all.

[11] "[T]here is a dynamic in a traditional classroom that MOOCs simply can't provide. In small, in-seat courses and workshops, students discover that they are part of a community, in which each person has a responsibility to contribute and the reward of personal interaction. Such courses allow for flexibility, Socratic questioning, and serendipity." Carolyn Foster Siegel, *MOOCs R Us*, INSIDE HIGHER ED, Mar. 7, 2013, http://www.insidehighered.com/views/2013/03/07/thomas-friedman-wrong-about-moocs-essay. In a survey of MOOCs at Wharton, "only one out of every

University decided against the creation of an online MBA program, as explained by its business school dean: "Part of what had already convinced me that MOOCs are not for us [in the MBA program] is that for a hundred years our education has been social."[12] Similarly, a Harvard University business professor weighed in on the use of MOOCs in higher education: "I think the big risk in any new technology is to believe the technology is the strategy. Just because 200,000 people sign up doesn't mean it's a good idea."[13] In the struggle to assess and balance the pedagogical advantages and disadvantages of such online classes with those of traditional classes, the hybrid or blended format[14] may provide

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twelve students who enrolled in Wharton's courses were *(sic)* still watching the lectures after eight weeks. Only [five percent] completed all of the course material and assessments (slightly higher than the [three percent] rate for non-business courses)." Brandon Alcorn, Gayle Christensen & Ezekiel Emanuel, *MOOCs Won't Replace Business Schools - They'll Diversify Them*, HARVARD BUS. SCH. BLOG NETWORK, June 3, 2014, *available at* http://blogs.hbr.org/2014/06/moocs-wont-replace-business-schools-theyll-diversify-them/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+harvardbusiness+%28HBR.org%29&cm_ite=DailyAlert-060414+%281%29&cm_lm=sp%3Aric-morris%40att.net&cm_ven=Spop-Email. *See also* Barbara W. Altman and Lucas Loafman, *Going Online: Building Your Business Law Course Using the Quality Matters Rubric*, 31 J. LEGAL STUD. EDUC. 21 (2014) (discussing the importance of utilizing objective rubrics to assess quality in university distance education courses).

[12] Jerry Useem, *Business School, Disrupted*, N.Y. TIMES, May 31, 2014, *available at* http://www.nytimes.com/2014/06/01/business/business-school-disrupted.html?_r=0 (quoting Harvard University Business School Dean Nitin Nohria). However, the business school decided to create a *pre*-MBA online program. *Id.*

[13] *Id.* (quoting Harvard University Business School Professor Michael Porter)

[14] *See supra* note 2 for a definition of hybrid/blended classes.

students the best of both worlds, though this class structure also faces academic resistance.[15]

A. Background – Hybrid/Blended and Flipped Classes

Broadly defined, a blended class replaces half the "seat time in courses with online activities to achieve learning objectives."[16] These courses are typically set up with lecture videos and/or existing online material, posted online by a professor for student viewing outside of class, with sessions in class based on the online content. Since students in a hybrid course are typically in class half the time of a traditional course, the online content, synchronous chat sessions, and asynchronous[17] discussion board postings may be counted towards class contact hours.[18]

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[15] Adam Carter, *Mohawk professor challenges college to debate blended learning*, CBC NEWS, May 16, 2014, http://www.cbc.ca/news/canada/hamilton/news/mohawk-professor-challenges-college-to-debate-blended-learning-1.2645445.

[16] Kim VanDerLinden, *Blended Learning as Transformational Institutional Learning*, 165 NEW DIRECTIONS FOR HIGHER EDUC. 75 (Sp. 2014) (citing D. RANDY GARRISON & NORMAN D. VAUGHAN, BLENDED LEARNING IN HIGHER EDUC.: FRAMEWORK, PRINCIPLES, AND GUIDELINES (2007)). *See also* Awadh A.Y. Al-Qahtani & Steve E. Higgins, *Effects of traditional, blended and e-learning on students' achievement in higher education*, 29:3 J. OF COMPUTER ASSISTED LEARNING 220 (2013). The authors found that "the blended learning approach undertaken in this study appears to have provided a clear advantage in terms of the students' achievement." *Id*. at 228.

[17] For a general discussion of asynchronous and synchronous learning environments, see Stefan Hrastinski, *Asynchronous & Synchronous E-Learning*, 4 EDUCAUSE Q. 51 (2008), *available at* https://net.educause.edu/ir/library/pdf/eqm0848.pdf.

[18] *See infra* Section III for a brief discussion of university class contact hours.

There is no universal definition of a flipped class,[19] but an education group offered the following:

> Flipped Learning is a pedagogical approach in which direct instruction moves from the group learning space to the individual learning space, and the resulting group space is transformed into a dynamic, interactive learning environment where the educator guides students as they apply concepts and engage creatively in the subject matter.[20]

Flipped courses facilitate active learning[21] for students. They can be taught in traditional or hybrid course formats, and

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[19] In the flipped classroom, the professor "is a learning facilitator, able to work one-to-one with students, clarify assignments, and offer help as needed. Classmates can work together on in-class assignments, engage in discussions, or collaborate on projects. A major benefit is that teachers spend more time working directly with students instead of lecturing to them." Mich. St. Univ. Office of the Faculty & Organizational Dev., *Definition: What is Flipped Teaching?*, http://fod.msu.edu/oir/flipped-classroom (last visited July 1, 2015).

[20] Robert Talbert, *Toward a common definition of 'flipped learning,'* CHRON. OF HIGHER EDUC., Apr. 1, 2014, *available at* http://chronicle.com/blognetwork/castingoutnines/2014/04/01/toward-a-common-definition-of-flipped-learning/ (citing FLIPPED LEARNING NETWORK, *Definition of Flipped Learning*, Mar. 12, 2014, http://www.flippedlearning.org/definition (last visited July 1, 2015)).

[21] The term *active learning* has many definitions, including: "Active learning engages students in the process of learning through activities and/or discussion in class, as opposed to passively listening to an expert. It emphasizes higher-order thinking and often involves group work." Aatish Bhatia, *Active Learning Leads to Higher Grades and Fewer Failing Students in Science, Math, and Engineering*, WIRED, May 12, 2014, *available at* http://www.wired.com/2014/05/empzeal-active-learning/. For journal articles on active learning in legal studies courses, see generally Perry Binder & Nancy R. Mansfield, *Social Networks and Workplace Risk: Classroom Scenarios from*

across many disciplines,[22] including law. When a political science professor taught a flipped International Law course in a hybrid format, there were encouraging results.[23] In twenty years of teaching the course face to face, he "never received so much feedback or in such a systematic fashion" as he did in this class.[24] For convenient access by his students, he posted *mini-lectures* in the university's learning management system (LMS), and video podcast versions on the university's dedicated site. In addition, he created an open discussion forum for student use and required student participation.[25] Further, he observed that the hybrid format freed him "from the more mundane aspects of traditional lecturing,

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a U.S. and EU Perspective, 30 J. LEGAL STUD. EDUC. 1 (2013); Larry A. DiMatteo & T. Leigh Anenson, *Teaching Law and Theory Through Context: Contract Clauses in Legal Studies Education*, 24 J. LEGAL STUD. EDUC. 19 (2007); Joan T.A. Gabel & Nancy R. Mansfield, *Resolved: Legal Issues Forum as a Method of Student-Centered Learning*, 16 J. LEGAL STUD. EDUC. 257 (1998); Catherine Jones-Rikkers & Constance Jones, *Active Learning in the Legal Environment of Business Classroom*, 16 J. LEGAL STUD. EDUC. 173 (1998); Tanya M. Marcum & Sandra J. Perry, *It's Not Easy Being Green: Bringing Real Life to the Undergraduate Legal Environment of Business Classroom*, 27 J. LEGAL STUD. EDUC. 81 (2010); and Stephanie R. Sipe & LeVon E. Wilson, *A Comparison of Active Learning and Traditional Pedagogical Styles in a Business Law Classroom*, 31 J. LEGAL STUD. EDUC. 89 (2014). However, Sipe and Wilson's conclusions contradict their original hypotheses and the research of others, in a study of Legal Environment of Business courses: "[T]here were no indications that an active learning classroom environment is any more effective in teaching university students certain business law concepts than the traditional lecture pedagogical style, at least in this particular study." *Id*. at 104.

[22] *See, e.g., supra* note 8 (disciplines included chemistry, engineering, and mathematics).

[23] Robert J. Beck, *Teaching International Law as a Partially Online Course: The Hybrid/Blended Approach to Pedagogy*, 11 INT'L STUD. PERSP. 273 (2010).

[24] *Id*. at 283.

[25] *Id*. at 277.

[so he] could concentrate on the more dynamic, interactive, and therefore exciting aspects of case method teaching that practitioners of the method so well appreciate."[26] Finally, and perhaps most importantly, the students' overall performance on their examinations in the hybrid International Law course exceeded that in the professor's traditional face to face class from the prior year.[27]

B. Creating Online Content for a Flipped Course in a Hybrid Format

The author's traditional MBA class session is four-plus hours in length (255 minutes), which is comprised of lecturing, student input and questions, critical thinking group modules, and three five-minute breaks. What he did not know prior to doing this project is how these minutes are apportioned to each activity. The class time is allocated to the following activities for traditional and hybrid classes, respectively:

Section III of this article assesses the balance of the above time allotment, along with ideas to compensate for the *Student questions/input* portion of the traditional class in a virtual environment.

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[26] *Id*. at 284.

[27] *Id*. at 285-86. However, the professor also observed that "given a hybrid course's substantial online elements, some students can prove especially prone to falling behind on their assignments. To be sure, the general problem of failing to remain abreast is not unique to hybrid or online teaching: some students enrolled in conventional face to face courses also fail to attend lectures or to complete assignments such as conventional textbook readings. Still, the possibility that some students fall behind seems higher in hybrid teaching since the relative amount of outside-the-classroom work is greater." *Id.* at 282.

TRADITIONAL CLASS		FLIPPED CLASS IN HYBRID FORMAT	
Lecture	75 minutes	Video Lecture	75 minutes
Student questions/input	45 minutes	Out-of-class case video	45 minutes
Group Modules	120 minutes	In-class group modules	125 minutes
Class breaks	15 minutes	Class Breaks	10 minutes
Total	**255 minutes**	**Total**	**255 minutes**

The author's goal for the flipped MBA class was to replicate as closely as possible the experience of being in a classroom, in half the seat time. To accomplish this task, he sought input from a colleague who flipped an undergraduate business class. That professor used software[28] to video capture lectures on his laptop computer, while simultaneously writing on PowerPoint slides with a pen tablet[29] attached to the laptop. He loaded each session into the university's password-protected LMS, and students experienced a split screen of the professor's lectures and slides, before walking into the flipped classroom.

The convenience of capturing content from the comfort of a personal computer was an attractive feature to the author. At the other end of the technology spectrum, his college has a digital studio where high quality videos can be produced. However, given

[28] Camtasia Studio, http://www.techsmith.com/camtasia.html?gclid=Cj0KEQjw6J2eBRCpqaW0857k9p4BEiQAWarYbAJmqEe3Ld6wjSb9E8GaoD9UjSvcMDwIZgWoFgiDfC4aAplO8P8HAQ (last visited July 1, 2015).

[29] Wacom Pen Tablet, http://www.wacom.com/en/us/ (last visited July 1, 2015).

the author's desire to recreate the class experience as closely as possible, he decided to record a session in the same classroom in which the class normally meets. Thus, with permission from the dean of graduate studies and the assistance of university information technology (IT) personnel, that classroom was reserved to video capture original content before empty seats. An IT professional explained how to use the software[30] and the different ways to film the content.

Ultimately, the author chose a student viewing experience with a split screen — the professor speaking on one side and on the other, an outline of covered content displayed on the classroom document camera (*doc cam*). This option gave the professor the freedom to write on the outline and quickly switch to other relevant documents. In addition, the software gave students the ability to click ahead or behind on a series of time-stamped doc cam content, which takes the user to the speaker's corresponding portion.

The video was uploaded to the university LMS, with instructions that the session would not be visible to students until the prior week's class was complete. Finally, the IT staff member assured the professor that (1) the video was not only password protected, but that after downloading, it could not be freely disseminated by students to others; and (2) the video would be preserved after the semester for possible use in a future flipped class.

The anonymous student feedback[31] from the video capture lecture session was mostly positive. However, students pointed out key areas where improvements could be made.[32]

[30] Panopto, http://panopto.com/ (last visited July 1, 2015).

[31] The Anonymous Student Feedback form used for each module is included in Appendix C.

C. Intellectual Property Issues when Creating Video Content

Privacy concerns may affect a professor's decision to capture video content during class. While some professors are very comfortable posting their video lectures on the internet, others may be more cautious, out of fear of having comments taken out of context.[33] Further, the presence of a classroom camera may hinder

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[32] Sample comments from the anonymous student feedback on the video capture lecture:

Effectiveness of Video:

- *Was similar to being in class. Was nice to be able to pause, rewind, etc. to take notes.*
- *Helped us develop an understanding of the terminology and legal process.*
- *Better to be in class but it was a good alternative.*

Top Takeaway/s:

- *Pointers of a deposition.*
- *The calculations for punitive damages.*
- *Litigation hold and the importance of retaining documents.*

Area/s of Improvement, if any:

- *Slow down – I had to pause and rewind the video several times because the velocity of the material was too quick and concentrated.*
- *More details would be helpful. Defining the terminology can be done by reading the book.*

(Most responses were left blank or indicated *Not applicable* or *None*.)

[33] Recently, professors at two universities using lecture capture systems had their videos *go viral*. "[T]he carefully edited clips play up familiar stereotypes about faculty: there's the quick-tempered bore … [and] the lazy test-recycler." Jack Stripling, *Video Killed the Faculty Star*, INSIDE HIGHER ED, Nov. 18, 2010, http://www.insidehighered.com/news/2010/11/18/videos#ixzz36PeLU6b

an honest student discussion on personal business ethics.[34] Finally, the use of video capture technology presents ownership of content issues for professors.

University faculty members nationwide are seeking guidance over who owns the digitized videos created for class — the professor, the university, or both. Copyright protection is granted to "original works of authorship fixed in a tangible medium of expression."[35] A professor's original video recording is considered fixed since it is captured in such a way that it becomes "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[36]

The dialogue over faculty intellectual property rights to digitized course material is fluid, especially in the MOOC space. For example, when a professor left Duke University for another institution, the former's Intellectual Property Board decided that the professor retained the rights to the course content of her

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(Another edited video of a so-called *liberal indoctrinator* professor was apparently captured by a student phone camera. *Id.*).

