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- ARTICLES -

INDIVIDUAL CRIMINAL LIABILITY FOR FINANCIAL FRAUD IN THE UNITED STATES: A MORAL AND LEGAL IMPERATIVE

By

Don Mayer*

I. INTRODUCTION

Nearly four years after the financial meltdown of 2008, the subprime mortgage crisis still reverberates, with depressed housing prices, lawsuits over the foreclosure process, and the U.S. and global economy in precarious recovery.[1] Because the consequences

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[1] As of March, 2012, the U.S. unemployment rate remains above 9 percent, and the annual rate of economic growth has slipped to roughly 1 percent during the last six months. New crises afflict world markets while the American economy may again slide into recession after only a tepid recovery from the worst recession since the Great Depression. *See* Caroline Salas Gage, *Fed's Dudley Says U.S. Economy is Not 'Out of the Woods': Economy*, BUS. WEEK, Mar. 19, 2012, Available at http://www.businessweek.com/news/2012-03-19/fed-s-dudley-says-u-dot-s-dot-expansion-not-yet-out-of-the-woods. *See also* Global Macro Monitor, *Current Housing Bust Much Worse than Great Depression*,

of the financial sector's risk-taking have been so severe, many have wondered why there have been so few criminal prosecutions.[2] President Obama had one answer when he said that in the "subprime lending fiasco," a lot of "that stuff wasn't necessarily illegal, it was just immoral or inappropriate or reckless."[3] Yet as former Federal Reserve Chairman Alan Greenspan has said, "[t]hings were being done which were certainly illegal and clearly criminal in certain cases. If you cannot trust your counterparties, it [capital markets] won't work. And indeed we saw that it didn't."[4] This article addresses the question of why there have been so few high-level criminal prosecutions for financial fraud.[5] It also explores whether current laws and procedures, as well as the politics of Wall Street and Washington, are even capable of punishing the prime movers of financial fraud in major financial

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http://www.ritholtz.com/blog/2012/02/current-housing-bust-much-worse-than-great-depression/ (last accessed June 27, 2012).

[2] Matt Taibbi, *Why Isn't Wall Street in Jail*? ROLLING STONE, Feb. 16, 2011. *See also* Gretchen Morgenson and Louise Story, *In Financial Crisis, No Prosecution of Top Figures*, N.Y. TIMES, Apr. 14, 2011.

[3] ABC News Interview of Barack Obama by Jake Tapper on 10/6/2011. Transcript available at http://abcnews.go.com/blogs/politics/2011/10/wall-street-corruption-solyndra-and-fast-furious-todays-qs-for-o-1062011/ (last accessed June 27, 2012).

[4] Alan Greenspan, Remarks at Jekyll Island, Nov. 9, 2010. Available at http://www.youtube.com/watch?v=Ewu1SY_LZAk (last accessed June 27, 2012).

[5] Basic financial fraud law speaks to a financial firm's relationship with its clients, investors, or trading partners. The securities laws of 1933 and 1934 require full and fair disclosure of material risks, risks that reasonable investors would consider important. Even without the securities laws, however, employees of financial firms could be charged with violating a variety of other federal and state antifraud statutes, which prohibit making false statements in various circumstances.

The common law, created through rulings over the years by judges, also prohibits fraud under many conditions. Finally, state and federal laws against perjury would criminalize what has become routine in many foreclosures: knowingly false documentation of a lender's right to foreclose on a homeowner. See *infra*, notes 59 – 68 and accompanying text.

institutions. (This article sometimes uses the phrase "Wall Street" to include not only investment banks and brokerage firms in New York City, but also the banking industry as a whole.[6]) This article argues that using criminal law to sanction certain fraudulent activities in the financial sector would help re-establish fundamental aspects of the social contract between business and society. One fundamental aspect is reflected in Greenspan's statement that trust is essential in capital markets.[7] Another fundamental aspect is that accountability for actions that harm others is essential to the ongoing consent and trust of market participants. To the extent that risk and reward have been separated, and that the public sees individuals gaining benefits at the expense of others, the social contract of U.S. capitalism becomes broken.[8]

That it may already be broken can be seen at one of Wall Street's leading institutions, Goldman Sachs & Co. The revelations (or allegations) published in March of 2012, from a departing executive, was that Goldman had largely abandoned fidelity to its

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[6] The regulatory separations between commercial banks and investment banks were largely erased in 1999 by the repeal of Glass-Steagall. *See infra* notes 11 – 12 and accompanying text.

[7] FRANCIS FUKUYAMA, TRUST (1994) (claiming that business is more efficient and productive and innovative where there is trust among many stakeholders in a society).

[8] THOMAS DONALDSON AND THOMAS DUNFEE, TIES THAT Bind (1999)(a general and updated view of social contract theory that posits business and free enterprise as essentially moral, in all of its different cultural contexts, provided that participants/citizens have "voice," "consent," and "right of exit," along with specified structural "hypernorms" that govern substantive "rights or wrongs.") Their structural efficiency hypernorm requires that market participants respect basic principles that underlie the economic system in which they participate. In the various financial frauds described within this article, in Part III, some market participants violated the structural efficiency hypernorm. The net effect is to undermine trustworthy markets, and Fukuyama's observation, *supra* note 7, that successful economies and societies will have a high degree of trust.

clients in favor of higher profits for the firm.[9] The broken-ness can also be seen in recent reports that the Bank of America is, in essence, a criminal enterprise, yet continues to be protected from market failure by repeated government bailouts and non-prosecution for fraud.[10] Other signs of the broken-ness of the social contract are the many major "fixes" that have been proposed or pursued since the government bailout of Fannie Mae, Freddie Mac, and major financial institutions. Politicians, the media, think-tanks, and various scholars and commentators have called for serious banking reform, from re-institution of Glass-Steagall Act,[11] passage of "the Volcker Rule,"[12] proposed regulation of derivatives and credit default swaps[13] and new financial regulation

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[9] Greg Smith, *Why I am Leaving Goldman Sachs*, N.Y. TIMES, Mar. 12, 2012. Smith says, in a widely-quoted paragraph, "It makes me ill how callously people talk about ripping their clients off. Over the last 12 months I have seen five different managing directors refer to their own clients as "muppets," sometimes over internal e-mail. Even after the S.E.C., Fabulous Fab, Abacus, God's work, Carl Levin, Vampire Squids? No humility? I mean, come on. Integrity? It is eroding. I don't know of any illegal behavior, but will people push the envelope and pitch lucrative and complicated products to clients even if they are not the simplest investments or the ones most directly aligned with the client's goals? Absolutely. Every day, in fact." *Id.*

[10] Matt Taibbi, *Too Crooked to Fail: Bank of America has defrauded everyone from investors and insurers to homeowners and the unemployed. So why does the government keep bailing it out?* ROLLING STONE, Mar. 29, 2012, at 58. The extent of fraudulent behavior by Bank of America, if Taibbi is correct, is breath-taking. (Unfortunately, space does not permit extensive documentation of his claims here.)

[11] Banking Act of 1933 (Pub. L. 73-66, 48 Stat. 162, enacted June 16, 1933), popularly referred to as the Glass Steagall Act.

[12] The Volcker rule would separate investment banking, private equity and proprietary trading (as in hedge funds) of financial institutions from their consumer lending arms. It is named after the former Fed chairman, Paul Volcker, and made its way into the House-Senate conference on Dodd-Frank legislation; however, it is widely regarded as significantly weaker than Glass-Steagall before its repeal, and Wall Street firms do not expect it to have a major impact on their proprietary trading.

[13] David Hilzenrath, *SEC reviews proposal regulating derivatives called 'swaps,'* WASH. POST, Oct. 11, 2011.

in the Dodd-Frank Act.[14] Even so, many credible observers are convinced that the dynamics for highly leveraged risk-taking and fraudulent practices by financial institutions "too big to fail" are still in place.[15]

Moreover, the proposed reforms to prevent or remediate future crises have lacked the courage of criminal convictions, either because Obama was correct in saying that what happened wasn't necessarily illegal, or because while adequate laws are in place, they are not being enforced. Possible reasons for this non-enforcement are discussed in Part III of this article.[16] While there are new criminal provisions in the Dodd-Frank legislation that directly apply to the financial sector, it's difficult to tell whether these provisions add true value to the tools of the Department of Justice and the FBI.[17]

The non-prosecution of high-level financial fraud raises central question of balance between public and private institutions: what is the proper role of government in helping to restrain the cultures of greed that periodically emerge?[18] With respect to the financial

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[14] Dodd–Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203, H.R. 4173)

[15] SIMON JOHNSON AND JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN (2010), at 4-6, 148, and 221-22.

[16] *See infra*, notes 69 – 87 and accompanying text.

[17] See Juliana Balliro, *Criminal Provisions and Implications of the Dodd-Frank Act*, available at http://www.nelsonmullins.com/DocumentDepot/Balliro_DRI.pdf. (As a defense attorney, Ms. Balliro sees some of the same "vagueness" problems with these new financial fraud provisions that the Supreme Court saw in *U.S. v. Skilling* and *U.S. v. Black*. *See infra* notes 72 – 74 and accompanying text.)

[18] Greed on Wall Street is by no means "new." The "old school values" celebrated by renowned Wall Street financier Felix Rohatyn probably pre-date the RJR - Nabisco takeover and the highly leveraged buy-outs and insider trading prosecutions of Ivan Boesky and Michael Milken in the 1980s. See Richard Beales, *Rohatyn's values a distant prospect on Wall Street*, REUTERS,

sector, the U.S. Government may have gradually become the chief enabler of too big to fail, and too big to jail.[19]

Despite civil lawsuits and a major settlement between five major banks, the U.S. Government, and 49 states' Attorneys Generals in February of 2012, many major firms that have key roles in the subprime mortgage mess have come out on the plus side of a cost-benefit analysis for their actions.[20] This is especially true in the case of the February 2012 settlement. Neil Barofsky, former Inspector General of the Troubled Assets Relief Program (TARP),

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Oct. 29, 2010, available at http://blogs.reuters.com/breakingviews/2010/10/29/rohatyns-values-a-distant-prospect-on-wall-street/ (last accessed June 27, 2012).

Moreover, as Michael Lewis points out, greed is not confined to Wall Street, but is epidemic on Main Street as well. MICHAEL LEWIS, BOOMERANG: TRAVELS IN THE NEW THIRD WORLD (2011), at 203-205. The epidemic of savings and loan failures in the 1980s should also remind us that greed is by no means confined to the upper echelons of Wall Street. The Savings and Loan Crisis of the 1980s was not Wall Street driven. See KITTY CALAVITA, HENRY PONELL, AND ROBERT H. TILLMAN, BIG MONEY CRIME: FRAUD AND POLITICS IN THE SAVINGS AND LOAN (1997)(the savings and loan debacle of the 1980s was the worst financial crisis of the twentieth century, costing taxpayers $500 billion, and involved many financial fraud). Calavita *et al*. believe that, despite over 1,000 prosecutions, the vast majority of perpetrators were not prosecuted or received minimal sentences

[19] Simon Johnson, *Too big to fail*, Project Syndicate, Feb. 22, 2012. Available at http://www.project-syndicate.org/print/too-big-to-jail. (last accessed June 27, 2012). Note that Alan Greenspan has commented that too big to fail is, more appropriately, too big to exist. Alan Greenspan, *We need a better cushion against risk*, FIN. TIMES, Mar. 26, 2009, available at http://www.ft.com/intl/cms/s/0/9c158a92-1a3c-11de-9f91-0000779fd2ac.html#axzz1pbIs7qo1 (last accessed June 27, 2012).

[20] This does not include Bear, Sterns or Lehman Brothers. But individuals who promoted the highly leveraged bets that proved to be the downfall of their companies were allowed to keep the bonuses they got during the hey-day of subprime securitization. See Susie Madrak, *Lehman Bros., Bear Sterns CEOs Walk Away with Millions,* Nov. 25, 2009, at CROOKS AND LIARS.COM. Available at http://crooksandliars.com/susie-madrak/lehman-bros-bear-stearns-ceos-walked (last accessed June 27, 2012).

has described the settlement as "kind of crazy."[21] Barofsky notes that the agreement was supposed to be a "settlement for this remarkable fraud that the banks and the servicers have created across the country –lying on affidavits, forging affidavits during foreclosures, all sorts of different abuses."[22] The public was told during the Attorney General's press conference that the settlement "was going to bring accountability. It was going to punish the servicers. It was going to be punitive and make them pay for this remarkable misconduct that occurred. . .but the penalty is actually going to involve money flowing from the taxpayer into the banks."[23] In other words, behind the mask of apparent accountability, and the triumphal pronouncements by Attorney General Holder and President Obama, the banks' lawyers successfully negotiated a win for the banks at the expense of the public.[24]

Accordingly, we argue here that some high-level criminal prosecutions for fraud are essential to restore balance in the financial system, a balance that would come from a healthy fear of individual indictment rather than fines paid by the firm, and lawyer fees and fines taken from shareholder earnings.

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[21] American Public Media: Marketplace (Economy), *The mortgage settlement may cost taxpayers*, Interview of Neil Barofsky by Adrienne Hill, Feb. 17, 2012. Available at http://www.marketplace.org/topics/economy/mortgage-settlement-may-cost-taxpayers (last accessed June 27, 2012).

[22] *Id.*

[23] *Id.*

[24] In Barofsky's words, "And instead of . . .being about accountability and punishment it seems like frankly a political whitewash during an election year. So it makes the Department of Justice look good. It makes the attorneys general look good. The banks are happy because they are going to get all the credit for this settlement while receiving money from the taxpayers. Really the only big losers are the taxpayers and, of course, the homeowners." *Id. See also infra,* notes 64-66, which detail the extent to which the five banks obstructed the IG's investigation.

As noted by an anonymous congressional aide, "You put Lloyd Blankfein in [federal] prison for one six-month term, and all this [nonsense] would stop, all over Wall Street. That's all it would take."[25] As it stands right now, however, a simple cost-benefit analysis would reveal that current sanctions against financial institutions are seen as a cost of "doing business." Citigroup, for example, represented that the company had $13 billion of subprime mortgage exposure when they really had $55 billion. The penalty to the chief financial officer, who made $19 million that year, 2007, was $100,000. In a different case, Goldman Sachs was fined $500 million but the date they settled their stock moved up $2 billion.[26]

Scot Paltow of the Wall Street Journal underlined the importance of criminal prosecutions as at least a partial brake on individual and institutional greed. He noted that Wall Street scandals "recur with the grim regularity of earthquakes and forest fires" because

> [W]all Street is where the money is. Beyond the inevitable appeal of billions of dollars changing hands daily, however, lie more peculiar reasons why knavery on a grand scale periodically racks the securities industry.[27]

With the ever-increasing complexity of many financial "products," the ability of ordinary investors to detect fraud is decreased, and even sophisticated investors were unable (or willingly blind) to see the inherent risks in much of the securitized loan instruments such

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[25] See Taibbi, *supra* note 2.

[26] *America's Dual Justice System: One For Wall Street And One For Everyone Else.* By Phil Angelides, Business Insider, Apr. 14, 2011. Available at http://www.zerohedge.com/article/phil-angelides-discusses-americas-dual-justice-system-one-wall-street-and-one-everyone-else [hereafter, Angelides]. (last accessed June 27, 2012).

[27] *The Dark Side of Wall Street: Why Scandals Continue to Erupt*, by Scot Paltow WALL ST. J. Dec. 22, 2002.

as CDOs and SIVs.[28] In short, the subprime mortgage securitization phenomenon was one of those times when many Wall Street firms could simply not "resist treating men and women of Main Street as chickens to be plucked."[29]

In this article, we explore first the general lapse of ethics at all levels, public and private, in the United States. Next, this article describes several specific examples of fraud in the subprime mortgage story, from loan originators like Ameriquest to Wall Street firms such as Lehman Brothers and mega-banks like Bank of America. The article then takes a brief look at fraud laws, and the process of prosecuting financial fraud in the U.S. and the reasons for current non-enforcement of criminal fraud. Finally, the article suggests that our political system is unable to prosecute to the "fullest extent of the law," and concludes that restoring balance to the system requires a more arms-length relationship between U.S. public and private sectors. [30]

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[28] MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE (2010) (Describing how a few sharp-eyed financial analysts, such as David Einhorn, actually read the huge documents which described the underlying assets on which the securitized bonds were based, and began betting against them years before the market for them collapsed.) *See also* ROGER LOWENSTEIN, THE END OF WALL STREET (2010), at 41-44 (describing how even the ratings agencies did not have full access to the data underlying the collateralized mortgage obligations).

[29] Part of the reason, from a psychological/social standpoint, was that when one firm on Wall Street was generating big bonuses making these trades, all firms wanted to do it. See BETHANY MCLEAN AND JOE NOCERA, ALL THE DEVILS ARE HERE: THE HIDDEN HISTORY OF THE FINANCIAL CRISIS (2010), at 153 (describing "Goldman envy").

[30] See Angelides, *supra* note 26. *See also infra*, notes 77-85 and accompanying text. It may be, simply put, that "factor seven" is the most important: arguably the U.S. Government no longer has an arms-length relationship with its major financial institutions such that it can impose effective discipline on financial fraud from and within those institutions. If it cannot, the inscription on the U.S. Supreme Court building that reads, "Equal justice for all" is aspirational, not actual.

II. ETHICAL FAILURES AT EVERY LEVEL

This article does not assume that financial sector ethics are generally worse than ethics elsewhere. From various accounts and from the exhaustive Financial Crisis Inquiry Commission Report[31] it is clear that there was plenty of moral blame to go around, from the politicians and government-sponsored entities that pushed home-ownership[32] to the many mortgage lenders like Countrywide and Ameriquest.

Michael Lewis describes how even relatively sophisticated investors were fooled by the opacity and complexity of the new financial instruments; many bankers in Europe relied on the AAA ratings of securitized mortgage bonds but also had trust in a Wall Street whose dominant ethos had clearly changed. Lewis describes how panicked Wall Street salesmen would go all the way to Germany to get rid of their toxic securitized mortgage bonds, relying on Germanic trust that was based on fair-dealing from Wall Street players of the past.[33]

German trust existed not only because of prior relationships with trustworthy U.S. financiers, but also because the toxic bonds were still, even in 2007, triple-A rated. In The Big Short, Lewis had described how the rating agencies themselves were seduced by the easy money and overlooked fundamental problems with

[31] FINANCIAL CRISIS INQUIRY COMMISSION, FINAL REPORT OF THE NATIONAL COMMISSIONS ON THE CAUSES OF THE FINANCIAL AND ECONOMIC IN THE UNITED STATES, January 2011. The Commission, chaired by Peter Angelides, has provided a lengthy report, including dissenting views, which is available at http://fcic.law.stanford.edu/report

[32] Peter Wallison, known for his work with the American Enterprise Institute, filed a dissenting report in which he claimed that the primary cause of the mortgage meltdown was the politicization of home ownership, which began as early as the Clinton Administration and continued under Bush II. See FCIC report, at 443-533. He singles out Fannie Mae as a principal culprit.

[33] LEWIS, *supra* note 18, at 153.

successively less attractive tranches of subprime mortgage securities from 2004 - 2007. (It is evidently far more difficult to see our own conflicts of interest than those of others.) Most people see themselves as ethical, and probably more ethical than "Wall Street." But Lewis finds that Wall Street isn't actually all that different from Main Street in its ethics. He cites Dr. Peter Whybrow, an Australian anthropologist. In American Mania, Whybrow writes that the human brain evolved over hundreds of thousands of years in an environment defined by scarcity. It was not designed, at least originally, for an environment of extreme abundance.[34] For example, Lewis found through his interviews in Vallejo, California, that the ethical restraints we thought people had are largely absent. Vallejo is a bankrupt city in a state where public employees had lost a sense of perspective about what was proportionate in pay, given the level of public monies available for the common good. "The people who had power in society," he notes, "and who were charged with saving it from itself, had instead bled the society to death."[35]

> It's a problem of people taking what they can, just because they can, without regard to the larger social consequences. . . . Alone in a dark room with a pile of money, Americans knew exactly what they wanted to do, from the top of the society to the bottom. They'd been conditioned to grab as much as they could, without thinking about the long-term consequences.[36]

Lewis concludes: "We have lost the ability to self-regulate, at all levels of the society."[37] If this is so, then we clearly must address what kinds of public actions would be most useful in restraining

[34] *Id.,* at 203-04.
[35] *Id.,* at 203.
[36] *Id.* at 205.
[37] *Id.*

individuals who may be tempted to take advantage of others. In this regard, a compelling case can be made that criminal enforcement against high-level financial fraud needs to be revived, and quickly.

III. FINANCIAL FRAUD, BEFORE AND AFTER THE MELTDOWN

This section considers a few selected examples of financial fraud, starting with fraud at loan originators such as Countrywide and Ameriquest, moving to fraud in the marketing of securitized loans by major financial institutions, and finally looking in at the ongoing fraud in many home foreclosures.

A. Fraud at Ameriquest and Countrywide

In the run-up to the subprime mortgage crisis, non-regulated mortgage lenders like Countrywide and Ameriquest recruited large numbers of young people to find sub-prime borrowers. In some cases, finding people to be dishonest about their income was not difficult. But the demand for subprime mortgage loans, a demand that became very big from Wall Street institutions in 2003 - 2007, created incentives for mortgage company employees to knowingly qualify the unqualified, and to further a high volume of loans by any means necessary.

Michael W. Hudson's book, *The Monster*, provides an example he claims is fairly typical. Mark Glover had worked at Ameriquest only a few weeks when he saw a co-worker doing something odd. "The guy stood at his desk on the twenty-third floor of downtown Los Angeles's Union Bank Building. He placed two sheets of paper against the window. Then he used the light streaming through the window to trace something from one piece of paper to another.

Somebody's signature."[38] At 29, Glover was new to the mortgage business, and worked on commission. He knew that "the only way to earn the six-figure income Ameriquest had promised him was to come up with tricks for pushing deals through the mortgage-financing pipeline that began with Ameriquest and extended through Wall Street's most respected investment houses."[39] He and the other young employees, mostly in their twenties, would work the phones "hour after hour," calling strangers and trying to talk them into refinancing their homes with high-priced "subprime" mortgages."[40]

> It was 2003, subprime was on the rise, and Ameriquest was leading the way. The company's owner, Roland Arnall, had. . .pioneered this risky segment of the mortgage market. . . .Now, with the housing market booming and Wall Street clamoring to invest in subprime, Ameriquest was growing with startling velocity. Up and down the line, from loan officers to regional managers and vice presidents, Ameriquest's employees scrambled at the end of each month to push through as many loans as possible, to pad their monthly production numbers, boost their commissions, and meet Roland Arnall's expectations.[41]

At company gatherings, writes Hudson, Ameriquest managers and sales representatives "[s]wapped tips for fooling borrowers and cooking up phony paperwork."[42] If a customer wanted a fixed-rate

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[38] MICHAEL W. HUDSON, THE MONSTER: HOW A GANG OF PREDATORY LENDERS AND WALL STREET BANKERS FLEECED AMERICA – AND SPAWNED A GLOBAL CRISIS (2010), at 1.
[39] *Id.*
[40] *Id.*
[41] *Id.,* at 1 – 2.
[42] *Id.* at 3.

loan, for example, and you could make more money by selling him an adjustable rate mortgage, it was a fairly simple matter to put a few fixed-rate loan documents on the top of the stack at closing, and bury the real documents (the ones with the upward-accelerating adjustable rate that would kick in two or three years later) near the bottom of the stack. Once the customer got into the rhythm of signing the many documents, "it was easy enough to peel the fixed-rate documents off the top and throw them in the trash." [43] It was also common to create loan documentation that was patently false by pasting the name of a low-earning borrower onto a W-2 belonging to a higher-earning borrower.[44]

For many years, Lehman Bros. and other Wall Street financial institutions needed more and more subprime mortgages for securitization. Arnall and Mozilo (at Countrywide) and others willingly complied. Arnall passed away before any charges could be brought; in 2010, Mozilo settled SEC charges that he misled mortgage buyers by paying a $22.5 million penalty and giving up $45 million of his gains. But Mozilo had made $129 million the year before the crisis began, and nearly another $300 million in the years before that, and admitted no guilt in his settlement with the SEC.[45]

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[43] *Id.*

[44] *Id.* If the loan originators had to hold their own paper, such fraud would never have been countenanced. But predatory lending worked well in conjunction with Wall Street's demand for the underlying homeowner obligations. See GRETCHEN MORGENSON AND JOSHUA ROSNER, RECKLESS ENDANGERMENT: HOW OUTSIZED AMBITION, GREED, AND CORRUPTION LED TO ECONOMIC ARMAGEDDON (2011), at 144 ("Compiling thousands of loans into trust to be sold to investors allowed each participant along the assembly line to deny accountability for predatory loans. Each transfer of the loan–from lender to financier to packager to investors–gave plausible deniability for problems in the mortgages to each of the parties involved.")

[45] Jeff Madrick and Frank Partnoy, *Should Some Bankers Be Prosecuted*, N.Y. REV. OF BOOKS, Nov. 10, 2011. Available at http://www.nybooks.com/articles/archives/2011/nov/10/should-some-bankers-be-prosecuted/?pagination=false&printpage=true (last accessed June 27, 2012).

B. Lehman Brothers

BNC National Bank (BNC) was owned by one of Wall Street's most storied investment banks, Lehman Brothers. Lehman had made a big bet on housing and mortgages, taking on the role of a major player in commercial real estate and, especially in subprime lending. Wall Street bankers and investors eagerly bought the loans produced by BNC, Ameriquest, and other subprime operators. One favorable aspect of the process was the fairly steep fees and interest rates borrowers agreed to (knowingly or not), and this allowed the bankers to charge generous commissions for "packaging" the securities. It also gave generous yields to investors who purchased them. The "up-front" fees on subprime loans often totaled thousands of dollars. As Hudson explains, "Interest rates often started out deceptively low—perhaps at 7 or 8 percent—but they almost always adjusted upward, rising to 10 percent, 12 percent, and beyond."[46]

When the rates re-adjusted, borrowers' monthly payments increased as well, often rising by hundreds of dollars. Those borrowers who tried to escape their overpriced loans by refinancing often had to pay thousands of dollars in "prepayment penalties." Millions of such loans—tied to modest homes in many places across the United—helped generate substantial fortunes for financiers and investors. But they also undermined the larger economy and helped spark a worldwide financial crisis.[47]

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[46] HUDSON, *supra* note 38 at 9.

[47] As Hudson notes,

> The subprime market did not cause the U.S. and global financial meltdowns by itself. Other varieties of home loans and a host of arcane financial innovations—such as collateralized debt obligations and credit default swaps—also came into play. Nevertheless, subprime played a central role in the debacle. It served as an early proving ground for financial engineers who sold investors and regulators alike on the idea that it was possible, through accounting alchemy, to turn risky

C. Goldman Sachs

On Goldman Sachs' website, the first declaration of their Business Principles and Standards is "[o]ur clients' interests always come first."[48] But in selling Abacus 2007-AC1, the clients evidently finished far behind Goldman Sachs. In testimony before the Senate Subcommittee headed by Sen. Carl Levin (D-MI), Goldman CEO Lloyd Blankfein said that clients had the "appetite" for risk, referring to a complex debt package sold by Goldman to clients that did not know that Goldman was also betting against the package.[49] In essence, Blankfein defended selling an investment that it believed would fail, an investment Goldman was betting against without telling the client. "We are not a fiduciary," he told the Financial Crisis Inquiry Commission, at least when it comes to market-making. In April of 2011, Blankfein's defense of market-making in the Abacus case was tested by an SEC complaint against Goldman and Fabrice Tourre.[50] As Professor John Coffee noted at

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> assets into "Triple-A-rated" securities that were nearly as safe as government bonds. In turn, financial wizards making bets with CDOs and credit default swaps used subprime mortgages as the raw material for their speculations. Subprime, as one market watcher said, was "the leading edge of a financial hurricane." *Id.*

[48] http://www.goldmansachs.com/who-we-are/business-standards/business-principles/index.html (last accessed June 27, 2012).

[49] See this frustrating exchange at http://www.youtube.com/watch?v=oOpFbjHcxF0 (last accessed June 27, 2012). It seems fair to say that Levin was from Venus and Blankfein was from Mars in this exchange. See Economy Watch, *Blankfein Speak Martian, Levin speaks Venusian*, at http://voices.washingtonpost.com/economy-watch/2010/04/sen_levin_opens_assault_on_gol.html (last accessed June 27, 2012).

[50] For the full SEC complaint, see http://www.sec.gov/litigation/complaints/2010/comp-pr2010-59.pdf (last accessed June 27, 2012).

the time, the charges by the SEC against Goldman suggested that Goldman had teamed with "the leading short-seller in the industry to design a portfolio of securities that would crash."[51]

The SEC complaint alleges that:

> GS&Co marketing materials for ABACUS 2007-AC1 – including the term sheet, flip book and offering memorandum for the CDO – all represented that the reference portfolio of RMBS underlying the CDO was selected by ACA Management LLC ("ACA"), a third-party with experience analyzing credit risk in RMBS. Undisclosed in the marketing materials and unbeknownst to investors, a large hedge fund, Paulson & Co. Inc. ("Paulson"), with economic interests directly adverse to investors in the ABACUS 2007-AC1 CDO, played a significant role in the portfolio selection process.[52]

Goldman's Fabrice Tourre had allegedly misled ACA into believing that Paulson invested approximately $200 million in the equity of ABACUS 2007-AC1 (a long position) and, accordingly, that Paulson's interests in the collateral section process were aligned with ACA's when in reality Paulson's interests were sharply conflicting. Assuming the allegations are true, this is clearly securities fraud, and certainly not just "market-making" but deliberate deception of a group of clients. As summarized by Felix Salmon,

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[51] "Goldman Sachs charged with mortgage fraud," DAILY HERALD, Apr.16, 2011.

[52] *SEC v. Goldman Sachs & Co*., *supra* note 50, at 1-2. RMBS is the acronym for Residential Mortgage Backed Security.

> The scandal here is not that Goldman was short the subprime market at the same time as marketing the Abacus deal. The scandal is that Goldman sold the contents of Abacus as being handpicked by managers at ACA when in fact it was handpicked by Paulson; and that it told ACA that Paulson had a long position in the deal when in fact he was entirely short.[53]

This kind of deception is cut from the same cloth as Goldman's selling to the German bank, IKA, at a time when it knew that what it was selling was about to become worthless.[54] It is also of a piece with Goldman's conflicted position in the El Paso merger with Kinder Morgan that Delaware's Chancellor Leo Strine found so questionable.[55] In short, Goldman Sachs & Co. either does not

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[53] Felix Salmon, *Goldman's Abacus Lies*, REUTERS, Apr. 16, 2010, Available at http://blogs.reuters.com/felix-salmon/2010/04/16/goldmans-abacus-lies/ (last accessed June 27, 2012).

[54] See LEWIS, *supra* note 33 and accompanying text.

[55] Steven Pearlstein, "Ripping out their eyeballs," WASH. POST, Mar. 18, 2012. Pearlman notes:

> In a scathing opinion issued last month by Delaware's Chancery Court, Chancellor Leo Strine concluded that Goldman had seriously breached its duty to the board and shareholders of El Paso Corp. in advising them to accept a takeover bid from Kinder Morgan, in which Goldman itself held a 19 percent stake and two seats on the board of directors. Goldman argued that it took care to deal with this "potential" conflict-of-interest by having its two Kinder Morgan directors recuse themselves from merger discussions and by bringing in another investment bank, Morgan Stanley, to advise El Paso on the terms of the proposed takeover. But Strine ruled that Morgan Stanley's independence was badly compromised by the fact that its $35 million fee was entirely contingent on the merger going through. In the end, the judge concluded, Goldman benefited in two ways from its unresolved conflict of interest: from the $20 million investment banking fee from El Paso for a transaction in which it claimed to have no active role, and from the lowball ("suboptimal") price that El Paso

recognize a conflict of interest when it stares them in the face, or doesn't care. Either way, the legal system must remind them. In this case, at least, it did so when Goldman settled for $550 million with the SEC.[56]

Yet the total amount of the settlement is far less than Goldman made on this and similar deals; Goldman made nearly $8.5 billion in 2010, the year of the settlement. No high-level executives at Goldman were sued or fined, and only one junior banker, Fabrice Tourre, was at risk of any civil sanctions, a matter that is still unresolved as of this writing. In short, the settlement with the SEC was never likely to serve as a deterrent to future wrongdoing. The real cost to Goldman is reputational, but through the settlement, Goldman put the Abacus issue behind it, and its shares rallied 4% leading into the announcement. The market, in other words, was not distressed over Goldman's "loss" to the SEC. Moreover, skeptics noted that focusing blame on Fabrice Tourre indicated that the SEC was less than thorough in ferreting out fraud at Goldman.[57]

Long-term reputational effects may yet take their toll on Goldman

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> shareholders were persuaded to accept from Kinder Morgan, in which Goldman continues to hold a 19 percent interest. *Id.*

[56] SEC Press Release: Goldman Sachs to Pay Record $550 Million to Settle SEC Charges Related to Subprime Mortgage CDO; Firm Acknowledges CDO Marketing Materials Were Incomplete and Should Have Revealed Paulson's Role. July 15, 2010, at http://www.sec.gov/news/press/2010/2010-123.htm (last accessed June 27, 2012).

