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SOUTHERN JOURNAL OF BUSINESS AND ETHICS

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From the Editor-in-Chief. . . .

This is the 11th volume of the *Southern Journal of Business and Ethics*, an official publication of the Southern Academy of Legal Studies in Business. The Journal is being published in hardcopy and electronically on the Southern Academy's web page at <http://www.salsb.org>.

The SJBE has been included in Ebsco Host services, allowing for full text search on most university library systems! This provides a great benefit to our authors and readers!

All articles that appear in this volume of the *Southern Journal of Business and Ethics* have been recommended for publication by the Advisory Editors, using a double, blind peer review process. A personal thanks is extended to the Advisory Editors for all their hard work and dedication to the *Journal* and the Southern Academy; without their work, the publication of this Journal would be impossible.

This is my eleventh year as Editor-in-Chief, and I wish to express my sincere thanks and appreciation to all the Officers of the Southern Academy for their support, encouragement, assistance and advice throughout this year. I would like to further express appreciation to Will Mawer of Southeastern Oklahoma State University, for his efforts in coordinating the start of the Journal. The publishing of this journal is an intense educational experience which I continue to enjoy.

Many of the papers herein were presented at the Southern Academy of Legal Studies in Business meeting in San Antonio, Texas, March, 2019. Congratulations to all our authors. I extend a hearty invitation to the next meeting of the SALSBS in San Antonio, Texas, March, 2020.

The Southern Academy annual meeting has been voted the "BEST REGIONAL" among all the regions affiliated with the Academy of Legal Studies in Business (ALSB) featuring over 60 authors and 50 papers. I hope to see ya'll in San Antonio! Please check the web site (www.salsb.org) for further information. To further the objectives of the Southern Academy, all comments, critiques, or criticisms would be greatly appreciated.

Again, thanks to all the members of the Southern Academy for allowing me the opportunity to serve you as editor-in-chief of the Journal.

M.P. (Marty) Ludlum

Editor-in-Chief

Southern Journal of Business and Ethics

www.salsb.org

Our Reviewers

The **Southern Journal of Business and Ethics** is truly a group effort, requiring the tireless efforts of many volunteers to review our submissions.

I would like to extend a very public and eternal thanks to our reviewers. Many are listed below. Some have chosen to be anonymous for their efforts. I thank them also for their many hours of work in supporting the **SJBE**.

Reviewers for the 2019 issue in alphabetical order were:

Jennifer Barger Johnson, University of Central Oklahoma

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Notes for Authors:

The focus of the **Southern Journal of Business and Ethics (SJBE)** is to examine the current trends and controversies in business, law and ethics, both domestic and international. In addition, future issues will include a new section, *Short Notes*, which will consist of shorter articles focusing on pedagogical ideas for the new business law instructor.

All authors promise that any submission is original work, and has not been previously published.

Since the topics of **SJBE** cross into many different academic areas, the **SJBE** does not have a specific format. Authors are free to use Chicago style, Harvard style or the APA, as long as the application is consistent throughout the paper.

The title should be in ALL CAPS. The text should be in Times New Romans 12 point font for the text and 10 point font for the footnotes. Authors' names should be centered below the title. Paragraphs should be indented five spaces.

The maximum size for a paper is twenty-five pages, all inclusive, single spaced. Articles substantially longer may be accepted as space allows.

All submissions should include a complete copy (with author identification) and a blind copy (with author identification left blank).

All submissions are electronic, in MS-Word format. No paper copies will be reviewed or returned.

Artwork is discouraged. Tables and charts should be kept to a minimum and should be included in an appendix following the paper.

Submissions deadline is 45 days after the SALSBS spring meeting each year. Articles sent after the deadline will be reviewed for the next issue, or may be withdrawn by the author and submitted elsewhere.

Look for the call for papers at the Southern Academy's website (www.salsb.org). If you would like to serve **SJBE** as a reviewer, your efforts would be appreciated. Many hands make light work.

If you have any questions, please submit them to the Editor in Chief.

Please submit all papers to:
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Mark Your Calendars

March 5-7, 2020

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A CAREER-STAGE APPROACH TO UNDERSTANDING GLASS CEILING PERCEPTIONS

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Abstract

This study examines the significance of various factors related to women's perceptions of the glass ceiling at different stages in their careers. We begin by reviewing the glass ceiling literature and develop hypotheses about how corporate culture, individual attributes, and organizational support programs impact these perceptions. We introduce career stage as a moderator, review the Career Stage Theory literature, and discuss how this might apply to glass ceiling perceptions as well. We discuss the theoretical foundations for why we expect corporate culture to be particularly important to women in the middle and late stages of their careers, organizational support systems to be particularly important to women in the middle stage of their careers, and individual attributes to be most important in the early career stages. Findings for direct effects show that an adverse corporate culture increases perceptions of the glass ceiling and that individual attributes decrease these perceptions. The direct relationship between organizational support and glass ceiling perceptions was not significant. Moderator effects show corporate culture and organizational support systems as particularly salient to glass ceiling perceptions for women in the mid-career stage. However, the importance of individual attributes to glass ceiling perceptions did not significantly vary by career stage.

Introduction

The first woman to become CEO of a Fortune 500 company Katherine Graham who rose to the top spot at the Washington Post in 1972 (Catalyst, 2017a). Since that time, there have been 63 female CEO's on the Fortune list (Catalyst, 2017b), with a record-breaking 32 holding CEO positions just last year (Fortune, 2017). However, only 6.4% of the U.S.'s largest companies are run by women, so while the number has grown, it remains small. Female representation on corporate boards has risen higher but also remains small. While 9.6% of the Fortune's board

seats were occupied by women in 1995 (Catalyst, 2015), that number rose to 20.2% (or 1100 seats) in 2015 (Deloitte et al., 2017).

These figures demonstrate some progress on the gender diversification and equality continuums, but for women still struggling to advance, it may not be enough. Research shows that women are not recruited into top positions, nor are they promoted into them, to the same extent as their male counterparts, despite being equally or in some cases more qualified (Ellemers et al., 2012). Advancement therefore remains elusive to many women, as they face an invisible barrier known as the glass ceiling.

But speculation abounds regarding perceptions of this barrier. This is an important issue, as it may matter in terms of how organizations counter those perceptions and enjoy desirable outcomes such as high commitment and low turnover. While perceptions are likely to vary based on a number of dimensions, our literature review leads us to believe that career stage is perhaps one of the most salient (Armstrong et al., 2018; Carter & Silva, 2010; Walsh et al., 2016) and is therefore the focus of this study. In particular, this study examines the significance of various factors to women's perceptions of the glass ceiling at different stages in their careers. We review the glass ceiling literature and discuss the various factors that influence glass ceiling perceptions. Hypotheses are developed to address the effects that corporate culture, individual attributes, and organizational support systems have on these perceptions. We then introduce career stage as a potential moderator, review the research that has applied Career Stage Theory, and discuss how this might apply to glass ceiling perceptions as well. In particular, we discuss the theoretical foundations for why we expect corporate culture to be particularly important to women in the middle and later stages of their careers, organizational support systems to be particularly important to women in the middle stage of their careers, and individual attributes to be most important in the early career stages. The research design is laid out, data analyses and results are described, and implications for theory and for practice are discussed.

Background

Glass Ceiling

Early references to the term "glass ceiling" appeared in the 1960's as part of the civil rights movement when concerns over racial inequities were mounting. During the 1970's it was used to describe an invisible and artificial barrier, formed as a result of attitudinal and organizational prejudices, which prevent women from attaining top executive jobs (Nagy, 2005; O'Connor, 2001). At this time, the feminist movement was bringing gender equality to the forefront of the "glass ceiling" dialogue, where it entered corporate America's lexicon and mainstream consciousness. The term "glass ceiling" originally referred to the maximum potential that women could achieve in organizations, but now it is commonly defined as "a barrier so subtle that it is transparent, yet so strong that it prevents women and minorities from moving up in the management hierarchy" (Morrison & Von Glinow, 1990;) and includes racial and ethnic minorities as well (Carli & Eagly, 2001; Ridgeway, 2001; Townsend, 1997). More recently, Cotter et al. (2001), developed four distinctive characteristics that help determine if a glass ceiling exists in an organization. First, a gender or racial difference must exist that is not explained by other job-relevant characteristics of the employees. Second, these differences must exist to a greater degree at higher levels in the organization than at lower levels. Third, there must be a smaller chance for advancement into those higher levels based on gender or racial inequality, and not merely the proportions of each gender or race currently at those higher levels. And fourth, such gender or racial inequality must increase over the course of organizational

members' careers.

Much of the research on the glass ceilings has been anecdotal, but some work has been theoretically grounded (Crocker & Major, 1989; Friedman & Davidson, 1999). Most of this research has primarily addressed the question of whether, or under what conditions, such a barrier exists (e.g. Blum et al., 1994; Powell & Butterfield, 1997; Tharenou et al., 1994), but other have focused on the causes (e.g. Ballenger, 2010; Boone et al., 2013; Rummel & Viggiani, 2011) and effects (e.g. Dost et al., 2012; Rosin & Korabik, 1991) of such a barrier, with a handful of studies that have considered the interplay between the glass ceiling and other independent constructs (Cech & Blair-Loy, 2010; Foley et al., 2002; Mooney & Ryan, 2009).

Perceived Glass Ceiling

Glass ceiling perceptions are important because they may inhibit women, and potentially other under-represented populations, from seeking and obtaining promotions (Powell & Butterfield, 1997). In essence this becomes a self-fulfilling prophecy (King et al., 2017), as perceptions of glass ceilings suppress the motivation to seek promotion, which then leads to fewer promotions and an increase in glass ceiling perceptions. As gender affiliation overshadows other determinants of success (Crocker & Major, 1989; Friedman & Davidson, 1999), it becomes a powerful source of social identity. Women might internalize negative evaluations and social stereotypes by those in the majority to the point where they limit themselves and turn down opportunities for advancement due to the fear that they will not succeed (Ilgen & Youtz, 1986). Applying expectancy theory to the notion of a glass ceiling, if an employee believes she can only advance to a certain point, valence and expectancy might be high but instrumentality (or her confidence that high performance will lead to advancement) will be low, thus adversely affecting motivation. This, in turn, has an adverse effect on job satisfaction, organizational commitment and turnover, as well-documented in the literature (e.g. DeCotiis et al., 1987; Dysvik & Kuvaas, 2010; Misra et al., 2013). In organizations where women comprise many of the lower-ranking positions, those women are likely to perceive the attribute that they share (gender) as inconsistent with the organization's requirements for success (Ely, 1995).

According to the Catalyst (1990; 1996, 2001a, 2001b, 2002, 2004), the most commonly identified factors contributing to glass ceiling perceptions are counterproductive behavior of male coworkers; inhospitable corporate culture; lack of careful career planning and planned job assignments; lack of mentoring; poor opportunities from managers; social exclusion (being ostracized from informal networks of communication); and stereotyping and preconceptions. Similarly, Afza and Newaz (2008) suggest five major factors which influence glass ceiling perceptions, including management perceptions, the work environment, work-life conflict, sexual harassment, and organizational policy.

A review of the literature suggests categorizing the various influences in a number of ways. For example, Oakley (2000) argues that corporate practices (e.g. recruitment, retention, and promotion) and cultural issues (e.g. stereotyping and preferred leadership style) comprise most of the effects, and Maheshwari (2012) indicates that obstacles to advancement can broadly be divided into individual, societal and organization-related barriers. Similar frameworks have been put forth by other researchers. Bombuwela et al.'s (2013) research investigated the effects of individual, family, organizational, and cultural factors on women's career development. The current paper follows suit, synthesizing previous approaches and using a framework for glass ceiling perceptions which includes the influences of corporate culture, individual attributes, and organizational support for women. The relevant research based on these groupings is reviewed

below.

Corporate Culture

An organization's culture reflects the personality of its executives and is inherited through the company's policies, management behavior, rumor mills, and employee observations. Riger and Galligan (1980) assert that certain environments can suppress women's attainment of managerial positions. Attitudes toward female managers, group dynamics directed toward "token" female members, and processes of "homosocial reproduction" in promotion decisions (Kanter, 1977) have all been blamed. Boone's (2013) study of glass ceiling perceptions in the hospitality industry yielded the following quote from a female respondent: "I can save you some time, the bottom line . . . it's still a man's world." While Bombuwela et al. (2013) attribute some of this to beliefs and traditions within the organization, Weyer (2007) goes farther in saying that the scarcity of female leaders is linked to ongoing prejudice and discrimination against women in the workplace. Ballenger (2010) also believes social injustice is at play, with upper management dictating the gender bias with which cultural capital is valued (Purcell, 2013).

Others blame a lack of respect from males and an insensitivity to the multiple roles that women assume (Risner & Anesh, 2013). A study by Haslam and Ryan (2008) shows evidence of a "glass cliff", whereby women seem to be selected for more precarious leadership positions, where failure is more likely, such as during times of declining organizational performance. Powell and Butterfield (2015) invoked several existing theories of gender discrimination to demonstrate the effect of gender on promotions to top management positions. Theories of patriarchy (e.g. Marshall, 1984; Strober, 1984), for example, suggest that women's access to top management positions are restricted because male decision makers prefer to maintain power and authority over women. Rational bias theory (Larwood et al., 1988) attributes top-level promotions to the intentional biases by decision makers who see personal advantage in perpetuating gender discrimination as long as they believe their organizations are not interested in eliminating it. Finally, unconscious bias theory (Motowidlo, 1986; Perry et al., 1994) states that decision makers have an ideal prototype for top positions which distorts their judgment. As a result of this discussion, we hypothesize as follows:

H1: There is a positive relationship between an adverse corporate culture and women's perceptions of the glass ceiling.

Organizational Support for Women

The glass ceiling has also been attributed to structural conditions of the organization (Ballenger, 2010), with inadequate mentoring and networking opportunities (Boone et al., 2013; Dimoivski et al., 2010; Sabat & Mishra, 2010) emerging as particularly salient problems. Similarly, Bombuwela's (2013) study on glass ceiling perceptions found considerable support for the influence of organizational practices. The Federal Glass Ceiling Commission recommended a list of actions for organizations to take in order to reduce this barrier (US Department of Labor, 1995). Among these were for the CEO to demonstrate commitment through constant communication about workforce diversity and to include diversity in all strategic business plans, with management held accountable for progress. Specifically, performance appraisals, compensation incentives and other evaluation measures must reflect a line manager's ability to set a high standard and demonstrate progress toward breaking the glass ceiling. Other

recommendations include preparing minorities and women for senior positions through formal mentoring and to initiate work-life and family-friendly policies such as flexible scheduling.

As a result, firms might develop programs to counter the negative effects of a glass ceiling. However, Priming Theory would ironically suggest that as these programs are created, their very existence would create perceptions of a glass ceiling and/or exacerbate them. The effect of priming has been demonstrated with respect to gender issues (Falk & Kenski, 2006), the media (Valentino et al., 2013) and psychology (Locke, 2015). Specifically, Hoobler et al. (2009) found that glass ceilings are perpetuated when bosses perceive family-work conflicts among female employees. Heightened sensitivity among management might signal to female employees that indeed this could limit their promotion opportunities. In this regard, it mimics affirmative action, which signals to the female employee that extra effort to facilitate these opportunities is needed, so this may increase their perception that it exists (Boone, 2013). We therefore suggest the following:

H2: There is a positive relationship between the existence of organizational support systems for women and their perceptions of the glass ceiling.

Individual Attributes

Riger & Galligan (1980) suggested that women's traits and behaviors are inappropriate for managerial roles, but this notion has been countered in more recent literature. According to Applebaum et al. (2013), women have more empathy, supportiveness and relationship-building qualities than their male counterparts, are more concerned with an organization's duty to its employees (Ludlum et al., 2016), and thus display more of the qualities associated with transformational leadership (Chin-Chun et al., 2011). In a study on women's career development, Bombuwela et al. (2013) found individual factors such as a lack of self-confidence and emotionally-driven behavior to be most influential as barriers to advancement. Women themselves have indicated that several self-imposed barriers (Boone et al., 2013) are the most inhibitive to moving up in the corporate hierarchy, with "lack of skills and education" being the most salient obstacle. While Boone et al. (2013) acknowledge that a corporate environment whose culture is negative towards women will inhibit perceived chances for advancement, they assert that women can intervene in affecting their opportunities, both passively (with resume items) or actively (through their behaviors). Morrison et al. (1987) identify several factors that allow women to break through the glass ceiling, including a track record of achievements, ability to be tough, decisive and demanding, and the willingness to take career risks. In accordance with this framework, Dell (1992) differentiates between expressive communication and rhetorical sensitivity in order to show how communication behaviors can in fact produce a glass ceiling. Specifically, a rhetorically sensitive person (who, by definition, is others-oriented) may not put their own interests out there, but the more expressive communicator is likely to make his/her interests known. This goes hand-in-hand with taking career risks, which may include accepting a high-risk assignment, changing functional areas, moving from a staff to a line position, demanding a promotion, or starting his/her own business (Dell, 1992). This is also consistent with earlier studies (e.g. Crosby, 1984), which demonstrate that women do not generally acknowledge the ways that gender discrimination may have affected their own career experiences and are more likely to assume personal responsibility for receiving fewer organizational resources than their male colleagues. We can therefore conclude that women with

college degrees, impressive resumes, and a focus on careers, are more likely to expect opportunities for advancement and offer the following hypothesis:

H3: There is a negative relationship between women's individual attributes and their perceptions of the glass ceiling.

Career Stage Theory

While perceptions are likely to vary based on a number of dimensions, our literature review leads us to believe that career stage is perhaps one of the most salient (e.g. Armstrong et al., 2018; Carter & Silva, 2010; Walsh et al., 2016) and is therefore the focus of this study. Much of the application of Career Stage Theory has been on sales force and salesperson behavior (e.g. Fisher, 2003; Hafer, 1986; Madhani, 2013, 2014), with some focus on employee motivation and performance (Mehta et al., 2000) and intentions to leave (Lucas et al., 1987; Youngblood et al., 1983). Career Stage Theory has its roots in vocational psychology and in sociology, with most research based on the approaches of Super (1957), Levinson et al. (1978) and Mowday et al., (1982). Cron (1984) built on Super's earlier work and developed a career stage framework whereby individuals experience four stages. During *exploration*, employees have low levels of occupational commitment and are more concerned with their own roles inside the organization. In the *establishment* stage, employees seek more stability and become more concerned with upward mobility and pay increases. Next is the *maintenance* stage, where employees are more interested in the status quo, rather than in advancing. Lastly, there is *disengagement*, where employees tend to psychologically distance themselves from their work and thus performance is typically low.

Super's and Cron's frameworks address attitudinal and behavioral attributes of employees, which correspond to the age-related model put forth by Levinson et al. (1978). This theory categorizes individuals into distinct stages between the ages of 20 and 45, each with their own developmental tasks and related behaviors and attitudes. *Getting into the Adult World* takes place in an individual's early 20s, whereby he/she tries to establish an occupation consistent with his/her self-image. At this point, commitment to an occupation is provisional. *Settling Down* occurs in the early thirties, at which time deeper commitments and long-range planning begin. Individuals at this stage are motivated by order, stability, security, and control. From 40 to 45, individuals have passed the midlife transition and no longer feel constrained by others. This time is usually accompanied by biological changes associated with aging and the psychological impact that aging can have.

Another conceptualization, developed by Mowday et al., (1982) suggests career stages based on level of organizational commitment and include pre-entry, early employment, and later employment. These stages tend to overlap with those suggested by Super (1957), Cron (1984), and Levinson (1978). An additional framework is based on organizational tenure (Bellenger et al., 1984; Slocum & Cron, 1985), with 1-7 years considered early, 8-15 years considered middle, and more than 15 years considered late (Mehta et al., 2000).

Based on the attitudinal and behavioral attributes that are present at each stage, individual perceptions about various phenomena vary over time. We expect this same logic to apply to glass ceiling perceptions and why these might be present.

Early Career

By any conceptualization, as individuals enter the working world, they are self-focused. Consistent with Super's (1957) first stage, the concern is for how one might be perceived in the organization, and as a result, they are oblivious to large scale organizational issues. According to Levinson (1978), this is typically in one's early 20s, when individuals are still exploring other careers and are not yet committed to their chosen professions. Their external job mobility, in turn, is more strongly related to salary than is the mobility of those in their middle and later career stages (Lam et al., 2012). Programs designed to help them advance in their careers are of little concern, since careers may change. They begin their careers with the expectation that their knowledge, skills, and abilities, will be key to their advancement, just as it had been to landing the job in the first place, as these are what has contributed to their successes thus far. In these early stages, personality is particularly telling of career engagement (Wille et al., 2012), and personality combined with general mental ability have been predictive of success at this time (de Haro et al, 2013).

They join their organizations with a sense of wonderment, naïve about the corporate cultures that lie within. They have not yet been exposed to the organizational dynamics that may one day have a direct effect on their careers within the firm, as this comes in time. In addition, it is in this career stage – under 30 years of age – where we see an increase in international assignments (Shortland, 2013). This trend towards younger expatriates, increasingly single and without children, represents a dramatic change in the composition of a typical international assignee profile. This, too, suggests, that skills and abilities will likely determine advancement, since it is well-known in the literature that expatriates are chosen based on functional and technical expertise, and it is also well-known in the expatriate literature that overseas assignments are expected to lead to advancement opportunities. That, then, is the perception, although it may not always be true.

Mid-Career

As women take on more family responsibilities, most often in their early to mid-thirties, motivations shift from establishing self-image, credentials and marketability, in favor of maintaining order, control, and stability in one's life (Levinson, 1978). This is often a time of nesting. They are thinking less about changing careers and more about building their families. According to Sheryl Sandberg, COO of Facebook, "The number one impediment to women succeeding in the workforce is now in the home." As such, if any conflict takes place between the two roles, women will sacrifice their careers for the sake of their families (Kargwell, 2008). Consequently, the impact of the family-work interface contributes to the formation of the glass ceiling (Rai & Srivastava, 2008) that women managers face. This is more evident when promotion is subject to a willingness to transfer to rural areas (Kargwell, 2008), or perhaps to travel for work. Studies have shown that women feel more responsible than their male counterparts toward housework and childcare during their work life, which in turn increases their stress levels (Schneer & Reitman, 2002). This suggests that any barriers to advancement will have more to do with work/family balance than with other issues. Women may not apply for promotion if they expect management to perceive these conflicts as well. In somewhat of a shift in the effect that these self-imposed barriers might have on advancement, Bambuwela (2013) found the connection to be mediated by organizational assistance (or lack of assistance) in managing these issues. In particular, they found these self-imposed barriers to be reinforced when mentorship and career planning for women is lacking (Bambuwela, 2013).

However, counter-intuitive findings (Hoobler et al., 2009), as mentioned earlier, show that glass ceilings are perpetuated when bosses and female employees themselves perceive family-work conflicts among female employees. Where there are stereotypes and assumptions that women will be the primary caregivers to their children, men have been discouraged from taking parental leaves (Cabeza et al., 2011) and are thus comparatively advantaged when it comes to advancement opportunities. Additionally, Marcinkus et al. (2007) found that mid-life women received more personal social support, as compared to work-based support, while it was work-based support that facilitated accomplishments and advancements. Thus, we again expect organizational support programs to create or perpetuate perceptions that a glass ceiling exists, and based on the discussion here, that this relationship will be most pronounced for women at the mid-career stage. We also expect corporate culture to emerge as a perceived obstacle at this time. Corporate culture reflects the personality of its executives and is inherited through the company's policy, management behavior, rumor mills and what the employees of that organization observe, all of which take time to learn. As more seasoned employees, they either understand their own company's culture or are aware in general of the role that corporate culture plays in advancement decisions. Naiveté is replaced by skepticism that they will ever break through, as the upper ranks are permeated by power players (King, 2016).

Advanced Career

Research shows that significant promotions typically take place for women when they are in their forties. At this time in their lives, many women must still weigh their career advancement against family-related issues (Glassman, 2006), but the dramatic “push and pull” between family and work responsibilities (Brizendine, 2008; Reddy, 2007) is reduced. In most cases, FMLA and all-day child care are no longer needed. Many women are returning to work after a prolonged absence, fulfilling their previous roles but now on a flex-time or part-time basis. While this may indicate that work/family conflict is still a barrier to advancement, Jackson (2001) reports that women in their forties did not perceive much work/family conflict and therefore the issue was not so strong as to keep women from seeking advancement. However, the difficulty arises in convincing management of their dedication and commitment, in which case corporate culture becomes a factor (Anonymous, 2015; Ragins et al., 1998). It is therefore at this stage in their careers where women are again vulnerable to gender stereotypes about women's ambitions. During this time, they are ever more likely to limit themselves and turn down opportunities for advancement due to the fear that they will not succeed (Ilgen & Youtz, 1986). These stereotypes are perpetuated by old boy's networks, where the adage applies that “It's not what you know, it's who you know”. Success at work, especially in management positions, relies heavily on an ability to network (Gamba & Kleiner, 2001). Women returning to work have likely been out of touch, are not networked, and are therefore out of the loop. They come back painfully aware of this and therefore see it as their main obstacle to getting ahead.

H5: The relationship between corporate culture and glass ceiling perceptions will be stronger for women in their middle and later careers than for those in the early career stages.

H6: The relationship between organizational support systems and glass ceiling perceptions will be stronger for mid-career women than for those in the early or later stages of their careers.

H7: The relationship between individual attributes and glass ceiling perceptions will be stronger for women in their early careers than for those in their middle and later career stages.

Methodology

Participants

The data were collected by sending an invitation en masse to female alumni of a small southern university, asking them to anonymously respond to an electronic survey. The survey was intended to ascertain the respondents' perceptions of a variety of organizational and career-related issues. 430 completed surveys were submitted directly to the researchers, who ensured their confidentiality. Table 1 provides the sample demographics as a percent of the total sample.

Table 1. Sample Demographics

Current Position		Age		Marital Status	
Clerical	1.2	>25	13.3	Single, no dependents	38.8
Staff	9.7	26-30	17.9	Single with dependents	4.2
Professional	35.9	31-35	11.9	Married, no dependents	19.9
Supervisor	8.2	36-40	12.4	Married with dependents	37.1
Middle Manager	29.5	41-45	14.2		
Executive	15.6	46-50	13.3		
		51-55	11.4		
		56 older	5.6		
Current org tenure		Education			
3 years or less	44.3	Bachelors	48		
4-6 years	26.2	Master	50		
7-10 years	12	Doctorate	2		
11-15 years	11.7				
16-20 years	5.9				

Measures

Given the multidimensional nature of the independent variables, they were considered to all be second order factors. As a result, they were each a composite of two pre-existing constructs related to that factor. A confirmatory factor analysis was used to verify the theorized structure.

Corporate Culture

This construct was a second order factor consisting of measures related to *Gender Stereotyping* and *Good Old Boys' Networks*. The Gender Stereotyping sub-construct items are based on items from Afza and Newaz (2008) and Michailidis et al. (2012). They were embedded in the survey with responses on a 5-point scale from "not an obstacle" to "high obstacle". Questions asked about perceptions of women as weak, uninterested, or "pushy". Cronbach's Alpha for this measure is 0.90. The Good Old Boys' Networks sub-construct items had the same response scale and were also based on items from Afza and Newaz (2008), as well as from Tran (2014). They asked about corporate structures and practices that favored male employees and male domination of senior positions. Cronbach's Alpha for this sub-construct is 0.86, and the final composite second order factor has a Cronbach's Alpha of 0.93.

Organizational Support

This construct was a second order factor consisting of measures related to organizational support, including programs aimed at *Family Support* and those aimed at *Women's Advancement*. Both sets of items were consistent with items from Michailidis et al. (2012). The Family Support sub-construct items were embedded in the survey with responses on a 5-point scale from “not helpful” to “greatly helpful”. Questions asked about perceptions of things such as onsite childcare and parental leave programs. Cronbach's Alpha for this measure is 0.90. The Women's Advancement sub-construct items had the same response scale and asked about the encouragement for women to broaden their managerial experience and about increasing opportunities for women to gain a combination of line and staff experiences. Cronbach's Alpha for this sub-construct is 0.90, and the final composite second order factor has a Cronbach's Alpha of 0.85.

Individual Attributes

This construct was a second order factor consisting of measures related to *Work Experiences* as well as *Career Focus*, consistent with similar items from Afza and Newaz (2008) They were embedded in the survey with responses on a 5-point scale from “not helpful” to “greatly helpful”. The Work Experiences sub-construct items asked about specialized training and advanced degrees. Cronbach's Alpha for this measure is 0.69. The Career Focus sub-construct items had the same response scale and asked about the willingness to take risks and about entrepreneurial tendencies. Cronbach's Alpha for this sub-construct is 0.90, and the final composite second order factor has a Cronbach's Alpha of 0.81.

Glass Ceiling

Based on Jawahar & Hemmasi (2006), four items were designed to measure perceptions regarding a *Glass Ceiling*. One asked about the extent to which the respondent thought that such a barrier exists at her company, rated on a 5-point scale and anchored by “to no extent” on one end and by “to a very great extent” on the other. The others asked about sufficient opportunities to advance into senior management at the firm, the chance that a woman could become CEO within the next 10 years, and whether the number of women achieving senior executive positions was steadily rising. These items were rated on a 5-point scale from “strongly disagree” to “strongly agree”. Cronbach's Alpha for this measure was 0.86.

Career Stage

According to Rush et al. (1980) age and stage should covary positively. More explicitly, the mean age of individuals should increase consecutively through the various stages of one's career. Given the subjectivity in measuring career stage, we adopt a modified version of Levinson's (1978) age framework and operationalized career stage using the following three categories: Early Career (25 under), Mid-Career (31 to 35), and Late Career (41 to 45).

Univariate Analysis

We used confirmatory factor analysis (CFA) to test our hypothesized second order model of the independent variables as well as an alternative first order model to investigate which factor structure best fit the data. The first order model was tested where all sub-constructs were allowed to covary with each other. This provided good fit to the data ($\chi^2[322] = 702.0$; SRMR = .059; RMSEA = .052; CFI = .95; TLI = .94) relative to conventional standards for evaluating

model fit (Hu & Bentler, 1999). Next, a second order-factor model was tested where each of the two sub-constructs for the independent variables loaded on their respective factors (Corporate Culture, Organizational Support, Individual Attributes). This model yielded almost the exact same results as the first order model ($\chi^2[328] = 709.5$; SRMR = .061; RMSEA = .052; CFI = .95; TLI = .94). Given that the results were nearly identical, and that the theory suggests a second order solution, we adopted the second model.

Results

Means, SDs, and correlations among the variables are presented in Table 2.

Table 2. Mean, Standard Deviations and Correlations

	Mean	SD	CORP	ORG	INDIV
CORP	3.33	0.92			
ORG	3.90	0.72	0.43**		
INDIV	3.80	0.63	-0.02	0.24**	
GC	2.87	1.00	0.39**	0.80	-0.28**

p<.05** n=430

Direct Effects

Hypotheses 1, 2 and 3 were tested using multiple regression. The results of the regression indicated that the three predictors explained a significant amount of the variance ($R^2=.23$, $F(3,426)=41.7$, $P<.001$). H1 hypothesized a positive relationship between adverse corporate culture and glass ceiling perceptions. As shown in Table 3, the beta coefficient for CORP is positive and significant ($\beta=.401$, $P<.001$). Therefore, *H1 is supported*. H2 hypothesized a positive relationship between organizational support and glass ceiling perceptions. As shown in Table 3, the beta coefficient for ORG is not significant ($\beta=-0.030$, $P>.01$). Therefore, *H2 is not supported*. H3 hypothesized a negative relationship between individual attributes and glass ceiling perceptions. As shown in Table 3, the beta coefficient for INDIV is negative and significant ($\beta=-0.26$, $P<.001$). Therefore, *H3 is supported*.

Table 3. Direct Effects

	B	SE B	β	p (sig)	B Upper 95%	B Lower 95%
CORP	0.43	0.05	0.4	0.000	0.32	0.53
ORG	-0.04	0.07	-0.03	0.544	-0.17	0.09
INDIV	-0.41	0.07	-0.26	0.000	-0.54	-0.27

Moderation effects

H4 hypothesized that corporate culture would have less of an effect on glass ceiling perceptions in the early stages of one's career but would be significantly more impactful in the middle and later stages. To test this, moderated regression with two dummy variables was used, using data from the early career (25 under), mid-career (31 to 35), and late career (41 to 45) stages (n=169). The dummies represented the mid and late career stages with the early-stage

being represented by the control or baseline condition. An interaction term between each of these variables and the independent variable carries the moderation (Cohen et al., 2003). If the first interaction variable is significant in the regression, a significant difference exists between the relationship of corporate culture and glass ceiling perceptions for people in the early and middle stages of their careers. If the second interaction variable is significant in the regression, a significant difference exists between the relationship of corporate culture and glass ceiling perceptions for people in the early and late stages of their careers.

It was observed that for this regression one data point appeared to be an outlier. First it had a DFFit of 0.85 which is 2.25 times higher than the suggest cut-off of 0.38 (Cohen, Cohen, West & Aiken, 2003; Aguinis, Gottfredson & Joo, 2013). Second, the DFBeta's of this point (which considers the impact of this point on each regression term) for the early to mid dummy was 0.64 or 4.12 times higher than the suggested cutoff of .15 and the early to late interaction variable DFBeta was -.58 or 3.79 times greater than the cut-off. Based on this conservative analysis, this single case (out of n=169) was excluded from the regression.

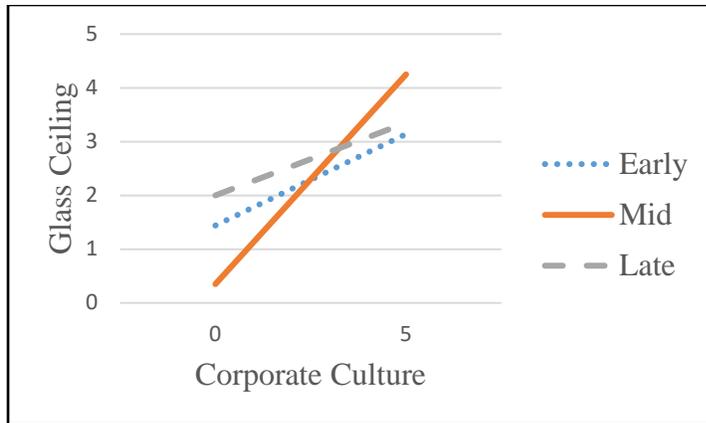
As reported in Table 4, Corporate Culture and Career Stage dummies were entered in the first step of the regression analysis. In the second step, the two interaction terms were entered. This model explained a significant increase in the variance of Glass Ceiling Perceptions, $\Delta R^2 = .04$, $F(2, 162) = 4.43$, $p < .05$. Specifically, the interaction between Corporate Culture and the early to mid-dummy variable was also significant ($\beta = 0.76$, $p < .05$), but the interaction between Corporate Culture and the early to late-dummy was not significant ($\beta = -0.13$, $p = .67$). This suggests that there is support for a difference in the relationship between early and mid-stage careers, but no support for a difference in the relationship between early and later career stages. Therefore, *H4 is partially supported*.

Table 4. Moderated Regression Results for Corporate Culture

	Model 1				Model 2			
	B	SE B	β	p (sig)	B	SE B	β	p (sig)
CORP	0.44	0.07	0.42	0.00	.34	.12	.33	0.00
Early to mid-dummy	0.39	0.16	0.19	0.02	-1.09	.62	-.53	0.08
Early to late-dummy	0.31	0.15	0.16	0.049	.56	.57	.29	.328
CORP*early to mid					.43	.18	.76	0.02
CORP*early to late					-.07	.17	-.13	0.67
R²	0.22				0.26			
ΔR^2					.04 (p < 0.05)			

As visible by the slopes in Figure 1, Corporate Culture is most influential in the middle stages of the career. The data suggests that in the middle stages of their careers, women seem to attribute glass ceilings to Adverse Corporate Culture, more so than women in the early or later stages of their careers.

Figure 1. Moderation Plot for Corporate Culture



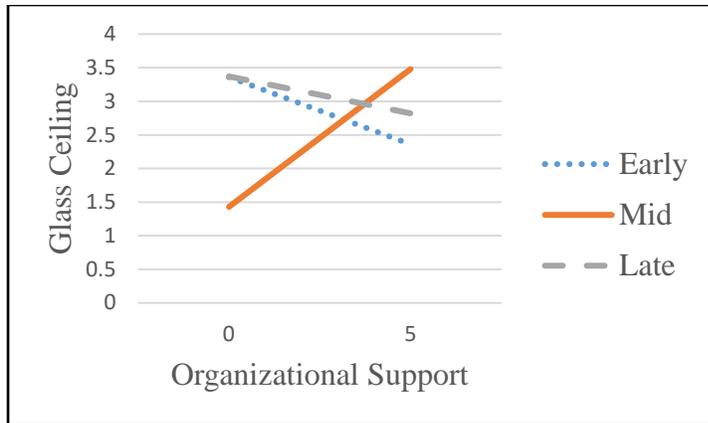
H5 hypothesized that Organizational Support would have less effect on Glass Ceiling Perceptions in the early and late stages of one's career but would be significantly more impactful in the middle stage. This was tested in the same way as H4 except the first dummy variable represented the early and late career stages with the mid-stage being represented by the control or baseline condition. As reported in Table 5, Organizational Support and Career Stage dummies were entered in the first step of the regression analysis. In the second step, the two interaction terms were entered. This model explained a significant increase in the variance in Glass Ceiling Perceptions, $\Delta R^2 = .04$, $F(2, 163) = 3.55$, $p < .001$. Specifically, the interaction between Organizational Support and the early dummy variable was significant ($\beta = -1.24$, $p < .05$), and the interaction between Organizational Support and the late dummy was also significant ($\beta = -1.10$, $p < .05$). This suggests that there is a difference in the relationship between early and mid-stage careers, as well as between mid- and late-stage careers. Therefore, *H5 is supported*.

Table 5. Moderated Regression Results for Organizational Support

	Model 1				Model 2			
	B	SE B	β	p (sig)	B	SE B	β	p (sig)
ORG	0.03	0.11	0.03	0.75	0.41	0.18	0.30	0.02
Mid to early-dummy	-0.46	0.18	-0.24	0.01	1.92	0.96	0.98	0.05
Mid to late dummy	-0.10	0.18	-0.05	0.57	1.94	1.05	1.00	0.07
ORG*mid to early					-0.61	0.24	-1.24	0.01
ORG*mid to late					-0.52	0.26	-1.10	0.049
R²	0.05				0.09			
ΔR^2					.04 ($p < 0.05$)			

As visible by the slopes in Figure 2, Organizational Support has the strongest positive impact on Glass Ceiling Perceptions in the middle career stages. The data suggests that in the middle stages, women seem to attribute glass ceilings to Organizational Support, more so than women in the early or later stages of their careers.

Figure 2. Moderation Plot for Organizational Support



H6 hypothesized that Individual Attributes would have less effect on Glass Ceiling Perceptions in the middle and late stages of one’s career but would be significantly more impactful in the early stage. For this regression one data point appeared to be an outlier, with a DFFit of 1.0 which is 2.63 times higher than the suggest cut-off of 0.38 (Cohen, et.al, 2003; Aguinis, et.al., 2013). Also, the DFBeta’s of this point (which considers its impact on each regression term) for the mid to early dummy was 0.67 or 4.45 times higher than the suggested cutoff of .15 and the mid to late interaction variable DFBeta was -.68 or 4.53 times greater than the cut-off. Therefore, this single case (out of n=169) was excluded from the regression.

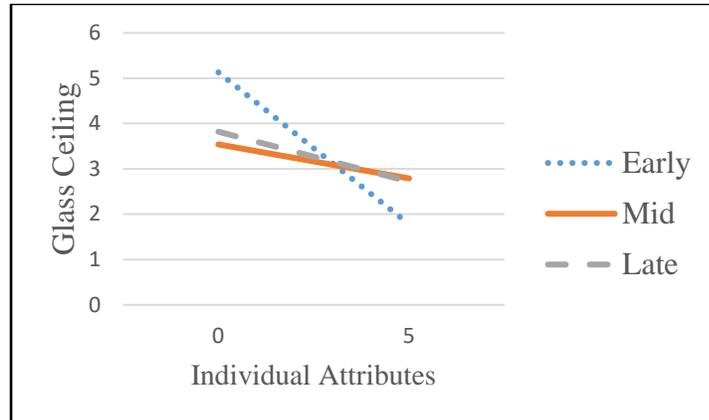
This was tested in the same way as H4. As reported in Table 6, Individual Attributes and Career Stage dummies were entered in the first step of the regression analysis. In the second step, the two interaction terms were entered. This second model did not explain a significant increase in the variance in Glass Ceiling Perceptions, $\Delta R^2 = .02$, $F(2, 162) = 2.04$, $p = .134$. Specifically, the interaction between Individual Attributes and the early dummy variable was not significant ($\beta = 0.96$, $p = 0.07$), and the interaction between Individual Attributes and the late dummy was also not significant ($\beta = 0.95$, $p = .10$). The data do suggest that the form of the relationship that we hypothesized exists, but there is no statistical difference in the relationship ($p < .05$) between early and mid-stage careers nor between late and mid-stage careers. Therefore, *H6 is not supported*.