[34] The author pauses the video capture technology in class when facilitating group ethics modules to ensure student privacy, and sometimes uses *clickers* in the classroom to foster anonymity. Perry Binder, *The Intersection of Ethical Decision-Making Modules and Classroom Response Systems in Business Education*, THE FUTURE OF EDUCATION CONFERENCE PROCEEDINGS (Libreriauniversitaria.it Edizioni 2013). An additional concern with video captured lectures is whether universities need students to sign privacy waivers, to avoid legal issues under The Family Education Rights and Privacy Act, 20 U.S.C. § 1232g (1974).

[35] Copyright Act of 1976, 17 U.S.C. § 102(a) (2006).

[36] Matthew M. Pagett, *Taking Note: On Copyrighting Students' Lecture Notes*, 19 RICH. J.L. & TECH. 6 (2013), *available at* http://jolt.richmond.edu/v19i2/article6.pdf (citing 17 U.S.C. § 101 (2006)).

MOOC for use at the professor's new university.[37] However, other universities have not resolved this issue or have reached different conclusions. At Harvard University, faculty members are encouraged to disseminate their work "in ways that are meaningful in the public interest," but if the university's "involvement in the creation and development of copyrighted materials is more than incidental," then the institution and professors share the rights.[38]

The former president of the American Association of University Professors (AAUP) weighed in on copyright ownership of course materials in higher education:

> [C]olleges have begun asserting ownership of the courses their faculty members develop, raising the question of what is keeping such institutions from claiming ownership of other scholarly products covered by copyright, such as books. … There is no need for the university to own the

[37] Abhi Shah, *In light of MOOCs, intellectual property policy remains flexible*, CHRON., Apr. 17, 2014, *available at* http://www.dukechronicle.com/articles/2014/04/17/light-moocs-intellectual-property-policy-remains-flexible. The university's director of the office of copyright and scholarly communications "said that although the policy was written in 2000 - long before MOOCs existed in their present form - it does not need to be revised because the policy is flexible enough that the Intellectual Property Board can interpret it as they see fit." *Id*. *See also* Keith Norbury, *Who Owns Captured Lectures?*, CAMPUS TECH., Nov. 27, 2012, http://campustechnology.com/Articles/2012/11/27/Who-Owns-Captured-Lectures.aspx.

[38] Carl Straumsheim, *When MOOC Profs Move*, INSIDE HIGHER ED, Mar. 18, 2014, http://www.insidehighered.com/news/2014/03/18/if-mooc-instructor-moves-who-keeps-intellectual-property-rights#ixzz36as1uNNk. *See also* Harvard Office of Tech. Dev., *Statement of Policy in Regard to Intellectual Property Policy*, http://otd.harvard.edu/resources/policies/IP/ (last visited July 1, 2015).

> online course you create, [ ] because a contract giving a college the right to use the course should suffice.[39]

The obvious starting point for an inquiry into digitized course content rights is to read a university's intellectual property policy, usually contained in its faculty handbook.[40] If such policies do not

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[39] Peter Schmidt, *AAUP Sees MOOCs as Spawning New Threats to Professors' Intellectual Property*, CHRON. OF HIGHER EDUC., June 12, 2013, *available at* http://chronicle.com/article/AAUP-Sees-MOOCs-as-Spawning/139743/.

[40] At the author's university, faculty ownership of intellectual property is contemplated in five categories: Individual Effort, University-Assisted Effort, University-Assigned Effort, Sponsor-Supported Effort, and Other Effort. Under the Individual Effort category, the term *Course Material* does not specifically address digitized content:

Individual Effort

> Ownership rights to Intellectual Property developed by a Creator shall reside with such Creator if: (i) the Intellectual Property is *Course Material* developed at the University by faculty or other employees. The University shall retain a non-exclusive, royalty-free license to use such material for educational purposes for up to twelve (12) months following the termination of the Creator's employment at the University.

Id. (*emphasis added*) Further, if a professor uses that university's video capture equipment, the question arises whether this activity falls instead in the University-Assisted Effort category:

University-Assisted Effort

> Ownership rights to Intellectual Property developed by individuals with *Significant Use of University Resources* shall reside with the University. Proceeds from the commercialization of Intellectual Property will be shared … as an incentive to encourage further development of Intellectual Property.

Id. (*emphasis added*) The term *Significant Use of University Resources* is defined as "the use of University resources that is over and above the normal usage of library resources, secretarial help, word processing equipment, or other support services." *Id.* Georgia State University's Intellectual Property Policy is on file with the author.

explicitly address ownership issues on lecturing in a digital era, then thoughtful discussion is needed among faculty members and administrators to clarify these policies.

II. CREATING REAL WORLD TEAM MODULES FOR CLASS

To sensitize students to business ethics and legal risk issues, the author developed classroom modules[41] centered on two roles – the student as an attorney's client and the student as a middle manager in the discovery phase of a lawsuit. MBA students needed a learning methodology for analyzing issues such as litigation strategy and settlement negotiation, the attorney-client privilege, and ethical compliance with document requests in a lawsuit. Critical thinking modules were essential to simulate real world interactions in a team setting. As legal and ethical dilemmas affect the employment setting on a continual basis, the author created scenarios where there were no *correct* answers; rather, participants had to think of solutions outside of the box to achieve the best outcome within the bounds of ethics.[42]

In the hybrid MBA class experiment, the author gave students detailed instructions in the prior class session on how to prepare the modules for the flipped session. The author shifted his initial expectation to not find a substitute teacher, after reading

[41] The Breach of Contract Module, Products Liability Module, and the Attorney-Client Privilege & Discovery Ethics Module are included in Appendix B.

[42] The *Legal Environment: Ethics & Corporate Governance* course objectives include: Recognize potential legal risks and ethical problems that managers face, and how law can be used to minimize those risks; Analyze business problems and managerial responsibilities from a legal perspective, recognizing the legal ramifications of business decisions; Apply legal doctrine to real-life business situations; and Develop a framework for analyzing ethical issues in business using various models of ethics and justice. The syllabus is on file with the author.

literature which emphasized that student teams need "a directed and guided environment."[43] However, the author limited the substitute to a half-class session and no lecturing. Fortunately, a business professor familiar with the flipped format (outside the legal studies discipline) volunteered to facilitate the live session. In addition, an IT professional was available to record the activities.

A. Breach of Contract Module

Students were required to read an actual Complaint,[44] containing the following causes of action: Breach of Contract, Deceptive and Unfair Trade Practices, Fraud, Misleading Advertising, and Specific Performance. In this case, the defendant ran a television advertisement stating that if a person accrues a certain number of points by purchasing its soft drinks, that person could claim a prize. If the purchaser failed to obtain enough points to redeem a particular prize, the written contest rules stated that this person could make up the difference by sending the defendant ten cents per point. The television commercial offered a Harrier jet worth several million dollars for 7,000,000 points, and the plaintiff *accepted* by mailing the defendant his fifteen points and a check for close to $700,000. The defendant claimed that the jet offer was an obvious joke, and that it was not listed as a prize in the contest

[43] Lemmer, *A View from the Flip Side*, *supra* note 5, at 463.

[44] JOHN D.R. LEONARD, Plaintiff v. PEPSICO, INC., Defendant, Case No: 96-15647, 11th Judicial Circuit, Dade County, Florida (General Jurisdiction Division, 1996). The Complaint is on file with the author. For a case summary and a video interview with one of the plaintiffs, see Rachid Haoues, *Flashback 1996: Man sues Pepsi for not giving him a Harrier Jet*, CBS NEWS, Jan. 29, 2015, http://www.cbsnews.com/news/1996-man-sues-pepsi-for-not-giving-him-a-harrier-jet/.

rules, while actual prizes were listed. The trial judge agreed with the defendant on the latter's summary judgment motion, thus preventing this case from going to a jury.[45]

The MBA class had five teams with five students per team. In class, each team selected a representative to present one side of the legal arguments in Opening Statements (two plaintiffs and two defendants), while one team ruled on the case as mock trial judges. Thereafter, each team had to answer and discuss a series of questions, including:

- Other than winning/losing the case, what main risk/s do you think the plaintiff's attorney considered prior to the Complaint being filed?
- If your attorney emailed the Complaint to you (whether a draft to the plaintiff-client or the filed Complaint to defendant-client), what questions would you have for your attorney at this stage?
- Plaintiff's causes of action for Specific Performance and Breach of Contract seem contradictory. Can a plaintiff seek the jet and its worth?
- Look up on the internet which party won this case. Comment on whether it was a good or bad decision. Explain.
- The plaintiff demanded a jury trial. How do you think a jury would rule in this case, as opposed to a judge?

The learning outcomes from this module appeared to be effective, given the anonymous student comments on their takeaways.[46] However, it is also apparent from the comments that

[45] Leonard v. PepsiCo, Inc., 88 F. Supp. 2d 116 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 88 (2d Cir. 2000).

[46] Sample anonymous student feedback from the Breach of Contract Module:
Effectiveness of Module:

the questions answered by each team following the Opening Statements were redundant and took time away from class discussion of the case.[47] In constructing this assignment, the author wanted to ensure that each team was in the front of the classroom and recorded on camera for the professor to watch afterwards. In hindsight, the balance of class interaction and critical discussion versus the professor's need to assess each team's responses, tips to the former.

B. Products Liability Module

This module is based on a case involving a teenager driving a pickup truck which was *t-boned* by a convicted drunk driver.

- *[I]t forced everyone to consider all the facts and look at the case from both parties' perspective.*
- *Some questions were ambiguous and required more reading from outline.*
- *The opening statements were good practice and allowed for some creativity, and the questions forced me to put myself in the situation and think through it.*

Top Takeaway/s:

- *The need for corporations to think about 'puffery' tactics from a legal standpoint.*
- *Contracts must be clear and explicit to be enforceable or result in [an] action. There is a standard of reasonableness that applies to everyone in interpreting vague messages.*
- *Contract law is complex and requires thorough analysis to reach the correct conclusion.*

Area/s of Improvement, if any:

- *Find way to make Part 2 [answering questions after Opening Statements] interactive or more enjoyable.*
- *It would have been better for all to do one question at a time.*
- *Discussion, even if student led, would be much better.*

[47] *Id.*

The question was whether the teen's death was caused by the impact of the crash, or a defective design of the truck's fuel tank system which led to fire.[48] At trial, the jury awarded the plaintiffs $4.2 million in compensatory damages and $101 million in punitive damages against the truck manufacturer.[49] The parties entered into a confidential settlement after the manufacturer's successful appeal.[50]

Before class, students watched a video of court testimony and were asked to assess the:

- styles of attorneys;
- value of engaging local counsel;
- credibility of witnesses;
- public relations challenge of a brand involved in a high profile trial;
- role of businesspeople in a lawsuit, with respect to the production of documents, depositions, and trial testimony;
- consequences of a defendant destroying documents in the discovery process of a lawsuit;
- impact of corporate malfeasance on the amount of punitive damages awarded by a jury; and
- need to evaluate settlement options prior to, during, and after trial and appeals.

[48] General Motors Corp. v. Moseley, 213 Ga. App. 875 (1994).
[49] Peter Applebome, *G.M. is held liable over fuel tanks in pickup trucks*, N.Y. TIMES, Feb. 5, 1993, *available at* http://www.nytimes.com/1993/02/05/us/gm-is-held-liable-over-fuel-tanks-in-pickup-trucks.html.
[50] *Supra* note 48. *See also* CNN, *GM settles exploding gas tank cases*, Sept. 12, 1995, http://www.cnn.com/US/9508/auto/lawsuits/09-12/.

As in the prior module, it appears from the above comments that the learning outcomes were achieved but the student presentation section needed to be more interactive.[51]

C. Discovery Ethics and Attorney-Client Privilege Module

In this fictitious module, students were placed in the role of a middle manager who is asked in a conversation with his supervisor to destroy documents subject to a Request for Documents:

> Supervisor to manager: *Just met with in-house counsel. Good news — she agrees that the memo doesn't fit the parameters of plaintiff's discovery request. Please get rid of it discreetly.*

[51] Sample anonymous student feedback from the Products Liability Module:
Effectiveness of Video/Module:

- *The video provided a good real world example of the concepts we discussed in class on the video [lecture].*
- *It was helpful to watch parts of an actual trial, especially one involving a major corporation.*
- *It demonstrates the ethical dilemmas companies experience.*

Top Takeaway/s:

- *Importance of deposition prep and how effective a good trial lawyer can be with a witness who is not adequately prepared.*
- *It's more beneficial, both ethically and financially, to do the right thing rather than try to avoid issues and responsibility via questionable methods – e.g., shredding documents.*
- *Credibility of witness plays a huge factor in a case.*

Area/s of Improvement, if any:

- *Provide summary document of the case/trial timeline.*
- *A few answers were repetitive*
- *Open discussion versus each group presenting their* [sic] *answers.*

The document in question is a memo written to the manager's previous supervisor (who is no longer with the company) by a company senior vice president who is still with the company, stating:

> *Just spoke with outside counsel. The Smith attorneys are threatening litigation; destroy all documents.*

The manager believes that the document might fit the plaintiff's discovery request and is unsure of what steps to take.

Student teams were instructed to achieve the following goals: 1- Do the ethical thing; 2- Protect their bright future in the company; and 3- Protect the company from further liability. The only guidance given was that they must do the ethical thing, whatever that is. The instructions for this and other modules state: "Some of these problems are written intentionally in a vague fashion in order to generate a wide range of reactions and solutions."

Participants prepared possible solutions to this ethical dilemma, and answered questions in a structured class discussion:

- Is the *smoking gun* memo covered by the attorney-client privilege?
- What is a litigation hold, and when does it become applicable?
- Which people in the company will you speak with as you figure a way out of this dilemma? Describe the course of action you've devised to resolve this problem and achieve your three objectives. Be specific.
- Assume you are the middle manager in this case and plaintiffs are planning to take your deposition. What questions will you have for the company's attorney? Would you seek your own attorney?

Finally, each team was required to prepare the following assignment:

> Prior to class, your team needs to write and print out a short interoffice memo (just one memo per team) to your current supervisor (the person who told you to get rid of document). The content of the memo is up to the team, and can be as brief as deemed necessary. Display the document on the classroom doc cam. Read it aloud to the class, explain your reasoning in writing it, and then open the floor for student comments.