[57] Louise Story and Gretchen Morgenson, *Just one suspect in Wall St. fiasco?; Washington's pursuit of a single securities trader draws skepticism*, INT'L HERALD TRIB., June 2, 2011. Story and Morgenson note:

> Indeed, numerous colleagues also worked on that mortgage security. And that deal was just one of nearly two dozen similar deals totaling $10.9 billion that Goldman devised from 2004 to 2007 - which in turn were similar to more than $100 billion of such securities deals created by other Wall Street firms during that period. *Id.*

Sachs & Co. Client trust may be the lifeblood of Goldman Sachs, as Lloyd Blankfein told Senator Levin and the subcommittee. But the revelations by Greg Smith[58] do strongly suggest that making money has taken priority over service to clients, and that various forms of deception are part and parcel of Goldman's money-making strategy.

D. Banks and Foreclosures

Since the fall of 2010, Matt Taibbi has been reporting on the fraudulent practices by lenders in foreclosing on properties. By March of 2012, his reporting on fraudulent practices got official recognition: the Inspector General of the Department of Housing and Urban Development had found that banking leaders ignored obvious and "widespread errors" in the foreclosure process, "[i]n some cases instructing employees to adopt make-believe titles and speed documents through the system despite internal objections."[59] Predictably, the banks "[l]argely focused the blame for mistakes on low-level employees,"[60] but the HUD IG found that managers pushed these lower-level employees to proceed even where decent documentation was lacking.[61]

The Inspector General's report confirms what journalist Matt Taibbi found when he spent a day in one of Florida's "rocket docket" foreclosure courts. In Florida's "rocket docket," retired judges would typically hear cases all day in an expedited special

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[58] Smith, *supra* note 9.

[59] Nelson D. Schwartz and J.B. Silver-Greenberg, "Bank Officials Cited in Churn of Foreclosures," N.Y. TIMES, Mar. 12, 2012.

[60] *Id.*

[61] The IG's reports on each of the five lenders was done to determine whether the banks had complied with applicable foreclosure procedures when processing foreclosures on FHA-insured loans. *See, e.g*. Office of Inspector General, U.S. Department of Housing and Urban Development, "CitiMortgage, Inc. Foreclosure and Claims Process Review," available at http:www.hudoig.gov/Audit_Reports/2012-KC-1801.pdf (last accessed June 27, 2012).

court. Law firms representing lenders were repeatedly allowed continuances where the robo-signed paperwork was contradictory or incomplete. Lawyers would show up at the next hearing with the "correct" paperwork and get judicial approval to foreclose. If the paperwork was still not "correct," the lender's lawyer was again given leave to appear at a subsequent hearing with the right stuff. Homeowners, if represented by counsel at all, often had to admit that payments had not been made, largely because of accelerated interest rates and fees that they had not understood at the time the loans were made. All signs pointed to fraudulent activity by the lenders, but judges were largely willing to overlook it in the interests of clearing the titles and getting past the mortgage-housing debacle.[62]

Florida's "rocket docket," in other words, was only one jurisdiction where fraudulent claims were being made by mortgage-holders. The five national banks investigated by the IG of HUD included Bank of America, JPMorgan Chase, Wells Fargo, Citigroup, and Ally Financial.[63] Reading through the report, observers noted the IG's statements that the banks had tried to obstruct the investigation in various ways. "Even as negotiators for the banks

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[62] Matt Taibbi, *Invasion of the home snatchers*, ROLLING STONE, Nov. 10, 2010. As Taibbi notes,

> If you're foreclosing on somebody's house, you are required by law to have a collection of paperwork showing the journey of that mortgage note from the moment of issuance to the present. You should see the originating lender (a firm like Countrywide) selling the loan to the next entity in the chain (perhaps Goldman Sachs) to the next (maybe JP Morgan), with the actual note being transferred each time. But in fact, almost no bank currently foreclosing on homeowners has a reliable record of who owns the loan; in some cases, they have even intentionally shredded the actual mortgage notes. That's where the robo-signers come in. *Id.*

[63] The IG's reports on each of the five banks were filed the day after the $25 billion settlement between banks, the 49 Attorneys General and the federal government was filed in federal court on March 12, 2012.

were fighting to win the best possible deal, their lawyers were stonewalling other government investigators trying to ascertain the scope of the 'robo-signing' abuses."[64] Bank of America only allowed its employees to be interviewed after the DOJ intervened by compelling testimony through a civil investigation demand.[65] Even then, Bank of America's attorneys often refused to allow employees to answer questions, "[s]topped them in the middle of clarifying information already provided, or counseled them in private before allowing them to provide a response." At Citigroup's mortgage division, the investigation was hindered by the bank's lack of records. "Citigroup simply did not have a mechanism for tracking how many foreclosure documents were signed." JP Morgan Chase and Ally also refused to provide access to some employees and some documents, and impeded the investigation as well. Wells Fargo provided a list of 14 affidavit signers and notaries, but stalled the IG so that the bank's attorneys could interview them first; it then tried to restrict access to just five of those employees. "HUD's inspector general said Ally Financial stonewalled investigators' attempts to interview any of the 18 employees who had received civil investigation demands from the Justice Department. All of those workers invoked their right under the Constitution against self-incrimination."[66]

From a two-year review of foreclosure practices at the five banks, the IG found that in order to speed foreclosures, bank employees

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[64]Ben Hallman, "Mortgage Investigation Consistently Hindered by Major U.S. Banks: HUD IG," HUFFINGTON POST, Mar. 13, 2012, available at http://www.huffingtonpost.com/2012/03/13/mortgage-settlement-investigation-banks-hud_n_1342091.html (last accessed June 27, 2012).

[65] Dan Rivoli, "Banks Stonewalled Probe of Foreclosure Practices: Housing Agency," INT'L BUS. TIMES, Mar. 15, 2012, available at http://www.ibtimes.com/articles314155/20120314/bank-america-foreclosures-report.htm. (last accessed June 27, 2012).

[66] *Id.* Some Wells Fargo employees testified that they signed up to 600 affidavits a day without checking to see if the information was correct. Notaries told investigators that they notarized more than a thousand documents a day, often without witnessing the signature on the documents.

"[s]igned hundreds of legal documents a day without reviewing the accuracy of the foreclosure information, notarized signatures on documents that purported to verify a bank's legal right to foreclose without ever checking whether that was true, and hired law firms that forged signatures en masse – all with the encouragement of management."[67]

In summary, from loan originations, to securitization, and to foreclosures, a great many financial institutions and their employees have engaged in deceitful behaviors that are either fraudulent or border on fraud. We have already seen that various civil actions and large-scale settlements seem incapable of fundamentally changing the individual and institutional temptations to deceive a wide variety of stakeholders, and four years after the meltdown, real accountability for reckless and/or intentional acts of deception is still largely lacking. Certainly the February 2012 mortgage fraud settlement between the U.S. Government, state attorneys general, and five major banks was not accountability for the large-scale fraud by the banks that settled.[68]

IV. CRIMINAL FRAUD, BUT VERY FEW HIGH-LEVEL PROSECUTIONS

There have been very few successful prosecutions of large firm financial or banking executives in the wake of the 2008 financial crisis. The government failed in its prosecution of two Bear, Sterns executives,[69] and has decided in several cases to go with

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[67] *Id.*

[68] See Barry Ritholtz, *Foreclosure settlement a failure of law, a triumph for bank attorneys*, WASH. POST, Feb. 25, 2012. Ritholtz makes the observation that "robo-signing" is, in essence, perjury, and that perjury to the courts used to be punished as a felony. *Id.*

[69] Peter Lattman, *Bears Stearns Ex-managers to Pay $1 Million to Settle Fraud Case*, N.Y. Times, Feb. 13, 2012. The article references the failed SEC prosecution, and that a jury acquitted them of criminal charges "after a monthlong trial." It is worth noting that the settlement had to be approved by

civil penalties rather than risk criminal prosecutions. The Financial Crisis Inquiry Commission (FCIC) found specific violations of securities laws, and referred those to the Department of Justice, but no actions have been taken.[70]

Along with securities fraud laws, for which the FCIC found violations in the lead-up to the meltdown, the generic federal fraud statute is for "wire fraud," generally seen as a natural extension of mail fraud in the face of changing technology.[71] The federal mail fraud statute, as well as various securities disclosure laws, may already be sufficient for some kinds of prosecutions of willful or criminally negligent recklessness in the financial sector. What follows is a brief look at reasons why current laws are either inadequate or underenforced.

A. The "Honest Services" Fraud Statute

In the 1970s and 1980s, prosecutions for "honest services" fraud flourished under the federal mail-fraud statute (1872) and the essentially similar wire-fraud statute (1952).[72] The basic idea is that each company is entitled to "honest services" from its management, and that false statements and fraud in the

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Judge Federic Block, a federal judge in Brooklyn. "In Monday's hearing, he raised his eyebrows over what seemed to him to be a rather small sum of money being paid by Mr. Cioffi and Mr. Tannin to resolve the lawsuit. 'The case is being settled for, relatively speaking, chump change," said Judge Block, but he was "inclined to sign off on it." *Id.*

[70] David Dayen, FCIC Referred Criminal Securities Fraud Violations to Justice Department a Year Ago, Firedoglake, Jan. 30, 2012, at FDL website. Available at http://news.firedoglake.com/2012/01/30/fcic-referred-criminal-securities-fraud-violations-to-justice-deparment-a-year-ago/ (last accessed June 27, 2012). By various accounts, including Dayan's, nothing has come of those referrals. *Id.*

[71] Lewis Gainor. *A Summary of Federal Wire Fraud*, by The Federal Criminal Lawyer, Feb. 9, 2011.

[72] 18 U.S.C. §1346 (Pub. L. 100-690, title VII, Sec. 7603(a), Nov. 18, 1988, 102 Stat. 4508)

See also Roger Donway, *The Honest Services Decision*, The Business Rights Center. Available at http://www.atlassociety.org/brc/honest-services-decision

commission of company business by its managers could lead to prosecution. But the potency of the honest services statute was severely diminished under the Supreme Court decisions in U.S. v. Skilling.[73] As one observer noted, "In its heyday, the honest services theory allowed prosecutors to pursue sleaziness of all sorts without identifying a victim who lost property or money, but now the Supreme Court decision has thrown a large wrench into the system."[74] In Skilling, as well as a companion case, U.S. v. Black, the Court confined 18 U.S.C. §1346 to include only schemes involving bribery and kickbacks. The rationale underlying the decision was that the statute was unconstitutionally vague by failing to apprise potential offenders of the criminal nature of their acts and therefore did not comport with the notice requirement under due process.

B. Causes of Non-enforcement

The causes of the financial meltdown were multiple and complex, but the essence of what has been described in many books about the subject is that deceptive practices were used to induce many borrowers into mortgages they did not understand, that the mortgages were securitized into financial instruments that many buyers did not understand, and that these deceptions bordered on fraud. Overall, and apart from the recent disabling of the "honest services" fraud statute by the U.S. Supreme Court, criminal law enforcement of any complex scheme to deceive or defraud is hampered by a number of factors.

First, some deception is accepted as part of marketplace behavior. Caveat emptor is still a practical "default" position, especially

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[73] *U.S. v. Skilling*, 541 U.S. ___ (2010)(honest services fraud statute, which prohibits "a scheme or artifice to deprive another of the intangible right of honest services", covers only bribes and kickback schemes.)

[74] Nathan Koppel, *Honest Services Fraud Cases on the Wane*, WALL ST. J. Aug. 26, 2010.

where complex transactions are in question, and where a financial institution is selling an investment without a clear fiduciary relationship to the buyer.[75]

Second, the SEC and other federal agencies that prosecute financial crimes often find that juries are mystified by the complexities of financial transactions. Third, prosecutors have to cross the high hurdle of the reasonable doubt standard in complex criminal cases, where more than a few jurors are generally likely to find "reasonable doubt." Fourth, financial wrong-doing at the highest levels often has the protection of corporate attorneys representing the alleged wrong-doers; in the HUD Inspector General's investigation, for example, attorneys were in the background (and sometimes in the foreground) making sure that minimal incriminating information got to the IG, and that employees retained their rights against self-incrimination.[76]

Fifth, as explained by a U.S. Attorney in Miami, Florida, the FBI's resources are limited, and DOJ can only prosecute the files that the FBI prepares; in addition, agents are promoted within the ranks based on successful convictions, and complex cases involving financial fraud are time-consuming and often unsuccessful for reasons noted above. Limited confirmation for the FBI's bias for more "low hanging fruit" can be found on the FBI's mortgage fraud website, which largely points to success in prosecuting borrowers or small-time operators who engage in fraud, rather than major lenders.[77] While these FBI efforts are important, and should be continued, they are not nearly enough. The tendency to go after the simpler cases must be counter-acted with greater resources and

[75] The Levin-Blankfein dialogue during the Senate Financial Subcommittee Hearings is one example of where "Wall Street" believes that it does not always have a fiduciary relationship with a buyer. *See supra* note 49 and accompanying text.

[76] See *supra* note 66 and accompanying text.

[77] http://www.fbi.gov/about-us/investigate/white_collar/mortgage-fraud/mortgage_fraud (last accessed June 27, 2012).

even a different reward system within the FBI. Granted, trying to probe the inner workings of a major lender or financial institution is far more difficult and time-consuming, but even an unsuccessful prosecution must be recognized as a public service.

A recent plea bargain illustrates the problem. In July of 2011, the FBI accused Edul Ahmad in Queens, N.Y., of luring fellow immigrants into subprime mortgages. He allegedly inflated the values of their properties and concealed his role in the deals that put people into ruinous mortgages. But he did not act alone. "Big banks created demand and provided credit for dubious loans," noted a N.Y. Times editorial, "which they bundled into securities and sole to investors."[78] The editorial goes on to point out the highest profile cases brought by the federal government so far (the $550 settlement between Goldman Sachs and the SEC regarding the Abacus investment, and the $335 settlement with Countrywide) did not make individuals accountable, and did not make top executives accountable.[79] They recommend "focusing on large banks and their top echelons."[80] For the reasons noted here, this still seems unlikely, but is indeed crucial to restoring accountability in the system.

Sixth, there is the appearance that major civil lawsuits and government-sponsored settlements create sufficient accountability, but individuals are not held accountable as criminal laws would, and the firms themselves often pay just a portion of the monies they "earned" as a result of deceptive practices. As a general

[78] "On the Trail of Mortgage Fraud," N.Y. TIMES (editorial), Jan. 15, 2012.
[79] *Id.* The editorial notes that for the Goldman Sachs settlement was "over one security and put the blame on a midlevel banker." For Countrywide, the settlement amount did not affect Angelo Mozilo personally, who received over half a billion in compensation from 2000 to 2009, and paid $67.5 million to settle civil fraud charges by the S.E.C. The DOJ did not pursue any criminal charges against Mr. Mozilo, nor did they pursue potential insider trading charges.
[80] *Id.*

strategy, large financial firms recognize that their lawyers can make even a fairly simple trial seem complex, and that jurors are unlikely to convict. That makes it much less likely that there is any restraint on criminal intent and fraudulent behavior by the firms or individuals that count on the firm's legal protection.

Seventh, it is possible that neither political party has the nerve to alienate the major banks as potential funders of their political campaigns. While Obama got considerable support from Wall Street in 2008, and appointed many Wall Street insiders, it appears that as of fall of 2011, very few chief executives at major banks intend to support him financially.[81] It is also possible that, now that Obama does not have Wall Street's support, he may be willing to go after "top echelons" of the banking industry. But he does not have unchecked power in this, for Congress still has "the power of the purse," and any interagency task force must be funded. As well, the President and politicians of both major parties may reasonably believe that "going after" high-level Wall Street fraud might weaken the tentative economic recovery. In any case, the lobbying heft of the banking industry seems strong, as only 5 percent of congressional bills designed to tighten financial regulations between 2000 and 2006 passed, while 16 percent of those that loosened such regulations were approved.[82] Economists found that a major reason was lobbying efforts. In 2009 and early 2010, "financial firms spent $1.3 billion to lobby Congress during the passage of the Dodd-Frank Act. The financial reregulation legislation was weakened in such areas as derivatives trading and shareholder rights, and is being further watered down."[83]

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[81] Charlie Gasparino, "Exclusive: Obama Facing No Support From Wall Street CEOs," FoxBusiness online, Nov. 20, 2011, available at www.foxbusiness.com/politics/2011/11/20/exclusive-obama-losing-support-among-wall-street-ceos/ (last accessed June 27, 2012) (It is a sign of our times that this is even a concern for the President or any presidential candidate).
[82] Madrick and Partnoy, *supra* note 45.
[83] *Id.*

In 2010, Attorney General Eric Holder announced that the Department of Justice will use "every tool available to investigate, prosecute, and prevent mortgage fraud, and we will not rest until anyone preying on vulnerable American homeowners is brought to justice."[84] This intention was reiterated in 2011 when the Attorney General proclaimed:

> We will protect Americans from the financial fraud that devastates consumers, siphons taxpayer dollars, weakens our markets, and impedes our ongoing economic recovery.[85]

Yet a report conducted by the Transactional Records Access Clearinghouse at Syracuse University shows that the federal government was on track to file just 1,365 prosecutions for financial institution fraud in fiscal year 2011. That would be the lowest number of such prosecutions in at least two decades.[86]

Eighth, it is likely that part of the problem is that the federal authorities lack the resources to pursue financial fraud criminals. Financial fraud detection requires a whole different type of training. Creating these types of specialized agents takes significant time and money. In April of 2011, Congress responded by introducing House Resolution 1350 (the Financial Crisis Criminal Investigation Act). The resolution, which is still in committee as of March, 2012, would provide the FBI with the funds to hire 1,000 new agents specifically to investigate and

[84] Department of Justice Press Release on June 17, 2010. Available at http://www.justice.gov/opa/pr/2010/June/10-opa-708.html (last accessed June 27, 2012).
[85] Department of Justice Press Release on April 25, 2011. Available at http://www.justice.gov/usao (last accessed June 27, 2012).
[86] Alexander Eichler, *Federal Prosecution of Financial Fraud Falls to 20 Year Low*, HUFFINGTON POST, Nov, 15, 2011

prosecute financial crimes relating to the 2008 crisis.[87]

Ninth, and finally, it is possible that new criminal statutes need to be crafted that will meet the due process and vagueness concerns of Skilling and Black. The statutes have to be vague enough to comprehend a variety of ingenious fraud, but not so vague that they fail due process standards. In addition, Congress could amend federal fraud statutes to require that prosecutors merely prove that bankers "should have known" rather than actually knowing that they were deceiving their clients. As plausible deniability is often built into corporate structures, this could be a distinct improvement, but still runs into difficulties with standard judicial doctrine in terms of actus reus and mens rea, and may also pose post-Skilling problems in terms of vagueness.

Thus, the verdict on criminal enforcement against high level financial fraud is not entirely in, but four years have passed since the meltdown, and high-level criminal prosecutions have not happened. The February 2012 settlement is sufficient evidence that the government is not serious about pursuing criminal charges against any major bank or high-level bank employee: robo-signing and false affidavits, to the courts, are historically the stuff of which perjury convictions are made. That is, there are enough smoking guns in the HUD IG's report to signal a firestorm of fraud. Thus, it appears that when the stakes are high to the banking industry, even though the fraud is clear and manifest and easily documented, the federal government will yield to lobbying and highly paid lawyering, declare victory for the public, and move on.

V. THE SOCIAL CONTRACT AND U.S. FINANCIAL CAPITALISM

Historically, free market exchanges are consistent with sound ethics and are usually beneficial to society. In the evolution of

[87] See http://www.govtrack.us/congress/bill.xpd?bill=h112-1350 (last accessed June 27, 2012).

markets, people trading both voluntarily and knowingly with others have created a great deal of good, both for themselves and for society. But history is also clear that laws are needed are needed to reinforce voluntary, informed and consensual exchanges in the marketplace. In the case of financial transactions, common law, civil law, and criminal law must all play their respective parts. Based on the FCIC report, as well as many other accounts of the financial meltdown, it is clear that many governmental decisions as well as private sector greed caused the meltdown, and also that, since the crisis, law and legal enforcement have not played a helpful role in holding key people accountable for fraudulent acts.

The harm is not just economic, but social. The lack of serious consequences to financial malefactors erodes the public's trust in both government and leading financial institutions, and creates a belief that the economic system is rigged toward the powerful. After four years of sporadic SEC enforcement, the lack of high-level federal criminal prosecutions, and the mortgage foreclosure settlement of February, 2012, it is clear that real accountability for seriously harmful acts is still lacking. This gives the appearance, along with government bailouts of firms that are too big to fail, that there is a two-tier justice system, and that many actors in the financial sector have reaped the rewards without incurring commensurate risk.

Americans have long admired that those who take entrepreneurial risks can reap the rewards, and that in fair competition, the rewards are theirs to use as they see fit. This seems morally sound in a social and economic context where those who take risks may also suffer serious consequences. But from Arnall and Mozilo, to the leaders of Bear, Stearns, to the private bankers at institutions bailed out by the public who awarded themselves bonuses rather than extend credit, and to the financial institutions unfairly foreclosing on homeowners, much of the financial sector now seems to exist in

a world where traditional risk-reward calculations no longer applies.

The very credibility of institutions that are central to U.S. capitalism is at stake. The apparent private-public partnership of Wall Street and Washington that perpetuates non-accountability for financial fraud also violates the trust of the public, and threatens to undo the social contract of U.S. capitalism that has historically linked risk and reward. Bankers, politicians, judges, prosecutors, and all who care about honest capitalism should understand that fixing financial fraud in the U.S. is now a legal and moral imperative.

INTRODUCTORY LEGAL INSTRUCTORS CAN LEARN FROM JOSEPH WHARTON AND ALBERT BOLLES

By

Donald Mong*

I. INTRODUCTION

What can introductory legal instructors learn from Joseph Wharton, who endowed the first business school, and Albert Bolles, who taught the first legal course there?[1] Wharton and Bolles established what today would be called five learning goals for required legal courses in business schools. Those five learning goals could be summarized as: to understand certain legal topics, particularly from property and merchantile law; to integrate that topical learning with learning from other disciplines; to understand ethical and social responsibilities in business; to develop critical analytical skills; and to develop strong communication skills.[2] [3]

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[1] Alumni folder on Albert Bolles provided by Nancy R. Miller, Public Services Archivist, University of Pennsylvania Archives, and on file with author.

[2] Joseph Wharton, Address to the Wharton School Association of the University of Pennsylvania: Is a College Education Advantageous to a Business Man (1890) (appended earlier letter from Wharton to the Trustees of the University of Pennsylvania establishing terms of his endowment of the Wharton School of

In the century and a quarter since Wharton and Bolles, a myriad of other learning goals and objectives have emerged. Today's instructors can be overwhelmed by trying to sort through that myriad to select the goals and objectives most appropriate for their students. Yet by distilling a century and a quarter of literature, we can see how subsequent goals and objectives evolved from the original five, and how Wharton's and Bolles's initial vision can still guide today's classrooms.

That vision is particularly important after a 2011 study found that 87% of undergraduate business students will receive only three credit hours of required legal instruction.[4] In other words, the introductory legal course will be the one and only required legal course for those students. The study also found that distinctions between the business law approach to required legal courses and the legal environment approach to those courses are blurring.[5] Instructors must therefore pack into the one required course all of the topical knowledge of business law, plus all of the contextual acumen of legal environment. Those instructors need clear learning goals and objectives, and Wharton, Bolles, and their pedagogic heirs can help to provide that clarity.

Finance and Economy) (provided by Ira Rubien, Executive Director of Marketing and Communication, The Wharton School, and on file with author).

[3] UNIVERSITY OF PENNSYLVANIA, THE WHARTON SCHOOL OF FINANCE AND ECONOMY, UNIVERSITY CATALOGUES (1883-4, 1884-5, 1885-6) (available online at http://www.archives.upenn.edu/primdocs/upl/upl1/ucatalog_entry.html) (last accessed June 27, 2012).

[4] Carol J. Miller & Susan J. Crain, *Legal Environment v. Business Law Courses: A Distinction Without a Difference?* 28 J. LEGAL STUD. EDUC. 149 (2011).

[5] *Id.*

II. LEGAL TOPICS

Joseph Wharton was an industrialist, not an educator, and he never used words like learning goals in his endowment terms. Nevertheless, Wharton's terms were specific on the legal topics that students were to understand. Specific topics were those from property law, mercantile affairs (including contracts), constitutional and statutory law, and forms of business organization.[6] Parliamentary procedure was to be taught on the presumption that business persons needed to participate in both public and private meetings. Topics in general were to be, "[t]he history and present status of commercial legislation and the direction in which improvements may be hoped…"[7]

Albert Bolles refined Wharton's vision somewhat in the first years of teaching of legal courses. The 1883-4 catalogue listed both and mercantile and constitutional law as required courses.[8] Two years later, required legal topics also included administrative law, legislation, and civil government.[9] The 1885-6 catalogue noted that mercantile law was to supplement mercantile practice, also taught by Bolles, which included legal topics of property, trusts, and railroads, the common carriers of the day.[10]

After the American Bankers Association endorsed Wharton's model, more universities established business schools.[11] By 1915, the schools' legal professors met as the Association of Collegiate Teachers of Business Law, under the sponsorship of the

[6] Wharton, *supra* note 2, at 32-3.
[7] *Id.*
[8] UNIVERSITY OF PENNSYLVANIA, *supra* note 3 at 31 (1883-4 catalogue).
[9] *Id.* at 36 (1885-6 catalogue).
[10] *Id.* at 37.
[11] University of Pennsylvania, *Penn Current* (January 19, 2012), http://www.upenn.edu/pennnews/current/2012-01-19/record/record-joseph-wharton (last accessed June 27, 2012)..

Association of American Law Schools.[12] Minutes from that meeting indicate that contracts were moving to the top of the list of required legal topics.[13] By the 1930's, textbooks were composed of one-half contracts and sales, and one-half agency and forms of business organization.[14] However, CPA's were concurrently urging more required coverage of negotiable instruments and taxes.[15] Meanwhile, other commentators were advocating coverage of courts and the Anglo-American legal system.[16]

Topical coverage was further modified after the 1959 Gordon and Howell and Pierson Reports urged movement away from the black letter teaching of business law and toward the more contextual teaching of legal environment.[17] More topics about legal history and regulatory environment were added.[18] [19] However, Donnell's 1968 survey indicated that businesspeople themselves were more worried more about a wide variety of liability topics and about how best to work with lawyers.[20] Daughtry's and Klayman and Nesser's surveys then showed that undergraduate alumni believed

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[12] Notes of the inaugural meeting of the Association of Collegiate Teachers of Business Law (December 25-29, 1915) (on file with author).
[13] *Id*.
[14] Nathan Isaacs, 49 HARVARD L. REV. 676 (1935) (reviewing HAROLD F. LUSK, BUSINESS LAW—PRINCIPLES AND CASES (1935) and LEONARD H. AXE, BUSINESS LAW (1935).
[15] Willard J. Graham, *Accounting and Law,* 10 ACCT. REV. 162 (1935).
[16] Harry J. Rathbun, 30 CALIF. L. REV. 240 (1941) (reviewing ROBERT E. STONE, BUSINESS AND PROPERTY LAW (1941).
[17] John Tanner et al., *A Survey of Business Alumni: Evidence of the Continuing Need for Law Courses in Business Curricula,* 21 J. LEGAL STUD. EDUC. 203 (2004).
[18] Hollis K. Martin, *Law for the College Undergraduate: The Past, the Present, and a Proposal,* 6 AM BUS L.J. 459 (1968).
[19] John D. Donnell, *Business Law Textbooks: A Retrospective Exploration*, 22 AM. BUS. L.J. 265 (1984).
[20] John D. Donnell, *The Businessman and the Business Law curriculum,* __ AM. BUS.L.J. 451 (1968).

that criminal law and negotiable instruments should also be near the top of required coverage lists.[21] [22]

As the twenty-first century began, technology-related legal topics like e-discovery and intellectual property protection became increasingly important for coverage.[23] [24] The shift to an entrepreneurial economy also prompted calls for more specific coverage of mortgages, leases, and collection procedures, those topics frequently encountered by almost all entrepreneurs.[25]

Miller and Crain provided recent literature on topical coverage when they surveyed 404 undergraduate AACSB schools in 2005.[26] Miller and Crain found that contracts continued to be one of the top three topics in both schools that used the business law approach for required legal courses and schools that used the legal environment approach. The vast majority of all schools used the legal environment approach and focused more heavily on topics like regulation, ethics, social responsibility, liability, risk identification, and legal constraints. The remaining schools that used the business law approach focused more heavily on contracts, the Uniform Commercial Code, torts, and legal systems.

The foregoing pages contain many legal topics for students to understand. Unfortunately, Miller and Crain found that over 87% of today's undergraduates will have only one, 3-credit course in

[21] William H. Daughtrey Jr., *Report on a Survey of Topic Preferences of Students in the Business Law Area,* 15 AM BUS L.J. 71 (1977).
[22] Elliot Klayman & Kathleen Nesser, *Eliminating the Disparity between the Business Person's Needs and What is Taught in the Basic Business Law Course,* 22 AM BUS L.J. 41 (1984).
[23] Daphyne S. Thomas & Mark L. Usry, *Entrepreneurship Classes Must Include More Legal Topics,* 16 BUS. FORUM 10 (1991).
[24] Sandra Malach et al., *Differentiating Legal Issues by Business Type,* 44 J. SM. BUS. MGMT 563 (2006).
[25] Thomas & Usry, s*upra.*
[26] Miller & Crain, *supra.*

which to acquire that understanding.[27] As recently as 1966, undergraduates had an average of 4.4 credit hours, or more than one course, in which to do so.[28] Yet today's curriculum does not provide that luxury, and instructors must cover all needed topics in a single course. Some topics require greater coverage than others, but it is important that students receive at least some exposure to virtually all of them.

One solution is to organize the learning goal of understanding certain legal topics into four learning objectives:

1. to understand property (including credit securement);

2. to understand contracts (including the Uniform Commercial Code);

3. to understand liability and regulatory matters (including criminal law, torts, and constitutional/administrative law); and

4. to understand business relationships (including agency, forms of business organization, basic tax consequences, and securities).

Those four learning objectives are lot to cover in one semester, but they allow instructors to organize the required legal course into four equal modules. Those modules can then progress from the relatively fixed rules of property law, to the heart of the course in contracts, to the complexities of the liability/regulatory environment, and finally to the comprehensiveness of business relationships. As we shall see throughout this article, such

[27] *Id.*
[28] J.A. Burger, *A Survey of Business Law,* 5 AM BUS L.J. 203 (1967).

organization can also help instructors to address other learning goals and objectives for the course.

III. CPA- RELATED TOPICS

A fifth learning objective might be to understand CPA-related topics. Other than law itself, accounting is the discipline that has had the greatest influence on topical coverage in required legal courses. Two of Wharton's five original instructors were in accounting and taxes.[29] Law became part of CPA exams in 1896, and accounting departments pushed for required legal courses to cover more CPA-related topics.[30] The increased complexity of accounting and tax codes throughout the twentieth century only added to needed coverage.

Still, early commentators were careful to differentiate legal coverage of given topics from accounting coverage of those topics. A 1932 article advised accountants to study legal principles, not details, and to refrain from giving legal advice.[31] The article emphasized that the accountant's role and privileges concerning confidential information were quite different than the lawyer's role and privileges. By 1964, however, the American Accounting Association was talking about a seamless web between law and accounting and urging specific coverage of a number of CPA-related topics in required legal courses.[32]

Prentice acknowledged that accounting departments preferred required legal courses to focus on the black letter rules of CPA-related topics.[33] Prentice, however, believed that accounting

[29] Wharton, *supra* note 2, at 30-32.
[30] Robert A. Prentice, *The Case for Educating Legally Aware Accountants,* 38 AM BUS L.J. 597 (2001).
[31] Graham, *supra* note 15.
[32] American Accounting Association, *Report of Committee on Courses and Curriculum*, 1964.
[33] Prentice, *supra* note 30.

should be a learned profession, not merely a technical one, and that required legal courses could help accountants to broaden their perspectives. He emphasized that law was interwoven into virtually all business transactions and needed to be taught accordingly. Prentice essentially argued that the legal environment approach could help accountants as much as it helped other business students.

Kocakulah *et al.* then conducted two surveys of accounting chairs in 2008 and 2009, respectively.[34] [35] Kocakulah *et al.*'s. own preference was for more black letter teaching of CPA-related topics in required legal courses. However, their surveys showed that most accounting chairs now favored the legal environment approach for teaching. Kocakulah *et al*. thus suggested a compromise of teaching both black letter rules and legal environment context within the required introductory legal course. This suggestion was given added importance when Miller and Crain found that only one-third of undergraduate business schools were requiring even accounting students to take a second legal course.[36] As recently as 1977, undergraduate accounting students had received an average of 5.4 credit hours of required legal training,[37] meaning that they had a second required legal course in which to cover CPA-related topics.