Table 6. Moderated Regression Results for Individual Attributes

	Model 1				Model 2			
	B	SE B	β	p (sig)	B	SE B	β	p (sig)
INDIV	-.364	.116	-.241	0.02	-.67	.19	-.44	0.00
Early to mid-dummy	.353	.172	.176	0.04	-1.58	1.08	-0.79	0.14
Early to late-dummy	.424	.164	.223	0.10	-1.31	1.08	-0.69	0.23
INDIV*early to mid					.52	.29	0.96	0.07
INDIV*early to late					.45	.27	0.95	0.10
R²	0.10				0.12			
ΔR^2					.02 (p = 0.134)			

As visible by the slopes in Figure 3, Individual Attributes does have a stronger impact on Glass Ceiling Perceptions earlier in a career compared to mid and later stages. In fact, the difference between early and mid-careers is statistically significant but only at $p < 0.10$.

Figure 3. Moderation Plot for Individual Attributes



Discussion

This study examined the significance of various factors to women's perceptions of the glass ceiling in general and also at different stages in their careers. Findings for direct effects show that favorable individual attributes decreased glass ceiling perceptions and that an adverse corporate culture increased these perceptions. These results corroborate previous findings on what contributes to perceptions of the glass ceiling. Of the three types of factors expected to influence these perceptions, we find adverse corporate cultures to have the most profound effect. Contrary to expectations, the relationship between organizational support and glass ceiling perceptions was not significant. However, since career stage moderation was found, it is not that organizational support is insignificant but rather that it is significant at some stages but not at others, and that without considering the role played by career stage, the varying direct effects cancel each other out.

We also found variations in the effects of corporate culture on women's perception of the glass ceiling, based on the career stage of the respondents. However, the importance of individual attributes to glass ceiling perceptions did not significantly vary by career stage, indicating that play a role regardless of where respondents are in their careers.

For the impact of an adverse corporate culture, we had expected it to be strongest for mid- and late-career women. While it did vary by career stage, it was only significantly stronger for mid-career women. For the impact of organizational programs on glass ceiling perception, this association was also significantly stronger for mid-career women than for early and late-career women and thus supported our expectations. These findings have implications for management theory and for practice, as described below.

Implications for Theory

Research on the factors influencing glass ceiling perceptions has been inconsistent in its measurement constructs, making any type of replication studies nearly impossible. We have therefore conceptualized the variables into meaningful categories based on a review of the literatures. Corporate culture, organizational support, and individual attributes capture elements of all categories uncovered in the literature and should therefore propel future empirical studies.

In addition, by addressing moderation, this paper takes a contingency approach to understanding what factors contribute to glass ceiling perceptions, whereas these are typically investigated in a static context.

Implications for Practice

Practitioners may not be surprised to learn that adverse corporate cultures contribute to perceptions of a glass ceiling and that positive individual attributes help to alleviate those perceptions. Women with specialized training, advanced degrees, and a willingness to take risks, are much less likely to see barriers to their career advancement than are those with opposite characteristics. And women who perceive gender stereotypes in the workplace are much more likely to see barriers than are those who do not detect such adverse cultures. Based on our findings, it is important that organizations pay more attention to their corporate cultures, as the values, attitudes, and behaviors perpetuated through informal channels make it extremely difficult for women to believe they can climb the corporate ladder. This, in turn, may hinder diversity efforts, not to mention recruitment and retention. While corporate cultures are usually socialized over long periods of time and are difficult to change, gradual modifications accompanied by natural attrition may benefit companies in the long run.

What companies may be surprised to learn is that organizational support programs (whether aimed at advancement or at work-family balance), did not have a significant effect on glass ceiling perceptions. Even more surprising, perhaps, is that for women in the middle stages of their careers, such programs appear to have the opposite effect than intended. Rather than allaying any concerns about their advancement opportunities, such programs seem to highlight the issues that make them necessary in the first place. For mid-career women, these programs produce a priming effect, which may be eliminated by packaging organizational programs to appeal to both men and women, and with more gender-neutral offerings.

Limitations

One limitation of this study is that career stages are somewhat of a moving target. In the middle stages of their careers, for example, not all women are experiencing the same work-life conflicts. Women tend to wait longer to start families than they have in the past, and thus expectations and findings based on career and other life-stage models should be re-examined periodically. In addition, the internal consistency of our results comes at the expense of generalizability. Participants were alumni of a northeastern university in the U.S. and that shared demographic may have contributed to the findings. Therefore, confirmation of the moderating role that career stage plays in predicting glass ceiling perceptions should include different sample sets.

Directions for Future Research

While the current study examines career stage moderation up to 45 years of age, future research may consider later stages and may be well-served to investigate whether women's perceptions of the glass ceiling follow them, particularly after they leave their organizations to start their own companies. For instance, do they continue to encounter a lack of respect for women, are they excluded from professional networks based on gender, or do they face any other obstacles that they associate with gender identity? Yet another fruitful avenue may be in parceling out various aspects of the glass ceiling phenomenon that have been treated as one construct, including the glass elevator, glass cliff, and sticky floor. Based on the literature

reviewed for this paper, it is possible that women are subject to the “sticky floor” at certain stages in their careers and to the “glass cliff” at other stages. Research on the various components of the glass ceiling has only scratched the surface at this point but may help to understand the differing perceptions among women in the same profession or even in the same organization.

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“PRESIDENTIAL” RECORDS? EXAMINING THE IMPACT OF THE PRESIDENTIAL RECORDS ACT ON PRESIDENT TRUMP’S USE OF A PERSONAL TWITTER ACCOUNT

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Abstract

This Article explores the unprecedented nature of President Trump’s tweets, both during his candidacy and after he assumed the presidency. It focuses on two accounts President Trump maintains, the official @POTUS account and his personal @realDonaldTrump account. The Article examines the ability of the Presidential Records Act to preserve an accurate and fulsome historical record of communications from the president, in light of his use of twitter in modern day environment. In consequence, the Article evaluates the nature of the differences between the two accounts and examines the restrictions between the office of the President and the individual. The Article concludes that President Trump’s use of his @realDonaldTrump account warrants the same consideration under the Presidential Records Act as his @POTUS account, due to the nature of the communications and the president’s frequent use of it to communicate with the American people. President Trump is acting in his capacity as president when he tweets from his personal account. The Article urges an interpretation of the Presidential Records Act that addresses the issues raised by the president’s use of twitter and, if necessary, urges Congress to amend the Presidential Records Act to regulate the President’s use of his personal twitter account.

Introduction

The President’s communication with the American people is essential to American democracy. Public access to an elected representative’s thoughts, opinions, and decisions has been a vital aspect to the democratic process, since newspapers and pamphlets were the main connection between the President and the public. With the advancement of communication technologies in the past centuries, from the telegram, to the television, to Twitter, the public’s expectations for Presidential behavior and accountability has changed to match these new technologies. Moreover, President Trump’s use of Twitter has been seen as controversial, as he uses two separate accounts on Twitter to communicate with both specific individuals and the public. One account, @POTUS, is associated with the presidency and the other account, @realDonaldTrump, is his personal account, which existed long before his presidential campaign even began. These accounts are managed by the same person, hence the President should be accountable for them in the same capacity. It is contended that the Presidential Records Act of

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1978(“PRA”),¹ has the authority to hold Presidents accountable for their online presences in today’s social media age. This research paper examines whether President Trump’s Twitter accounts, @POTUS and @realDonaldTrump are governed by the Presidential Records Act (PRA) in the same capacity.

I. Presidential Media Use in History

When analyzing the social impact of President Trump’s Twitter use today, it is imperative that we understand the standards that have been set by previous presidents through their use of communications technologies to address the public. As new technologies emerged such as, the radio, television, and social media became staples in American households, each President of the time acknowledged that, to remain relevant in the public’s eyes, adoption of these communication tools would be vital to the success of their presidency.

Calvin Coolidge was the first president to use radio to communicate with America when he broadcast his State of the Union Address on December 6, 1923. This broadcast was the first opportunity for the public to experience the president’s words live without having to be in the same physical location as him. Though only six cities were able to hear Coolidge’s broadcast (Washington, New York, St. Louis, Kansas City, Dallas and Providence) the relationship between the president and the public shifted completely.² It became possible for the president to deliver his message to a mass audience in real time, without time delay. No longer did people have to rely exclusively on newspapers or word of mouth to know what the president had said in his speech or what legislation was in the works. From the audience’s perspective, the ability to hear the president and receive his words as they were being said shortened the separation between the people and the office.³

Following in Coolidge’s footsteps, Franklin Delano Roosevelt took to the radio frequently to address the public in his regular “fireside chats.” Coolidge may have been the first president to use radio, but Roosevelt’s ability to talk to Americans regularly about the way that politics and the economy were shaping the country and people’s lives made him the first president to really capture the way that these new media removed many of the barriers between the American people and the Oval Office.⁴ The chats included topics such as, government and capitalism, the National Recovery Administration, and economic progress, among others.⁵ Taking to the radio to address current political topics provided Americans the opportunity to hear about policy developments and presidential happenings firsthand. With the advancement of media technology, and the role of president adopting these technologies to maintain a relationship with the public, the American people began to expect enhanced access to the

¹ 44 U.S.C. §§ 2201–2207 (1978).

² James Eric Black, *Silent Cal and The Invisible Audience: The Sociotechnological Significance of The Presidential Voice*, 69 ETC: REV. GEN. SEMANTICS 3, (2012).

³ *Id.* at 3.

⁴ Drew DeSilver, *From Telegrams to Instagram, a Look at Presidents and Technology*, PEW RES. CENTER (Feb. 13, 2015), www.pewresearch.org/fact-tank/2015/02/13/from-telegrams-to-instagram-a-look-at-presidents-and-technology/.

⁵ Elvin T. Lim, *The Lion and the Lamb: De-Mythologizing Franklin Roosevelt’s Fireside Chats*, 6 RHETORIC & PUB. AFF 437, (2003).

president. ⁶ With each development in communications technology, the public's expectations of the president shifted from being more understanding of a private and distant form of leadership, to a more involved style of leadership that involved public communication with the people about their country. ⁷

President Harry Truman gave a televised speech from the White House in 1947. He was able to truly use the television to its full potential to promote his administration. ⁸ In 1952 Eisenhower launched campaign advertisements that featured graphics and footage of him speaking on what the country needed and why he should be elected. ⁹ Being the first president to ever use televised campaign ads gave Eisenhower a flashy advantage over his opponent Adlai Stevenson, as the advertisements gave Eisenhower's campaign more visibility, to the 15,300,000 American households with televisions at the time. ¹⁰ President Eisenhower continued to take television as a serious medium of communication and had the first televised presidential press conference on January 19, 1955. ¹¹ Eisenhower fashioned a new trend by making the presidency more accessible to the public through his use of the television, especially in regards to campaigning, press conferences, and any updates that warrant mass broadcasting. This led to the first televised debates between then Vice President Richard Nixon and Senator John F. Kennedy in 1960. ¹² The televised debates allowed the audience to observe the candidates in action, hear their thoughts, and watch them interact in a mediated yet high-stakes environment. This debate afforded the American people the opportunity to form opinions on both candidates in a way that previous media technologies did not.

The next media milestone was the invention of the internet during the Clinton administration, the White House website was launched in October of 1994. ¹³ The website provided a space where people could access what had been posted at any point. However, President Clinton did not use the internet frequently, as he admitted to sending only two emails in the entirety of his presidency. Notwithstanding the innovation of the internet completely revolutionized the manner in which future presidents would communicate with the American

⁶ Drew DeSilver, *From Telegrams to Instagram, a Look at Presidents and Technology*, PEW RES. CENTER (Feb. 13, 2015), www.pewresearch.org/fact-tank/2015/02/13/from-telegrams-to-instagram-a-look-at-presidents-and-technology/.

⁷ Jason Tabrys, *How TV And Evolving Media Technology Changed The American Presidency*, UPROXX (Nov. 8, 2016), <https://uproxx.com/news/tv-media-american-presidency-evolution/5/>.

⁸ Harry S. Truman, *Radio and Television Address Concluding a Program by the Citizens Food Committee Oct. 5, 1947*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=12766> (last visited Oct. 17, 2018, 12:36 PM).

⁹ *Id.*

¹⁰ *Number of TV Households in America*, THE BUFFALO HISTORY (last visited Sept. 20, 2019, 20:56 PM). http://www.buffalohistory.org/Explore/Exhibits/virtual_exhibits/wheels_of_power/educ_materials/television_handout.pdf.

¹¹ Drew DeSilver, *From Telegrams to Instagram, a Look at Presidents and Technology*, PEW RES. CENTER (Feb. 13, 2015), www.pewresearch.org/fact-tank/2015/02/13/from-telegrams-to-instagram-a-look-at-presidents-and-technology/.

¹² John W Self, *The First Debate over the Debates: How Kennedy and Nixon Negotiated the 1960 Presidential Debates*, 35 PRESIDENTIAL STUD. Q. 361, 361-75 (2005).

¹³ Drew DeSilver, *From Telegrams to Instagram, a Look at Presidents and Technology*, PEW RES. CENTER (Feb. 13, 2015), www.pewresearch.org/fact-tank/2015/02/13/from-telegrams-to-instagram-a-look-at-presidents-and-technology/.

people.¹⁴ In order to stay relevant the President has to implement modern methods of communication such as Twitter, Face book and Snapchat. Predominantly, because most Americans barely watch TV or listen to the radio. Nowadays, most people get their news from Twitter.

II. President Trump on Twitter

As technological communications have advanced for the American people, the presidency has adapted to suit contemporary needs. On May 18, 2015 the Twitter handle @POTUS was first used by President Barack Obama. The White House Press release that corresponds with the creation of the account stated: “The @POTUS Twitter account will serve as a new way for President Obama to engage directly with the American people, with tweets coming exclusively from him.”¹⁵ Because of Twitter’s 140 character limit and casual nature, the norms on this platform are almost the complete opposite of those thought to be associated with the presidency. Although the acronym POTUS has been used for decades to shorten President of the United States, the @POTUS handle on Twitter was not originally owned and operated for the use of the President. According to a motherjones.com article, a man named Steve D’Alimonte was the original owner of the @POTUS handle, who started it in 2008 because he was a “big fan of West Wing.”¹⁶ According to the article D’Alimonte tweeted only once from the account on March 11, 2008, when he tweeted, “wondering what Roy got me into now,” in reference to his friend Roy suggesting that he start a Twitter. D’Alimonte claims that he used the account until 2011, generally to browse as opposed to tweet, until he went to log in after a period of nonuse, and was no longer allowed to access the account.¹⁷ Then, two years later, Barack Obama sent his first presidential tweet from his @POTUS account.

The adoption of the @POTUS account by President Barack Obama was the first opportunity to consider, whether this account was owned by President Obama, or the office of the President? During Obama’s control of the @POTUS handle, he refrained from using his personal account @barackobama and even handed off control of the account to his political organization, Organizing for Action, meaning that every tweet from the account was explicitly not his, but the organization’s.¹⁸ Conversely, the creation of the @POTUS account was specifically intended for the President to be able to communicate anything he wanted with the public, at any time.¹⁹ This platform differed from previous ways the president could communicate with the public because it could happen without any notice, as with planned TV appearances, without having to experience it live, as with radio broadcasts, and without needing

¹⁴ Jennifer Epstein, *Clinton: I Sent 2 e-Mails as President*, POLITICO (Feb. 16, 2011, 04:57 PM), <https://www.politico.com/story/2011/02/clinton-i-sent-2-e-mails-as-president-049682>.

¹⁵ Alex Wall, *Introducing @POTUS: President Obama’s Twitter Account*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (May 18, 2015, 11:40AM), <https://obamawhitehouse.archives.gov/blog/2015/05/17/introducing-potus-presidents-official-twitter-account>.

¹⁶ James West, *This Is Actually the First Tweet @POTUS Ever Sent, Back in 2008*, MOTHER JONES (May 19, 2015, 2:37 AM), <https://www.motherjones.com/politics/2015/05/first-tweet-potus/>.

¹⁷ *Id.*

¹⁸ Philip Bump, *You’re Not Really Following @BarackObama on Twitter*, THE ATLANTIC (Apr. 8, 2013), <https://www.theatlantic.com/politics/archive/2013/04/youre-not-following-barackobama-twitter/316523/>.

¹⁹ Alex Wall, *Introducing @POTUS: President Obama’s Twitter Account*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (May 18, 2015, 11:40AM), <https://obamawhitehouse.archives.gov/blog/2015/05/17/introducing-potus-presidents-official-twitter-account>.

an intermediary to relay the information, as with newspaper. Twitter's format provides a direct connection from the President to America. In particular, with Obama's use of the account, there was no confusion about the source of each post.

On January 20, 2017 at 12:01pm, immediately after the swearing in of the new president, the @POTUS handle was moved from being President Barack Obama's to the newly elected, President Donald Trump's. In the transition of ownership, all of President Obama's tweets from the account were moved to an account with the handle @POTUS44, in reference to him being the 44th president.²⁰ It is argued that moving the tweets from the @POTUS handle, and passing on that account to President Trump, is indicative that the account is related to the presidency in the same ways that the White House is. The development of the account under the Obama administration was not with the intention of maintaining the account forever, but instead, as something that successors could use during their presidencies. In the description section of Obama's @POTUS44 account it states, "This is an archive of an Obama Administration account maintained by the National Archives and Records Administration []." ²¹ The distinction that the National Archives and Record Act applies to the @POTUS44 account can be attributed to the Obama administration's determination to ensure that the presidential social media accounts be available to each president moving forward, as opposed to each administration being responsible for their own handles or account development.

The Obama administration made significant efforts to organize social media accounts for the seated president. For each president there are accounts associated with Snapchat, Facebook, Instagram, YouTube, Tumblr, Medium, Flickr, and Twitter, which is the subject for this research. On Twitter, the Obama administration also created accounts for various other significant people and/ or departments of the presidency, including @WhiteHouse, @VP, @FLOTUS, @PressSec, @LaCasaBlanca, @WHLive, @VPLive, and @Cabinet. All of the content created on these accounts have been archived under the account name with 44 added to the end (i.e. @FLOTUS44, @VP44, etc.). In terms of the Presidential Records Act of 1978 ("PRA"),²² all presidential records must be stored. The process of archiving the content on these accounts is managed by the National Archives and Records Administration and it is stated in the descriptions of each account that, "[t]weets may be archived" with a link to the White House's privacy page, denoting the significance of archival of the content created on social media, regardless of how casual or insignificant it may seem to be.²³ Each of the Twitter accounts created under Obama were passed on to President Trump upon him being sworn into office; however, not all of the accounts have been utilized since they have been switched over.

Since the Trump Administration came into office, two of the Twitter accounts created under the Obama Administration for the presidential office have never tweeted anything,

²⁰ Kori Schulman, *The Obama Administration Digital Transition: Moving Forward*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Jan. 17, 2017, 6:08PM),

<https://obamawhitehouse.archives.gov/blog/2017/01/17/obama-administration-digital-transition-moving-forward>.

²¹ President Barrack Obama @POTUS44, *Bio*, TWITTER, <https://twitter.com/POTUS44> (last visited Sept. 25, 2018).

²² 44 U.S.C. §§ 2201–2207 (1978).

²³ Kori Schulman, *The Obama Administration Digital Transition: Moving Forward*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Jan. 17, 2017, 6:08PM),

<https://obamawhitehouse.archives.gov/blog/2017/01/17/obama-administration-digital-transition-moving-forward>.

@VPLive and @WHLive. These two accounts were created with the intention of giving a third person perspective into the speeches and events that the President and Vice President were participating in on a day-to-day basis. The description of the @VPLive account states, “[f]ollow along for live updates from @VPPence’s travels, speeches, and day-to-day activities” while the @WHLive account description states, “[f]ollow along for live updates from @POTUS Trump’s speeches and @WhiteHouse events.”²⁴ Although these accounts were utilized in Obama’s presidency, the lack of use during the Trump presidency, thus far, indicates that there has already been a shift in how the President uses Twitter to communicate with the American public. Instead of maintaining a separate account to update Americans on the President’s events and speeches, there has been a shift towards the President using his @POTUS and @realDonaldTrump account for such updates.

The Obama Administration’s interest in providing the office of the president with the social media handles was thoughtful, but the amount of handles created segmented the office of the President too deeply. Instead of having separate accounts for each individual aspect of the President’s life, Trump and his administration utilize the @POTUS account as a means of taking on the responsibility of updating the American public on the President’s events and appearances. Under President Trump, the use of Twitter has become less departmentalized compared to the initial creation of the various accounts during the Obama Administration, but the glaring difference is the use of the @realDonaldTrump account, which has no connection to the Office of the President, like the @WhiteHouse account for instance, other than its use by the President.

III. Presidential Records Act

As media technologies have developed there has been a need to update laws and regulations to address contemporary methods of communication. One of the biggest laws impacting presidential communication was the enactment of the PRA,²⁵ a result of Nixon’s 1972-1974 Watergate controversy.²⁶ The American public and lawmakers feared that Richard Nixon would dispose of the tapes related to his illegal actions, thus, the creation of the PRA ensured that the President would be legally required to keep and compile their communications for control by the National Archives.²⁷

The PRA governs the official records of Presidents and Vice Presidents created or received after January 20, 1981, and mandates the preservation of all presidential records. The PRA changed the legal ownership of the official records of the President from private to public, and established a new statutory structure under which Presidents must manage their records.²⁸ Section 2203 (a)

²⁴ Vice President Mike Pence Live (@VPLive), *Bio*, TWITTER <https://twitter.com/search?q=from%3A%40VPLive%20until%3A2011-12-31&src=twyback> Sept. 25, 2018; White House Live @WHLive), *Bio*, TWITTER <https://twitter.com/search?q=from%3A%40WHLive%20until%3A2011-12-31&src=twyback> (last visited Sept. 25, 2018)

²⁵ 44 U.S.C. §§ 2201–2207 (1978).

²⁶ Wendy Ginsberg, *The Presidential Records Act: Background and Recent Issues for Congress*, CONG. RES. SERVICE 1, 1-14 (2014).

²⁷ Bruce P Montgomery, *Nixon’s Ghost Haunts the Presidential Records Act: The Reagan and George W. Bush Administrations*, 32 PRESIDENTIAL STUD. Q. 789-809, 795 (2002).

²⁸ 44 U.S.C. § 2203 (1978).

of the PRA provides that “the President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of the President’s constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are preserved and maintained as Presidential records pursuant to the requirements of this section and other provisions of law.”²⁹ The Act has been amended to reflect the development of various media technologies that the President can use to communicate with. It can be argued that the PRA lacks the necessary specificity to hold Presidents accountable for their online presences in today’s social media age. In fact, the PRA does not specify any consequences or penalties for a president’s noncompliance with the PRA; as there have been no President’s legally accused of not following the guidelines set out by the PRA, there is no outline for potential consequences.³⁰ Nevertheless, it is contended that an examination of the purpose behind the Act corroborates the PRA’s authority to govern online activities such as Twitter.

Before the development of the PRA, in 1950 the Federal Records Act was put into place in an attempt to regulate the documentation and maintenance of federal communications for the public and for future reference.³¹ The Act’s main goal “as the primary agency for records management oversight, the National Archives and Records Administration is responsible for assisting Federal agencies in maintaining adequate and proper documentation of policies and transactions of the Federal Government.”³² Although this regulation was intended to affect the federal government, it did not directly apply to the president or those relating to the executive branch, such as the Vice-President, which is why the development of the PRA was so vital to record maintenance. In an attempt to update the Federal Records Act and PRA to reflect the changing ways the president can communicate, Congress passed an amendment to the Act in 2014 under President Obama in an attempt to include electronic records. Included in this amendment was “strengthening the Federal Records Act by expanding the definition of Federal records to clearly include electronic records, authorizing the early transfer of permanent electronic Federal and Presidential records to the National Archives, while legal custody remains with the agency or the President, and granting the Archivist of the United States final determination as to what constitutes a Federal record.”³³ Although this amendment does not explicitly state anything in regards to the president’s social media presence or how it should be regulated, the specific inclusion of “electronic records” displays the federal government’s attempt to modernize laws so they reflect the changing technological communication environment.

The Presidential Records Act commences by defining what constitutes as presidential records. The first definition provided is for the term “documentary material” which is defined as, “all books, correspondence, memoranda, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to,

²⁹ 44 U.S.C. § 2203 (a) (1978).

³⁰ *Id.* at § 2201.

³¹ David S. Ferriero, *NARA’s Role under the Presidential Records Act and the Federal Records Act*, 49 PROLOGUE (2017), available at <https://www.archives.gov/publications/prologue/2017/summer/archivist-pra-fra>.

³² *Frequently Asked Questions about Records Management in General*, NAT’L ARCHIVES (July 7, 2017), <https://www.archives.gov/records-mgmt/faqs/general.html>.

³³ *National Archives Welcomes Presidential and Federal Records Act Amendments of 2014*, NAT’L ARCHIVES (Dec. 1, 2014), <https://www.archives.gov/press/press-releases/2015/nr15-23.html>.

audio and visual records, or other electronic or mechanical recordings, whether in analog, digital, or any other form.”³⁴ This definition is important, because the second definition, which is of “Presidential Records” comprises of , “documentary materials, or any reasonably segregable portion thereof, created or received by the President, the President’s immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.”³⁵ As documentary materials include “electronic and mechanical recordings,” similarly, the President’s online accounts, and the content that they create, ought to be governed by the PRA as is the case with any memos published by the office or other, more official, correspondence.

The emphasis of the PRA on the records that the President produces and is involved with as they directly relate to the presidency reflect the significance that both the American people, and other branches of government, place on the President and his communications. With the developments of new communication technologies that allow the President to use even more media to communicate with staff and the public, the PRA needed to be updated, and in 2014 was amended to include recordings of “electronic messaging accounts.”³⁶ This amendment sought to hold presidents accountable by being held legally responsible for submitting their electronic correspondences to the National Archive and Records Administration along with their other presidential records. The amendment defines electronic messages and electronic messaging accounts by stating, “the term ‘electronic messages’ means electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals. The term ‘electronic messaging account’ means any account that sends electronic messages.”³⁷ Although this amendment attempted to encompass electronic communications through its definitions of what the electronic messages and accounts were, as with most writings on digital communications technologies, within five years, these definitions do not capture some of the most important and significant aspects of the ways the President uses online communication technologies.

In understanding the way the Presidential Records Act, or any law for that matter, can be applied, it is first worth understanding the difference between the letter of the law and the spirit of the law. According to Black’s Law Dictionary, the letter of the law, also known as *litera legis*, equates to the literal definition of the law.³⁸ Applied to the 2014 amendment to the PRA, the letter of the law would determine that only electronic messages and electronic messaging accounts need to be recorded to be in compliance with the law. Conversely, the spirit of the law, as defined by Black’s Law Dictionary as the “general meaning or purpose, as opposed to its

³⁴ 44 U.S.C. § 2201 (1978).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Brayn A. Garner, BLACK’S LAW DICTIONARY,

<https://books.google.com/books?id=O1m1bI5vCooC&pg=PA540&lpg=PA540&dq=letter+of+the+law-+BRYAN+A.+GARNER&source=bl&ots=IHNtUmb5VH&sig=ACfU3U2G0RPCghQTIBK1162NnVUWEzZRAw&hl=en&sa=X&ved=2ahUKEwjR18vd8eXkAhUIZN8KHeqeDdo4ChDoATAAegQICRAB#v=onepage&q=letter%20of%20the%20law-%20BRYAN%20A.%20GARNER&f=false> (last visited Sept. 21, 2019).

literal content,” which essentially equates to, the intention of the law.³⁹ The significance of the “spirit of the law” cannot be overstated in relation to technology, as too often does the legal system find itself unable to keep up with the ever changing and advancing technological world. Through highlighting the intentions of the law, as opposed to just the literal definition, the application of laws can exist to circumstances that may not have been predicted at the time of its enactment. For instance, the PRA’s 2014 amendment inclusion of electronic messages clearly intended to record the President’s online communications because of their significance to the presidency.⁴⁰ Since President Trump’s inauguration in January 2017, he has used his personal twitter account, @realDonaldTrump as a means of communicating with the public about his administration. He has used it to announce matters related to official government business, including high level White House and cabinet staff changes as well as significant changes to national policies. Accordingly, President Trump’s twitter account bears all the trappings of an official state run account, and should be governed by the PRA. Moreover, in *Knight First Amendment Institute v. Trump*, the court held that “the President presents the @realDonaldTrump account as being a presidential account as opposed to a personal account and uses the account to take actions that can be taken only by the President as President.”⁴¹

IV. What is Electronic Messaging Under the Presidential Recording Act

The problem with the PRA’s definition of electronic messaging, especially in relation to presidents on social media, is that it is confined to electronic messaging between individuals, as opposed to electronic communications between an individual and a large, interactive audience. The one argument that may exist for why the PRA is not comprehensive enough to cover the recordation of social media posts, is that email is a one-to-one form of online communication, while social media, and Twitter specifically, is intended as a one-to-many form of online communication. Although this distinction may seem insignificant, the difference between one-to-one digital communication and one-to-many digital communication has significant societal, and more importantly, legal, implications. What is important though, is that the spirit of the amendment displays the intent to capture presidential communications online. As can be seen through the thorough investigation regarding the avoidance of the Federal Records Act by former Secretary of State Hillary Clinton when she used a personal email address instead of a government one, the significance of proper and applicable definitions, especially when it comes to adhering to the law, is immeasurable.⁴² Since the definition for electronic messages, and messaging accounts is not ambiguous when applied to email and email accounts, there is no ambiguity in the case regarding whether Secretary of State Clinton’s emails fit into this definition. However, trying to hold an individual accountable with an ambiguous definition can be difficult, especially when the vague definition skews closer to inapplicability than accuracy.

³⁹ Brayn A. Garner, BLACK’S LAW DICTIONARY, <https://books.google.com/books?id=O1m1bI5vCooC&pg=PA540&lpg=PA540&dq=letter+of+the+law+-BRYAN+A.+GARNER&source=bl&ots=IHNTumb5VH&sig=ACfU3U2G0RPCghQTIBK1162NnVUWEzZRAw&hl=en&sa=X&ved=2ahUKEwjRI8vd8eXkAhUIZN8KHeqeDdo4ChDoATAAegQICRAB#v=onepage&q=letter%20of%20the%20law-%20BRYAN%20A.%20GARNER&f=false> (last visited Sept. 21, 2019).

⁴⁰ PRESIDENTIAL AND FEDERAL RECORDS ACT AMENDMENTS, H.R. Doc. No. 1233, (113th Cong. 2014).

⁴¹ 302 F. Supp. 3d 541, 567 (S.D.N.Y. 2018).

⁴² Sarah Mimms et al., *Democrats Wonder, Did Clinton Learn Anything From 2008?*, THE ATLANTIC (Mar. 25, 2015), <https://www.theatlantic.com/politics/archive/2015/03/democrats-wonder-did-clinton-learn-anything-from-2008/436770/>.

Understanding the difference between communications technologies, especially during the technological age can be difficult as so many of these platforms feature various ways of communicating with others. Facebook, for instance, allows users to post publicly for their friends to see, message individuals directly, or even create groups to share messages with.⁴³ The various communication methods on a single social media platform are seemingly infinite, and to understand how Presidential accounts on social media are regulated by the Presidential Records Act, it is vital to understand the differences between the various ways the President can create and share content on social media, Twitter specifically.

Twitter was launched in 2006 and is deemed a “microblogging” site that allows users to create posts of up to 140 characters at a time, which can be accompanied by photos, videos, or even links.⁴⁴ In the third quarter of 2017, Twitter had over 330 million monthly active users, including individuals, such as myself, public figures such as the President of the United States, and even private organizations such as Pace University.⁴⁵ The amount of active users reflect not only the draw of the site itself, but also the interests of users to keep up with various individuals and organizations through their accounts in one place. Similar to how individuals may create a Twitter with the intention of following people they admire or want to stay updated with, organizations and individuals can make accounts with the intention of cultivating an audience for themselves. All social networking services provide affordances that attract users; however, in the paper “Are They Talking to Me? Cognitive and Affective Effects of Interactivity in Politicians’ Twitter Communication,” Eun-Ju Lee. and Soo Yun Shin examine exactly why Twitter’s interactivity attracts so many users, with a focus on politicians who turn to Twitter to communicate with the public.⁴⁶

The most valuable affordance that Twitter provides politicians, and Presidents, is interactivity. Through studying South Korean politicians’ use of the platform, Lee and Shin were able to recognize that “[c]onsidering that direct, reciprocal communication is at the heart of social networking sites communication, we conceptualized interactivity as the extent to which a politician’s Twitter communication represents two-way conversations, as opposed to one-sided public addresses.”⁴⁷ Social networks, such as Twitter, differ greatly from the previous media technologies that Presidents have adopted in that the audience can be just as active in the conversation as the original creator, or speaker, is. Radio and television brought the president into the homes of everyday Americans, but social media networks brought Americans to the White House. Although the PRA does not take into account the differences between electronic messaging and social networking services, the nature of the PRA captures the spirit of the President’s social media presence.

⁴³ Amy C. Orben et al., *From Face-to-Face to Facebook: Probing the Effects of Passive Consumption on Interpersonal Attraction*, FRONTIERS PSYCHOL. (July 10, 2018), <https://www.frontiersin.org/articles/10.3389/fpsyg.2018.01163/full>.

⁴⁴ Cristina Ioana Roiu, *Something Old, Something New: Engaging People in Making History with Twitter*, 20 STUDII DE BIBLIOTECONOMIE ȘI ȘTIINȚA INFORMĂRII 86, 85-90 (2016).

⁴⁵ *Number of monthly active Twitter users worldwide from 1st quarter 2010 to 2nd quarter 2018 (in millions)*, STATISTA (2018), <https://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/>.

⁴⁶ Eun-Ju Lee & Soo Yun Shin, *Are They Talking to Me? Cognitive and Affective Effects of Interactivity in Politicians’ Twitter Communication*, 15 CYBERPSYCHOL. BEHAV. & SOC. NETWORKING 515, 515-20 (2012).

⁴⁷ *Id.* at 515.

V. Comparing @realDonaldTrump and @POTUS

To understand the differences between @realDonaldTrump and @POTUS, it is vital that we understand the differences between @POTUS under President Obama (which will be referred to moving forwards as @POTUS44) and @POTUS under President Trump. The way we chose to compare and analyze the two accounts was by taking a time period and examining the number of tweets, both retweets and original, and the content of the tweets. The term ‘retweets’ refers to tweets that were originally created by one account, but are now appearing on another because they were ‘retweeted’ or shared by this secondary account. For this, the period of time we chose to examine was January 6 to February 6, 2016 for President Obama, and January 6 to February 6, 2018 for President Trump. This period of time seemed significant because the State of the Union address occurred for both Presidents which gave them an opportunity to engage with the public both before and after the address. During that period President Obama tweeted 29 times and did not retweet any accounts, while during the same amount of time two years later, President Trump tweeted 7 times from his @POTUS account and retweeted 273 times.

By looking at the @POTUS44 account on the night of his State of the Union Address, it can be seen that President Obama tweeted two tweets regarding the address. The first was in response to astronaut Scott Kelly’s tweet where he posted a picture and said he had a “window seat” to watch the address from, to which Obama responded, “So proud of you, Scott. How long is the delay up there? See you when you get back!” The second tweet Obama made in regards to his last State of the Union Address was, “I’m treating this last State of the Union just like my first - because I’m still just as hungry. I hope you tune in, because it’s for you.”⁴⁸ On the other hand, examination of the retweets by @POTUS under President Trump’s control provides some interesting insight on who the President trusts to take information from and put on his own account. A significant amount of the retweets, 86 of them to be exact, were directly from @realDonaldTrump. It is worth mentioning now that @realDonaldTrump tweeted 174 times during that time period and retweeted only 15 times. The other retweets by @POTUS included a significant number from Republican lawmakers and people on the Trump administration such as Representative Jason Smith, Dan Scavino Jr., Trump’s assistant, and Governor John Bel Edwards, among dozens of others. The majority of the retweets by representatives and other individuals in government were praising President Trump’s performance during the State of the Union Address on January 30th, 2018. Of the retweets during that period, 98 of them were directly in response to the State of the Union address, and it should be noted that none of them was a critique, but they were all positive regards or complimentary of the president either for the speech itself, or the content of the address. A significant number of the retweets that related to the State of the Union address were directly from the @WhiteHouse account. In preparation for the State of the Union the @WhiteHouse account created tweets that introduced Americans mentioned in the address with the simple, “[m]eet . . .” followed by the person’s name and an image of them in front of a black background.⁴⁹ The campaign @WhiteHouse put together for the address was retweeted heavily by the president after his address. The differences between the way President Obama and President Trump managed the @POTUS account under their

⁴⁸ President Obama (@POTUS44), TWITTER (Jan. 12, 2016, 5:20 PM), <https://twitter.com/POTUS44/status/687081708886355968>.

⁴⁹ The White House (@WhiteHouse), TWITTER <https://twitter.com/WhiteHouse?lang=en> (last visited Sep. 26, 2018).

presidency are immeasurable and show a lack of expectations for the President's behavior on these platforms. Differences in standards may seem insignificant, but when there are confusing legal expectations, for the social media environment our presidents have used to communicate with the public, a social standard can provide some relief for a confused and disoriented audience.

With content that is instantly available after its creation, it seems that the Presidential Records Act is rendered unnecessary by virtue of online accessibility. However, the value of proper accountability is immense. Problems ensuing with President Trump's use of Twitter are visible in two major ways. The first, is that the President not only has official control of the @POTUS; handle, as President Obama forfeit control of the account when President Trump was sworn into office, but also maintains, and primarily uses, his personal account @realDonaldTrump to communicate. The second problem lies with what the President is using his personal account, @realDonaldTrump to communicate about, and with whom.⁵⁰ The lack of a target audience, for much of President Trump's tweets, is apparent, as he often tweets directly towards individuals, communicating with them as though through email or private memo. Conversely, there are often times when President Trump tweets with statements that are intended for the mass audience, such as Christmas wishes or Veteran's Day praise.⁵¹ The varying ways that the President utilizes Twitter blur the lines of the platform even more, and makes the audience wonder whether or not these tweets can truly be classified as electronic messages within the confines of the PRA definition.

One clear example of the ways in which President Trump blurs the lines between one-to-many social media content and one-to-one content is the way that former Secretary of State Rex Tillerson found out he was fired from the position through a tweet by @realDonaldTrump. The tweet from March 13, 2018 stated: "Mike Pompeo, Director of the CIA, will become our new Secretary of State. He will do a fantastic job! Thank you to Rex Tillerson for his service! Gina Haspel will become the new Director of the CIA, and the first woman so chosen. Congratulations to all!"⁵² Rex Tillerson claimed that he found out about his firing through this tweet as opposed through any personal communication directly from the President or his office.⁵³ The President's decision to use this public platform as a means of communicating official executive information concerning one of his top staff members displays the President's indifference to the traditional ways of communicating. Using Twitter, which gives access to millions of followers worldwide, instead of a direct, and private, communication channel with Tillerson, displays the ways in which the President is utilizing social media as an electronic messaging account; even though the President may not be using a platform that allows for a back and forth communication channel, the electronic messages he creates on his social media, whether intended for an intended individual or a mass audience of millions, are protected by the Presidential Records Act and require archival by the National Archives and Records Administration.

⁵⁰ Kreis Ramona, *The "Tweet Politics" of President Trump*, 16 J. LANGUAGE POL., 607-18, 611 (2017).

⁵¹ Donald J. Trump (@realDonaldTrump), TWITTER <https://twitter.com/realDonaldTrump> (last visited Sep. 26, 2018).

⁵² Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 13, 2018, 5:44 AM), <https://twitter.com/realDonaldTrump/status/973540316656623616>.

⁵³ Dan Mangan, *Rex Tillerson Learned He Was Fired from President Trump's Tweet*, CNBC (Mar. 13, 2018, 10:22 AM), <https://www.cnbc.com/2018/03/13/tillerson-learned-he-was-fired-from-trumps-tweet.html>.