In the subsequent live session, the author explained to students that he reviewed their presentations which lasted the entire two-plus hours, answered all of their follow up questions, and provided insight to some of their responses and reactions.[52] Of

[52] In the sample anonymous student feedback from the Discovery Ethics & Attorney-Client Privilege Module, a student requested the professor's insights in the subsequent live session (under *Area/s of Improvement, if any*):

Effectiveness of Module:

- *It made me think about all of the steps I would need to take if I was in this situation and the possible ramifications if it is not handled well.*
- *It is realistic and shows the difficulty of helping the company but also being ethical.*
- *[H]ighlighted the importance [of what is covered by the] attorney-client privilege in the discovery process.*

Top Takeaway/s:

- *Doing the ethical thing is priority #1 (and is also the economical thing).*
- *Ethics are difficult to manage – situations can be complicated, taking great thought as to how to proceed.*
- *Don't cover anything up.*

Area/s of Improvement, if any:

- *Invest more time exploring this issue and different ways to handle different/unique situations.*

particular note, he addressed the memorandum to the supervisor which was collected by the professor facilitating the flipped session, and given to the author for analysis before the next live session. Each of the five memos had elements of scolding the supervisor for unethical behavior, giving legal advice on the attorney-client privilege, and advising the supervisor that the destruction of documents subject to discovery requests could lead to sanctions in a lawsuit. The author then went into a detailed discussion of whether this is the manner in which they would typically address a supervisor, how it is not the role of a manager to give legal advice, and that the contents of the very memo they wrote created a new smoking gun document for the plaintiff, since discovery is an ongoing process in a lawsuit.

The wrap up session proved to be valuable for students and the professor. However, it also underscored the importance of having the author or a substitute legal studies professor present in the flipped session to answer substantive legal questions. Alternatively, the professor can monitor an online discussion board and respond to student questions prior to the next live session.

III. LESSONS LEARNED FROM THE HYBRID/FLIPPED CLASS SESSION

Team modules reinforced and brought to life the legal concepts provided in the professor's video captured lecture. By having students drive the content of the flipped class, they gained a greater appreciation of the ethical issues facing companies in litigation. These critical thinking exercises forced business students to confront, analyze, synthesize, and reflect on real world

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- *Would have been more effective as an open discussion.*
- *Get your insights next class on what to actually do in a similar situation.*

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business dilemmas. In summary, completing these tasks helped students etch their ethical imprint within the parameters of managing legal risk in a hypothetical corporate environment.

With respect to creating video captured content for out-of-class use, the author learned several lessons. First, it is important to determine the physical environment to record a session, such as the classroom where students attend class. Second, it is critical to speak with IT professionals beforehand, in order to select the proper software, and to optimize its use. For example, the use of a split screen with the professor on one side and the doc cam content on the other, served as an effective blend.[53] Third, at the outset of the presentation, summarize what students learned in class the prior week, and conclude with what will be covered in the session after the flipped class. Finally, time the digital presentation to be released to students by the LMS directly after the last live session, so students don't get ahead of the material.

Below are some tips for ensuring a successful video capture session in an empty classroom:

- Dress as you would for a typical class;
- Look directly into the camera as much as possible;
- Do not to stand behind a computer podium (For PowerPoint, use a remote clicker to advance slides.);
- Understand that there is a different dynamic when speaking to a camera, without the synergy presented by an inquisitive audience;
- Slow down;
- Aim to be as natural as you are in class; and

[53] *See supra* Section I.B. for student comments, including: *Was similar to being in class; Was nice to be able to pause, rewind, etc. to take notes*; and *Better to be in class but it was a good alternative.*

- Edit the presentation with the assistance of the IT staff if you stumble during the session.

For the in-class portion of this experiment, an IT staff member was present to record the student presentations. However, when the professor subsequently accessed this digital content before the next live session, only the audio portion was available and not the video of the students or the documents placed on the doc cam. Whether it was defective software or human error, one thing to expect is that technology can fail.

The author learned through anonymous student feedback that a more interactive component was needed during the team presentations.[54] In addition, it made him think about whether to create and monitor an online discussion board for student questions, or merely wait for the next class session to answer questions in person. Alternatively, if the author is present for the flipped class (or has a legal studies professor cover it), he could have students view the seventy-five minute video lecture outside of class, spend the first forty-five minutes in class answering student questions and solving additional problems based on the video, and then facilitate the group modules for 120 minutes. In that scenario, students would be in class for 180 minutes rather than 255 minutes. Finally, this class experiment highlighted the importance of having a facilitator in the classroom, whether it is the course professor, a substitute legal studies professor, or a professor from another business discipline. Yet, that conclusion negated one of the author's goals, which was to not create a burden for substitute professors.[55]

[54] The modules included in Appendix B were updated based on student feedback.

[55] *See supra* note 43 and corresponding text for a brief discussion on the importance of a guided environment for student teams. The author achieved his

If a professor requires attendance in the hybrid format, it may be necessary to include a verification process to ensure that students view the video content. This task could be accomplished with a short online quiz based on the content of the video captured lecture. Further, a professor interested in teaching a hybrid course must find out if the university has specific guidelines regarding class contact hours. Of the author's two hours of online content, the lecture and case video were seventy-five minutes and forty-five minutes in length respectively. Professors would need to check, for example, whether the case video content satisfies requisite university class contact time. Otherwise, they need to match the video lecture time with the amount of seat time lost, or perhaps supplement the online experience with a synchronous chat session and/or an asynchronous discussion board.

In sum, the author learned that creating video captured lectures outside of class changes the dynamic of student interaction in class. This digital content can be saved in a university's LMS for future use, giving professors more time to think about creating dynamic student-driven classroom exercises, rather than what to say next in class.

CONCLUSION

Flipping a class session or an entire course is an exciting and viable teaching option, whether in a hybrid or traditional format. Technology has provided professors with an ever-changing platform to offer rich content outside of class and augment that material in class with thought provoking discussion.

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two other goals, by ensuring that students received his own lecture materials in his absence, and by having students lead the live flipped session, using critical thinking modules.

Regardless of how cutting edge the digital material may be, professors still need to employ *old school* teaching principles to ensure that learning objectives are met and course outcomes are achieved.

APPENDIX A: HIGHLIGHTS OF VIDEO CONTENT CREATED FOR STUDENT VIEWING ANY TIME BEFORE CLASS

The following topics were discussed in the video session (seventy-five minutes):[56]

- Main factors an attorney will consider in advising business clients whether to file a Complaint, including strength of case, whether the defendant is solvent and collectable, and whether a contract has an attorneys' fee clause
- Types of damages, including compensatory and punitive damages, and how burdens of proof could differ, depending on the state
- Strict liability for a manufacturer of products

[56] The *Legal Environment: Ethics and Corporate Governance* course syllabus is on file. The following is the Course Description:

> This course offers an understanding of how businesses can comply with the law and use an ethical culture as a positive strategy for making successful decisions. Law is often misconceived as a hindrance to business growth, a limitation on creative practices, and an issue to be avoided until absolutely necessary. This misconception has been highlighted in recent corporate scandals where many executives have assumed that speed and a lack of transparency are critical to financial success, and that law and ethics only get in the way of that success. On the contrary, ignoring the law and ethical obligations to owners, customers, and consumers exposes the company to legal and financial liability. When incorporated properly into managerial decision-making, law and ethics can become an affirmative strategic tool that functions to facilitate growth, creativity and competitive advantage.

- Strategizing with an attorney on what goes in a Complaint and Answer
- The role of a businessperson in the discovery process of a lawsuit. The topics included:
    - Company document retention programs and the impact of litigation hold letters
    - Businesspeople working with in-house counsel, outside counsel, and technical support staff on e-Discovery issues
    - The role of a manager in a Request for Production of Documents
    - Tips on how to prepare for a deposition, whether transcribed or videotaped
    - When the attorney-client privilege is applied in a business setting
    - The importance of a *top down* company code of ethics
    - Discovery abuse and sanctions the judge can impose on a company
- Settlement strategy and negotiation
- Collection on a civil judgment
- Advantages and disadvantages of mediation and arbitration, as alternatives to litigation
- The morality of confidential settlements in products liability cases

APPENDIX B: COMPANY TEAM MODULES[57]

Note: Some of these problems are written intentionally in a vague fashion in order to generate a wide range of reactions and solutions.

Breach of Contract Module

A. Read the attached Complaint.[58]
B. Each team will have one person deliver a 3-5 minute Opening Statement, either for the Plaintiff or Defendant on this case. One team will be assigned to sit as a panel of trial judges, and *deliberate* for a few minutes. Then, one of the judges will present the verdict to the class, along with the team's reasoning. Further details will be given out in class.
C. After the Opening Statements and the judicial ruling, teams will be assigned to present answers to the following questions and facilitate a structured class discussion (You are no longer plaintiffs, defendants, and judges.):
    1- Other than winning/losing the case, what main risk/s do you think the plaintiff's attorney considered prior to the Complaint being filed?
    2- If your attorney emailed the Complaint to you (whether a draft to the plaintiff-client or the filed Complaint to defendant-client), what questions

[57] Other Modules are used throughout the course, including scenarios on Employment Discrimination & Severance Agreements; Ethics & Corporate Governance; Intellectual Property Issues for Businesses; and Non-Compete Agreements – Business & Morale Implications. The complete set of modules is on file with the author.

[58] *See supra* note 44 for information about the Pepsi Complaint.

would you have for your attorney at this stage?

3- Count I (Specific Performance) & Count II (Breach of Contract) seem contradictory. Can a plaintiff seek the jet and its worth?
4- Count III alleges Fraud. How viable is that claim?
    - Same question for Count IV (Deceptive and Unfair Trade Practices) and Count V (Misleading Advertising)
5- If plaintiff's remedies appear to be listed in Counts I & II, what main purpose is served by including Counts III, IV & V?
6- Look up on the internet which party won this case. Comment on whether it was a good or bad decision. Explain.
7- The plaintiff demanded a jury trial. How do you think a jury would rule in this case, as opposed to a judge?

Products Liability Module

A. Watch the case video before class.[59]
B. React to these questions as a businessperson. Teams will be assigned to present answers to the following questions and facilitate a structured class discussion:
    1- Give your general impressions of the attorneys. Is there value in seeking local counsel?
    2- Which theory do you believe, the plaintiff's or the defendant's? Why?
    3- The engineer testifying for the plaintiff had previously testified on behalf of the defendant in

[59] *See supra* notes 48-50 for details on the General Motors case.

similar cases. Assess his credibility as a plaintiff-witness in the current case.

4- In the video deposition, a former company employee discussed the destruction of documents. What role did corporate ethics play in the size of the jury verdict?

5- If your deposition (*depo*) was being taken by the plaintiff's attorney in this case (assume that you are a current company employee), what general tips would the attorney *defending* the depo give you? Do research on this. Would the preparation be the same for a video depo, as opposed to a transcribed depo?

    - Give an example in this case where prior sworn testimony was used at trial to *impeach* a witness.

6- Explain the difference between compensatory and punitive damages.

7- Was the jury's verdict sound? Explain.

8- What questions were left unanswered for you in this case?

9- From both the businessperson and societal point of view, discuss the pros and cons of permitting confidential settlements in products liability cases.

Discovery Ethics and Attorney-Client Privilege Module

Last year, Sharon Smith filed a lawsuit in Fulton County State Court against *The Company* (TC), a Georgia corporation, alleging injuries caused by TC's product. Assume that attorneys for Smith have begun the discovery process, and that you are a middle manager at TC. Your supervisor puts you in charge of

gathering all documents requested by the plaintiff (which include all interoffice memoranda concerning TC's allegedly defective product in the Smith case) in a Request for Production of Documents. These documents will then be passed on to in-house and outside counsel to screen them for relevance and privileged material.

In the course of gathering these documents, you come across a *smoking gun* memorandum written last September to your previous supervisor (who is no longer with the company) by a TC senior vice president who is still with the company. The memo, which you show to your current supervisor, says, in part: *Just spoke with outside counsel.* The Smith attorneys are threatening litigation; destroy all documents.*

*Note: This is the same outside attorney handling TC's present defense.

The next day, your supervisor orally informs you: *Just met with in-house counsel. Good news — she agrees that the memo doesn't fit the parameters of plaintiff's discovery request. Please get rid of it discreetly.* Though you lack legal training, your gut feeling is that the document may fit the request.

Your Objectives: 1- to do the ethical thing; 2- while protecting your bright future in the company; and 3- while protecting TC from further liability.

Goal: Achieve ALL three (3) objectives. However, you MUST do the ethical thing, whatever that is.

A. Teams will be assigned to present answers to the following questions and facilitate a structured class discussion:

1- Is the smoking gun memo covered by the attorney-client privilege?

2- What is a litigation hold, and when does it become applicable?

3- Which people in the company will you speak with as you figure a way out of this dilemma? Describe the course of action you've devised to resolve this problem and achieve your three objectives. Be specific.
4- Assume you are the middle manager in this case and plaintiffs are planning to take your deposition. What questions will you have for TC's attorney? Would you seek your own attorney?

B. Each team must prepare the following assignment:
Prior to class, your team needs to write and print out a short interoffice memo (just one memo per team) to your current supervisor (the person who told you to get rid of document). The content of the memo is up to the team, and can be as brief as deemed necessary. Assign one team member to display the document on the classroom doc cam. Read it aloud to the class, explain your reasoning in writing it, and then open the floor for student comments.

APPENDIX C: ANONYMOUS STUDENT FEEDBACK FORM

I value your opinion on the effectiveness of today's session. Please fill out section I below before attending class. In that class, please fill out sections II-IV, immediately after completing each module. Remember, while the video lecture material is hopefully straightforward, the modules may appear ambiguous or without clear guidelines, in my effort to generate diverse solutions.

I. VIDEO CAPTURE LECTURE SESSION (Do the reading assignment and then watch this video *prior* to class.)
Effectiveness of Video:
Top Takeaway/s:

Area/s of Improvement, if any:

II. BREACH OF CONTRACT MODULE
Effectiveness of Module:
Top Takeaway/s:
Area/s of Improvement, if any:

III. PRODUCTS LIABILITY MODULE
Effectiveness of Video/Module:
Top Takeaway/s:
Area/s of Improvement, if any:

IV. DISCOVERY ETHICS & ATTORNEY-CLIENT PRIVILEGE MODULE
Effectiveness of Module:
Top Takeaway/s:
Area/s of Improvement, if any:

IS THE LAWYER A DOCTOR?