Clearly, then, understanding CPA-related topics is an important learning objective of today's required legal courses. At the same time, it is important that the CPA-related learning objective not

[34] Mehmet C. Kocakulah et al., *The Business Law Education of Accounting Students in the USA: The Accounting Chairperson's Perspective,* 17 ACCOUNTING EDUC. J. 17 (2008).
[35] Mehmet C. Kocakulah et al., *The Present State of the Business Law Education of Accounting Students: The Business Law Professor's Perspective*, 26 J. LEGAL STUD. EDUC. 137 (2009).
[36] Miller & Crain, *supra* note 4.
[37] Jan W. Henkel, *The Uniform CPA Examination—Factors in Achieving Success on the Business Law Section,* 14 AM BUS L.J. 377 (1977).

overshadow the other learning goals and objectives of the courses. Covering CPA-related topics as they occur naturally within the previous four-module outline for the course can help instructors to maintain that balance. So too can an understanding of Wharton's second original learning goal, integration of learning.

IV. INTEGRATION

Wharton's second original learning goal was to integrate legal learning with learning from other business and non-business disciplines. Wharton called his endowed school the Wharton School of Finance and Economy and wrote that its purpose was to, "establish means for imparting a liberal education in all matters concerning Finance and Economy."[38] He decried "narrowness and empiricism," and stressed that overall instruction was to be based on "…broad principles deduced from all human knowledge, and ground in science, as well as in art…."[39] Integration of learning was never mentioned in the legal sub-section of Wharton's endowment terms, but the intent was clear. Students were to be trained to liberally integrate knowledge from diverse fields.

Of course, integration of learning might have been simpler in those days. Albert Bolles was one of only five instructors included in Wharton's endowment, the others being in the disciplines of accounting, money & currency, taxes, and what today would be called economics.[40] Bolles taught both law and finance courses in the early years of the school[41] and also wrote textbooks in law,

[38] Wharton, *supra* note 2, at 29.
[39] *Id. at 26-27.*
[40] *Id. at 30-32.*
[41] First Annual Report of the Wharton School of Finance and Economy, University of Pennsylvania, General Administrative Records (UPA 3), Box 19, Folder; 1881 Wharton School, University of Pennsylvania Archives, Philadelphia, PA. 1.1.

banking, industrial history, and financial history.[42] The school's first annual report to the provost emphasized that law was to "[e]mbrace a full discussion of the actual methods of business management . . . with constant reference to the legal aspects of such transactions."[43] Legal learning was thus to integrate with broad business learning and to focus on the real-world practices of companies.

As business schools grew, however, learning became less integrated. Business faculties became more departmentalized, and legal departments concentrated more on CPA-related topics. In 1970, Dunfree and Decker sought ways to re-integrate legal learning with overall business learning.[44] Dunfree and Decker urged legal instructors to organize their courses not by traditional legal topics, but how those topics related to specific business functions. Dunfree and Decker essentially returned to the approach that Bolles had used in the beginning. Dunfree and Decker's timing, of course, was in the wake of the 1959 Pierson and Gordon and Howell reports, which had urged more contextual teaching of law and other business disciplines.[45]

Frascona later reaffirmed the importance of integration, even while arguing that required legal courses should be taught to relate to individual transactions, rather than to broader business functions.[46] MacDonald and Ramaglia then took perhaps the broadest approach of all to integration by using a liberal arts approach based on law's

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[42] Alumni folder on Albert Bolles, *supra* note 1; UNIVERSITY OF PENNSYLVANIA, *supra* note 3.
[43] First Annual Report, *supra.*
[44] Thomas W. Dunfee & C. Richard Decker, *Needs and Proposal: Specific Integration of Business Law into the Business School Curriculum,* 7 AM BUS L.J. 277 (1970).
[45] Thomas W. Dunfee et al., *The Business Law Curriculum: Recent Change and Current Status,* 18 AM BUS L.J. 59 (1980).
[46] Joseph L. Frascona, *Business Law Is Business Law,* 15 AM. BUS. L.J. 7 (1977).

historical, contextual, and international evolution.[47] MacDonald & Ramaglia argued that understanding the contextual relationships of business transactions could sometimes be more important than understanding the details of the transactions themselves.

Morgan, however, believed that legal instructors had become too focused on political science in their integration attempts.[48] Morgan advocated an interdisciplinary approach for required legal learning, but one that focused mostly on law's relationships with other business disciplines only. His approach was to balance the teaching of private law, public law, and developmental law. Private law was to include such traditional topics as contracts and torts. Public law was to include such topics as antitrust and employment, securities, and consumer law. Developmental law was to include such emerging socioeconomic, political, and technological topics as could alter existing business/legal relationships.

Lampe then showed how integration could affect the legal topics chosen for the required course.[49] Lampe urged teaching the required legal course from the business manager's perspective, rather than from the lawyer's perspective. Commenting that only a small percentage of business students would become CPA's or attorneys, Lampe advised instructors to focus on topics like preventing legal problems, hiring and managing lawyers, staying out of court, and using self help for legal matters. To make room for these topics in the syllabus, Lampe called for de-emphasizing traditional topics like contracts, torts, and agency law.

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[47] Diane B. MacDonald & Judith A. Ramaglia, *Teaching International Business Law: A Liberal Arts Perspective*, 22 J. LEGAL STUD. EDUC. 39 (2005).
[48] James F. Morgan, *Legal Studies in Business: Toward Realizing Its Potential in the New Millennium*, 78 J. EDUC. BUS. 285 (2003).
[49] Marc Lampe, *A New Paradigm for the Teaching of Business Law and Legal Environment Classes,* 23 J. LEGAL STUD. EDUC. 1 (2006).

Recent authors have taken integration to a higher level by seeking to unify a company's legal strategy with its overall business strategy,[50] and by using strategic legal knowledge for competitive advantage.[51] Strategic integration is an exciting field that can show students how lawyers can be active partners in a company's progress.[52] Still, a learning objective of understanding strategic integration is probably beyond the capabilities of undergraduates, who normally take the required legal course at the 300 level.[53] Instructors should focus instead on two other learning objectives: To integrating legal learning with other disciplines of the business curriculum and to relate legal learning to the everyday functional areas of a company. Those functional areas are where most students will be employed and the ones to which they can most readily relate legal teaching.

V. ETHICS AND SOCIAL RESPONSIBILITY

Wharton's third original learning goal was to understand ethical and social responsibilities in business. Then again, Wharton's treatment of ethics consisted first of an admonition against "[t]he immorality and practical inexpediency of seeking to acquire wealth by winning it from another, rather than by earning it through some sort of service to one's fellow-men (sic)."[54] In other words, Wharton was primarily concerned that students not gamble. However, his endowment terms also spoke of "[t]he necessity of rigorously punishing by legal penalties and by social exclusion those persons who commit frauds, betray trusts, or steal public

[50] Constance E. Bagley, What's Law Got to Do With It? Integrating Law and Strategy, 47 AM BUS L.J. 587 (2010).
[51] George J. Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage,* 47 AM BUS L.J. 641 (2010).
[52] *Id.*
[53] Miller & Crain, *supra* note 4.
[54] Wharton, *supra* note 2, at 34.

funds, directly or indirectly . . .” and of “[m]aintaining sound financial morality . . .”[55]

Wharton’s treatment of social responsibilities was even broader. His vision was to “[q]ualify (individuals) for the solution of the social problems incident to our civilization . . .”[56] and to “[d]raw (those individuals) into careers of unselfish legislation and administration . . .”[57] Required legal courses were to train students in the rules of participating in both private and public meetings, reinforcing the expectation that students would become “[m]ost useful members of society, whether in private or public life . . .”[58] Early school catalogues, which Bolles would have drafted as its secretary, reinforced Wharton’s words.[59]

After somewhat of a historical lag, authors next focused in depth on the learning goal of ethics and social responsibility through jurisprudence.[60] Authors called jurisprudence the philosophy of law[61] and sought to show how differing ways of thinking about law’s role in society could result in differing ethical and social implications.[62] Fisher believed that studying jurisprudence exposed students to law’s great thinkers and helped them to gain a deeper appreciation for ethical and social concerns.[63] He noted that AACSB standards had recently been amended to require consideration of ethical matters within the economic and legal context of business. Ingulli and Black later sought to expand the

[55] *Id.* at 29, 34.
[56] *Id.* at 27.
[57] *Id.* at 28.
[58] *Id.* at 28, 32-33.
[59] UNIVERSITY OF PENNSYLVANIA, *supra* note 3.
[60] Murray S. Levin, *Reflections on Enhancing the Understanding of Law through Ethical Analysis,* 27 J. LEGAL STUD. EDUC. 247 (2010).
[61] *Id.*
[62] Edwin W. Tucker, *Content of the Introductory Business Law Course,* 15 AM BUS L.J. 15 (2012).
[63] Bruce D. Fisher, *A Role for Jurisprudence in the Business Law Curriculum,* 15 AM. BUS. L.J. 38 (1977).

ethical debate to include all genders, races, and classes through diverse classroom discussions.[64]

In recent decades, authors have called for more ethical coverage in the classroom and more ethical research by faculty.[65] Murphy described a school-wide project to infuse ethics into all courses.[66] Despite finding positive faculty and student feedback, she also found concerns about whether using ten percent of the syllabus for ethics was a proper fit for the required legal course. McGill's approach to ethical and social learning tried to overcome those time concerns by merging academic integrity discussions with the traditional legal topics like contracts, torts, and intellectual property protection.[67]

Pressures to infuse more ethical and social responsibility learning into required legal courses are sure to continue. For example, a recent article promoted a sustainability project for those courses, noting that AACSB standards now encouraged "a new generation of ethical leaders that can support sustainability."[68] Meanwhile, other articles have advocated the use of ethical and social responsibility discussions to gain deeper legal understandings overall. Levin replaced rule-based ethical learning with

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[64] Elaine D. Ingulli, *Transforming the Curriculum: What Does the Pedagogy of Inclusion Mean for Business Law?* 28 AM BUS L.J. 605 (1991).
[65] *See, e.g.,* Klayman & Nesser, *supra* note 22*;* Thomas W. Dunfee, *On the Synergistic, Interdependent Relationship of Business Ethics and Law,* 34 Am. Bus. L.J. 317 (1996); Tonia Hap Murphy, *Reneging: A Topic to Promote Engaging Discussions About Law and Ethics in a Business Law or Legal Environment Course*, 26 J. LEGAL STUD. EDUC. 325 (2009).
[66] Tonia Hap Murphy, *Michael Novak's Business as a Calling as a Vehicle for Addressing Ethical and Policy Concerns in a Business Law Course*, 25 J. LEGAL STUD. EDUC. 17 (2008).
[67] Shelley McGill, *Integrating Academic Integrity Education with the Business Law Course: Why and How?* 25 J. LEGAL STUD. EDUC. 241 (2008).
[68] 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).

discussions drawing from the liberal arts and from jurisprudence.[69] Willey and Burke used those discussions as part of a constructivist philosophy to help students learn new legal knowledge by relating it to prior personal knowledge and experiences.[70] The authors acknowledged, however, that the crowded syllabi gave little time for deeper learning in required legal courses.

Understanding ethical and social responsibilities in business thus remains an important learning goal for required legal courses. However, while Miller and Crain's 2005 survey recorded near-universal support for the goal, that study found little agreement on the best placement for the learning goal within the overall business-school curriculum.[71] Accordingly, multiple disciplines are simultaneously addressing ethical and social responsibilities in business, and required-legal-course instructors might do best to focus their particular learning objectives on things that only legal courses can do best. One learning objective might be to identify conflicts between legal responsibilities and ethical and social responsibilities (without trying to resolve those conflicts through in-depth analyses). Another learning objective might be to identify the correct procedural steps to take if confronted with ethical/legal conflicts early in one's career. Those two learning objectives should provide students with solid footing for entry-level positions.

VI. CRITICAL ANALYTICAL SKILLS

Wharton's fourth original learning goal was to develop critical analytical skills. Wharton assigned this learning goal to all disciplines of his endowed school by requiring original theses from students. Subject matter for the theses included legal topics like "[l]ife-insurance, tontines, annuities and endowments; Reciprocity

[69] Levin, *supra* note 60.
[70] Lorrie Willey & Debra D. Burke, *A Constructivist Approach to Business Ethics: Developing a Student Code of Professional Conduct*, 28 J. LEGAL STUD. EDUC. 1.
[71] Miller & Crain, *supra* note 4.

and commercial treaties . . ."[72] The theses themselves were to be "[l]ucid, terse, and sincere, showing mastery of the subject, with appropriate and logical arrangement of parts, leading to a definite statement of conclusions reached."[73]

To prepare for those theses, students were to be "[t]aught and drilled, not lectured to without care whether or not attention is paid."[74] Of all Wharton's original learning goals, the development of critical analytical skills might be the most indirectly stated, but it was certainly more than just part of "[a]n ordinary good education…not here dwelt upon, because it is desired to direct attention to the peculiar features of the (business) school."[75]

Bolles, of course, was key to developing those critical analytical skills in the earliest students. The importance that early faculty placed on the skills can be seen in the 1915 minutes of the inaugural meeting of the Association of Collegiate Teachers of Business Law.[76] Those minutes record unanimous agreement that required legal courses should train students in legal analysis, not just inform them of legal rules. Cases were listed as the preferred tool for that analytical training.

A 1940's article also advocated the use of cases and warned that many instructors were focusing only on black letter rules of legal topics, rather than requiring deeper analysis from students.[77] Case advocacy continues to this day,[78] as do concerns about the proper

[72] Wharton, *supra* note 2, at 35.
[73] *Id.* at 33.
[74] *Id.* at 33.
[75] Notes of the inaugural meeting of the Association of Collegiate Teachers of Business Law, *supra* note 12..
[76] *Id.*
[77] Harry J. Rathbun, book review of Robert E. Stone, BUSINESS AND PROPERTY LAW, Chicago, The Foundation Press (1941).
[78] Darren Charters et al., *Using the Case Study Approach to Challenge Students in an Introductory Business Law Course*, 26 J. LEGAL STUD. EDUC. 47 (2009).

depth of analysis in required legal courses. Zacharias revisited that latter concern and observed that business schools were attempting to cover in one required legal course all of the topics that law schools took two years to cover[79] Zacharias further found that undergraduates were not yet prepared to understand rule manipulation, the subtleties of how minor changes in circumstances can affect the appropriate legal rules to apply. In other words, undergraduate business students were limited in the depth of analysis that could be expected from them.

McDevitt disagreed and wanted to immediately immersion undergraduates into appellate-level cases.[80] He reasoned that because 40% of Supreme Court cases involved business issues, students could learn about those issues by conducting in-depth Internet research, by writing briefs, and by presenting oral arguments. McDevitt's goals were to challenge introductory students to active learning and to sharpen research and communication skills, but his approach would seem more suitable for higher-level legal courses, not for required introductory ones.

Other approaches to the development of critical analytical skills have also been proposed. Recent articles have suggested that both contracting exercises[81] and negotiating exercises[82] can be used for that purpose in required legal courses. Meanwhile, Burke and Johnson have argued that maintaining one's competitive advantage in the 21st Century global economy will require even more right-

[79] Lawrence F. Zacharias, *The Business of Law,* 31 CALIF. MGMT. REV. 121 (1988).
[80] William J. McDevitt, Active Learning through Appellate Simulation: A Simple Recipe for a Business Law Course, 26 JOURNAL OF LEGAL STUDIES EDUCATION, 245(2009).
[81] Susan M. Denbo, *Contracts in the Classroom—Providing Undergraduate Business Students with Important "Real Life" Skills,* 22 J. LEGAL STUD. EDUC. 149.
[82] Diana Page & Arup Mukherjee, *Promoting Critical-Thinking Skills By Using Negotiation Exercises,* 82 J. EDUC. BUS. 251 (2007).

brain skills like critical analysis.[83] Burke and Johnson believed that required legal courses to be a prime setting in which to develop those skills.

Instructors of required legal courses must therefore give considerable weight to the learning goal of developing critical analytical skills. The challenge is to adopt such learning objectives as can balance that goal with the course's other learning goals and objectives and as can correctly gauge the level of critical analysis of which one's own undergraduates are capable. Understanding Bloom's taxonomy can help, as Manton et al. showed when they applied that taxonomy to required legal courses.[84] Bloom's six levels of learning began with the student acquiring knowledge and progressed with him/her comprehending it, applying it to situations, and analyzing it. Bloom's highest two levels of learning then came when the student synthesized that knowledge with other knowledge and when (s)he filtered that knowledge through ethical value judgments. Manton et al. emphasized that proper testing of student knowledge had to match the level of learning in which the student was currently engaged.

Samuels and Coffinberger applied that concept to determine whether objective questions or essays worked better for testing knowledge in required legal courses.[85] Samuels and Coffinberger found that objective questions worked better for testing the breadth of knowledge required for learning during the lower steps of Bloom's taxonomy. By contrast, essays worked better for testing

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[83] Debra D. Burke et al., *The Twenty-First Century and Legal Studies in Business: Preparing Students to Perform in a Globally Competitive Environment*, 27 J. LEGAL STUD. EDUC. 1 (2010).
[84] Edgar Manton et al., *Testing the Level of Student Knowledge,*124 EDUC. 682 (2004).
[85] Linda B. Samuels & Richard L. Coffinberger, *Balancing the Needs to Assess Depth and Breadth of Knowledge: Does Essay Choice Provide a Solution?* 22 J. LEGAL STUD. EDUC. 103 (2005).

the depth of knowledge required for the critical analytical learning at the higher steps of Bloom's taxonomy. The key, however, was that the lower learning was required before the student could undertake the higher learning.

Murphy addressed proper sequencing of critical analytical learning by undergraduates in her review of Willingham's WHY DON'T STUDENTS LIKE SCHOOL? A COGNITIVE SCIENTIST ANSWERS QUESTIONS ABOUT HOW THE MIND WORKS AND WHAT IT MEANS FOR THE CLASSROOM.[86] Willingham had emphasized that students must first possess a firm base of factual knowledge in the matter to be critically analyzed before they could be expected to critically analyze that matter. For Murphy, that meant that there was still a need for "good old-fashioned lecturers and preclass (sic) reading assignments"[87] in the overall process of developing critical analytical skills.

As Yordy put it, instructors needed to neither overwhelm nor underwhelm students at each stage of the required legal course.[88] Yordy's work was based on cognitive development theory, which described how students progressed from passively receiving knowledge at earlier stages of their academic careers to actively acquiring and challenging that knowledge at later stages. Yordy proposed using cognitive development theory to help to establish the order of topical coverage in required legal courses. He believed that legal topics ranged from the simpler to the more complex, and legal authority ranged from the more clear-cut to the

[86] Tonia Hap Murphy, 27 J. LEGAL STUD. EDUC. 357 (2010) (reviewing DANIEL T. WILLINGHAM, WHY DON'T STUDENTS LIKE SCHOOL? A COGNITIVE SCIENTIST ANSWERS QUESTIONS ABOUT HOW THE MIND WORKS AND WHAT IT MEANS FOR THE CLASSROOM (2009).
[87] *Id.*
[88] Eric D. Yordy, *Using Student Development Theory to Inform Our Curriculum and Pedagogy: A Response to the Secretary of Education's Commission on the Future of Higher Education*, 25 J. LEGAL STUD. EDUC. 51 (2008).

more ambiguous.[89] Yordy believed that placing the simpler and more clear-cut legal topics earlier in the course would allow students to gain the broad factual basis in law needed before trying to synthesize, analyze, and evaluate the course's later topics.

Yordy's proposal does not always work with topics as wide-ranging as the ones that must be covered in the required legal course. For reference, however, one might look at the four topical learning objectives proposed earlier in this article. Those four learning objectives began with property law and its well-established rules, progressing ultimately to business relationships, the area requiring the most highly integrative and ethically based skills. The same principle can apply to proper sequencing of learning objectives for developing critical analytical skills themselves. Early in the course, learning objectives might better focus on simple issue identification and rule statement. Later in the course, learning objectives might progress to higher levels of analysis. The correct level of that analysis is a matter for individual instructors to gauge with their own students, but Samuels and Coffinberger cautioned against expecting law-school-type results from undergraduates.[90]

VII. COMMUNICATION SKILLS

Having written extensive endowment terms himself, Wharton had high expectations for his final learning goal of developing strong communication skills. On the oral side, "Elocution should be taught and practiced to the extent of habituating the students to clear, forcible, and unembarrassed utterance before an audience…not…to promote mere rhetoric or prettiness."[91] On the written side, required original theses were to be "[l]ucid, terse, and sincere, showing mastery of the subject, with appropriate and

[89] *Id.*
[90] Samuels & Coffinberger, *supra* note 85.
[91] Wharton, *supra* note 2, at 33.

logical arrangement of parts, leading up to a definite statement of conclusions reached."[92] Like the learning goal of developing critical analytical skills, Wharton assigned the learning goal of developing strong communications skills to all disciplines of his endowed school. Bolles's own communication skills while serving as the school's initial secretary and writing many of its initial textbooks attest to how highly he valued strong communications skills.[93]

The learning goal of developing strong communications skills took on added importance for required legal courses in the last century. Siedel found more and more companies assigning legal work to non-lawyers, rather reserving that legal work for the company's lawyers.[94] Business school graduates thus had to be firmly grounded in correct legal terminology and good oral and written communications skills to deal with those assignments.

Olazábal recently compared good legal writing to haiku, the Japanese poetry form based on economy of words and meanings.[95] She believed that required legal courses were ideal settings in which to teach the undergraduate to focus on succinct paragraphs and on the IRAC style of writing. Cooley, too, urged more writing in the required legal course.[96] She wanted instructors to focus on the complexities of legal language and proposed writing projects that could be piggybacked onto other parts of crowded syllabi.

The required legal course is fertile ground for developing strong communications skills, but it is important for instructors to

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[92] *Id.* at 35.
[93] UNIVERSITY OF PENNSYLVANIA, *supra* note 3.
[94] George J. Siedel III et al., *An Executive Appraisal of the Importance of Business Law,* 22 AM BUS L.J. 249 (1984).
[95] Ann Morales Olazábal, *Law as Haiku*, 22 J. LEGAL STUD. EDUC. 123 (2005).
[96] Amanda Harmon Cooley, "*Piggybacking" on Business Communication through Interdisciplinarity: Developing Student Communication Skills in Legal Environment of Business Courses,* 72 BUS. COMMUNIC. Q. 431 (2009).

remember that the course's purpose is to train businesspeople, not lawyers. Learning objectives for strengthening communications skills must therefore focus primarily on the communications skills needed for entry-level management jobs. The most frequent legally related task encountered by entry-level managers is not in-depth legal analysis. It is instead the daily documentation of numerous transactions and employee matters that might eventually become parts of the records of lawsuits and regulatory inquiries. In other words, the most frequent legally related task for entry-level managers is Olazábal's haiku, but written on a time slip.

Thus, the first learning objective for developing strong communications skills should be to apply correct legal terminology in a wide variety of legal topics. The second learning objective should be to both concisely and comprehensively state legal issues. For most students, short-answer tests and gentle Socratic questioning in class might do more to strengthen these types of communication skills than term papers and multiple-choice tests can.

VIII. LESSONS LEARNED

The learning goals of Wharton, Bolles, and their pedagogic heirs are clear. Instructors of required legal courses should begin with the learning goal of understanding certain legal topics, since that is the goal upon which all other learning goals and objectives must be based. It was no accident that Wharton's most continuous instructions for required legal courses came in an extensive paragraph about topical coverage.[97] Wharton focused heavily on the topics of property, constitutional, merchantile and organizational law, but later commentators broadened that coverage.

[97] Wharton, *supra* note 2, at 32-3.

As previously stated, today's instructors might organize their topical coverage into five learning objectives:

1. to understanding property (including securing credit);
2. to understand contracts (including the U.C.C.):
3. to understand liability and regulatory matters (including criminal law, torts, and constitutional/administrative law);
4. to understand business relationships (including agency, forms of business organization, basic tax consequences, and securities); and
5. to understand CPA-related topics as they appear naturally within the first four learning objectives.

Those learning objectives would allow instructors to progress from the relatively fixed rules of property law, to the heart of the course in contracts, to the complexities of the liability/regulatory environment, and finally to the comprehensiveness of business relationships. The learning objectives would also set the stage for the remaining learning goals and objectives of the course.

The second learning goal of the required legal course is to integrate topical legal learning with learning from other disciplines. Bolles made his single most important contribution in this area, for he established the practice of integrating legal learning not only with other academic disciplines, but with the specific functions of the real-world companies.[98] Today's instructors of required legal courses should focus on learning objectives aimed at the functional areas of such companies and leave strategic integration to higher-level courses.

There is no substitute for continuous integrative guidance in classroom discussions, but some instructors may find that a team project helps students to better relate legal terms and concepts to specific company functions. This author uses a project based on

[98] University of Pennsylvania, *supra* note 41, at 2-3.

the major sections of an entrepreneurial business plan—marketing, operations, human resources, insurance, financing, and accounting.[99] Students simply assign each legal term or concept covered throughout the semester to the functional area(s) to which it most relates. The project has the dual purpose of ensuring that students fully understand the legal terms and concepts themselves, and that the students can relate those terms and concepts to how companies function.

The third learning goal for the required legal course is to understand ethical and social responsibilities in business. This is such an important learning goal that it can easily overwhelm the course's other learning goals and objectives. At the required introductory level, therefore, today's legal instructors should focus primarily on the twin learning objectives of identifying, rather than resolving ethical/legal conflicts, and of providing students with prudent practical advice if confronted by ethical/legal conflicts early in their careers.

In many ways, the first three learning goals set the stage for the final two. The fourth learning goal for required legal courses is to develop critical analytical skills. The researchers who followed Bloom's taxonomy showed that students were best prepared for this task when firmly grounded in the topical, integrative, and in ethical/social knowledge of the preceding three learning goals. Long before Bloom, Wharton inherently understood that concept when he assigned the fourth learning goal of developing critical analytical skills to all disciplines of his endowed school, not just to the legal one.

Required legal courses are ideal for developing critical analytical skills, but such development depends on proper sequencing of

[99] *See, e.g.,* PENNSYLVANIA DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT, ENTREPRENEUR'S GUIDE: STARTING AND GROWING A BUSINESS IN PENNSYLVANIA (2003).

learning objectives. Early in the course, learning objectives might better focus on simple issue identification and rule statement. Later in the course, learning objectives might progress to higher levels of analysis, like evaluating competing legal and ethical concerns. Instructors who assign cases for deeper critical analysis might also find better results later in the course. In the end, however, it is important to remember that the purpose of the required legal course is to train future businesspeople to spot legal concerns, avoid legal problems, and to know when to call a lawyer, not to train those individuals for intensive legal analysis.

The final learning goal for required legal courses is to develop strong communication skills. Wharton and Bolles knew that the required legal course would be ideal for developing precision in communication. Again, however, it is important that learning objectives for this goal complement the overall learning goals of the course. A learning objective to apply correct legal terminology can complement the learning goal of understanding certain legal topics. A learning objective to concisely state matters can complement all of the other learning goals that culminate in the critical analytical one. Moreover, that learning objective of concise statement can perhaps do more to prepare students for future careers than any other learning objective emanating from the course. Preparing students for future careers was, of course, precisely what Wharton and Bolles envisioned.

HYSTERIA OVER SEXTING: A PLEA FOR A COMMON SENSE APPROACH

By

John O. Hayward*

If that's your goal – to protect them [teenage girls from sexting], then why threaten, by prosecuting them, putting a permanent blot on their escutcheon, for life?[1]

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[1] Ambro, J. in oral argument before the Third Circuit Court of Appeals in *Miller v. Skumanick,* 605 F. Supp. 2d 634 (M.D. Pa. 2009). *See* Shannon P. Duffy, *3rd Circuit Panel Mulls if Teen 'Sexting' Is Child Pornography*, THE LEGAL INTELLIGENCER (JAN. 19, 2010) available at http://www.law.com/jsp/article.jsp?id=1202439023330 (last accessed June 27, 2012), *cited* in Weronika Kowalczyk, *Note: Abridging Constitutional Rights: Sexting Legislation in Ohio,* 58 Clev. St. L. Rev. 685, 702 (2010). The district court in Miller held that the county district attorney's threat to prosecute three teenage girls under child pornography laws for sexting (one girl was accused of posing "provocatively" in a bathing suit) if they refused to participate in a program designed to educate them about its dangers violated their right of free expression under the First Amendment and granted a temporary restraining order (TRO) enjoining the DA from prosecuting them. *Aff'd sub nom*. *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010). An "escutcheon" is a shield, here used to mean a "disgrace to one's reputation." *See* AMERICAN HERITAGE DICTIONARY of the ENGLISH LANGUAGE (1971) 447.

I. INTRODUCTION

Teenagers have enthusiastically embraced digital technology and its myriad assortment of electronic devices and gadgets. But unfortunately they find themselves the target of numerous laws criminalizing their use. While sharing their favorite music via peer-to-peer (P2P) file sharing may no longer bring lawsuits from the RIAA,[2] E-mailing their friends about the chubby or weird classmate in their midst can result in suspensions from school or complaints from the district attorney accusing them of cyber bullying.[3] Sending sexy photos of themselves in various stages of undress to their favorite boyfriend or girlfriend earns them more unwanted attention from school administrators as well as another missive from the DA accusing them of trafficking in child pornography![4] Indeed it seems that teens and digital technology have combined to produce an inordinate amount of angst among parents and school officials, a plethora of arraignments from law enforcement, and new legal edicts from indignant lawmakers. In short, the digital age has embroiled adolescents in legal battles undreamt of by even the most prescient cyber prophets.

This article deals with "sexting," the practice of "[s]ending, receiving, or forwarding sexually explicit messages, photos, or

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[2] *See* Nate Anderson, *No More Lawsuits: ISPs to Work with RIAA, cut off P2P Users*, available at http://arstechnica.com/tech-policy/news/2008/12/no-more-lawsuits-isps-to-work-with-riaa-cut-off-p2p-users.ars (last accessed June 27, 2012). Apparently suing P2P file sharers was a financial bust. See *RIAA Spent $17.6 Million In Lawsuits... To Get $391,000 In Settlements?* available at http://www.techdirt.com/articles/20100713/17400810200. (last accessed June 27, 2012).*See generally* John O. Hayward, Grokster *Unplugged: It's Time to Legalize P2P File Sharing,* 12 INTEL. PROP. L. BULL. 1 (2007).

[3] Elisa Hahn, Dozens of Students Suspended for Facebook Cyberbullying (Jan. 14, 2010) available at http://www.king5.com/news/More-than-20-students-suspended-for-FB-cyberbullying-81629692.html (last accessed June 27, 2012).

[4] *See* John A. Humbach, *'Sexting' and the First Amendment*, 37 HASTINGS CONST. L.Q. 433, 434-435 (2010) (describing teenagers in Florida, Ohio and New Jersey being charged with child pornography for sexing images of themselves to their friends or posting them on Facebook); *see* also *supra* note 1.

images via cell phone, computer, or other digital device."[5] (The term is a combination of sex and texting.) It examines the social setting in which it occurs, its prevalence and frequency, the legal issues surrounding sexting, including the constitutional concerns of free speech, obscenity and child pornography laws, and prosecutions under these statutes. Also, it reviews legislative responses and proposes a Model Statute to deal with this growing social phenomenon of the digital age. Lastly, it concludes with a plea not to criminalize teenage sexual desire and urges law enforcement to step back from the precipice of teen sexting prosecutions that are eerily reminiscent of 17th century witch hunts.

II. THE SOCIAL PHENOMENON OF SEXTING

A. Definitional Parameters

Definitions of the term "sexting" vary. The National Center for Missing and Exploited Children ("NCMEC") refers to the practice of "[y]outh writing sexually explicit messages, taking sexually explicit photos of themselves or others in their peer group, and transmitting those photos/messages to their peers."[6] This definition

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[5] Commentators have not been able to agree on a standardized definition. *See* Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 20 (2007) (term "lacks a clear definition"). The definition provided herein is taken from a press release issued by the Office of the Berkshire District Attorney, Comm. of Massachusetts, available at http://www.mass.gov/?pageID=bermodulechunk&L=1&L0=Home&sid=Dber&b=terminalcontent&f=nu_2009_0303_sexting_press_conference&csid=Dber (last accessed June 27, 2012). *See also Miller v. Mitchell*, 598 F.3d at 143, *supra* note 1 (defining "sexting" as "[t]he practice of sending or posting sexually suggestive text messages or images, including nude or semi-nude photographs, via cellular telephones or over the Internet").

[6] Nat'l Ctr. for Missing & Exploited Children, *Policy Statement on Sexting*, Sept. 21, 2009, http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=41

doesn't cover situations where young people send sexually explicit images of themselves to adults,[7] nor is it meant to include situations where images are sent under "[d]uress, coercion, blackmail, or enticement,"[8] although as the Harvard Law School's Berkman Center for Internet & Society Report [hereinafter Berkman Report] points out, determining whether any of these circumstances exist in a given incident can be complicated[9]

Means to take and distribute sexually explicit images include cell phones, computers, web and digital cameras, and video game systems. It is well to remember that young people have been taking sexually provocative photos of themselves since the advent of Polaroid instant photography during the late 1940's.[10] However, the Internet and digitization now make it possible to take and reproduce images easily, quickly and cheaply, and transmit them instantly to vast audiences without the subject's approval or even knowledge.[11]

B. Research: Prevalence & Frequency

No fewer than four surveys have focused on sexting among teenagers and young people.[12] The first was the Pew Research

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30 *cited* in Dena T. Sacco, with Rebecca Argudin, James Maguire, and Kelly Tallon, *Sexting: Youth Practices and Legal Implications*, Cyberlaw Clinic, Harvard Law School, Berkman Center for Internet & Society [hereinafter BERKMAN] 3, available at http://cyber.law.harvard.edu/research/digitalnatives/policy (last accessed June 27, 2012).