Just as President Coolidge used the radio as a means to communicate his messages with Americans, and President Eisenhower did the same with television, similarly, President Trump uses Twitter. Although, Trump has used the platform to communicate with individuals as though it is a one-to-one communication technology, the majority of content on the accounts is intended for the masses, in just the same way that radio broadcasts and television appearances by past presidents have been. Communication technologies have changed and been adopted at such a fast pace, that the laws intended to govern these means of communication have not been able to be updated at the same pace. Because of this incongruity, it is fundamental to recognize the way the spirit of the law can account for any shortcomings with the letter of the law.

What matters when it comes to looking at the applicability of the Presidential Records Act in relation to President Trump's tweets, whether on his @POTUS account or his @realDonaldTrump account, is not the literal wording of the Act and its amendments, but the spirit of the law. The amendment that included electronic messaging and electronic messaging accounts was added to the PRA in 2014, before social media became a common method of communication between the president, the public, and other organizations. The language of the amendment might not have directly included these networking sites, but the goal of the amendment was the ability to legally enforce the recording electronic communications from the President.⁵⁴ Although, the wording of the amendment does not capture the communications technologies that have evolved into use by the President since its amendment in 2014, the intention of the Act is clear in that it sought to create accountability for the President's electronic content with regards to online communications. As such, it is argued that the spirit of the law requires that the President record all online communication, Twitter included.

Now, with an understanding of the way the Presidential Records Act seeks to hold the President accountable through recordings of their communications, whether verbal, written, or posted online, it is important to recognize the ways in which President Trump is attempting to evade accountability for his Twitter, presence. The clearest way to see this difference is in the @POTUS account's description, which states, "45th President of the United States of America, @realDonaldTrump. Tweets archived: <http://wh.gov/privacy>."⁵⁵ Then, the @realDonaldTrump account's description states, "45th President of the United States of America ⁵⁶ The @POTUS account clearly states that the Tweets from the account are being archived, supported by a link to the White House website's privacy policy, while the @realDonaldTrump account's description makes no statement regarding the archival of the content created and shared on that account. President Trump's inability to recognize the ways in which his @realDonaldTrump account and its content are equally subject to the Presidential Records Act as his @POTUS account, can be seen not only in the descriptions of the accounts, but in the treatment of content and account management. Through a quantitative analysis of the tweets from @POTUS and @realDonaldTrump, the ways that the President attempts to evade the PRA through use of his "personal" account becomes apparent.

⁵⁴ PRESIDENTIAL AND FEDERAL RECORDS ACT AMENDMENTS, H.R. Doc. No. 1233, (113th Cong. 2014).

⁵⁵ President Trump (@POTUS), *Bio*, TWITTER <https://twitter.com/POTUS> (last visited Sep. 25, 2018).

⁵⁶ Donald J. Trump (@realDonaldTrump), *Bio*, TWITTER <https://twitter.com/realDonaldTrump> (last visited Sep. 25, 2018).

Seeing as President Trump has access to both the @POTUS and @realDonaldTrump account, it would be expected that he would tweet and retweet from the accounts in an equal manner. However, an analysis of the tweets and retweets on these accounts during a month-long period reveal that the President uses the accounts to create and share content in two different ways, which displays the way that the President is attempting to evade the Presidential Records Act through use of his personal account. Examining the differences between the management and usage of the @POTUS account and the @realDonaldTrump account requires a comparative analysis of the content on each account. Just as, earlier in this paper, the @POTUS account was compared to the @POTUS44 account during the time between January 6 and February 6, by examining the content between the @POTUS and @realDonaldTrump accounts during the same time period in 2018, it can be seen that there are some serious differences in the ways content is created and shared on the accounts. Between January 6 and February 6, 2018 the @POTUS account tweeted seven times, meaning that the account created original content seven times, and had 273 retweets, meaning that the President essentially shared another account's tweets to his followers. On the other hand, in the same time period, the @realDonaldTrump account tweeted 174 times and retweeted other accounts' content just 15 times. Of the 273 retweets by @POTUS, 86 were from @realDonaldTrump, while the rest were from @WhiteHouse and Republican lawmakers, the majority of which were in direct response to the State of the Union Address given by the President on January 30, 2018. Examples of some of the retweets by @POTUS include one from @WhiteHouse on January 30, 2018 which states that "[t]onight, President Trump delivered his first #SOTU address. He outlined the record-setting accomplishments of his first year and cast an inspiring vision for building a safe, strong, and proud America."⁵⁷ Another example of one of @POTUS' retweets from the same day is from Representative Jody Hice, a Republican congressman from Georgia which states, "[u]nder the Trump Administration, we're working to restore our Nation's military readiness and warfighting capabilities. After years of consistent neglect, I'm proud to have an ally in the White House who recognizes the importance of a well-funded Armed Services. #SOTU @POTUS."⁵⁸ There are dozens more retweets on the @POTUS account that share a similar tone in that they are tweets by Republican lawmakers that either compliment the President directly or do so through praising the speech he gave. Significantly, the National Archives, the agency of government responsible for maintaining government's records resolved that the President's tweets are official records. In consequence, it is argued that all of President Trump's tweets from his @POTUS account or his @realDonaldTrump account, constitute electronic messages governed by the PRA. The Act authorizes the Archivist of the United States to "maintain and preserve Presidential records on behalf of the President, including records in digital or electronic form."⁵⁹

Now, by understanding the management of the @POTUS account, while keeping in mind that in the description of this account there is a statement that all tweets on it are being archived, examining the content management of the @realDonaldTrump account can provide clarity about whether the accounts truly differ in anything other than their titles. In the month between January 6 and February 6 of 2018, the @realDonaldTrump account tweeted 174 times. These

⁵⁷ The White House (@WhiteHouse), TWITTER (Jan. 30, 2018, 9:06 PM), <https://twitter.com/WhiteHouse/status/958567018172690438>.

⁵⁸ Rep. Jody Hice (@CongressmanHice), TWITTER (Jan. 30, 2018, 7:13 PM), <https://twitter.com/CongressmanHice/status/958538629995008006>.

⁵⁹ 44 U.S.C. § 2203 (1978).

tweets ranged in subject from the State of the Union Address to comments on Jay-Z, but no matter what the subject of the tweet was, the President used the same communication technology to share his ideas or opinions. Both the @POTUS account and @realDonaldTrump account create content and share content, even though they do so in different capacities. With the President primarily using his personal Twitter account to communicate with the public, as can be seen through the data regarding his content creation on his @realDonaldTrump account, it is valuable to have the letter of the law match the spirit. In addition, not only is @realDonaldTrump account operated by the President of the United States but the @Whitehouse account, an indisputably official account run by the government, encourages twitter users to “[f]ollow for the latest from @POTUS @realDonaldTrump and his Administration.” Moreover, the @POTUS account repeatedly republishes tweets from the @realDonaldTrump. Hence, in June 2017, then White House Press Secretary Sean Spicer stated at a press conference that President Trump’s tweets should be considered “official statements by the President of the United States.”⁶⁰

In response to the President’s overwhelming use of his personal Twitter account and underwhelming use of his Presidential account, there have been lawsuits filed against President Trump in an attempt to get him to be held more accountable for his use of Twitter.

VI. Lawsuit Alleging Violation of the Presidential Records Act

*Citizens for Responsibility and Ethics in Washington and National Security Archive v. Trump and EOP*⁶¹ is pending before the United States District Court for the District of Columbia. In June of 2017, the plaintiffs, the Citizens for Responsibility and Ethics in Washington and the archivist National Security Archive, alleged that the defendants, President Donald Trump and elements of the Executive Office of the President, are in violation of the Presidential Records Act by deleting electronic messages on Twitter and using other electronic messaging applications without required archival records. The plaintiffs averred that President Trump had used Twitter as a communication medium during his campaign and during his tenure as president, including tweets on inauguration day. They contend that deletion of tweets is the destruction of presidential records in violation of the Presidential Records Act of 1981.

The lawsuit referenced a specific tweet the President deleted, in which he comments on a meeting with generals at his Mar-a-Lago resort.⁶² Being held accountable for the deletion of tweets from @realDonaldTrump is more difficult because, according to The White House’s privacy policy, tweets, direct messages, and Twitter mentions are automatically archived, but that only applies to the “official White House accounts.” In fact, the White House privacy policy explicitly states: “On Twitter, The White House automatically archives ‘tweets’ from official White House accounts, and may capture ‘mentions’ (tweets from other users to official White House accounts).”⁶³ The White House’s privacy policy may not literally capture the President’s

⁶⁰ Aric Jenkins, *Sean Spicer Says President Trump Considers His Tweets ‘Official’ White House Statements*, TIME (June 6, 2017), <https://time.com/4808270/sean-spicer-donald-trump-twitter-statements/>.

⁶¹ No. 1:17-cv-01228 (D.D.C. 2017).

⁶² Rebekah Entralgo, *Trump Sued For Allegedly Violating Presidential Records Act*, NPR (June 22, 2017, 6:48 PM), www.npr.org/sections/thetwo-way/2017/06/22/533977417/trump-sued-for-allegedly-violating-presidential-records-act.

⁶³ PRIVACY POLICY, <https://www.whitehouse.gov/privacy-policy/> (last visited Sep. 27, 2018).

personal Twitter account in its language, but its spirit intends to record all Presidential communications through Twitter, just as the Presidential Records Act does.

Another controversy President Trump has been at the center of relating to his Twitter usage involves the President blocking those who have criticized him through tweets on the platform. According to Twitter, blocking “helps users in restricting specific accounts from contacting them, seeing their Tweets, and following them.”⁶⁴ Through blocking someone, the person blocking will no longer receive contact from the person they blocked, and the person they blocked can no longer see the content of, follow, or interact with in any capacity, the person that blocked them. In *Knight First Amendment Institute v. Trump*,⁶⁵ seven people, joined by the Knight First Amendment Institute at Columbia University filed a lawsuit in July of 2017 against President Trump for blocking them on his @realDonaldTrump account after the individuals criticized him through the platform.⁶⁶ The plaintiffs alleged that this account constitutes a public forum, and that blocking access to it is a violation of their First Amendment rights. The United States Supreme Court in *Packingham v. North Carolina*,⁶⁷ described social media as “the modern public square” and as one of the most important places for the exchange of views. The ruling, which was unanimous, struck down a North Carolina law that prohibited registered sex offenders from accessing social media sites. The problem with the President blocking critics is an issue in that the individuals cannot directly tweet at him as millions of others can, but the bigger concern for this research paper is that, when the President uses his personal twitter account, as he has been, as the most frequent and unfettered way to communicate with his public, selectively restricting certain members of the public from accessing that communication channel displays a lack of respect for the communication between the public and the President. Blocking these individuals means that they cannot respond to the President’s tweets, meaning that they are essentially being silenced for their opinions, which goes against the First Amendment right to free speech.⁶⁸ Although the Presidential Records Act may legally call for the recording of these tweets, those records are not released to the public for five years after the final term. The judge in the case determined that the best option for the President was to unblock the individuals, and to then mute them, meaning that he would not see their tweets, but they still had access to his, which is reminiscent of the communication technologies Presidents have utilized in the past. The decision was appealed and the Second Circuit issued its decision on July 9, 2019, upholding Judge Buchwald’s opinion. The Second Circuit determined that President Trump used his Twitter to conduct official government business, and therefore, he cannot block Americans from the account on the basis of their political views. The court said that the first amendment does not permit a public official using a social media account for “all manner of official purposes” to exclude people from an otherwise open online dialogue because they disagree with the official.⁶⁹

⁶⁴ HOW TO BLOCK ACCOUNTS ON TWITTER, <https://help.twitter.com/en/using-twitter/blocking-and-unblocking-accounts> (last visited Sep. 25, 2018).

⁶⁵ 302 F. Supp. 3d 541, 579 (S.D.N.Y. 2018).

⁶⁶ John Herrman & Charlie Savage, *Trump’s Blocking of Twitter Users Is Unconstitutional, Judge Says*, N.Y. TIMES (May 23, 2018), <https://www.nytimes.com/2018/05/23/business/media/trump-twitter-block.html>.

⁶⁷ 582 U.S. ____ (2017); 137 S.Ct. 1730 (2017).

⁶⁸ Laura Sydell, *First Amendment Advocates Charge Trump Can’t Block Critics On Twitter*, NPR (Nov. 7, 2017, 4:54 PM), <https://www.npr.org/sections/alltechconsidered/2017/11/07/562619874/first-amendment-advocates-charge-trump-cant-block-critics-on-twitter>.

⁶⁹ No. 18-1691, 2019 WL 2932440, *4 (2d Cir. July 9, 2019).

VII. Proposed Amendments to the Presidential Records Act

In an attempt to have the letter of the Presidential Records Act regulate the President's social media presence in the same way that the spirit does, on June 12, 2017 Democratic Representative Mike Quigley introduced the Covfefe Bill to Congress.⁷⁰ The bill was introduced in the wake of President Trump's frequent use of Twitter stating "[i]n order to maintain public trust in government, elected officials must answer for what they do and say; this includes 140-character tweets. If the president is going to take to social media to make sudden public policy proclamations, we must ensure that these statements are documented and preserved for future reference."⁷¹ Representative Quigley's office, stated the bill seeks to amend, "the Presidential Records Act to include the term 'social media' as a documentary material, ensuring additional preservation of presidential communication and statements while promoting government accountability and transparency."⁷² The bill would amend the PRA to preserve Twitter posts and other social media interactions of the President and require the National Archives to store such items.

Although the full title of the bill is the Communications Over Various Feeds Electronically for Engagement (COVFefe) Act, the acronym references a tweet by President Trump from his @realDonaldTrump account on May 31, 2017, which stated, in its entirety: "Despite the constant negative press covfefe."⁷³ The tweet was deleted, but the impact of the confusing tweet, along with its deletion, sparked interest in the American people as to what "covfefe" was, and whether or not it should be recorded by for the future through the Presidential Records Act. Though the Act has not been made into law, its existence demonstrates the American people's interest in having the letter of the law better reflect the changes in communication technology. If the bill were enacted, it would see US law treat US Presidents' personal social media accounts (such as Trump's "@realDonaldTrump" Twitter account) the same as "official" social media accounts (such as the "@POTUS" Twitter account).

George Lakoff, Professor Emeritus of University of California, Berkeley and the author of *Don't Think of an Elephant*, is an expert on cognitive science and linguistics. He has examined President Trump's tweets and concluded: "Trump uses social media as a weapon to control the news cycle. It works like a charm. His tweets are tactical rather than substantive."⁷⁴ This is precisely why President Trump's twitter use must be recorded whether the content originates from his @POTUS account or his @realDonaldTrump account. The Presidents use of Twitter is remarkably effective and boasts a massive following. President Trump has more than

⁷⁰ Blair Guild, *Democratic Lawmaker Introduces 'Covfefe' Bill*, CBS NEWS (June 12, 2017, 5:57 PM), www.cbsnews.com/news/democratic-lawmaker-introduces-covfefe-bill/.

⁷¹ David Alexander, *COVFefe Act Would Preserve Trump's Tweets as Official Statements*, REUTERS, <https://www.reuters.com/article/us-usa-trump-covfefe-idUSKBN19402C> (last visited July 26, 2019).

⁷² *Quigley Introduces the COVFefe Act*, CONGRESSMAN MIKE QUIGLEY (June 12, 2017), <https://quigley.house.gov/media-center/press-releases/quigley-introduces-covfefe-act>.

⁷³ Matt Flegenheimer, *What's a 'Covfefe'? Trump Tweet Unites a Bewildered Nation*, N.Y. TIMES (May 31, 2017), <https://www.nytimes.com/2017/05/31/us/politics/covfefe-trump-twitter.html>.

⁷⁴ Andrew Buncombe, *Donald Trump One Year On: How the Twitter President changed social media and the country's top office* (Jan. 17, 2018, 21:43 PM), <https://www.independent.co.uk/news/world/americas/us-politics/the-twitter-president-how-potus-changed-social-media-and-the-presidency-a8164161.html>.

60 million followers on his @realDonaldTrump Twitter account. If the Covfefe bill were enacted it would bar the President from deleting his posts, as he has sometimes done.

Conclusion

Presidents of the United States have never shied away from adopting the latest communication technologies as a means of interacting with the American public. From Coolidge's use of the radio to President Obama's first tweet on Twitter, American presidents have known the value in communicating with their public by utilizing technology that the public would use. However, communicating comes at a cost in that the laws have shifted to hold Presidents accountable for their communications, both with individuals directly, and with the masses. With the Presidential Records Act put into place in 1978, records of all presidential communications was finally a legal right of the American people; the Act, in spirit, sought to provide records so that the American people could have a transparent understanding of their president's communications, both in public, and in private. Although the spirit of the law is clear, the letter, which has not been updated in a way that reflects the various forms of communication technology that the President engages with today. The law is outdated to the point of uncertainty regarding these new technologies. President Trump's use of Twitter displays exactly how the outdated letter of the Presidential Records Act can be used as a loophole for the President's Twitter presence. The separate accounts the President maintains on Twitter may be distinct in use and management, but when it comes to treatment by the Presidential Records Act, they are the same. The President's use of the separate accounts, one since before his presidency (@realDonaldTrump) and one devoted exclusively to his presidency (@POTUS), makes no difference because the account content and use amounts to the same thing – the President communicating with the public – and that is what the Presidential Records Act was created to maintain. For President Trump to believe that using his @realDonaldTrump account during his presidency protects his content from being legally archived by the Presidential Records Act is misguided and wrong. Just as President Trump's speeches, memos, and @POTUS account tweets are subject to recording by the National Archives and Records Administration, as are his tweets from his @realDonaldTrump account.

MEDIATION MADNESS V: MISFIT MEDIATORS

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This series has highlighted many concerns in the mediation process and has offered models to address them. The series closes with a foray into a seldom-explored topic—mediator misconduct. While it is rare, some mediators drift off course under the pressures of mass mediation to engage in behaviors that are detrimental to the mediation process. This paper introduces a Continuum of Mediator Misconduct that traces the progression from mediator missteps to misconduct and provides a Misfit Mediator Matrix that examines five Misfit Mediators one may encounter in mediation. Recommendations, including a proposed Party Bill of Rights, are offered along with updates on settlement rates and success stories in mediation.

I. INTRODUCTION

Mediation offers an alternative to the rigors of formal litigation in a courtroom. Once considered “Alternative” Dispute Resolution, mediation is now the dominant form of dispute resolution in civil cases. It has exploded as a successful conflict resolution tool because, according to Gene Valentini, director of the Texas Dispute Resolution System, it provides an opportunity to resolve virtually any issue in “a cost effective and timely manner” (2010, p. 2). One can speak freely in mediation “about anything you feel will get you to a point of resolution because nobody’s recording or saying it’s out of order, whereas in the courtroom you may not be able to address those things” (p. 2). Business leaders must understand the dynamics of the process in order to prepare for successful mediation.

Applying models and recent research from the field of group dynamics, this paper examines the problem of mediator misconduct which is exacerbated by pressures arising from the dramatic shift to compulsory, caucused mediation or mass mediation. The meteoric rise of caucused mediation (mediation conducted primarily in private session) as the dominant form has profound implications for business leaders. With most lawsuits being referred to compulsory caucused mediation, business leaders must be familiar with the process and the unique challenges it presents. In particular, they must be aware of the potential for mediator misconduct in the less-structured mediation setting, with parties now dealing with each other at arm’s length through counsel and an increasingly powerful mediator. This article offers a glimpse into the nature and

scope of mediator misconduct. It introduces a Continuum of Mediator Misconduct that traces the progression from mediator missteps to misconduct. Next, it offers a Misfit Mediator Matrix that highlights profiles of five misfit mediators one may encounter in mediation. Each is described and analyzed in the Typology of Misfit Mediators in terms of specific patterns of behavior, motives, style, and Model Standards violated. The paper closes with recommendations, including a proposed Party Bill of Rights, along with updates on settlement rates and success stories in mediation.

The extent to which business leaders recognize and respond to the challenges of compulsory mediation can determine whether it succeeds. Before considering how skills can be developed in this area, it is important to examine the meaning of mediation, its use, and its success in resolving conflict.

II. THE MEANING OF MEDIATION

Texas statutory law defines mediation this way:

- (a) Mediation is the forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.
- (b) A mediator may not impose his own judgment on the issues or that of the parties (Texas Civil Practice, 2008).

Unfortunately, this statutory definition offers little insight into what mediation actually can and should be. When successful, mediation can be characterized as proactive, forward-looking, and problem-solving in nature. As a process, it is enlightening, flexible, confidential, and, typically, evokes less stress than does formal litigation. It is not a drastic action and does not involve the surrender of freedom that arbitration dictates, as the latter requires an impartial third party who breaks a deadlock by issuing a final binding ruling (Lovenheim, 1998). Mediation basically involves negotiation through a disinterested third party, and it effectively can defuse emotional time bombs. One drawback mars this otherwise rosy picture: neither side is bound by anything in mediation. Arbitration binds; mediation intervenes benevolently. If the parties involved remain stubborn, intervention can sour, and mediation then becomes an exercise in futility.

Proactive use of mediation can help businesses avoid costly settlements and the potential of expensive litigation. Given the number of lawsuits filed and the heavy reliance on compulsory mediation by the courts, business leaders must understand the process and how to prepare for and conduct mediation.

III. THE USE OF MEDIATION

Over the past two decades, the use of mediation has exploded. Business leaders and the courts have discovered its value as a cost-effective alternative to litigation in the traditional adversarial system. The number of mediation cases in Texas, Oklahoma, and Nebraska (the states nearest the region to track statistics) is staggering. Cases received by Texas alternative dispute resolution centers in the most recent three-year period for which records were kept

average almost 20,000 annually, with a total of more than 58,000 from 2003 to 2005 (Annual Report Texas, 2005). The same situation is true of Oklahoma. As shown in Table 1, on average, almost 6,000 cases have been referred annually to the alternative dispute resolution system there, with 73,976 cases referred in just over a decade. Also, an impressive average settlement rate of 65 percent has been registered (Annual Report Oklahoma, 2018). Farther north, results in Nebraska (see Table 2) are even more impressive. The number of cases referred annually to that state's alternative dispute resolution system has more than doubled over the past decade, with an average settlement rate of 81 percent (Annual Report Nebraska, 2017). These striking regional settlement rates are mirrored across the United States: Better Business Bureau, 78%; U.S. Equal Employment Opportunity Commission, 70%; Financial Industry Regulatory Authority, 80%; and State of Florida Division of Administrative Hearings, 78.5% (4 Disputes.com). They are also seen internationally as the Bangalore Mediation Centre tops 65% with 100 cases per day (MediatorsBeyondBorders.org, 4 Disputes.com) and World Intellectual Property Organization exceeds 70% across its 179 member-nations (WIPO). Thus, the widespread use of mediation and its potential for cost-effective conflict resolution are well established.

Table 1: Oklahoma Alternative Dispute Resolution System Cases Referred and Settlement Rate

<i>Date</i>	<i>Cases</i>	<i>Settlement Rate</i>
2005	6,328	68%
2006	7,968	62%
2007	5,139	64%
2008	5,766	64%
2009	6,275	71%
2010	6,375	63%
2011	6,535	64%
2012	5,704	62%
2013	5,261	61%
2014	5,046	63%
2015	4,852	63%
2016	<i>No</i>	<i>Report</i>
2017	4,559	68%
2018	4,168	70%
Total	73,976	65%

Source: *Annual Report Alternative Dispute Resolution System* from the Supreme Court of Oklahoma Administrative Office of the Courts

Table 2: Nebraska Alternative Dispute Resolution System Cases Referred and Settlement Rate

<i>Date</i>	<i>Cases</i>	<i>Settlement Rate</i>
2008	1,171	84%
2009	1,467	83%
2010	1,604	85%
2011	1,723	83%
2012	1,876	81%
2013	1,948	79%
2014	2,133	79%
2015	2,083	78%
2016	2,271	80%
2017	2,367	79%
Total	18,643	81%

Source: *Annual Mediation Center Case Data Report* from the Nebraska Office of Dispute Resolution

IV. PURPOSE

Over the past two decades, mediation has evolved from a voluntary collaboration between parties facilitated by a neutral mediator to “ever-more directive, coercive activities within the big-tent of evaluative mediation” (Love & Waldman, 2016, p. 138). Activities, such as “bashing, trashing, opining, predicting, and proposing” are now commonplace in the mediator’s “toolbox” (p. 138). By 2012, some scholars claimed mediation was morphing into arbitration as adversarial posturing and control by lawyers and mediators making key decisions threatened party self-determination—the hallmark of mediation (Nolan-Haley, 2012). By 2015, several sources reported a marked decline, and in some cases, total abandonment of joint sessions as compulsory, caucused mediation took hold (e.g., Coben, 2015; Folberg, 2016). This form of mediation has evolved from “Alternative Dispute Resolution” to standard practice in most civil cases (Hoole & Felt, 2018). It is conducted largely in confidential private sessions, with little direct contact between the parties. Mediators shuttle between mediation rooms, where parties increasingly rely on counsel in a secretive system, with intense pressure to settle at lightning speed. This shift has empowered mediators and attorneys and has led to the gradual erosion of power among the parties in mediation. The explosion in court-ordered mediation and the record speed at which cases settle is a boon to mediators and mediation firms. But, the mediation industry, characterized by strict confidentiality, separate (private) caucuses, and the lack of official oversight, is a breeding ground for gamesmanship, duplicity, and deceptive practices, with little risk of being caught (Krivis, 2002, Cooley, 1997, 2000).

Never has there been greater pressure for mediators to settle, greater need for integrity and trustworthiness, and greater opportunity (or temptation) to engage in questionable practices.

Modern mediation is a double paradox. First, the open collaborative practice of mediation is now more secretive and less interactive than the courtroom. Second, the object of the dispute resolution process, the parties, are now the least empowered, least informed participants in the room (actually in separate rooms). James Coben's article *Mediation's Dirty Little Secret* portrayed some mediators as deceptive master manipulators whose strong-armed tactics left parties feeling more bullied than empowered (Coben, 2000). A growing body of case law "featuring parties seeking to unravel agreements they signed in mediation" due to "fraud, coercion, mistake, or duress" (Love & Waldman, 2016, p. 142) supports the notion that some mediators drift off course under the pressures of mass mediation to engage in behaviors that are inconsistent with the basic tenets of mediation, and become Misfit Mediators. This paper offers a glimpse into the nature and scope of mediator misconduct. First, it introduces a Continuum of Mediator Misconduct that traces the progression from mediator missteps to misconduct. Next, the authors propose a Misfit Mediator Matrix that highlights profiles of five misfit mediators one may encounter in mediation. Each is described and analyzed in the Typology of Misfit Mediators in terms of specific patterns of behavior, motives, style, and Model Standards violated. The paper closes with recommendations, including a proposed Party Bill of Rights, along with updates on settlement rates and success stories in mediation.

V. DEALING WITH MEDIATOR MISCONDUCT

A. PARTY RIGHTS AND MODEL STANDARDS

The trend toward mass mediation (compulsory, caucused mediation) dominates modern mediation. The mediator's role is greatly enhanced in this system by virtue of extreme pressure to settle quickly, control over all information disclosed in the mediation, and a virtual lack of oversight. The parties, on the other hand, are powerless, content to sit quietly in a private caucus room waiting for the mediator to return with the next tidbit of information, wholly reliant on counsel, in a glorified game of Battleship—only in this game, the mediator is watching both game boards. Paul Rajkowski, an experienced community mediator, calls it a "shameful" process (Rajkowski, 2016, p.1). He claims the mediator's neutrality is compromised because he acts as an agent for the party when he interprets and delivers messages and offers in shuttle diplomacy. He also claims that self-determination is compromised because private caucuses allow attorneys to withhold information and give both the attorney and the mediator power at the expense of the parties. Finally, he claims the process diminishes mediators' facilitative skills and yields agreement but not resolution (Rajkowski, 2016). Regardless of one's position on the virtues of mass mediation, it is clear that the power of the mediator has grown while party autonomy and self-determination have diminished (Nolan-Haley, 2018). In this setting, mediator integrity, standards of conduct, and official oversight are paramount. Before mediator misconduct can be considered, one must first establish expectations, or standards of conduct, for mediators.

The most widely accepted standards for mediator conduct, the *Model Standards of Conduct for Mediators*, were jointly developed by the American Arbitrators Association, American Bar Association, and Association for Conflict Resolution in 1994, with revision in 2005 (Model Standards, 2005). If anything, the revised Model Standards “are stronger in their assertion of the primacy of party self-determination...explicitly recognizing party control in process design, mediator selection, and decisions to terminate” (Love & Waldman, 2016, p. 128). In the absence of mediator regulation and codes of conduct in most states, the Model Standards “stand out as a shining example of an authoritative statement on the conduct expected of mediators” (Shapiro, 2016, p. 84). Key tenets of the Model Standards are summarized as follows:

- Self-Determination – parties must be free to make voluntary decisions without coercion or intimidation.
- Impartiality – parties have a right to be treated in an impartial manner, free of favoritism, bias, prejudice, and differential treatment.
- Conflict of Interest – mediators must avoid or disclose conflicts of interest involving the subject matter of the dispute and any relationship with mediation participants that may impact impartiality or integrity.
- Confidentiality – information obtained in mediation, including private sessions, is not disclosed without consent.
- Quality of the Process – mediators promote fairness, honesty, mutual respect, and party participation in all phases of mediation and will not knowingly misrepresent a material fact or undertake an additional dispute resolution role (e.g., provide counseling or therapy) without party consent. (Model Standards, 2005)

These are lofty goals for any mediator, but they present even greater challenges in caucused mediation because of the secrecy of the process and time constraints. The mediator who has little time to navigate this complex, confidential landscape may be tempted to take a few shortcuts to reach a quick settlement in the allotted time. The potential for misguided, unscrupulous, or unethical behavior abounds in this environment. Some mediators drift off course under the pressures of mass mediation, engage in behaviors that are inconsistent with the basic tenets of mediation, and become Misfit Mediators. Time pressure, limited information and contact, strict confidentiality, and lack of oversight promote mediator misconduct which ranges from minor missteps and infractions to regular practices that are unethical or potentially illegal. The authors explore the nature and scope of mediator misconduct in the next section.

B. *CONTINUUM OF MEDIATOR MISCONDUCT*

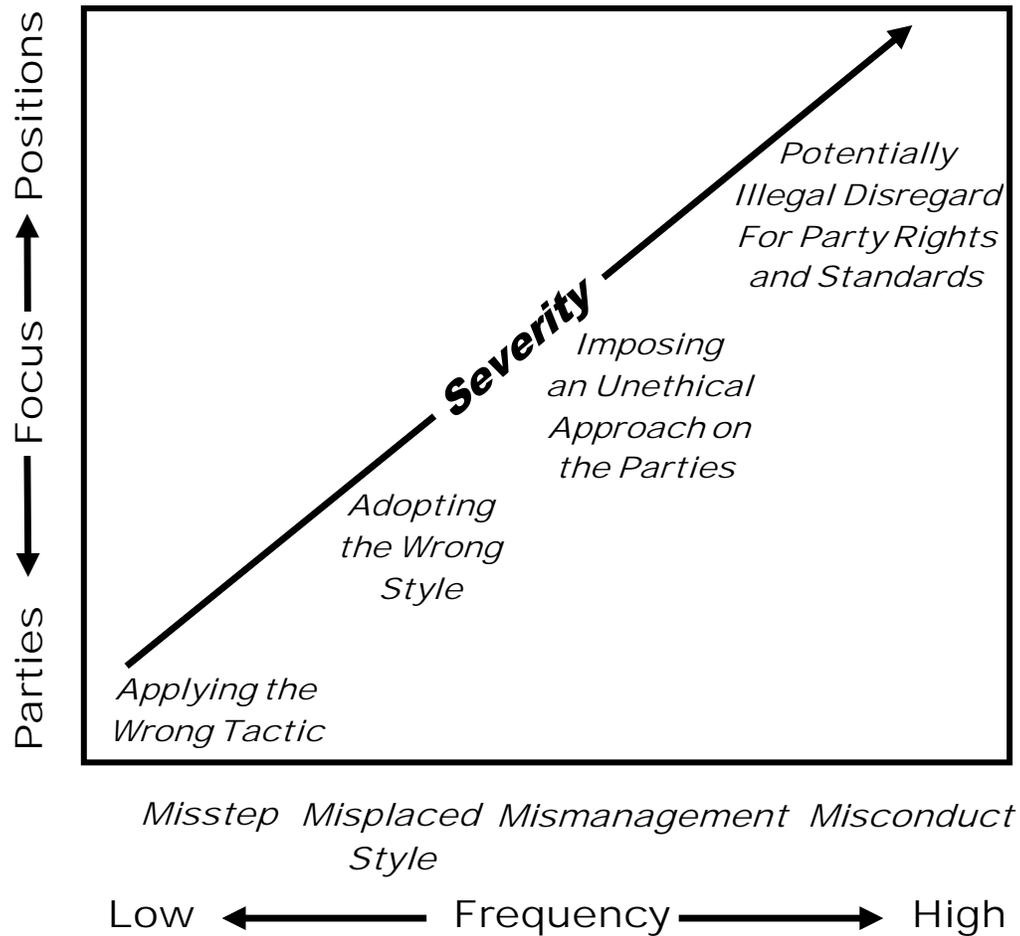
The mediation industry, characterized by strict confidentiality, separate (private) caucuses, and the lack of official oversight, is a breeding ground for gamesmanship, duplicity, and deceptive practices, with little risk of being caught (Krivis, 2002). In this environment, mediator misconduct is most likely a progression. Without detection or consequence, an initial trade-off or violation of standards can recur, escalate, and eventually result in a pattern of unethical, potentially illegal behavior that is detrimental to the parties. In the absence of oversight (e.g.,

exit surveys, mediator ratings, and a grievance or complaint system) and enforcement of standards, parties have no recourse. They simply take their lumps, settle, and escape the nightmare of litigation. The Continuum of Mediator Misconduct in Figure 1 tracks the progression from *Missteps* to *Misconduct*, classifying these behaviors in terms of *frequency* (ranging from a one-time misstep to a recurring pattern of behavior), *severity* (ranging from a mistake to the practice of potentially illegal behavior), and *focus* (rightly focused on party interests or on the positions and preferences of the mediator).

As indicated in Figure 1, mediator misconduct escalates, without oversight and potential consequences, from simple *Missteps* to a pattern of planned, willful, and potentially illegal *Misconduct*. At the outset, the mediator Missteps, making a mistake or an error in judgement in his zeal to settle a case. Mediators are human and thus subject to moods, emotions, subtle biases, and lapses in judgement. They may resort to intimidation, manipulation, coercion, and gamesmanship at times in order to reach a settlement. Good mediators learn from mistakes, recover, and grow in the process. Those who don't risk recurrence, leading to habits that fuel Misplaced Styles—patterns of behavior that favor the mediator's preference or position over the interests of one or both parties. A two-year study of mediation quality by the ABA Section of Dispute Resolution found that mediators “almost by rote, rely on essentially identical approaches to every case” (ABA Task Force, 2008, p. 12). Thus, early missteps and mistakes can shape mediation style and may become a way of life for some mediators. These unconscious patterns can escalate to Mismanagement, where the mediator adopts increasingly directive practices that impose his style on the parties, with little regard for party self-determination. Such behavior violates the basic tenets of mediation prescribed in the Model Standards and is considered unethical. Finally, some mediators, operating without oversight under the shroud of secrecy that surrounds caucused mediation, may be tempted to engage in conflicts of interest, personal and systematic biases, and vendettas. They will have reached the highest level in Figure 1, Misconduct, which entails a pattern of willful, planned wrongdoing that is potentially illegal and clearly places the mediator's interests over the parties' interests.

Courts that establish mediation programs “have a responsibility to ensure these mediation programs provide a quality justice experience...for justice is the bottom line for court systems” (Model Surveys, 2016, p. 1). The Continuum of Mediator Misconduct is a useful tool that parties, attorneys, mediators, and the courts can use to identify the nature of mediator misconduct—its frequency, severity, and focus. Not all misconduct warrants a response. Determining the location of an observed behavior or strategy on the continuum alerts mediation participants to the potential need to react and suggests an appropriate response. Early detection and classification of behaviors afford greater flexibility in choosing an effective response. Having considered the nature and scope of potential mediator misconduct, the authors next examine five “Misfit Mediators” that parties may encounter in caucused mediation and the specific behaviors they may exhibit.

Figure 1: Continuum of Mediator Misconduct



Source: C. D. Bultena, K. R. Tilker, C. D. Ramser

C. MISFIT MEDIATOR MATRIX

While there are many fine mediators, some drift off course into patterns of behavior that are inconsistent with the basic tenets of mediation, becoming “Misfit Mediators.” Five “Misfit Mediators” that parties may encounter in caucused mediation are portrayed in the Misfit Mediator Matrix in Figure 2. These misfit mediators are characterized in terms of specific behaviors, motives, and styles, as well as Model Standards compromised in the Typology of Misfit Mediators in Table 3. The Model Standards were briefly summarized in the previous section. Each misfit mediator violates at least one of these standards, as indicated in Table 3. Their behavior ranges from Mismanagement to Misconduct on the Continuum of Mediator Misconduct in Figure 1. Thus, it is unethical at best. With little done to reign in these bad actors in mass mediation, for reasons already discussed, the old adage “to be forewarned is to be forearmed” is applicable. Parties and their counsel have a better chance of protecting party rights

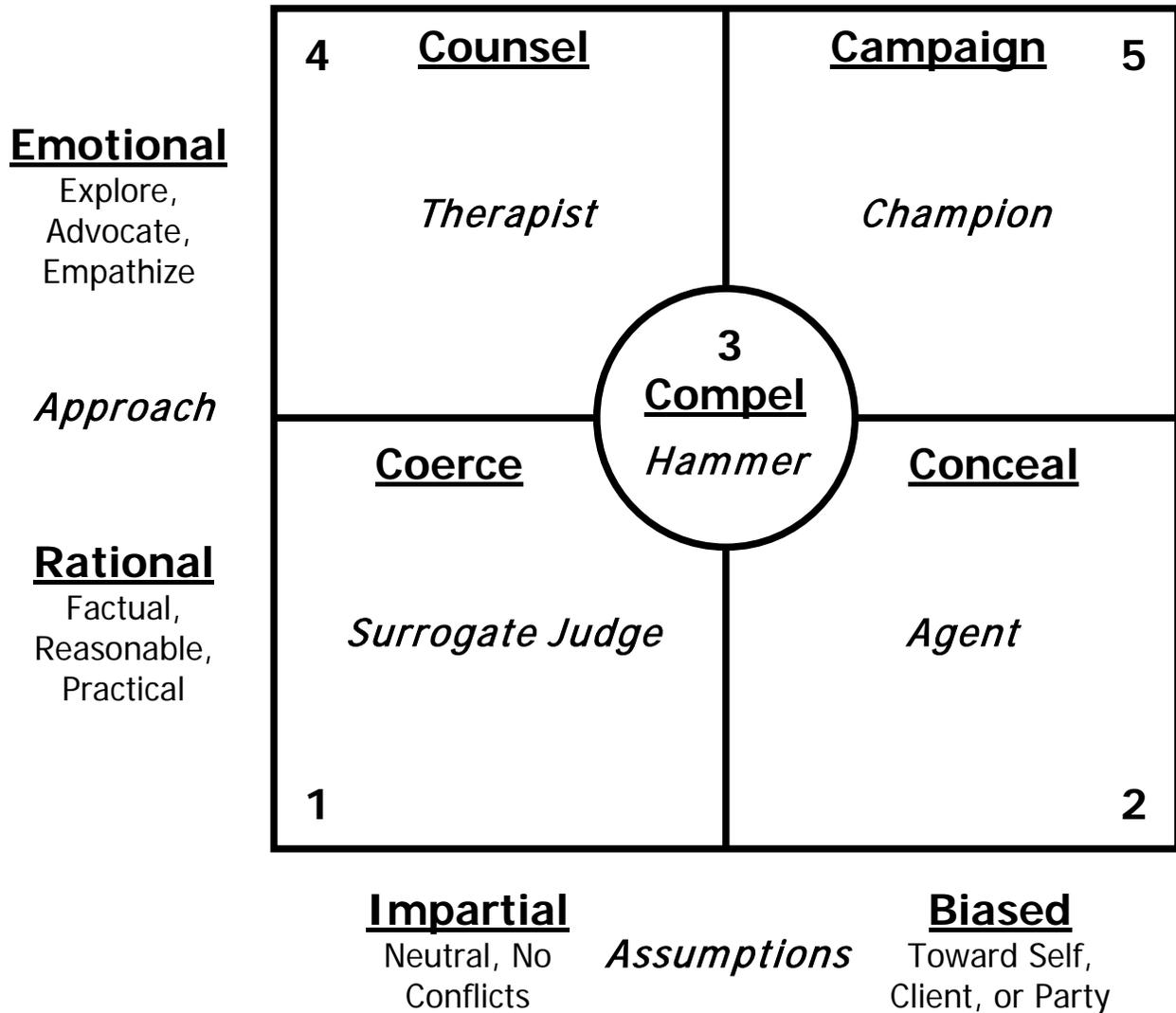
and securing a reasonable outcome if they identify these actors early and formulate an appropriate response, which may include termination of the mediation if necessary.