LARRY MOORE, JD*

I. INTRODUCTION

In the promotion of their professional titles, physicians are the gold standard for marketing the doctoral degree of their profession, while lawyers represent the absolute worst. Indeed, physicians are so good that they have caused the professional doctoral degree "MD'[1] and their profession, "physician" to be merged into one in the public eye.[2] It is a common joke that any "PhD" who is introduced as doctor will immediately get a question about some vague pain, and the poor doctor will have to explain that they aren't a physician.

Lawyers on the other hand, through a combination of old habits, history and shortsightedness have refused to use the title either professionally or socially even though they possess a

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[1] Comments on *TITLES: Professor vs Doctor??*, THE CHRONICLE OF HIGHER EDUCATION, (April 2011), https://chronicle.com/forums/index.php?topic=77995.0; *see also* Michael I. Shamos, *Handbook of Academic Titles* (2002), http://euro.ecom.cmu.edu/titles/titlebook.htm.
[2] *Id.*

doctoral degree "JD" that is academically equal to the "MD."[3] This is all the more unfortunate from a marketing point as the decision to use the title is left solely to the discretion of the individual and to the profession.[4] As a result, attorneys have left themselves without the use of the august title of "Doctor" for absolutely no logical reason at all in an age in which the term "Doctor" has become the socially accepted metric of higher academic and professional attainment.[5] This practice has had a devastating effect on lawyers who teach or work in the academic field as the use of this title doctor, which in most cases is their proper title, is looked upon as mistaken, fraudulent, pretentious or all of the above.

II. ACADEMIC DEGREE AS AN HONORIFIC TITLE

[3] *Id.*

[4] Robert Hickey, *How to Address a Person Holding a Doctorate*, The Protocol School of Washington's Honor & Respect, The Official Guide to Names, Titles, and Forms of Address On-Line Guide To Forms of Address, http://www.formsofaddress.info/Doctorate.html ("...How Do I know if a PhD Should Be Addressed as "Dr."?..."Holders of medical doctorates (medical, osteopaths, dentists, podiatrist, vets...) use Dr. (Name) professionally and socially. Holders of academic doctorates in academia and research usually do too. Holders of academic doctorates outside of academia and research ... in corporate and business ... usually don't. E.g., every lawyer now-a-days is a JD ... doctor of jurisprudence, but none use Dr. ... and a holder of a doctorate in finance at a bank probably doesn't either. So the good news is that if it's a doctor and if he works at a college or in scientific research ... you can address him as Dr. (Name) safely. And the bad news is with PhD's outside those arenas ... you will need to call to see what his or her preference is. The key is "the preference of the bearer" ... it's not up to me or you to decide when or if someone with a PhD is addressed as Dr. If that's what he or she want's I will go along with it. A person's name belongs to them."); *see also* supra note 1.

[5] Hickey, *supra* note 4.

The earned academic title of doctor is an Honorific title.[6] In this regard, it is like a title of nobility that, once received, can be used for life. For example, once knighted or dammed as "Sir Lawrence" or "Lady Astor" they are to be addressed by that formal title until death unless that title is supplanted by a higher title.[7] The same is true with the title of "Doctor." There are two types of doctoral degrees, the earned doctoral degree[8] and the honorary doctoral degree.[9] Receiving either is an honor for life, though only a person who has the earned degree can use "Doctor" as a title.[10] The honorary title can be listed as an honor but cannot be used in direct address.[11] However, the doctor of law is not an honorary degree, it is an earned university professional doctoral degree.[12] Earned degrees are further subdivided into the research doctoral degree "PhD" and the professional doctoral degrees.[13] Earning either entitles the bearer to be addressed by the title of "Doctor."[14]

III. RESEARCH DOCTORAL DEGREES AND PROFESSIONAL DOCTORAL DEGREES

[6] ROBERT HICKEY, HONOR AND RESPECT, THE OFFICIAL GUIDE TO NAMES, TITLES, AND FORMS OF ADDRESS (The Protocol School of Washington 2013), 73-74.
[7] *Id.*
[8] *See* Hickey, *supra* note 4.
[9] Robert Hickey, *How to Address Those With Honorary Degrees*, The Protocol School of Washington's Honor & Respect, The Official Guide to Names, Titles, and Forms of Address On-Line Guide To Forms of Address, http://www.formsofaddress.info/Degree_Honorary.html.
[10] *See* Hickey, *supra* note 4.
[11] *Id.*
[12] *Id.; see also* Shamos, *supra* note 1.
[13] Hickey, *supra* note 4.
[14] *Id.*

There is one primary research degree: the "PhD" primarily for the arts, sciences, and humanities disciplines.[15] However, there are at least eight professional doctoral degrees, one of which, the doctor of nursing, is relatively new in importance.[16] They are the doctor of pharmacy, dentistry, education, chiropractic, optometry, medicine, law, and nursing. All of which are academically equal.[17] But the only profession which hesitates, is fearful, and almost embarrassed to use the earned title is that of law.

Physicians are the most aggressive in marketing their title. Indeed they start using the title of "Doctor" before they receive their degree. The first time a medical student shows up on a hospital floor as part of his instructions, those who don't know that they are students routinely referred to them as "Doctor." On the other hand, for decades the two worst professions in using and marketing their degrees were the pharmacists and the attorneys.[18]

Since then, pharmacists have drastically upgraded their efforts in promoting the use of their professional doctoral degree.[19] Now pharmacists and their staff make obvious references to the pharmacist as the "Doctor," and their doctoral degrees are prominently displayed for the general public to see.[20] Lawyers have made no progress whatsoever during this same period in promoting the use of their earned professional doctoral degree.[21]

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[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] 30 years ago I asked in the seminar on doctoral degrees: "how many people knew that their pharmacist was a doctor?" No hand went up. When I asked: "how they thought a pharmacist got his job?" one student actually said, "I thought they started out in sacking and then got promoted to checking and finally moved up to handing out pills."

[19] *See* Hickey, *supra* note 4.

[20] *Id.*

[21] *Id.* (However, a new pending usage problem involving when to use the use of

IV. POST DOCTORAL TITLES: LAW VS. MEDICINE

It is sometimes said that attorneys cannot be called a "Doctor" because their profession has two post-doctoral degrees that is, a Masters of Law, "LLM," and a Doctor of Juridical Science degree, "SJD"[22] This is another example of lawyer marketing at its worst as it gives the impression that the "JD" is not really a doctoral degree at all.[23] Physicians as usual are far shrewder in how they deal with their post-doctoral professional education. They merely call all post-doctoral work a residency, and call the additional advanced education that is the equivalent to law's "LLM" and "SJD," an "additional residency."[24] Thus to

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the title "Dr." is developing in the field involving the "Doctor" in the medical fields of nursing, hospital administration and therapy.) ("In hospitals (and some other healthcare environments as well) there is often *a practice* that no one except the *physicians* (medical doctors, dentists, osteopaths, chiropractors, podiatrists, veterinarians ...) are addressed as Dr. (Name). This is out of consideration for the patients who want to know who are the doctors and who are nurses, support staff and allied professionals. It can be confusing with so many people walking around in white! I have been told this makes for some unhappy PhD's in hospital administration, physical therapy and nursing, *etc.* who might prefer to be addressed as Dr. (Name) too. It's my understanding that all of these professionals might well be addressed as Dr. (Name) in other situations *(teaching or consulting, for example).* But for patients in the hospital, the practice makes sense.").

[22] Education Portal, Legal Research and Professional Studies, *Types of Law Degrees and Legal Studies Degrees*, http://education-portal.com/types_of_law_degrees.html.

[23] *Law Degrees: Graduate, Top Universities, World Wide University Rankings, Guides and Events*, http://www.topuniversities.com/courses/law-legal-studies/grad/guide.

[24] Dayna Noffke, *About Medical Residency Programs*, eHow, http://www.ehow.com/about_4741121_medical-residency-programs.html ("The minimum length of a residency is three years, after which the resident is eligible for licensure. The total number of years for a residency vary by specialty.

become a brain surgeon or a cancer specialist, the physicians simply continue their advanced study in an additional residency.[25] This profession wisely doesn't call it a "Master" or a "Post-Doctoral Doctorate."[26] The medical field does not cannibalize its doctoral degree.[27]

There are some rational reasons behind the legal profession's current poor title position in the naming their post-doctoral education the "Master of Law" and the "Doctor of Juridical Science" degrees. The first is that initially legal education in the U.S. was at the undergraduate level and thus the law degree was a true bachelor's degree.[28] As such their post graduate study of law was a Master's degree.[29] Law slowly became a graduate degree during the latter part of the 19th century.[30] However, until well into the 20th century, the degree was still called a bachelor's degree, with the master as the post graduate

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Neurological surgeons and plastic surgeons spend the longest time serving as interns--between seven and 10 years total. Other types of residency programs include allergy, anesthesiology, critical care, emergency medicine, pediatrics, preventive medicine, general and orthopedic surgery, obstetrics, pathology," ophthalmology, psychiatry and others).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] Ralph Michael Stein, *The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction*, 57 CHICAGO-KENT L. REV. 429, 446, 452 (1981) (In 1815, the majority of Harvard Law Students were undergraduate students and Harvard was the model for law schools nationwide. However, Harvard decided to create a separate School of law and by 1895, 75% of law students had their undergraduate degree thus making the law degree ever more a post graduate degree).

[29] Jeff Fulton, *JD vs. LLM*, eHow, http://www.ehow.com/facts_5619446_jd-vs_-llb-law-degree.html.

[30] *See* Stein, *supra* note 28.

degree.[31] However, over time the initial degree was renamed to recognize the reality that it had become a fully accredited post graduate professional doctoral degree.[32] However, the profession never bothered to change the name of the Master or Doctoral degrees to something comparable to that of the medical field so as not to devalue or over shadow their doctoral degree.[33]

V. LAW PRACTICE AND THE "JD" DEGREE

Another reason that prevented lawyers from using the title "Doctor" is the fact that as late as the 1950s, approximately a third of all lawyers in the United States had never gone to law school.[34] These were lawyers who were licensed in 30s, 40s, and 50s when many states did not require a degree to take the bar exam.[35] Thus

[31] *See* Fulton, *supra* note 29.
[32] *Id.*
[33] *Id.*
[34] VERN COUNTRYMAN, TED FINMAN, AND ROBERT MELOTT, THE LAWYER IN MODERN SOCIETY 2 (1966).

Percentage Distribution of Lawyers
by Educational Background

	College		Law School	
Year	Attended	Received Degree	Attended	Received Degree
1948	65.4	36.8	75.6	60.9
1951	73.2	43.6	83.8	71.1
1957	81.1	59.1	90.8	80.1
1963	86.8	62.6	94.2	87.3

[35] *Id. ("*This change probably is attributable primarily to two factors. First, the prerequisites for admission to the bar have changed. Between 1951 and 1963,

the use of the title would soon raise the embarrassing question of why some lawyers were addressed as "Doctor" while others were still referred to as "Mr" or 'Ms." Even today, a possible key obstruction to the general acceptance of the use of calling one with a "JD" degree "Doctor" is the fact that several states still permit law office study to be substituted for a law degree in obtaining a law license.[36] These lawyers cannot be expected to agree to use a title which they don't have and cannot use.

The evolution of academic attainment in the modern society has now reached the stage where it is mandatory that not only do attorneys use the title which they have earned so as to keep pace and status with their comparable peers in other disciplines, but also to rename the Master and Doctoral degree as not to denigrate that title in a manner similar to that of physicians.

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the number of states requiring a law degree almost tripled, and the number of law schools that admitted only students with four years of college work more than doubled. Second, the number of older lawyers — those most likely to have been trained informally — was, of course, declining.") (Indeed I worked in a firm during the 1980's where one of the senior partners who was internationally prominent and successful, confided to me that he dropped out of school when he was 15, worked in a law office until he was 21 and old enough to take the bar which he passed. It can be expected that lawyers with no degrees, many of whom were in the upper levels of the legal profession not only would not encourage the use of the title "Doctor", but would actually discourage its use even though it was by then being printed on the diploma of every new law graduate. As one attorney observed to me "It would not be helpful to anyone's practice to have one's clients know that their lawyer never went to college or law school").

[36] *Comprehensive Guide to Bar Admission Requirements,* National Conference of Bar Examiners and American Bar Association Section of Legal Education and Admissions to the Bar, 8-9 (2012) (California, Maine, New York, Vermont, Virginia, Washington, and Wyoming still permit some form of law office study in lieu of law school for bar purposes).

Today the doctoral degree and the use of the term "Doctor" have become the norm instead of the exception for top professionals in all fields. Law is now the only profession where that title is always missing even though most lawyers licensed since the 1980's have a doctor's degree.[37] In fact it can be an insult to be called Mr. or Ms. when you have earned a doctorate.[38] It's as if attorneys, trained to read and understand difficult and complicated documents, can't read their own diplomas so as to discern what degree and title they have earned.

Ironically, law schools have been a major contributor for this embarrassing situation. In any situation and especially in an academic situation, any professor with a doctoral degree is entitled to be addressed as "Doctor."[39] However, law schools almost never identify their own Professors as "Doctor." Instead, they are generally referred to as "Professor."[40] And while the term is widely known, there is no systematic definition or rule as to when, how, and who is entitled to use it.[41] The usage is generally left to the discretion of each individual college or university and as such may or may not convey any particular honor.[42]

So even in law's own highest bastions of education, the "JD" degree is treated as if it was merely an Honorary Degree, something to list as an honor on a resume but not as a form of address.[43]

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[37] *Id.*
[38] *See* Hickey, *supra* note 4.
[39] *Id.*
[40] *Id.*
[41] *See* Shamos, *supra* note 1.
[42] *Id.*
[43] Hickey, *supra* note 9.

VI. CONCLUSIONS

Lawyers must lose their shyness and law schools must be rid of their hesitancy in demanding that their doctoral degree be used as their title of address[44] unless superseded by a higher one such as Judge.[45] The "JD" has been legitimately earned and today's society expects those that have earned such a title to use it.

It is up to the profession, law schools, local and national bars to educate its members and to let the world know that lawyers are doctors too. It's also time to do for the LLM degree what the profession did with the LLB a generation ago, change its name. But change at this time is necessary and past due. This, of course, will not necessarily be easy as seven states still provide an option for getting a law license without going to law school.[46] So it is very likely that lawyers from these states who have been admitted to the bar without attending law school will continue to resist using the title. However, unless this change is made, within the next

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[44] During the late 1990s. I was president of the Southeast Academy of Legal Studies. This is an organization of law professors teaching in major college business schools. As such I instituted a policy in our program to list our members as "Doctor" and to encourage them to inform their schools that they are in fact doctors and should be addressed as such pursuant to academic protocol. We had some success at some universities, though some others still insisted that lawyers were not doctors. This was ironic as all universities with law schools always count "JD" degrees in listing the number of doctoral degrees they grant each year. Newspapers still have an antiquated style sheet which refuse to address an attorney as "Doctor" even though the attorney has the degree and in spite of the fact that their style sheet allows them to use the title for every other profession. So it's not usual to see a news article referring to Dr. Livingston who is an accountant and Mr. Stanley the lawyer even though both have academic doctoral degrees.