[7] *Id*.

[8] *Id.*

[9] *Supra* note 6.

[10] *See* Peter C. Wensberg, LAND'S POLAROID: A COMPANY AND THE MAN WHO INVENTED IT (1987).

[11] BERKMAN, *supra* 6, at 3-4.

[12] Nat'l Campaign to Prevent Teen & Unplanned Pregnancy, *Sex and Tech: Results from a Survey of Teens and Young Adults*, 2008, http://www.thenationalcampaign.org/SEXTECH/PDF/SexTech_Summary.pdf [hereinafter Sex and Tech Survey]; Cox Commc'ns, *Teen Online & Wireless*

Center Report in December 2009. The Center released results of a survey that concentrated on teens between twelve and seventeen years of age who reported sending or receiving "sexually suggestive nude or nearly nude images via text messaging" on their cell phones. The results indicated that 4% had sent sexually provocative images of themselves to someone else via text message, with 15% having received such images from someone they knew. According to the survey, older teens are more likely to have engaged in such behavior, with eight per cent of seventeen-year-olds having sexted a nude or semi-nude photo and thirty per cent having received such photos.[13]

According to the survey, sexting tends to take place in three circumstances: (1) exchanges of images solely between two romantic partners; (2) exchanges between romantic partners that are then shared with others outside the relationship; and (3) exchanges where at least one person would like to start a romantic relationship. The survey data seemed to imply that sexting has become a form of "relationship currency," with girls often feeling pressured to send images.[14]

Safety Survey: Cyberbullying, Sexting, and ParentalControls, May 2009, available at http://www.cox.com/takecharge/safe_teens_2009/media/2009_teen_survey_internet_and_wireless_safety.pdf [hereinafter Cox Survey] (last accessed June 27, 2012); ASSOCIATED PRESS & MTV, *A Thin Line: Digital Abuse Study*, 2009, [hereinafter A Thin Line Survey]; Pew Internet & Am. Life Project, *Teens and Sexting: How and why minor teens are sending sexually suggestive nude or nearly nude images via text messaging (*2009), available at http://www.pewinternet.org/Reports/2009/TeensandSexting.aspx [hereinafter Pew Survey]. An additional survey has been published in the United Kingdom. *See* Andy Phippen, *Sharing Personal Images and Videos Among Young People*, South West Grid for Learning (2009), available at http://www.swgfl.org.uk/StayingSafe/SextingSurvey,*cited* in BERKMAN, *supra* note 6, at 4.

[13] *Id*. at 4.

[14] *Id*.

Three earlier surveys revealed higher levels of sexting, ranging between 20-24%. The Berkman Report attributed this discrepancy to those studies focusing on older teenagers and young adults. In addition, it opined that the Pew Report asked only about nude or nearly nude images sent or received via text messaging, whereas the other surveys asked broader questions, inquiring whether the respondents had "shared"[15] such images, "sent/posted"[16] such images, or sent such images in "emails or text messages."[17]

The second survey was the National Campaign to Prevent Teen and Unplanned Pregnancy. It reported 20% of teenagers between ages 13-19 and 33% of young adults between ages 20-26 have "sent/posted nude or semi-nude pictures or video of themselves." In addition, the survey revealed that 71% of teenage girls and 67% of teenage boys who sexted shared these pictures with a boyfriend or girlfriend. Although these photos are sent to an intended recipient, oftentimes they are shared with others with 38% reporting that sexually suggestive text messages or emails meant for someone else were shared with them. Lastly, the survey disclosed that slightly more than fifty per cent of teenage girls thought that "pressure from a guy" is a reason they send "sexy messages or images" but only 18% of teenage boys felt that pressure from a girl was a reason they sent sexy messages or photos.[18]

The third survey, the Cox Teen Online & Wireless Safety Survey, found comparable levels of sexting. About 20% of teens aged 13-18 either sent, received, or forwarded "sexually suggestive nude or nearly nude photos through text message or email" and more than a third knew someone who had done so. Confirming results of

[15] A Thin Line Survey, *supra* note 12, *cited* in BERKMAN, *supra* note 6, at 5.
[16] Sex and Tech Survey, *supra* note 12, *cited* in BERKMAN, *supra* note 6, at 5.
[17] *Id*. citing Cox Survey.
[18] *Id*. at 5.

earlier surveys, most of the teen sexters sent such photos to their boyfriends or girlfriends.[19]

The fourth survey, sponsored by AP-MTV and conducted in September 2009, found that nearly one-quarter of 14-17-year-olds and one-third of 18-24-year-olds have been involved in "some type of naked sexting." It reported that females between the ages of 14-24 are slightly more likely to have shared a naked photo or video of themselves than males (13% vs. 9%), while males in this age group are more likely to report having received a naked photo or video of someone else that had been "passed around" (14% vs. 9%). [20] The survey findings also indicated that a majority of sexted images are sent to a boyfriend, girlfriend, or someone with whom the sender had a romantic interest, but nearly one-third (29%) of 14-24-year-olds who had engaged in sexting reported sending these images to people they only knew online and had never met.[21] Once these images are received, nearly one in five (17%) reported sending them along to someone else, and slightly more than half (55%) of those who sent images shared them with more than one person.[22] The survey also found that nearly half (45%) of currently sexually active young people have been involved in at least one sexting-related activity, and that sexually active young people are twice as likely to have shared naked photos of themselves as non-sexually active young people (17% vs. 8%), with slightly more than sixty per cent of sexters having experienced pressure to send these images.[23] These findings would seem to be consistent with the view that sexting "[m]erely amounts to a new form of sexual expression, self-exploration, and high-tech foreplay and flirting."[24]

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[19] *Id.* at 6.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*. at 6-7.
[24] Clay Calvert, *Sex, Cell Phones, Privacy and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 20, fn. 97 (2009), quoting Ellen

C. Media-Created Hysteria over Sexting

Given that sexting is a powerful amalgam of teenage sexuality, nudity, the Internet, and a societal culture drenched in erotic imagery, it's not surprising that the media would seize upon it as the latest technological development endangering our youth.[25] When a teenager committed suicide because her nude sexted image was widely circulated at her school,[26] the media shifted into high gear.[27] Although some concern was raised about the methodology of the National Campaign's survey,[28] the media feeding frenzy continued unabated.[29] Even when psychologists pointed out that sexting was "normal" for hormone-driven teenagers and that an earlier generation would have also done it if they had the technology,[30] frantic parents urged their lawmakers to protect their

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Goodman*, It's Not About Sex; Sexting Is Really About Trust, and the Violation Thereof*, PITT. POST-GAZETTE, Apr. 24, 2009, at B-5, available at LEXIS, News & Business Library (quoting Danah Boyd of Harvard's Berkman Center for Internet and Society, to wit "[i]f you look at the reasons why they share naked content, one is a form of flirting. Another is a way of brokering trust, a guy saying, 'You don't trust me? You won't send me a naked picture?' ").

[25] *Id.* at 21-22.

[26] Jim Siegel, *Lawmaker Crafting Bill to Set Penalty for Teens "Sexting*,*"* COLUMBUS DISPATCH, Mar. 27, 2009, at B3 (discussing the tragic death of 18-yr-old Jessica Logan), *cited* in Calvert, *supra* note 24, at 4, fn.17.

[27] *Id.* at 21 (pointing out that national newspapers like THE NEW YORK TIMES, WALL STREET JOURNAL, USA TODAY, and the WASHINGTON POST all ran stories on sexting; not to be outdone, the broadcast media joined the chorus as *The Early Show, Nightline,* and *Today* did programs on the subject; even NPR's *All Things Considered* aired a feature on sexting, followed by *Law and Order: Special Victims Unit* devoting a program to the topic).

[28] Carl Bialik, *Which is Epidemic--Sexting or Worrying About It?: Cyberpolls, Relying on Skewed Samples of Techno-Teens, Aren't Always Worth the Paper They're Not Printed On*, WALL ST. J., Apr. 8, 2009, at A9, *cited* in Calvert, *supra* note 24, at 21.

[29] *Supra* note 25.

[30] Calvert, *supra* note 24, at 20, *citing* Christopher J. Ferguson, Professional Profile, Social Psychology Network, http://christopher.ferguson.socialpsychology.org (last accessed June 27, 2012) and Andrew Shaw, *Psychology Professor Says 'Sexting' is 'Normal,'* YORK

offspring from the latest technological menace. The legislators quickly obliged[31] despite sociologists concern that making sexting a crime was tantamount to criminalizing teen sexual desire.[32]

D. "Self-Sexualization" of Young Girls and the Emergence of "Prostitots"

The hue and cry over sexting should come as no surprise in our sexualized society saturated with images of semi-nude women (as any visitor to a shopping mall with a Victoria's Secret can attest) and where "the mass media – television, movies, magazines, music, and the Internet – frequently portray sex and sexual behavior as riveting, central in everyday life, and emotionally and physically risk free."[33] No doubt young people notice and ask themselves if it's acceptable for adults, why not for them? Moreover, when one of their role models appears in a popular

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DISPATCH (Pa.), Mar. 30, 2009, and Paula Reed Ward, *DA's Case Over Teen 'Sexting' Draws Ire of Parents*, PITT. POST-GAZETTE, Mar. 26, 2009, at A-1, *available at* 2009 WLNR 5651200. In June 2011, one member of the "earlier generation," U.S. Congressman Anthony Weiner, decided to emulate teenage behavior when he sexted sexually explicit photos of himself to several women whom he had chatted with online. Initially he denied sending the photos saying someone had hacked into his e-mail account. After his statements were shown to be false, he resigned his Congressionl seat. *See* NYT, June 17, 2011 at A1. According to the Pew Internet & Am. Life Project, *supra* note 12, sexting is more common among people aged 18 to 29 than among teenagers. *See* Tara Parker-Pope, *Digital Flirting – Easy to Do and Easy to Get Caught*, NYT, June 14, 2011, at D5 (NY Ed), available at http://well.blogs.nytimes.com/2011/06/13/digital-flirting-easy-to-do-and-to-get-caught/?pagemode (last accessed June 27, 2012).

[31] *Supra* note 26, and Calvert, *supra* note 24, at 55-58 (detailing sexting legislative initiatives in Ohio, Vermont, and Utah).

[32] Nathan Jurgenson, *Sexting and the Criminalization of Teen Desire*, SOCIOLOGY LENS, Mar. 30, 2011, available at http://thesocietypages.org/sociologylens/2011/03/30/sexting-and-the-criminalization-of-teen-desire/ (last accessed June 27, 2012).

[33] JANE D. BROWN, JEANNE R. STEELE, & KIM WALSH-CHILDERS (Editors), SEXUAL TEENS, SEXUAL MEDIA (2002) at xi. (discussing media's influence on adolescent sexuality).

magazine in a semi-clad state posed in a suggestive setting, they can only conclude that there is nothing remiss about public semi-nudity. In 2008, popular teen idol Miley Cyrus, star of the Walt Disney Company's billion dollar "Hannah Montana" franchise, posed topless, albeit with her chest covered, for Vanity Fair photographer Annie Leibovitz.[34] The photo appeared in the June issue of the magazine, and showed her with a bare back holding what appears to be a bed sheet to cover her chest.[35] Whatever Ms. Leibovitz's intent, Ms. Cyrus's gaze, position and setting suggest much more than an innocent allure. At the time of the photograph, Ms. Cyrus was fifteen years old and most of her three million

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[34] *See* Brooks Barnes, *Revealing Photo Threatens a Major Disney Franchise*, NYT, April 28, 2008, at C1, available at http://www.nytimes.com/2008/04/28/business/media/28hannah.html (last accessed June 27, 2012). *See* also Calvert, *supra*, note 24, at 11-12. Subsequent to the publication of the photo, Ms. Cyrus became embroiled in her own sexting scandal when "[p]rovocative, but not nude, pictures of Cyrus wound up on the Internet last year after a hacker accessed her e-mail account. Cyrus had sent the pictures to a boyfriend, according to media reports." *Id*. at 11, fn. 44, *citing* Dan Herbeck, *Exposed Stars Send Wrong Message*, BUFFALO NEWS, Jan. 25, 2009, at A1. Interesting to note that several years earlier celebrity photographer Leibovitz herself was embroiled in a copy-right infringement case against Paramount Pictures concerning her celebrated photo of pregnant actress Demi Moore, whom she photographed nude in profile, with her right hand and arm covering her breasts and her left hand supporting her distended stomach, a well known pose evocative of Botticelli's *Birth of Venus.* The photo appeared on the cover of the August 1991 issue of *Vanity Fair*. To promote its film *Naked Gun 33 1/3: The Final Insult*, Paramount parodied the photograph posing actor Leslie Nielsen in a similar position but with a smirk on his face instead of Moore's serious look. Leibovitz sued for copyright infringement, but the District Court granted Paramount's motion for summary judgment holding that the photo was "transformative" and thus protected under the Fair Use doctrine. *See Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214 (S.D. N.Y. 1996). Relying on the Supreme Court's decision in *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569 (1994), the appeals court *affirmed*. *See* 137 F.3d 109 (2nd Cir. 1998). *Accord*: *Bourne Co., v. Twentieth Century Fox Film Corp.,* 602 F. Supp. 2d 499 (S.D.N.Y. 2009); and *E.S.S. Entertainment 200, Inc. v. Rock Star Videos, Inc.,* 444 F. Supp. 2d 1012 (C.D. CA. 2006).

[35] *Id*.

viewers were aged six to fourteen.[36] Such photos no doubt influence other young girls to behave in a similar way.

This incident illustrates what some psychologists refer to as the "self-sexualization" of girls. As stated by the American Psychological Association in its 2007 "Report of the APA Task Force on the Sexualization of Girls" ("APA Report"):

> As girls participate actively in a consumer culture (often buying products and clothes designed to make them look physically appealing and sexy) and make choices about how to behave and whom to become (often styling their identities after the sexy celebrities who populate their cultural landscape), they are, in effect, sexualizing themselves. Keen observers of how social processes operate, girls anticipate that they will accrue social advantages, such as popularity, for buying into the sexualization of girls (i.e., themselves), and they fear social rejection for not doing so.[37]

The Report terms this concept as "self-sexualization" in which girls "treat and experience themselves as sex objects.[38] Sexting would thus seem to be an expression of this self-sexualization, as young people use technology with which they are intimately

[36] *Id*.
[37] Calvert, *supra* note 24, at 12, *citing* AMERICAN PSYCHOLOGICAL ASSOCIATION, REPORT OF THE APA TASK FORCE ON THE SEXUALIZATION OF GIRLS (2007) [hereinafter REPORT OF THE APA TASK FORCE], *available at* http://www.apa.org/pi/wpo/sexualizationrep.pdf (last accessed June 27, 2012).
[38] *Id*., citing REPORT OF THE APA TASK FORCE at 18.

familiar and use constantly to garner attention and advance their status among their peers.[39]

One scholar has remarked that this development has produced what she describes as "prostitots" – hypersexualized girls.[40] She explains that while "Lolita" may be an apt metaphor for the sexy girl in contemporary culture, the Lolitas depicted in the media are fabrications.[41] She believes they serve as a tool to

> [m]arket needs and profit motives, and they are powerfully alluring, especially to the young girls whose vulnerability they exploit. They are framed in a clever rhetoric of empowerment and choice. But they skillfully conceal the narrow, restrictive, and ultimately disempowering definition of sexuality that is delivered by these images and their accompanying messages. Rather than offering girls – and the rest of their audiences – thoughtful, open-minded, progressive, and ethical understandings about sexuality, our media and culture have produced a gathering of "prostitots."[42]

The author labels this the "Lolita Effect" which she thinks teaches young girls five myths about sex and sexuality: (1) girls don't choose boys, boys choose girls, but only sexy girls, (2) there is only one kind of sexy – slender, curvy, white beauty, (3) girls should work to be that type of sexy, (4) the younger a girl is, the sexier she is, and (5) sexual violence can be hot.[43] She remarks that

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[39] *See* SEX AND TECH REPORT, *supra* note 12, at 1; *see* also BROWN et al, *supra* note 33, Ch. 13, "Sexual Selves on the World Wide Web: Adolescent Girls' Home Pages as Sites for Self-Expression," at 265-85.

[40] M. GIGI DURHAM, THE LOLITA EFFECT (2008) 27.

[41] *Id*. at 26. The name Lolita was made famous by Russian born author Vladimir Nabokov in his 1955 novel of the same name depicting a sexually precocious twelve-year-old girl and her affair with a forty-year-old man.

[42] *Id*. at 26-27.

[43] *Id* at 63-178.

these myths encourage young girls to flirt with grown-up sexuality,[44] and commentators have opined that "[w]hen young girls sext, it simply may be a symptom or objective manifestation of such flirtation with eroticism and sexuality,"[45] or "[a] strategy to hold on to boyfriends."[46] One astute observer of mass communication has commented on the power of the "[s]exy little girl" to stir the adult imagination, drawing on the example of Brittany Spears, who posed in 1998 wearing a school girl uniform, to illustrate the point.[47] As one legal scholar has written:

> Should the legal system, then, really be shocked by sexting, with little girls trying to be sexy for their boyfriends or prospective boyfriends? Should society try to prosecute those girls as child pornographers and treat them like pedophiles when they are no more than budding Britneys?[48]

So far from being child pornographers, teenage sexters are merely engaging in a courtship ritual, albeit one that many regard as shocking and some law enforcement officials label criminal.

E. Prosecutions of High Tech Flirting

As one observer has noted, the zeal with which some prosecutors have pursued teenage sexting is reminiscent of 17th century Salem witch hunts.[49] Probably the most well known incident occurred in

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[44] *Id*. at 21.
[45] Calvert, *supra* note 24, at 15.
[46] *Id*., *citing* Amy Kossoff Smith, *Sexting: How Parents Can Keep Kids Safe*, MONITOR (McAllen, Tex.), May 4, 2009, *available at* LEXIS, News & Business Library.
[47] *Id*., *citing* Durham, *supra* note 40, at 114-15
[48] *Id*. at 15.
[49] *See* Errol Louis, *Sexting Spawns New Witch Hunt*, DAILY NEWS (N.Y., N.Y.), Apr. 23, 2009, at 3 (prosecuting teens for sexting "carries an unmistakable echo of those fraught, hysteria-filled months in 1692 when magistrates in colonial Massachusetts arrested and charged more than 150

Tunkhannock, Pennsylvania. One commentator has summarized it well:

> In October 2008, school officials of the Tunkhannock School District in Wyoming County, Pennsylvania, confiscated students' cell phones and discovered two photos of three girls "showing various states of undress" that were being traded around the school. The first photo depicted two teen girls, Marissa Miller and Grace Kelly, aged thirteen at the time, from the waist up wearing white, opaque bras at a slumber party. The second photo is of another teen girl, known as Nancy Doe, wearing a towel wrapped around her waist while standing outside a shower. The photos were turned over to District Attorney George Skumanick, who found the images "provocative" enough to subject the girls to child pornography charges. Skumanick then sent a letter to parents of the three girls, as well as the parents of seventeen other teens caught sexting, promising to drop the charges "if the child successfully completed a six-to nine-month program focused on education and counseling." In a later meeting, Skumanick threatened to prosecute "unless the children submitted to probation, paid a $ 100 program fee and completed the program successfully." The three girls refused to agree, and jointly with their parents, filed a [42 U.S.C.] §1983

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people with the crime of witchcraft"), cited in Calvert, *supra* note 24, at 34. This sad episode in colonial American history has been chronicled in CHARLES W. UPHAM, SALEM WITCHCRAFT (Vol. 1) (1948) and CHADWICK HANSEN, WITCHCRAFT AT SALEM (1969). It served as the basis of Pulitzer Prize winning playwright Arthur Miller's drama *The Crucible* (1953), which has been filmed twice, once in 1956 with an adaptation by existentialist philosopher Jean-Paul Sartre and in 1996 with Miller himself writing the screenplay.

> action against Skumanick as well as a motion to enjoin him from initiating criminal charges against the three girls for the two photos at issue. Miller, Kelly, Doe and their parents were represented by the American Civil Liberties Union of Pennsylvania.[50]

The complaint raised three constitutional issues: (1) retaliation in violation of the girls' First Amendment right to free expression, (2) retaliation in violation of their First Amendment right to be free from compelled expression, and (3) brought by the girls' parents, retaliation against them for exercising their Fourteenth Amendment substantive Due Process right as parents to direct their children's upbringing.[51] The court granted the Temporary Restraining Order (TRO),[52] reasoning that the "[t]hreat of prosecution has a chilling effect on plaintiffs expressing themselves by appearing in photographs, even such innocent photographs as those in bathing suits" in violation of the First Amendment, and such violation constitutes irreparable harm.[53] The court did not address the issue of whether the girls could be charged with possession of child pornography.[54] On appeal, the decision was affirmed.[55]

Other incidents include:

[50] Amanda M. Hiffa, *Note: OMG TXT PIX PLZ: The Phenomenon of Sexting and the Constitutional Battle of Protecting Minors From Their Own Devices*, 61 SYRACUSE L. REV. 499, 510-11 (2011).
[51] Miller v. Skumanick, 605 F. Supp. 2d 634, 640 (M.D. Pa. 2009), *supra* note 1.
[52] *Id*. at 647.
[53] *Id*. at 646.
[54] *Id*. at 645.
[55] 598 F. 3d 139 (3rd Cir. 2010).

In March 2009, a fourteen-year-old boy in Brooksville, Florida, was arrested and "accused of sending a picture of his genitalia" to the cell phone of a female high school classmate.[56]

That same month, a fourteen-year-old girl from Passaic County, New Jersey, faced child pornography charges "after posting nearly 30 explicit nude pictures of herself on MySpace.com--charges that could force her to register as a sex offender if convicted." [57]

In January 2009, three high school girls from Westmoreland County, Pennsylvania "were charged with manufacturing and disseminating or possessing child pornography after they allegedly sent nude or seminude cell phone pictures of themselves to three male classmates. The boys, ages 16 and 17, were charged with possession of child pornography for having the images on their phones." The girls involved were even younger, just fourteen and fifteen years of age.[58]

Additional occurrences have been reported in Massachusetts,[59] New Jersey,[60] Utah,[61] Wisconsin,[62] Oregon,[63] and Michigan.[64] One

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[56] Calvert, *supra* note 24, at 1.
[57] *Id*.
[58] *Id*. at 1-2.
[59] *See* Anonymous, *Police Investigate as pupils' phones taken*, May 13, 2011 available at http://articles.boston.com/2011-05-13/news/29540727_1_phones-pupils-police (last accessed June 27, 2011) (describing Hull Police confiscating students cell phones allegedly containing suggestive photos); Aaron Gouvela & Jessica Heslam, *Hang-up for 'sexting' boys: Six middle-schoolers may face kid porn rap,* available at http://www.bostonherald.com/news/regional/view/2009_02_11_Hang-p_for_%E2%80%98sexting__boys:_Six_middle-schoolers_may_face_kid_porn_rap/srvc=home&position=3 (describing middle school boys aged 12 to 14 who could face charges of distributing child pornography after one of them took a nude picture of his 13-year-old girlfriend and sexted it to his friends)(last accessed June 27, 2011); Jack Minch & Kris Pisarik, *Cell-phone Photo of Nude Girl Spurs Billerica Police Probe*, SUN (Lowell, Mass.), Jan. 31, 2009, *available at* 2009 WLNR 1878831 (describing a police investigation of reports of "[a] nude or seminude picture of a 14-year-old

report indicated that child pornography prosecutions against sexting teens have been instituted in at least ten states.[65]

Marshall Middle School girl circulating through the community by cell-phone text messages" and noting that local police are classifying the photo as child pornography), *cited* in Calvert, *supra* note 24, at 3, fn. 7.

[60] Leslie Brody, *Porn Gets Students Booted; Used Cellphones to Trade Photos of Girls*, RECORD (Bergen County, N.J.), June 10, 2008, at A-1, available at 2008 WLNR 10937828 (reporting that "[s]even ninth-graders at Pascack Valley High School have been suspended for the rest of the school year for distributing racy photos of middle school girls via cellphones and school-issued laptops," adding that "[t]he girls were seen from the waist up in various states of undress, typically with bare breasts," and noting that it was "unclear whether the shots were self-portraits or snapped by others"), *cited* in Calvert, *Id*.

[61] Melinda Rogers, *Teens Face Charges for Trading Nude Photos*, SALT LAKE TRIB., Mar. 14, 2008, at B1 (describing the situation in Davis County, Utah, where police and school officials were investigating "several Farmington Junior High teenagers who traded nude photos of themselves over cell phones"), *cited* in Calvert, *Id*.

[62] Jacqui Seibel & Erin Richards, *Girl's Nude Photo Circulates; District Urges Phone Checks*, MILWAUKEE J. SENTINEL, Feb. 18, 2009, at 1B (describing an incident in which a 14-year-old girl in Waukesha, Wisconsin, sent a nude photo of herself "to her boyfriend, but when the couple broke up, he forwarded it to other students using his cell phone" and the photo ultimately "ended up in the hands of hundreds of area high school students"), *cited* in Calvert, *Id.*

[63] Lori Tobias, *'Sexting': Dumb Prank or Child Porn*?, SUNDAY OREGONIAN (Portland, Ore.), Mar. 29, 2009, at B1 (describing an incident in which "a 17-year-old Oregon girl faces years in prison after using her cell phone at a drunken party in Newport last year to record, for a minute or less, a 16-year-old girl involved in crude sexual activity"), *cited* in Calvert, *Id*.

[64] Leanne Smith, *Students Suspended Over Revealing Cell Phone Photo*, ANN ARBOR NEWS (Mich.), Oct. 24, 2008, at Al, available at 2008 WLNR 20625025 (reporting the suspension of several students at Pinckney Community High School in Michigan for "[r]eceiving or transmitting a revealing photo a 14-year-old girl took of herself with a cell phone and sent to her friends," and noting that "the photo of the Pinckney girl, which showed her genitals and her face, has reportedly been transmitted to at least 200 students throughout Livingston County and beyond"), *cited* on Calvert, *Id*.

[65] Humbach, *supra*, note 4, at 436, fn. 19, citing *Texting Trouble; Trouble While Texting,* ABC News Transcript, Mar. 13, 2009. Another estimated at least 20 prosecutions had begun or been threatened – some involving child pornography charges. S*ee* Calvert, *supra*, note 24, at 2, fn. 6, citing Editorial, *'Sexting' Overreach*, CHRISTIAN SCI. MONITOR, Apr. 28, 2009, available at

Apparently agitated parents and the media frenzy over sexting have spurred prosecutors into taking action against unsuspecting teens whose lives may be irreparably damaged more by criminal charges than by glimpsing a photo of a topless teen. Observers and legal commentators alike have sharply criticized prosecuting sexters under child pornography statutes as going "[b]eyond paternalism"[66] and in effect "[d]eclaring the subject of the images [teenagers] simultaneous victims and perpetrators."[67] Indeed, prosecuting sexters goes one step further than the proverbial blaming the victim in a rape trial.[68] It prosecutes the "victim" for the very harm the statute was designed to protect them against!

F. Concerns – Societal and Legal

Before society embarks on a crusade to rid the nation from the supposed evils of sexting, it would be prudent to pause and ask some important societal and legal questions. First, who are the victims and what is the harm the laws seek to prevent? Second, do the laws recognize different types of sexting, i.e., someone sending a suggestive photo of themselves only to their boyfriend or girlfriend as opposed to forwarding the same photo to everyone at school? Third, are criminal sanctions the most effective way to deal with sexting or should it be left to parents and educational administrators? Fourth, would laws banning sexting deter sexters

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http://www.csmonitor.com/2009/0428/p08s03-comv.html (last accessed June 27, 2011).

[66] Calvert, *supra* note 24, at 45, quoting *Newsweek* Contributing Editor Dahlia Lithwick, *Teens, Nude Photos and the Law*, NEWSWEEK, Feb. 23, 2009, at 18.

[67] Sarah Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes That Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images By Teenagers*, 33 HARV. J. L & GENDER 687, 694 (2010).

[68] *See* Stephanie Hallett, *New York Times Puts Another Alleged Rape Victim on Trial*, MS. MAGAZINE (blog), April 19, 2011 (reporting on the trial of two police officers accused of raping a drunk woman). A jury acquitted the Officers. *See* NYT, May 27, 2011 at A1.

and how enforceable would they be?[69] The last two questions are legal and will be addressed under Part III. Namely, should all sexters be prosecuted under statutes punishing the creation, possession, and distribution of child pornography or would prosecution (if any) under different laws be more appropriate? Finally, do laws banning sexting impinge on student First Amendment rights of free expression?

1. Identifying the "Victims" and Quantifying the Harm:

Customary child pornography scenarios involve unwilling minors coerced by adults in a dominant position over them accompanied by a commercial motive.[70] This is certainly not the case in circumstances dealing with sexting where a teen voluntarily photographs herself or himself attempting to gain the attention of a peer,[71] or intending it to be a form of flirting.[72] Clearly sexting does not involve the traditional victims of child pornography.

Gauging the harm depends on the extent to which the intended recipient re-transmits the sexted image to others. If the image goes no further, then it can be argued that the harm is minimal or even non-existent.[73] However, if the image is widely re-transmitted to others without the consent or knowledge of the original sender, then the harms can include embarrassment and humiliation,[74] harassment, potential job loss, parental or school punishment, and

[69]Calvert, *supra* note 24, at 8-10 (raising similar concerns).
[70]New York v. Ferber, 458 U.S. 747, 753 (1982) (*infra* PART III C).
[71]*See* Sex and Tech, *supra* note 12, at 3.
[72]*See* Calvert, *supra* note 24, at 20.
[73]*See* Kowalczyk, *supra* note 1, at 713 ("A teen taking a nude photo of herself and sending it to a significant other as sexual expression is harmless if kept between the original participants."); Wastler, *supra* note 67, at 698-701; Calvert, *supra* note 24, at 22 (suggesting that prosecutors and legislators consider Larry Flynt's Hustler Hollywood retail store's slogan in West Hollywood, Calif: "Relax. It's Just Sex").
[74]See Calvert, s*upra* note 24, at 4 (describing a teenager who committed suicide when her sexted nude image was widely distributed at her school).

social stigma.[75] One commentator labels situations where minors take suggestive or nude photos of themselves as "[s]elf-produced child pornography"[76] and argues that the images "[c]reate vast social harm as they are used by offenders to sexually assault children, they aid in the creation of juvenile sex offenders, and they further support the sexualization and eroticization of children."[77] Others have argued on legal grounds that these "harms" do not justify criminal prosecution of teen sexters.[78] There is no doubt that if the images result in the criminal prosecution of the teenager along with being labeled a sex offender, that harm is quite devastating to the individual and arguably greater than having her or his nude image floating about on the Internet.

2. Recognition of Different Types of Sexting:

Fundamental fairness requires that any legal action taken against teenage sexters allow for the age of the sexters, whether the sexting is primary or secondary, and whether it is volitional or coerced.[79] For example, a thirteen-year-old girl sexting a provocative photo to a fourteen-year-old boy as a form of flirtation is quite different

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[75] *Id*. at 24.

[76] See Leary, *supra* note 5, at 4.

[77] *Id* at 50. *See* also Susan Hanley Duncan, *A Legal Response Is Necessary for Self-Produced Child Pornography: A Legislator's Checklist for Drafting The Bill*, 89 OR. L. REV. 646 (2010) (essentially agreeing with Leary on the supposed harms of sexting).

[78] *See* Humbach *supra* note 4, at 481 fn. 257 (arguing that the Supreme Court has explicitly rejected them as bases for suppressing expression, *citing* Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002), (*infra* PART III D) and that "[a] court applying strict scrutiny needs to take care not to simply accept the products and publications of advocacy groups as though they are valid social science data." *See* also Claudio J. Pavia, *Constitutional Protection of "Sexting" in the Wake of Lawrence*, 16 VA.J.L. & TECH. 189, 194-95 (2011) (arguing that sexting is not always abusive and that just because an activity may be harmful does not justify a "blanket prohibition that implicates fundamental rights"). Teens' Home Pages can also be a form of self-expression. *See* Brown, *supra*, note 39.

[79] *See* Calvert, *supra* note 24, at 28-32.

from a seventeen-year-old boy sending his nude photo to a thirteen-year-old girl in the hope that she will agree to date him. Primary sexting involves the individual appearing in the photo sending it to someone else, while secondary sexting entails the recipient forwarding it to others.[80] Sexting can be volitional in the sense that the sender willingly takes the photo and freely transmits it to someone who agrees to accept it as opposed to someone being coerced into taking a photo and sending it, or the sender not consenting to having the photo sent or re-transmitted or the recipient not wanting to be given the photo in the first place. Putting these scenarios into a continuum would involve at one extreme the sexter voluntarily taking a nude photo and sending it to someone who willingly receives it and does not re-transmit it, to the other extreme of being coerced to take and send a nude photo that is widely distributed without consent.

3. Alternatives to Criminal Sanction:s

While some observers advocate legal sanctions against teenage sexters or use of the criminal justice system,[81] others disagree,[82] arguing that the situation should be dealt with using education by parents or school administrators,[83] and even utilizing tort remedies, e.g. intentional infliction of emotional harm.[84]

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[80] *Id*. at 30.
[81] *See* Leary, *supra* note 5, at 24.
[82] *See* Stephen F. Smith, *Jail for Juvenile Child Pornographers? A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 544 (2008).
[83] *See* Calvert, *supra* note 24, at 33-40 and Hiffa, *supra* note 50, at 523-28 (calling for collaborative efforts among policy makers, service providers, parents and school officials).
[84] Calvert, *supra* note 24, at 41.