The Misfit Mediator Matrix in Figure 2 graphically depicts the location of the various mediator profiles on the authors' multidimensional space. To the authors' knowledge, this is the first published model of misfit mediators. The five profiles in the table are classified on two dimensions: the mediator's **Approach** and **Assumptions**. In terms of Approach, the model considers whether the mediator employs a *Rational* approach that is factual, reasonable, or practical or whether the mediator uses an *Emotional* approach that explores emotions, empathizes, and advocates for parties. Assumptions deal with the impartiality of the mediator, whether he is an *Impartial* third-party neutral with no conflicts of interest or whether the mediator is *Biased* toward self, a party, or the client. Combinations of these dimensions yield four quadrants. A fifth was added to provide a mixed or middle-of-the-road position. Each quadrant is labeled with a specific behavior (*Coerce*, *Conceal*, *Compel*, *Counsel*, or *Campaign*) that represents the misguided mediator's primary focus.

In Figure 2, **Quadrant 1**, which is labeled **Coerce**, is home to the "*Surrogate Judge*," whose behavior is rational and generally unbiased (impartial). The Surrogate Judge is typically a retired judge serving as a mediator. With decades of service, he has considerable knowledge and experience regarding the law and court proceedings. According to Ellen Waldman, professor of law at Thomas Jefferson School of Law, the judiciary was not a particularly diverse group when it served; most members are older white males, who are no longer representative of the parties they serve (Deason, Green, Shestowsky, Van Loo, & Waldman, 2018). Moreover, Jennifer Brown, dean of Quinnipiac Law School, points out that "judges are quick to separate parties into caucus and may fail to appreciate the value of interaction and mutual problem solving by the parties" (p. 332). Some have a proclivity to become Surrogate Judges who use their unique blend of power, knowledge, and experience to intimidate and coerce parties and speak for the judge presiding over the case. As shown in the Typology of Misfit Mediators in Table 3, their motto is "*The Judge is not going to ...*" These misfit mediators speak for the judge as a means of discrediting a party's case, lowering expectations, and expediting settlement.

The Surrogate Judge may believe the judge would, in fact, hold a particular view, but he may not speak as a judge in mediation. His power emanates from what Milgram called the authority-obedience response (Milgram, 1974). It is human nature to obey the voice of authority. The parties and counsel are coerced to yield to the voice of authority and the power of the inevitable—what they are told the judge will do in court. Attorneys, who are often familiar with the Surrogate Judge and conditioned to respect his authority in the courtroom, are reluctant to question or intervene. Thus, the parties' right of self-determination, and to not be coerced, in the Model Standards is violated. Referring again to Table 3, this mediator uses an evaluative style of mediation and a competing (assertive, win-lose) conflict management style.

Figure 2: Misfit Mediator Matrix



Source: C. D. Bultena, C. D. Ramser, and K. R. Tilker

Behavior in **Quadrant 2, Conceal**, is also rational, but in this case, it is biased towards an attorney, law firm, insurance company, corporation, or other entity that has developed a cozy relationship with the mediator who acts as an *Agent* for the entity. The mediator typically has worked a number of cases for the entity and is its mediator of choice. The entity may support the mediator with steady work, advance information, office space, supplies, and services as part of this business relationship. The mediator in this case acts as an agent or “House Mediator” for the entity in question. This mediator’s motto from Table 3 is “*Let’s get it done!*”

Such arrangements are rarely discovered in caucused mediation because, beyond a brief meet and greet, the parties are never in the same room together, and confidentiality rules and lack of oversight prevent detection. Moreover, because there is no official system by which parties

evaluate, review, or rate mediators, and no official means (in most states) or desire by overwhelmed parties to report grievances, these practices persist. Parties victimized by the conflict of interest and partiality of the Agent often “lump it”—choose not to bring it up because the potential gain is not worth the probable loss (Young, 2006, p. 23). For these reasons, parties are seldom involved in mediator selection, deferring the decision to attorneys who, like everyone else in the mass mediation process, rush to a quick settlement by any means. The mediator has an obligation to avoid/disclose even the appearance of a conflict of interest in this case (Model Standards, 2005). The *Agent* violates the Model Standards of impartiality and conflict of interest. Table 3 reveals this misguided mediator also uses an evaluative mediation style and a competing (assertive, win-lose) style of conflict management.

The middle-of-the-road position is found in **Quadrant 3**, labeled **Compel**. Here lies the “*Hammer*,” whose behavior is rational, with a tendency to revert to emotional tactics to press for a settlement. This misfit mediator is generally impartial but is biased toward his own agenda of doing “*Whatever it Takes*” to reach a settlement in the allotted time. These mediators who typically work for high-volume mediation firms, use a forceful Directive style. They rely on what James Alfini, director of Education and Research at the Florida Dispute Resolution Center, calls “*muscle mediation*” in which mediators “*trash*” (discredit the merit of the respective cases, forcing the parties to make realistic offers) and “*bash*” (strike down initial offers, regardless of case merit, in a rush to the middle) to reach a settlement in record time (Alfini, 1991, p. 66-73). Compromise, whereby both parties sacrifice in a Lose-Lose proposition, is the dominant conflict management style in this glorified game of “*Whac-A-Mole*.” Parties who dare to speak or challenge the mediator are quickly whacked back into their holes. While it is debatable whether the parties really had a voice in mediator selection, given the previous discussion, some argue that the parties willingly subjected themselves to the Hammer in hopes of reaching a quick settlement. Nevertheless, the Hammer’s behavior is still unethical; the parties are coerced and stripped of their right to self-determination in the process. Both are key Model Standards violated by this form of mediation.

A vastly different scenario unfolds in **Quadrant 4**, labeled **Counsel**, where the *Therapist* resides. This well-intentioned mediator uses an emotional approach to “*Get to the Bottom*” of every conflict. He employs an arsenal of psychodynamic therapies to alter problematic behaviors, feelings, and thoughts by discovering their unconscious meanings and motivations in order to not only resolve the conflict but to reconcile the parties. He is impartial in his approach and, given a considerable amount of time, which is rare in mass mediation, may succeed in his quest for truth, justice, and reconciliation. He uses a transformative mediation style to guide the parties in discovering and essentially resolving their own conflict through a collaborative win-win conflict management style. While this approach is appropriate in extreme cases of tragic loss and conflict among lifelong friends and family, it is time-consuming and a poor fit for mainstream mediation. *Therapists* tend to expand the role of mediator to encompass other professions (e.g., counseling and psychotherapy), offering advice and providing services in violation of the Model Standards for Quality of the Process. Subjecting parties to such an

Table 3: Typology of Misfit Mediators

Type	Description	Mediation Style	Conflict Style	Model Std. Compromised
Quadrant 1 – Rational/Impartial – Coerce – “The Judge is not going to ...”				
Surrogate Judge	Intimidates parties and attorneys with superior knowledge. Speaks for the judge to “bash and trash” positions for a quick settlement.	Evaluative	Competing	Coercion
Quadrant 2 – Rational/Biased – Conceal – “Let’s get it done!”				
Agent	Develops a cozy relationship with a client (attorney/law firm, insurance company or corporation). Operates as a “House Mediator” with a bias toward client interests.	Evaluative	Competing	Impartiality/ Conflict of Interest
Quadrant 3 – Combination – Compel – “Whatever It Takes!”				
Hammer	Operates as a “Field Marshal” on a tight schedule to hammer out a quick settlement. Parties are left in a fog trying to keep up.	Directive *	Compromising	Coercion/Self-Determination
Quadrant 4 – Emotional/Impartial – Counsel – “Get to the Bottom!”				
Therapist	Leads parties through a protracted emotional and psychoanalytical process aimed at discovering root causes of conflict for resolution and restoration of parties.	Transformative	Collaborating	Mixing Roles/Self-Determination
Quadrant 5 – Emotional/Biased – Campaign – “Right a Wrong!”				
Champion	Knight in Shining Armor who rushes to early judgment in a case to advocate for the apparent “victim” against the “villain.”	Evaluative	Accommodating	Impartiality

* Denotes a new Mediation Style introduced by the authors

Source: C. D. Bultena, C. D. Ramser, and K. R. Tilker

approach without prior agreement and clear ground rules is an exercise in futility that also violates the Model Standard of party self-determination.

Last, **Quadrant 5**, labeled **Campaign**, is also an emotional approach, but here it is biased against one party. The mediator in this case rushes to judgment early in the mediation process, usually before the parties meet. After examining various court documents, discovery, and other premediation information, which may include conversations with party counsel, this misguided mediator rushes to judgment concerning which party is the “victim” and which is the “villain.” Once this determination is made, the mediator becomes a **Champion** for the “victim” and the adversary of the “villain.” This Knight in Shining Armor actively campaigns for the “weaker” party and may even form a secret alliance with the victim and his counsel in private caucuses. The opposing party is presumed guilty without cause and is at a distinct disadvantage throughout the mediation.

Joan Kessler, JAMS mediator and associate editor of *Advocate* (a dispute resolution journal), argues, however, that mediators are called upon to analyze the veracity and credibility of the parties and their cases, sometimes taking a party and counsel to the “woodshed” in private session when flaws are discovered, usually late in the afternoon (Kessler, 2015). She believes it is the mediator’s responsibility to expose these flaws before they surface later before an arbitrator or judge. As a mediator, there is a difference between calling out a party privately on substantive issues *during* mediation and prejudging a party *before* mediation even begins with biased treatment throughout. The latter is more pervasive and personal. The mediator is guilty of “Campaigning” for a party, which violates the Model Standard of impartiality. The **Champion** uses an evaluative style of mediation and an accommodating style of conflict management—accommodating the needs of the “victim” and encouraging the “villain” to do so as well (lose willingly).

Having examined the five Misfit Mediators, it is important to note that some mediators have “**Multiple Misfit Syndrome**”—they simultaneously exhibit the behaviors of more than one misfit mediator in the matrix. For example, a mediator may simultaneously exhibit behaviors of the Surrogate Judge, Agent, Hammer, and Champion in a single mediation. Alternatively, the matrix is not exhaustive. Future research may reveal other “Misfits” and a need to expand the matrix.

What options do parties have in responding to these misfit mediators? In caucused mediation, there are few. Caucused mediation is a blind system of private sessions. After a brief meet and greet, the parties typically never see the opposing party and counsel again. With strict confidentiality, virtually all information, except the party’s own disclosures, are private. Experiencing only one side of the mediation, parties are blind to the process and have neither the knowledge nor capacity to respond. They have tunnel vision consisting of only the information the mediator discloses to them. With parties having no clue about what is going on in the other room with the opposing party, counsel, and the mediator, group dynamics grind to a halt. They are asynchronous, stifled, or non-existent. Without collaboration, all a party can do is appeal to counsel for help in changing the course of the mediation or choose to terminate. Direct confrontation with one of the misfit mediators is ill-advised, given the power imbalance between

the party and the mediator. It will likely backfire into an unwinnable contest that depreciates the party's position and hopes for a fair settlement. A possible exception, however, is the Therapist, who may listen and respond to the party because listening is his strong suit. Unfortunately, once mediation begins, little can be done to address misfit mediators. The battle is won or lost before the war begins in mediator selection.

Mediator selection is as important in a civil case remanded to mediation as jury selection is in a criminal case. But, until parties are aware of their rights in mediation and a system of mediator assessment (e.g., party exit surveys, mediator ratings, and a grievance/complaint reporting system) is put in place to aid parties in mediator selection, self-determination is diminished and parties remain wholly dependent upon counsel for mediator selection. Party counsel may not be the ultimate authority in mediator selection and may not select the "best" mediator for the party. Attorneys may not be familiar with all mediators, may not be as offended as the party by a particular misfit's style, may have embraced the behavior of some misfit mediators as an acceptable means to a quick settlement, and may regularly lose the battle in mediator selection to more assertive opposing counsel (only one mediator gets the contract). Remedies for these shortcomings and a system to inform, monitor, and protect party rights in mediation are discussed in the next section.

D. *RECOMMENDATIONS*

The stakes are clearly higher for the parties than any other mediation participant. Their very livelihood may be at stake. None of the participants—the mediator, the attorneys, the sitting judge, or the court—have so much at stake. Yet, the parties have the least power in the system. They do have the right to terminate mediation, but this rarely happens. So, once mediation begins, the parties are at the mercy of the mediator, who is the "Field Marshal" of caucused mediation. He is also the "Chief Information Officer," the only one with access to information from both sides. The mediator is the "Center of the Universe" in caucused mediation. With so much responsibility entrusted to the mediator, selection is of paramount importance. However, most parties in mediation are novices. Waldman calls them "one-shotters"—under-resourced parties who are uninformed, overwhelmed, unaware of their rights, and denied their right to informed consent (Deason, Green, Shestowsky, Van Loo, & Waldman, 2018, pp. 317-18). It is unrealistic to expect counsel (for those who can afford it) to voluntarily disclose, educate, and prepare parties for mediation when the court ordering mediation is ultimately responsible for administering mediation programs and delivering justice.

Parties may know how to find the best professionals to render a service when it comes to finding a competent plumber, electrician, or dentist. Some use online adviser services that rate local professionals or they rely on word-of-mouth. Unfortunately, mediators are not covered on these sites, and most people have few friends with experience in mediation. Absent an informed means to evaluate and select a mediator, parties abdicate this important role to counsel. Attorneys deal with mediators they know who are available and acceptable to opposing counsel. If opposing counsel has a "House Mediator" like the Agent, they will lobby hard for this

selection. Time is usually short when party counsel is ready to hire and schedule a mediator. At this point, it may be a matter of finding a mediator who is *acceptable* to opposing counsel and *available* rather than the “best” mediator. These factors can be related because opposing counsel may stonewall in order to force party counsel to accept the preferred mediator.

Once the parties are sitting across the table from a misfit mediator, it is too late, unless they want to terminate and take their chances in court (something most attorneys resist). So, the solution to the problem of misfit mediators is not to hire one in the first place. Parties, who have the greatest stake in the process, must be involved in mediator selection. This requires *Disclosure* of Standards of Conduct for Mediators (a Party Bill of Rights); a system to *Monitor* mediator performance relative to the standards (party surveys); party *Access* to survey data aggregated by mediator; and a mechanism to *Report* grievances and complaints to the court or mediation program. An informed party is empowered to participate.

The ABA Section of Dispute Resolution has taken some steps in the right direction. First, the Model Standards of Conduct for Mediators (Model Standards, 2005) were published to establish the key tenets of what mediation is supposed to be. While they are aspirational, they are the best attempt yet at defining the ethical practice of mediation. The Model Standards are widely known among judges, mediators, attorneys, and legal scholars, but parties are largely unaware of them. The banking industry has “Truth in Lending” disclosures required by the government to protect borrowers and the medical and insurance industry have a “Patient Bill of Rights” to protect patients, but there is no such provision in the mediation industry. The authors propose a “Party Bill of Rights” for mediation parties that briefly summarizes party rights outlined in the Model Standards. A proposed Party Bill of Rights is presented in Table 4. It summarizes six basic party rights (articles) in a clear and concise manner. The authors added a provision for mediator selection and review in Article 5 – Quality of the Process. The authors envision the Party Bill of Rights being used as a form of party disclosure mandated by the court ordering mediation. Some variant of the Party Bill of Rights in Table 4, with appropriate signatures, would be reviewed with parties well in advance of mediation, to be filed with the mediator, counsel, and the court. Official disclosure would also occur at the outset of mediation, to be filed with the court.

Once the parties are aware of their rights in mediation, they are better prepared to participate, especially in mediator selection. To do so effectively, they must have access to the information necessary to make an informed decision. The ABA Section of Dispute Resolution took an important step in this direction two years ago with the release of the Model Mediation Surveys (Model Surveys, 2016). Working with Resolution Systems Institute, they developed a well-validated party survey designed to be given upon completion of mediation. Among other things, it gauges satisfaction with the process, outcome, and mediator performance in terms of ethical practice and competence (Model Surveys, 2016). The survey would detect the misguided behavior of misfit mediators. Survey instructions advise aggregation of results by mediator over time in order to maintain mediation confidentiality. It is recommended that the court require

Table 4: Party Bill of Rights

Article 1 - Party Self-Determination
<ul style="list-style-type: none"> Parties must be free to make voluntary, uncoerced decisions. They may exercise this right at any stage of a mediation, including <i>mediator selection</i>, process design, and participation in the process and outcomes.
Article 2 - Impartiality
<ul style="list-style-type: none"> Parties have a right to be treated in an impartial manner, free from even the appearance of favoritism, bias, or prejudice. They should not be treated differently due to any personal characteristics, background, values, or beliefs.
Article 3 - Conflicts of Interest
<ul style="list-style-type: none"> Mediators shall avoid a conflict of interest or the appearance of such during and after mediation. Mediators shall disclose any conflict of interest arising from involvement with the subject matter of the dispute or from any relationship with any mediation participant before, during, or after mediation that raises a question of impartiality or the integrity of the mediation.
Article 4 - Confidentiality
<ul style="list-style-type: none"> Mediators shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties. Mediators should not communicate any information from the mediation to any non-participants with exception of the settlement agreement sent to the court. Mediators shall not convey directly or indirectly to any person information that was obtained in private session without the consent of the disclosing person.
Article 5 - Quality of the Process
<ul style="list-style-type: none"> Mediators should promote fairness, honesty, and mutual respect among participants and should not knowingly misrepresent any material fact during the course of the mediation. Mediators should promote party competency and participation in all phases of mediation including mediator selection and review.
Article 6 - Giving Advice and Mixing Roles
<ul style="list-style-type: none"> Mediators should not provide information they are not qualified by training and experience to provide. They should not undertake another dispute resolution role without consent of the parties.

Source: Adapted from Model Standards of Conduct for Mediators (Model Standards, 2005)

party surveys at the end of every mediation ordered. Results should be aggregated by the mediator, and parties should have access to this data in order to make an informed choice of mediator. While some mediators may question the relevance of the “misfits” described in this paper, the authors are convinced many parties would recognize them in a “mediator line-up.” Finally, the authors recommend, as is the case for virtually any public service, a mechanism for parties to report complaints and grievances concerning a mediation or mediator. Such information would be submitted to the court for oversight and potential action.

Despite its importance, only seven states had implemented a comprehensive mediator regulatory system when Paula Young at Appalachian School of Law released a 185-page report of her extensive research on the topic a decade ago (Young, 2006). Her report opened with the account of Clare Smith, who endured considerable abuse by both the mediator and her counsel in a divorce case in Kentucky. The state had no system for reporting abuse at the time. Smith’s cry for help appeared in a now infamous post on Findlaw.com. Two notable exceptions to this dismal track record in mediator regulation are programs developed by the International Mediation Institute (IMI) and the Equal Employment Opportunity Commission (EEOC). The IMI carefully vets, trains, certifies, and monitors its more than 400 mediators, with full client access to mediator evaluation and reviews by prior users (Love & Waldman, 2016, p. 144-45). Clients are well-informed and empowered for effective mediator selection, with full feedback on mediator performance. The organization receives high marks for mediator satisfaction. Mediators who do not meet IMI’s standards of conduct and performance are decertified. The EEOC has perhaps the best-developed mediation system in the world. From 1999 to 2018, the agency conducted more than 214,000 mediations involving more than \$2.5 billion in monetary benefits. It has perfected the art of facilitative mediation on a grand scale, with a settlement rate of 72%. In a major study led by E. Patrick McDermott, participants reported being particularly satisfied with the role and conduct of mediators, with 91% of charging parties and 96% of respondents indicating they would be willing to participate in mediation again if they were ever party to an EEOC charge (McDermott, Ichniowski, Perez, & Prather, 2018).

While they may be few in number, misfit mediators have a profound impact on parties who have the highest stake in mediation. The best way to reign in unscrupulous, misguided, or misfit mediators is with **Disclosure** (Party Bill of Rights), **Monitoring** (Party Exit Surveys), **Access** (Mediator Database), and **Reporting** (Complaint System). The ABA has begun to put some of these measures in place, but court officials and those responsible for mediation programs must close the loop by providing parties access to aggregated mediator data and an effective grievance/complaint reporting system. With these measures established, parties are empowered to participate in what may be THE most important mediation task—mediator selection. The authors acknowledge the value of additional mediator training and enhanced certification requirements as an indirect means to curb mediator misconduct, but this system is convoluted in an unregulated, unlicensed industry and is difficult to enforce. Without the accountability the authors recommend in disclosure and mediator assessment/regulation mandated by the courts, little may change.

VI. SUMMARY

The advent of caucused mediation as the dominant form of dispute resolution in civil cases puts parties in a precarious position. It is a breeding ground for undetected deception and misconduct. Without accountability, mediators may engage in various forms of misconduct. This paper provides a glimpse into this process. The nature and progression of misconduct in terms of frequency, severity, and focus was examined in the Continuum of Mediator Misconduct. Profiles of five misfit mediators one may encounter in mediation were highlighted in the Misfit Mediator Matrix. Each profile was further analyzed in the Typology of Misfit Mediators in terms of approach, assumptions, mediation and conflict style, and Model Standards violated. These models offer a rare look into an industry shrouded in secrecy. A detailed plan for addressing mediator misconduct was outlined in recommendations, including *Disclosure* (a Party Bill of Rights), *Monitoring* (party exit surveys), *Access* (a database of aggregated mediator data), and *Reporting* (a complaint/grievance reporting system). These actions, along with recent progress by the ABA Section of Dispute Resolution, will turn the tide in modern mediation to provide a “quality justice experience” (Model Surveys, 2016, p.1).

VII. SUCCESSFUL MEDIATION IN BUSINESS

While there is room to improve mediation through application of the models presented in this paper, there is little doubt that mediation has become a highly effective mechanism for conflict resolution. The significance of the process can be seen in the large number of cases in Texas and Oklahoma, the rapid growth in the number of cases in Nebraska, and the impressive settlement rates seen in the region. These impressive regional settlement rates are mirrored across the United States and internationally. Thus, the widespread use of mediation and its potential for cost-effective conflict resolution are well-established. Beyond the numbers, however, mediation’s success is also evident in the wide variety of cases settled, not to mention the many cases that do not reach full settlement yet narrow the differences to be subsequently resolved through arbitration or litigation. As shown in Table 5, successful mediation has occurred in a broad range of conflict situations, varying greatly in both the size and nature of the dispute. Cases range from massive personal injury claims against the National Football League to a dispute over manure odor on a farm. Table 5 also highlights the variety of issues involved in mediation, varying from suits over divorce, farm land, and dead rats to claims over residential power rates, auto repossession, and shipwrecks. Overall, the increasing volume, variety, and scope of mediation cases highlight its expanding role in business and society.

Table 5: Examples of Successful Mediation in Business

Cases Mediated by NYS Agricultural Mediation Program (2019)

- A dispute between a dairy farmer and his neighbor over odor connected with storage and spreading of manure. The battle over manure ended when the farmer agreed to give notice and change the timing of his manure spreading.
- A divorce mediation involving a family with three kids that operated a greenhouse and a farm stand business. The parents discovered that they could talk more calmly with their mediator. Both are now active with the kids and make plans without fighting.
- A farmer leased 200 acres to give his parents some income and security and subsequently fell into a debt crisis that became a family crisis. A mediator met with the family and the bank to restructure the debt. The farm is profitable and growing again.

Major Cases Mediated by JAMS (2019)

- Successfully mediated multiple cases involving claims of sexual abuse involving faculty, clergy and students in colleges, universities, primary and secondary schools, boarding schools and foster care.
- Settled claims of unfair, deceptive, and bad faith billing and pricing practices by a residential power company.
- Settled a consumer class action lawsuit claiming wrongdoing in bank repossession and resale of a large number of financed vehicles.
- Successfully mediated a series of personal injury claims brought by professional football players, including concussions, against various NFL teams.
- Settled a maritime dispute between ship owners and insurers over the cause of loss in a shipwreck, whether it was mechanical failure or human error.

Cases Mediated by MediateBC - British Columbia (2019)

- Two former restaurant partners suing over division of assets. Once the mediator explained the standard for admissible evidence, they realized how costly a trial would be and settled over the last bottle of wine.
- Mediated a contentious divorce in a family with a 15-year-old daughter and an 11-year-old son. The daughter wrote a letter begging the parents to stop fighting for the boy's sake. Not a dry eye in the house, including the lawyers and mediator. The parents went to lunch and settled immediately.
- Settled a small-claims court dispute in which the plaintiff claimed damages resulting from a rat infestation. Much to the mediator's surprise, the party brought a box to the mediation. Upon inspection, he realized it was Exhibit A, a box full of dead rats. The case settled quickly just to get the rats out of the room.

VIII. CONCLUSION

The success of mediation and its application across a spectrum of conflict situations has been noted, the problems posed by mediator misconduct in compulsory caucused mediation have been exposed, and several tools to help mediators and participants respond appropriately to ensure success in mediation have been supported. Business leaders can use these tools to avoid the pitfalls of mediator misconduct in compulsory mediation and to better prepare for the inevitability of mediation when a dispute or lawsuit arises. Mediation need not be a maddening process. It is most likely to succeed when participants detect and respond appropriately to the realities of mediator misconduct in compulsory mediation.

The volume, variety, and settlement rates of mediation cases suggest a bright future for this form of conflict resolution. With the use of mediation on the rise, it is more important than ever for business leaders to master skills necessary to take full advantage of the opportunities this process offers. Mediation is an effective tool when business leaders prepare for and navigate the process with a clear understanding of how to remove interpersonal barriers, thus ensuring more understanding, mutual respect, and open communication.

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ETHICS REVISITED: BASIC OBLIGATIONS AND PRO BONO BUYOUTS

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INTRODUCTION

Attorneys are bound by their oath of admission and by their state rules of professional conduct to serve society and the justice system in many ways. Recent studies have established a clear “Justice Gap” that can only be addressed by members of the Bar. Some states have attempted to deal with this problem through implementation of “buy-out” provisions allowing members of the bar to contribute a specified sum of money to a Legal Services organization in lieu of providing free legal services to those in need. The history of various the oaths of Admission and rules of professional conduct, the changes in the legal profession, and the legal needs of a large portion of our society dictate that immediate changes should be made by members of the Bar in order to adequately provide legal services to those who lack access to justice.

OATH OF ADMISSION

Attorneys take an oath of admission as a prerequisite to the issuance of a license to practice law in the state courts. The language of the oaths of admission vary widely from state to state. However, there are some commonalities among the language of these oaths that serve as a reminder of the obligations that attorneys must undertake in our society.³ One of the important obligations is the aspirational goal of providing pro bono legal services to those unable to afford counsel.

The oaths of admission in twenty-two (22)⁴ states specifically confirm that attorneys shall not delay any person’s cause for “lucre or malice.”⁵ Essentially, this means that attorneys are

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³ For a thorough discussion of the history of the oath taken by attorneys from 1237 to 1785, see Leonard S. Goodman, *The Historic Role of the Oath of Admission*, 11 AM. J. LEGAL HIST. 404 (1967) Goodman concludes at p. 411: “The oath of admission, whether sworn or affirmed, represents the lawyer’s first, if not his only, personal formulation of ethical standards. The oath today is often more symbolic than substantive; the shortened form preserves it as an anachronism. Its history, however, suggests that it could be revived to serve more truly and completely as the lawyer’s credo, which it has been for his profession from the earliest periods of English law.”; For another examination of the evolution of the oath of admission see, Carol Rice Andrews, *The Lawyer’s Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3 (2009).

⁴ For a comprehensive list of the oaths for each of the 50 states, see Appendix A.

⁵ Black’s Law Dictionary (10th ed. 2014), Bryan A. Garner, Editor in Chief. LUCRE (loo-kær) n. (14c) Monetary gain; profit. MALICE n. ...1. The intent, without justification or excuse, to commit a wrongful act. 2. Reckless disregard of the law or of a person’s legal rights. 3. Ill will; wickedness of heart. • This sense is most typical in

unable to refuse to represent a potential client solely due to their inability to pay. There are variations on this concept. Specifically, the Connecticut oath prohibits an attorney from obstructing any cause “for personal gain or malice”,⁶ the South Carolina oath prohibits delay for “profit or malice”,⁷ the Kansas oath states that the attorney shall “neither delay nor deny the rights of a person through malice, for lucre or from any unworthy desire”⁸ and the Washington oath reminds an attorney that they shall not delay unjustly the cause of any person.”⁹ All of these oaths, whether using the antiquated term “lucre” or more modern English, instruct attorneys to forgo payment if the sole reason to deny the representation is for personal gain.

These oaths confirm the adage “justice delayed is justice denied.”¹⁰ In a speech to the American Bar Association (ABA), Chief Justice Warren Burger stated, “A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; that people come to believe the law – in the larger sense – cannot fulfill its primary function to protect them and their families in their homes, at their work, and on the public streets.”¹¹ While criminal defendants are constitutionally entitled to the assistance of counsel, civil litigants have no parallel rights. The statistics on the “justice gap” highlights the unmet legal needs of low-income Americans. A 2017 study found that 86 percent of the civil legal problems of low-income Americans were inadequately assisted by counsel.¹² These problems can range from eviction to family law to bankruptcy – real-life problems that create massive disruption of an individual’s daily life. Yet, these often meritorious claims or defenses can go unaddressed, thus leading to a deepening of the socioeconomic impact.

nonlegal contexts. — Also termed (in sense 2) abandoned and malignant heart; abandoned heart; malignant and abandoned heart.

“Malice means in law wrongful intention. It includes any intent which the law deems wrongful, and which therefore serves as a ground of liability. Any act done with such an intent is, in the language of the law, malicious, and this legal usage has etymology in its favour. The Latin *malitia* means badness, physical or moral — wickedness in disposition or in conduct — not specifically or exclusively ill-will or malevolence; hence the malice of English law, including all forms of evil purpose, design, intent, or motive. [But] intent is of two kinds, being either immediate or ulterior, the ulterior intent being commonly distinguished as the motive. The term malice is applied in law to both these forms of intent, and the result is a somewhat puzzling ambiguity which requires careful notice. When we say that an act is done maliciously, we mean one of two distinct things. We mean either that it is done intentionally, or that it is done with some wrongful motive.” John Salmond, *Jurisprudence* 384 (Glanville L. Williams ed., 10th ed. 1947).

“[M]alice in the legal sense imports (1) the absence of all elements of justification, excuse or recognized mitigation, and (2) the presence of either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and wilful doing of an act with awareness of a plain and strong likelihood that such harm may result”.

⁶ Connecticut <https://www.jud.ct.gov/cbec/statutory.htm>.

⁷ South Carolina https://www.scbare.org/media/filer_public/6c/82/6c82017a-a0a5-416b-beae-03b2dc2bcf94/oath.pdf.

⁸ Kansas <http://www.kscourts.org/rules/Rule-Info.asp?r1=rules+relating+to+admission+of+attorneys&r2=390>.

⁹ Washington

https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=APR&ruleid=gaapr05.

¹⁰ Penn, William (1693), *Some Fruits of Solitude*, Headley, 1905, p. 86.

¹¹ Burger, “What’s Wrong With the Courts: The Chief Justice Speaks Out”, *U.S. News & World Report* (vol. 69, No. 8, Aug. 24, 1970) 68, 71 (address to ABA meeting, Aug. 10, 1970).

¹² Legal Services Corporation, 2017 Justice Gap Report, <https://www.lsc.gov/media-center/publications/2017-justice-gap-report>.

This obligation to maintain confidence in the judicial system through providing access to justice seems to fall squarely upon the shoulders of attorneys via the oath of admission. However, not all oaths provide clear direction in this regard and even for those that do, its enforceability is questionable.

There are seventeen (17) states which refer specifically to the needs of those who lack access to justice. Thirteen (13) of these states specifically mandate that an attorney shall “never reject the cause of the defenseless or oppressed.”¹³ A Westlaw search for disciplinary actions in all states based on this language of the oath returned zero results. These oaths indicate that the cause of the impoverished, defenseless, oppressed or those who cannot afford adequate legal assistance may not be rejected by an attorney based upon any “personal considerations.” However, it is clear that the oaths’ call for pro bono assistance is not being taken seriously by either the bar associations or the members of the bar. The lack of any enforcement mechanism indicates that the language in the oaths is advisory at best and wholly ignored at worst.

The specific language used in each state varies, but the majority refer to the need to provide legal representation for those unable to afford counsel or adequate legal assistance,¹⁴ to give “due consideration to the legal needs of those without access to justice”,¹⁵ and to ensure that “justice is available to all citizens.”¹⁶ Some states also note a specific obligation to act for the betterment of society, to improve the administration of justice, and to support professionalism among lawyers.¹⁷

RULES OF PROFESSIONAL RESPONSIBILITY

Although the oath of admission in some states may not specifically mention an obligation to provide legal services to those without meaningful access to justice, all states encourage

¹³ These states include the following:

Arkansas, <https://www.arcourts.gov/rules-and-administrative-orders/court-rules/rule-vii-application-license>;

Colorado, <https://www.cobar.org/For-Members/Committees/Professionalism-Coordinating-Council>;

Florida, <http://www.jud10.flcourts.org/sites/default/files/docs/LunchAndLearn/OathOfAdmissionToTFB.pdf>;

Idaho, https://isb.idaho.gov/wp-content/uploads/ibcr_sec02_admissions.pdf;

Indiana, <https://www.in.gov/judiciary/files/rule-amends-2004-0904-admis-disc.pdf>;

Louisiana, <http://files.lsba.org/documents/PracticeAidGuide2/S0807TheLawyersOathPDF.pdf>;

Michigan, <https://www.michbar.org/generalinfo/lawyersoath>;

New Mexico, http://www.nmcompcomm.us/nmrules/NMRules/15-304_3-30-2010.pdf;

Ohio, <http://www.supremecourt.ohio.gov/AttySvcs/admissions/affidavit.pdf>;

South Dakota, <https://ujs.sd.gov/Information/oath.aspx>;

Washington, https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=APR&ruleid=gaapr05

Wisconsin, <https://docs.legis.wisconsin.gov/misc/scr/40/15>

¹⁴ Arizona, <https://www.azbar.org/membership/admissions/oathofadmission>;

Indiana, <https://www.in.gov/judiciary/files/rule-amends-2004-0904-admis-disc.pdf>; Iowa.

¹⁵ Hawaii, http://www.courts.state.hi.us/docs/court_rules/rules/rsch.htm.

¹⁶ South Carolina, https://www.sctbar.org/media/filer_public/6c/82/6c82017a-a0a5-416b-beae-03b2dc2bcf94/oath.pdf

¹⁷ Arkansas, <https://www.arcourts.gov/rules-and-administrative-orders/court-rules/rule-vii-application-license>;

Arizona, <https://www.azbar.org/membership/admissions/oathofadmission>;

Colorado, <https://www.cobar.org/For-Members/Committees/Professionalism-Coordinating-Council>.

attorneys to provide voluntary pro bono services via the state rules of professional responsibility or professional conduct.¹⁸ Unlike some oaths of admission, however, the Rules of Professional Conduct merely encourage rather than mandate pro bono representation. The most recent report issued by the ABA's Standing Committee on Pro Bono and Public Service reported that almost 20% of attorneys provided at least 50 hours of pro bono service in 2016, providing an average of 36.9 hours of pro bono services. However, approximately one (1) out of five (5) attorneys has never undertaken pro bono service of any kind.¹⁹ Many of these attorneys undoubtedly live in states that mandate representation of the indigent through the oaths, yet continue to accept only paying clients.

Federal and state courts have spoken to the issue, stating, "...The obligation of counsel to serve indigents is an ancient and established tradition of the legal profession"²⁰ and, "...one who is allowed the privilege to practice law accepts a professional obligation to defend the poor."²¹ While this is particularly applicable in cases involving risk to the Constitutional rights of individual citizens in criminal matters, it is also a consideration in the representation of those who have basic legal needs yet no way to afford the current cost of securing legal representation in civil matters. Yet courts have not gone so far as to elevate this "established tradition" or "professional obligation" to anything more than a platitude. Courts and the state bars instead rely upon the good nature of the attorney to fulfill this obligation.

The Florida Supreme Court remarked that, "When appointment of counsel is desirable but not constitutionally required, the judge should use all available legal aid services, and when these services are unavailable, he should request private counsel to provide the necessary services. Under these circumstances, no compensation is available, and the services are part of the lawyer's historical professional responsibility to represent the poor."²² That case, *In re D.B.*, was decided in 1980 and no groundswell of change has occurred as result of that Court's decision. But, as Justice Thurgood Marshall observed, "One of the most important ideals of the legal profession is that all persons and groups should be able to receive competent representation in the legal process."²³ The New Jersey Supreme Court in *State v. Rush* has aptly stated the basis for the ideal: "The duty to defend the indigent without charge is not a personal duty in the conventional sense of an obligation owed by one man to another, for the breach or nonperformance of which that other is entitled to dollar or other relief. A lawyer does not owe free representation to any and every indigent who chooses to demand it of him. Rather the duty is owed to the Court, and it is the Court's call that he is obliged to answer. The duty is to assist the Court in the business before it. The duty thus is an incident of the license to practice law."²⁴

This is an interesting approach to the pro bono obligation – the Court in *Rush* essentially envisions a duty to represent civil litigants equal to the Constitutional rights for criminal

¹⁸ See Appendix B for each of the 50 states.

¹⁹ "Supporting Justice: A Report on the Pro Bono Work of America's Lawyers." American Bar Association, April 2018. https://www.americanbar.org/groups/probono_public_service/research_pro_bono.

²⁰ *U.S. v. Dillon*, 346 F.2d 633 (9th Cir. 1965).

²¹ *In re D.B.*, 385 So. 2d 83, 92 (Fla. 1980).

²² *Id.*

²³ Thurgood Marshall, Financing Public Interest Law Practice: The Role of the Organized Bar, 61 A.B.A.J. 1487, 1487 (Dec. 1975).

²⁴ *State v. Rush*, 46 N.J. 399, 410, 217 A.2d 441, 447 (1966).

defendants. In criminal cases, judges commonly appoint counsel (even those who are untrained in criminal law) to represent the indigent. Failure to appear could give rise to contempt, and the Court in *Rush* anticipates a similar role for indigent civil litigants. Once again, however, this plea for assistance has roundly fallen on deaf ears, given the inability or unwillingness to view the promise in the oath of admission as a mandatory “incident of the license to practice law.”

PRO BONO OBLIGATIONS

The ABA has placed particular emphasis on the duties of attorneys to provide free legal representation. In 1969, the ABA revised the Code of Professional Responsibility which addressed, for the first time, the responsibility of a lawyer to engage in pro bono work.²⁵ In 1975, the ABA House of Delegates adopted a resolution which formally acknowledged “the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services.”²⁶ In 1983, the ABA adopted Model Rule 6.1 which states that a lawyer “should render public interest legal service.” This Model Rule provided that a lawyer could discharge the responsibility “by service in activities for improving the law, the legal system or the legal profession and by financial support to organizations that provide legal services to persons of limited means.”²⁷

In 1988, the ABA adopted the “Toronto Resolution” which resolved to recognize and support “the professional obligation of all attorneys to devote a reasonable amount of time, but in no event less than 50 hours per year to pro bono and other public service activities that serve those in need or improve the law, the legal system or the legal profession.”²⁸ ABA Model Rule 6.1 was amended in 1993 to clarify that the aspirational goal of 50 hours per year should be achieved through the provision of legal services to low-income people and groups that serve low-income people.²⁹ In 2002, Model Rule 6.1 was revised to add a sentence at the beginning of the Rule to highlight the importance of the proposition that every lawyer has a professional responsibility to provide legal services to persons unable to pay.³⁰ Of course, none of these Model Rules have any binding effect on the practice of law; instead, the ABA relies on the attorney’s sense of moral duty to encourage compliance.

PRO BONO HOURS AND BUY-OUT PROVISIONS

Currently, thirty-one (31) states and the District of Columbia have identified a specific number of hours of pro bono services that attorneys should provide each year, generally, between

²⁵ “Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged.” ABA Ethical Consideration 2-25.

²⁶ “The Montreal Resolution” defined pro bono in part by specifying areas in which the services should be rendered, namely: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. Appendix B, Development of ABA Model Rule 6.1: Historical Timeline.