[45] *See* Hickey, *supra* note 9.

[46] *See* Fulton, *supra* note 29.

generation, most top professionals in the country will have an earned doctoral degree along with the honor and respect of being called "Doctor" except for the lawyer.

THE ROAD LESS TRAVELED: GENDER IDENTITY DISCRIMINATION IN THE US AND UK

PATRICIA PATTISON[*]
JESSICA GUTH[**]

Two roads diverged in a wood, and I—
I took the one less traveled by,
And that has made all the difference.[1]

I. INTRODUCTION

Trans individuals in both the United States and in the United Kingdom have had to take the road *less traveled by*, in their private lives and in their employment relationships and it has *made all the difference*. Horrific consequences have resulted for many of those whose gender identity differs from their birth-assigned gender with hate crimes, violence and murder being the most grim consequences. "Transgender and gender non-conforming people face rampant discrimination in every area of life: education, employment, family life, public accommodations, housing, health,

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[1] ROBERT FROST, *The Road Not Taken*, MOUNTAIN INTERVAL (1920).

police and jails, and ID documents."[2] While we acknowledge that all these issues are urgently in need of attention and awareness raising, the focus of this paper is on the protection of trans individuals in the employment sphere in two jurisdictions which vary significantly in their approach. We argue that the protection available under the Equality Act 2010 provides some hope for trans individuals in the UK but that much depends on judicial interpretation. Concepts such as gender stereoptyping which could be 'borrowed' from the US context could help interpret and develop the law so as to promote equality and protections from discrimination. We further argue that the US has further to travel along the road to equality and that it can learn from the explicit protection afforded to trans individuals in statute. We begin with a brief consideration of the context in which we are writing and an explanation of the vocabulary used before considering each jurisdiction in turn. Toward the end of the paper we seek to highlight what the jurisdictions can learn from each other.

A. Legal Recognition of Gender Identity

Since April 4, 2005 it has been possible in the UK to apply for a Gender Recognition Certificate[3] that is available for those who have suffered from gender dysphoria, have lived as their acquired gender for at least two years and intend to do so permanently.[4] Statistics on the number of Gender Recognition

[2] National Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, (Feb. 3, 2011), http://www.thetaskforce.org/reports_and_research/ntds.

[3] Gender Recognition Act, 2004, c.17 (U.K.)

[4] Gender Recognition Act, 2004, c.17 (U.K.) (§ 1. A Gender Recognition Certificate allows the holder to live legally as their acquired gender. In other

Certificates issued gives us a glimpse into the community with which this paper is concerned. Statistics are readily available showing the number of certificates applied for since inception. A total of 4111 Gender Recognition Certificates have been applied for between April 2005 and the end of March 2014.[5] Reports have been published quarterly since 2009 and show a fairly steady stream of around 75 applications a quarter.[6] These figures of course give us only the briefest of insights as they refer only to people who have taken the step to formally change their gender; they do not take account of the many transgendered people who have chosen not to apply for a certificate for whatever reason or of those whose gender identity is far more fluid such as those identifying as any other part of the trans community. Here estimates vary greatly between 65000 people[7] to 300000 people[8] identifying as trans in the UK.

In the US transgender persons struggling to have their self-identified gender legally recognized find that amending their birth certificates is fundamentally necessary in order to ensure legal

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words once the Certificate has been obtained, the holder is legally (as well as in their own life generally) considered to be the acquired gender, not the sex assigned at birth).

[5] MINISTRY OF JUSTICE *Quarterly Official Statistics on Gender Recognition Certificates applied for and granted by Her Majesty's Courts and Tribunals Service's Gender Recognition Panel, available at* https://www.gov.uk/government/collections/gender-recognition-certificate-statistics (last visited on May 27, 2014).

[6] *Id.*

[7] OFFICE FOR NATIONAL STATISTICS *Trans Data Position Paper.* (OPSI 2009).

[8] GIRES *Gender Dysphoria, Transsexualism and Transgenderism: Incidence, Prevalence and Growth in the UK and the Implications for the Commissioners and Providers of Healthcare, available at* http://www.gires.org.uk/assets/GIRES-Prevalence-Abstract-2.pdf (last visited on May 27, 2014).

congruity with their gender identity. Since there are no federal laws their difficulties vary from state to state. In many instances birth certificates will only be changed upon production of proof of sex reassignment surgery (SRO). However, most transgender persons do not undergo SRO. Questions still remain as to whether trans people are required to have surgery for their sexual identities to be recognized for various legal transactions, such as marriage. For instance, transgender people in Montana face the situation where they could be legally recognized as one sex for some purposes and another sex for others. Montana permits transgender persons to legally change drivers' license sex designations even if surgery has not been performed; on the other hand, Montana only permits postoperative transgender persons to legally change birth-assigned sex on birth certificates.[9]

B. Employment Discrimination

In the United Kingdom it is clear is that discrimination in employment is of significant concern. A relatively recent government survey found that most trans employees were concerned about employment issues; very few felt their gender identity was safe from disclosure and at least half had been the victim of discrimination in the workplace.[10]

In the United States few people will be surprised to learn that "in this day and age [transgender] individuals still face intense,

[9] Wesley Parks, *Removal of the Impediment: The State of Transgender Marriage in Montana*, 74 MONT. L. REV. 309, 310 (2013).
[10] GOVERNMENT EQUALITIES OFFICE *Headline Findings from our transgender online surveys, available at* https://www.gov.uk/government/publications/headline-findings-from-our-transgender-online-survey (last visited May 27, 2014).

pervasive discrimination in the employment context, the statistics are still nothing short of astounding."[11]

> A recent national survey of almost 6,500 transgender individuals found that nearly half of respondents had experienced an adverse employment action--denial of a job, denial of a promotion, or termination of employment--as a result of their transgender status and/or gender nonconformity. Fifty percent reported harassment by someone at work, forty-five percent stated that co-workers had referred to them using incorrect gender pronouns "repeatedly and on purpose," and fifty-seven percent confessed that they delayed their gender transition in order to avoid discriminatory actions and workplace abuse. It is little wonder that many in the transgender community feel that they have no choice but to suffer through this type of hostility, as transgender employees who lose their job due to workplace bias are six times as likely as the general United States population to be living on a household income under $10,000 per year, and four times as likely to have experienced homelessness as transgender individuals who did not lose a job due to workplace bias.[12] *(Citations omitted.)*

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[11] Jason Lee, Comment, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination Under Title VII,* 35 HARV. J. L. & GENDER 423, 424 (2012).

[12] *Id.* at 424-425, (*citing* Jaime M. Grant, et al, *Nat'l Ctr. for Transgender Equal. and Nat'l Gay and Lesbian Task Force, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 2 (2011), *available at* http://www.thetaskforce.org/reports_and_research/ntds).

These findings suggest that a better understanding of transgender discrimination in employment is vital if we are to move forward towards equality. To help us do that, this paper considers both the US condition and the situation in the UK in order to see what, if anything, we can learn from each other.

II. THE VOCABULARY OF GENDER IDENTITY

Biology loves variation. Biology loves differences.
Society hates it.[13]

In order to understand the law surrounding gender identity, it is important to understand the meaning of *transgender (or trans)*. Traditionally it has been a comprehensive term "encompassing anyone who is at odds with traditional concepts of gender, whether transsexual, transvestite, intersexed, or otherwise."[14] More recently, outside the courtroom, it is sometimes being replaced by the term *genderqueer.* "Genderqueer (GQ; alternatively non-binary) is a catch-all category for gender identities other than man and woman, thus outside of the gender binary and cisnormativity."[15] Genderqueer people may identify as one or more of the following:

[13] Dr. Milton Diamond, quoted at http://www.huffingtonpost.com/2013/08/27/trans-murder-rates_n_3824273.html#slide=875171.
[14] Neil Dishman, The Expanding Rights of Transsexuals in the Workplace, 21 LAB. LAW 121, 123-24 (Fall 2005) (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 576 (4th ed., text revision 2000)).
[15] USHER, RAVEN, ED. NORTH AMERICAN LEXICON OF TRANSGENDER TERMS (2006).

- having an overlap of, or indefinite lines between, gender identity and sexual and romantic orientation.[16]
- two or more genders (bigender, trigender, pangender);
- without a gender (nongendered, genderless, agender; neutrois);
- moving between genders or with a fluctuating gender identity (genderfluid);[17]
- third gender or other-gendered; includes those who do not place a name to their gender;[18]

Transsexuals are individuals who have been diagnosed with a recognized medical condition called *gender identity disorder or gender dysphoria*.[19] According to the American Psychiatric Association, transsexualism is characterized as a disjunction between an individual's sexual organs and sexual identity.[20] Individuals who change their birth-assigned gender may be male to female (MTF) or female to male (FTM).

> Gender identity disorder is marked by two characteristics:
> (1) a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex; and

[16] BRILL, STEPHANIE A. & RACHEL PEPPER, THE TRANSGENDER CHILD: A HANDBOOK FOR FAMILIES AND PROFESSIONALS (2008).
[17] WINTER, CLAIRE RUTH UNDERSTANDING TRANSGENDER DIVERSITY: A SENSIBLE EXPLANATION OF SEXUAL AND GENDER IDENTITIES (2010).
[18] BEEMYN, BRETT GENNY , AN ENCYCLOPEDIA OF GAY, LESBIAN, BISEXUAL, TRANSGENDER, AND QUEER CULTURE (2008).
[19] *Id.*
[20] American Psychiatric Association. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 576-582 (4th ed.2000).

> (2) persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex."[21]

Last, a transvestite is more commonly thought of as a cross-dresser (a heterosexual person who dresses as the opposite sex); an intersexed person is someone who has ambiguous genitalia and/or chromosomes (a physical, not psychological, condition).[22]

III. The Current Situation in the US

Regarding legislative protection of trans individual from employment discrimination, the current situation in the US can best be described as complex and uncertain. In thirty-three states there is no state law protecting transgender people from being fired *for being who they are*.[23] Only seventeen states and the District of Columbia currently prohibit discrimination based on gender identity;[24] this current patchwork of state-level protections for trans people is insufficient.

Forty years ago, "Battling Bella" Abzug, a member of Congress from New York and a trailblazer for women, introduced a bill to protect gay people from discrimination for *the first time in*

[21] Dishman, *supra*, note 14 at 123.
[22] Erika Birch & Rachel Otto, *Is Legislation Necessary to Protect the Rights of Transgendered Employees?* 51 ADVOC 24 (2008).
[23]Transgender Law Center, *LGBT Policy Tally Snapshot*, http://transgenderlawcenter.org/equalitymap (last visited July 30, 2115.
[24] *Id. (*CA, CO, CT, DE, HI, IL, IA, MA, ME, MN, NJ, NM, NV, OR, RI, VT and WA have protective legislation).

American history.[25] The Equality Act of 1974 would have banned discrimination against lesbians, gay men, unmarried persons, and women in employment, housing, and public accommodations. It didn't specifically mention trans individuals, nor did it become law. Four decades later, the only good news is that this year there were over 200 co-sponsors on the current bill, Employment Non-Discrimination Act (ENDA).[26] Because the Act has never been passed trans people can be denied employment or fired because of their gender identity in thirty-three states. Although an overwhelming majority of the American public support legislative action to ban discrimination based on sexual orientation and gender identity, Congress has not acted.[27]

In addition, Congress and most of the federal courts have repeatedly failed to include sexual orientation and gender identity as explicitly protected categories under Title VII of the 1964 Civil Rights Act.[28] In deference to Congress, even the most progressive

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[25] Ian S. Thompson, *The 40th Anniversary of an LGBT Milestone in Congress,* ACLU, *available at https://www.aclu.org/blog/washington-markup* (last visited May 30, 2014.)

[26] *Id. See also* Alex Reed, *A Pro-Trans Argument for a Transexclusive Employment Non-Discrimination Act,* 50 AM BUS. L.J. 835 (2013) (For an in-depth discussion of ENDA).

[27] *Id.* (A 2011 poll found that 73 percent of likely voters support protecting LGBT people from discrimination in employment).

[28] 42 U.S.C. 2000e-2(a) (2000). (This subsection, which applies to employers who have at least fifteen employees and are involved in interstate commerce, provides:

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any

of courts have therefore only granted relief to bi/homosexual plaintiffs who focus on their nonsexual gender-nonconformity--such as their manner of speech or dress--rather than on their bi/homosexuality itself.

However, twenty years ago, the United States Supreme Court, in *Price Waterhouse v. Hopkins*,[29] determined that under Title VII

> [i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.[30]

The Court created a "diverging road" when it held that employment discrimination based on gender stereotyping was illegal discrimination because of sex; however, this diverging road is the "one less traveled by, [a]nd that has made all the difference."[31] In discrimination suits based on transgendered status, gender stereotyping has seldom been raised as an issue. When plaintiffs have attempted to prove they were discriminated against because

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> individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The Act was not originally intended to include any provision regarding gender protection; "sex" was added to the list of protected classes in a last-minute attempt to sabotage the bill, but despite the fear that its passage would result in equal employment rights for women, the bill passed).

[29] 490 U.S. 228 (1989).

[30] 490 U.S. 228 at 251 ((*citing* Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13 (1978)) (*citing* Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971))).

[31] FROST, *supra* note 1.

of their gender nonconforming appearance, behavior, and personal habits, very few have been successful in their reliance on the theory of gender stereotyping. The federal judiciary generally has been unwilling to go down the less traveled road and it has made all the difference.

To analyze this judicial reluctance to allow plaintiffs' recovery based on gender stereotyping, this section of the paper first explores the issues of gender stereotyping as presented by the *Price Waterhouse* Court,[32] and then examines the relevant Title VII jurisprudence.