4. Would Banning Sexting Deter It?

Despite the pleas to criminalize and ban sexting,[85] does it seem reasonable and likely that such action would be effective? Prohibiting it would not end the practice but rather make it more clandestine if not drive it underground. Much like attempts to ban illegal peer-to-peer (P2P) file sharing, legal prohibitions have not reduced the practice[86] nor has the Supreme Court's decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd*.[87] Furthermore, is it really an efficient and prudent use of prosecutors' staff and financial resources for them to devote time and effort to jailing teens for swapping nude photos of each other?[88] Aren't there more serious crimes threatening the public order?

III. THE FIRST AMENDMENT, OBSCENITY, AND CHILD PORNOGRAPHY LAWS

A. Unprotected Speech

Not all speech is protected under the First Amendment. Obscenity,[89] defamation,[90] public safety,[91] inciting to riot,[92] and so-

[85]*See* Leary, *supra* note 5, and Duncan, *supra* note 77.

[86]See *RIAA v. The People: Five Years Later*, Electronic Frontier Foundation, available at http://www.eff.org/wp/riaa-v-people-years-later#8 (last accessed June 27, 2012) describing how years of litigation against illegal peer to peer file sharers have not stemmed the tide of illegal file sharing.

[87]545 U.S. 913 (2005) (holding that distributors of software primarily used to download copyrighted files could be contributorily liable for copyright infringement, despite the software's lawful uses where the software was distributed with the principal, if not exclusive, object of promoting its use to infringe copyright).

[88]*See* Calvert, *supra* note 24, at 59 ("The reality would seem to be that the overwhelming amount of sexting by minors would go undetected by law enforcement, even in the presence of criminal laws targeting it.")

[89]*Roth v. United States*, 354 U.S. 476 (1957). A*ccord*: Miller v. California, 413 U.S. 15 (1973) (First Amendment does not protect obscene material) and

called "fighting words"[93] are areas of unprotected speech. The rationale usually given for unprotected speech is that it contains no ideas or viewpoints and doesn't advance any socially worthwhile goal.[94] Obscenity would seem to fit into this description, assuming

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Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (holding unconstitutional a federal statute criminalizing depictions of "virtual" child pornography). These cases are discussed *infra* PART III (B) (C) (D). *See also U. S. v. Stevens*, 130 S. Ct. 1577 (2010) (Court declines to create new class of unprotected speech and invalidates animal cruelty law because it criminalized depictions of ordinary and lawful activities) and *U. S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (holding that federal law requiring cable companies to scramble sexually oriented material violated First Amendment because a less restrictive alternative was available).

[90]*See New York Times v. Sullivan*, 376 U.S. 254 (1964) (First Amendment prohibits a public official from recovering damages for a defamatory statement unless the statement was made knowing it was false or with actual malice, i.e., reckless disregard for whether it was true or false). *Accord*: *BE&K Constr. Co. v. NLRB,* 536 U.S. 516 (2002) and *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).

[91] *See Gitlow v. New York*, 268 U.S. 652 (1925) (held freedom of speech and the press not absolute rights, but subject to reasonable limitations by the states, and thus state could punish utterances endangering the foundation of llawful government that threatened to overthrow it by unlawful means). *Accord*: *People v. Epton,* 227 N.E.2d 829 (NY 1967) (defendant's words and actions created a "clear and present danger" of intensifying riots; conviction for conspiracy to incite riot upheld).

[92]*See Schenck v. U.S.*, 249 U.S. 47 (1919) (words created a clear and present danger, and as they would not protect shouting fire in a theatre, conviction for conspiracy upheld). *Accord*: *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789 (1984).

[93]*See Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (upholding a conviction under a statute prohibiting use of "offensive" words, not as defined by what the addressee thought, but by what reasonable men of common intelligence understood as words likely to cause a average addressee to fight, i.e. "fighting words"). *Accord*: *U. S. v. Stevens*, *supra* note 89. *See* also *Cohen v. Calif.*, 403 U.S. 15 (1971) (conviction reversed for wearing jacket imprinted with four letter expletive in courthouse) and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (municipal hate-speech ordinance prohibiting fighting words that aroused "anger, alarm or resentment on the basis of race, color, creed, religion or gender" struck down as violating the First Amendment).

[94] *Chaplinsky* at 572.

agreement can be reached on its definition.[95] Let's examine how the Court has navigated its way through the uncharted sea of obscenity and avoided running aground on the shoals of child pornography.

B. Obscenity as Unprotected Speech - Roth v. U.S

For more than a century and a half the Supreme Court was not asked to consider whether obscenity was an explicit exception to the First Amendment.[96] Then in 1957, the Court decided *Roth v. United States*,[97] ruling that indeed there was such an exception.[98] The case[99] concerned the constitutionality of 18 U.S.C. § 1461, which made punishable the mailing of material that is "[o]bscene, lewd, lascivious, or filthy . . . or other publication of an indecent character."[100] Roth conducted a business in New York in the publication and sale of books, photographs and magazines. He used circulars and advertising matter to solicit sales. He was convicted by a jury in the District Court for the Southern District of New York upon 4 counts of a 26-count indictment charging him with mailing obscene circulars and advertising, and an obscene book, in violation of the federal obscenity statute. His conviction was affirmed by the Court of Appeals for the Second Circuit.[101]

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[95] One is reminded of Justice Potter Stewart's comment in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) that he

could not define hard core pornography, but he knew it when he saw it.

[96] Humbach *supra* note 4, at 439.

[97] S*upra* note 89.

[98] *Id*. at 483 (the Court said obscenity is the kind of expression that was simply "outside the protection intended for speech and press").

[99] The Court, noting probable jurisdiction, consolidated it with another case, *Albert v. Calif.,* dealing with the constitutionality of §311 of West's California Penal Code Ann., 1955, which, *inter alia,* made it a misdemeanor to keep for sale, or to advertise, material that is "obscene or indecent." Albert was convicted thereunder for lewdly keeping for sale obscene and indecent books and for writing, composing, and publishing an obscene advertisement of them. His conviction was sustained. 354 U.S. at 494.

[100] 354 U.S. at 479.

[101] *Id*. at 480.

The high Court affirmed, Justice Brennan delivering the Opinion of the Court, holding that obscenity is not within the area of speech or press protected by the First Amendment.[102] After casting it into the wilderness of unprotected speech, he extolled the virtures of protected speech:[103]

> All ideas having even the slightest redeeming social importance -- unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion -- have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. [citation omitted]

Citing *Chaplinsky*,[104] he next set forth the rationale for excluding certain types of speech from First Amendment protection:[105]

> There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." [Emphasis in original]

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[102]*Id*. at 481, 485.
[103]*Id*. at 484.
[104]*Supra* note 93, at 571-72.
[105]354 U.S. at 485.

Then Justice Brennan declared that a depiction of sex in itself is not enough to deny First Amendment protection, rather it must appeal to prurient interest:[106]

> However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern. [citations omitted]

Finally, citing with approval the charge to the jury in *Roth*, he pronounced the standard by which material would be considered obscene:[107]

> The test in each case is the effect of the book, picture or publication considered as a whole not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend

[106]*Id*. at 487. Prurient is defined as" Obsessively interested in improper matters, especially of a sexual nature." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1054 (1971).
[107]*Id*. at 490.

> the common conscience of the community by present-day standards.

Thus obscenity was categorized as a form of speech not protected by the First Amendment[108] and originated what might be termed the "reasonable person using contemporary community standards" test for obscenity. Although some teenage sexting might be considered obscene under this standard,[109] certainly a great deal of it would not be.[110] Sixteen years after *Roth*, the Supreme Court handed down *Miller v. California*,[111] furnishing what has become known as the "three-pronged test" for obscenity. Let us now turn to that case.

C. Miller – Obscenity's Three-Pronged Test

Miller involved the application of a state's criminal obscenity statute to a situation in which sexually explicit materials [so-called "adult" materials] had been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials.[112] The appellant had caused five unsolicited advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures, so they complained to the police.[113] He was convicted of mailing unsolicited sexually explicit material in violation of a California statute and appealed.[114]

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[108] 354 U.S. at 483.
[109] Humbach *supra* note 4, at 444.
[110] Calvert *supra* note 24, at 51 (who argues it may not even be child pornography, another category of forbidden images).
[111] 413 U.S. 15.
[112] *Id*. at 18.
[113] *Id*.
[114] *Id.* at. 15.

After a detailed review of the Court's "obscenity-pornography" jurisprudence articulating standards in cases involving what one Justice described as the "the intractable obscenity problem,"[115] Chief Justice Burger delivered the Opinion of the Court, holding that henceforth the test for obscenity would be (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[116]

Applying these criteria to teenage sexting, one legal analyst has opined that[117]

> [i]t seems highly likely that some substantial part of sexually explicit teen communications would meet the Miller criteria. It is plausible, for example, that teens who make and send sexually explicit images and videos of themselves do so with the intention of titillating their friends and classmates. If 'appeal to the prurient interest' means anything, it means something like that. …It is likewise easily conceived that such pictures and videos would often meet the second Miller prong as well: being 'patently offensive in light of community standards.'

[citations omitted]. Lastly, the commentator suggests that it would also meet the third criteria, i.e., lacking "[s]erious literary, artistic, political, or scientific value," although he remarks their sexting might have "high value" to the teenagers themselves.[118]

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[115] Mr. Justice Harlan. *Id*. at 16
[116] *Id.* at 24.
[117] Humbach, *supra* note 4, at 445
[118] *Id*. at 446.

Thus it would seem that some teen sexting would run afoul of anti-obscenity laws and not be protected under the First Amendment, though it is highly unlikely that the authors of such laws ever envisioned them being used against individuals who create their own images using themselves as models and distribute the photos to their friends as a form of self expression or flirting.[119] Even if the images are not obscene, they may be child pornography, a far worse scourge carrying devastating consequences.[120]

D. Ferber - Obscene or Not, It Could Be Banned As Child Pornography!

Nine years after grappling with obscenity in *Miller*, the Supreme Court handed down *New York v. Ferber*,[121] holding that child pornography was a new category of speech not protected by the First Amendment.[122] At issue in the case was the constitutionality of a New York criminal statute which prohibited persons from knowingly promoting sexual performances[123] by children under the age of 16 by distributing material which depicts such performances.[124] A bookstore owner had been convicted under the statute for selling films depicting young boys masterbating.[125] The Appellate Division upheld the conviction but the New York Court of Appeals reversed, holding that the statute violated the First Amendment as being both underinclusive and overbroad.[126] The

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[119] *See* supra note 24.
[120] Humbach, *supra* note 4, at 452 (treatment as a felony sex offender).
[121] 458 U.S. 747 (1982).
[122] *Id*. at 763.
[123] The statute defined "sexual performances" as "any performance that includes sexual conduct by such a child, and "sexual conduct" is in turn defined as actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." *Id*. at 751.
[124] A "performance" was defined as "any play, motion picture, photograph or dance" or "any other visual representation exhibited before an audience." *Id*.
[125] *Id*. at 751-52.
[126] *Id*. at 752.

Supreme Court reversed. Justice White delivered the Opinion of the Court, holding that the States were entitled to greater leeway in the regulation of pornographic depictions of children for the following reasons: (1) the legislative judgment that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child easily passes muster under the First Amendment;[127] (2) the *Miller* standard for determining what is legally obscene is not a satisfactory solution to the child pornography problem;[128] (3) the advertising and selling of child pornography provide an economic motive for, and are thus an integral part of, the production of such materials, an activity illegal throughout the Nation; [129] (4) the value of permitting live performances and photographic reproductions of children engaged in lewd exhibitions is exceedingly modest, if not de minimis;[130] and (5) recognizing and classifying child pornography as a category of material outside the First Amendment's protection is not incompatible with this Court's decisions dealing with what speech is unprotected.[131] The Justices went on to say that "[w]hen a definable class of material, such as that covered by the New York statute, bears so heavily and pervasively on the welfare of children engaged in its production, the balance of competing interests is clearly struck, and it is permissible to consider these materials as without the First Amendment's protection."[132]

The Court put a great deal of emphasis on the need to protect children from abuse and exploitation,[133] saying that to do so "constitute[d] a government objective of surpassing

[127] *Id*. at 757-58.
[128] *Id*. at 760-61.
[129] *Id*. at 761.
[130] *Id.* at 762.
[131] *Id*. at 763.
[132] *Id*. at 764.
[133] *Id*. at 757.

importance."[134] It also highlighted the need to stem the flow of child pornography by cutting off its sources of supply, remarking that "[t]he distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled."[135] It declared that one way to "[d]ry up the market for this material [is] by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product."[136] Apparently the Justices felt so strongly about the need to "dry up" the market for child pornography that eight years later when *Osborne v. Ohio*[137] came before them, they held that mere possession of child pornography could be criminalized,[138] even though more than two decades earlier in *Stanley v. Georgia*,[139] they had held that the First Amendment prohibited the states from punishing private possession of obscene materials.[140] This means that if what teens are sexting is regarded as child pornography, they can be treated as felony sex offenders and prosecuted under the child pornography laws.[141]

In attempting to narrow the scope of Ferber and have it comport with the demands of literary or artistic expression, the Court noted with approval the suggestions of a state judge who observed that if a literary or artistic work required lewd exhibition of a child's genitals, "a person over the statutory age who perhaps looked younger could be utilized" or "simulation outside of the

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134 *Id*.
135 *Id*. at 759.
136 *Id*. at 760.
137 495 U.S. 103 (1990).
138 *Id*. at 111.
139 394 U.S. 557 (1969).
140 *Id.* at 568. For a clarification of how the Court distinguished Osborne from Stanley, *see* Humbach, *supra* note 4, at 451-54 (explaining that in Stanley the legislature sought to control private thoughts whereas in Osborne they sought to protect the victims of child pornography).
141 *See supra*, note 129.

prohibition of the statute could provide another alternative."[142] Twenty years later digital technology would present the Court with exactly that scenario. In *Ashcroft v. Free Speech Coalition*[143] the Justices were asked to decide if digitally simulated images of children engaged in sexual acts constituted child pornography. It is to that decision we now turn.

E. Free Speech Coalition – If a Computer Depicts It, It's Not Child Pornography

Free Speech Coalition challenged the constitutionality of the Child Pornography Prevention Act's (CPPA)[144] expansion of the federal prohibition on child pornography that included not only pornographic images made using actual children[145] but also "[a]ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "[i]s, or appears to be, of a minor engaging in sexually explicit conduct,"[146] and any sexually explicit image that is "[a]dvertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct."[147] As a result, it banned a range of sexually explicit images, sometimes called "virtual child pornography," that appear to depict minors but were produced by means other than using real children, such as through the use of youthful-looking adults or computer-imaging technology. Concerned that the CPPA threatened their activities, the Free Speech Coalition, an adult-entertainment trade association and others, filed suit alleging that the "appears to be" and "conveys the impression" provisions were overbroad and vague, chilling production of works protected by the First Amendment. While the District Court disagreed and granted

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[142] 458 U.S. at 762-63.
[143] 535 U.S. 234 (2002).
[144] 18 U.S.C. §2251 *et seq.* (1996).
[145] 18 U.S.C. §2256(8)(A).
[146] §2256(8)(B).
[147] §2256(8)(D).

the Government's motion for summary judgment, the Ninth Circuit reversed, holding that as a general principle pornography can be banned only if it is obscene under *Miller*,[148] but pornography depicting actual children can be proscribed whether or not the images are obscene because of the State's interest in protecting the children exploited by the production process[149] and in prosecuting those who promote such sexual exploitation.[150] It held the CPPA invalid on its face, finding it to be substantially overbroad because it banned materials that are neither obscene under Miller nor produced by the exploitation of real children as in *Ferber*.[151]

The Supreme Court affirmed,[152] ruling that it covered materials beyond the categories recognized in *Miller* and *Ferber*.[153] It outlawed images that are not obscene under the *Miller* standard, which requires the Government to prove that the work in question, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value.[154] It also prohibited speech having serious redeeming value, proscribing the visual depiction of an idea -- that of teenagers engaging in sexual activity -- that is a fact of modern society and has been a theme in art and literature for centuries.[155] The Justices held that the section could also not find support in *Ferber*, rejecting the Government's argument that speech prohibited by the CPPA would be virtually indistinguishable from material that may be banned under that ruling.[156] While *Ferber* upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these

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148 413 U.S. 15. S*upra* PART III (B)(1).
149 *Ferber,* 458 U.S. 747, 758. S*upra* PART III (C).
150 *Id*. at 761.
151 198 F.3d 1083 (1999).
152 535 U.S. at 256.
153 *Id*. at 240.
154 413 U.S. at 424. *See supra* PART III (B)(1).
155 535 U.S. at 246.
156 *Id*. at 249.

acts were "intrinsically related" to the sexual abuse of children,[157] in banning "virtual child pornography" the CPPA prohibited speech that recorded no crime and created no victims by its production since it is not "intrinsically related" to the sexual abuse of children.[158] The Court rejected the Government's assertion that the images could lead to actual instances of child abuse because the causal link was contingent and indirect and the harm did not necessarily follow from the speech, but depended upon some "unquantified potential" for subsequent criminal acts.[159] Finally, it remarked that the First Amendment is turned upside down by the Government's argument that, because it is difficult to distinguish between images made using real children and those produced by computer imaging, both kinds of images must be prohibited. The Justices held that the overbreadth doctrine prohibited the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.[160]

F. Sexters as Child Pornographers

Although some sexting could be considered child pornography under a strict interpretation of child pornography laws,[161] many commentators do not regard it as such.[162] If sexting were to be

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[157] *Id*. *citing* 458 U.S. at 759. *See supra* PART III (C).
[158] *Id*. at 250.
[159] *Id.*
[160] *Id*. at 255 c*iting Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973).
[161] *See* Humbach, *supra* note 4, at 446 ("Even when teenage sexting and other auto-pornography is not legally 'obscene,' it might still be viewed as 'child pornography'…" *citing New York v. Ferber,* 458 U.S. 747, 764-65 (1982), *supra* Part III (C) and Leary, *supra* note 5, at 4; *see* also Duncan, *supra* note 77, at 651.
[162] *See* Calvert, *supra* note 24, at 54 ("[n] all nude photographs – and certainly not all topless photographs – that a minor sexts of herself to another minor would constitute child pornography); *see* also Wastler, *supra* note 67, at 695; Kowalczyka, *supra* note 1, 700; Hiffa, *supra* note 50, at 514-515.

viewed as child pornography under federal[163] and state laws,[164] then nearly half of all teenagers would be felony sex offenders.[165]

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[163] *See* 18 U.S.C. §2256 (8) (Supp. 2009) defining child pornography as:

> any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where--
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

The term "sexually explicit conduct" is defined for purposes of the federal child pornography statute as:

> (i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;
> (ii) graphic or lascivious simulated;
> (I) bestiality;
> (II) masturbation; or
> (III) sadistic or masochistic abuse; or
> (iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person. *See* 18 U.S.C. §2256 (2) (B) (Supp. 2009).

[164] *See* Shannon Shafron-Perez, *Average Teenager or Sex Offender? Solutions to the Legal Dilemma Caused by Sexting*, 26 J. MARSHALL J. COMPUTER & INFO. L. 431, 437 (2009) ("Today, every state has its own laws proscribing child pornography."). The author graciously provides their citations, to wit: Alabama (Ala. Code § 13A-12-190 (2006); Ala. Code § 13A-12-191 (2006); Ala. Code § 13A-12-192 (2006); Ala. Code § 13A-12-193 (2006); Ala. Code § 13A-12-194 (2006); Ala. Code § 13A-12-195 (2006); Ala. Code § 13A-12-196 (2006); Ala. Code § 13A-12-197 (2006); Ala. Code § 13A-12-198 (2006).) Alaska (Alaska Stat. § 11.41.455 (2008); Alaska Stat. § 11.61.125 (2008); Alaska Stat. § 11.61.127 (2008); Alaska Stat. § 11.61.129 (2008).) Arizona (Ariz. Rev. Stat. Ann. § 13-3551 (2001); Ariz. Rev. Stat. Ann. § 13-3552 (2001); Ariz. Rev. Stat. Ann. § 13-3553 (2001); Ariz. Rev. Stat. Ann. § 13-3554 (2001); Ariz. Rev. Stat. Ann. § 13-3555 (2001); Ariz. Rev. Stat. Ann. § 13-3556 (2001); Ariz. Rev. Stat. Ann. § 13-3557 (2001); Ariz. Rev. Stat. Ann. § 13-3559

(2001).) Arkansas (Ark. Code Ann. § 5-27-301 (West 2008); Ark. Code Ann. § 5-27-302 (West 2008); Ark. Code Ann. § 5-27-304 (West 2008); Ark. Code Ann. § 5-27-401 (West 2008); Ark. Code Ann. § 5-27-402 (West 2008); Ark. Code Ann. § 5-27-403 (West 2008); Ark. Code Ann. § 5-27-404 (West 2008); Ark. Code Ann. § 5-27-405 (West 2008); Ark. Code Ann. § 5-27-601 (West 2008); Ark. Code Ann. § 5-27-602 (West 2008); Ark. Code Ann. § 5-27-603 (West 2008); Ark. Code Ann. § 5-27-604 (West 2008); Ark. Code Ann. § 5-27-605 (West 2008); Ark. Code Ann. § 5-27-607 (West 2008); Ark. Code Ann. § 5-27-608 (West 2008).) California (Cal. Penal Code § 311.1 (West 2008); Cal. Penal Code § 311.2 (West 2008); Cal. Penal Code § 311.3 (West 2008); Cal. Penal Code § 311.4 (West 2008); Cal. Penal Code § 1054.10 (West 2008); Cal. Penal Code § 1170.71 (West 2004); Cal. Penal Code § 11165.1 (West 2000).) Colorado (Colo. Rev. Stat. Ann. § 18-6-403 (West 2004).) Connecticut (Conn. Gen. Stat. Ann. § 53a-193 (West 2007); Conn. Gen. Stat. Ann. § 53a-196a (West 2007); Conn. Gen. Stat. Ann. § 53a-196b (West 2007); Conn. Gen. Stat. Ann. § 53a-196c (West 2007); Conn. Gen. Stat. Ann. § 53a-196d (West 2007); Conn. Gen. Stat. Ann. § 53a-196e (West 2007); Conn. Gen. Stat. Ann. § 53a-196f (West 2007); Conn. Gen. Stat. Ann. § 53a-196g (West 2007).) Delaware (Del. Code Ann. tit. 11, § 1103 (2007); Del. Code Ann. tit. 11, § 1108 (2007); Del. Code Ann. tit. 11, § 1109 (2007); Del. Code Ann. tit. 11, § 1111 (2007).) Florida (Fla. Stat. Ann. § 775.0847 (West Supp. 2008); Fla. Stat. Ann. § 827.071 (West 2006); Fla. Stat. Ann. § 847.001 (West 2000); Fla. Stat. Ann. § 847.002 (West Supp. 2008); Fla. Stat. Ann. § 847.012 (West 2000); Fla. Stat. Ann. § 847.0135 (West 2000); Fla. Stat. Ann. § 847.01357 (West Supp. 2008); Fla. Stat. Ann. § 847.0137 (West Supp. 2008); Fla. Stat. Ann. § 847.0138 (West Supp. 2008); Fla. Stat. Ann. § 847.0139 (West Supp. 2008).) Georgia (Ga. Code Ann. § 16-12-100 (West 2009); Ga. Code Ann. § 16-12-100.2 (West 2009).) Hawaii (Haw. Rev. Stat. Ann. § 707-750 (LexisNexis 2007); Haw. Rev. Stat. Ann. § 707-751 (LexisNexis 2007); Haw. Rev. Stat. Ann. § 707-752 (LexisNexis 2007); Haw. Rev. Stat. Ann. § 707-753 (LexisNexis 2007); Haw. Rev. Stat. Ann. § 712-1210 (LexisNexis 2007); Haw. Rev. Stat. Ann. § 712-1211 (LexisNexis 2007); Haw. Rev. Stat. Ann. § 712-1218 (LexisNexis 2007); Haw. Rev. Stat. Ann. § 712-1218.5 (LexisNexis 2007); Haw. Rev. Stat. Ann. § 712-1219 (LexisNexis 2007); Haw. Rev. Stat. Ann. § 712-1219.5 (LexisNexis 2007).) Idaho (Idaho Code Ann. § 18-1507 (2004); Idaho Code Ann. § 18-1507A (2004).) Illinois (720 Ill. Comp. Stat. Ann. 5/11-20.1 (West 2002); 720 Ill. Comp. Stat. Ann. 5/11-20.1A (West 2002); 720 Ill. Comp. Stat. Ann. 5/11-20.3 (West Supp. 2009); 720 Ill. Comp. Stat. Ann. 5/11-23 (West 2002); 720 Ill. Comp. Stat. Ann. 5/14-3 (West 2003).) Indiana (Ind. Code Ann. § 34-24-1-1 (West 1999); Ind. Code Ann. § 35-42-4-4 (West 2004); Ind. Code Ann. § 35-42-4-12 (West Supp. 2008).) Iowa (Iowa Code Ann. § 710.10 (West 2003); Iowa Code Ann. § 728.1 (West 2003); Iowa Code Ann. § 728.12 (West Supp. 2009).)

Kansas (Kan. Stat. Ann. § 21-3516 (2008).) Kentucky (Ky. Rev. Stat. Ann. § 15.900 (West 2006); Ky. Rev. Stat. Ann. § 531.300 (West 2006); Ky. Rev. Stat. Ann. § 531.310 (West 2006); Ky. Rev. Stat. Ann. § 531.320 (West 2006); Ky. Rev. Stat. Ann. § 531.330 (West 2006); Ky. Rev. Stat. Ann. § 531.335 (West 2006); Ky. Rev. Stat. Ann. § 531.340 (West 2006); Ky. Rev. Stat. Ann. § 531.350 (West 2006); Ky. Rev. Stat. Ann. § 531.360 (West 2006); Ky. Rev. Stat. Ann. § 531.370 (West 2006).) Louisiana (La. Rev. Stat. Ann. § 14:81.1 (2004).) Maine (Me. Rev. Stat. Ann. tit. 17-A, § 259 (2006); Me. Rev. Stat. Ann. tit. 17-A, § 281 (2006); Me. Rev. Stat. Ann. tit. 17-A, § 282 (2006); Me. Rev. Stat. Ann. tit. 17-A, § 283 (2006); Me. Rev. Stat. Ann. tit. 17-A, § 284 (2006); Me. Rev. Stat. Ann. tit. 17-A, § 285 (2006).) Maryland (Md. Code Ann., Crim. Law § 3-602 (West 2002); Md. Code Ann., Crim. Law § 11-201 (West 2002); Md. Code Ann., Crim. Law § 11-207 (West 2002); Md. Code Ann., Crim. Law § 11-208 (West 2002); Md. Code Ann., Crim. Law § 11-208.1 (West Supp. 2008).) Massachusetts (Mass. Gen. Laws Ann. ch. 272, § 29A (West 2000); Mass. Gen. Laws Ann. ch. 272, § 29B (West 2000); Mass. Gen. Laws Ann. ch. 272, § 29C (West 2000).) Michigan (Mich. Comp. Laws Ann. § 750. 145c (West 2004); Mich. Comp. Laws Ann. § 750. 145d (West 2004).) Minnesota (Minn. Stat. Ann. § 617.246 (West 2009); Minn. Stat. Ann. § 617.247 (West 2009).) Mississippi (Miss. Code Ann. § 97-5-31 (West 2005); Miss. Code Ann. § 97-5-33 (West 2005); Miss. Code Ann. § 97-5-35 (West 2005).) Missouri (Mo. Ann. Stat. § 573.010 (West 2003); Mo. Ann. Stat. § 573.023 (West 2003); Mo. Ann. Stat. § 573.025 (West 2003); Mo. Ann. Stat. § 573.035 (West 2003); Mo. Ann. Stat. § 573.037 (West 2003); Mo. Ann. Stat. § 573.038 (West Supp. 2009); Mo. Ann. Stat. § 573.050 (West 2003); Mo. Ann. Stat. § 573.052 (West Supp. 2009).) Montana (Mont. Code Ann. § 45-5-625 (2007).) Nebraska (Neb. Rev. Stat. § 28-707 (2003); Neb. Rev. Stat. § 28-1463.01 (2003); Neb. Rev. Stat. § 28-1463.02 (2003); Neb. Rev. Stat. § 28-1463.03 (2003); Neb. Rev. Stat. § 28-1463.04 (2003); Neb. Rev. Stat. § 28-1463.05 (2003).) Nevada (Nev. Rev. Stat. Ann. § 200.508 (West 2007); Nev. Rev. Stat. Ann. § 200.700 (West 2007); Nev. Rev. Stat. Ann. § 200.710 (West 2007); Nev. Rev. Stat. Ann. § 200.720 (West 2007); Nev. Rev. Stat. Ann. § 200.725 (West 2007); Nev. Rev. Stat. Ann. § 200.730 (West 2007); Nev. Rev. Stat. Ann. § 200.735 (West 2007).) New Hampshire (N.H. Rev. Stat. Ann. § 649-A:1 (2007); N.H. Rev. Stat. Ann. § 649-A:2 (2007); N.H. Rev. Stat. Ann. § 649-A:3 (2007); N.H. Rev. Stat. Ann. § 649-A:4 (2007); N.H. Rev. Stat. Ann. § 649-A:5 (2007).) New Jersey (N.J. Stat. Ann. § 2C:24-4 (West 2005).) New Mexico (N.M. Stat. Ann. § 30-6A-1 (West 2003); N.M. Stat. Ann. § 30-6A-2 (West 2003); N.M. Stat. Ann. § 30-6A-3 (West 2003).) New York (N.Y. Penal Law § 263.00 (McKinney 2008); N.Y. Penal Law § 263.05 (McKinney 2008); N.Y. Penal Law § 263.10 (McKinney 2008); N.Y. Penal Law § 263.11 (McKinney 2008); N.Y. Penal Law § 263.15 (McKinney 2008); N.Y. Penal Law

§ 263.16 (McKinney 2008); N.Y. Penal Law § 263.20 (McKinney 2008); N.Y. Penal Law § 263.25 (McKinney 2008).) North Carolina (N.C. Gen. Stat. Ann. § 14-190.6 (West 2000); N.C. Gen. Stat. Ann. § 14-190.13 (West 2000); N.C. Gen. Stat. Ann. § 14-190.16 (West 2000); N.C. Gen. Stat. Ann. § 14-190.17 (West 2000); N.C. Gen. Stat. Ann. § 14-190.17A (West 2000).) North Dakota (N.D. Cent. Code § 12.1-27.2-01 (1997); N.D. Cent. Code § 12.1-27.2-02 (1997); N.D. Cent. Code § 12.1-27.2-03 (1997); N.D. Cent. Code § 12.1-27.2-04 (1997); N.D. Cent. Code § 12.1-27.2-04.1 (1997); N.D. Cent. Code § 12.1-27.2-04.2 (1997); N.D. Cent. Code § 12.1-27.2-05 (1997); N.D. Cent. Code § 12.1-27.2-06 (1997).) Ohio (Ohio Rev. Code Ann. § 2907.01 (West 2006); Ohio Rev. Code Ann. § 2907.321 (West 2006); Ohio Rev. Code Ann. § 2907.322 (West 2006); Ohio Rev. Code Ann. § 2907.323 (West 2006).) Oklahoma (Okla. Stat. Ann. tit. 21, § 1021 (West 2002); Okla. Stat. Ann. tit. 21, § 1021.1 (West 2002); Okla. Stat. Ann. tit. 21, § 1021.2 (West 2002); Okla. Stat. Ann. tit. 21, § 1021.3 (West 2002); Okla. Stat. Ann. tit. 21, § 1021.4 (West 2002); Okla. Stat. Ann. tit. 21, § 1024.1 (West 2002).) Oregon (Or. Rev. Stat. Ann. § 163.665 (West 2003); Or. Rev. Stat. Ann. § 163.670 (West 2003); Or. Rev. Stat. Ann. § 163.676 (West 2003); Or. Rev. Stat. Ann. § 163.682 (West 2003); Or. Rev. Stat. Ann. § 163.684 (West 2003); Or. Rev. Stat. Ann. § 163.686 (West 2003); Or. Rev. Stat. Ann. § 163.687 (West 2003); Or. Rev. Stat. Ann. § 163.688 (West 2003); Or. Rev. Stat. Ann. § 163.689 (West 2003); Or. Rev. Stat. Ann. § 163.690 (West 2003); Or. Rev. Stat. Ann. § 163.693 (West 2003).) Pennsylvania (18 Pa. Cons. Stat. Ann. § 6312 (West 2000).) Rhode Island (R.I. Gen. Laws § 11-9-1 (2002); R.I. Gen. Laws § 11-9-1.1 (2002); R.I. Gen. Laws § 11-9-1.3 (2002); R.I. Gen. Laws § 11-9-2 (2002).) South Carolina (S.C. Code Ann. § 16-15-335 (2003); S.C. Code Ann. § 16-15-375 (2003); S.C. Code Ann. § 16-15-395 (2003); S.C. Code Ann. § 16-15-405 (2003); S.C. Code Ann. § 16-15-410 (Supp. 2009); S.C. Code Ann. § 16-15-445 (2003).) South Dakota (S.D. Codified Laws § 22-22-24.3 (Supp. 2003); S.D. Codified Laws § 22-24A-1 (2008); S.D. Codified Laws § 22-24A-2 (2008); S.D. Codified Laws § 22-24A-3 (2008); S.D. Codified Laws § 22-24A-4 (2008).) Tennessee (Tenn. Code Ann. § 39-17-1001 (West 2002); Tenn. Code Ann. § 39-17-1002 (West 2002); Tenn. Code Ann. § 39-17-1003 (West 2002); Tenn. Code Ann. § 39-17-1004 (West 2002); Tenn. Code Ann. § 39-17-1005 (West 2002); Tenn. Code Ann. § 39-17-1008 (West Supp. 2009).) Texas (Tex. Penal Code Ann. § 43.21 (Vernon 2003); Tex. Penal Code Ann. § 43.25 (Vernon 2003); Tex. Penal Code Ann. § 43.26 (Vernon 2003); Tex. Penal Code Ann. § 43.27 (Vernon Supp. 2007).) Utah (Utah Code Ann. § 76-5a-1 (West 2008); Utah Code Ann. § 76-5a-2 (West 2008); Utah Code Ann. § 76-5a-3 (West 2008); Utah Code Ann. § 76-5a-4 (West 2008).) Vermont (Vt. Stat. Ann. tit. 13, § 2821 (1998); Vt. Stat. Ann. tit. 13, § 2822 (1998); Vt. Stat. Ann. tit. 13, § 2823 (1998); Vt. Stat. Ann. tit. 13, § 2824 (1998); Vt. Stat. Ann. tit. 13, § 2825 (1998); Vt. Stat. Ann. tit. 13, § 2826 (1998); Vt. Stat. Ann. tit. 13, § 2827

As one commentator noted:[166]

> Thus, in addition to the twenty percent of teens who are "producing" sexually explicit images of themselves, there is, perhaps an even greater number of teens who are guilty of felonies for having received such images and retained or forwarded them to others (i.e., "possession" and "distribution"). Receiving just one picture carries a mandatory minimum sentence of five years. On the conservative assumption that, for each teen who photographs herself, an average of two or three classmates receive copies of the pictures, it is a plausible estimate that as many as forty to fifty percent or more of otherwise law-abiding American teenagers are already felony sex offenders under current law and as such are subject to long-term imprisonment followed by "sex offender" registration requirements for decades or for life.