²⁷ Appendix B, Development of ABA Model Rule 6.1: Historical Timeline.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

twenty (20) and fifty (50) hours per year.³¹ There are twenty (20) states which have no specific number of pro bono hours identified as a goal.³²

Some states encourage attorneys to make financial contributions to legal services organizations as an alternative to providing the specified number of hours but do not specify an amount.³³ There are ten (10) states which provide a “pro bono buyout” provision.³⁴ In lieu of providing the suggested number of pro bono hours, an attorney may contribute a specified amount of money that will satisfy this professional obligation. These range anywhere from \$250 to \$750 per year. However, forty-one (41) states have not quantified a financial contribution that attorneys should make to support access to justice.³⁵

The first buy-out provision was implemented by Florida in 1993 followed by Mississippi (1996), New Mexico (1997) and Massachusetts (1999).³⁶ Subsequently, six (6) additional states implemented a specific dollar amount for the buy-out of pro bono hours.³⁷ The dollar amounts of these buy-outs have not changed since the dates the amounts were originally implemented notwithstanding any increase in the billable hour rate of attorneys, the inflationary rate, or the increased attention of “The Justice Gap.” While an attorney’s time is more valuable to the public than a set dollar amount, any move in the direction towards assisting low-income litigants is an important step.

LEGAL SERVICES CORPORATION AND “THE JUSTICE GAP”

During the 1970’s, the legal needs of the poor became a concern to Congress. In 1974, the Legal Services Corporation was formed by Congress to ensure equal access to justice for all Americans by providing civil legal assistance to those who otherwise would be unable to afford it.³⁸ As of 2017, there were 133 legal aid organizations funded by Legal Services Corporation

³¹ See Appendix C.

³² See Appendix D.

³³ Kentucky [https://cdn.ymaws.com/www.kybar.org/resource/resmgr/SCR3/SCR_3.130_\(6.1\).pdf](https://cdn.ymaws.com/www.kybar.org/resource/resmgr/SCR3/SCR_3.130_(6.1).pdf);

Montana

https://cdn.ymaws.com/www.montanabar.org/resource/resmgr/attorney_rules_and_regulations/rules_of_professiona_l_conduc.pdf;

Oregon https://www.osbar.org/_docs/probono/policy/ProBonoPolicyHandbook.pdf;

Virginia <http://www.vsb.org/pro-guidelines/index.php/rules/public-service/rule6-1/>;

Washington https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garp6.1.

³⁴ District of Columbia \$750.00 or 1% of income; Florida \$350.00; Hawaii \$500.00; Massachusetts \$250 to 1% of annual taxable professional income; Michigan \$300.00-\$500.00, “if income allows”; Mississippi \$200.00; Nevada \$500.00; New Mexico \$500.00; Utah \$10.00 for each hour not provided; Wyoming \$500.00.

³⁵ See Appendix E.

³⁶ Florida \$350.00 (1993); Mississippi \$200.00 (1996); New Mexico \$500.00 (1997); Massachusetts \$250 to 1% of annual taxable professional income (1999).

³⁷ Nevada \$500.00 (2006); Utah \$10.00 for each hour not provided (2005); Wyoming \$500.00 (2006); District of Columbia \$750.00 or 1% of income (2007); Hawaii \$500.00 (2012); Michigan \$300.00-\$500.00, “if income allows” (2012).

³⁸ History of Legal Services Corporation, <https://www.lsc.gov/about-lsc/who-we-are/history>. “LSC is the single largest funder of civil legal aid for low-income Americans in the nation. Established in 1974, LSC operates as an independent 501(c)(3) nonprofit corporation that promotes equal access to justice and provides grants for high-quality civil legal assistance to low-income Americans.” The Legal Services Act governs the activities of the organization. . <https://www.lsc.gov/about-lsc/laws-regulations-guidance/lsc-act> LSC is funded by contributions

across the United States, Puerto Rico and the U.S. Territories, which serve an estimated one million low-income Americans.³⁹

The 2017 report of the Legal Services Corporation, “The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans”, had several major findings.⁴⁰ First, 71% of low-income households experienced at least one civil legal problem in the last year, including problems with health care, housing conditions, disability access, veterans’ benefits, and domestic violence. That number is staggering. More than two-thirds of low-income individuals had a litigation-related concern in a single year. A person who fails to adequately assert their rights to disability benefits, for example, can experience devastating financial ramifications. Even if only a minority of these claims are meritorious, those that are viable but are not advanced by counsel can fall by the wayside and impact a person’s life indefinitely.

The limited resources of Legal Services organizations can only be stretched so far to meet these needs. Low-income Americans approach LSC-funded legal aid organizations for support with an estimated 1.7 million problems.⁴¹ They will receive only limited or no legal help for more than half of these problems due to a lack of resources. Although Legal Services organizations are making an impact, the truth is that they are only able to make a dent in the overall needs of these underserved communities. More needs to be done.

The “Justice Gap” is defined as the difference between the civil legal needs of low-income Americans and the resources available to meet those needs. Nationally, more than 60 million Americans have family incomes that are equal to or below 125% of the Federal Poverty Level.⁴² One in four (25%) of low-income households has experienced six (6) or more civil legal problems in the past year. However, low-income Americans seek legal assistance for only 20% of the civil legal problems they face.⁴³ Undoubtedly, part of the disconnect attributed to the Justice Gap arises from the simple inability to find free or low-cost legal representation.

Associate Justice of the Supreme Court of California Goodwin Liu was the keynote speaker at the National Meeting of State Access to Justice Commission Chairs. This meeting was held in conjunction with the ABA Equal Justice Conference in San Diego in May 2018. He noted that legal aid lawyers are estimated to provide just 1 percent of the total legal needs in the

from the federal, state and local governments, IOLTA (Interest on Lawyer Trust Accounts) programs, private foundations and private donations. “Since 2013, federal FSC funding has represented less than 40% of the total funding LSC grantees receive each year.” <https://www.lsc.gov/lsc-irs-form-990-returns>

³⁹ The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans <https://www.lsc.gov/justicegap2017>.

⁴⁰ Legal Services Corporation, 2017 Justice Gap Report, <https://www.lsc.gov/media-center/publications/2017-justice-gap-report>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* The executive summary states, “7 in 10 low-income Americans with recent personal experience of a civil legal problem say a problem has significantly affected their lives.” ABA Access to Justice Commission Needs Assessments and Impact Studies.

https://www.americanbar.org/groups/legal_aid_indigent_defendants/resource_center_for_access_to_justice/atj-commissions/atj_commission_self-assessment_materials1/studies/.

United States each year.⁴⁴ “No wonder the majority of our low-income population don’t bother to seek a lawyer when they have a legal problem,” Liu said. “Even if we asked every lawyer in America to do 100 more hours of pro bono work a year, all of that additional work would be enough to secure only 30 minutes per problem per household in America.”⁴⁵ Even so, 30 minutes per problem is better than what we have now, and any increase in the availability of legal representation is better for both individual clients and society as a whole.

RECOMMENDATIONS

In a 1999 article, Donald Patrick Harris stated, “Getting past the rhetoric, the arguments come down to the following: proponents of mandatory pro bono contend lawyers have an obligation to serve the public and the legal system while opponents emphasize a lawyer's right to choose to “succeed” by maximizing her income if she so chooses.”⁴⁶ However, the current state-by-state approaches to this conundrum do not address the legal needs of a substantial segment of our society. Justice Thurgood Marshall succinctly stated the two potential roles for lawyers: “You either work to improve society, or you become a parasite on it.”⁴⁷ Lawyers should accept that achieving success in society encompasses providing public service.

It appears that achieving equitable access to our justice system for all members of our society will be difficult. At best as it appears that the use of moral persuasion and legislative coercion has thus far been unsuccessful. As one scholar noted, “The sovereign has on the one hand given an individual, purportedly as an incident of his citizenship, the privilege to go to court to adjudicate a specific claim, it should not allow that privilege to be effectively abrogated in the case of indigent litigants by lack of adequate legal assistance.”⁴⁸ The discussion of “mandatory pro bono has been addressed ad nauseum since the 1980’s.”⁴⁹ Clearly, mandatory pro

⁴⁴ Associate Justice of the Supreme Court of California Goodwin Liu, the keynote speaker at the National Meeting of State Access to Justice Commission Chairs, held in conjunction with the ABA Equal Justice Conference in San Diego in May 2018. Also see, the ABA Journal and its “3 ways to meet the “staggering” amount of unmet legal needs”, June 26, 2018. <https://www.americanbar.org/news/abanews/publications/youraba/2018/july-2018/3-ways-to-meet-the-staggering-amount-of-unmet-legal-needs/>.

⁴⁵ *Id.*

⁴⁶ Donald Patrick Harris, *Let's Make Lawyers Happy: Advocating Mandatory Pro Bono*, 19 N. ILL. U. L. REV. 287, 288 (1999). “This article hopes to make clear that there should be no conflict between the potential for a legal career to provide a livelihood and the potential to provide a meaningful life using legal skills as an expression of our connection to fellow humans... This paper proposes that the legal profession should redefine success to include service to others.”

⁴⁷ Glen Darbyshire, *Clerking for Justice Marshall*, reprinted in ROGER GOLDMAN & DAVID GALEN, THURGOOD MARSHAL.: JUSTICE FOR ALL 179 (1992) (quoting Justice Thurgood Marshall).

⁴⁸ Alan Jay Stein, *The Indigent's Right to Counsel in Civil Cases*, 43 FORDHAM L. REV. 989, 1009 (1975).

⁴⁹ Steven B. Rosenfeld, *Mandatory Pro Bono: Historical And Constitutional Perspectives*, 2 CARDOZO L. REV. 255, 255 (1981); Lisa S. Tudzin, *Pro Bono Work: Should It Be Mandatory Or Voluntary?*, 12 J. LEGAL PROF. 103, 109 (1987); Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113, 1119 (1991); Michael Millemanna, *Symposium: Mandatory Pro Bono in Maryland*, 49 MD. L. REV. 18 (1990); Robert Granfield, *A Serendipitous Symposium: Two Issues Confronting the Legal Profession*, 41 LAW & SOC'Y REV. 113 (2007); Philip P. Houlea, *Is Mandatory Uncompensated Prop Bono in Civil Cases Constitutional?*, 3-JUN Nev. Law. 20 (1995); Deborah L. Rhode, *Special Issue Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues Proceedings of the Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues*, 67 FORDHAM L. REV. 2415 (1999); Kendra Emi Nittaa, *An Ethical Evaluation of Mandatory Pro Bono*, 29 LOY. L.A. L. REV. 909 (1996); Katja Cerovseka and Kathleen Kerra, *Opening the Doors to Justice: Overcoming the Problem of Inadequate Representation for the Indigent*, 17 GEO. J. LEGAL ETHICS 697

bono will not provide a solution to the problem without an effective and efficient enforcement mechanism that heretofore courts and bar associations have been unwilling to implement. The requirement is present in the oaths of admissions' emphasis on refusing to accept clients solely for personal gain. These mandates in the oath are largely being ignored, and unless and until continued licensure becomes dependent upon pro bono representation, the state of affairs will not change.

And, the state of affairs should change. Attorneys cannot legitimately make the argument that it is unfair to require pro bono work. The oath of admission is not secret – all those who wish to enter the practice of law are sworn, before ever practicing, to help the needy. A newly minted law school graduate who is averse to working for free should simply refrain from applying for and accepting a license to practice law. The license to practice law carries with it a wide array of professional obligations that are not present with other professions. This is no different, and the fact that attorneys give an oath before practicing law should be all the leverage bar associations need to mandate a certain threshold of pro bono representation.

While some may counter that mandatory pro bono obligations are not feasible, unreasonable, or too restrictive, none are so compelling to override the core need to close the Justice Gap. A common complaint is that some attorneys may feel that an increased pro bono practice would disproportionately impact their ability to earn income or would detriment their current, paying clients. Specifically, one author has referred to mandatory pro bono as a “tax” on the right to practice law, and that tax is particularly burdensome on younger lawyers.⁵⁰ Mr. Rotunda argues that older, more experienced attorneys can simply delegate their pro bono obligations to fresh associates, while solo attorneys are not afforded the same luxury.⁵¹

It is obviously true that lawyers who work cases for free will see their earning capacities diminish slightly. But, even if the number of hours required were 100 per year, this would only amount to five percent of the overall hours worked, assuming a conservative number of 2,000 hours per year worked. This is a small price to pay considering the massive public service need existing in our underserved communities. As will be seen below, those who make less can buy-out their pro bono obligations more cheaply, thus mitigating the financial impact of these obligations. However, Mr. Rotunda raises a valid point concerning the disproportionate impact of pro bono obligations on younger attorneys, given that their practices are likely to be smaller and more susceptible to small fluctuations in incoming cash flow. For that reason, it is entirely reasonable to place a moratorium on pro bono obligations until the attorney has at least 3-5 years of practicing experience.

Additionally, some may argue that pro bono obligations are difficult to predict and may take the attorney outside their zone of expertise. For example, a client initially seeking a dissolution of marriage may appear to be a fairly straightforward case for the average family law

(2004); Talbot D'Alemberte, *Tributaries of Justice: The Search for Full Access*, 25 FLA. ST. U. L. REV. 631 (1998); Debra D. Burkea, George W. Mechling, and James W. Pearce, *Mandatory Pro Bono: Cui Bono?*, 25 STETSON L. REV. 983 (1996); Kellie Isbella and Sarah Sawle, *Pro Bono Publico: Voluntary Service and Mandatory Reporting*, 15 GEO. J. LEGAL ETHICS 845 (2002).

⁵⁰ Ronald D. Rotunda, *Forcing Lawyers to Perform Pro Bono Services*, VERDICT, JULY 18, 2016, <https://verdict.justia.com/2016/07/18/forcing-lawyers-perform-pro-bono-services>.

⁵¹ *Id.*

attorney. But, it is certainly possible that the client has a series of complicated trusts that must be administered and considered, and this may be outside the attorney's area of competence. On the surface, it might seem that the attorney must now spend an inordinate and unduly burdensome amount of time, and far more than anticipated, becoming competent in trust law.

However, this can easily be addressed with straightforward and flexible law office management. Once the attorney realizes that a particular case will be more time-consuming than first anticipated, the attorney should simply stop taking new pro bono cases to compensate for the increase in time allotted. Eventually, the imbalance will correct itself when no new cases are opened. For this reason, pro bono obligations should be modeled around some jurisdiction's Continuing Legal Education (CLE) requirements that require a certain number of hours over a multi-year period.⁵² Further, attorneys can make robust inquiries into their clients' matter at the initial client consultation to ensure the scope of the representation remains within the attorney's subject matter expertise. Understandably, pro bono representation may occasionally impact an attorney's workload, perhaps even at the expense of the attorney's personal life, but maintaining strict control and oversight over the pro bono caseload should prevent any such disruption from becoming long-term or chronic.

The reality is that pro bono representation is simply too important for attorneys to ignore or to pass off to others. Even if there is some impact to profitability and time, the advantages to those with unmet needs far surpass any disadvantages. Admittedly, it appears that this commitment to enforcing pro bono obligations is unlikely to materialize anytime in the near future. In the meantime, the problem of insufficient pro bono representation could be addressed, at least partially, by taking two steps:

First, each state could increase the number of suggested aspirational pro bono hours of service that members of the bar should provide. The amounts currently suggested are woefully inadequate if bar associations want to seriously address the unmet legal needs of low income individuals. A good start would be to uniformly suggest a nationwide minimum of 100 pro bono hours per year. In many states, this would be a doubling of the current aspirational goals and would signal a real commitment to tackling this societal problem.

Second, states could increase the amount of buy-out that attorneys should contribute in lieu of providing the minimum pro bono hours order to relieve themselves of fulfilling this professional duty to society as a privilege of the practice of law. The current amounts generally accepted do not accurately reflect the true value of attorney representation. The hourly rate charged by attorneys for legal services in the United States is dependent upon many factors including the size and prestige of a firm, the area of law being done, the experience of the lawyer and the geographic area.⁵³

⁵²See generally THE FLORIDA BAR, *Frequently Asked Questions about CLE Requirements*, <https://www.floridabar.org/member/cle/cle-faq> (noting that attorneys must complete 33 hours of CLE over a span of three years).

⁵³How Much Lawyers Cost: 5 Factors That Affect Lawyers' Rates, <http://blog.lawkick.com/how-much-lawyers-cost/>, December 27, 2018.

The amount of the buyout could be contingent on the individual attorney's hourly rate and overall revenue. A conservative estimate of average hourly rates range \$150-\$500 per hour.⁵⁴ If current buy-out rates are revised to be consistent with conservative average hourly rates charged by attorneys, then the cost to discharge the pro bono hours suggested should anywhere be \$3,000.00-\$25,000.00 per year.⁵⁵ This amount far exceeds the current buy-out rates of \$200.00-\$750.00.⁵⁶ Attorneys each year should be tasked with estimating the value of 100 hours of their time, based upon their prevailing rate that year, and forward that amount to the bar association in lieu of pro bono work. Once again, this would send a signal to the bar that pro bono volunteerism is valued and important. Further, drastically increasing the amount of the buy-out commensurate with the attorney's billable rates would incentivize attorneys to engage in pro bono work rather than pay for the right to escape it.

Third, incentives should be implemented to encourage attorneys to provide pro bono representation. Reaching certain thresholds of pro bono representation should lead to tangible benefits that attorneys can use to justify increased pro bono hours. For example, states could offer credit towards CLE hours for attaining certain benchmarks of pro bono hours. One possibility would be to reduce the total number of CLE hours required by five percent for 50 hours, ten percent for 100 hours, and twenty percent for 200 hours. However, this would not serve the purpose of and need for mandatory CLE. Another option would be to reduce the registration fees associated with CLE programs based on the number of pro bono hours. A third incentive could give attorneys a similar offset in the amount of their annual state bar fees for reaching certain benchmarks. If an attorney reaches the same benchmarks mentioned above, their corresponding fees to be paid would reduce by the same percentages. This has the added benefit of having the state show its commit to pro bono representation by decreasing the fees it generates.

⁵⁴ See generally How, and How Much Do Lawyers Charge, <https://www.lawyers.com/legal-info/research/how-and-how-much-do-lawyers-charge.html>; Trends in Hourly Rates for Attorneys Across the United States, <http://www.virtualparalegalservices.com/blog-entries/trends-in-hourly-rates-for-attorneys-across-the-united-states/>; Top 10 Lawyer Hourly Rates by City, <https://www.lawyersmutualinc.com/blog/top-10-lawyer-hourly-rates-by-city/>; Top Partner Billing Rates at BigLaw Firms Approach \$1,500 Per Hour, http://www.abajournal.com/news/article/top_partner_billing_rates_at_biglaw_firms_nudge_1500_per_hour/; Average Hourly Billing Rate for Partners Last Year was \$727 in Largest Law Firms, http://www.abajournal.com/news/article/average_hourly_billing_rate_for_partners_last_year_was_727_in_largest_law_firms/; What Hourly Rate Should I Expect When Hiring a Lawyer?, https://blogs.findlaw.com/law_and_life/2016/04/what-hourly-rate-should-i-expect-when-hiring-a-lawyer.html.

⁵⁵ Current conservative estimate of average hourly rates charged by attorneys \$150-\$500 per hour. In states which set a specific annual number of pro bono hours, between 20 to 50 hours of suggested voluntary pro bono services are specified.

⁵⁶ Florida (\$350.00):

<http://www.jud10.flcourts.org/sites/default/files/docs/LunchAndLearn/OathOfAdmissionToTFB.pdf>;

Hawaii (\$500.00): http://www.courts.state.hi.us/docs/court_rules/rules/rsch.htm;

Massachusetts (\$250.00): <https://malegislature.gov/Laws/GeneralLaws/PartIII/TitleI/Chapter221/Section38>;

Michigan (\$300.00-\$500.00): <https://www.michbar.org/generalinfo/lawyersoath>;

Mississippi (\$200.00): <https://law.justia.com/codes/mississippi/2013/title-73/chapter-3/article-1/section-73-3-35>;

Nevada (up to \$500.00): <https://www.leg.state.nv.us/Const/NVConst.html>;

New Mexico (\$350.00): http://www.nmcompcomm.us/nmrules/NMRules/15-304_3-30-2010.pdf;

Wyoming (\$500.00): https://www.courts.state.wy.us/wp-content/uploads/2017/06/praclaw_2015060300.pdf.

CONCLUSION

Pro Bono representation is vital to meet the needs of under privileged and low-income individuals. Legal Services and other governmental programs are underfunded and are incapable of serving all those who need representation. Attorneys, on the other hand, are required to take an oath to refrain from refusing cases solely because of a lack of profit; however, this oath has not been enforced on individual attorneys.

A change is needed to give individuals the legal help they need. First, the courts or bar associations could mandate a certain number of hours of pro bono work as a condition of continued licensure. Or, in the alternative, a smaller step towards tackling this problem is to increase the amount of the pro bono buy-out to accurately reflect the value of attorney time. Without some external force driving attorneys towards increased pro bono participation, the unmet needs of the public will continue to grow.

APPENDIX A

Alabama <https://www.alabar.org/assets/uploads/2015/03/WEBSITE-Oath-of-Office.pdf>
Connecticut <https://www.jud.ct.gov/cbec/statutory.htm>
Delaware <https://courts.delaware.gov/rules/pdf/SupremeAmendedRule55.pdf>
Florida <http://www.jud10.flcourts.org/sites/default/files/docs/LunchAndLearn/OathOfAdmissionToTFB.pdf>
Kansas <http://www.kscourts.org/rules/Rule-Info.asp?r1=rules+relating+to+admission+of+attorneys&r2=390>
Louisiana <http://files.lsba.org/documents/PracticeAidGuide2/S0807TheLawyersOathPDF.pdf>
Maine <http://legislature.maine.gov/statutes/4/title4sec806.html>
Massachusetts <https://malegislature.gov/Laws/GeneralLaws/PartIII/TitleI/Chapter221/Section38>
Michigan <https://www.michbar.org/generalinfo/lawyersoath>
Minnesota <https://www.revisor.mn.gov/statutes/cite/358.07>
Mississippi <https://law.justia.com/codes/mississippi/2013/title-73/chapter-3/article-1/section-73-3-35/>
New Hampshire <https://law.justia.com/codes/new-hampshire/2015/title-xxx/chapter-311/section-311-6/>
New Mexico http://www.nmcompcomm.us/nmrules/NMRules/15-304_3-30-2010.pdf
Ohio <http://www.supremecourt.ohio.gov/AttySvcs/admissions/affidavit.pdf>
Oklahoma <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=64829>
Pennsylvania <https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=42&div=0&chpt=25>
Rhode Island <https://www.courts.ri.gov/Courts/SupremeCourt/Supreme%20Court%20Rules/AdmissionBar-ArticleII.pdf>
South Carolina https://www.sctbar.org/media/filer_public/6c/82/6c82017a-a0a5-416b-beae-03b2dc2bcf94/oath.pdf
South Dakota <https://ujs.sd.gov/Information/oath.aspx>
Vermont <https://legislature.vermont.gov/statutes/fullchapter/12/211>
Washington https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=APR&ruleid=gaapr05
Wisconsin <https://docs.legis.wisconsin.gov/misc/scr/40/15>

APPENDIX B

Alabama, http://judicial.alabama.gov/docs/library/rules/cond6_1.pdf;

Alaska, <https://public.courts.alaska.gov/web/rules/docs/prof.pdf>;

Arizona, <https://www.azbar.org/Ethics/RulesofProfessionalConduct/ViewRule?id=15>;

Arkansas, https://www.arcourts.gov/rules-and-administrative-orders/%5Bcurrent%5D-arkansas-rules-of-professional-conduct?body_value_op=contains&body_value=pro+bono&=Search;

California, <http://www.calbar.ca.gov/Access-to-Justice/Pro-Bono/Pro-Bono-FAQ>;

Colorado, <https://www.cobar.org/For-Members/Opinions-Rules-Statutes/Rules-of-Professional-Conduct/Rule-61-Voluntary-Pro-Bono-Publico-Service>;

Connecticut, <https://www.jud.ct.gov/Publications/PracticeBook/PB.pdf>;

Delaware, <https://courts.delaware.gov/rules/pdf/DLRPC-LN.pdf>;

Florida, https://www.floridabar.org/wp-content/uploads/2018/10/2019_04-Oct-12-2018-RRTFB.pdf;

Georgia, <https://www.gabar.org/Handbook/index.cfm#handbook/rule140>;

Hawaii, http://www.courts.state.hi.us/docs/court_rules/rules/hrpcond.htm#Rule_6.1;

Idaho, <https://isb.idaho.gov/wp-content/uploads/irpc.pdf>;

Illinois, http://www.illinoiscourts.gov/supremecourt/Rules/Art_VII/artVII.htm#Rule756;

Indiana, https://www.in.gov/judiciary/rules/prof_conduct/;

Iowa, <https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/12-31-2012.32.pdf>;

Kansas, <http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+Discipline+of+Attorneys&r2=14>;

Kentucky, [https://cdn.ymaws.com/www.kybar.org/resource/resmgr/SCR3/SCR_3.130_\(6.1\).pdf](https://cdn.ymaws.com/www.kybar.org/resource/resmgr/SCR3/SCR_3.130_(6.1).pdf);

Louisiana, <https://www.lsba.org/ProBono/ProBonoVoluntaryReporting.aspx>;

Maine, http://mebaroverseers.org/regulation/bar_rules.html?id=88254;

Maryland, <https://mdcourts.gov/probono/faqs>;

Massachusetts, <https://www.mass.gov/supreme-judicial-court-rules/rules-of-professional-conduct-rule-61-voluntary-pro-bono-publico>;

Michigan, <https://www.michbar.org/programs/atj/voluntarystds>;

Minnesota, https://www.revisor.mn.gov/court_rules/pr/subtype/cond/id/6.1/;

Mississippi, <https://courts.ms.gov/Images/OPINIONS/122099.PDF>;

Missouri, <https://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/384af6c9c3fd86256ca600521254?OpenDocument>;

Montana, https://cdn.ymaws.com/www.montanabar.org/resource/resmgr/attorney_rules_and_regulations/rules_of_professional_conduc.pdf;

Nebraska, <https://supremecourt.nebraska.gov/supreme-court-rules/chapter-3-attorneys-and-practice-law/article-5-nebraska-rules-professional-51>;

Nevada, <https://www.leg.state.nv.us/CourtRules/RPC.html>;

New Hampshire, https://www.courts.state.nh.us/rules/pcon/pcon-6_1.htm;

New Jersey, <https://www.njcourts.gov/attorneys/assets/probono/probonofaq.pdf?cacheID=dbM7gjk>;

New Mexico, <https://www.nmbar.org/NmbarDocs/forMembers/Mentorship/Resources/Resource06.pdf>;

New York, <http://www.nycourts.gov/RULES/jointappellate/Rule6.1.pdf>;

North Carolina, <https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-61-voluntary-pro-bono-publico-service/>;

North Dakota, <http://www.ndcourts.gov/rules/conduct/frameset.htm>;

Ohio, <http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf>;

Oklahoma, <http://ccbamembers.com/wp-content/uploads/2017/05/Oklahoma-Rules-of-Professional-Conduct.pdf>;

Oregon, <https://www.osbar.org/docs/probono/policy/ProBonoPolicyHandbook.pdf>;

Pennsylvania, <https://www.pacode.com/secure/data/204/chapter81/s6.1.html>;

Rhode Island, <https://www.courts.ri.gov/publicresources/disciplinaryboard/pdf/article5.pdf>;

South Carolina, https://www.law.cornell.edu/ethics/sc/narr/SC_NARR_6.HTM#6.1;

South Dakota, <http://www.ndcourts.gov/court/rules/conduct/rule6.1.htm>;

Tennessee, www.tba.org/sites/default/files/2018_Rules_of_Prof_Conduct-final.pdf;

Texas, <https://www.texasbar.com/Content/NavigationMenu/LawyersGivingBack/LegalAccessDivision/ProBonoResolution.pdf>;

Utah, https://www.utcourts.gov/resources/rules/ucja/ch13/6_1.htm;

Vermont, <https://www.vermontjudiciary.org/sites/default/files/documents/VermontRulesofProfessionalConduct.pdf>;

Virginia, <http://www.vsb.org/pro-guidelines/index.php/rules/public-service/rule6-1/>;
Washington, [https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garpc6.1](https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garpc6.1;);
West Virginia, <http://www.courts.wv.gov/legal-community/court-rules/professional-conduct/rule6.html>;
Wisconsin, <https://www.wicourts.gov/courts/offices/docs/olrscr20annotated.pdf>;
Wyoming, https://www.courts.state.wy.us/wp-content/uploads/2017/05/RULES_OF_PROFESSIONAL_CONDUCT_FOR_ATTORNEYS_AT_LAW.pdf.

APPENDIX C

Alaska <https://public.courts.alaska.gov/web/rules/docs/prof.pdf>;
Arizona <https://www.azbar.org/Ethics/RulesofProfessionalConduct/ViewRule?id=15>;
Arkansas https://www.arcourts.gov/rules-and-administrative-orders/%5Bcurrent%5D-arkansas-rules-of-professional-conduct?body_value_op=contains&body_value=pro+bono&=Search;
California <http://www.calbar.ca.gov/Access-to-Justice/Pro-Bono/Pro-Bono-FAQ>;
Colorado <https://www.cobar.org/For-Members/Opinions-Rules-Statutes/Rules-of-Professional-Conduct/Rule-61-Voluntary-Pro-Bono-Publico-Service>;
District of Columbia <https://www.dcbart.org/bar-resources/legal-ethics/amended-rules/rule6-01.cfm>;
Georgia <https://www.gabar.org/Handbook/index.cfm#handbook/rule140>;
Hawaii http://www.courts.state.hi.us/docs/court_rules/rules/hrpcond.htm#Rule_6.1;
Idaho <https://isb.idaho.gov/wp-content/uploads/irpc.pdf>;
Iowa <https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/12-31-2012.32.pdf>;
Kentucky [https://cdn.ymaws.com/www.kybar.org/resource/resmgr/SCR3/SCR_3.130_\(6.1\).pdf](https://cdn.ymaws.com/www.kybar.org/resource/resmgr/SCR3/SCR_3.130_(6.1).pdf);
Louisiana <https://www.lsba.org/ProBono/ProBonoVoluntaryReporting.aspx>;
Maryland <https://mdcourts.gov/probono/faqs>;
Minnesota https://www.revisor.mn.gov/court_rules/pr/subtype/cond/id/6.1/;
Montana
https://cdn.ymaws.com/www.montanabar.org/resource/resmgr/attorney_rules_and_regulations/rules_of_professional_conduc.pdf;
North Carolina <https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-61-voluntary-pro-bono-publico-service/>;
New Mexico <https://www.nmbar.org/NmbarDocs/forMembers/Mentorship/Resources/Resource06.pdf>;
Tennessee www.tba.org/sites/default/files/2018_Rules_of_Prof_Conduct-final.pdf;
Texas
<https://www.texasbar.com/Content/NavigationMenu/LawyersGivingBack/LegalAccessDivision/ProBonoResolution.pdf>;
Utah https://www.utcourts.gov/resources/rules/ucja/ch13/6_1.htm;
Vermont <https://www.vermontjudiciary.org/sites/default/files/documents/VermontRulesofProfessionalConduct.pdf>;
Wisconsin <https://www.wicourts.gov/courts/offices/docs/olrscr20annotated.pdf>;
Wyoming https://www.courts.state.wy.us/wp-content/uploads/2017/05/RULES_OF_PROFESSIONAL_CONDUCT_FOR_ATTORNEYS_AT_LAW.pdf.

Thirty (30) Hours: Michigan <https://www.michbar.org/programs/atj/voluntarystds>;
Washington https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garp6.1

Twenty-Five (25) Hours: Massachusetts <https://www.mass.gov/supreme-judicial-court-rules/rules-of-professional-conduct-rule-61-voluntary-pro-bono-publico>

Twenty (20) Hours: Florida https://www.floridabar.org/wp-content/uploads/2018/10/2019_04-Oct-12-2018-RRTFB.pdf;
Mississippi <https://courts.ms.gov/Images/OPINIONS/122099.PDF>;
Nevada <https://www.leg.state.nv.us/CourtRules/RPC.html>;
New York <http://www.nycourts.gov/RULES/jointappellate/Rule6.1.pdf>.

A little different: Oregon specifies two (2) cases or 20-40 hours in direct legal services to the poor.
<https://www.osbar.org/docs/probono/policy/ProBonoPolicyHandbook.pdf>

APPENDIX D

Connecticut <https://www.jud.ct.gov/Publications/PracticeBook/PB.pdf>;
Delaware <https://courts.delaware.gov/rules/pdf/DLRPC-LN.pdf>;
Illinois http://www.illinoiscourts.gov/supremecourt/Rules/Art_VII/artVII.htm#Rule756;
Indiana https://www.in.gov/judiciary/rules/prof_conduct/;
Kansas <http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+Discipline+of+Attorneys&r2=14>;
Maine http://mebaroverseers.org/regulation/bar_rules.html?id=88254;
Missouri
<https://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/384af6c9c3fdae1d86256ca600521254?OpenDocument>;
Nebraska <https://supremecourt.nebraska.gov/supreme-court-rules/chapter-3-attorneys-and-practice-law/article-5-nebraska-rules-professional-51>;
New Hampshire https://www.courts.state.nh.us/rules/pcon/pcon-6_1.htm;
New Jersey <https://www.njcourts.gov/attorneys/assets/probono/probonofaq.pdf?cacheID=dbM7gjk>;
North Carolina <https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-61-voluntary-pro-bono-publico-service/>;
North Dakota <http://www.ndcourts.gov/rules/conduct/frameset.htm>;
Ohio <http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf>;
Oklahoma <http://ccbamembers.com/wp-content/uploads/2017/05/Oklahoma-Rules-of-Professional-Conduct.pdf>;
Pennsylvania <https://www.pacode.com/secure/data/204/chapter81/s6.1.html>;
Rhode Island <https://www.courts.ri.gov/publicresources/disciplinaryboard/pdf/article5.pdf>;
South Carolina https://www.law.cornell.edu/ethics/sc/narr/SC_NARR_6.HTM#6.1;
South Dakota <http://www.ndcourts.gov/court/rules/conduct/rule6.1.htm>;
West Virginia <http://www.courtswv.gov/legal-community/court-rules/professional-conduct/rule6.html>;
Virginia <http://www.vsb.org/pro-guidelines/index.php/rules/public-service/rule6-1/>.

APPENDIX E

Alabama http://judicial.alabama.gov/docs/library/rules/cond6_1.pdf;
Alaska <https://public.courts.alaska.gov/web/rules/docs/prof.pdf>;
Arizona <https://www.azbar.org/Ethics/RulesofProfessionalConduct/ViewRule?id=15>;
Arkansas https://www.arcourts.gov/rules-and-administrative-orders/%5Bcurrent%5D-arkansas-rules-of-professional-conduct?body_value_op=contains&body_value=pro+bono&=Search;
California <http://www.calbar.ca.gov/Access-to-Justice/Pro-Bono/Pro-Bono-FAQ>;
Colorado <https://www.cobar.org/For-Members/Opinions-Rules-Statutes/Rules-of-Professional-Conduct/Rule-61-Voluntary-Pro-Bono-Publico-Service>;
Connecticut <https://www.jud.ct.gov/Publications/PracticeBook/PB.pdf>;
Delaware <https://courts.delaware.gov/rules/pdf/DLRPC-LN.pdf>;
Idaho <https://isb.idaho.gov/wp-content/uploads/irpc.pdf>;
Illinois http://www.illinoiscourts.gov/supremecourt/Rules/Art_VII/artVII.htm#Rule756;
Indiana https://www.in.gov/judiciary/rules/prof_conduct/;
Iowa <https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/12-31-2012.32.pdf>;
Kansas <http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+Discipline+of+Attorneys&r2=14>;
Kentucky [https://cdn.ymaws.com/www.kybar.org/resource/resmgr/SCR3/SCR_3.130_\(6.1\).pdf](https://cdn.ymaws.com/www.kybar.org/resource/resmgr/SCR3/SCR_3.130_(6.1).pdf);
Louisiana <https://www.lsba.org/ProBono/ProBonoVoluntaryReporting.aspx>;
Maine http://mebaroverseers.org/regulation/bar_rules.html?id=88254;
Maryland <https://mdcourts.gov/probono/faqs>;
Minnesota https://www.revisor.mn.gov/court_rules/pr/subtype/cond/id/6.1/;
Missouri <https://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/384af6c9c3fd86256ca600521254?OpenDocument>;
Montana https://cdn.ymaws.com/www.montanabar.org/resource/resmgr/attorney_rules_and_regulations/rules_of_professiona_l_conduc.pdf;
North Carolina <https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-61-voluntary-pro-bono-publico-service/>;
Nebraska <https://supremecourt.nebraska.gov/supreme-court-rules/chapter-3-attorneys-and-practice-law/article-5-nebraska-rules-professional-51>;
New Hampshire https://www.courts.state.nh.us/rules/pcon/pcon-6_1.htm;
New Jersey <https://www.njcourts.gov/attorneys/assets/probono/probonofaq.pdf?cacheID=dbM7gjk>;
New York <http://www.nycourts.gov/RULES/jointappellate/Rule6.1.pdf>;
North Carolina <https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-61-voluntary-pro-bono-publico-service/>;
North Dakota <http://www.ndcourts.gov/rules/conduct/frameset.htm>;
Ohio <http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf>;
Oklahoma <http://ccbamembers.com/wp-content/uploads/2017/05/Oklahoma-Rules-of-Professional-Conduct.pdf>;
Oregon <https://www.osbar.org/docs/probono/policy/ProBonoPolicyHandbook.pdf>;
Pennsylvania <https://www.pacode.com/secure/data/204/chapter81/s6.1.html>;
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South Carolina https://www.law.cornell.edu/ethics/sc/narr/SC_NARR_6.HTM#6.1;
South Dakota <http://www.ndcourts.gov/court/rules/conduct/rule6.1.htm>;
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Texas <https://www.texasbar.com/Content/NavigationMenu/LawyersGivingBack/LegalAccessDivision/ProBonoResolution.pdf>;
Vermont <https://www.vermontjudiciary.org/sites/default/files/documents/VermontRulesofProfessionalConduct.pdf>;
Virginia <http://www.vsb.org/pro-guidelines/index.php/rules/public-service/rule6-1/>;
Washington https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garpc6.1;
West Virginia <http://www.courtsww.gov/legal-community/court-rules/professional-conduct/rule6.html>;
Wisconsin <https://www.wicourts.gov/courts/offices/docs/olrscr20annotated.pdf>.

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THE YEAR IN POT: 2018

MARTY LUDLUM, DARRELL FORD, & JENNIFER BARGER-JOHNSON¹

2018 was very entertaining. America gained many scandals. Teacher strikes, hush-money payments to porn stars, and Robert Mueller dominated the news. America also lost a number of cultural icons. We said goodbye to President George H.W. Bush, Stephen Hawking, Aretha Franklin, and Reverend Billy Graham. However, the one burning issue on nearly everyone's lips was marijuana. Let's be blunt: 2018 was a big year in marijuana.² Three states voted on medical marijuana: Missouri, Oklahoma, and Utah. Two more states voted on recreational marijuana: Michigan and North Dakota. In addition, Vermont handled recreational marijuana by a legislative process without a vote of the people. Also, we had a major change in the stated policy of the federal government during 2018, although the details of that change have not been realized. Finally, 2018 saw a significant international shift which affects the United States.

This paper will summarize the vast changes to marijuana statutory law occurring in 2018.³ First we will discuss Michigan's Proposition 1, followed by Missouri's trifecta of marijuana options. Next we will discuss Oklahoma's Proposition 788. Then we will explain North Dakota's rejected Measure 3. Next, we will examine Utah's passed Proposition 2, subsequently rewritten as House Bill 3001. Finally, we will examine Vermont's legislative marijuana proposal. We will conclude with an important but limited federal policy change, and Canada's legalization of marijuana during 2018, and some predictions on the future of marijuana policy throughout North America.

We will start with a shotgun approach to marijuana history. Marijuana has been used by humans for at least five millennia.⁴ Marijuana's first recorded use was 2727 B.C.⁵ Pot is a practical medicine. Marijuana, or *Cannabis Sativa*⁶ can be ingested in many ways (smoked,

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² A previous version of this paper was presented to the Southern Academy of Legal Studies in Business Conference, San Antonio, Texas, March 1, 2019.

³ Changes in case law are not discussed in this paper.

⁴ See JOHN W. ROULAC, INDUSTRIAL HEMP: PRACTICAL PRODUCTS – PAPER TO FABRIC TO COSMETICS 8 (1995) (both industrial hemp [cannabis] and marijuana [cannabis sativa] are from the genus of the mulberry family).