A. Price Waterhouse v. Hopkins

For many years Congress and the judiciary have recognized "the problem of subconscious stereotypes and prejudices,"[33] but it wasn't until 1989 that the Supreme Court specifically clarified the illegality of gender stereotyping.[34] Although the partners at Price Waterhouse recognized Ann Hopkins as an "outstanding professional" with a "strong character, independence and integrity,"[35] they denied her a partnership because she was not feminine enough. Clearly engaging in gender stereotyping, they criticized her as being "brusque" and "harsh,"[36] "a lady using foul language."[37] Reacting negatively to her personality, partners comment that she was "macho," "overcompensated for being a woman," needed to take "a course at charm school," and should "walk more femininely, talk more femininely, dress more

[32] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[33] Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988).
[34] Price Waterhouse, 490 U.S. at 237.
[35] *Id*. at 233-34.
[36] *Id*. at 234-35.
[37] *Id*. at 235.

femininely, wear make-up, have her hair styled, and wear jewelry."[38] The masculine characteristics that had made her a successful manager were the same characteristics that kept her from being selected for partnership.

The Court clearly recognized gender stereotyping as sex discrimination under Title VII. A plurality concluded that Title VII prohibits discrimination, not just because one is a woman, but also because one fails to act like a woman.[39] Because the Court emphasized that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group,"[40] many have unsuccessfully tried to apply the theory of gender stereotyping to transgendered persons.

B. The Road Less Traveled

In the late seventies and early eighties, trans individuals were consistently unsuccessful in their Title VII claims for sex discrimination. Based on the idea that sex refers to anatomy and not to how individuals psychologically perceive themselves, federal courts decided that trans people do not fall under the protection of Title VII.[41] In 1989 *Price Waterhouse*[42] gave trans persons new hope of Title VII protection when the Court expanded

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[38] *Id.*

[39] Price Waterhouse, 490 U.S. at 250 (Brennan, J. speaking for Justices Marshall, Stevens, and Blackmun); 258-61 (White, J. concurring); 272-73 (O'Connor, J. concurring) (accepting plurality's sex-stereotyping analysis).

[40] I*d*. at 251.

[41] *See*, Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661 (9th. Cir. 1977); Sommers v. Budget Marketing, Inc., 667 F.2d 748, 749-50 (8th Cir. 1982); and Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984).

[42] 490 U.S. 228 (1989).

the definition of "sex" under Title VII, holding that sex stereotyping provides a cause of action under the statute.[43]

Since the *Price Waterhouse* Court and many other federal appellate courts had used the terms "sex" and "gender" interchangeably their practice had clouded the issues in many of the gender stereotyping cases.[44] So the federal courts sought to clarify the issue by defining "sex" as a noun to distinguish men from women, regarding their biological and physiological features. As Judge Posner has pointed out, the term "gender" is one "borrowed from grammar to designate the sexes as viewed as social rather than biological classes."[45] Gender will be used in this paper to describe cultural attitudes and behaviors such as appearance, vocal range, and gestures.

A second practice that has clouded the issue has been many courts' tendency to equate effeminacy with homosexuality. Too often it is assumed that masculine men and feminine women are heterosexual while feminine men and masculine women are homosexual. These assumptions, sometimes true, sometimes not true, are the direct result of gender stereotyping. When MTF trans and effeminate men, most frequently the victims of employment discrimination, have complained that they were harassed or denied employment benefits because of their gender nonconformity, the courts have dismissed the claims saying that homosexuality and transsexuality are not protected under Title VII.

The courts basically used three reasons to deny recovery based on the gender stereotyping theory. First, many courts rejected an effeminacy discrimination claim without even

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[43] *Id*. at 250-251.

[44] Jon D. Bible & Patricia Pattison, *Similar Cases, Different Results: The Perplexing Question of What Constitutes Title VII "Effeminacy Discrimination*, 11 ALSB J.E.L.L. 22 (2009).

[45] RICHARD A. POSNER, SEX AND REASON, 24-25 (1992).

mentioning *Price Waterhouse*.[46] Their decisions were premised on the belief that there is a difference between biological sex and gender; gender-based discrimination, which encompasses traits such as masculinity, is not proscribed by Title VII.[47] Second, some courts declined to address the stereotyping claims because they had not been asserted at the trial, even though the courts expressly recognized a Title VII cause of action for discrimination based on an employee's failure to conform to stereotypical gender norms.[48] Third, some courts denied recovery finding that the plaintiffs were only using the theory of gender stereotyping to make an "end run" around Title VII requirement or to "bootstrap" protection for sexual orientation.[49]

However, similar to the cases of sexual harassment of effeminate men, the theory of sexual stereotyping remained on the road less traveled. For example, in 2007 the Tenth Circuit affirmed the lower's court dismissal of a case brought by a MTF transsexual, a Utah bus driver who was fired because the company feared reprisal from the employee's use of women's restrooms.[50]

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[46] *See*, Dandan v. Radisson Hotel Lisle, 2000 U.S. Dist. LEXIS 5876 (N.D. Ill. Mar. 28, 2000); and Klein v. McGowan, 36 F.Supp.2d 885, 887 (D. Minn. 1999), aff'd, 198 F.3d 705 (8th Cir. 1999).

[47] Klein at 889,890.

[48] Bibby v. Phil. Coca Cola Bottling Co,, 260 F.3d 257, 259-60 (3d. Cir. 2001); Simonton v. Runyon, 232 F.3d 33 (2d. Cir. 2000); and Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252 (1st. Cir. 1999).

[49] *See* Simonton v. Runyon, 232 F.3d 33, 37-39 (2nd Cir. 2000); DiCintio v. Westchester Cnty. Med. Center, 807 F.2d 304 (2nd Cir. 1986); Dawson v. Bumble & Bumble, 231 F.Supp.2d 301, 306 (S.D.N.Y. 2003); Smith v. Liberty Mutual Ins. Co., 569 F.2d 325 (5th Cir. 1978); Willingham v. Macon Teleg. Pub. Co., 507 F.2d 1084 (5th Cir. 1975); Vickers v. Fairfield Medical Center, 453 F.3d 757 (6th Cir. 2006); Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1066 (7th Cir. 2003); and Klein v. McGowan, 36 F.Supp.2d 885, 887 (D. Minn. 1999), aff'd, 198 F.3d 705 (8th Cir. 1999).

[50] Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1220 (10th Cir. 2007).

The driver presented two legal theories to support to her claim that, in violation of Title VII, she was discriminated against because of sex.[51] First, she argued that transsexualism is sex discrimination, protected under Title VII. Alternatively, she argued that she was dismissed because of gender stereotyping, her failure to conform to the male sex stereotype. In response, the court first reiterated that transsexuals are not a protected class under Title VII based on the traditional definition that it is "unlawful to discriminate against women because they are women and men because they are men."[52] The court recognized only "the two starkly defined categories of male and female.[53] Second, the court also rejected her claim of gender stereotyping, that she was fired because, as a biological male, she failed to conform to stereotypical gender norms. The court acknowledged that the plaintiff established a prima facie case of gender stereotyping, but found that in defense the employer had articulated a legitimate, nondiscriminatory reason for the termination.[54] The decision to discharge "was based solely on her intent to use women's public restrooms while wearing a UTA [Utah Transit Authority] uniform, despite the fact she still had male genitalia."[55] "However far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women's restrooms."[56] (Neither the court, nor the employer, discussed how the public would know what genitalia was under the uniform.)

The Sixth Circuit was the first appellate court to rely on *Price Waterhouse* to uphold a transsexual's claim for protection

[51] *Id*. at 1221.
[52] *Id.*
[53] *Id*. at 1222.
[54] *Id*. at 1224.
[55] Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1220 (10th Cir. 2007).
[56] *Id.*

under Title VII.[57] Smith, a biological male, served as a lieutenant in the Fire Department for seven years without any negative incidents.[58] After being diagnosed, in accordance with international medical protocols for treating GID [Gender Identity Dysphoria], Smith began "expressing a more feminine appearance on a full-time basis".[59] Smith notified his immediate supervisor about his GID diagnosis and treatment, also informing him of the likelihood that his treatment would eventually include complete physical transformation from male to female. After learning of the GID diagnosis the fire chief, along with the mayor and the city law director, determined to use Smith's transsexualism and its manifestations as a basis for terminating his employment. When Smith learned of the city officials' intention, he retained counsel and filed a complaint with the EEOC. Immediately after receiving the EEOC's right to sue letter, the city fired him in retaliation.

Implying that his claim was disingenuous, the district court stated that Smith merely "invokes the term-of-art created by *Price Waterhouse,* that is, 'sex-stereotyping,' as an end run around his 'real claim."[60] The real claim, the court observed, was "based upon his transsexuality"[61] and "Title VII does not prohibit discrimination based on an individual's transsexualism."[62] However, on appeal the sixth circuit court reversed and remanded, holding that if transsexuals are fired for not conforming to gender stereotypes, they have a claim under Title VII; the fact that they are transsexuals does not somehow strip them of *Price Waterhouse's*

[57] Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).
[58] *Id.* at 570.
[59] *Id.*
[60] *Id.* at 571.
[61] *Id.*
[62] *Id.*

protection.[63] The circuit court explained that just as an employer who discriminates against women for not wearing dresses or makeup is engaging in sex discrimination under the rationale of *Price Waterhouse*, "employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."[64]

Two district courts have followed the lead of the Sixth Circuit. In 2007, the District of Columbia district court held that "Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer."[65] Dave Schroer applied for a position as a terrorism research analyst with the Congressional Research Service (CRS), presenting himself as a man. He was offered and accepted the position. When he met with a representative of the CRS to discuss the details, he explained that he was under a doctor's care for gender dysphoria and, consistent with the recommended treatment, was going to change his name to Diane, begin dressing in traditionally feminine attire, and start presenting full-time as a woman.[66] He showed the representative pictures of himself dressed in professional female clothing. In a phone call the next day the CRS representative told Schroer that he "would not be a good fit given the circumstance that they spoke of yesterday."[67] In denying the CRA's motion to dismiss the district court stressed:

> The point here, however, is that Schroer does not claim that disclosure of her gender dysphoria was

[63] *Id.*
[64] *Id.*
[65] Schroer v. Billington, 525 F. Supp.2d 58, 63 (D.C. 2007).
[66] *Id.* at 61.
[67] *Id.*

> the singular cause of her non-selection. Instead, informed by the discovery she has taken, Schroer now asserts that she was discriminated against because, when presenting herself as a woman, she did not conform to Preece's sex stereotypical notions about women's appearance and behavior.[68]

In a more recent case, the United States District Court for the Southern District of Texas determined that Lopez's transsexuality did not bar her sex stereotyping claim.[69] The defendant medical clinic offered a position to the plaintiff, Izza Lopez, a/k/a/ Raul Lopez, but the job offer was subsequently rescinded when the clinic's management determined that Lopez had "misrepresented" herself as a woman during the interview process.[70] Lopez asserted that River Oaks impermissibly rescinded its job offer to her because she failed to conform with traditional gender stereotypes.[71] The court concluded that "applying Title VII as written and interpreted by the United States Supreme Court .... Lopez has stated a legally viable claim of discrimination as a male who failed to conform with traditional male stereotypes."[72]

Based on reasoning identical to that used with Title VII the Eleventh Circuit decided a section 1983 case in favor of a MTF trans who was fired when her supervisor learned that she would begin presenting as a woman.[73] She was hired as an editor in the Georgia General Assembly's Office of Legislative Counsel when

[68] *Id.*
[69] Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 R.Supp.2d 653 (S.D. Texas 2008).
[70] *Id.* at 657.
[71] *Id.*
[72] *Id.* at 667-668.
[73] Glenn v. Brumby, 663 F.3d1312 (11th Cir. 2011).

presenting as a man. Glenn claimed sex discrimination in violation of the Equal Protection Clause. The district court granted Glenn's motion for summary judgment, and the Eleventh Circuit affirmed on appeal.[74] The Eleventh Circuit noted that "a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."[75]

In 2012 the EEOC clearly recognized that a MTF plaintiff had stated a Title VII claim of action.[76] The EEOC said that Title VII has always protected transgender persons from discrimination because of sex.[77] Similar to the fact situations in several other cases, Macy, a MTF trans, applied for a position in a crime laboratory that was part of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) at a time when she was still publicly presenting as a man. During phone calls with the Director, he told her twice that she would have the position as long as her background check did not uncover any problems. Then Macy informed the staffing firm that she was "in the process of transitioning from male to female."[78] Shortly after that she was notified that the position had been eliminated due to federal budget restrictions. When she investigated further she learned that it was not true; the AFT had hired another person.[79] Macy thereafter filed an EEO complaint alleging that she had been discriminated against "on the basis of sex, sex stereotyping, sex due to gender transition/change of sex, and sex due to gender identity."[80] Noting

[74] *Id.* at 1315.
[75] *Id.* at 1315.
[76] Macy v. Holder, EEOC No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012).
[77] *Id.* at *11.
[78] *Id.* at *1.
[79] *Id.* at *1-2.
[80] *Id.* at *3.

that "evidence of gender stereotyping is simply one means of proving sex discrimination" the EEOC also indicated:

> When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim." This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition [in *Price Waterhouse*] that "an employer may not take gender into account in making an employment decision."[81]

D. A Summary of the US Situation

In the previous sections it has been documented that in the US, as a legal theory of recovery, gender stereotyping can be characterized as the "road less traveled." In a variety of cases where the theory could have been implemented to allow Title VII recovery, it was not. Either it was not argued, or not allowed, based on a number of rationales. In the remainder of the paper the authors will consider a number of perspectives in an attempt to

[81] *Id.* at *7.

identify the reasoning that has caused gender stereotyping to be widely ignored. Following *Price Waterhouse* why does gender stereotyping in employment remain an acceptable alternative? Is the answer to be found in the nature of the US federal judiciary, our historical, philosophical, and religious culture, or in our social-psychological attitudes?

IV. THE CURRENT SITUATION IN THE UK

The UK situation in relation to transgender discrimination is, in one sense far less complex than the US situation. [82] Protection from discrimination is included in the Equality Act 2010 which prohibits direct and indirect discrimination, harassment and victimization because of a number of protected characteristics including sex, sexual orientation and gender reassignment. However, as the Act covers only the protected characteristic of gender reassignment, there are likely to be many in the trans community who are not able to bring themselves within the narrow statutory definition and as such must look for protections elsewhere. For this reason and because the Act is relatively recent, it is worth exploring the history of protection in this area in order to see what protections is available and how it compares with the US experience.

[82] We refer throughout this paper to the UK situation for ease although this is not always strictly accurate. Readers will be aware that the UK refers to the United Kingdom of England, Wales Scotland and Northern Ireland but that Scotland and Northern Ireland operate their own jurisdictions in terms of law and that given relatively recent changes in governance there is also an increasing number of laws applying only in Wales. It is therefore vital to note the geographic extent of the legislation under scrutiny. Most of the relevant legislation referred to in this paper applies to Great Britain; that is England, Wales and Scotland.