[citations omitted]. A society that criminalizes approximately half

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(Supp. 2008).) Virginia (Va. Code Ann. § 18.2-370 (West 2001); Va. Code Ann. § 18.2-374.1 (West 2001); Va. Code Ann. § 18.2-374.1:1 (West 2001).) Washington (Wash. Rev. Code Ann. § 9.68A.001 (West 2009); Wash. Rev. Code Ann. § 9.68A.011 (West 2009); Wash. Rev. Code Ann. § 9.68A.040 (West 2009); Wash. Rev. Code Ann. § 9.68A.050 (West 2009); Wash. Rev. Code Ann. § 9.68A.060 (West 2009); Wash. Rev. Code Ann. § 9.68A.070 (West 2009); Wash. Rev. Code Ann. § 9.68A.080 (West 2009); Wash. Rev. Code Ann. § 9.68A.120 (West 2009).) West Virginia (W. Va. Code Ann. § 61-8C-1 (West 2002); W. Va. Code Ann. § 61-8C-2 (West 2002); W. Va. Code Ann. § 61-8C-3 (West 2002); W. Va. Code Ann. § 61-8C-4 (West 2002); W. Va. Code Ann. § 61-8C-5 (West 2002).) Wisconsin (Wis. Stat. Ann. § 948.01 (West 2005); Wis. Stat. Ann. § 948.05 (West 2005); Wis. Stat. Ann. § 948.051 (West Supp. 2008); Wis. Stat. Ann. § 948.07 (West 2005); Wis. Stat. Ann. § 948.12 (West 2005); Wis. Stat. Ann. § 948.14 (West Supp. 2009).) Wyoming (Wyo. Stat. Ann. § 6-4-301 (2009); Wyo. Stat. Ann. § 6-4-303 (2009).

[165] Humbach, *supra* note 4, at 437.

[166] *Id*.

of its teenage citizens for taking and sharing inappropriate pictures of themselves is one in need of serous review of those criminal statutes.

G. Sexting and Teen First Amendment and Privacy Rights

Clearly, adults sexting nude photos of themselves to their friends are committing no crime as their actions are a protected form of expression under the First Amendment.[167] Moreover, teens have First Amendment rights[168] that they do not lose when they enter the schoolhouse.[169] So if a teen's nude photograph of themselves can be viewed as a form of self-expression, statutes banning the taking of such pictures or video, without more, would most likely be struck down as violating the First Amendment.[170] Furthermore,

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[167] *Osborne v. Ohio*, 495 U.S. 103, 112 (1990) (citing *New York v. Ferber*, 485 U.S. 747, 765 fn. 18 ("depictions of nudity, without more, constitute protected expression"); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (nude dancing protected as form of expression under First Amendment); *see also Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975) holding unconstitutional a city ordinance prohibiting the exhibition of films containing nudity by a drive-in movie theater when its screen is visible from a public street or place. On the value of free expression in a democratic society, *see* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 9 (1992) (commenting that free speech can be an end in itself) and ROBERT TRAGER & DONNA L. DICKERSON, FREEDOM OF EXPRESSION IN THE 21ST CENTURY 101 (1999) (remarking that self-expression is how we define ourselves has human beings).

[168] *Am. Amusement Machine Ass'n v. Kendrick*, 244 F. 3d 572, 576 (7th Cir 2001) ("children have First Amendment rights"). *See* also Kowalczyk, *supra* note 1, at 712-14.

[169] *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 506 (1969) ("students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

[170] Calvert, *supra*, note 24, at 43, *citing Entertainment Software Ass'n v. Blagojevich,* 469 F.3d 641, 646 (7th Cir. 2006) (affirming a permanent injunction prohibiting an Illinois law restricting minors' access to sexually explicit video games, and noting that one of the implications of the fact that children have First Amendment rights is that the U.S. Constitution "requires us to ask whether legislation unduly burdens the First Amendment rights of

arguments can be made under *Lawrence v. Texas*[171] that sexting is a right under the Due Process clause of the Fifth Amendment and that teenagers taking nude photos of themselves without any intent to disseminate them are engaged in private activities beyond the reach of prosecutorial sanctions.[172] As the Court in *Lawrence* stated:

Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.[173] "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[174] "Our obligation is to define the liberty of all, not to mandate our own moral code."[175]

Thus it is reasonable to ask whether any of the legislation criminalizing sexting that we are about to review can withstand a constitutional challenge under Lawrence. The high Court itself

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minors"). *Accord: Entm't Software Ass'n v. Chi. Transit Auth.,* 696 F. Supp. 2d 934 (N.D. Ill. 2010) (preliminary injunction granted against enforcement of municipal ordinance prohibiting placement of commercial advertisements for mature-content video games on trains, buses and other facilities) and *Video Software Dealers Ass'n v. Schwarzenegger,* 556 F.3d 950 (9th Cir. 2009) (summary judgment granting declaratory relief against enforcement of state statute imposing restrictions and labeling requirements on the sale or rental of violent video games to minors affirmed).

[171] 539 U.S. 558 (2003). *See* Pavia, *supra* note 78, at 220 (counseling against "defining rights so narrowly as to grant the majority culture a backdoor to define which rights should be deemed fundamental").

[172] *See* Dissent of Padovano, J. in *A.H. v. State*, 949 So.2d 234, 239-40 (Fla. Dist. Ct. App. 1st Dist 2007) ("[a]lthough I do not condone the child's conduct in this case, I cannot deny that it is private conduct. Because there is no evidence that the child intended to show the photographs to third parties, they are as private as the act they depict.") quoted in Pavia, *supra* note 78, at 208; *see* also Hiffa note 50, at 520-22.

[173] 539 U.S. at 562.

[174] *Id*. at 574, quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

[175] *Id*. at 571, quoting *Casey* at 850.

posed a similar question in examining the statute under review in that case.[176]

IV. LEGISLATIVE RESPONSES TO SEXTING

As documented in the Berkman Report, the most common legislative response thus far has been to modify criminal laws by downgrading certain child exploitation related felony offenses to misdemeanors or status offenses when committed in the context of sexting.[177] These provisions generally call for less severe punishments, exclusion from sex offender registries, and expunging of juvenile records where the subject, possessor, and sender of the sexually explicit image are minors close in age.[178] At least four states, including Colorado,[179] Missouri[180], Utah,[181] and Vermont,[182] have modified their criminal laws in this manner.

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[176] "The issue is whether the majority may use the power of the State to enforce these views [criminalizing certain intimate sexual conduct] on the whole society through operation of the criminal law." *Id.* at 571.

[177] Berkman, *supra* note 6, at 31. *See* also Jordan J. Szymialis, *Note: Sexting: A Response to Prosecuting Those Growing Up with a Growing Trend,* 44 IND. L. REV. 301, 318-22 (2010) (discussing sexting legislation in Arizona, Connecticut, Illinois, Louisiana that punishes first-time sexting offenders as well as pending bills or enactments in Nebraska, Utah, Ohio, New Jersey, Florida, New York, and Missouri).

[178] Berkman, *supra* note 6, at 31-32. This mirrors so-called "Romeo and Juliet" statutes that reduce the penalty for sexual intercourse between minors if they are close in age. *See generally* Calvert, *supra* note 24, at 29 and Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 314-15 (2003) and Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 313 (2006).

[179] Law provides that in order to be charged with Internet sexual exploitation of a child (a class 4 felony), the offender must have known or believed that the child was younger than 15 years old at the time of the offense and the offender must have been at least 4 years older than the child. BERKMAN, Appendix A. *See* http://www.leg.state.co.us/clics/clics2009a/csl.nsf (last accessed Jul 1, 2012).

[180] Law prohibits a minor from using a telecommunications device knowingly or recklessly to create, receive, exchange, send or possess sexually explicit images

A similar legislative response, passed in Nebraska[183] is to build an affirmative defense into existing child pornography statutes. These

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of a minor – themselves included – as a class B misdemeanor for a first violation and a class A misdemeanor for any subsequent violation. It also exempts these offenses from sex offender registration. *Id*. *See* http://www.house.mo.gov/content.aspx?info=/bills091/bills/hb62.htm (last accessed July 1, 2012).

[181] Utah Code Ann. §§ 76-10-1204, 76-10-1206 carves out three specific levels of punishment for distribution of pornographic materials based on the age of the offender, making the offense a third degree felony for offenders who are 18 years of age and older, a class A misdemeanor for offenders who are 16 or 17 years of age, and a class B misdemeanor for offenders under the age of 16. *Id*. *See* http://le.utah.gov/%7E2009/bills/hbillenr/hb0014.htm (last accessed July 1, 2012).

[182] 13 Vt. Stat. Ann. §2802b provides for delinquent adjudication and subsequent record expungement of minors who knowingly and voluntarily and without threat or coercion use a computer or electronic communication device to transmit an indecent visual depiction of themselves to another person, as well as for those who possess such transmitted images without taking reasonable steps, whether successful or not, to destroy or eliminate the images. The law applies only to first-time offenders; subsequent offenses will be prosecuted as sexual exploitation of children. *Id*. *See* http://www.leg.state.vt.us/database/status/summary.cfm?Bill=S.0125&Session=2010 (last accessed July 1, 2012).

[183] Law makes it a class IV felony for persons under the age of 19 to knowingly possess any visual depiction of sexually explicit conduct that has a child as one of its participants or portrayed observers, providing two affirmative defenses to the charge: (1) the visual depiction portrays no person other than the defendant, *or* (2) (a) the defendant was less than nineteen years of age; (b) the visual depiction of sexually explicit conduct portrays a child who is fifteen years of age or older; (c) the visual depiction was knowingly and voluntarily generated by the child depicted therein; (d) the visual depiction was knowingly and voluntarily provided by the child depicted in the visual depiction; (e) the visual depiction contains only one child; (f) the defendant has not provided or made available the visual depiction to another person except the child depicted who originally sent the visual depiction to the defendant; *and* (g) the defendant did not coerce the child in the visual depiction to either create or send the visual depiction. The statute also prohibits the creation or distribution of any visual depiction of sexually explicit conduct involving a child as a participant or portrayed observer, providing two similar affirmative defenses to these charges:

defenses generally provide that if the accused minor is the only subject of the image at issue, or if the possessor or distributor of the image is a minor close in age to the depicted minor and the depicted minor consented to the production of the image, the accused is not guilty of violating the child pornography laws.[184]

At the time of this writing, five additional states have passed bills dealing with sexting. The most recent was Rhode Island. In July 2011, the governor signed into law a measure providing that a person who receives a sexually explicit image of an underage person or sends it out to friends or family, or posts it on websites, could be charged under the state's child pornography laws and could have to register as a sex offender.[185] Under the new law teens who send out their own images or photos will be charged in Family Court with a "status" offense.[186]

In June, 2011 Florida passed a statute providing that a minor commits the offense of sexting if he or she knowingly uses a computer or other device to transmit or distribute a photograph or video of himself or herself which depicts nudity and is harmful to minors, or knowingly possesses such photograph or video that was transmitted or distributed to a minor from another minor; and also provides that transmission or distribution of multiple photographs

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(1) the defendant charged with *creating* the image was less than eighteen years of age at the time the visual depiction was created and includes no person other than the defendant, *or* (2) the defendant charged with d*istributing* the image (a) was less than eighteen years of age, (b) the visual depiction of sexually explicit conduct includes no person other than the defendant, (c) the defendant had a reasonable belief at the time the visual depiction was sent to another that it was being sent to a willing recipient, and (d) the recipient was at least fifteen years of age at the time the visual depiction was sent. *Id. See* http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=6401 (last accessed July 27, 2012).

[184] BERKMAN, *supra* note 6, at 32.

[185] House Bill 5094. *See* http://www.newsy.com/videos/rhode-island-bans-underage-sexting/ (last accessed July 27, 2012).

[186] *Id*.

or videos is a single offense if such photo-graphs and videos were transmitted or distributed in same 24-hour period.[187] During the same month Nevada[188] revised Chapter 245 governing certain acts by juveniles relating to the possession, transmission and distribution of certain sexual images. Earlier in the year, North Dakota's governor signed into law a bill relating to the creation, possession, or dissemination of sexually expressive images.[189] Lastly, Texas passed a statute relating to the creation of the offense of electronic transmission of certain visual material depicting a minor and to certain educational programs concerning the prevention and awareness of that offense.[190] According to the National Conference of State Legislatures (NCSL), at least fourteen states have enacted bills addressing youth sexting with another seventeen states considering such legislation.[191]

Some states have focused on educational responses to sexting as well as criminal penalties. South Carolina, for example, is currently considering a bill that would create the offense of sexting and also an educational program for persons who commit the offense, while Indiana and New York have bills dealing with educating youth about the dangers of sexting and California is considering a bill that would mandate sexters undergo

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[187] See *2011 Legislation Related to "Sexting,"* compiled by the National Conference of State Legislatures (June 22, 2011) [hereinafter NCSL] available at http://www.ncsl.org/default.aspx?tabid=22127 ((last accessed July 27, 2012). The law also provides that photographs and videos transmitted or distributed in same 24-hour period; provides that possession of multiple photographs or videos that were transmitted or distributed by minor is single offense if such photographs and videos were transmitted or distributed by minor in same 24-hour period; provides that act does not prohibit prosecution of minor for conduct relating to material that includes depiction of sexual conduct or sexual excitement or for stalking. *Id*.

[188] *Id.*

[189] *Id.*

[190] *Id*.

[191] *Id*.

counseling.[192] New Jersey has several bills pending, one would require school districts to provide students and parents with information on sexting, and another prohibit the sale of cell phones in retail stores that do not provide pamphlets on sexting to customers whereas legislation under consideration in Alaska, Kansas, and Mississippi deal with sexting as exploitation of children.[193]

Below is a Model Bill addressing sexting that seeks to balance the privacy and First Amendment rights of teenagers and the concerns of those troubled over the harms wrought by child pornography. It provides that anyone under eighteen years of age who sends out or receives sexually explicit messages, photos or images shall be guilty of a misdemeanor but cannot be charged under the state's child pornography laws and does not have register as a sex offender. They are required to attend an educational program on the dangers and social implications of sexting and their record of conviction is expunged once they reach eighteen years of age. Under the bill the sender of nude or partially nude photos or images commits no crime but the intended recipient can be charged if he or she re-transmits, sends, or forwards the photos or images to someone else even if the sender consents. Lastly, obtaining sexually explicit or nude or partially nude photos or images through force, intimidation, coercion, or threats are prohibited.

Model Sexting Statute

> Whereas: parents and minors are unaware of and unacquainted with the harms, dangers, hazards, and social implications of sexting and its possible use to embarrass, threaten, intimidate or otherwise coerce minors and students; and

[192] *Id.*
[193] *Id.*

Whereas: the practice of "sexting" is of great concern to teachers, educators, and school administrators because it can impact the educational environment by rapidly reaching a large number of students and public school officials and employees and disrupting the operation of a public school;

NOW THEREFORE,
BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF _____

SECTION 1. Definitions

For Purposes of this statute, unless the context otherwise requires:

(a) "Sexting" means the practice of sending, receiving, or forwarding sexually explicit messages, photos, or images via cell phone, computer, or other electronic communication device;

(b) "Person" means anyone under eighteen years of age;

(c) "Electronic communication" means any communication involving the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means;

(d) "Electronic" includes but is not limited to, electronic mail, internet-based communication, pager service, cell phones and electronic text messaging;

(e) "Sexually explicit" means:

(1) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of anyone is exhibited;
(2) graphic or lascivious simulated;
(3) bestiality;
(4) masturbation; or
(5) sadistic or masochistic abuse; or
(6) graphic or simulated lascivious exhibition of the genitals or pubic area;

(f) Partial or complete nudity alone shall not be considered a violation of this statute except where noted.

SECTION 2. Prohibited Acts; Statutory Pre-Emption

(a) No person shall knowingly or willfully send, receive, or forward sexually explicit messages, photos, or images via cell phone, computer, or other electronic communication device, including photos or images of himself or herself;

(b) No person who was the intended recipient of any sexually explicit message, photo, or image, including those covered under Section 1(f), shall send, re-transmit, or forward such message,

photo, or image even with the consent of the original sender;

(c) No person shall obtain any sexually explicit messages, photos, or images, including those covered under Section 1(f), through force, intimidation, coercion, or threats;

(d) No person engaged in sexting shall be charged under the state's child pornography or obscenity statutes;

SECTION 3. Penalties; Education & Registration Requirements; Expunging of Records

(a) Persons convicted under this statute shall be guilty of a misdemeanor and required to attend an educational program dealing with the harms, dangers, hazards, and social implications of sexting;

(b) No person convicted under this statute shall be required to register as a sex offender;

(c) Persons convicted under this statute shall have the record of such conviction expunged on their eighteenth birthday;

SECTION 4: This Law shall be effective upon passage.

V. LEGAL COMMENTATORS REACT TO SEXTING

This writer's review of the opinions of legal commentators on prosecuting teens as child pornographers for sexting reveals that the overwhelming majority believe that it is inadvisable to do so.[194] However, under certain conditions, one legal scholar maintains that it should be an option available to prosecutors,[195] while others

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[194] *See* Kowalczyk, *supra* note 1, at 715 ("Although felony charges under child pornography laws may be appropriate when applied to sexual predators and pedophiles who attempt to contact children via cell phones, they are inapposite to sexting between adolescents."); Humbach, *supra* note 4, at 438 ("Whatever else may be made of all this [prosecuting teens as child pornographers for sexting], there is certainly reason to suspect something is profoundly amiss when a system of laws makes serious felony offenders of such a large proportion of its young people."); Calvert, *supra* note 24, at 64 ("Instead of turning minors over to the criminal justice system, schools should be teaching them about the dangers of sexting itself."); Hiffa, *supra* note 50, at 529 ("Criminalizing sexting between minors is the wrong approach for a multitude of reasons."); Wastler, *supra* note 67, at 698 ("Sexting should be considered outside the scope of the child pornography exclusion…"); Pavia, *supra* note 78, at 215 ("It does not make sense for the government to brand children as criminals for making private decisions that are "immoral" with a law designed to protect children."); Smith, *supra* note 82, at 544 ("To funnel into the criminal or juvenile justice system cases of self-produced child pornography – material that, at its root, steps from the undeniable fact that today's teenagers are sexually active well before they turn eighteen – is unjustified."); Robert H. Wood, *The Failure of Sexting Criminalization: A Plea For The Exercise of Prosecutorial Restraint*, 16 MICH. TELECOMM. TECH. L. REV. 151, 178 (2009), *infra* note 201; Elizabeth C. Eraker, *A Note: Stemming Sexting: Sensible Legal Approaches To Teenagers' Exchange of Self-Produced Pornography*, 25 BERKELEY TECH. L. J. 555, 596 (2010) ("Lawmakers looking to address the sexting phenomenon should focus, instead, on crafting a new misdemeanor outside of child pornography statutes…); Shafron-Perez, *supra* note 164, at 452 ("While minors are clearly exercising poor judgment when they engage in sexting, this is not the type of conduct that child pornography laws were enacted to prohibit."); Szymialis, *supra* note 177, at 339 ("For the vast majority of sexting incidents, the solution should be to continue in the tradition of the juvenile court system and focus on rehabilitation.")

[195] *See* Leary, *supra* note 5, at 48 ("This article does not suggest that juvenile prosecution be a mandatory consequence. Rather, jurisdictions should develop a

advocate creating a new offense specific to self-produced child pornography.[196] However, popular sentiment as reflected in newspaper editorials and commentary supports the position of the majority of legal writers that child pornography charges should not be brought against sexters.[197]

VI. CONCLUSION

In an era of prostitots[198] and television programs of the ilk of *Toddlers and Tiaras,* where six-year-old girls use makeup and mascara to participate in beauty pageants, prosecuting teenagers under child pornography laws for taking and sharing naked photos of themselves warps the purpose of such laws that are intended to protect children from commercial exploitation and abuse,[199] both of which are absent in sexting. Prosecutors should take a common

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protocol which includes: (1) juvenile prosecution as an option, and (2) factors to consider in determining if an individual case deserves that response.").

[196] *See* Duncan, *supra* note 77, at 698 ("A more sensible approach involves creating a new offense specific to self-produced child pornography occurring among minors."); W. Jesse Weins & Todd C. Hiestand, *Sexting, Statutes, and Saved by the Bell: Introducing a Lesser Juvenile Charge With an "Aggravating Factors" Framework,* 77 TENN. L. REV. 1, 55 (2009) ("But because the images, motivations, and harms of sexting vary substantially, something unique is needed to address the issue. Using a lesser charge with an "aggravating factors" framework provides a coherent and balanced approach for the juvenile system.").

[197] *See* Bialik, *supra* note 28; Shaw, *supra*, note 30; Jurgenson, *supra* note 32; Louis, *supra* note 49; Tobias, *supra* note 63; Editorial, CHRISTIAN SCIENCE MONITOR, *supra* note 65; Lithwick, *supra* note 66; Jesse Singal, *Panic Over Teen 'Sexting' Eclipses Bigger Threat*, BOSTON GLOBE, Jan. 08, 2010 at A15; Xiaolu Zhang, *Charging Children with Child Pornography – Using the Legal System to Handle the Problem Of "Sexting,"* 26 COMPUTER LAW & SECURITY REPORT 251 (2010); Monica Yant Kinney, *No Need To Go Overboard on Teens' Sexting*, PHILADELPHIA INQUIRER, Feb. 06, 2011 at B01; Kelley R. Taylor, *Sexting: Fun or Felony,* PRINCIPAL LEADERSHIP, Apr. 2009 at 60; Vivian Berger, *STOP Prosecuting Teens for Sexting*, NATIONAL LAW J. , July 27, 2009 at 42.

[198] *See* PART II D *supra*.

[199] *See* Ferber *supra* note 70.

sense approach to sexting and at the same time be mindful of the legal maxim "*cessante ratione legis, cessat ipsa legis*" ("the reason for the law ceasing, the law also ceases").[200] Legal commentators have rightly urged restraint in sexting cases.[201] They call out for education and parental guidance,[202] not the prosecutor's hammer wielding child pornography indictments. Such prosecutions cause more harm than the sexting itself.

Every society has their forbidden fruit. For colonial Salem it was witchcraft and consorting with the devil.[203] Our culture has long demonized sex and nudity.[204] At the moment they seem to be epitomized by sexting. Instead of legislation that some argue criminalizes teenage sexual desire,[205] we should heed the advice of one commentator addressing the issue of sexting prosecutions - to wit: "If we value qualities of mercy and compassion in society, arguably we should not engage in such prosecutions."[206] Eloquently spoken. We should heed his wisdom. Otherwise, much

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[200] *U.S. v. McLaughlin*, 170 F. 3d 889, 885 fn.1 (9th Cir 1999), cited in Humbach, *supra* note 4, at 458 fn.142.

[201] *See* for example Robert H. Wood, *The Failure of Sexting Criminalization: A Plea For The Exercise of Prosecutorial Restraint*, 16 MICH. TELECOMM. TECH. L. REV. 151 (2009); also Smith, *supra* note 82; Humbach, *supra* note 4, at 485 ("The prosecutorial and judicial personnel who are acting in these prosecutions are typically two or more generations removed from the teenagers whose sexual expression is condemned and whose prospects are drastically affected. Ultimately, however, efforts such as these are generally futile.")

[202] *See* Calvert *supra* note 24, at 64 ("As Professor Robert D. Richards recently argued, 'rather than focus on how best to punish the minors involved in sexting or how to terrify them into thinking they'll be behind bars until they reach middle age, a better approach would be to educate them about the harms they are bringing on themselves."); *see also supra* note 83.

[203] *See supra* note 49.

[204] *See* Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695 (2007), providing a review of the efforts to rein in nudity and obscenity even before emergence of the current "sexting" phenomenon. Cited in Humbach, *supra* note 4, at 438, fn.27.

[205] *See supra* note 32.

[206] *See* Wood *supra* note 201, at 178.

like our Colonial forebears who regretted witchcraft prosecutions, we will suffer the same fate if we mindlessly pursue criminalization of sexting.

NEW TOP-LEVEL DOMAIN NAMES ADD .XXXTRA COMPANY BURDEN – GROUP ACTIVITIES FOR CREATING EFFECTIVE DOMAIN REGISTRATION PORTFOLIOS

By

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I. INTRODUCTION

If businesses have any doubt whether sex sells, consider that the domain name sex.com was sold for $13 million in 2010.[1] In 2011, attorneys for companies[2] and even universities[3] had sex.com on

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[1] *Sex.com domain name sold for $13 million*, Reuters, October 21, 2010, http://www.reuters.com/article/2010/10/21/us-sexcom-idUSTRE69K3KY20101021 (last accessed July 27, 2012). In addition, www.porn.com sold in 2007 for $9.5 million. *The Domain Name Porn.com Sells for $9.5M*, PC World, Mar. 16, 2007, http://www.pcworld.com/article/131910/the_domain_name_porncom_sells_for_95m.html (last accessed July 27, 2012).

[2] *Businesses are complaining about a .xxx shakedown*, MSNBC, August 16, 2011, http://www.msnbc.msn.com/id/44152618/ns/business-us_business#.Tuh4nGObNMs (last accessed July 27, 2012).

[3] *.XXX Sites Bought by Colleges to Thwart Porn*, The Huffington Post, December 9, 2011, http://www.huffingtonpost.com/2011/12/10/xxx-colleges-

their minds as they attempted to keep valuable trade names out of the hands of wrongdoers, by preemptively registering their respective "Names.xxx" in preparation for the launch of .xxx[4] in 2012. For example, a United Kingdom domain registrar reported in August 2011 that only 20 percent of pre-registrations for the .xxx domain name were from businesses involved in pornography, with the other 80 percent purchased by companies simply trying to guard their valuable trademarks.[5] In February 2012, entrepreneur Richard Branson successfully challenged the registration of RichardBranson.xxx, presumably to protect his personal and business brands.[6]

Large corporations maintain several trademark prosecution attorneys and paralegals to police against infringements worldwide. The advent of the internet took this activity to a new level, as companies in the 1990's attempted to figure out the relationship between their brand names and the first wave of top-

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porn_n_1140864.html (last accessed July 27, 2012). The University of Florida paid $3,600 ($199.99 each) to block ufl.xxx, universityofflorida.xxx, floridagators.xxx, babygator.xxx and 13 others. *Schools snagging .XXX domain names*, WTSP .com, February 24, 2012, http://www.wtsp.com/news/article/240585/19/Schools-snagging-XXX-domain-names (last accessed July 27, 2012).

[4] *See* .xxx Registry Agreement, http://www.icann.org/en/tlds/agreements/xxx (last accessed July 27, 2012).

[5] *Businesses buying .xxx porn domains to protect trademarks*, Techworld, August 4, 2011, http://news.techworld.com/personal-tech/3295352/businesses-buying-xxx-porn-domains-to-protect-trademarks/ (last accessed July 27, 2012).

[6] *UK's Branson beats Porn Cybersquatter*, PC World, Feb. 26, 2012, http://www.pcworld.com/article/250599/uks_branson_beats_porn_cybersquatter.html (last accessed July 27, 2012). A Texas grocery chain HEB, also won HEB.xxx. *See TD Bank files 15th complaint about .xxx*, Domain Name Wire, February 22, 2012, http://domainnamewire.com/2012/02/22/td-bank-files-15th-complaint-about-xxx/ (last accessed July 27, 2012).

level domains ("TLDs").[7] At the time, many companies were slow to react while savvy entrepreneurs purchased several "Company.com"[8] domain names and sold them to the very companies with identical trade names. When the Anti-Cybersquatting Consumer Protection Act of 1999[9] was passed to prevent such domain name registrations done in bad faith, these enterprising individuals were then labeled as cybersquatters.[10] Companies are continually deciding which domain names to register for strategic business purposes or for the defensive purpose of keeping names out of the hands of cybersquatters, business competitors, and those who wish to "gripe" about a company.

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[7] The right-most label in a domain name, such as .com or .net, is referred to as its "top-level domain."Top-Level Domains (gLTDs), http://www.icann.org/en/tlds (last accessed July 27, 2012).

[8] As of Mar. 6, 2012, there are over 101,000,000 active .com websites, while over 333,000,000 .com websites have been deleted. Domain Counts and Internet Statistics, http://www.domaintools.com/internet-statistics (updated daily) (last accessed July 27, 2012).

[9] 15 U.S.C. § 1125(d).

[10] A cybersquatter is defined under 15 U.S.C. § 1125(d)(1)(A) as follows: A person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section, if, without regard to the goods or services of the parties, that person--

(i) has a bad faith intent to profit from that mark, including a personal name which is protected as a mark under this section; and

(ii) registers, traffics in, or uses a domain name that

(I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark;

(II) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark; or

(III) is a trademark, word, or name protected by reason of section 706 of title 18, United States Code, or section 220506 of title 36, United States.

For a history of cybersquatting and the Anti-Cybersquatting Consumer Protection Act of 1999, *see* Thekla Hansen-Young, *Whose Name is it, Anyway? Protecting Tribal Names from Cybersquatters*, 10 VA. J.L. & TECH. 1, 4-6 (2005).

There are now twenty-two generic TLDs ("gTLDs"),[11] ranging from .com to .xxx. In addition, TLDs have been established for over 250 countries and external territories and are referred to as "country-code" TLDs or "ccTLDs."[12] Finally, in early 2012, companies decided whether to spend $185,000 to purchase their company name as a branded TLD extension, or a generic word which may relate to the company's business or product:

> In the for-profit world, that means that instead of going to coke.com or nike.com, you might be able to go to drink.coke or justdoit.nike. Nonprofit groups could reserve the .school domain and hand one out to every elementary school. Cities could consolidate their online presence at .nyc or .losangeles. And interest groups could stake out their own corner of the Web by offering every auto junkie a .car domain name, every law firm a .law address, and every restaurant a site that ended with .food.[13]

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[11] Top-Level Domains (gTLDs), http://www.icann.org/en/tlds (last accessed July 27, 2012). There are 22 gTLDs, including the original .com, .edu, .gov, .int, .mil, .net, .org., arpa. In 2001/2002: .biz, .info, .name, .pro, aero, .coop, .museum. In 2003: .asia, .cat, .jobs, .mobi, .tel and .travel. *Id.*

[12] *Id.*

[13] *ICANN approves open Web domain rules: anything is possible with $185,000*, http://www.blogymate.com/post.aspx?BlogID=6958&t=ICANN-approves-open-Web-domain-name-rules:-.anything-is-possible-with-$185,000 (last accessed July 27, 2012). In 2011, a few companies and entities went public with their interest: .nyc, .paris, .Unicef, .Deloitte, .Hitachi, and .Canon. *Forget .com, here's .coke*, CNN Money, June 20, 2011, http://money.cnn.com/2011/06/20/technology/dot_brand_domain_name_icann/index.htm?iid=HP_LN (last accessed July 27, 2012).
The new gTLDs applied for were revealed on June 13, 2012. *See* Reveal Day 13 June 2012 – New gTLD Applied-For Strings, ICANN, June 13, 2012, http://newgtlds.icann.org/en/program-status/application-results/strings-1200utc-13jun12-en (last accessed July 27, 2012).