⁵ Oakley Ray & Charles Ksir, DRUGS, SOCIETY, AND HUMAN BEHAVIOR 404-05 (8th ed. 1999) (Chinese Emperor Shen Nung recorded use of marijuana in 2737 B.C.); Richard Glen Boire & Kevin Feeney, MEDICAL MARIJUANA LAW 13-14 (2006) (China records using marijuana for many ailments thousands of years ago); see also Mitch Earleywine, UNDERSTANDING MARIJUANA 26 (2002) (thousands of years of medical use); and Tim Malyon & Anthony Henman, *No Marihuana: Plenty of Hemp*, 88 NEW SCIENTIST 433 (1980).

⁶ D. Paul Stanford, *Hemp, Cannabis and Marijuana: What's the Difference?* CounterPunch.org (March 29, 2016), <https://www.counterpunch.org/2016/03/29/hemp-cannabis-and-marijuana-whats-the-difference/>.

vaped, eaten, tinctured, topical, and others).⁷ The drug is inexpensive, and patients can grow their own and thereby control costs. Most importantly, marijuana is safe when compared to other medications. No recorded fatal overdose has occurred in thousands of years.⁸ Marijuana's safety record is unrivaled in medicine.

America's pot history is hazy. Marijuana was legal for the majority of U.S. history to date.⁹ Early American medical journals described many uses for marijuana.¹⁰ Marijuana was a poor man's pain reliever.¹¹ The American Medical Association fought for marijuana as medicine.¹² Pharmaceutical giants Eli Lilly and Squibb of Bristol-Myers-Squibb sold marijuana products.¹³

After the failed attempt at alcohol prohibition, the government demonized marijuana as a loco-weed that drives addicts to murder and rape.¹⁴ By 1930, 30 of the 48 states had outlawed marijuana.¹⁵ States implemented racially charged anti-marijuana laws.¹⁶ Under Richard

⁷ Bailey Rahn, *6 Ways to Enjoy Cannabis without Having to Smoke It*, Leafly.com (March 23, 2015), <https://www.leafly.com/news/cannabis-101/6-smoke-free-ways-to-consume-cannabis>.

⁸ STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 51 (1993); see also J. Michael Walker & Susan M. Huang, *Cannabinoid Analgesia*, 95 PHARMACOLOGY & THERAPEUTICS 127, 133 (2002); Sandra P. Welch & Billy R. Martin, *The Pharmacology of Marijuana*, PRINCIPLES OF ADDICTION MEDICINE 249, 260 (Allan W. Graham, et al., eds., 3d. ed. 2003).

⁹ RICHARD JAY MOLLER, MARIJUANA: YOUR LEGAL RIGHTS 8 (1981), and Marty Ludlum & Jennifer Barger Johnson, *Forget Video Poker: Sell Marijuana on Tribal Lands*, 28.1 SOUTHERN L.J. 85 (2018).

¹⁰ In 1850, Marijuana was listed in the *Pharmacopoeia*, which was a widely regarded reference and authority for medicinal drugs, as a treatment for numerous ailments, including: cholera, rabies, dysentery, tonsillitis, and menstrual bleeding. See also Patrick Stack & Claire Suddath, *A Brief History of Medical Marijuana*, TIME HEALTH & FAMILY (2009), <http://www.time.com/time/health/article/0,8599,1931247,00.html>; Matthew J. Seamon, et al., *Medical Marijuana and the Developing Role of the Pharmacist*, 64 AM. J. HEALTH-SYST. PHARM. 1037, 1040 (2007); and Christen D. Shepherd, *Comment, Lethal Concentration of Power: How the D.E.A. Acts Improperly to Prohibit Growth of Industrial Hemp*, 68 UMKC L. REV. 239, 245 (1999).

¹¹ Peter J. Cohen, *Medical Marijuana: The Conflict between Scientific Evidence and Political Ideology*, 2009 UTAH L. REV. 35 (2009).

¹² Laura M. Borgelt, et al., *The Pharmacologic and Clinical Effects of Medical Cannabis*, 33 PHARMACOTHERAPY 195 (2013) (the AMA objected to criminalization efforts because of the common use of marijuana in many medical settings).

¹³ Roger Parloff, *How Pot Became Legal*, 160 FORTUNE 140 (2009); Debra Borchardt, *Pfizer, Eli Lilly Were the Original Medical Marijuana Sellers*, FORBES, (APR 8, 2015), <https://www.forbes.com/sites/debraborchardt/2015/04/08/pfizer-eli-lilly-were-the-original-medical-marijuana-sellers/#2c5f96f03026>.

¹⁴ Foreword, REEFER MADNESS (Madacy Entertainment Group, Inc. 1998) (1936) ("The new drug menace which is destroying the youth of America in alarmingly-increasing numbers. Marihuana is that drug - a violent narcotic - an unspeakable scourge - The Real Public Enemy Number One!"); and *id.* (marijuana causes "ruthless murder, hold-up and sex crimes"); and Alyson Martin & Nushin Rashidian, *A NEW LEAF: THE END OF CANNABIS PROHIBITION* 39-40 (2014) (prohibitionists claimed marijuana turns black men into beasts and Hispanics into killers, with racist rhetoric of saving whites from minorities); see also Tim Weber, *Note: Would Government Prohibition of Marijuana Pass Strict Scrutiny?*, 46 IND. L. REV. 529, 553 (2013) (anti-Mexican immigrant and anti-African American sentiments fueled marijuana restrictions).

¹⁵ Goey Rabiniski, *Marijuana Prohibition Began 100 Years Ago*, MASSROOTS.COM, (May 5, 2015), <https://www.massroots.com/news/100-years-ago-marijuana-prohibition-began/>.

¹⁶ David F. Musto, *Opium, Cocaine and Marijuana in American History*, 265 SCI. AM. 40, 45-46 (1991) (smoking cannabis leaves came to the U.S. with Mexican agriculture workers and became associated with black jazz musicians); see also Mitch Earleywine & Mallory Loflin, *Curious Consequences of Cannabis Prohibition*, 6 ALB. GOV'T L. REV. 438 (2013); Paul Butler, *(Color) Blind Faith: The Tragedy of "Race, Crime and the Law,"* 111 HARV. L. REV. 1270, 1275 (1998) (book review); and Michelle Alexander, *THE NEW JIM CROW: MASS*

Nixon, the War on Drugs reached its climax, culminating with the *Controlled Substances Act of 1970*,¹⁷ making marijuana illegal in all states.¹⁸

Less than a decade later, some states tried small medical marijuana programs. New Mexico was the first in 1978.¹⁹ Thirty states followed New Mexico's lead, but the support was short lived. The FDA approved a synthetic form of marijuana, Marinol, in 1980.²⁰ Since marijuana was available in pill form, interest in medical pot mellowed.²¹ Having been the first to make marijuana illegal in 1913, California was the first state to formally legalize the drug when it passed the *Compassionate Use Act of 1996*, which allowed marijuana for medical purposes.²² California's medical marijuana scheme was extremely lax.²³

California's under-regulated pot industry grew rapidly. Los Angeles has more medical marijuana sellers than public schools or taco stands.²⁴ California was not alone in the pot boom. The city of Seattle has over 100 medical marijuana dispensaries.²⁵ In some major cities, legal marijuana merchants outnumber McDonalds and Starbucks.²⁶

Public sentiment favors more and more marijuana. According to a 2017 Gallup poll, a clear majority of all Americans support legal marijuana.²⁷ In a 2018 AARP survey, 80% of older Americans support medical marijuana.²⁸ Three out of every four American physicians support medical marijuana.²⁹

With this broad public support, policies emerged throughout the nation. Changes on the

INCARCERATION IN THE AGE OF COLORBLINDNESS (2013); Paul M. Gahlinger, *ILLEGAL DRUGS: A COMPLETE GUIDE TO THEIR HISTORY, USE AND ABUSE* 62 (2004).

¹⁷ *Comprehensive Drug Abuse and Control Act of 1970*, Pub. L. No. 91-513 § 1101(b)(3)(A), 84 Stat. 1236, 1292 (codified at 21 U.S.C. §§ 801-971) (2000) (hereinafter *Controlled Substances Act*).

¹⁸ For young people, marijuana is much easier to acquire than alcohol because of regulated alcohol sales. Tim Dickinson, *A Drug War Truce?* 1081 *ROLLING STONE* 45, 48 (2009); see also Thomas Nicholson, et al., *Focus on Abuse, Not Use: A Proposed New Direction for US Drug Policy*, 19 *DRUGS: EDUCATION, PREVENTION, AND POLICY* 303 (2012).

¹⁹ Behavioral Health Servs. Div. Health & Env't Dep't, *THE LYNN PIERSON THERAPEUTIC RESEARCH PROGRAM: A REPORT ON PROGRESS TO DATE 1*, 1 (1983).

²⁰ See, e.g., Kambiz Akhavan, *Marinol vs. Marijuana: Politics, Science, and Popular Culture*, *DRUGTEXT.ORG* 4-5 (2001),

<http://www.drugtext.org/pdf/Cannabis-marijuana-hashisch/marinol-vs-marijuana-politics-science-and-popular-culture.pdf>; and Laurence Brunton, et al., *GOODMAN & GILMAN'S MANUAL OF PHARMACOLOGY AND THERAPEUTICS* 396 (2008). See *Marinol Prescribing and Safety Information*, *DRUGS.COM*, <https://www.drugs.com/pro/marinol.html> (last visited Aug. 30, 2017).

²¹ See Gregg A. Bilz, *The Medical Use of Marijuana: The Politics of Medicine*, 13 *HAMLIN J. PUB. L. & POL'Y* 117, 125 (1992).

²² Cal. Code, Health and Safety Code, HSC sect. 11362.5 (1996).

²³ Marty Ludlum & Darrell Ford, *Three Lessons from California's Compassionate Use Act*, 6.1 *ACAD. OF HEALTH CARE MGT. J.* 69 (2010).

²⁴ *Id.*

²⁵ Jim Camden, *House Weights Pot Law Proposals*, *SPOKESMAN REVIEW*, Mar. 6, 2015.

²⁶ Ludlum & Ford, *supra* note 23.

²⁷ Art Swift, *In U.S., 45 Percent Say They Have Tried Marijuana*, *GALLUP* (July 19, 2017),

http://www.gallup.com/poll/214250/say-tried-marijuana.aspx?g_source=Well-Being&g_medium=newsfeed&g_campaign=tiles. (60 percent of Americans support legal marijuana in 2016.)

²⁸ Barbara A. Gabariel, *Most Older Americans Support Medical Marijuana*, *AARP.ORG* (Apr 4, 2018),

<https://www.aarp.org/health/drugs-supplements/info-2018/medical-marijuana-pain-prescription-fd.html>.

²⁹ Michelle Castillo, *Survey: 76 percent of doctors approve of medical marijuana use*, *CBS NEWS* (May 31, 2013), <https://www.cbsnews.com/news/survey-76-percent-of-doctors-approve-of-medical-marijuana-use>. (Citing the New England Journal of Medicine polling results.); see also *State Medical Marijuana Laws*, Nat'l Conf. St. Legislatures (Aug. 2, 2017), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

marijuana debate are coming fast and furious. Coming into 2018, 30 of our 50 states had some form of legalized marijuana. In addition, several more states had decriminalized marijuana. Twenty-two states and the District of Columbia, Guam, and Puerto Rico have legalized marijuana for medical use.³⁰ Eight additional states – Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, and Washington – have legalized marijuana for medical and recreational use.³¹ However, at the federal level, marijuana remains illegal under the *Controlled Substances Act of 1970*³² which has never been modified.

Marijuana will be a growing federalism issue for the indefinite future.³³ States increasingly allow more access to marijuana, while at the same time the federal government maintains an absolute prohibition on marijuana.³⁴ With this as backstory, let's examine the changes of 2018.

Michigan

The State of Michigan voted on legalizing recreational marijuana in 2018,³⁵ after filing 365,000 signatures in support the previous year.³⁶ Michigan already legalized medical marijuana in 2008.³⁷ In addition, several Michigan cities already legalized or decriminalized

³⁰ eRepublic, *Marijuana States Map*, GOVERNING THE STATE AND LOCALITIES – GOVERNING.COM (2018), <http://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html>. See also Ian MacDougall, *Smoke Signals*, 162 NEWSWEEK GLOBAL 1 (2014), <http://www.newsweek.com/2014/05/23/smoke-signals-251113.html>; Joy Blackburn, *Can the V.I. Learn from State that have Legalized Marijuana*, VIRGIN ISLANDS DAILY NEWS, Apr. 13, 2015; and Carol Josel, *PA's Medical Marijuana Act: A moneymaker with health benefits*, EXAMINER.COM (Apr. 28, 2016), <http://www.examiner.com/article/pa-s-medcal-marijuana-act-a-moneymaker-with-health-benefits>; Alexandra Sifferlin, *Puerto Rico Governor Signs Executive Order to Legalize Medical Marijuana*, TIME.COM (May 4, 2015), <http://time.com/3845638/puerto-rico-medical-marijuana>, and Joe Wertz & Jackie Fortier, *Key questions and answers on SQ 788, Oklahoma's vote on medical marijuana*, KOSU.ORG, (2017) available at <http://kgou.org/post/capitol-insider-all-about-oklahoma-s-medical-marijuana-state-question>.

³¹ Marty Ludlum & Darrell Ford, *Katie's Law: Oklahoma's Second Puff of Medical Marijuana*, 41.2 OKLAHOMA CITY UNIV. L. REV. 169 (2016). See also Marty Ludlum & Darrell Ford, *Marijuana Legalization in Washington and Colorado: The Tipping Point in Policy and Practical Implications*, 6 MUSTANG J. L. & LEGAL STUD. 37 (2014).

³² *Controlled Substances Act*, *supra* note 17.

³³ David R. Katner, *Up in Smoke: Removing marijuana from Schedule 1*, 27 BOSTON U. PUB. INT. L.J. 167 (2018); Mathew A Melone, *Federal marijuana policy: Homage to federalism in form; Potemkin federalism in substance*, 63 WAYNE L.REV. 215 (2018); Joelle Anne Moreno, *Half-baked: The science and politics of legal pot*, 123 PENN. ST.L.REV. 403 (2019); and Mark S. Mills, *Testing the bounds of federalism: Can state and federal marijuana laws coexist?* 25 NEVADA LAWYER 13 (2017).

³⁴ *Controlled Substances Act*, *supra* note 17.

³⁵ Christopher Ingraham, *Michigan becomes 10th state to allow recreational marijuana*, WASHINGTON POST (Nov. 7, 2018) available at https://www.washingtonpost.com/business/2018/11/07/michigan-becomes-th-state-allow-recreational-marijuana/?no_redirect=on&utm_term=.26baa559a6d6.

³⁶ Only 252,000 signatures were needed. David Eggert, *Michigan vote on legalizing marijuana is likely in 2018*, SEATTLE TIMES (Nov. 20, 2017) available at <https://www.seattletimes.com/nation-world/nation-politics/group-to-submit-signatures-to-legalize-marijuana-in-michigan/>.

³⁷ Lee DeVito, *Let's get high: Michigan just voted to legalize recreational marijuana*, DETROIT METRO TIMES (Nov. 6, 2018) available at <https://www.metrotimes.com/detroit/lets-get-high-michigan-just-voted-to-legalize-recreational-marijuana/Content?oid=17411461>. See also Bill Chappell, *Voters relax marijuana laws in 3 more states: Michigan, Utah, Missouri*, NPR (Nov. 7, 2018) available at <https://www.npr.org/2018/11/07/665161814/3-more-states-ok-easing-their-marijuana-laws-michigan-utah-missouri>.

pot including Detroit, Flint, and Grand Rapids.³⁸ The 2018 ballot initiative was called Michigan Proposition 1.³⁹ The proposition legalized recreational marijuana for all persons age 21 and over.⁴⁰ The proposition included a 10% tax for education and public roads.⁴¹ On November 8, 2018, Michigan voters approved Proposition 1 by a vote of 56% to 44%⁴² and thereby created the *Michigan Regulation and Taxation of Marijuana Act*.⁴³ This Act delegates responsibility for marijuana licensing, regulation, and enforcement to the Michigan Department of Regulatory Affairs.⁴⁴ This agency is responsible for the oversight of medical and adult-use (recreational) marijuana in Michigan.⁴⁵ Retail stores for recreational marijuana should open in the near future.⁴⁶

Michigan's Proposition 1 had several generous provisions. Consumers could grow 12 marijuana plants of their own.⁴⁷ Consumers could possess up to 10 ounces of marijuana at their home.⁴⁸ However, if a resident had more than 2.5 ounces, the marijuana must be locked in a container.⁴⁹ Also of interest, Michigan's Proposition 1 expressly did not affect the drug-free

³⁸ Paige Pflieger & Mark Brush, *These 14 cities in Michigan have passed laws decriminalizing marijuana possession and use*, MICHIGAN RADIO NPR (Nov. 7, 2018) available at

<https://www.michiganradio.org/post/these-14-cities-michigan-have-passed-laws-decriminalizing-marijuana-possession-and-use>. Charles E. Ramirez, *Marijuana liberalization spreads in Oakland county*, DETROIT NEWS (Nov. 5, 2014) available at

<https://www.detroitnews.com/story/news/politics/elections/2014/11/05/marijuana-decriminalization-spreads-oakland-county/18561833/>. Charles Fain Lehman, *At Midnight, Michiganders Will Set Clocks to 4:20*, WASHINGTON FREE BEACON (Dec. 5, 2018) available at <https://freebeacon.com/issues/midnight-michiganders-will-set-clocks-420/>.

³⁹ Jordan Ross, *Michigan voters to legalize recreational marijuana*, JURIST (Nov. 7, 2018); see also Christine Hauser, *Marijuana Embraced in Michigan, Utah and Missouri, but Rejected in North Dakota*, NEW YORK TIMES (Nov. 7, 2018) available at <https://www.nytimes.com/2018/11/07/us/politics/michigan-marijuana-legalization.html>.

⁴⁰ Hauser, *id.* See also Jeff Karoub, *Michigan voters bring legal recreational marijuana to the Midwest*, CHICAGO TRIBUNE (Nov. 7, 2018) available at <https://www.chicagotribune.com/news/nationworld/politics/ct-michigan-voters-legalize-recreational-pot-20181106-story.html>.

⁴¹ DeVito, *supra* note 37. See also Emma Winowiecki, *5 things to know about Michigan's proposal to legalize marijuana*, DETROIT RADIO NPR (Nov. 7, 2018) available at <https://www.michiganradio.org/post/5-things-know-about-michigans-proposal-legalize-marijuana>.

⁴² Hauser, *supra* note 39. See also Kathleen Gray, *Legal marijuana in Michigan: What you need to know*, DETROIT FREE PRESS (Nov. 7, 2018) available at <https://www.freep.com/story/news/marijuana/2018/11/07/michigan-marijuana-results-election-legalization/1835297002/>.

⁴³ Michigan Compiled Laws, Chapter 333. Health § 333.7212 [https://www.legislature.mi.gov/\(S\(siax2xugmg41baf15sm2fefo\)\)/mileg.aspx?page=getObject&objectName=mcl-Initiated-Law-1-of-2018](https://www.legislature.mi.gov/(S(siax2xugmg41baf15sm2fefo))/mileg.aspx?page=getObject&objectName=mcl-Initiated-Law-1-of-2018).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Karoub, *supra* note 40.

⁴⁷ DeVito, *supra* note 37.

⁴⁸ Karoub, *supra* note 40, and DeVito, *supra* note 37.

⁴⁹ MICHIGAN BALLOT PROPOSAL 18-1 available at https://www.house.mi.gov/hfa/PDF/TestPDF/Ballot_Proposal_2018-1_Marijuana_Initiative.pdf. See also Amy Hybels, *What you need to know about legal recreational marijuana in Michigan*, ABC12 (Dec. 5, 2018) available at <https://www.abc12.com/content/news/What-you-need-to-know-when-recreational-marijuana-becomes-legal-December-6-502036281.html>. MICHIGAN BALLOT PROPOSAL 18-1 available at https://www.house.mi.gov/hfa/PDF/TestPDF/Ballot_Proposal_2018-1_Marijuana_Initiative.pdf.

workplace regulations.⁵⁰ As a result, Michigan will have future court battles over the workplace requirements.⁵¹

Missouri

In 2018, Missouri had a much contested battle over medical marijuana.⁵² The state had three different policy options on the same ballot.⁵³ All three options allowed for medical marijuana for anyone over age 18. The first option was called Missouri Amendment 2.⁵⁴ Amendment 2 included a 4% tax on marijuana to benefit military veterans.⁵⁵ In addition, it required doctor approval for medical marijuana to be administered for one of only ten specified medical conditions including cancer, glaucoma, epilepsy, chronic pain, PTSD, and Parkinson's.⁵⁶ Under Amendment 2, patients would be allowed to grow their own marijuana in a facility registered with the state.⁵⁷ If passed, the Missouri Secretary of State estimates that Amendment 2 would cost roughly \$7 million annually, but would yield \$18 million in state tax revenue, and \$6 million in local tax revenue.

By contrast, Missouri's Amendment 3 had a 15% tax on medical marijuana earmarked for a research institute on marijuana's benefits.⁵⁸ This Amendment would create a state research institute made up a 9-person research board.⁵⁹ Instead of getting doctor approval, Amendment 3 required a patient to have an approved illness on a list selected by the state.⁶⁰ In addition, Amendment 3 did not allow a patient to grow their own marijuana.⁶¹ The Missouri Secretary of State estimated costs of Amendment 3 at \$500,000 per year, and revenues of approximately

⁵⁰ (Act does not permit or accommodate marijuana at the workplace) See Gray, *supra* note 42. MICHIGAN BALLOT PROPOSAL 18-1 available at https://www.house.mi.gov/hfa/PDF/TestPDF/Ballot_Proposal_2018-1_Marijuana_Initiative.pdf.

⁵¹ Gray, *supra* note 42.

⁵² Ashley Byrd, *Missouri medical marijuana program releases proposed rules for facilities*, MISSOURINET (March 18, 2019) available at <https://www.missourinet.com/2019/03/18/missouri-medical-marijuana-program-releases-draft-rules-for-facilities/>. Kera Mashek, *Regulations for Missouri's medical marijuana industry continue to roll out*, FOX4KC.COM (March 12, 2019) available at <https://fox4kc.com/2019/03/12/regulations-for-missouris-medical-marijuana-industry-continue-to-roll-out/>.

⁵³ A potentially messy fight if more than one of the laws would have passed. Ingraham, *supra* note 35.

⁵⁴ Missouri Department of Health & Senior Services, *Frequently asked questions*, (n.d.) last accessed on April 22, 2019 at <https://health.mo.gov/safety/medical-marijuana/faqs.php>.

⁵⁵ Gregory J. Holman, *FAQ: How is Missouri going to pick who gets a medical marijuana dispensary license?* SPRINGFIELD NEWS-LEADER (March 28, 2019) available at <https://www.news-leader.com/story/news/local/ozarks/2019/03/28/missouri-medical-marijuana-weed-pot-cannabis-dispensary-licenses/3299627002/>.

⁵⁶ Danny Wicentowski, *Missouri has Three Marijuana Initiatives on the 2018 ballot. Here's the Breakdown*, RIVERFRONT TIMES (3 Aug 2018), available at <https://www.riverfronttimes.com/newsblog/2018/08/03/missouri-has-three-marijuana-initiatives-on-the-2018-ballot-heres-the-breakdown>.

⁵⁷ Byrd, *supra* note 52.

⁵⁸ Mashek, *supra* note 52.

⁵⁹ Wicentowski, *supra* note 56.

⁶⁰ Alex Smith, *Months Before Medical Marijuana Is Available In Missouri, Clinic Opens Its Doors in Kansas City*, KCUR 89.3 (Feb. 13, 2019) available at <https://www.kcur.org/post/months-medical-marijuana-available-missouri-clinic-opens-its-doors-kansas-city#stream/0>.

⁶¹ Jo Mannies, *Missouri's medical-marijuana program has long road ahead*, ST. LOUIS PUBLIC RADIO (Jan. 3, 2019) available at <https://news.stpublicradio.org/post/missouris-medical-marijuana-program-has-long-road-ahead#stream/0>.

\$66 million off taxes and fees.⁶² If passed, both Amendments 2 and 3 could only be altered by a vote of the people of the state of Missouri.⁶³

Lastly, Missouri's Proposition C could be changed by the Missouri legislature and would not require a vote of the people again.⁶⁴ That flexibility might be a benefit when setting up the necessary regulatory bodies. Proposition C provided a 2% tax on medical marijuana benefiting veterans' issues, drug treatment, public safety, and public education.⁶⁵ Proposition C required a doctor's approval instead of an approved illness. In addition, Proposition C excluded home growing.

According to the Missouri Secretary of State's Office, Proposition C would provide the least potential revenue of the three measures.⁶⁶

Missouri voters had all three issues on the ballot in 2018. If all three were to pass, the highest vote total would have been placed into law.⁶⁷ Voters approved only Missouri Amendment 2, by a margin of 66% to 34%.⁶⁸ Amendment 3 failed by a vote of 31% to 69%.⁶⁹ Proposition C failed more narrowly 44% to 56%.⁷⁰ Under Amendment 2, patient applications would not be accepted until July 4, 2019, and cultivation, manufacturing, dispensing, and other license applications would not be accepted until August of 2019.⁷¹

Oklahoma

Oklahoma eased into the market related to marijuana in 2015. In 2015, Oklahoma first allowed CBD oil for medicinal use.⁷² Such uses included qualifying conditions such as multiple sclerosis, intractable nausea and vomiting, appetite stimulation, and chronic wasting diseases. The CBD program did not allow for smoked marijuana or recreational use. Oklahoma is one of 16 states with a CBD oil statute.⁷³

In 2018, Oklahoma voters petitioned for a broader form of medical marijuana under State Question 788.⁷⁴ The petition was signed by 67,801 Oklahoma voters.⁷⁵ Oklahoma State

⁶² Wicentowski, *supra* note 56.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Mannies, *supra* note 61. Mashek, *supra* note 52.

⁶⁶ Wicentowski, *supra* note 56.

⁶⁷ *Id.*

⁶⁸ Hauser, *supra* note 39. See also Ross, *supra* note 39.

⁶⁹ Andy Marso, *Medical marijuana hopes withering in Kansas as Missouri gets ready for rollout*, KANSAS CITY STAR (April 1, 2019) available at <https://www.kansascity.com/news/politics-government/article228530619.html>.

⁷⁰ *Id.*

⁷¹ Missouri Department of Health and Senior Services, Final Medical Marijuana Rules, available at <https://health.mo.gov/safety/medical-marijuana/rules.php>.

⁷² Stephanie Backus, *Governor Mary Fallin signs bill allowing pilot program for cannabis oil*, KOCO.COM (Apr. 30, 2015),

<http://www.koco.com/article/gov-mary-fallin-signs-bill-allowing-pilot-program-for-cannabis-oil/4303904>, and Ludlum & Ford, *supra* note 31.

⁷³ Randy Ellis, *States, federal government, doctors disagree over medical marijuana benefits*, NEWSOK.COM, June 3, 2018, available at

<https://newsok.com/article/5596666/states-federal-government-doctors-disagree-over-medical-marijuana-benefits>.

⁷⁴ Randy Ellis, *Oklahoma's medical marijuana law would be unique*, NEWSOK.COM, June 3, 2018, available at <https://newsok.com/article/5596643/oklahomas-medical-marijuana-law-would-be-unique>.

⁷⁵ *Id.*

Question 788 modified criminal law.⁷⁶ It provided possession of up to 1.5 ounces of marijuana without a medical marijuana card will be classified as a misdemeanor with a \$400 fine as the maximum punishment.⁷⁷ Oklahoma's medical marijuana proposal had a seven percent (7%) tax on the retail sale.⁷⁸ SQ 788 provided that medical marijuana use shall cause no discrimination.⁷⁹ The proposal created the Oklahoma Medical Marijuana Authority, the regulatory agency in charge.⁸⁰ On June 26, 2018, Oklahomans voted 57% to 43% in favor of medical marijuana.⁸¹

North Dakota

North Dakota faced a 2018 vote on recreational marijuana. North Dakota enacted medical marijuana from a voter measure in 2016.⁸² North Dakota's proposition was called Measure 3.⁸³ Measure 3 allowed recreational marijuana for anyone over age 21.⁸⁴ However, Measure 3 had two other very interesting aspects which created controversy. First, Measure 3 would expunge all previous marijuana convictions in the state.⁸⁵ Second, Measure 3 made no reference to any quantity regulation or taxes on recreational marijuana.⁸⁶ On election day, the North Dakota voters rejected Measure 3 by a vote of 60% to 40%.⁸⁷ Some commentators mentioned North Dakota was still having difficulty implementing the medical marijuana program, only approved two years prior.⁸⁸

⁷⁶ Marty Ludlum, Jennifer Barger-Johnson, & Darrell Ford, *Oklahoma's State Question 788 on Medical Marijuana: High on Expectations, Hazy on Details*, SOUTHERN J. OF BUS. AND ETHICS, 10, 60-69 (2018).

⁷⁷ SQ 788 section 1b.

⁷⁸ SQ 788 section 7a.

⁷⁹ SQ 788 section 6a.

⁸⁰ OKLAHOMA MEDICAL MARIJUANA AUTHORITY, available at <http://omma.ok.gov/>.

⁸¹ OKLAHOMA STATE ELECTION BOARD, *Official Results of June 26, 2018 Election*, available at https://www.ok.gov/elections/support/20180626_seb.pdf. (Official votes were 507,582 in favor and 385,176 against).

⁸² North Dakota Department of Health, State laws, administrative rules and Attorney General's opinion, (n.d.) last accessed on April 22, 2019 at https://www.ndhealth.gov/mm/State_Laws_and_Administrative_Rules.aspx. See also Chappell, *supra* note 37.

⁸³ North Dakota Legislative Council Staff, 2018 GENERAL ELECTION BALLOT MEASURES (Sept. 2018) available at <https://www.legis.nd.gov/files/resource/miscellaneous/19.9402.01000.pdf>.

⁸⁴ Daniel Burbank, *Measure 3 failed in ND, but supporters say it may not be end of issue*, KFYRTV.COM (Nov. 7, 2018) available at <https://www.kfyrtv.com/content/news/Measure-3-failed-but-supporters-say-it-may-not-be-the-end-of-legalizing-marijuana-issue-in-ND-499999982.html>.

⁸⁵ Jack Dura, *North Dakota's Measure 3: High time for marijuana?* BISMARCK TRIBUNE (Oct. 21, 2018) available at <https://www.grandforksherald.com/news/government-and-politics/4517218-north-dakotas-measure-3-high-time-marijuana>. Trevor Hughes, *Legal marijuana states: Election Day brings pot debate to North Dakota, Utah, Michigan and Missouri voters*, USA TODAY (Nov. 2, 2018) available at <https://www.usatoday.com/story/news/politics/elections/2018/11/02/midterm-elections-2018-these-states-could-soon-legalize-marijuana/1809890002/>.

⁸⁶ (This would be the nation's most permissive recreational marijuana law). Hughes, *id.*

⁸⁷ Blair Emerson, *Measure 3 goes up in smoke*, BISMARCK TRIBUNE (Nov. 6, 2018) available at https://bismarcktribune.com/news/election/measure-goes-up-in-smoke/article_7dba9ab8-b9b5-5d22-b84b-25fa848fdb1a.html. (Deep-red North Dakota overwhelmingly rejected it). Ingraham, *supra* note 35. (Thumbs down from the voters). Hauser, *supra* note 39. See also *North Dakota Election Results*, NEW YORK TIMES (Jan. 28, 2019) available at <https://www.nytimes.com/interactive/2018/11/06/us/elections/results-north-dakota-elections.html>.

⁸⁸ Tom Angell, *North Dakota Marijuana Legalization Measure Fails*, FORBES (Nov. 6, 2018) available at <https://www.forbes.com/sites/tomangell/2018/11/06/north-dakota-marijuana-legalization-measure-fails/#445893f05c89>. See also Chappell, *supra* note 37. See also Karoub, *supra* note 40.

Utah

Utah faced a state vote on medical marijuana in 2018.⁸⁹ Previously Utah approved CBD oil in 2014.⁹⁰ Utah's proposal was called Proposition 2. Proposition 2 allowed consumers to have up to 2 ounces of non-smokeable⁹¹ marijuana.⁹² In addition, the marijuana was not taxed.⁹³ Utah's Proposition 2 also provided that if a patient does not live within 100 miles of a dispensary then and only then the patient could grow his/her own marijuana (up to six plants in his/her own home).⁹⁴ The Utah measure was approved by voters 53% to 47%.⁹⁵

Most recognize that Utah is a very conservative state largely due to the influence of the Mormon Church.⁹⁶ However, the Mormon Church was mildly supportive of medical marijuana.⁹⁷ Even though the people voted pass Utah's Proposition 2 by a decent margin, Utah state law allows the legislature to override a publicly voted issue.⁹⁸ The Utah legislature amended and replaced Proposition 2 with House Bill 3001 which contained several dramatic changes.⁹⁹

The *Utah Medical Cannabis Act*, designed as a replacement for voter-approved Proposition 2, was brought forward as Utah House Bill 3001.¹⁰⁰ Under the bill, a patient cannot grow his or her own marijuana.¹⁰¹ In addition, House Bill 3001 would reduce the number of

⁸⁹ Ross, *supra* note 39.

⁹⁰ UTAH MEDICAL CANNABIS ACT, available at <https://elections.utah.gov/Media/Default/2018%20Election/Issues%20on%20the%20Ballot/Proposition%202%20-%20Full%20Text.pdf>.

⁹¹ Ben Lockhart, *Patient groups ask court to invalidate Utah's medical marijuana compromise*, DESERET NEWS UTAH (Dec. 6, 2018) available at <https://www.deseretnews.com/article/900045333/patient-groups-ask-court-to-invalidate-utahs-medical-marijuana-compromise-enforce-proposition-2.html>.

⁹² Dennis Romboy, *Utah lawmakers put up stop sign on medical marijuana bills after Prop. 2 compromise*, DESERET NEWS UTAH (Feb. 1, 2019) available at <https://www.deseretnews.com/article/900053626/utah-lawmakers-put-up-stop-sign-on-medical-marijuana-bills-after-prop-2-compromise.html>.

⁹³ German Lopez, *Utah votes to legalize medical marijuana with Proposition 2*, VOX.COM (Nov. 7, 2018) available at <https://www.vox.com/policy-and-politics/2018/11/7/18052950/utah-proposition-2-medical-marijuana-legalization-results>.

⁹⁴ Associated Press, *Utah Election Results*, NEW YORK TIMES (Jan. 28, 2019) available at <https://www.nytimes.com/interactive/2018/11/06/us/elections/results-utah-elections.html>.

⁹⁵ *Id.*

⁹⁶ Frank Newport, *Mormons Most Conservative Religious Group in the U.S.*, GALLUP.COM (11 Jan 2010) available at <https://news.gallup.com/poll/125021/mormons-conservative-major-religious-group.aspx>.

⁹⁷ Karoub, *supra* note 40.

⁹⁸ Taylor Stevens, *Medical cannabis advocates suing the state over Prop 2 override have a bigger goal: challenging the Legislature's disregard of the peoples' will*, SALT LAKE TRIBUNE (Dec. 6, 2018) available at <https://www.sltrib.com/news/politics/2018/12/06/medical-cannabis/>. See also Hughes, *supra* note 85.

⁹⁹ Ben Winslow, *Utah State Legislature votes to replace Proposition 2, the medical cannabis ballot initiative*, FOX13NOW.COM (Dec. 3, 2018) available at <https://fox13now.com/2018/12/03/utah-house-votes-to-replace-proposition-2-the-medical-cannabis-ballot-initiative/>.

¹⁰⁰ Bethany Rodgers, *Utah has a new medical marijuana law — but not the one approved by voters in the recent election*, THE SALT LAKE TIMES TRIB., (Dec. 3 2018) available at <https://www.sltrib.com/news/politics/2018/12/03/utah-house-passes-medical/>.

¹⁰¹ Julia Ritchey & Nicole Nixon, *Utah Legislature Passes Overhaul Of Proposition 2, Rewriting Medical Cannabis Law*, KUER NPR UTAH (Dec. 3, 2018) available at <https://www.kuer.org/post/utah-legislature-passes-overhaul-proposition-2-rewriting-medical-cannabis-law#stream/0>.

dispensaries in the state.¹⁰² Neither of these provisions were terribly controversial, however, the influence of the Church showed in the other provisions of House Bill 3001. House Bill 3001 required dispensaries to employ pharmacists at their offices, adding a huge expense for medical marijuana dispensaries.¹⁰³ In addition, House Bill 3001 limited application of medical marijuana to a list of approved ailments rather than a doctor's recommendation.¹⁰⁴ House Bill 3001 also added a provision that a person could use medical marijuana if the doctor indicated they have less than six months to live.¹⁰⁵

While the provision did pass public support, most commentators saw House Bill 3001 as an overreach of the legislature's power as well as a complete contradiction of the intent of the public's law.¹⁰⁶ House Bill 3001 has been described as a sham and illusory.¹⁰⁷ Critics of the bill also indicate that could "strangle Utah's medical marijuana program in red tape" and cause unnecessary delays or "block too many patients from cannabis treatment."¹⁰⁸ In addition, critics of House Bill 3001 indicated the power of the people is dead, at least in Utah.¹⁰⁹ Utah now has medical marijuana, albeit far from the original idea of the voter approved legislation.

Vermont

Gaining the distinction as the first state to accomplish marijuana without a vote of the people, Vermont moved forward on recreational marijuana in 2018.¹¹⁰ Vermont had previously adopted medical marijuana in 2004.¹¹¹ Marijuana is popular in Vermont, with estimates of 15-25 metric tons consumed each year.¹¹² The recreational marijuana law was called Act 86

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Utah State Legislature, H.B. 3001 UTAH MEDICAL CANNABIS ACT, (n.d.) last accessed on April 2, 2019 <https://le.utah.gov/~2018s3/bills/static/HB3001.html>.

¹⁰⁵ Karissa Neely, *Utah state and business prep for medical cannabis storage and distribution*, UTAH DAILY HERALD (Jan. 7, 2019) available at https://www.heraldextra.com/business/local/utah-state-and-business-prep-for-medical-cannabis-storage-and/article_3a329398-8e40-5366-88f9-30ebce5d0d33.html.

¹⁰⁶ Christina Giardinelli, *Medical Marijuana Compromise Bill Passes Utah House and Senate*, DAILY UTAH CHRONICLE (Dec. 8, 2018) available at <http://dailyutahchronicle.com/2018/12/04/medical-marijuana-compromise-bill-passes-utah-house-and-senate/>.

¹⁰⁷ Andrew Pinckney, *Patients struggling to stay legal using medical cannabis find support with new bill from Utah lawmaker*, ST. GEORGE NEWS (UT) (March 5, 2019) available at <https://www.stgeorgeutah.com/news/archive/2019/03/05/ajp-1g119-patients-struggling-to-stay-legal-using-medical-cannabis-products-find-support-with-new-bill-from-utah-lawmaker/#.XL4Z5ehKhPY>.

¹⁰⁸ Rodgers, *supra* note 100.

¹⁰⁹ Giardinelli, *supra* note 106.

¹¹⁰ Katy Savage & Polly Mikula, *It's ok to take... your own, in private; Recreational use, possession, growth of marijuana is legal July 1*, MOUNTAIN TIMES (VT) (June 28, 2018) available at <http://mountaintimes.info/recreational-marijuana-legal-july-1/>. See also Tom Angell, *Vermont governor signs marijuana legalization into law*, FORBES (Jan. 22, 2018) available at <https://www.forbes.com/sites/tomangell/2018/01/22/vermont-governor-signs-marijuana-legalization-into-law/#4b12e2526a27>. April McCullum, *Vermont's legal marijuana law: What you should know*, BURLINGTON FREE PRESS (Jan. 22, 2018) available at <https://www.burlingtonfreepress.com/story/news/politics/government/2018/01/22/vermonts-legal-marijuana-law-wh-at-you-should-know/1045478001/>.

¹¹¹ 18 V.S.A. § 4472 et seq. See also Vermont Office of the Attorney General, GUIDE TO VERMONT'S LAWS ON MARIJUANA IN THE WORKPLACE, (June, 2018) available at <https://ago.vermont.gov/wp-content/uploads/2018/06/Employer-MJ-Guidance-TOC.pdf>. Savage & Mikula, *Id.*

¹¹² Savage & Mikula, *supra* note 110.