A. The historic context: finding a road to travel

Prior to the late 1990s there was no protection to speak of for trans people living in the UK. In fact the existing legislation was often used to justify unfair treatment.[83] The Sex Discrimination Act (SDA) 1975[84] required the equal treatment between men and women but was held not to include trans people because, according to the legislation, the appropriate comparator for a woman suffering unequal treatment was a man and vice versa meaning that an employer could simply claim that a male to female transsexual would be treated in the same (appalling) way as a female to male transsexual and there was therefore equal (equally unfair, but equal) treatment between the sexes. This view was challenged in 1996 with the ruling of the European Court of Justice[85] in the case of *P v S and Cornwall County Council* (*P v S*).[86] The road toward at least some protections therefore turned out to be, and has to a large extent continued to be, a European one. In

[83] Stephen Whittle, '*Employment Discrimination and Transsexual People'*, (The Gender Identity Research and Education Society, 2000), *available at* http://www.gires.org.uk/assets/employment-dis-full-paper.pdf (last visited May 27 2014); and Stephen Whittle, Lewis Turner, and Maryam Al-Alami, *Engendered Penalties:Transgender and Transsexual People's Experiences of Inequality and Discrimination*. (Press for Change, 2007), *available at* http://www.pfc.org.uk/pdf/EngenderedPenalties.pdf (last visited May 27, 2014).

[84] Sex Discrimination Act, 1975, c.65 (G. Brit.)

[85] For those readers not familiar with the relationship between European Union (EU) Law and that of the European Union Member States, it is worth noting that EU law takes precedent over National Law and that where questions of EU Law arise in any of the national courts (at whatever level) those questions can be referred to the European Court of Justice (ECJ) for interpretation. The ECJ is therefore not an appeal court in the traditional sense but rather a court of interpretation which is to ensure the uniform interpretation of law across the EU.

[86] P v S and Cornwall County Council, ECJ [1996] Industrial Relations Law Reports 347.

P v S, the claimant was a male to female transsexual working for an education establishment. When she informed her employer of her intention to undergo gender reassignment she was dismissed. The employer argued that the termination was actually due to redundancy but it was held that the real reason was the employer's objection to P undergoing gender reassignment . The case was referred to the European Court of Justice in Luxembourg because, although English Law provided no protection for P, it was thought that the European Union Law in this area might. The Court referred to Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions[87] and concluded that 'Article 5(1) of the Directive precludes dismissal of a transsexual for a reason related to a gender reassignment'.[88] The Court also took a different, and ultimately much fairer approach to the question of comparators and instead of asking whether P would have been dismissed had she been a female to male transsexual (where the answer would have been yes), the court instead asked whether P would have been dismissed had she remained a man (where the answer would have been no) and therefore saw no reason why discrimination on the grounds of sex had not been established. The importance of this decision should not be underestimated. It was the first decision in the world offering protection to trans people and because it was decided in the European Court of Justice its reach went beyond the jurisdiction in which it arose (the UK) and

[87] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions *OJ L 39, 14/02/1976, p. 40–42*

[88] P v S and Cornwall County Council, ECJ [1996] Industrial Relations Law Reports 347.

made it unlawful to discriminate in the workplace against those intending to undergo, undergoing or having undergone gender reassignment in all of the European Union Member States. The new interpretation of the SDA was confirmed in *ChessingtonWorld of Adventures Ltd v Reed*,[89] where the English Employment Appeals Tribunal held that there was no need for a comparator of the opposite sex in order to hold that there was discrimination on the grounds of sex. The changes were formalised with the introduction of the Sex Discrimination (Gender Reassignment) Regulations 1999[90] which amended the SDA to include specific provision prohibiting discrimination on the grounds of gender reassignment.[91]

Since then there has been little progress in domestic courts with research showing that discrimination remains wide spread.[92] *Croft v Consignia*[93] serves as a useful example of the UK courts' unwillingness to fully embrace trans equality. The case concerned a male to female transsexual Ms. Crofts who wanted to use the female toilets at her workplace and was refused by the employer. The Employment Appeal Tribunal (EAT) held that until Ms. Crofts was legally a woman, in other words, until she had completed the transition and was legally entitled to have her new gender recognized in law, the employer was not obliged to allow her to use the female facilities. The EAT held that the Health and Safety

[89] Chessington World of Adventures Ltd v Reed, EAT [1997] Industrial Relations Law Reports 556.
[90] Sex Discrimination (Gender Reassignment) Regulations 1999 SI 1999/1102.
[91] Sex Discrimination Act, 1975, c.65 (G. Brit.) §2A.
[92] Whittle, *supra* note 83.
[93] Croft v Consignia, EAT, [2002] IRLR 851 and Croft v Royal Mail [2003] IRLR 592 EWCA Civ 1045 (The change of name is due to the employer Consignia changing its name back to Royal Mail, the parties remain the same in fact).

legislation which obliges employers to provide separate toilet facilities for men and women took precedent in this case and that Ms. Croft was assigned to a particular set of facilities in the same way as her non transsexual colleagues. The Court of Appeal, while more sympathetic to Ms. Croft and trans people generally also failed to uphold her claim. The Court of Appeal considered section 82 of the SDA which set out the definition of gender reassignment and acknowledged that this included those undergoing gender reassignment. It agreed that the long term refusal to allow the use of toilet facilities for the 'new' gender would be discriminatory but that there was no automatic entitlement to use the toilet facilities of the new sex immediately from the employee informing the employer of their intention. Instead the employer should allow the use of the facilities based on a case by case consideration of the workplace context including having regard to other employees and the transsexual employee's circumstances including the stage in the medical proceedings and the employee's own assessment and presentation. In Ms. Croft's case, so the Court, the time had not yet come for her to be entitled to use the female toilet facilities.

The decision in *Croft* was disappointing but there were others which showed more promise. In *A v Chief Constable of the West Yorkshire Police*[94] the Court of Appeal held that a post-operative transsexual had the right to be treated as female in all aspects and the Police could not invoke a 'genuine occupational requirement' defense[95] to less favorable treatment when refusing A's application to become a Constable on the grounds that she would not be able to conduct intimate searches of women. *In Richards v Secretary of State for Work and Pensions*, ECJ[96] and

[94] A v Chief Constable of the West Yorkshire Police, CA [2003] IRLR 32.
[95] Sex Discrimination Act, 1975, c.65 (G. Brit.) §7A.
[96] Richards v Secretary of State for Work and Pensions (Case C-423/04) ECJ 2006 I-03585.

Grant v The United Kingdom ECtHR[97] Europe once again led the way forcing the UK to take another step towards trans equality. In *Richards* the ECJ concluded that Ms. Richards who had been living as woman permanently was entitled to a state pension payable to women at 60 rather than having to wait until reaching the age of 65 at which men became entitled to a state pension. This was irrespective of whether Ms. Richards had a Gender Recognition Certificate or not, the deciding factor was simply whether or not she had been permanently living as a woman. In *Grant* the European Court of Human Rights in Strasbourg[98] came to exactly the same conclusion stating that not allowing Ms. Grant to take her pension at age 60 was a breach of Article 8 of the European Convention on Human Rights.

Some progress has therefore been made and a path to be taken shaped by European Union Law and European Human Rights Instruments. It is now up to the UK to travel that path, widen it and make it more inclusive.

B. The Statutory Framework: Providing a roadmap

The Equality Act 2010 came into force in October 2010 and aims to consolidate all the previously existing anti-discrimination legislation in Great Britain. It covers a series of

[97] Grant v The United Kingdom (Application No. 32570/03) ECtHR [2006] All ER (D) 337.

[98] The European Court of Human Rights (ECtHR) is an institution separate from the European Union and should not be confused with the European Court of Justice. The ECtHR hears cases arising from infringements of the European Convention on Human Rights to which the UK is a signatory. In order to bring a case to the ECtHR, all national avenues for seeking redress must have been exhausted. The ECtHR therefore functions more like an appeal court in the traditional sense

'protected characteristics' which, for the purposes of this paper importantly, includes gender reassignment. Section 7 confirms that a person has the protected characteristic of gender reassignment when that person "is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex."[99] The Act prohibits four distinct forms of behavior by employers. The first is direct discrimination defined as treating someone less favorably because of a protected characteristic; the second is indirect discrimination which is the application of a provision, criterion or practice which has a disproportionate negative impact on someone because of a protected characteristic, thirdly, harassment which is the engaging in behavior which has the purpose or effect of creating a hostile or degrading environment and finally victimization which is the less favorable treatment of someone because they assert their rights under the provisions laid down in the Equality Act.

Although the Equality Act 2010 contains provisions which reach beyond the employment sphere, the discussion in this paper is limited to employment. Nonetheless it is worth noting that protection from discrimination begins at the hiring process and applies to hiring, the offering of terms and conditions, the actual terms and conditions and access to promotions, benefits and other perks as well as to disciplinary actions and dismissal. The Act covers those in regular employment relationships as well as those classed as contractors or temporary workers and makes special provisions for partnerships as well as personal and public office holders (where these are not elected).

The statutory framework therefore appears, at first glance at least, comprehensive and should ensure that those who have or

[99] Equality Act, 2010 c15 (Gr. Brit.) s7 (1).

who are planning to undergo gender reassignment will be protected from discrimination in the work place. The Equality Act has also removed the requirement of medical supervision which was included in the SDA. This change is to be welcomed as it is likely to increase the number of people able to access protection as there is no longer a requirement to intend to or be undergoing medical treatment – the focus is now on the gender as which the person intends to or is living permanently and the Explanatory Notes of the Act make it quite clear that gender reassignment is to be understood as a process and not as a medical procedure.

However there are also some worrying provisions in the Equality Act 2010. These relate mostly to the exceptions to the provisions providing for non-discrimination in the provision of services contained in Schedule 3. However, there are also exceptions relating to work. These exceptions are set out in Schedule 9 and provide that where there is an occupational requirement to have a particular protected characteristic, such as gender, there is no discrimination if someone of a different gender is treated less favorably. The occupational requirement must, however, be proportionate. Schedule 9, Part 1 Section 1 (3)(a) states that the references in sub-paragraph (1) to a requirement to have a protected characteristic are to be read— (a)in the case of gender reassignment, as references to a requirement not to be a transsexual person (and section 7(3) is accordingly to be ignored);[100] This provision is hugely problematic and the explanatory notes fail to fully encapsulate the issues arising. The explanatory notes give the following example:

> A counsellor working with victims of rape might have to be a woman and not a transsexual person,

[100] Equality Act, 2010, c. 15 (Gr. Brit.) Schedule 9.

> even if she has a Gender Recognition Certificate, in order to avoid causing them further distress.[101]

There are several issues here. The first is that it seems to endorse a distinction between woman and transsexual person with or without a Gender Recognition Certificate whereas the point of the GRC was to allow a person to legally and completely become their 'new' gender. The provision appears to make a GRC rather pointless if discrimination is allowed even where one has been granted. The second problem is that the employer of the counsellor would have no way of knowing whether the person applying for the job is transsexual. If the employee presents herself as a woman and the employer has no reason to think she is a transsexual, the fact that she was not in fact born a woman is surely irrelevant and there is no reason to think she could not be an effective counsellor or that a victim of rape would feel uncomfortable with her. The example given, which may shape how employers implement the provisions, seems to be based on a stereotyped assumption of what a woman and a rape counsellor should be and what they should look like. It seems there is significant scope here for employers to (deliberately or not) discriminate against a large proportion of the LGBT community based on appearance. A third issue is that the example makes presumptions about what the victims of rape might feel or think about counsellors and those presumptions are based on a very narrow view. It ignores sexual violence against men and importantly for the purposes of this paper, against trans victims. It ignores the

[101] Equality Act, 2010, c. 15 (Gr. Brit.) Explanatory Notes.

fact that the Act would not require those offering counselling to the trans community to themselves be trans and it presumes that female rape victims would not want a male counsellor. It's a badly conceived example but one that has the potential for significant impact as employers look to the explanatory notes to help them shape their own policy and guidance.

While the Equality Act has broadened the path to be taken to include a more nuanced and less medical understanding of gender reassignment it has not taken us further down the path to equality and has in some important respects opened up the possibility of backward steps when it should have been leading us forward.

C. Reading the Roadmap - Interpreting Statute: Recent Case Law

The question now is the extent to which the courts will interpret the provisions in the Equality Act 2010 in a way which advances equality. There is of course the possibility of expansive interpretation of the provision prohibiting discrimination and very narrow and strict interpretation of the exceptions. There is also however the potential for the opposite to happen. There have been few cases since the Act came into force in October 2010 and results are mixed.

In early 2014, Ms. Chapman, a police Constable and male to female post-operative transsexual complained to an Employment Tribunal that she had been discriminated against because she was a transsexual because she had effectively been forced to out herself as such over the police radio.[102] The control

[102] Chapman v Essex Police, ET, 2014 unreported, *available at* http://www.independent.co.uk/news/uk/home-news/transsexual-pcs-

room did not believe who she was and claimed she had 'a male voice'. Ms. Chapman reported the incident but the police force refused to carry out a full investigation or deal with the matter. Two further incidents followed leaving Ms. Chapman extremely distressed. Her claim was however rejected and her reaction to being challenged over her identity when using the radio was described as extreme. The police force on the other hand was praised for having introduced trans awareness training 6 months prior to the hearing. A more positive approach was taken in a case relating to service provision and the use of toilet facilities by customers.[103] Ms. Brooks, a male to female transsexual sued a pub after being refused entry to the ladies toilets and then being barred when she complained. Her complaint was upheld and she was awarded compensation.

D. Summary of the UK position

The UK position looks in good shape. We have a clear roadmap in the form of statutory provisions which prohibit the discrimination because of gender reassignment. However, we have not yet learned to take the direct path shown to us by the map. The map seems to have flaws, roads not fully marked out and some falsely labelled as heading towards equality when in fact they take us a step backwards. What we now need is a brave judiciary willing to take the most direct path towards equality, a judiciary which will interpret concepts broadly and inclusively and

discrimination-case-against-essex-police-rejected-9009093.html (last visited May 27 2014).

[103] Kirklees Law Centre v New Inn, ET, 2014, unreported, *available at* http://www.lawcentres.org.uk/policy/news/news/kirklees-law-centre-wins-landmark-transgender-discrimination-case (last visited May 27 2014).

exceptions narrowly so as to afford the most protection to the most members of the trans community.