With so many choices and shrinking corporate budgets, a business strategy must be developed by large and small businesses to determine which domain names to register and which to walk away from. Equally important is a strategy for deciding which domain names owned by cybersquatters are worth retrieving and which ones may not be worth the effort.

The purpose of this paper is to discuss the intersection of trademark law and domain name law; identify the means for a company to retrieve domain names through litigation or domain name arbitration; develop a decision tree to determine which domains are worth pursuing with legal action; and share interactive teaching methods on how students can create a domain name business portfolio. These activities include an:

1. In-class module to conduct a state and federal trademark search, followed by a discussion on how trademark law impacts domain name selection;
2. Out-of-class group project to study the domain portfolio of a large corporation, identify available domain names that the company should consider registering, reveal select domain names in the hands of cybersquatters, and analyze the risk of pursuing legal action; and
3. In-class reinforcement group activity to start a business on a "shoestring" budget, focusing on decision making skills for purchasing domain names.

The inspiration for this paper is the positive feedback received when using team projects and modules to teach intellectual property law and more specifically, domain name law, in the author's MBA class entitled, Legal Environment: Ethics and Corporate Governance. Many of these activities are easily adaptable and appropriate for undergraduate Legal Environment of

Business students, which the author did in the Spring 2012 semester.

II. TRADEMARK LAW AND ITS EVOLUTION INTO DOMAIN NAME LAW

In 1993, Network Solutions, Inc. ("NSI"),[14] was awarded a contract with National Science Foundation to register domain names. In 1998, the United States Department of Commerce and NSI amended their cooperative agreement by requiring "the establishment of a Shared Registration System in which an unlimited number of registrars would compete for domain name registration business utilizing one shared registry."[15] Since then, the Internet Corporation of Assigned Names and Numbers ("ICANN")[16] has overseen an explosion of TLD offerings.

Before this "wild west" era of the internet,[17] trademark law was a logical and semi-orderly system of laws governing business. For example, trademark law permits the registration of marks by category, thus making room for several brands using the same word as a business name. As such, companies go to great lengths

[14]For a history of NSI, *see* Network Solutions timeline, http://about.networksolutions.com/site/network-solutions-is-a-remarkable-company (last accessed July 27, 2012).
[15] Registrar Accreditation: History of the Shared Registry System, http://www.icann.org/en/registrars/accreditation-history.htm (last accessed July 27, 2012).
[16] *Id.* The Department of Commerce identified ICANN as "a newly-formed, private, non-profit corporation as the entity that would oversee the transition to competition under the SRS. Part of ICANN's responsibilities included establishing and implementing a procedure for registrar accreditation that would ensure a transition to a competitive domain name registration system providing continued Internet stability and domain-name durability." *Id.*
[17] March Hare, *Internet domain names: the new 'wild west',* Bloor Research, Nov. 7, 2000, http://www.it-director.com/content.php?cid=1350 (last accessed July 27, 2012).

protecting company brand names, and slogans[18] through international, federal, and state registrations, and through common law protection. (mere use of a mark in commerce)[19] The internet turned trademark law on its head, since many companies could make a legitimate claim in registering their trade names with a treasured .com TLD when it first became available in the 1990's, yet only one entity could win that race. For instance, the original

[18] For example, McDonalds asserts as of February 27, 2012: "The following trademarks used herein are owned by the McDonald's Corporation and its affiliates: 1-800-MC1-STCK, 365Black, America's Favorite Fries, Arch Card, Big Breakfast, Big Mac, Big N' Tasty, Birdie, Birdie the Early Bird Design, Black History Makers of Tomorrow, Changing. Together., Chicken McNuggets, Chicken Selects, Cinnamon Melts, Egg McMuffin, Extra Value Meal, Filet-O-Fish, French Fry Box Design, Golden Arches, Golden Arches Logo, Good Time, Great Taste, Gospelfest, Grimace and Design, HACER, Hamburglar and Design, Hamburger University, Happy Meal, Happy Meal Box Design, Have You Had Your Break Today?, Healthy Growing Up, I'm lovin' it, "It's what I eat and what I do", Immunize for Healthy Lives, Mac Attack, Mac Tonight and Design, Made For You, McCafé, McChicken, MCDirect Shares, McDonaldland, McDonald's , All American High School Basketball Game, McDonald's Building Designs, McDouble, McExpress, McFamily, McFlurry, McFranchise, McGriddles, McHappy Day, McHero, McJobs, McMemories, McNuggets, McPollo, McRecycle USA, McRib, McScholar, McScholar of the Year, McSkillet, McDonald's Internet Logo, me encanta, McWorld, Mighty Kids Meal, Morning Mac, Passport to Play, Passport to Play Logo, PlayPlace, Quarter Pounder, RMHC, Ronald McDonald and Design, Ronald McDonald House, Ronald McDonald House Charities, Ronald McDonald House Charities Logo, Ronald McDonald House Logo, Sausage McGriddles, Sausage McMuffin, See What We're Made Of, Shamrock Shake, Single Arch Logo, Snack Wrap, Speedee Logo, The House That Love Built, The House That Love Built Design, Triple Thick, twoallbeefpattiesspecialsaucelettucecheesepicklesonionononasesameseedbun, We Love To See You Smile, What's On Your Plate, World Famous Fries, You Deserve a Break Today." McDonald's Terms and Conditions Page: Trademark Information, http://www.mcdonalds.com/us/en/terms_conditions.html (last accessed July 27, 2012).

[19] For a detailed discussion of the levels of trademark protection, visit the United States Patent and Trademark Office Frequently Asked Questions section, http://www.uspto.gov/faq/trademarks.jsp (last accessed July 27, 2012).

owner of MLB.com was the law firm of Morgan, Lewis & Bockius, not Major League Baseball.[20]

The Anti-Cybersquatter Law permits a trademark holder to file a federal lawsuit to order the cancellation of a cybersquatter's domain name and/or the transfer of the domain name to the owner of the mark. The plaintiff may also sue for actual or "statutory" damages with the court having discretion to award damages of not less than $1,000 and not more than $100,000 per domain name.[21] For example, a federal court judge in October 2000 assessed statutory damages of $500,000, ruling that five domain names were obtained in bad faith and were confusingly similar to the plaintiff's trademark.[22] In January 2012, Verizon filed a federal court action against an alleged cybersquatter and registrar controlling "over 660 domain names which are confusingly similar" to the Verizon brand name.[23]

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[20] *Naming Your Law Firm Website*, Law Office Tech. Rev., May 11, 2001, http://goliath.ecnext.com/coms2/gi_0199-3807418/Naming-Your-Law-Firm-Web.html (last accessed July 27, 2012). *See also*, the story of the dispute between Nissan Motor and Nissan Computer over the Nissan.com web-site from the perspective of Nissan Computer (http://www.nissan.com/Lawsuit/The_Story.php), and the dispute over theNewYorker.com. *Name game for domain*, CNET News, November 5, 1996, http://news.cnet.com/Name-game-for-domain/2100-1023_3-244423.html?tag=mncol (last accessed July 27, 2012).

[21] 15 U.S.C. § 1117.

[22] *Electronics Boutique Holding Corp. v. Zuccarini,* 2000 U.S. Dist. LEXIS 15719 (E.D. Pa., October 30, 2000), *available at* http://www.keytlaw.com/Cases/electronic.htm (last accessed July 27, 2012).

[23] *Verizon Says More Than 600 Websites Used In Cybersquatting Scam*, PaidContent.org, Jan. 30, 2012, http://paidcontent.org/article/419-verizon-says-more-than-600-websites-used-in-cybersquatting-scam (last accessed July 27, 2012).

However, federal court cases are time consuming and costly.[24] Thus, many companies turn to a swifter and more economically viable means of retrieving domain names: the Uniform Domain Name Dispute Resolution Policy ("UDRP"),[25] a worldwide arbitration process approved by ICANN in October 1999. Under UDRP, domain name registrants are required to submit to mandatory electronically-conducted[26] arbitration if a person or company disputes ownership, and prove to an arbiter or a panel of three arbiters that:

> (i) a domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and
> (ii) the domain name holder ("DNH") has no rights or legitimate interests in respect of the domain name; and
> (iii) the domain name has been registered and is being used in bad faith.[27]

The following situations shall be evidence of the registration and use of a domain name in bad faith:

> (i) circumstances indicating that the DNH registered or acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark

[24] For example, Defendant Zuccarini was ordered to pay over $30,000 in costs and attorneys fees. *See Electronics Boutique, supra* note *22*.
[25] Uniform Domain-Name Dispute-Resolution Policy, http://www.icann.org/en/udrp/udrp.htm (last accessed July 27, 2012).
[26] *See* Online Complaint Filing Form Complaints under the Uniform Domain Name Dispute Resolution Policy (UDRP), http://www.wipo.int/amc/en/domains/filing/udrp/eudrpcomplaint.jsp (last accessed July 27, 2012).
[27] *See* Uniform Domain-Name Dispute-Resolution Policy, http://www.icann.org/en/dndr/udrp/policy.htm (last accessed July 27, 2012).

> or to a competitor of that complainant, for valuable consideration in excess of the DNH's documented out-of-pocket costs directly related to the domain name; or
> (ii) the DNH registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that the DNH has engaged in a pattern of such conduct; or
> (iii) the DNH registered the domain name primarily for the purpose of disrupting the business of a competitor; or
> (iv) by using the domain name, the DNH intentionally attempted to attract, for commercial gain, Internet users to the DNH's web site or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of a web site or location or of a product or service on a web site or location.[28]

UDRP has become an efficient model for trademark holders to consolidate several infringing domain names in one action, especially with respect to one form of a cybersquatter known as a "typosquatter." Oftentimes, people mistype letters in the address bar and get diverted to an unintended infringing site where there might be revenue generating ads to click on. For example, Allstate

[28] *Id.* Note that an unfavorable arbitration ruling "shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded. If an Administrative Panel decides that your domain name registration should be canceled or transferred, we will wait ten (10) business days (as observed in the location of our principal office) after we are informed by the applicable Provider of the Administrative Panel's decision before implementing that decision." *Id.*

retrieved the following typosquatter domain names from a defendant in one action: allstaate.com, allstatee.com, allstatte.com, allsttate.com.[29] Typosquatting is also a method that businesses may use when a competitor uses the former's brand name in a web site in an effort to divert customers to a competing product.[30]

The "bad faith" requirement of UDRP is not just for cybersquatters or typosquatters. A trademark holder might be able to use this process to wrest a name from someone "griping" about a company if that company's valuable trade name is in the domain name and the domain name holder is not using the name for legitimate speech purposes, but for commercial gain to sell the site to the trademark holder. For example, Wal-Mart retrieved the name "wal-martsucks.com" because it was able to show all three elements required under UDRP.[31] Thus, companies are continually

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[29] *Allstate Ins. Co. v. Anunet Pvt Ltd., World Intellectual Property Organization Case No. D2011-0060,* http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2011-0060 (2011) (Tsuru, Arb.) (last accessed July 27, 2012). *See also Verizon Trademark Services LLC v. Zx Domains c/o Sezar Sak*, World Intellectual Property Organization Case No. D2011-0419, http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2011-0419 (2011) (Osborne, Arb.). (cerizonwireless.com, veriazonwireless.com, verizonvisaonline.com, verizonwoireless.com, verizonworeless.com, verizpnwireless.com, verizxon.com, veruizonwireless.com) (last accessed July 27, 2012).

[30] Arbitration ruling in favor of Sigma Two Group LLC, the manufacturer of "Firefly Magic," in a domain name dispute with a competitor, Avenstar, which registered the domain name magicalfireflies.com and was allegedly using it to sell competing goods. *Stephen J. Taylor and Sigma Two Group LLC v. Avenstar and Mark McGinnis*, National Arbitration Forum Claim Number: FA0803001169965 (2008), http://domains.adrforum.com/domains/decisions/1169965.htm (2008) (Banks, Arb.) (last accessed July 27, 2012).

[31] *Wal-Mart Stores, Inc. v. Richard MacLeod d/b/a For Sale,* World Intellectual Property Organization Case No. D2000-0662, http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0662.html (2000) (Bernstein, Arb.) (last accessed July 27, 2012). *See also Wal-Mart Stores, Inc. v. Walsucks and Walmarket Puerto Rico*, World Intellectual

adding "CompanyNameSucks.newTLD" to their domain name portfolio in a preemptive attempt to keep such sites out of the hands of gripers. However, where there's a gripe, there's a way. In 2000, legal counsel for a large company registered his

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Property Organization Case No. D2000-0477, http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0477.html (2000) (Abbot, Arb.). (last accessed July 27, 2012). (The domain names "wal-martcanadasucks.com", "wal-martcanadasucks.com", "walmartuksucks.com", "walmartpuertorico.com", and "walmartpuertoricosucks.com" were transferred to the Complainant, Wal-Mart Stores, Inc.). However, if a company is unable to establish all three elements, it should not be able to force a transfer of such a domain name. In a "subsequent case involving essentially the same issues and same parties," the domain name "wallmartcanadasucks.com" was not transferred to Wal-Mart. *Wal-Mart Stores, Inc. v. wallmartcanadasucks.com and Kenneth J. Harvey*, D2000-1104, http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1104.html (2000) (Perritt, Arb.), (last accessed July 27, 2012). For a discussion of this case, *see Protest Domain Names and Sites*, Ivan Hoffman, http://www.ivanhoffman.com/protest.html (last accessed July 27, 2012). Many gripe sites include a company's name coupled with a derogative word like "sucks." Several arbiters and judges have ruled that the combination of a company's trade name with such a derogatory word can still be retained by the domain name holder (see the "wallmartcanadasucks.com" case *infra*), if, for example, the site does not generate commercial content. In addition, there are similar cases involving gripe sites not coupling a trade name with a derogatory word. *See, e.g.,* see *Career Agents Network.com versus Career Agents Network.biz*, discussed in Jacqui Cheng, *Gripe site prevails in domain cybersquatting case*, Ars Technica, http://arstechnica.com/tech-policy/news/2010/03/gripe-site-prevails-in-domain-cybersquatting-case.ars (last accessed July 27, 2012). *But see Antigua College of Medicine v. Steven L. Woodward*, No. 10-10978, 2011 U.S. Dist. LEXIS 139190 (E.D. Mich. Dec. 5, 2011). Summary judgment by the plaintiff was denied to the school on its trademark infringement and cybersquatting claims against student, since the latter's activity did not involve any commercial activity or a bad faith intent to profit. *Id. See University Denied Judgment In Trademark, Cybersquatting Case Against Gripe Site*, Lexisnexis.com Daily Legal News, Dec. 9, 2011, http://www.lexisnexis.com/community/litigationresourcecenter/blogs/mealeys/archive/2011/12/09/university-denied-judgment-in-trademark-cybersquatting-case-against-gripe-site.aspx (last accessed July 27, 2012).

CompanyNameSucks.com as a preemptive move. Shortly thereafter, a griper registered CompanyNameReallySucks.com, which garnered more publicity for his gripe site.[32]

Before the advent of the internet, a business had a difficult enough time guarding valuable business names, whether on the state, federal, or international stage. Since then, intellectual property attorneys have had to devise domain registration strategies to keep pace with competitors, cybersquatters, typosquatters, gripers, twenty-two generic top level domain names, and over 250 country TLDs. With .xxx and gTLDs on the horizon, what is a business to do?

A. Classroom Activity to Teach Intellectual Property Law and Domain Name Law

As part of the in-class Intellectual Property Module, students conduct federal[33] and state[34] trademark searches on a company name.

In-Class Intellectual Property ("IP") Module[35]

In this module, students are required to:

[32] *Real Cybersquatting Really Sucks*, Wired, May 9, 2000, http://www.wired.com/techbiz/media/news/2000/05/36210 (last accessed July 27, 2012).
[33] Trademark Electronic Search System (TESS), http://tess2.uspto.gov/bin/gate.exe?f=tess&state=4008:jvvtrv.1.1 (last accessed July 27, 2012).
[34] *See, e.g.,* Georgia Secretary of State Trademark Search Page, http://sos.georgia.gov/corporations/marksearch.htm (last accessed July 27, 2012).

[35] *See* Appendix A for full text of module.

1. Conduct a federal trademark search on the company name;
2. Discuss similar names and filings;
3. Conduct a state trademark search on the company name;
4. Discuss the value and differences among federal, state, and common law trademarks;
5. Identify (in their opinion) the five most valuable domain names for the company;
6. Conduct research on the web to identify at least three potential cybersquatters or typosquatters; and
7. Discuss the company's strategies on how to deal with such issues.

Students are asked to conduct a federal trademark search on, for example, the word "Delta," upon which they discover that more than one company is permitted to use that word as a trade name because of separate and distinct business categories in the trademark application process.[36] Thereafter, students engage in an

[36] *See, e.g.,* as of February 27, 2012, Delta Goods and Services: IC 010. US 026 039 044. G & S: Dental instruments for use in oral and joint therapeutic treatment of skin, nerve and muscle tissues; dental instruments, namely, oral irrigators, dental devices for root canal procedures in the nature of root canal therapy instruments used to shave the inside of a root canal and dental root files used in root canal dental procedures, dental handpieces, electromagnetic energy emitting devices for dental and medical use in the nature of lasers for dental and medical use and structural component parts therefor; electronic aesthetic skin treatment devices using light emitting diodes, namely, infrared, red, orange, yellow, green, and blue wavelengths for generating light rays; electronic light therapy apparatus for the skin; electronic stimulator for oral and joint treatment of skin, nerve and muscle tissues; lasers for medical purposes; lasers for medical use; lasers for surgical and medical use; lasers for the cosmetic treatment of the face and skin; light emitting devices, namely, lamps and LED devices for treatment of a variety of skin conditions; light emitting diode (LED) apparatus for lighting, incorporated into medical instruments; medical and surgical laparoscopes; medical apparatus and instruments for use in surgery. *See also*, as

interactive discussion on the rush to register the most valuable TLD, delta.com, when it first became available in the 1990's. That company was Delta Financial,[37] not Delta Airlines or Delta Faucets.

IP Module Takeaway #1: Several businesses may make use of the same trade name, as long as that name is registered in separate and distinct trademark categories.

Then, the students discuss that a company does not formally register all trademarks in state or federal registries,[38] and instead relies on common law trademark rights by placing a ™ on names, slogans, and logos.[39] Likewise, while McDonalds has a federal trademark on the term "Triple Thick"[40] and registered the domain name TripleThick.com, several other domain names using "Triple Thick" (with TLDs other than .com) were available for purchase.[41] Thus, companies of all sizes reach a point where they must decide

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of February 27, 2012, Delta Goods and Services: IC 009. US 021 023 026 036 038. G & S: handheld x-ray florescence analyzers for use in the fields of metallurgy, mining, recycling and environmental safety.

[37] Delta Airlines purchased delta.com from Delta Financial. *No winner in delta.com deal*, Christopher Elliott, Sept. 5, 2000, http://www.elliott.org/inside-interactive-travel/no-winner-in-deltacom-deal/ (last accessed July 27, 2012).

[38] *See* McDonalds' names and slogans asserted as trademarks, *supra* note 18.

[39] If the business name or slogan is for a service, the symbol is "SM," or service mark. The ® symbol refers to a federal trademark registration. It is wise for a business to use TM and SM if it only has a state registration or no registration. (since the business owner isn't permitted to use the ® symbol without a federal registration). *See* Frequently Asked Questions about Trademarks, http://www.uspto.gov/faq/trademarks.jsp (last accessed July 27, 2012). For a discussion of the relevant law on timing of use and trademark registration, *see* Tammy W. Cowart and Wade M. Chumney, *I Phone, You Phone, We All Phone with IPhone: Trademark Law and Ethics from an International and Domestic Perspective*, 28 J. LEGAL STUD. EDUC. 331, 340-43 (2011).

[40] Search conducted on July 27, 2012.

[41] *See* The "WhoIs" Lookup, register.com, http://www.register.com/whois.rcmx%3bjsessionid=EB2AD8774F3F99D9CC0118238FE622DC.euapp03 (last accessed July 27, 2012).

which valuable trade names are not worthy of protecting as domain names, while facing the possibility that the latter may fall into the hands of a cybersquatter. This discussion gives students a practical reinforcement of the cybersquatter material discussed in class, and serves as a warm up exercise for the more rigorous team project to be completed outside of class.

IP Module Takeaway #2: Corporations do not seek a federal trademark on all business names and slogans, and instead rely on common law trademark rights by using the names or slogans in commerce. Even if a large company secures a federal trademark on a name or slogan, that company is unlikely to own several TLDs for that name, unless it is for one of its most popular brand names.

III. DOT.NAME DECISIONS AND .XXXTRA COMPANY BUDGET BURDENS

ICANN began accepting dot.Name and other generic top-level domain applications on January 12, 2012.[42] On February 9, 2012, ICANN's Board of Directors passed a resolution reaffirming that a second round of applications for the Program will be launched after the first round of applications closed.[43] As of June 13, 2012, ICANN received 1,930 applications[44] at $185,000 per name.[45]

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[42] David Perera, *ICANN says gTLD applications reach 100*, FierceGovernmentIT, Feb. 27, 2012, http://www.fiercegovernmentit.com/story/icann-says-gtld-applications-reach-100/2012-02-27 (last accessed July 27, 2012).

[43] *Id*. The first round of applications closed on May 30, 2012. *See* Reveal Day, *supra* note 13 .

[44] *ICANN (Quietly) Delays Launch of New gTLDs by Six Months,* Isenberg on Domains, July 30, 2012, http://isenbergondomains.com/2012/07/30/icann-quietly-delays-launch-of-new-gtlds-by-six-months/ (last accessed July 30, 2012).

In May 2012, a seven month objection period began where trademark holders can argue that a new .Name infringes on a valuable trade name.[46] For example, if a person or company applied for a .McDonalds gTLD, then McDonalds might have grounds to object. In January or February 2013, the new .Names should be ready to launch if no formal objections are received and the .Name is approved,[47] though that prediction may be overly ambitious, given that only 1,00 applicants were expected.[48] What makes this process intriguing is that entities can apply not only for their company or brand names, but also for generic words such as .hotel or .bank,[49] as trademark owners worry "that they will have to defensively register hundreds or thousands of new domain names using their trademarks, with potentially hundreds of new gTLDs coming online."[50] The system has many critics: "Ideally, this [new gTLD process] shouldn't have gone forward in the first place,"[51] said one such critic.

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[45] However, a New gTLD Financial Assistance handbook released in December 2011 sets forth criteria for applicants which "demonstrate a service in public interest, financial need and minimum financial capabilities" to pay $47,000 instead of the standard $185,000. *New gTLD rules as application period opens*, Patent Survey 2012, Managing Intellectual Property, London, U.K., Feb. 2012, at 6-7.

[46] *Id.* at 6. While the objection period might be extended, the "comment" period deadline of August 12, 2012 appeared unchanged. ICANN (Quietly) Delays, *supra* note 44.

[47] New gTLD rules, *supra* note 45 at 7.

[48] *ICANN decides how to manage gTLD batches*, Managing Intellectual Property Patent Survey 2012, page 20 (February 2012).

[49] *SIIA: More trademark protections needed in ICANN gTLD program*, IT World, Jan. 12, 2012, http://www.itworld.com/it-managementstrategy/241145/siia-more-trademark-protections-needed-icann-gtld-program (last accessed July 27, 2012).

[50] *Id.*

[51] *Id.* Comment made by legal counsel to a trade group, the Software and Information Industry Association.

Similarly, Lawrence Strickling, administrator of the Commerce Department's National Telecommunications and Information Administration, "[u]rged ICANN to take steps to minimize the need for these defensive registrations."[52] An executive vice president of the Government Relations for the Association of National Advertisers "worried that companies would be forced to spend millions not only to monitor their trademarks in top level domains but in the proliferating number of websites.[53] Others point out, though, that the high cost of securing a gTLD will "[g]o a long way toward deterring bad registry owners."[54]

Likewise, the .xxx registry increases the cost of monitoring valuable trademarks online. In December 2011, ICM Registry,[55] the official registrar for .xxx domain names, suspended fifty to seventy .xxx domain names, including WashingtonPost.xxx and CNBC.xxx.[56] Fortunately for these companies, the registrar targeted "blatant and undeniable" cybersquatters, and spared these businesses the time and expense of going through the domain name arbitration process.[57] Other companies have not been so lucky, and needed to resort to the UDRP process to attempt a retrieval of .xxx domain names. These names include: a bank (TDBank.xxx), a movie studio (foxstudios.xxx), universities (UTSystem.xxx and BaylorGirls.xxx), and a jeweler (KayJewelers.xxx).[58]

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[52] *ICANN to expand top level domains despite critics*, Reuters, Jan. 4, 2012, http://www.msnbc.msn.com/id/45878628/ns/technology_and_science-tech_and_gadgets/#.TwV44dRWrIM (last accessed July 27, 2012).
[53] *Id.*
[54] *Id.*
[55] ICM Registry welcome page, http://www.icmregistry.com (last accessed July 27, 2012).
[56] *ICM takes down "blatant" .xxx cybersquatters*, Patent Survey 2012, (Managing Intellectual Property, London, U.K.), Feb. 2012, at 20.
[57] *Id.*
[58] See *TD Bank files 15th complaint against .xxx*, Domain Name Wire News, Feb. 22, 2012, http://domainnamewire.com/2012/02/22/td-bank-files-15th-complaint-about-xxx/ (last accessed July 27, 2012).

Sadly, the domain name game for businesses has gone from thwarting cybersquatters' efforts to generate revenue through the use of others' valuable trademarks, to preventing pornographic content from tarnishing brands through a registry dedicated entirely to .xxx. Thus, businesses with a limited budget must devise an effective "decision tree" to figure out which domains are worth registering as a defensive measure, which infringing domain registrants to pursue with legal action, and which situations to simply leave alone.

IV. GROUP PROJECTS

A. Out-of-Class Group Project: Creating an Effective Domain Name Registration Portfolio

The below assignment has several writing components, including the sections below dealing with domain name registrations.

Group Project: Creating an Effective Domain Name Registration Portfolio[59]

> Protecting a company's valuable name has become a headache and a business decision for lawyers and business people alike. As top level domain names (TLDs) are being approved at an increasing rate, companies must assess which names to protect and which to leave alone, for an unsuspecting cybersquatter to snatch. One of the newest TLDs is .asia;[60] however, few companies have bothered to

[59] See Appendix B for the complete group project assignment.

[60] A proposed ".Africa" is also on the horizon. *See Scramble for 'dot africa' internet domain name*, CNN, Dec. 7, 2011, http://www.cnn.com/2011/12/07/tech/africa-domain-name/index.html (last accessed July 27, 2012). The African Union (AU) has already chosen its registrar. *See AU Chooses Uniforum to Administer .Africa Domain*,

register their domain names with this registry. (*see* www.ups.asia as an example of a company that did)

> Question 1. Discuss the importance and/or perils of registering domain names in multiple countries. I am not just looking for a discussion of how to protect your business name on the web; rather, I'm looking for you to discuss the business person's perspective of the importance or lack of importance for multiple country domain name registrations.

The purpose of Question 1 is to sensitize students to the various possibilities for domain names around the globe. A business needs to assess whether the .com, .net, and .org TLDs are enough, or whether it needs to have additional domain extensions in other continents or countries. Obviously, the answers will lie in the company budget mixed with its global business strategy.

Group Project Takeaway #1: With over 250 country TLDs and twenty-two generic TLDs, businesses need to analyze their budgetary needs to proactively register domain names globally, in an effort to protect valuable company trademarks.

In Question 2 below, students are asked to examine a large company's domain name portfolio, conduct research to determine which available domain names it should consider registering, identify domain names which actively infringe the company's trade name or brand, and decide whether the company should pursue legal action to recover such domain names.

Computerworld, Feb. 27, 2012, http://news.idg.no/cw/art.cfm?id=7BDEBB0D-D465-6BFE-FE40E79EA7B136CA (last accessed July 27, 2012).

> Question 2. Analyze the domain portfolio of [Pick a Fortune 500 Company]. Go to a domain name registrar's website to conduct a name search. (List in a separate Appendix: approximately twenty (20) domain name that the company currently possesses. Discuss in the body of your paper:
> - Three (3) unregistered domain names that the company should purchase. Why do you believe the company did not pursue registration of those names?
> - Five (5) domain names in the hands of others which you believe that the company should own – discuss whether you believe each owner of those sites is a cybersquatter or possesses the domain name for a legitimate purpose. Explain. If a cybersquatter, assess the benefit/s and risk/s of the company pursuing ownership the domain names. (see a "Who Is Lookup" website to identify owners of domain names)

When students study the vast number of domain name choices, it becomes clear that a company, no matter the size, cannot protect trade names with every domain names extension. This critical thinking exercise requires students to create a decision tree to determine how limited resources will be utilized to register domain names for business purposes, or to keep select TLDs out of the hands of others.

Group Project Takeaway #2: Companies of all sizes have budgetary constraints on intellectual property protection, especially with domain name registration and enforcement costs.

Before the group project is handed in, students discuss in class the defensive registrations and legal action to possibly take against infringing domain names. (i.e., cybersquatters, typosquatters, gripe

sites, competitor sites, .xxx sites, and generic TLD sites) Companies monitor the web regularly, and take very seriously the following types of cases:

Decision Tree to Determine Which Cybersquatter Cases to Elevate:

1. Cybersquatter sites containing pornographic content;
2. Cybersquatter Competitor sites; and
3. Cybersquatter sites containing infringing content.

The websites in the above decision tree can tarnish a business brand and would take priority in the decision to take legal action against an infringing site. However, before companies take action against a seemingly infringing site, they should decide whether a domain name causes a likelihood of confusion[61] in the mind of the public, a trigger for trademark infringement actions. Consider the case of Microsoft demanding that a 17-year old graphic designer named Mike Rowe, transfer his website MikeRoweSoft.com to the software company. After international attention and perhaps the recognition that this site wouldn't produce consumer confusion, the company issued a statement: "We take our trademark seriously, but in this case maybe a little too seriously."[62] The two parties then settled the matter for, among other things, an Xbox.[63]

[61] For the elements of a trademark infringement action, *see Likelihood of Confusion - The Basis for Trademark Infringement*, David V. Radack, 54 JOM 12, (2002), http://www.tms.org/pubs/journals/jom/matters/matters-0212.html (last accessed July 27, 2012).
[62] Daniel Sieberg, *Teen fights to keep MikeRoweSoft.com*, CNN, Jan. 20, 2004, http://edition.cnn.com/2004/TECH/internet/01/20/rowe.fight (last accessed July 27, 2012).
[63] *MikeRoweSoft settles for an Xbox*, CNet, Jan. 26, 2004, http://news.cnet.com/2100-1014_3-5147374.html (last accessed July 27, 2012).

Going after gripe sites with a trademarked name within the domain name can bring up issues similar to MikeRoweSoft.com. Many times, an aggressive "takedown" strategy against those who gripe on the web can backfire. Such an action lends attention and possibly more legitimacy to the gripe site than simply ignoring the site: "The fact that management or the lawyers (or both) think this is a big enough issue to deal with suggests that they're actually concerned about what [the griper is] saying."[64]

When company attorneys sense the need to shut down a gripe site, they need to first read the story of *Taubman v. Mishkoff*,[65] dealing with the website TaubmanSucks.com.[66] The owner of this site attracted the attention of Public Citizen,[67] which represented the defendant and won the case.

Decision Tree to Determine Which Cases (Perhaps) Not to Elevate:

1. Most gripe sites; and
2. Fan sites.[68]

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[64] *Goldman Sachs Doesn't Pay Attention: Threatens Gripe Site*, Techdirt, Apr. 13, 2009, http://www.techdirt.com/articles/20090412/2233464469.shtml (last accessed July 27, 2012). For a discussion of gripe site cases, *see* Anita Cava, *Marketing and the Law: Internet Gripe Sites: Constitutionally Protected free Speech or Cybersquatting? Judges Balance the Equities to Decide*, 33 J. ACAD. MARK. SCI. 377 (2005).

[65] 319 F.3d 770 (6th Cir. 2003).

[66] This website provides a detailed account of the website owner's struggle to keep his domain name.

[67] *Taubman v. Mishkoff* Public Citizen, http://www.citizen.org/litigation/forms/cases/getlinkforcase.cfm?cID=140 (last accessed July 27, 2012).

[68] While not discussed in this article, it may be bad publicity to go after a fan of your company when, for example, the fan merely puts a company logo on a fan website, and it is clear that the site is unaffiliated with the company.

Group Project Takeaway #3: Businesses need to prioritize which infringing or unfavorable websites to consider taking legal action against, and which sites to simply leave alone.

B. In-Class Reinforcement Exercise: Creating a Domain Name Portfolio for Small Businesses

After the group project is graded and during the class feedback session, students break up into their teams to work on a follow up in-class activity.