(House 511),¹¹³ and went into effect on July 1, 2018.¹¹⁴ Act 86 allowed for adults over age 21 to possess one ounce of recreational marijuana and two mature and four immature marijuana plants per housing unit.¹¹⁵ People who want to grow marijuana in their rental apartment need to clear it with their landlords first.¹¹⁶ This could cause legal challenges in the future.

Vermont residents can travel with one ounce of marijuana, if in a sealed container.¹¹⁷ The new law does not address retail sales in Vermont.¹¹⁸ The law does not allow public consumption.¹¹⁹ Marijuana use under Act 86 is allowed only within “individual dwellings.”¹²⁰ With passage of Act 86, the Vermont legislature legalized recreational marijuana.¹²¹ The bill was passed by voice vote (not a recorded by-name vote), allowing political cover for all legislators.¹²² However, with growing popularity and political support, some politicians will choose to embrace the marijuana issue.¹²³ The law was signed by Vermont Governor Scott on January 22, 2018.¹²⁴ Governor Scott indicated “mixed emotions” on signing the bill.¹²⁵ Scott had vetoed a previous measure for medical marijuana in 2017.¹²⁶

Vermont’s legislative Act 86 is a very practical approach, as most of Vermont’s neighbors have legalized marijuana (Maine and Massachusetts have recreational marijuana, New Hampshire, Connecticut, and New York have medical programs and have decriminalized possession).¹²⁷

However, Vermont’s new law faces some future problems, in addition to landlord-tenant

¹¹³ *Id.*

¹¹⁴ Vermont Office of the Attorney General, GUIDE TO VERMONT’S LAWS ON MARIJUANA IN THE WORKPLACE, (June, 2018) available at <https://ago.vermont.gov/wp-content/uploads/2018/06/Employer-MJ-Guidance-TOC.pdf>.

¹¹⁵ *Id.* See also 18 V.S.A. § 4230a. *Id.* See also McCullum, *supra* note 110. See also Emily Alfin Johnson & Liam Elder-Connors, *July 1: Vermont Legalizes Limited Amounts of Recreational Cannabis*, VPR.ORG (July 1, 2018) available at

<https://www.vpr.org/post/july-1-vermont-legalizes-limited-amounts-recreational-cannabis#stream/0>.

¹¹⁶ McCullum, *supra* note 110.

¹¹⁷ 18 V.S.A. § 4230a. Savage & Mikula, *supra* note 110.

¹¹⁸ Vermont Office of the Attorney General, *supra* note 114. Savage & Mikula, *supra* note 110. See also McCullum, *supra* note 110. See also Tom Angell, *Vermont governor signs marijuana legalization into law*, FORBES (Jan. 22, 2018) available at

<https://www.forbes.com/sites/tomangell/2018/01/22/vermont-governor-signs-marijuana-legalization-into-law/#4b12e2526a27>.

¹¹⁹ 18 V.S.A. § 4230a.

¹²⁰ McCullum, *supra* note 110.

¹²¹ Clover Whitham, *Recreational marijuana now legal in Vermont*, BURLINGTON FREE PRESS (July 1, 2018) available at

<https://www.burlingtonfreepress.com/story/news/nation-now/2018/07/01/recreational-marijuana-use-now-legal-vermont/748793002/>.

¹²² Bob Kinzel, *Vermont Senate Passes Marijuana Legalization Bill, Which Now Heads To Gov. Scott*, NEW ENGLAND PUBLIC RADIO (Jan. 10, 2018) available at

<https://www.nepr.net/post/vermont-senate-passes-marijuana-legalization-bill-which-now-heads-gov-scott#stream/0>.

¹²³ Angell, *supra* note 118.

¹²⁴ Johnson & Elder-Connors, *supra* note 115.

¹²⁵ Linley Sanders, *Marijuana legalization 2018: Which states might consider cannabis laws this year?* NEWSWEEK (Jan. 2, 2018) available at

<https://www.newsweek.com/marijuana-legalization-2018-which-states-will-consider-cannabis-laws-year-755282>.

Clover Whitham, *supra* note 121.

¹²⁶ Sanders, *Id.*

¹²⁷ Savage & Mikula, *supra* note 110.

issues mentioned above, it r also does not protect workers who use marijuana.¹²⁸ As currently written, employers are not required to allow marijuana in the workplace for any reason, and employers can still adopt policies prohibiting the use of marijuana in the workplace.¹²⁹ Employers are, however, reminded that under Vermont's *Fair Employment Practices Act* (VFPEA), employers are not allowed to discriminate against a "qualified individual with a disability."¹³⁰ This law protects recovering and recovered substance abusers. "An employee's current illegal drug use does not automatically disqualify the employee from protection under Vermont's disability laws, unless that use: (i) prevents him or her from performing the duties of the job, or (ii) constitutes a 'direct threat to the property and safety of others.'"¹³¹ Vermont's political branches will need to focus on potential issues like these in the future.

Federal Action

In 2018, the Trump administration made its first major action towards the marijuana issue. On January 4, 2018, the Attorney General Jefferson Sessions rescinded the guidelines of the Cole Memo.¹³² The Cole Memo was an Obama era policy which indicated federal prosecutors' priorities should not be attacking marijuana producers and consumers where it is legal under state law.¹³³ Attorney General Sessions indicated that this lowering of the priority of marijuana laws was no longer a policy of the Trump administration.¹³⁴ However, very shortly after this proclamation, Sessions was fired as Attorney General.¹³⁵ Since then, the Trump administration has not made any clear policy statements on the marijuana issue. The future of marijuana policy at the federal level is very unclear.

International Action

While America is obsessed with the southern border, perhaps the northern border deserves some attention. On October 17, 2018 Canada legalized marijuana for all adults,¹³⁶ by

¹²⁸ 18 V.S.A. § 4474. *See also* Vermont Office of the Attorney General, *supra* note 114.

¹²⁹ Kathryn J. Russo, Martha Van Oot, and Ashley C. Zangara, *What Vermont's Recreational Marijuana Law Means for Employers*, SHRM.ORG (June 26, 2018) available at <https://www.shrm.org/ResourcesAndTools/legal-and-compliance/state-and-local-updates/Pages/What-Vermont-Rec-reational-Marijuana-Law-Means-for-Employers.aspx>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Attorney General of the United States, JUSTICE DEPARTMENT ISSUES MEMO ON MARIJUANA ENFORCEMENT, (Jan. 4, 2018) available at <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement>.

¹³³ James M. Cole, MEMORANDUM FOR ALL UNITED STATES ATTORNEYS (Aug. 29, 2013) available at <https://www.justice.gov/iso/opa/resources/30520132756857467.pdf>.

¹³⁴ Attorney General of the United States, *supra* note 132.

¹³⁵ Ryan W. Miller, *Jeff Sessions is out at attorney general: Here's what we know*, USA TODAY (Nov. 7, 2018) available at

<https://www.usatoday.com/story/news/politics/2018/11/07/jeff-sessions-fired-donald-trump-heres-what-we-know-no-w/1922566002/>. Peter Baker, Katie Benner & Michael D. Shear, *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, NEW YORK TIMES (Nov. 7, 2018) available at <https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html>.

¹³⁶ Bani Sapra, *Canada becomes second nation in the world to legalize marijuana*, CNN (June 20, 2018) available at <https://www.cnn.com/2018/06/20/health/canada-legalizes-marijuana/index.html>. Ingraham, *supra* note 35. Andre Bourque, *Canada's cannabis laws and 5 burning questions for 2019*, FORBES (Jan. 8, 2019) available at <https://www.forbes.com/sites/andrebourque/2019/01/08/canadas-cannabis-laws-by-province-and-5-burning-questions-for-2019/#6aec90da4eb3>.

passing bill C-45.¹³⁷ Canada has had medical marijuana since 2001.¹³⁸ Of course, Canada shares a very large border with the northern United States.¹³⁹ In addition, Canada and the United States have significant economic and political ties. Interestingly, Canada's marijuana is nearly double the price in Oregon, largely because of difficulties in Canada's supply chain regulations.¹⁴⁰ Many Canadian marijuana retailers have empty shelves.¹⁴¹ This supply shortage is leading to a resurgence of the black market for pot.¹⁴²

Canada's pot policy is not without problems. Canada's regulations vary widely by province.¹⁴³ Edibles will not be allowed until regulations are formalized in 2019.¹⁴⁴ Marijuana retailers face daunting regulatory costs (over \$25,000 a year).¹⁴⁵ Many states bordering Canada have already legalized weed, including Washington, Vermont, Michigan and Maine.¹⁴⁶ Of course, crossing the border with weed is a federal crime.¹⁴⁷

Conclusion

After the 2018 initiatives, over 80 million U.S. citizens live in a state that has legalized recreational marijuana.¹⁴⁸ Now, in 2019, 33 states have some form of legalized marijuana.¹⁴⁹ America reached the tipping point in marijuana several years ago. Legalized medical marijuana is the norm and legal recreational marijuana is a growing trend. The federal policy of 1970 (no marijuana for anyone at any time) seems the only outlier on the marijuana issue.

The current year (2019) could see even more state action, as marijuana initiatives are pending in New Jersey, Delaware, Rhode Island, Connecticut, Ohio, and Kentucky. The states have acted based on public sentiment for the legalization of marijuana in some form. It is time for the federal government to take action.

¹³⁷ Amelia McDonnell-Parry, *Weed is now legal in Canada*, ROLLING STONE (Oct. 15, 2018) available at <https://www.rollingstone.com/culture/culture-news/canada-legal-weed-pot-737905/>.

¹³⁸ Sapra, *supra* note 136.

¹³⁹ US-Canada border is twice as long as US-Mexico border, excluding Alaska. Janice Cheryl Beaver, *U.S. International Borders: Brief Facts*, CRS REPORT FOR CONGRESS (Nov. 9, 2006) available at <https://fas.org/sgp/crs/misc/RS21729.pdf>.

¹⁴⁰ Bourque, *supra* note 136.

¹⁴¹ Selena Ross, *Canada legalized pot in October. But its black market is still going strong*, WASHINGTON POST (Jan. 5, 2019) available at https://www.washingtonpost.com/world/the_americas/canada-legalized-pot-in-october-but-its-black-market-is-still-going-strong/2019/01/04/ca09a3b0-fe53-11e8-a17e-162b712e8fc2_story.html?utm_term=.303a099bfb73.

¹⁴² *Id.*

¹⁴³ Bourque, *supra* note 136.

¹⁴⁴ *Id.* McDonnell-Parry, *supra* note 137.

¹⁴⁵ Ross, *supra* note 141.

¹⁴⁶ Jon Campbell, April McCullum, Elizabeth Murray, and Dan D'Ambrosio, *Legal weed in Canada: What it means for New York and the border*, BINGHAMTON PRESS & SUN-BULLETIN (Feb. 21, 2019) available at <https://www.pressconnects.com/story/news/local/2019/02/21/canada-weed-legalization-2019-border-new-york-marijuana-law/2928804002/>.

¹⁴⁷ *Id.*

¹⁴⁸ (80 million Americans have access to legal recreational marijuana). Ingraham, *supra* note 35.

¹⁴⁹ Ross, *supra* note 39. See also Chappell, *supra* note 37.

HAS COMPARATIVE FAULT SWALLOWED RYAN? THE FUTURE OF IMPLIED CONTRACT/TORT INDEMNITY IN MARITIME LAW

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ABSTRACT

According to the United States Supreme Court, a warranty of workmanlike performance is implied in every contract between a maritime contractor and a shipowner. A breach of this implied warranty to perform the work in a reasonably safe manner results in a right of indemnity in the shipowner, allowing recovery from the negligent stevedoring contractor for any amount paid to a longshoreman. However, legislative changes wrought by Congress have cast doubt on the continued viability of this doctrine, and have resulted in a split among federal appellate courts as to the doctrine's applicability. This paper discusses the history of the doctrine, the current state of the jurisprudence, and the road forward.

I. PRELIMINARY MATTERS

A. Admiralty Jurisdiction: The Federal Court/Congress Dichotomy

The maritime law, particularly as it concerns personal injury and wrongful death, holds a distinctive position in American law, due in large part to the power of “both the courts and the Congress ... to fashion new remedies to meet the social, economic and human needs resulting from ever-expanding maritime operations.”⁴ The well-spring of this judicial power is none other

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⁴ See George W. Healy II, *Remedies for Maritime Personal Injury and Wrongful Death in American Law: Sources and Development*, 68 TUL. L. REV. 311, 311-12 (1994); John W. Sims, *The American Law of Maritime Personal Injury and Death: An Historical Review*, 55 TUL. L. REV. 973, 973 (1981).

than the Constitution itself.⁵ Congress' role, despite the lack of a similarly specific constitutional grant of authority, stems from the more diffuse power to regulate commerce.⁶

In 1917, the Supreme Court noted that it "must now be accepted as settled doctrine that ... Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. And further, that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction."⁷ In admiralty cases, then, unless there is a relevant statute, the general maritime law, as developed by the judiciary, applies.⁸

B. The Desire for Uniformity

Admiralty jurisdiction since *DeLovo v. Boit*, 7 F. Cas. 418 (C.C.Mass 1815), has extended to "all maritime contracts and torts" rather than to only certain select situations, as had been the case in England.⁹ The significance of determining admiralty jurisdiction in tort is not only to establish the availability of a federal forum, but also to determine the applicable substantive law; a holding that a particular occurrence is within the admiralty jurisdiction generally amounts to a holding that the law governing that occurrence is the substantive maritime law.¹⁰ Underpinning

⁵ U.S.CONST.art. III, § 2, cl. 1 ("the judicial Power shall extend to all Cases ... of admiralty and maritime Jurisdiction."); *see also* 28 U.S.C.A. §§ 1251, 1331 *et seq.*, giving federal District Courts exclusive jurisdiction in civil causes of admiralty jurisdiction. There is controversy concerning the source of the language used in the Constitution. *See* Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORN. L.Q. 460 (1925)(arguing the language was little more than an afterthought of John Rutledge of South Carolina, the Chairman of the Committee of Detail assigned to draft the Constitution). *But see* Robinson, ADMIRALTY AND FEDERALISM, Chapter 1, 1970 (arguing the language had been included in earlier drafts of the Constitution). *See also* Healy, *supra* note 1.

⁶ U.S. CONST. ART 1, § 8, cl. 2 conferring upon the Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested b this Constitution in the government of the United States or in any department or officer thereof". *See also* *Gibbons v. Ogden*, 22 U.S. 1, 6L Ed 23, 9 Wheat. 1, (1824) (delineating the scope of Congress' authority to regulate under the commerce clause); Healy, *supra* note 1.

⁷ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215 37 S.Ct. 524, 61 L.Ed. 1086, 1996 A.M.C. 2076, (1917) (*citing* *Butler v. Boston & S. S. S. Co.* 130 U.S. 527, 9 S.Ct. 612, 32 L. Ed. 1017 (1889); *Re Garnett*, 141 U.S. 1, 14, 11 S.Ct. 840, 35 L. Ed. 631, 634 (1891); *The Lottawanna (Rodd v. Heartt)* 88 U.S. 558, 22 L.Ed. 654, 1996 A.M.C. 2372, 21 Wall. 558, (1874); *Butler v. Boston & S. S. S. Co.* 130 U.S. 527, 557, 9 S.Ct. 612, 32 L. Ed. 1017, 1024 (1889); *Workman v. New York*, 179 U.S. 552, 21 S.Ct. 212, 45 L. Ed. 314 (1900)). *See also* Healy, *supra* note 1.

⁸ *See Supra* note 4. *See also* *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 259, 99 S.Ct. 2753, 2756, 61 L.Ed.2d 521, 526, 1979 A.M.C. 1167 (1979) ("Admiralty law is judge-made law to a great extent..."); *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986).

⁹ *Hertz v. Treasure Chest Casino, L.L.C.*, 2003 WL 21748686 (E.D.La., 2003)(holding "that the national policy, as well as the juridical logic, requires the clause of the Constitution to be construed so as to embrace all maritime contracts, torts and injuries ...").

¹⁰ *Hertz v. Treasure Chest Casino L.L.C.*, 2003 WL 21748686 (E.D.La.,2003).

this doctrine is the belief that “in planning their conduct and business expenses, persons engaged in maritime commerce should be able to rely on the applicability of a single law.”¹¹

The desire for uniformity in admiralty law is merely a subset of a broader desire for uniformity in all federal law.¹² The Supreme Court has explained that the key factor to consider in fashioning federal law is the strength of the relevant federal interest.¹³ The national interest in the uniform regulation of maritime commerce is strong enough to preclude state jurisdiction over injuries occurring on navigable waters.¹⁴ Uniformity is a battle-cry often recited by courts sitting in admiralty jurisdiction.¹⁵

II. REMEDIES FOR PERSONAL INJURIES UNDER MARITIME LAW

A. A Brief Framework: Status and Relationships

Maritime law is one of status and relationships. Maritime claims require careful analysis of the parties’ status, because important discussions flow therefrom.¹⁶ Of paramount importance

¹¹ See Henry M. Hart Jr., *The Supreme Court, 1958 Term*. 73 HARV. L. REV.84, 146 (1959). See also, *Southern Pacific Co.*, 244 U.S. at, 218, 37 S.Ct. 524 (1917) (holding state laws do not preempt application of general maritime law).

¹² *Clearfield Trust Co. v. United States* 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943)(emphasizing the desirability of a uniform rule of federal law, in lieu of the patchwork that would result from piecemeal adoption of state laws). See also *Teague v. National R.R. Passenger Corp.*, 708 F.Supp 1344 (D. Mass. 1989)(explaining that FELA jurisprudence is essentially a federal common law and showing distress that each court might look to the law of its own forum state; “That way lies chaos: the fifty courts in the fifty states might produce as many as fifty versions of what should be unified federal law.”)

¹³ See *United States v. Standard Oil Co.*, 332 U.S. 301, 309, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947).

¹⁴ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215 (1917). See also *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67, 744, 63 S.Ct. 573, 87 L.Ed. 838 (1943) (stating that when the government acts out of authority founded in the United States Constitution and federal statutes, state law is inapplicable and discussing the desirability of a uniform rule); *Byrd v. Byrd*, 657 F.2d 615, 617 (4th Cir. 1981) (“A state law, even though it does not contravene an established principle of admiralty law will, nevertheless, not be applied where its adoption would impair the uniformity and simplicity which is a basic principle of the federal admiralty law”); *Wells v. Liddy*, 186 F.3d 505, 525 (4th Cir. 1999) (noting “[s]tate law is said to conflict with general maritime law when it negatively impacts upon admiralty’s foremost goal—uniformity.”).

¹⁵ See, e.g. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L. Ed 2d 275, 1991 A.M.C. 1, (1990)(citing uniformity when imposing rule in maritime law barring the recovery of non-pecuniary damages in all actions under DOHSA, the Jones Act, and general maritime law); *Georgia Ports Authority v. Andrew Rickmers Schiffsbeteiligungsges MBH & Co. KG*, -- S.E.2d ---, 2003 WL 21659410, (Ga.App., 2003)(citing uniformity as foremost concern in refusal to allow states to shield themselves from maritime liability using sovereign immunity); *Texas A&M Research Foundation v. Magna Transp., Inc.*, --F.3d--, 203 WL 2154061, (5th Cir. 2003) (citing the “strong interest in maintaining uniformity in maritime law,” as reason for denying attorney’s fees); *In re Superior Crewboats, Inc.* 2003 WL 21219887, (E.D.La., 2003) (holding the principles of ‘relation back’ are not applicable in an admiralty proceeding because application of the rule would interrupt the uniformity of general maritime law). *But see American Dredging Co. v. Miller*, 510 U.S. 443, 451 114 S.Ct. 981, 127 L.Ed.2d 285, 1994 A.M.C. 913 (1994)(holding that a state’s application of *forum non conveniens* did not “interfere[] with the proper harmony and uniformity of maritime law” because maritime law’s requirement of uniformity is intended to reach only those matters that “bear upon the substantive right to recover,” and *forum non conveniens* is not inconsistent with that requirement).

¹⁶ Robert Force, *The Curse of Miles v. Apex Marine: The Mischief of Seeking “Uniformity” and “Legislative Intent” In Maritime Personal Injury Cases*, 55 LA. L. REV. 745 (1995).

is a party's status as, and the relationship between, shipowners,¹⁷ stevedoring contractors,¹⁸ longshoremen,¹⁹ seamen,²⁰ and other maritime workers. These classifications determine the rights and duties of the parties.

B. Seamen

Traditionally, maritime law recognized two claims by seamen who suffered injuries during the course of their employment: (1) maintenance and cure; and (2) unseaworthiness.²¹ These doctrines were seen as serving "the great public policy of preserving this important class of citizens [seamen] for the commercial service and maritime defense of the nation."²² Congress, however, has used its regulatory authority to legislatively modify the remedies available to injured seaman.

¹⁷ A shipowner, for purposes of this paper, is a person or corporation who owns or operates a vessel. *See generally*, George K. Fuiaxis, *Indemnification or Comparative Fault: Should a Tortfeasor's Right to Receive "Ryan Indemnity" in Maritime Law Sink or Swim in the Presence of Comparative Fault?* 67 FORDHAM L. REV. 1609, 1625.

¹⁸ A stevedoring contractor hires longshoremen and contracts with shipowners to perform various services, such as loading and unloading cargo. *Id.*

¹⁹ A longshoreman is generally defined as a maritime employee who loads and unloads cargo ships, and who works in a port's wharves. BLACK'S LAW DICTIONARY 943 (6th ed. 1990); *Duke v. Helena-Glendale Ferry Co.*, 159 S.W.2d 74, 77 (Ark. 1942). Longshoremen and many other types of non-seaman maritime workers are covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950. The LHWCA provides, at 33 U.S.C. § 902 (3) that "employee" means "any person engaged in maritime employment, including any longshoreman or other person engaged in long shoring operations, and any harbor-worker including a ship repairman, ship builder, and ship-breaker, but such term does not include (A) individuals employed exclusively to perform office, clerical, secretarial, security or data processing work; (B) individuals employed by a club, camp, recreational operation, restaurant, museum or retail outlet; (C) individuals employed by a marina and who are not engaged in construction, replacement or expansion of such marine (except for routine maintenance); (D) individuals who (i) are employed by supplies, transporters or vendors, (ii) are temporarily doing business on the premises or an employer described in paragraph (v), and (iii) are not engaged in work normally performed by employees of that employer under this Act; (E) aquaculture workers; (F) individuals employed to build, repair or dismantle any recreational vessel under sixty-five feet in length; (G) a master or member of a crew of any vessel; or (H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net; if individuals described in clauses (A) through (F) are subject to coverage under a State worker's compensation law."

²⁰ Seamen are sailors or mariners, or those whose business is navigating ships, or who are connected with the ship as such and in some capacity assist in its conduct, maintenance or service. BLACK'S LAW DICTIONARY 1349 (6th ed. 1990). The Supreme Court has established a two-prong test for determining seaman status. First, "an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368, 115 S.Ct. 2172, 132 L.Ed.2d 314, 1995 A.M.C. 40 (1995). Second, "a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both duration and nature." *Id.* *See also* *Becker v. Tidewater, Inc.*, 335 F.3d 376 (5th Cir. 2003). The classification as seaman is a complex one, thoroughly discussed by commentators. *See e.g.*, Jack L. Albritton, *Seaman Status in Wilander's Wake*, 68 TUL. L. REV. 373 (1994).

²¹ *See* *California Home Brands, Inc. v. Ferreira*, 871 F.2d 830, 832 (9th Cir. 1989); *see generally* Fuiaxis, *supra* note 14.

²² *Harden v. Gordon*, 11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6047).

Under maintenance and cure, owners are strictly liable for seamen's personal injury or death in the service of the ship.²³ Seamen may recover food, lodging, medical care, and unearned wages from their employers while recuperating, either aboard ship or ashore, from a sickness or injury incurred upon a vessel or ashore.²⁴ The injury need not be causally related to the seaman's shipboard duties.²⁵ The shipowner's duty to provide maintenance and cure extends until such time as nothing further can be done to improve the seaman's condition.²⁶ Originally, under this remedy, a seaman could not recover compensatory damages if maintenance and cure had been provided by the shipowner.²⁷ A seaman's right to maintenance and cure is nonforfeitable except in cases of willful misconduct (*i.e.*, negligence would not suffice).²⁸

Under the unseaworthiness doctrine, shipowners are absolutely liable for any breach of the non-delegable duty to maintain a seaworthy vessel.²⁹ The Supreme Court announced the cause of action for unseaworthiness in *The OSCEOLA* but drew a somewhat artificial distinction between "operational negligence" and unseaworthiness.³⁰ At that time, although a cause of action for unseaworthiness of the vessel was recognized, no action was recognized for injuries caused by negligence.³¹ Further, unseaworthiness was originally restricted to the structure of the vessel, the adequacy of its equipment and furnishings, and the disposition of its officers; negligence generally related solely to the direction and control of operations aboard ship.³² This changed, of course, in the wake of the Court's decision in *Mahnich*.³³ With the *Mahnich* decision, the Court held that an

²³ *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938). See *Harden v. Gordon*, 11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6047) and *Reed v. Canfield*, 20 F. Cas. 426 (C.C.D. Mass. 1832) (No. 11,641).

²⁴ *Farrell v. United States*, 336 U.S. 511, 517-18 (1949); *Warren v. United States*, 75 F. Sup. 836, 838 (D. Mass. 1948); *Reed v. Canfield*, 20 F. Cas. 426 (C.C.D. Mass. 1832) (No. 11,641).

²⁵ See Healy, *supra* note 1, at 317.

²⁶ See Healy, *supra* note 1, at 318.

²⁷ *Reed*, 20 F. Cas at 426.

²⁸ *The BEN FLINT*, 3 F. Cas. 183, 185 (D. Wis 1867) (No. 1299) ("To forfeit a claim, ... the disability or sickness of the seamen must be owing to vicious or unjustifiable conduct, such as gross negligence operating in the nature of a fraud upon the owners, willful disobedience to orders, and persistent neglect of duty").

²⁹ *The OSCEOLA*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760, (1903). See *Knight v. Alaska Trawl Fisheries, Inc.* 154 F.3d 1042, 1044 (9th Cir. 1988).

³⁰ *The OSCEOLA*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760, (1903) See *Knight v. Alaska Trawl Fisheries, Inc.*, 154 F.3d 1042, 1044 (9th Cir. 1998)

³¹ See Healy, *supra*, note 1, at 325.

³² *The OSCEOLA*, 189 U.S. at 176 (1903). Unseaworthiness was later extended to include the disposition of the crew, including the ship's officers. See *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 339-40, 1955 AMC 488, 491-92 (1955). This development in the law was departure from land-based tort standards, which at the time precluded recovery to an employee for injuries that were the result of the negligence of fellow servants. See *Chicago, M. & St. P. Ry. V. Ross*, 112 U.S. 377, 383-84 112 U.S. 377, 5 S.Ct. 184, 28 L.Ed. 787, (1884). See also *Plamals v. Pinar Del Rio*, 277, U.S. 151, 1928 A.M.C. 932 (1928)(reaffirming *The OSCEOLA*'s operational negligence exclusion).

³³ *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944).

unseaworthy condition resulting from negligence was nonetheless compensable.³⁴ Seamen may recover compensation for past and future income, pain and suffering, disability, expenses of medical care, and loss of enjoyment of activities of normal life if their death or personal injury was caused by the unseaworthiness of the ship.³⁵

Unseaworthiness remained the only cause of action for seamen seeking damages,³⁶ until Congress modified this age-old framework by enacting the Jones Act³⁷ in 1920. A Jones Act cause of action may be invoked only by a seaman³⁸ and may be asserted only against the seaman's employer.³⁹ The Jones Act expanded seamen's right by giving them a cause of action against shipowners in negligence,⁴⁰ but limiting recovery to pecuniary losses suffered during the seamen's lifetime.⁴¹ Thus, there was no reason to bring an action in unseaworthiness and risk having the claim dismissed on the ground it fell under the operational negligence exclusion.⁴²

³⁴ *Id.* At 102-03.

³⁵ See Andrew Hoang Do, *Seaman Remedies and Maritime Releases: A Practical Consideration*, 7 U.S.F. MAR. L.J. 379, 390 (1995). However, because the concept of negligence is irrelevant to a claim of unseaworthiness, a seaman cannot recover consequential damages under the unseaworthiness doctrine. See *Knight v. Alaska Trawl Fisheries, Inc.* 154 F.3d 1042, 1044 (9th Cir. 1998).

³⁶ See Healy, *supra* note 1, at 325.

³⁷ 46 U.S.C. § 688 (1994).

³⁸ *Braen v. Pfeifer Oil Transp. Co.*, 361 U.S. 129, 80 S. Ct. 247 (1959).

³⁹ See Force, *supra* note 13, at 745. See also *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772 (1970); *Matute v. Lloyd Bermuda Lines, Ltd.* 931 F.2d 231 (3d Cir. 1991).

⁴⁰ *Id.*

⁴¹ See *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

⁴² GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* § 6-38 at 384 (2d ed. 1975). There are also other reasons for plaintiff seamen preferring the Jones Act negligence action. For instance, the Jones Act eliminated contributor negligence as a bar to recovery, and the Jones Act provided for a jury trial. See Healy, *supra* note 1, at note 90.

III. Longshore and Harbor Workers

By the late nineteenth century, longshore and harbor workers, unlike their seamen compatriots, did have an action for negligence against shipowners.⁴³ Like seamen, however, longshoremen lacked an adequate remedy for the negligence of their employers.⁴⁴ When a harbor worker was injured on navigable waters, he was forced to bring a maritime tort action which was subject to the harsh defenses of the time: contributor negligence, assumption of the risk, and the fellow-servant doctrine.⁴⁵ Congress, however, assumed that employees working in or near a harbor would also be covered by state workers' compensation laws.⁴⁶

Accordingly, Congress initially took no action to create a federal remedy for harbor workers against their employers.⁴⁷ In light of the fact that the ability to legislate in admiralty is solely the province of Congress,⁴⁸ attempts to include harbor workers injured over navigable waters in state-created, no-fault administrative remedies were, logically, doomed before they began.⁴⁹ This intuitive analysis was confirmed in *Southern Pacific Co. v. Jensen*,⁵⁰ when the Supreme Court held that a New York workers' compensation statute could not constitutionally be applied to the death of a longshoreman, because to do so would destroy "the very uniformity in respect to maritime matters which the Constitution was designed to establish."⁵¹

In 1927, however, Congress enacted the Longshore and Harbor Workers' Compensation Act, ("LHWCA")⁵² which created a federal system of compensation for longshore and harbor workers who were injured or killed on navigable waters in cases where recovery "may not validly be provided by State law."⁵³ The LHWCA provided a longshoreman's exclusive remedy against

⁴³ See, e.g., *Gerrity v. THE KATE CANN*, 2 F. 241 (E.D.N.Y. 1880) (permitting employee of grain elevator company to recover for injuries caused by negligent management of the vessel), *aff'd*, 8 F. 719 (C.C.D.N. 1881). See generally Healy, *supra* note 1, at 335.

⁴⁴ See Healy, *supra* note 1, at 335.

⁴⁵ *Id.*

⁴⁶ *Id.* This assumption may have been a result of the Supreme Court's validation, in non-maritime contexts, or similar state statutes in *New York Central Railroad v. White*, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667 (1917); *Hawkins v. Bleakly*, 243 U.S. 210, 37 S.Ct. 255, 61 L.Ed. 678 (1917); and *Mountain Timer Co. v. Washington* 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685 (1917). See Healy, *supra* note 1, at 335.

⁴⁷ See Healy, *supra* note 1, at 336.

⁴⁸ See *supra*, note 3.

⁴⁹ See Healy, *supra* note 1, at 336.

⁵⁰ 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, 1996 A.M.C. 2076 (1917).

⁵¹ *Id.* At 217.

⁵² Pub. L. No. 69-803, 44 Stat. 1424 (1927) (current codified version at 33 U.S.C. §§ 901-950 (1988)). See generally, Healy, *supra* note 1, at 337.

⁵³ 33 U.S.C. § 902(a). The LHWCA does not cover seamen (who are defined there as "master(s) or member(s) of a crew of any vessel.") 33 U.S.C. § 903(a)(1).

his employer, but preserved the longshoreman's right to bring a tort action against a third party.⁵⁴ The LHWCA specifically excluded from coverage "a master or member of a crew of any vessel," thereby eliminating any Jones Act remedy.⁵⁵

Problems soon arose when the lower courts began applying the provisions of the LHWCA.⁵⁶ While section 905 limited the longshoreman's remedy against the employer to compensation "on account of ... injury or death,"⁵⁷ section 933 preserved his right to recover damages against a third party.⁵⁸ Thus, although a worker could sue third parties, he had no remedy against his employer other than compensation.⁵⁹ This did not, however, necessarily mean that other parties had no remedy against the worker's employer, notwithstanding section 905.⁶⁰

Until 1946, an action founded upon section 933 appeared to be limited to negligence.⁶¹ Then, in *Seas Shipping Co. v. Sieracki*,⁶² the Supreme Court extended the warranty of seaworthiness to a longshoreman on the theory that he was performing work traditionally done by a seaman.⁶³ The Court reasoned that since the LHWCA explicitly preserved a longshoreman's cause of action against a third party,⁶⁴ the LHWCA did not "nullify any right of the longshoreman against the owner of the ship."⁶⁵ Thus, longshoremen received the remedies of seamen, while maintaining their own LHWCA benefits,⁶⁶ and the "Sieracki-seaman" classification was born.

⁵⁴ *Id.* §905 (b).

⁵⁵ 33 U.S.C. § 902(3)(g) The Act also initially reduced a longshoremen's remedies, because the Supreme Court had ruled only a year before in *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 52, 272 U.S. 50, 47 S.Ct. 19, 71 L.Ed. 157, 1926 AMC 1638, 1639-40 (1926) that longshoremen could be recognized as seamen if they were injured on navigable waters while doing work traditionally done by seamen, thus allowing them to sue under the Jones Act.

⁵⁶ See Healy, *supra* note 1, at 339.

⁵⁷ 33 U.S.C. § 905(a).

⁵⁸ *Id.* §933.

⁵⁹ See Healy, *supra* note 1, at 339.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, (1946)

⁶³ *Id.* At 99, 1946 AMC at 708. The *Sieracki* holding was extended to other maritime workers engaged in work traditionally performed by seamen. See, e.g., *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 413, 74 S.Ct. 202, 98 L.Ed. 143, 1954 AMC 1, 9 (1953) (injury to a shoreside carpenter employed by a private contractor while repairing vessel compensable).

⁶⁴ See *supra* note 51.

⁶⁵ See *Sieracki*, 328 U.S. at 102.

⁶⁶ See Gordon K. Wright, *The Ship, Stevedore, and Longshore Worker Triangle 1917-1995*, 26 J. MAR. L. & COM. 503, 506 (1995).

IV. INDEMNITY AND CONTRIBUTION UNDER GENERAL MARITIME LAW: A LOOK BACK

A. Contribution

Maritime contribution is rooted in England's rule of divided damages.⁶⁷ The divided damages rule was an English maritime rule that divided damages equally between two parties when both parties were at fault.⁶⁸ Although originally adopted by American courts as a "more equal distribution of justice" than the common law rule (which precluded contribution among joint tortfeasors and permitted the plaintiff to force one of the wrongdoers to bear the entire loss), the divided damages rule was harsh when applied to a party that was only slightly at fault in causing a loss.⁶⁹

In response, the courts adopted the major-minor fault rule, (later, the active-passive negligence rule), to allow a negligent tortfeasor who was only "passively" negligent to recover indemnity from a tortfeasor whose "active" negligence caused the plaintiff's loss.⁷⁰ This theory of indemnity supposes that the indemnitor is guilty of active, primary or original fault while the indemnitee is guilty only of passive, secondary or implied fault,⁷¹ and it applies a restitutionary

⁶⁷ Marie R. Yeates, *Contribution and Indemnity in Maritime Litigation*, 30 S. TEX L. REV. 215 (1989). This rule is traceable to Article XIV of the Laws of Oleron, which dates from approximately 1150 A.D. See Graydon S. Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 CAL. L. REV. 304 (1957); see also *The NORTH STAR*, 106 U.S. 17, 1 S.Ct. 41, 27 L.Ed. 91, (1882)(tracing the history of the rule of divided damages). This rule is also commonly referred to as the "Rule of Moiety." 'Moiety' means "the half of anything". See *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1993 A.M.C. 1217, (6th Cir. 1993); BLACK'S LAW DICTIONARY 1005 (6th ed 1990). The divided damages rule was adopted by the Supreme Court in *The SCHOONER CATHARINE v. Dickenson*, 58 U.S. (17 How.) 170 (1855), explaining that it was the rule "best tending to induce care and vigilance on both sides ...". *Id.* at 178. See also the *ALABAMA* and *The GAMECOCK*, 92 U.S. 695, 697 (1876)(explaining that a rule requiring those who are both at fault to share the liability encourages both parties to be safer).

⁶⁸ General maritime law follows the common law rule of joint and several liability, whereby one of several tortfeasors is liable in full for an injured plaintiff's damages. See *Transorient Navigators Co. S.A. v. M/S SOUTHWIND*, 788 F.2d 288, 294 (5th Cir. 1986)(calling joint and several liability a "well-established principle of admiralty"). See also *The ATLAS*, 93 U.S. 302 (1876); *Love joy v. Murray*, 70 U.S. (3 Wall.) 1 (1866); see generally Yeates, *supra* note 64; and Warren B. Daly, Jr. *Contribution and Indemnity: The Quest for Uniformity*, 68 TUL. L. REV. 501, 503-7 (1994). Common law, however, did not allow contribution between joint tortfeasors. See *The SCHOONER CATHARINE v. Dickenson*, 58 U.S. (17 How.) 170 (1855). Recall that contribution allows a tortfeasor against whom a judgment is rendered to recover *proportional shares* of the judgment from a joint-tortfeasor whose negligence also contributed to plaintiff's injury, while indemnity allows a tortfeasor to shift *all* of the loss onto another tortfeasor. BLACK'S LAW DICTIONARY 329 and 769 (6th ed. 1990).

⁶⁹ See Yeates, *supra* note 64, at 224; *The MAX MORRIS v. Curry*, 137 U.S. 1, 14 (1890).

⁷⁰ *Id.* See, e.g., *Culver v. Slater Boat Co.*, 644 F.2d 460, 466 (5th Cir.), *rehearing en banc granted*, 644 F.2d 466 (1981) ("Where a tortfeasor's own acts and omissions help create the unsafe workplace, its negligence undoubtedly is active"); *Wedlock v. Gulf Miss. Marine Corp.*, 554 F.2d 240, 243 (5th Cir. 1977) ("...the classic case of passive negligence occurs only when one joint tortfeasor creates a danger that the other (passive) tortfeasor merely fails to discover or to remedy"); *Avondale Shipyards, Inc. v. Vessel Thomas E. Cuffe*, 434 F.Supp. 920, 928 (E.D.La. 1977) (a party is passively negligent if it "breach[es] an absolute duty to provide a seaworthy vessel or (is) liable under a rule imposing vicarious or technical liability").

⁷¹ See, e.g., *Tri-State Oil Tool Industries, Inc. v. Delta Marine Drilling Co.*, 410 F.2d 178 (5th Cir. 1969).

principle to the situation where one person discharges a liability that has been imposed on him by operation of law, but which—because of another’s ‘primary’ fault—should have been discharged by the other.⁷² The distinction between primary and secondary liability for this purpose is not based on a mere difference in degrees of fault but rather on a “difference in the character or kind of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person,”⁷³ and therefore where the indemnitee’s liability is merely constructive, vicarious or derivative, the burden for the entire loss may be shifted to the indemnitor whose actual fault caused the injury.⁷⁴

The Court also held that, in the interests of justice, where one of the joint tortfeasors was unable to pay his share of plaintiff’s damages, the plaintiff was entitled to be made whole by the solvent tortfeasor.⁷⁵ The natural evolution of these holdings led to two extremely important (and revolutionary) corollaries: the court pronounced the rule of implead to allow a defendant to join a joint tortfeasor into the pending proceedings, and also held that a separate action would lie to allow one tortfeasor to seek contribution from another tortfeasor.⁷⁶

The divided damages rule was “liberally extended” by the Court.⁷⁷ For example, the Court expanded the doctrine to encompass not only damage to the vessels involved in a collision, but personal injuries and property damage caused to innocent third parties as well.⁷⁸ The Court also applied the rule of divided damages in circumstances not involving a collision between two vessels, as where a ship strikes a pier due to the fault of both the shipowner and the pier owner,⁷⁹ or where a vessel runs aground in a canal due to the negligence of both the shipowner and the canal company.⁸⁰

⁷² *U.S. Lines, Inc. v. Newport News Shipbuilding and Dry Dock Co.*, 688 F.2d 236 (4th Cir., 1982). *See* Restatement of Restitution § 76 (1937).