IV. ANALYSIS

A. Review and Comparison

America, the Land of the Free, does not appear to be ready to extend human rights protections to its trans citizens. This is in stark contrast to other developed countries in Europe. The United Kingdom has already legislated to provide trans individuals with a system to clearly identify themselves with their appropriate gender. For nearly fifteen years the UK has protected trans from discrimination in employment and in other aspects of their daily lives. Meanwhile, back in the US, only a handful of courts have recognized that trans people are protected under Title VII. It has only been in the last year that the EEOC recognized the coverage. For decades LGBT individuals have sought to be protected by ENDA, but Congress has continued to reject their appeals.

In past generations the United States has prided itself on being in the forefront of social and progressive change. Has it now stalled and failed to recognize any but the "typical" American, the rugged individual who tamed the West by brute force? Recent surveys have indicated that approximately 75 percent of Americans support workplace protection for LGBT, but they believe that the protection has already been provided under federal law.

Why do Americans, as compared to the British and Europeans, remain more attached to rigid gender stereotypes? Is it because as a younger country we are still adolescent in our thinking? As a society are we too fearful to honor and respect individual differences? Is the aversion to trans individuals based in religion? Do people in the US take religion more seriously than

those in the UK and Europe? Why are gays and lesbians becoming more accepted in the US, but trans persons are still reviled?

B. Transgender Fear and Hate

There is evidence that indicates that trans individuals are the objects of significant revulsion, particularly in the US. Previously in the paper, statistics were presented that shows that they are six times more likely to be murdered than gays and lesbians. Why are the majority of Americans now willing to give gays and lesbians full protection from discrimination, but continue to reject trans people? Over the years Congress has come close to passing ENDA when only LGB were included, but refused to even bring a bill to the floor when it included transgenders. This section of the paper is designed to contemplate and speculate on the reasons for the extreme revulsion.

In a posting on the Internet one man passionately answered the question, "Why do so many people hate transgender people?"

> The reason people hate transgender is very simple. Every human being has something I call "basic identity features" these are things like: gender, ethnicity or also / and religion also a few more, depending on culture and society. Now because the gender is one of the most basic, basic identities everybody need [sic] to definitely identify themselves in these terms. Now, if you come along with your [sic] as you say: "transgender" - Identity everyone will of course want to be as far distanced from you in terms of features. All women who have similarities with you, will feel threatened. Because they want to be as feminine as possible. But when they spot features, which you and them have in

> common, they feel automatically threatened because it seems as if they're [sic] basic identity is not so sure anymore, what follows is, that they start thinking about themselves and if they're enough feminine etc. etc. same in men. It's absolutely down to the psychic core of Darwinism. And I feel the same. I'm male and I drastically hate transgender people. Because sometimes I have the impression a [sic] have certain similarities with them, but I want to be as masculine as possible. This complete [sic] makes me hate all those people ![104]

It appears that his opinion is based on the fear that a WTM trans may appear to be more masculine than he is.

Fear is the most common emotion discussed in most of the postings. Another individual posted, "I think because of the two basic fears people tend to avoid addressing: fear of the unknown and fear of change. Transgender people encompass both."[105] One insightful person succinctly stated, "People tend to fear what they don't understand."[106] Several posts on the blog offered thoughtful and compassionate comments.

> People hate transgender people because we live in a society that shuns differences. Difference has become almost shameful because of our cultural obsession with conformity and belonging. People

[104] Experience Project, *Why do so many people hate transgender people*?, *available at* http://www.experienceproject.com/question-answer/Why-Do-So-Many-People-Hate-Transgender-People-We-Dont-You-You-:c/1827020 (last visited May 28, 2014).
[105] *Id.*
[106] *Id.*

> are uncomfortable with others who do not share their same ideals.[107]
>
> It is also due to lack of empathy. I cannot imagine how trapped and confused and isolated I would feel if I was not comfortable with being a woman. I think they are very strong people to be able to overcome the fear of being an outcast or not accepted to pursue the life they feel is meant for them.[108]

In response to the comment on empathy, another person observed, "You are right. If you are able to mentally dehumanize someone, you can do anything to them and maintain a clear conscience."[109]

Where did the members of our society learn to fear, hate and dehumanize trans people? One author postulates that we learned it at the movies.[110] He cited movies such as *Ace Ventura: Pet Detective*, *Naked Gun 33 1/3*, and *The Hangover.* In all three movies MTF trans individuals tricked male characters into having a sexual experience with them. In *Ace Ventura: Pet Detective*, the male victim, played by Jim Carey, only "made out" (didn't have intercourse) with the trans female. However, "the memory of kissing a transgender woman was forcing Carey to puke profusely, burn his clothes, and weep."[111] How many millions of people learned a nasty, but unforgettable, lesson from that scene? The author summarizes:

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[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] Cord Jefferson, *How I Learned to Hate Transgender People*, GOOD MAGAZINE, (June 30, 2011) *available at* http://magazine.good.is/articles/how-i-learned-to-hate-transgender-people (last visited May 28, 2014).
[111] *Id.*

> Repugnance is a common theme in the trans-people-as-jokes canon. But more prevalent is the element of deceit. Time and again in both comedic and dramatic films, transgender people are cast as deviant tricksters out to fool innocent victims into sleeping with them. This narrative plays upon two of America's deepest fears: sexual vulnerability and humiliation. Not only is your sex partner "lying" about their gender, victims who "fall for it" are then forced to grapple with the embarrassment of being had, of being seen as gay. Men "tricked" into sleeping with another man are embarrassed by the threat to their masculinity. So much culture has taught us that transgender people aren't just sexual aliens, they're also predatory liars.[112]

But there is hope. At a web site called CafeMom, one of the participants confessed that "I secretly hate transgender people."[113] But she concluded her comments with, "I've decided in order to fully accept transgender people, I need to fully understand them and their life struggles. How I feel sickens me and I cannot believe I really feel this way."[114]

These remarks only reflect antidotal evidence, thoughts, values, and experiences of individuals who were interested enough in the topic to offer their comments. Of course, there is no way to prove the real reasons that so many people have an aversion to, and inclination to discriminate against trans individuals. However

[112] *Id.*

[113] *I secretly hate transgender people*, CafeMom, *available at* http://www.cafemom.com/group/115189/forums/read/16409668/I_secretly_hate_transgende (last visited May 28, 2014).

[114] *Id.*

some legal scholars have conducted research and contributed their expert opinions.

This concept of male preference was presented and discussed in depth in a 1995 Yale Law Journal article. Professor Mary Anne C. Case asserts that the societal devaluation and general disdain for women and feministic characteristics are the basis for discrimination against men who want to experience and value their feminine qualities.[115]

> The man who exhibits feminine qualities is doubly despised, for manifesting the disfavored qualities and for descending from his masculine gender privilege to do so. The masculine woman is today more readily accepted. Wanting to be masculine is understandable; it can be a step up for a woman, and the qualities associated with masculinity are also associated with success.[116]

In her article Professor Case was only considering discrimination against effeminate men. If they are "doubly despised" it is difficult to imagine the level of repugnance that may be experienced by MTF trans.

By focusing on the reasons why the societal margins, effeminate men and trans individuals, are disliked and feared, it is possible to recognize that the base fear may be of feminine influence.

> In arguing that the treatment of the exceptional effeminate man teaches us much about that of both feminine and masculine women as well as

[115] Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence,* 105 YALE L.J. 1, 2 (1995).
[116] *Id.* at 2.

> masculine men, I hope to have shown how, once again, the margins can illuminate the center; and to have taken steps to make the world safe for us all, norms and exceptions, men and women, masculine and feminine, and every shade in between.[117]

V. CONCLUSION

When you know better, you do better.[118]

Throughout this paper we have outlined the systematic discrimination faced by trans people in employment and in their lives generally in both the US and the UK and we have speculated on why discrimination is so wide-spread and why legislators and courts are reluctant to extend protection to the trans community in any meaningful way. It seems clear to us that law alone can achieve very little here. Even in the UK where legislation does exist, discrimination is still common. What is required is a change in culture and attitude. A better understanding of trans people in their lives and struggles, greater visibility and role models, and positive media portrayal would all help. In addition, as we have suggested above, as long as women are not fully seen as equal, it is unlikely that male to female transsexuals will be considered as equals as they will be assumed to have deliberately assumed the weaker sex. Both countries have a long way to go to change attitudes but arguably the UK, less constrained perhaps by the religious right, has walked a little further down the long road to equality. Having said that changes in attitude are needed, we do

[117] *Id.* at 104.

[118] Maya Angelou, *available at* http://www.eonline.com/news/546030/maya-angelou-s-15-best-quotes-regarding-love-forgiveness-humility-and-survival (last visited May 29). 2014)

believe that law has a role to play to send clear signals about what is and is not acceptable within society. In concluding this paper we therefore want to outline what it is we think the US and UK can learn from each other.

A. What the US can learn from the UK

The UK has taken one very big step towards equality through legislation. The US has not and, as we have contended above, the law in the US is not clear and seems to be decided on a case by case basis. While legislation, or at least case law, that categorically brings trans people within the remit of existing legal provisions, might not immediately reduce levels of discrimination, doing nothing allows people to keep believing and perpetuating their stereotypes. Legislation which affords protection to trans people forces those who discriminate and those who hate to examine those prejudices. Some will do so before they discriminate, others may only get there after having been sued. Legislation will generate cases; cases will generate media coverage which will in turn generate discussion which will, it is hoped, lead to better understanding and less discrimination. The symbolic power of law is what is important rather than the exact provisions themselves.

An approach which is based on prohibiting direct discrimination and indirect discrimination captures the most obvious discrimination directed at trans individuals because they are trans but would also cover more subtle and sometimes unintentional discrimination. In fact a broad interpretation of indirect discrimination could cover situations of gender stereotyping on the basis that applying gender norms has a disproportionate negative impact on trans individuals. The opportunity for the US is to take an approach and to interpret it

more broadly and more inclusively than it so far has been in the UK. The US could also do well to consider the possibility of explicit protection from harassment and not just discrimination in order to try and reduce the amount of bullying and harassment faced by trans people in the workplace and further afield.

B. What the UK can learn from the US

It should be obvious from the discussions above that we believe that the US has further to travel on the road to equality than the UK does. For a start the UK has, in statute, recognized that those who intend to, are undergoing or have undergone gender reassignment are deserving of protection. However, that is not to say that the UK cannot learn anything from the US. There are many who identify as trans without intending to undergo gender reassignment and there is no real protection for them in the UK. It is here where the concept of gender stereotyping might be usefully employed to gain some protections. This of course would only work if the gender stereotyping provisions are interpreted so as to cover the trans community and this seems to be a rather big if. For example, the law on dress codes and grooming standards in the UK has held fast to a 'difference is acceptable as long as standards are comparable in approach[119] and cases such as Schmidt[120] and

[119] *Schmidt v Austicks Bookshops Ltd* [1977] IRLR 360 EAT.

[120] *Id*. (In this case the question arose of whether particular dress codes were more restrictive for men than for women. The Employment Appeal Tribunal concluded that as long as general standards were laid down difference in detail of clothing permitted was not likely to be discriminatory. Schmidt has been doubted but not explicitly overruled).

Smith[121] remain good law. Certain stereotyped assumptions therefore persist.

In relation to transvestites who may wish to dress in clothing usually associated with the opposite sex while at work, current case law holds out little hope. The case of *Kara v London Borough of Hackney*[122] shows that neither the UK, nor Europe are quite ready to step boldly toward equality. A male transvestite was, according to the UK Employment Appeals Tribunal not discriminated against when banned from wearing women's clothes and, according to the ECtHR, his Convention rights were also not breached. Although the ban on him wearing women's clothing was an interference with his private life, the ban was found to be in accordance with the law and 'necessary in a democratic society. In other words, the public image of the company and the concern about co-workers was more important than equality for Kara and other trans people.

There is another, subtly but importantly different, way of looking at these cases: If we say Kara was discriminated against because she is a transvestite, there is no protection in law. If we however frame the situations as Kara was discriminated against because she did not conform to the expectations of men in the workplace, we have discrimination because of gender. The problem is that the same arguments that can be made here were made in relation to transgender people before the SDA was amended: A female (the appropriate comparator in this case) who dresses in male clothing would also be banned from doing so. Both

121 Smith v Safeway plc [1996] IRLR 456 CA (in which a man was held not to have been treated less favorably because the uniform policy required men to have hair that was shorter than shoulder length whereas women's hair could be longer as long as it was pinned back at work).

122 Kara v London Borough of Hackney (1996).

sexes are therefore treated equally (badly). It seems therefore this road may be blocked.

However, the law does show some promise for exploring the idea of stereotyping. There are examples where stereotyping has clearly been held to be unlawful such as in cases where presumptions were made about women's roles and the importance of their jobs vis-à-vis their husband's.[123] Even more promising is the law in relation to sexual orientation and, in fact gender reassignment which states that discrimination is also unlawful where someone believes a person to have a protected characteristic. A useful example of this is the case of *Thomas v Sanderson Blinds*[124] where the claimant was teased and bullied for being homosexual when in fact the perpetrators knew that he was not gay (and he knew that they knew). It was simply that he had gone to a boarding school in a town known to be gay friendly and that he displayed certain mannerisms considered to be stereotypically gay. If stereotypical assumptions or perceived possession of a protected characteristic might give rise to protection this can be used in some cases to protect some in the trans community and it may in time be developed to further so as to offer even greater protection. We should, surely be working towards a model of equality which allows all to express their

123 See for example Coleman v Skyrail Oceanic ([1981] IRLR 398 in which the woman was dismissed when she married her husband who worked for a rival travel firm. The firms were concerned about confidential information being leaked and assumed that the man was the breadwinner and therefore the woman should be dismissed by her firm. Also see Horsey v Dyfed County Council [1982] IRLR 395 where it was assumed that the female employee would leave the company and follow her husband who had got a job in another city. On that basis she was refused training because she was unlikely to return to work for long after the training course.

124 English v Thomas Sanderson Blinds (2009)

identity in the way that they want without imposing our expectations of how men and women should dress, talk and behave.

- END ARTICLES -

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3. Case Names. Abbreviate case names in footnote citations in accordance with Table 6 (and Table 10) in the BLUEBOOK. Abbreviate case names in textual sentences in accordance with BB Rule 10.2. Note that there are only eight words abbreviated in case names in textual sentences (10.2.1(c)), but more than two hundred words in abbreviated in case names is citations (Table 6 & Table 10). Please pay close attention to case name abbreviations.

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