Creating a Domain Name Portfolio for Small Businesses[69]

> For the team project, you analyzed the domain portfolio of a Fortune 500 company. Now let's switch gears by looking at a start-up company working on a "shoestring" budget. The proposed name of your company is The PMBA Crew, LLC. You are a one person LLC doing business out of your home. You've already developed a logo and are a savvy web designer. Your plan is to start conducting business in our state in a few months, with an eye towards conducting business in other states within the next three to five years.
>
> You have a budget of approximately $500 for corporate registrations. Discuss how you will allocate this money to form an LLC, secure ten relevant domain names (assume $10.00/name), and any other costs to protect the business assets and keep the business in compliance with state law.

In the group project, we focused on a large company which likely has thousands of domain names in its portfolio. This exercise focuses on a start up business with a budget on a "shoestring." By

[69] See Appendix C for complete exercise.

limiting students to only ten domain name registrations for the "The PMBA Crew," the following items were discussed:

- The business will select an essential .com site to which all of its other business generating sites will be "pointed" (likely PMBACrew.com) and would make use of the popular .net and .org domain extensions
- The .Name or generic TLD did not make it into the discussion because of cost ($185,000), and neither did the .xxx TLD ($199.00)

Domain Portfolio Takeaway #1: With the proliferation of domain name extensions, small businesses have the difficult task of guarding their brands through domain name registrations.

- Having the word "The" in the formal name of the business (The PMBA Crew, LLC) forces us to include that word in some of the domain names, thus limiting our other choices. Since this company had not incorporated yet, we'd likely change the name to PMBA Crew, LLC from "The" PMBA Crew, LLC.
- Though it is unlikely that the company would be able to prevent customers from "griping" on the web, the class decided it would be wise to register the most popular potential gripe site name, PMBACrewSucks.com

Domain Portfolio Takeaway #2: Small businesses, just like large businesses, are unable to prevent gripe sites from appearing on the internet. However, it might be a prudent course of action to register the most likely potential domain names for company gripe sites.

V. CONCLUSION

The internet changed forever how companies leverage brands and how attorneys guard against brand dilution. Businesses must

create a domain name portfolio with a strategy tied to company budgets and enforcement of intellectual property rights. The addition of .xxx, .Name, and other generic top-level domain extensions has increased the budgetary pressure on companies as they attempt to capture market shares on the web while not falling prey to cybersquatters and competitors. The challenges only increase, as ICANN promises to roll out a second wave of generic TLD bidding opportunities in 2013 and beyond.

APPENDIX A

In-Class Intellectual Property ("IP") Module

In this module, students need to research the following:

1- Conduct a Georgia Secretary of State corporate search on the company name: http://corp.sos.state.ga.us/corp/soskb/csearch.asp and identity the following information:

- Is this a foreign or domestic company - explain
- What it mean to be an active or inactive company
- Who is the registered agent (and what is the purpose of a registered agent)

2- Conduct a federal trademark search on the company name: http://tess2.uspto.gov/bin/gate.exe?f=tess&state=4003:gtjtim.1.1
Prepare to discuss similar names and filings

3- Conduct a state trademark search on the company name:
http://sos.georgia.gov/corporations/marksearch.htm
Prepare to discuss the value and differences among federal, state, and common law trademarks.

4- Identify (in your opinion) the five most valuable domain names for the company.
Then, do some research on the web to identify at least three potential cybersquatters or typosquatters. Be prepared to discuss the company's strategies on how to deal with such issues.

APPENDIX B

Group Project: Creating an Effective Domain Name Registration Portfolio
(Sections B.1 and B.2 below)

I. OBJECTIVES

a) To understand all sides of legal controversies
b) To apply legal concepts in understanding the public policy implications of issues
c) To have a spirited interchange of ideas

II. PROCEDURE

a) The topics for the paper are listed below.
b) The paper is designed to be informative and persuasive. You may use emotion and passionate advocacy (backed up by accurate information).
c) Make sure every teammate has his or her name typed onto the top of the paper.

III. PAPER GUIDELINES

The group will turn in one paper, 12 pages in length, Times New Roman, double spaced (nothing shorter or longer!). The paper should be organized to include:

a) No Introduction
b) 12 page analysis divided into Sections (see below)
c) No Conclusion
d) Add a Footnote page

Footnotes must be listed at the end on a separate page (does NOT count toward the page requirement) (any generally accepted format

of footnoting is fine). A resource list at the end of the paper is NOT needed.

IV. HOW THE PAPER WILL BE GRADED

a) Your written project will be graded on the following items:
   i. how much thought went into the paper and how well you organize your thoughts, research, and arguments
   ii. whether your legal information is factually correct and your arguments are legally sound, logical and well-reasoned, based on the Topics
   iii. how well you follow the instructions
   iv. spelling and grammar

SECTION A. The hottest international legal issue is in the Intellectual Property (IP) field –Briefly identify examples of the proactive steps that some have corporations taken to prevent piracy of copyrighted materials (e.g. movie dvds), valuable trademarks (e.g. brand names used on counterfeit products), trade secrets, and patents (e.g. inventions).

Next, pick one U.S.-based company doing business outside the United States. Identify and document (in detail) the challenges that company has faced in the IP arena in that country (could be any one or a combination of copyrights, trademarks, trade secrets, patents). Discuss the company's efforts through legal, political, and other avenues to address IP piracy in that country, if any. Provide evidence that the company's IP protection plan has been effective or ineffective. In your opinion, how can that company bolster its effort to protect IP? Be specific and explain. (3 pages)

SECTION B. Protecting a company's valuable name has become a headache and a business decision for lawyers and business people alike. As top level domain names (TLDs) are being approved at an increasing rate, companies must assess which names to protect and which to leave alone, for an unsuspecting cybersquatter to snatch. One of the newest TLDs is .asia;[70] however, few companies have bothered to register their domain names with this registry. (see www.ups.asia as an example of a company that did)

> B.1- Discuss the importance and/or perils of registering domain names in multiple countries. I am not just looking for a discussion of how to protect your business name on the web; rather, I'm looking for you to discuss the business person's perspective of the importance or lack of importance for multiple country domain name registrations. (3 pages)
>
> B.2- Analyze the domain portfolio of [Pick a Fortune 500 Company]. Go to a domain name registrar's website to conduct a name search. (List in a separate Appendix: approximately twenty (20) domain name that the company currently possesses. Discuss in the body of your paper:
>
> > - Three (3) unregistered domain names that the company should purchase. Why do you believe the company did not pursue registration of those names?

[70] A proposed new .Africa is also on the horizon. See Scramble for 'dot africa' internet domain name, CNN, December 7, 2011, http://www.cnn.com/2011/12/07/tech/africa-domain-name/index.html.The African Union (AU) has already chosen its registrar. See AU chooses UniForum to administer .africa domain, Computerworld, February 27, 2012, http://news.idg.no/cw/art.cfm?id=7BDEBB0D-D465-6BFE-FE40E79EA7B136CA.

- Five (5) domain names in the hands of others which you believe that the company should own – discuss whether you believe each owner of those sites is a cybersquatter or possesses the domain name for a legitimate purpose. Explain. If a cybersquatter, assess the benefit/s and risk/s of the company pursuing ownership the domain names. (see a "Who Is Lookup" website to identify owners of domain names) (3 pages)

SECTION C. Conduct an interview with a senior executive or in-house counsel to a mid-sized to large company (either U.S.-based or not) which does business in another country. Identify the type of IP portfolio that the company has (patents, etc.). Have that person discuss the challenges of protecting IP in that country, and try to get him or her to be specific with instances where the company successfully or unsuccessfully prevented piracy. Supplement Section C with background information you discover on the internet about the company and/or the interviewee. (3 pages)

APPENDIX C

In Class Reinforcement Exercise: Domain Name Portfolio for Small Businesses

For the team project, you analyzed the domain portfolio of a Fortune 500 company. Now let's switch gears by looking at a start-up company working on a "shoestring" budget. The proposed name of your company is The PMBA Crew, LLC. You are a one person LLC doing business out of your home. You've already developed a logo and are a savvy web designer. Your plan is to start conducting business in our state in a few months, with an eye towards conducting business in other states within the next three to five years.

You have a budget of approximately $500 for corporate registrations. Discuss how you will allocate this money to form an LLC, secure ten relevant domain names (assume $10.00/name), and any other costs to protect the business assets and keep the business in compliance with state law.

Partial "To Do" List Before Incorporating: Conduct a free State of Georgia corporate name search. Do a free federal and State of Georgia Trademark Search. Analyze existing domain names. Consider the tax implications of entity selection.

ENHANCING CRITICAL THINKING SKILLS THROUGH MOCK TRIAL

By

Daniel J. Herron*
Ruth Wagoner**
Jo Ann Scott***

I. INTRODUCTION

The variety of structures, content, and focus of University Requirements or General Education plans are as nearly as numerous and varied as the universities and colleges which require them. However, a common thread within this area of pedagogy has clearly and recently emerged: the need for these university requirement or general education courses to stress critical thinking. While most University Requirement plans retain a need for minimal coverage in traditional disciplines based in the three broad areas of social science, natural science, and humanities, regardless of the course's disciplinary topic, that common thread of critical thinking is nearly always required. As one researcher has noted, [c]ritical thinking may well be the higher education buzz word of

the 1980's and 1990's."[1] Clearly, this has remained true well into the twenty first century.

In our combined teaching experience of more than 60 years, we have found mock trial to be the single most effective vehicle for teaching critical thinking skills. It was not our intent to teach critical thinking skills when we started coaching mock trial. We were trying to teach students something about the law and how to be persuasive. We wanted to expose the student to application of the law using persuasive speaking skills. It turns out that the adversarial nature of the courtroom provides an excellent methodology for teaching thinking, speaking, and listening skills.

We are classroom teachers and coaches of mock trial teams that compete nationally. We, along with other mock trial coaches, are convinced by our students' performances that mock trial experience teaches analytical, evaluative, and communicative skills. Since intercollegiate mock trial is competitive in nature, success is driven by the students' mastery of these skills. Mock trial is an effective strategy for teaching critical thinking because it is interactive in a public setting. This sets it apart from pencil and paper tests, case studies, and papers. In a mock trial, students demonstrate their ability to think within an adversarial system in front of a judge and their peers. It is the combination of interaction between students and the public nature of mock trial that make it a most effective vehicle for teaching thinking, speaking, and listening skills. The public display of interactive elements raises the stakes engaging the student ego that encourages the students to do well.

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[1]Caryn L. Beck-Dudley, *Understanding Reflective Judgment and Its Use in Legal Courses*, 16 JOURNAL OF LEGAL STUDIES EDUCATION 229 (1998).

This paper argues that intercollegiate competitive mock trial competition, as currently defined and administered by the American Mock Trial Association,[2] may serve the need to interject and actually teach critical thinking skills in a course that will satisfy most general education criteria.

II. IDENTIFYING A WORKING DEFINITION OF CRITICAL THINKING

A. Traditional Critical Thinking Approaches

There seems to be relatively, and remarkably, a general agreement in the literature regarding the concept of critical thinking itself. As early as 1939 Watson and Glaser argued that

> [c]ritical thinking involves a persistent effort to examine any belief or supposed form of knowledge in the light of evidence that supports it and the further conclusions to which it tends, as well as the ability to recognize problems, to weigh evidence, to comprehend and use language with accuracy and discrimination, to interpret data, to recognize the existence (or non-existence) of logical relationships between propositions, to draw warranted conclusions and generalizations and to test the conclusions by applying them to new situations to which they seem pertinent.[3]

In 1956, Benjamin Bloom articulated his now famous and generally accepted taxonomy regarding critical thinking that

[2]The American Mock Trial Association, 801 Grand Avenue, Suite # 3140, Des Moines IA 50309; founded 1985.

[3]Garside, Colleen. *Look Who's Talking; A Comparison of Lecture and Group Discussion Teaching Strategies in Developing Critical Thinking Skills* COMMUNICATION EDUCATION pp. 212-227 July 1996.

espoused a linear or sequential approach of knowledge=>comprehension=>application=>analysis=>synthesis=>evaluation.[4] Bloom's taxonomy has formed the basis for most variations in the attempt to define critical thinking. Ennis, for example, argues that reasonable reflective thinking that is focused on deciding what to believe or do includes such critical thinking processes as formulating hypotheses, alternative ways of viewing the problem, questions, possible solutions, and plan for investigating something[5].

The pinnacle, or ultimate, achievement and simultaneous skill in nearly all critical thinking taxonomies, it seems, is the evaluative aspect and the application of that evaluation to potential or prospective situations. Even taxonomies which vary in definitions or even specific methodologies do not vary in the identification of a final evaluative determination since, as Richard Paul, argues the plurality of definitions is not problematic, and in fact, is advantageous because it helps to maintain insights into alternative perspectives and helps us to escape the limits of separate definitions.[6]

Nearly every identified critical thinking taxonomy includes an evaluative function either as a fundamental activity interwoven throughout the taxonomy or as a culminating dynamic. Descriptions or action words or phrases such as: evaluating evidence, drawing conclusions, judging, examining assumptions, interpreting information, determining if a reason is relevant, drawing inferences, detecting bias, or weighing evidence are typical.[7] The point of this paper is not to argue the merits of the

[4]BENJAMIN S. BLOOM (ED.), TAXONOMY OF EDUCATIONAL OBJECTIVES 201-207 (1956).
[5]Garside, Colleen, *op cit.*
[6]*Id.*
[7]Barry Beyer, *Critical Thinking Revisited*, SOCIAL EDUCATION 273 (April 1985); while nearly fifteen years old, this article gives a fairly comprehensive overview of eight different critical thinking taxonomies from a variety of sources. These

different critical thinking taxonomies, but instead to identify one that may be used to evaluate the intercollegiate mock trial experience.

Keeley and Browne give the most succinct definition of critical thinking in distilling it down to [c]ritical thinking is the process of reacting with systematic evaluation to what one reads and hears.[8] Picking up on this concept Kubasek and Browne add that critical thinking has two components: a technical skill component and an attitudinal component.[9] The technical skill component requires the student to first identify the structure of the argument: issue, conclusion, and reasons; the attitudinal component is the application of an evaluative set of processes to that structure and argument.[10]

B. Reviewing Traditional Critical Thinking Approaches to Law Cases

Critically thinking about law cases, whether in the classroom or in actual legal/judicial practice, is remarkably similar to generally accepted concepts of critical thinking regardless of disciplinary context.[11] However, there had been debate that legal critical thinking omits the highest cognitive skill in Bloom's taxonomy: the emphasis on evaluation.[12] The traditional methodology for law case critical thinking, is commonly identified as FIRAC: Facts,

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taxonomies from the Beyer article are attached as an appendix to this paper for reference only.

[8]M. NEIL BROWN AND STUART M. KEELEY, ASKING THE RIGHT QUESTIONS: A GUIDE TO CRITICAL THINKING 2 (4th ed. 1994).

[9] M. Neil Browne and Nancy Kubasek, *Integrating Critical Thinking into the Legal Environment of business Classroom*, 14 JOURNAL OF LEGAL STUDIES EDUCATION 37 (1996).

[10]*Id.*

[11]This similarity supports the hypothesis that the teaching of *law* by definition includes the teaching of *critical thinking*; but this conclusion is premature at this juncture of the paper.

[12]Browne and Kubasek, *op cit.* 38.

Issue(s), Rule of law, Application of the rule of law, Conclusion of the court.

While FIRAC seemingly lacks a readily identifiable evaluative step, the process that FIRAC initiates will, if fully developed and applied, evolve an evaluative step beyond the mere identification of the conclusion of the court. This evaluative step is essentially the reflective judgment component of a critical thinking taxonomy. Beck-Dudley notes that [i]n reviewing the critical thinking literature it becomes apparent that most of the critical thinking inventories look at a students ability to interpret, analyze, evaluate, infer, communicate, and reflect.[13]

In integrating legal education with critical thinking models, Beck-Dudley relies on King and Kitchener's stages of learning.[14] King and Kitchener developed seven stages of reflective judgment in which each stage examines how an individual evaluates evidence before deriving an answer to a question or problem posed. Beck-Dudley argues that reflective judgment is distinguished from critical thinking by its focus on an individual's epistemic assumption and in assessing how people reason about skill-structured problems.[15] However, it seems that reflective judgment is necessarily part-and-parcel of the evaluative component of critical thinking in that it views how information is evaluated and interpreted.

Beck-Dudley also argues that this reflective judgment is a crucial step in the overall teaching and understanding law and law cases in the classroom. Since so much of law cases pertains to the idea of weighing and evaluating evidence and conclusions drawn from that evidence, Beck-Dudley found in her classroom experience that

[13]Beck-Dudey, *op cit.* 230
[14]PATRICIA M. KING AND KAREN STROHM KITCHENER, DEVELOPING REFLECTIVE JUDGMENT (1994).
[15]Beck-Dudley, *op cit.* 231

> [a] standard, case analysis approach to the course does not produce increases in levels of reflective judgment....and that the course needed to be refocused to incorporate the instructional goals of stage three and stage four learners. The goals for a stage three learner are to learn to use evidence in reasoning to a point of view and learn to view their own experiences as one potential source of information but not as the only valid source. The learning goals for stage four learners are to learn that interpretation is inherent in all understanding and that the uncertainty of knowledge is a consequence of the inability to know directly and learn that some arguments can be evaluated as better within a domain on the basis of adequacy of the evidence.[16]

Beck-Dudley's work seems to dispel the long-held notion that traditional legal thinking and analysis must necessarily be devoid of the evaluative step. In fact, her work argues and supports the contrary notion: legal critical thinking must, by definition, include a distinct and pervasive reflective, i.e. evaluative, judgment dynamic. In searching then for a critical thinking model to use in analyzing intercollegiate mock trial experiences, we look for a generally accepted taxonomy which incorporates as many identifiable and discreet functions as possible and one that incorporates a detailed evaluative aspect as exemplified in the emerging literature on legal critical and reflective thinking.

Beyer's taxonomy fits such a description. The traditional FIRAC model can be integrated into Beyer's taxonomy; yet, Beyer's model retains the inter-disciplinary and trans-disciplinary nature of critical thinking taxonomies in that it may be applied to a variety of disciplines or even serve as an overarching model for a variety of

[16] *Id.* 236, citing to King and Kitchener.

disciplines. Beyer characterizes critical thinking as involving careful, precise, persistent and objective analysis of any knowledge, claim or belief in order to judge it's validity and/or worth.[17] Beyer continues by identifying ten discrete critical thinking skills in a similar sequential fashion as Bloom's taxonomy. Beyer offers these sequential steps:

1) distinguish between verifiable facts and value claims;
2) determine the reliability of the source;
3) determine the factual accuracy of the statement;
4) distinguish relevant from irrelevant information, claims or reasons;
5) detect bias;
6) identify unstated assumptions;
7) identify ambiguous or equivocal claims or arguments;
8) recognize logical inconsistencies and fallacies in a line of reasoning;
9) distinguish between warranted and unwarranted claims;
10) determine the strength of the argument.[18]

Beyer's taxonomy provides a sequential approach while incorporating the evaluative aspect. It is this model then that we will utilize. Against this model we will compare characteristics of the intercollegiate mock trial competition.

III. INTERCOLLEGIATE COMPETITIVE MOCK TRIAL

A. The American Mock Trial Association

Mock Trial is an intercollegiate competition among schools that are members of the American Mock Trial Association (AMTA). Today, 350+ schools nationwide, some of which have as many as five teams, are members of AMTA. Member schools include

[17]Garside, Colleen, *op cit.*
[18]Beyer, *op cit.* 272.

nationally prominent institutions such as Harvard, Yale, Michigan, Princeton, Stanford, UCLA, University of Chicago, and University of Maryland, and NYU, among many others.

Cases and Rules

At the beginning of each year, teams are given a fictional legal case, complete with witness affidavits and applicable case law. Mock Trial uses a slightly simplified version of the Federal Rules of Evidence. The case can be either criminal or civil, alternating each year. This variation gives students insights into two different fields of law. As with any legal case, there is a prosecution (or, in a civil case, a plaintiff) and a defense. Students from one member school represent one side and compete against students from another school who present the opposing side. In competition, teams represent both the plaintiff and defendant in successive rounds.

B. Trial Structure and Procedure

Opening Statements.

Every trial begins with an opening statement from each side. Opening statements serve as road maps for the judge and jury; they detail the information to be provided by each of the witnesses who will testify.

Case-in-chief.

Each side then presents a case-in-chief (plaintiff or prosecution first) in which three witnesses testify. The witness testimony is elicited through a question/answer sequence between the examining attorney and the witness. All testimony is governed by the Rules of Evidence; if an objection is raised, testimony that is speculative, irrelevant, prejudicial, based on hearsay, etc. may be ruled inadmissible by the presiding judge. During the case-in-

chief, opposing counsel has the opportunity to cross examine witnesses in order to damage their credibility or minimize the impact of their testimony thereby helping to prove their own case by disproving the opposing side's case. The prosecution (or plaintiff) always bears the burden of proof—it is their responsibility to prove their case to the court. The defense must defend against the allegations of the plaintiff in their case-in-chief.

Closing Arguments.

To conclude a trial, attorneys from each side give closing arguments, in which they summarize the evidence presented and use it to argue their case. Only evidence that has been brought forth in the trial may be used to support closing arguments; evidence that has been stricken from the record will not be considered by the judge.

Scoring

Mock Trial is not won or lost based on the merits of the case—whether or not the prosecution (plaintiff) meets its burden—but on how well the student participants perform and how clearly they articulate their case theory through witness testimony. Under girding this policy is the realization that the facts in each case are slanted in some way, whether toward the defense or prosecution (plaintiff), thus making it easier for that side to win on the merits of the case. To avoid potential bias, the students' performances, not the overall outcome of the case, are the basis for determining the winner. Each participant is scored on a 1-10 basis, with a score of 10 describing a student who functions "like an experienced attorney" or for a witness who give a "convincing performance, effectively advancing the case." These scores assess the effectiveness of each student presentation—opening statements, each direct examination, each cross examination, each witness performance on direct and cross examination, and closing arguments-- before the court. The participants are scored by two

judges (often trial lawyers or judges). Each judge is given a ballot, on which a total of 14 functions for each team are evaluated. Then, scores on the ballots are tabulated, and the team scoring more points is awarded that ballot. At the end of a four-round tournament, eight ballots have been scored for each team. A team's record is determined by how many ballots they have been awarded.

Tournament Competition

Most tournaments consist of four rounds of competition. After the first round, teams will have a record based on whether they have won, lost, or tied the two judges' ballots from that round. All mock trial competition is power-paired, which means that teams are paired for the following round based upon their record from previous round; teams with similar records meet.

Awards and Honors

At the end of a tournament, awards are given based on team and individual performances throughout the tournament. Team awards are based strictly on a team's record at the end of a tournament. In the case of a tie, a tie-breaking procedure, which looks at such variables as strength of wins and losses, is employed. Individual awards are given to outstanding witnesses and attorneys. To earn an individual award one must usually earn at least 16 points. Points are awarded based on where an individual finishes; five points are given for first on the bottom of the ballot, three points for second, and one point for a third place finish. Scores for performance on prosecution (plaintiff) and defense are kept separate. These points are then added to arrive at a score for each individual. A score of 20, a perfect score, would reflect four first-place finishes at the bottom of the ballot as a witness or an attorney for one side. Participants who exceed the minimum point score needed for an award are recognized as all-tournament attorneys or witnesses. In national tournament competition, the awards are

given All-American status similar to those awarded in college athletics.

C. Mock Trial and Critical Thinking

Mock trial is an effective strategy for teaching critical thinking because it is interactive in a public setting. In mock trial, students demonstrate their ability to think within an adversarial system in front of a judge and their peers. It is the combination of interaction between students and the public nature of mock trial that make it extremely well suited to teaching thinking, speaking, and listening skills.

The constraints of the courtroom force students to present their case in the form of questions and answers using both their own and the opposition's witnesses. Objections may be made and answered. The trial requires interaction to tell the story. Mock trail is dynamic in that a team may have a strategy they prefer but they must adapt to the witnesses called, the other team's evidence, and the rulings of the court. In this sense mock trial does not have the same limitations as a paper and pencil test, an essay, or a case study. Those are solitary acts that allow the student to remain aloof, an observer. Because mock trial is interactive, the student internalizes it and the competitive element raises the stakes producing a much higher level of ego involvement. Students have an incentive to do well in front of their team, their opponents and the judges who represent a professional and distant audience.

Students gain knowledge of rules and the facts of a case, learn how to frame issues, and develop case theory. There is a progression which produces direct and cross questions, develops narrative, considers counter arguments and appropriate responses or reactions which results in extemporaneous modification of strategy depending on the court's rulings and opposing counsel's case. This activity manifests itself through group dynamics, audience analysis, and performance. This is not to suggest that these

elements proceed in an orderly or linear fashion, rather that there is a symbiotic relationship between and among them that makes it all the more complex and interesting. This is a developmental process but it is not necessarily discrete.

IV. INTERFACING OF A CRITICAL THINKING MODEL AND COMPETITIVE MOCK TRIAL

A. Beyer's Model

Beyer's Model of critical thinking can be used to illustrate how effectively mock trial teaches critical thinking skills.

Distinguish Between Verifiable Facts and Value Claims.

Attorneys use questions to elicit both facts and claims and to differentiate between them. For example, an attorney may ask an expert witness if the product in question was exposed to the elements for several days. The answer would be a verifiable fact. If the expert is then asked if he was surprised the product was corroded and he answers no, going on to explain why he was not surprised, the expert has made a value claim as to the reason why the product was corroded.

Determine the Reliability of the Source.

Attorneys spend part of every direct establishing why the court should believe the witness, while opposing attorneys look for bias or limitations that might affect the believability of the witness.

Determine the Factual Accuracy of the Statement.

Through a series of questions, an attorney can compare testimony by this witness to their own affidavit and to the testimony of other witnesses and or documents.

Distinguish Relevant From Irrelevant Information, Claims or Reasons.

In mock trial the standard for relevance is "any evidence which makes the existence or nonexistence of a fact necessary for the resolution of the case more or less probable." This standard is used to determine what facts should be elicited from a witness as well as what material is objectionable on the grounds of relevance. In mock trial, relevance lies in the subjective opinion of the ruling judge so information that is entered into evidence in one trial may not be accepted in another.

Detect Bias.

Attorneys look for any advantage a witness may gain by telling a particular version of events. The court will allow a crossing attorney wide latitude in exploring bias. Fact witnesses as well as expert witnesses are questioned about any benefit they might receive for their testimony. For example, a defendant pleading self-defense has an incentive to describe the alleged attack as vicious and unexpected.

Identify Unstated Assumptions.

From a pool of 8-9 affidavits, teams select witnesses immediately before a trial with the plaintiff choosing first then alternating until each side selected three witnesses. Teams have some sense of the case theory of their opponents based on the witnesses they selected. For example, if the plaintiff does not call a witness who is the author of a report, the defense may assume the plaintiff will try to garner that testimony from another witness.

Identify Ambiguous or Equivocal Claims or Arguments.

Much of a trial is spent clarifying these types of statements from witnesses. Attorneys ask questions of their own witnesses usually

trying to create an impression of certitude. When crossing witnesses attorneys try to show there are other possibilities, the witness is not absolutely sure; various factors may have limited the witness' ability to know. For example, a witness may note that the date on a memo preceded the event in question. This may call the legitimacy of the memo into question.

Recognize Logical Inconsistencies and Fallacies in a Line of Reasoning.

If the defense is arguing self-defense, the prosecution might well point to the lack of cuts or wounds that one would expect if the defendant had been attacked. In a civil case, if a defense attorney argues that a plaintiff expert is not credible because of a prior relationship with one of the parties it is then inconsistent to present a defense expert who draws the same conclusions.

Distinguish Between Warranted and Unwarranted Claims.

If a business is claiming their product exceeds industry standards, the plaintiff may respond by arguing that if one failure resulted in the death of his client's spouse it is not an acceptable rate of failure. Plaintiff is rejecting industry standard as acceptable to the reasonable person. An attorney may try to argue in closing that the company had a duty, that there was a breach, and a defective product, therefore the company should pay. This overlooks the third element of the law that the breach is the cause of the injury and as such the conclusion that the company should pay is unwarranted

Determine the Strength of the Argument.

In closing arguments attorneys address the strength of their own case and the weakness of the other side in light of the relevant law. When evaluating the opposing argument, an attorney may mention the paucity of evidence offered, the possibility of multiple

interpretations of this same evidence, and the inconsistencies between the claims made in opening statement and the evidence presented. In persuading the court of the strength of her own argument counsel may direct the judge's attention to points made in testimony that support her opening statement. Counsel may also enumerate the many pieces of evidence that lead to the ruling for which she is asking the court. The standard in evaluating argument is always the applicable law.

Beyer's model can also be grouped into three categories. Mock trial is an effective vehicle for teaching communication skills, courtroom constraints, and argumentation.

B. General Communication Skills

Group Dynamics.

Mock trial requires collaboration between and among attorneys and their witnesses. Even if one person makes all the decisions, they cannot implement them without the active involvement of their teammates. Assume that the prosecution is arguing that the defendant had time to call the police before she shot her son. An effective team will look for opportunities to show the defendant wasn't near a phone, her son surprised her with his attack, and the yelling was loud but did not go on for very long before the shot, etc. Both attorneys and witnesses work to add testimony that supports that position, either by asking particular questions or answering in such a way as to support the theory. Additionally, each student has to perform and that performance is subject to interference and change. If the students don't all know the case theory they cannot adapt.

Audience Adaptation.

Team members have to adapt to the other team's theory of the case if possible as early as the opening statement. The defense opening

should refer to points of agreement or contrast with the defense opening. Effective closing arguments must reflect the testimony of opposing witnesses. Participants must also adjust to the court's rulings. Testimony that is admissible in one trial may not be heard in another. Strong attorneys have several strategies for trying to get evidence crucial to their case into evidence.

Speaking.

Opening statements and closing arguments provide opportunities for students to give speeches. During the trial, attorneys and witnesses pay attention to the language both they and the other team use; by paying attention, attorneys may preclude a given series of questions and answers.

Listening.

If you don't listen in mock trial you will lose. Judges remember what is said in opening statements and hold attorneys to those assertions in closing arguments. The court penalizes those who make claims in closing argument that they did not prove. Attorneys should attend carefully to their own witness' answers to make sure the necessary facts are made known to the court. Opposing witnesses may claim to know information not in their affidavit. If they do, it should be brought to the court's attention that this information, if relevant and important, was omitted from the affidavit and the witness is only now bringing it to the court's attention. One of the most effective uses of careful listening is to turn the opposition's words against them.

C. Courtroom Specific Skills

Constraints of the Courtroom.

To function effectively in the courtroom, students must learn how to ask questions on direct and cross-examination. They also

develop some understanding of objections. Most teams use relevance, hearsay, narration, leading, asked and answered. These customs of the courtroom are new to most undergraduates so students have to learn to introduce facts and evidence through witnesses rather than their own testimony.

The Adversarial System.

Students are ill prepared for coping effectively with confrontation in a public setting. In a trial, they may have to fight to admit every piece of evidence. For students used to arguing their case on paper, the adversarial nature of the courtroom is a rude awakening. By arguing objections, students learn the value of thinking quickly of relevant responses and alternative strategies; while, at the same time, controlling their tempers.

Arguing objections allows students to show how the Rules of Evidence interact. For example, a witness may have information from a document that plaintiff's attorney is trying to enter as evidence. The defense may object on the grounds that the document is hearsay until it is entered into evidence. Plaintiff responds that the document is not available, to which the defense responds that opposing counsel has then violated the rule requiring a fair and accurate copy be offered to the court. Another example involves witness credibility. Plaintiff's counsel may ask questions of a witness concerning prior bad acts. Usually this is not permitted but if those prior bad acts are relevant to the witness' honesty, or lack thereof, the court may allow it under the rule that "credibility is always an issue." (AMTA Rule 602).

In a courtroom, attorneys and witness are interrupted by opposing counsel and/or the judge and told they may not continue a given line of questioning. It is up to the attorney, with the help of the witness, to find a different way of eliciting the information without raising the same or another objection. A trial requires students to perform; it is different than giving a speech because attorneys and

witnesses have to interact with others to do their own piece so their success is dependent in part on their ability to interact.

Argumentation

We know that from the real practice of law that objections rarely present drawn out arguments before a judge. However, in mock trial the cases are created with a fairly neutral fact pattern. This often produces evidence objections that can either be sustained or overruled depending on the student's ability to argue. As the purpose of mock trial is education we often have judges using these objection arguments to probe the depth of knowledge of the participants.

On a traditional test students may be asked to argue in the form of an essay answer. Even though such answers require higher order cognitive skill, the student argues in a vacuum. The answer is not subject to other's scrutiny in the process of building the case. In mock trial arguments are properly directed solely to the bench. The bench is encouraged to challenge the validity of the argument being made. Opposing counsel and the bench itself are often responsible for the development of the argument. For example, the bench may rule that an objection is overruled "on those grounds." This acts as a clear suggestion that the bench will entertain other objections to the testimony. So the judge often acts as a changing force for the attorney's response. When making an objection, opposing counsel determines the content of counsel's response. As additional objections are often made during the argument over the original objection attorneys are forced to continue to adapt the criteria of relevance of their argument. Mock trial argument construction is more organic than essay exams in that the questions change during a trial. The interactive element of mock trial provides immediate feedback and requires interaction.

V. CONCLUSION

For all these reasons, mock trial is an excellent vehicle for teaching critical thinking skills and affords students a unique opportunity to cultivate these skills.

- END ARTICLES -

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