⁷³ *Builders Supply Co. v. McCabe*, 336 Pa. 322, 77 A.2d 368, 370 (1951).

⁷⁴ *Danny’s Construction Co. v. Havens Steel Co.*, 437 F.Supp. 91, 93 (D.Neb.1977); *see* Restatement of Restitution ss 94, 95, 96 (1937).

⁷⁵ *The ATLAS*, 93 U.S. 302, 319, 3 Otto 302, 23 L.Ed. 863 (1876).

⁷⁶ *See Yeates*, *supra* note 64, at 221; *The HUDSON*, 15 F. 162 (S.D.N.Y. 1883) (creating the rule of implead); *United States v. The Steamship JUANITA*, 93 U.S. 930 (1876) (holding separate action for contribution was permissible). The HUDSON Rule (implead) remains an important (and often used) part of American jurisprudence and is now Fed. R. Civ. P. 14(c).

⁷⁷ *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694, 1974 A.M.C. 537, (1974).

⁷⁸ *See, e.g., The WASHINGTON*, 9 Wall. 513, 19 L.Ed. 787 (1870); *The ALABAMA*, 92 U.S. 695, 23 L.Ed. 763 (1876); *The ATLAS*, 93 U.S. 302, 23 L.Ed. 863 (1876); *The CHATTAHOOCHEE*, 173 U.S. 540, 19 S.Ct. 491, 43 L.Ed. 801 (1899). *See generally*, *The MAX MORRIS*, 137 U.S. 1, 8-11, 11 S.Ct. 29, 30—32, 34 L.Ed. 586 (1890).

⁷⁹ *See Atlee v. Packet Co.*, 21 Wall, 389, 22 L.Ed. 619 (1875).

⁸⁰ *See White Oak Transp. Co. v. Boston, Cape Code & New York Canal Co.*, 258 U.S. 341, 42 S. Ct. 338, 66 L.Ed. 649 (1922). *See also The MAX MORRIS*, 137 U.S., at 13-14, 11 S. Ct., at 32-33.

However, in the landmark case *Halcyon Lines*, the Court ignored this line of precedent.⁸¹ *Halcyon Lines* was a personal injury case; a worker making repairs on a ship moored in navigable waters was injured and alleged that his injury was due to the negligence of the shipowner (Halcyon) and the unseaworthiness of the vessel.⁸² Since the employee was covered by the Longshoremen's and Harbor Workers' Compensation Act, he was prohibited from suing his employer (Haenn).⁸³ Halcyon, however, impleaded Haenn as a joint tortfeasor, seeking contribution for the judgment recovered by the employee.⁸⁴ The Court, in a jurisprudential about-face, held that absent Congressional action, the rule of divided damages could *not* be extended to cases other than collision cases.⁸⁵ Thus, contribution was not permitted among joint tortfeasors in personal injury actions.⁸⁶

B. Indemnity

There are three doctrines in maritime law that may support a finding of indemnity. The first is based in contract law – indemnity based upon an express contractual agreement to indemnify. This theory is still alive and well.⁸⁷

The second theory is tort indemnity.⁸⁸ Courts utilize this form of indemnity to prevent unjust results; when contribution among joint tortfeasors was denied,⁸⁹ tort indemnity prevented a

⁸¹ *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318, (1952).

⁸² *Id.*, 342 U.S. at 283.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*, 342 U.S. at 285. The lower courts, however, generally did not implement *Halcyon* as a total bar to contribution in non-collision cases. *See, e.g.*, *Crain Bros., Inc. v. Weiman & War Co.*, 223 F2d 256 (CA3 1955); *Moran Towing Corp. v. M. A. Gammino Const.*

⁸⁶ *See Daly, supra* note 65, at 502. Note, however, that recovery had long been reduced by plaintiff's own fault. *Id.*; *see The MAX MORRIS*, 137 U.S. at 14-15.

⁸⁷ *See e.g.*, *American Stevedores, Inc. v. Porello*, 330 U.S. 446, 457-58, 67 S.Ct. 847, 91 L.Ed. 1011, (1947) (leaving question of intent of the parties regarding the indemnity agreement to the District Court); *Theriot v. Bay Drilling Corp.*, 783 F2d 527, 540 (5th Cir. 1986) (applying federal maritime law and enforcing indemnity agreement that fully exculpated party from liability for its own negligence); *Transcontinental Gas Pipeline Corp. v. Mobil Drilling Barge (The MR. CHARLIE)*, 424 F2d 685 (5th Cir. 1970), *cert. denied*, 400 U.S. 832 (1970) (tracing precedent governing indemnity contracts); *Batson-Cook Co. v. Industrial Steel Erectors*, 257 F2d 410 (5th Cir. 1958) (upholding District Court's construction of indemnity clause). Maritime contractual indemnification is not, however, unbounded. For instance, provisions contravening public policy or contrary to applicable statutory provisions will not be enforced by the courts. *See, e.g. Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 87, 1955 AMC 899, 902 (1955); *Pippen v. Shell Oil Co.*, 661 F2d 378, 386-87 (5th Cir. 1981).

⁸⁸ Noncontractual indemnity was recognized in general maritime law to escape the harsh effects of the ancient maritime rule of divided damages. *See supra*, notes 64 – 67 and accompanying text. This form of indemnity has also been called 'indemnity by operation of law'. *See Yeates, supra*, note 64, at 222.

⁸⁹ Recall that the common law did not recognize contribution between joint tortfeasors. Maritime law, while not prohibiting contribution, adhered to the rule of moieties. *See supra*, notes 64 – 66 and accompanying text. This forced division of damages was also seen as extremely harsh in some circumstances, as where one party was only slightly at fault for causing the loss. *See Yeates, supra*, note 64, at 224.

harsh result by shifting the loss from one tortfeasor to another, more culpable, tortfeasor who, under principles of equity, should more properly bear the loss.⁹⁰ Until recently, the general maritime law allowed a tortfeasor whose fault was determined to be merely passive (or secondary) to recover full indemnity from the actively (or primarily) negligent tortfeasor;⁹¹ however, virtually all courts considering the issue in the wake of the Supreme Court's ground-breaking comparative fault decisions⁹² have concluded that tort indemnity has been supplanted by percentage-fault-based contribution.⁹³ In *Loose v. Offshore Navigation, Inc.*⁹⁴, the Fifth Circuit described the demise of tort indemnity: "The concepts of active and passive negligence have no place in a liability system that considers the facts of each case and assesses and apportions damages among joint tortfeasors according to the degree of responsibility of each party."

The third party theory is implied contractual indemnity, commonly known as *Ryan* indemnity.

V. A NEW ORDER: RYAN INDEMNITY

Ryan indemnity takes its name from *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*⁹⁵ *Ryan* indemnity was developed to deal with the inequity that had developed as a result of the Supreme Court's holding in *Sieracki*.⁹⁶ *Sieracki* mad shipowners pay injured longshore workers for many waterfront accidents that resulted solely or principally from the fault of the stevedoring contractors (*i.e.*, the stevedoring contractors themselves created the condition which rendered the ship unseaworthy, but were entitled to compensation from blameless shipowners).

⁹⁰ See Yeates, *supra*, note 64, at 223. Examples of this doctrine include the active-passive negligence rule, the major-minor fault rule, the rule of last clear chance, and the *in extremis* rule. Tort indemnity may also arise where liability springs solely from the relationship to the wrongdoer, as in vicarious liability springing from the master-servant relationship. *Id.* However, even under the "divided damages" rule, the doctrines of intervening negligence and last clear chance were historically disfavored by admiralty courts. See *S.C. Loveland, Inc. v. East West Towing, Inc.*, 608 F.2d 160, 169 (5th Cir. 1979) ("[T]he doctrine of last clear chance is rarely applied in admiralty cases and then only where there is a definite line of cleavage between the final fault and the preceding acts of negligence"), *cert. denied*, 446 U.S. 918, 100 S.Ct. 1852, 64 L.Ed.2d 272 (1980); *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100, 115-17 (5th Cir. 1970) (questioning application of doctrine of intervening negligence in maritime cases); G. Gilmore & C. Black, *The Law of Admiralty* 494 (2d ed. 1975) ("[T]he maritime court has been less ready than the shore courts to find that a subsequent wrongful act by one party breaks the chain of causation connecting the accident with the prior negligence of the other party.")

⁹¹ See notes 67 – 71 and accompanying text.

⁹² See *United States v. Reliable Transfer Co.* 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251, 1975 A.M.C. 541, (1975) and *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 114 S.Ct. 1461, 128 L.Ed.2d 148, 1994 A.M.C. 1521, (1994)

⁹³ See *Knight v. Alaska Trawl Fisheries, Inc.*, 154 F.3d 1042, 1046 (9th Cir. 1998); *Black v. Red Star Towing & Transp. Co.*, 860 F.2d 30, 34 (2d Cir. 1988); *Smith & Kelly Co. v. S/S Concordia TADJ*, 718 F.2d 1022, 1028 (11th Cir. 1983); *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 501-02 (5th Cir. 1982). See *supra* notes 67 – 73.

⁹⁴ 670 F.2d 493, 502 (5th Cir. 1982).

⁹⁵ 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956)

⁹⁶ *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, (1946). See text accompanying notes 59-60.

This injustice was heightened by the ruling in *Halcyon Lines* that the stevedoring contractors were not amenable to shipowners' actions in tort for contribution.⁹⁷

In *Ryan*, the plaintiff longshoreman was injured aboard a vessel when a roll of pulpboard, weighing about 3,200 pounds, broke loose and struck him as the ship was being unloaded.⁹⁸ There was no evidence that the longshoreman was negligent; rather, the evidence showed that the stevedoring company had negligently loaded and secured the cargo.⁹⁹ The district court entered judgment upon the jury's verdict, finding that the shipowner was liable for the longshoreman's injuries.¹⁰⁰ The Second Circuit reversed.¹⁰¹

The Supreme Court affirmed the Second Circuit, holding that a stevedoring contractor has an independent, albeit implied, voluntarily assumed contractual obligation to the shipowner to load cargo properly and safely.¹⁰² *Ryan*, then, stands for the proposition that a warranty of workmanlike performance is implied in every contract between a maritime contractor and a shipowner.¹⁰³ A breach of this implied warranty to perform the work in a reasonably safe manner results in a right of indemnity in the shipowner, allowing recovery from the negligent stevedoring contractor for any amount paid to a longshoreman.¹⁰⁴

The Court compared the indemnification to "a manufacturer's warranty of the soundness of its manufactured product," and held that no express oral or written agreement is necessary for a shipowner to recover indemnity.¹⁰⁵ By grounding the shipowner's cause of action against the stevedoring contractor in contract rather than tort, the Court was able to side-step the *Halcyon Lines* holding that the stevedoring contractors were not amenable to shipowners' actions in tort for contribution, even though the duty or reasonable care in the warranty is very similar to the standard found in negligence actions.¹⁰⁶ *Ryan* allows an award for consequential damages stemming from

⁹⁷ *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318, (1952).

⁹⁸ *Ryan*, 350 U.S. 126 (1956).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 127.

¹⁰¹ *Id.* at 135.

¹⁰² *Id.* at 131.

¹⁰³ *Id.*

¹⁰⁴ See Francis J. Gorman, *The Choice Between Proportionate Fault or Ryan Indemnity in Maritime Property Damage Cases*, 10 MAR. L. & COM. 325 (1979).

¹⁰⁵ *Ryan*, 350 U.S. at 132, 133-34. See Fuiazis, *supra* note 14.

¹⁰⁶ *Ryan* "confirmed the applicability to maritime service contracts of the hornbook rule of contract law that one who contracts to provide services impliedly agrees to perform in a diligent and workmanlike manner. This obligation has been implied in contracts ranging from an ordinary construction contract, to a contract to install plumbing, to a contract to tan goat skins, and there is no reason why it should not be implied in maritime service contracts as well." *Fairmont Shipping Corp. v. Chevron Intern. Oil Co., Inc.*, 511 F.2d 1252, 1975 A.M.C. 261, (2nd Cir. 1975) (internal citations omitted).

the breach, thereby obligating the stevedoring contractor to discharge “foreseeable damages resulting to the shipowner from the contractor’s improper performance.”¹⁰⁷

Post-*Ryan*, the Supreme Court repeatedly upheld shipowners’ indemnity actions against stevedoring contractors.¹⁰⁸ The lower courts also embraced the *Ryan* holding, and tended to view it expansively, finding implied indemnity obligations in a wide variety of other types of maritime contracts.¹⁰⁹

A. The Revisions To The LHWCA

In 1972, Congress enacted extensive revisions to the Longshore and Harbor Workers’ Compensation Act (“LHWCA”).¹¹⁰ The amendments eliminated both the longshore workers’ right to sue shipowners for unseaworthiness and the shipowners’ right to seek indemnity from the stevedoring contractors.¹¹¹ Thus, Congress ended the circuitous liability created by the Supreme Court: longshoremen could not sue shipowners for unseaworthiness¹¹² but obtained, in return,

¹⁰⁷ *Ryan*, 350 U.S. at 129, n.3. See Fuiaxis, *spura* note 14.

¹⁰⁸ In fact, the Supreme Court significantly broadened the reach of *Ryan*. See, e.g. *Weyerhaeuser S.S.Co. v. Nacirema Operating Co.*, 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed.2d 491, (1958) (holding that the warranty of workman-like performance was not limited to those situations in which the stevedoring contractor’s negligence created the unseaworthy condition, and shipowner is entitled to *Ryan* indemnity in the absence of “conduct on the shipowner’s part sufficient to preclude recovery”); *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 84 S.Ct 748, 11 L.Ed.2d 732, (1964)(holding stevedoring contractor could breach warranty of workman-like performance, even absent negligence, since the stevedoring contractor was best situation to prevent injuries); *Crumady v. The JOACHIM HENDRIK FISSER*, 358 U.S. 423, 79 S.Ct. 445 S.Ct. 445, 3 L.Ed.2d 413, (1959)(ruling shipowner is entitled to *Ryan* indemnity even in the absence of privity with the stevedoring contractor and comparing the action to manufacturer’s product liability); *Reed v. The YAKA*, 373 U.S. 410, 414-15, 83 S.Ct. 1349, 10 L.Ed.2d 448, (1963)(non-negligence of stevedoring contractor does not operate to protect him as a matter of law from indemnifying the shipowner).

¹⁰⁹ See e.g. *Fairmont Shipping Corp. v. Chevron Intern. Oil Co., Inc.*, 511 F.2d 1252, 1975 A.M.C. 261, (2nd Cir. 1975)(implying warranty in contract to provide tug assistance); *Lusich v. Bloomfield S.S. Co.*, 355 F.2d 770 (5th Cir. 1966)(implying warranty in contract to repair ship); *Parfait v. Jahncke Serv., Inc.*, 484 F.2d 296 (5th Cir. 1973), *cert. denied*, 415 U.S. 957 (1974)(implying warranty in contract to repair ship’s engine); *Whisenant v. Brewster-Bartle Offshore Co.*, 446 F.2d 394, (5th Cir. 1971)(implying warrant in contract to test pipes on oil well drilling barge). See *Yeates, supra* note 64, at 228-29, citing cases finding the implied warranty applicable to cases involving ship painting, ship cleaning, indemnity for cargo damage, a wharfinger’s obligation to a ship, pilotage, and launch service. *But cf. Bosner, S.A. de C.V. v. Tug L.A. BARRIOS*, 796 F.2d 776 (5th Cir. 1986)(explaining *Ryan* indemnity created a potential for injustice because where the stevedoring contractor’s breach of the implied warranty is non-negligent, the negligence of the shipowner rarely defeats the stevedoring contractor’s obligation to indemnify the negligent shipowner).

¹¹⁰ See H.R.Rep.No.92-1441, 92d Cong., 2d Sess. 4-8, reprinted in (1972) U.S.Code Cong. & Ad.News 4698, 4701-05; S.Rep.No.92-1125,, 92d Cong., 2d Sess. 8-12 (1972); 118 Cong.Rec 36265, et seq. (Oct. 14, 1972); 118 Cong.Rec. 36376, 36381-36388 (Oct. 14, 1972).

¹¹¹ LHWCA § 5(b), 33 U.S.C. §905(b). See *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260, 99 S.Ct. 2753, 2757, 61 L.Ed.2d 521, 527 (1979)(holding “Congress acted in 1972 ... to eliminate the shipowner’s liability to the longshoreman for unseaworthiness and the stevedore’s liability to the shipowner for unworkmanlike service resulting in injury to the longshoreman in other words, to overrule *Sieracki* and *Ryan*”). See also *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 260-62 & n. 18, 97 S.Ct. 2348, 2355-56 & n.18, 53 L.Ed.2d 320, 331 & n.18 (1977); *Samuels v. Empresa Lineas Maritimas Argentinas*, 573 F.2d 884, 888 (5th Cir. 1978), *cert. denied*, 443 U.S. 915, 99 S.Ct. 3106, 61 L.Ed.2d 878 (1979).

greater compensation benefits;¹¹³ stevedoring contractors had to pay those higher benefits but escaped suit by shipowners for *Ryan* indemnity;¹¹⁴ and shipowners could not receive *Ryan* indemnity from contractors but could only be sued by longshoremen under land-based negligence standards, rather than for unseaworthiness.¹¹⁵

Congress, however, neglected to make concomitant changes to the Federal Employees' Compensation Act ("FECA").¹¹⁶ As a consequence, the Fifth Circuit held in *Aparicio*¹¹⁷ that *Ryan* indemnity continued to be viable, at least as applied to workers not covered by the LHWCA.¹¹⁸ IN *Aparicio*, harbor workers employed by Panama Canal Company brought personal injury actions against the vessel owners alleging that they were injured by the vessels' unseaworthiness and crews' negligence.¹¹⁹ The vessel owners filed third-party complaints against the Panama Canal Company for indemnity, asserting that the company breached its warranty of workmanlike performance.¹²⁰ *Aparicio* claimed that, as an employee covered FECA, he did not receive the benefit of the bargain struck by Congress in the form of increased compensation payments provided to those covered by the LHWCA, and he thus should not be required to relinquish his *Sieracki*-seaman status and accompanying unseaworthiness action.¹²¹ The court held "[w]e refuse to read into [the 1972 LHWCA amendments] the abolition of judicially-built remedies as they apply to maritime workers not covered by the LHWCA, included not only FECA-covered employees but those amphibious workers who may be covered only by a state compensation law or who may have no compensation law coverage at all."¹²² As a consequence, "if the harbor worker is not covered by the LHWCA, the *Sieracki* cause of action and the concomitant [*Ryan*] indemnification action afforded the vessel owner are both still seaworthy."¹²³ Currently, the

¹¹² 33 U.S.C. § 905 (b); *see generally* Knight v. Alaska Trawl Fisheries, Inc., 154 F3d 1042, 1044-45, 1998 A.M.C. 2710, (9th Cir. 1998).

¹¹³ 33 U.S.C. § 8101 *et seq.*

¹¹⁴ *Id.* at § 905 (b).

¹¹⁵ *Id.*

¹¹⁶ 5 U.S.C. 8101 *et seq.*

¹¹⁷ *Aparicio v. SWAN LAKE*, 643 F2d 1109, 1981 A.M.C. 1887 (5th Cir. 1981).

¹¹⁸ *Id.* at 1119. The court presented the issue at hand as "whether landlubbers who do sailor's work aboard ships were dislodged from their *Sieracki* seaman status by the wake of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act ..." *Id.* at 1110.

¹¹⁹ *Id.* at 1109.

¹²⁰ *Id.*

¹²¹ *Id.* at 1117. *But see* Normile v. Maritime Co. of Philippines, 643 F.2d 1380, 1981 A.M.C. 2470 (9th Cir. 1981) (denying a FECA longshoreman's unseaworthiness action against the vessel, stating "given that the 1972 Amendments have eviscerated if not eliminated *Sieracki*, we decline to consider it binding ...).

¹²² *Aparicio*, 643 F2d at 1116.

¹²³ *Id.* at 1110. *See also* Cormier v. Oceanic Contractors, Inc., 696 F2d 1112 (5th Cir. 1983)(citing *Aparicio* and holding that the 1972 amendments to the LHWCA did not preclude a *Sieracki* seaman injured outside the territorial boundaries of the LHWCA (*i.e.* in United Arab Emirates) from bringing an unseaworthiness claim against the vessel).

First,¹²⁴ Third,¹²⁵ Fifth,¹²⁶ and Sixth¹²⁷ Circuits recognize they *Ryan* indemnity continues to exist where the LHWCA does not apply.

As a result of this development, the question arose: can a ‘true’ Jones seaman whose duties include doing the unloading work of a longshoreman, in a setting not subject to the LHWCA, shed his seaman status and join a “pocket of *Sieracki* seamen”?¹²⁸ According to the court, no such transformation is possible, and the vessel owner, while liable to the seaman, is not entitled to *Ryan* indemnity from the stevedoring contractor.¹²⁹

B. The Current State of Affairs: The Circuit Split

Ryan, the Ninth Circuit noted, appeared to be a “dead letter” after the LHWCA amendments.¹³⁰ The Fifth Circuit agreed, explaining “the effect of the [1972] Amendments is to eliminate the *Ryan* doctrine,”¹³¹ and calling the *Ryan* doctrine “withered.”¹³² The Fifth Circuit continued to express its doubts, explaining in *Gator Marine*, “[W]e question the vitality of *Ryan* principles ...”.¹³³ The Second Circuit, adding its voice to the chorus, declared that the amendments to the LHWCA meant, in practical terms, “the abolition of the warranty of workman-like performance and its accompanying right to [*Ryan*] indemnity.”¹³⁴

¹²⁴ Parks v. United States, 784 F.2d 20 (1st Cir. 1986).

¹²⁵ Purnell v. Norned Shipping BV, 801 F.2d 152 (3rd Cir. 1986).

¹²⁶ Aparicio v. SWAN LAKE, 643 F.2d 1109, 1981 A.M.C. 1887 (5th Cir. 1981). *See also* Verdin v. C&B Boat Co., 860 F.2d 150 (5th Cir. 1988)(explaining “we do not doubt ... that *Ryan* still has valid application in some cases not involving workers covered by the LHWCA ...”).

¹²⁷ Oglebay Norton Co. v. CSX Corp., 788 F.2d 361, 1987 A.M.C. 71 (6th Cir. 1986).

¹²⁸ Bridges v. Penrod Drilling Co., 740 F.2d 361, 1986 A.M.C. 1777 (5th Cir. 1984).

¹²⁹ *Id.* *But see* Oglebay Norton Co. v. CSX Corp., 788 F.2d 361, 1987 A.M.C.71, (6th Cir. 1986)(holding that, as regards a seaman who brought his case under the Jones Act rather than under the LHWCA, “there is no indication that the warranty of workmanlike service no longer exists, or that indemnity actions have been barred ... Therefore, it appears that *Ryan* and its progeny continue to be valid precedent in this case.) Since *Ryan* indemnity had not been previously applied to a Jones Act negligence claim (as opposed to a no-fault seaworthiness action) the more rational course is to apply *Reliable Transfer* comparative fault rather than *Ryan* indemnity. Yeates, *supra* note 64, at 236.

¹³⁰ *Id.* For a more in depth discussion of these cases, *see* Yeates, *supra*, note 64, at 230-231.

¹³¹ Brock v. Coral Drilling, Inc., 477 F.2d 211, 213, 1973 A.M.C. 1117, (5th Cir. 1973).

¹³² Bass v. Phoenix Seadrill/78, Ltd., 749 F.2d 1154, 1167 (5th Cir. 1985)(quoting *Gator Marine Service Towing Co. v. J. Ray. McDermott & Co.*, 651 F.2d 1096, 1100, 1984 A.M.C. 1927 (5th Cir. 1981)).

¹³³ *Gator Marine Service Towing Co. v. J. Ray. McDermott & Co.*, 651 F.2d 1096, 1100, 1984 A.M.C. 1927 (5th Cir. 1981).

¹³⁴ Valentino v. Rickners Rhederei, 552 F.2d 466 (2d Cir. 1977)(internal quotation omitted).

The Supreme Court's pronouncement on the subject of the amendment to the LHWCA was:

The intent and effect of this amendment were to overrule this Court's decisions in *Seas Shipping Co. v. Sieracki* and *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, insofar as they made an employer circuitously liable for the injuries to its employee, by allowing the employee to maintain an action for unseaworthiness against the vessel and allowing the vessel to maintain an action for indemnity against the employer.¹³⁵

In the wake of the amendments, many courts agreed that the essential element of *Ryan* indemnity was the shipowner's exposure to liability in unseaworthiness actions,¹³⁶ and reasoned that in the absence of this no-fault liability, no indemnity should flow from a breach of the warranty of workman-like performance.¹³⁷ Thus, while the implied warranty still existed, its breach did not trigger a right of indemnity.¹³⁸

Still other courts held that the implied warranty of workman-like performance had survived, albeit in limited circumstances.¹³⁹ According to the one commentator, a litigant satisfying six requirements could still obtain *Ryan* indemnity: (1) the litigant must be a shipowner; (2) who, relying on the expertise of the stevedoring contractor; (3) entered into a contract; (4) whereby the stevedoring contractor agreed to perform services without supervisory control by the shipowner; (5) the improper, unsafe or incompetent execution of such services foreseeably renders the vessel unseaworthy or triggers a pre-existing unseaworthy condition; (6) thereby exposing the shipowner to liability regardless of fault.¹⁴⁰

¹³⁵ *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694, 1974 A.M.C. 537, (1974). See Yeates, *supra* note 64, 15 230-231.

¹³⁶ See *Hobart v. Sohio Petroleum Co.*, 445 F.2d 435 (5th Cir.), *cert. denied*, 404 U.S. 942, 92 S.Ct. 288, 30 L.Ed.2d 256 (1971)(stating "[T]he predicate of the [Ryan] doctrine is the shipowner's absolute nondelegable liability under the seaworthiness guaranty"); *Knight v. Alaska Trawl Fisheries, Inc.*, 154 F.3d 1042, 1998 A.M.C. 2710 (9th Cir. 1998)("We have emphasized that Ryan indemnity is based on a shipowner's nondelegable duty to provide a seaworthy ship...") *Campbell Indus., Inc. v. Offshore Logistics Int'l, Inc.*, 816 F.2d 1401, 1404 (9th Cir. 1987) ("The warranty of workmanlike performance ... is intended to ease the shipowner's burden of absolute liability stemming from the doctrine of unseaworthiness"); *Flunker v. United States*, 528 F.2d 239, 243 (9th Cir. 1975) (cautioning against "unmoor[ing] the [Ryan] theory from the unseaworthiness doctrine from which it spring"); *Davis v. Chas. Kurz & Co., Inc.*, 483 F.2d 184, 187 (9th Cir. 1973) ("The circumstance which gives rise to the implied warranty is the duty of seaworthiness owed by the party seeking indemnification").

¹³⁷ See Yeates, *supra* note 64, at 231.

¹³⁸ *Id.* See *Navieors Oceanikos, S.A. v. S.T. MOBIL TRADER*, 554 F.2d 43 (2d Cir. 1977)(explaining that "[i]n the absence of the vessel's exposure to liability regardless of fault, this is not a *Ryan* case and, consequently, while an implied warranty of workmanlike performance exists ... there is no basis for an indemnity that disregards the vessel's contributory negligence"); *F. J. Walker Ltd. V. Motor Vessel LEMONCORE*, 561 F.2d 1138, 1148 (5th Cir. 1977)(holding "proof of a breach of the warranty of workmanlike performance does not *ipso facto* establish a right to indemnity by the vessel").

¹³⁹ See Yeates, *supra* note 64, at 231. See also *supra* notes 121-124.

¹⁴⁰ *Id.*; citing Bagwell, *Continuing Problems After the Supposed Demise of Ryan Indemnity in U.S. Admiralty Law*, 1982 LLOYD'S MAR. & COM. L.Q. 556, 558. See also *Hercules, Inc. v. Stevens Shipping Co.*, 698 F.2d 726 (5th Cir. 1983)(hinting that *Ryan* indemnity action may still be applicable in certain circumstances). See *F. J. Walker Ltd. V. Motor Vessel LEMONCORE*, 561 F.2d at 1148 (explaining that, "[o]viously, if such breach is not an operative factor in the damages that occur, or if conduct on the part of the shipowner causes the injury ... indemnity should be denied.")

The First,¹⁴¹ Third,¹⁴² Fourth,¹⁴³ and Sixth¹⁴⁴ Circuits permit negligent shipowners to recover *Ryan* indemnity, provided the negligence of the shipowner does not impede the stevedoring contractor's performance. These courts continue to believe that the purpose of *Ryan* indemnity is to place liability upon the party who is in the best position to prevent accidents and reduce the risk of harm.¹⁴⁵ The doctrine creates an incentive for stevedoring contractors to mend their negligent behavior.¹⁴⁶ Further, it is inequitable to hold shipowners liable for harm they could not have prevented, even though the exercise of reasonable care.¹⁴⁷

Additionally, these courts believe that because *Ryan* indemnity is not based on tort principles of contribution,¹⁴⁸ but instead rests on the theory that the stevedoring contractor has an implied contractual duty to render a workmanlike performance,¹⁴⁹ principles of comparative negligence are inapposite to the contractual relationship between the stevedoring contractor and the shipowner.¹⁵⁰

Although opponents of *Ryan* indemnity argue that it is inflexible and outmoded, it is not as inflexible as it may at first appear.¹⁵¹ Courts that continue to recognize *Ryan* indemnity refuse to apply it if the shipowner's negligent conduct prevented or actively hindered the stevedoring contractor from performing his duties in a workmanlike manner.¹⁵² In such instances, the

¹⁴¹ Parks v. United States, 784 F.2d 20, 1987 A.M.C. 83 (1st Cir. 1986).

¹⁴² Cooper v. Loper, 923 F.2d 1045, 1991 A.M.C. 1032 (3rd Cir. 1991).

¹⁴³ Hyeman v. ITO Corp., 966 F.2d 1442, 1991 A.M.C. 2654 (4th Cir. 1992)(per curiam).

¹⁴⁴ Oglebay Norton Co. v. CSX Corp., 788 F.2d 361, 1987 A.M.C. 71 (6th Cir. 1986) *cert. denied*, 479 U.S. 849 (1986).

¹⁴⁵ Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 323-34 (1964); Heyman v. ITO Corp., 1992 A.M.C. 2654, 2657 (4th Cir. 1992); Oglebay Norton Co. v. CSX Corp., 788 F.2d 361, 367 (6th Cir. 1986). *See also* Henry v. A/S Ocean, 512 F.2d 401, 406 (2^d Cir. 1975)(noting *Ryan* indemnity "serves to allocate risks among those segments of the enterprise best able to minimize the particular risk involved.")

¹⁴⁶ *See* Fuiaxis, *supra* note 14, at 1635. Fuiaxis also notes that, since stevedoring has become its own specialty area of practice, with concerns and problems unique to its field, the stevedoring contractor, while reaping the benefits of his specialty skills, should also reasonable be expected to shoulder the costs of any accidents he causes. *Id.*

¹⁴⁷ *Id.* *See generally* Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 134-35 (1956) ("[T]he contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense.")

¹⁴⁸ *See supra* note 133; *see* Cooper v. Loper, 923 F.2d 1045, 1051 (3^d Cir. 1991) ("Because *Ryan* indemnity rests on the theory that the stevedore has an implied contractual duty to render workmanlike service, tort principles of contribution do not apply").

¹⁴⁹ *See Ryan*, 350 U.S. at 133-34.

¹⁵⁰ *See Fuiaxis, supra* note 14, at 1635.

¹⁵¹ *Id.* *See also* notes 153 – 181 and accompanying text, *infra*.

¹⁵² *See* Weyerhaeuser Steamship Co. v. Nacirema Operating Co., 355 U.S. 563, 567 (1958) (shipowner is entitled to *Ryan* indemnity "absent conduct on its part sufficient to preclude recover"). Subsequent decisions have attempted to arrive at a workable standard for this conduct. *See also* Humble Oil & Refinng Co. v. Philadelphia Ship Maintenance

shipowner was the cause in fact of the accident, and should bear the costs of its misconduct, however it is important to note that the court must weigh the fault with respect to the stevedoring contractor's breach of the warranty of workmanlike performance, rather than weighing fault with respect to the seaman's personal injury.¹⁵³ If the court finds that the shipowner's conduct prevented the stevedoring contractor from performing its duties in a workmanlike manner, then the shipowner's right to indemnification may be revoked.¹⁵⁴ This, *Ryan* indemnity, although at first appearing to be an unyielding rule, is arguable flexible enough to serve admiralty interests by protecting seamen.¹⁵⁵

In contrast, the Second,¹⁵⁶ Fifth,¹⁵⁷ Ninth,¹⁵⁸ and Eleventh¹⁵⁹ Circuits do not allow a shipowner whose liability to the primary victim is based on negligence to recover *Ryan* indemnity. These courts reason that "the *Ryan* warranty was established to correct a particular inequity: specifically, its purpose was to allow a non-negligent ship owner to recoup from a negligent contractor damages the ship owner was forced to pay to the injured party . . . But the more the case deviates from the original *Ryan* scenario, . . . the less justification there is to apply the warranty."¹⁶⁰

Co., 444 F.2d 727 (3d Cir. 1971) ("the critical question [is] whether the shipowner's breach of his absolute duty to furnish a safe and seaworthy vessel so prevented or hindered the stevedore from completing its performance that the subsequent breach of warranty by the stevedore may be deemed excuse"); 1. *Cooper v. Loper*, 923 F.2d 1045, 1050-51, 1991 A.M.C. 1032 (3rd Cir. 1991) ("A stevedore does not impliedly contract to provide indemnity under all circumstances, however. If a stevedore can prove that the shipowner's conduct prevented or seriously impeded the stevedore from performing in a workmanlike manner, then indemnity will be denied"); *Turner v. Global Seas, Inc.*, 505 F.2d 751, 753 (6th Cir. 1974) (holding conduct sufficient to preclude recovery is "conduct which prevented or seriously hampered [a contractor's] performance of its duty in accordance with its warranty"). Other circuits have followed suit and defined shipowner conduct sufficient to preclude recovery. *See Hanseatische Reederei Emil Offen & Co. v. Marine Terminals Corp.*, 590 F.2d 778, 782 (9th Cir. 1979) (stating that shipowner indemnification is denied when the shipowner's conduct "effectively prevents the stevedore from satisfying its implied warranty of workmanlike service"); *LeBlanc v. Two-R Drilling Co.*, 527 F.2d 1316, 1321 (5th Cir. 1976) (asserting that to deny recovery for indemnification one must focus on "whether conduct or circumstances of the condition for which [the] [s]hipowner has a legal responsibility seriously impeded or prevented [the] [c]ontractor from performing the job in a safe and workmanlike manner"); *Henry v. A/S Ocean*, 512 F.2d 401, 407 (2^d Cir. 1975) (declaring that indemnification is precluded "only where [the shipowner] prevented or seriously handicapped the stevedore in his effort to perform his duties"). *But see Western Tankers Corp. v. United States*, 387 F.Supp. 487, 491 (S.D.N.Y. 1975) (finding that a shipowner's negligence is enough to preclude indemnity if he is the "best situated to adopt preventive measures and thereby reduce the likelihood of injury"). *See Fuiaxis, supra* note 14, at 1635.

¹⁵³ *See Fuiaxis, supra* note 14, at 1636; *see Oglebay Norton Co. v. CSX Corp.*, 788 F.2d 361, 366 (6th Cir. 1986).

¹⁵⁴ *See Fuiaxis, supra* note 14, at 1636.

¹⁵⁵ *Id.*

¹⁵⁶ *Black v. Red Star Towing and Transp. Co.*, 860 F.2d 30, 34 (2nd Cir. 1988).

¹⁵⁷ *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154 (5th Cir. 1985); *Verdin v. C&B Boat Co.*, 860 F.2d 150 (5th Cir. 1988).

¹⁵⁸ *Knight v. Alaska Trawl Fisheries, Inc.*, 154 F.3d 1042, 1998 A.M.C. 2710 (9th Cir. 1998). The argument espoused in the following paragraphs is an extraction from the *Knight* court.

¹⁵⁹ *Smith Kelly Co. v. S/S Concrodia Tadj*, 718 F.2d 1022, 1984 A.M.C. 409 (11th Cir. 1983).

¹⁶⁰ *United States v. C-Way Constr. Co.*, 909 F.2d 259, 264 (7th Cir. 1990). Many courts have declined to extend *Ryan* to facts differing from those contemplated in the original decision. *See Newby v. F/V Kristen Gail*, 937 F.2d 1439, 1444 (9th Cir. 1991) (declining to apply *Ryan* to ship collision case); *California Home Brands*, 817 F.2d at 836-37 (no

When a shipowner is at fault for causing injury to a seaman by its own independent acts, the *Ryan* warrant should not apply.¹⁶¹

Also, according to these courts, comparative fault principles “best advance[] the goals *Ryan* attempted to achieve.”¹⁶² The goal of *Ryan* – accident avoidance – is best achieved by encouraging all responsible parties to exercise reasonable care.¹⁶³ When multiple parties are at fault, however, immunizing one party with all-or-nothing indemnity “provides little incentive for [that] party to take prophylactic steps.”¹⁶⁴

Finally, comparative fault principles do achieve a “just and equitable allocation of damages.”¹⁶⁵ Since a breach of the warranty of workmanlike service may be non-negligent, *Ryan* indemnity creates a potential for injustice because the indemnitor need not be a fault.¹⁶⁶ In cases where applying *Ryan* indemnity would cause the stevedoring contractor to indemnify the shipowner for the shipowner’s own negligence toward its own employee on its own vessel, there is an inherent injustice which comparative fault principles curtail.¹⁶⁷

These courts hold that the type or degree of negligence is irrelevant when proportioning fault.¹⁶⁸ *Ryan* was a precursor of modern comparative fault because it attempted to transfer ultimate legal liability to the defendant truly in the wrong by requiring an actively negligent tortfeasor, the stevedoring contractor, to indemnify a passively negligent tortfeasor, the shipowner.¹⁶⁹ This was desirable in order to mitigate the rule that disallowed apportionment of damages among tortfeasors.¹⁷⁰ Comparative fault, on the other hand, obtains the same objective

Ryan indemnity from seaman to shipowner); *McCune v. F. Alioto Fish Co.*, 597 F.2d 1244, 1252 (9th Cir. 1979) (*Ryan* warranty does not include defective products); *Davis*, 483 F.2d at 187 (general contractor not entitled to *Ryan* indemnity from subcontractor); *see also C-Way Constr. Co.*, 909 F.2d at 264 (no *Ryan* indemnity from materials supplier to shipowner for damage to ship); *Bosnor, S.A. de C.V. v. Tug L.A. Barrios*, 796 F.2d 776, 785-86 (5th Cir. 1986) (limiting *Ryan* to its facts and applying comparative fault to property damage case).

¹⁶¹ *Knight v. Alaska Trawl Fisheries, Inc.*, 154 F.3d 1042, 1998 A.M.C. 2710 (9th Cir. 1998)

¹⁶² *Smith & Kelly Co. v. S/S Concordia TADJ*, 718 F.2d 1022, 1028 (11th Cir. 1983). *See also Knight*, 154 F.3d at 1046.

¹⁶³ *See e.g., Flunker v. United States*, 528 F.2d 239, 243 (9th Cir. 1975)(noting that one of *Ryan*’s purposes is “to place ultimate liability on the party who was truly at fault and who should mend his negligent ways to prevent future injury”).

¹⁶⁴ *Smith & Kelly*, 718 F.2d at 1029.

¹⁶⁵ *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975) (establishing rule of comparative fault in ship collision cases).

¹⁶⁶ *Smith & Kelly*, 718 F.2d at 1029; *Bosner, S.A. de C.V. v. Tug L.A. BARRIOS*, 796 F.2d 776 (5th Cir. 1986)(explaining *Ryan* indemnity creates a potential for injustice because where the stevedoring contractor’s breach of the implied warranty is non-negligent, the negligence of the shipowner rarely defeats the stevedoring contractor’s obligation to indemnify the negligent shipowner).

¹⁶⁷ *Knight v. Alaska Trawl Fisheries, Inc.*, 154 F.3d 1042, 1047, 1998 A.M.C. 2710 (9th Cir. 1998).

¹⁶⁸ *See generally Fuiaxis, supra* note 14.

¹⁶⁹ *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 501 (5th Cir. 1982).

¹⁷⁰ *See id.* at 501.

more precisely and effectively, by determining the tortfeasors' fault according to the facts presented at trial and apportioning damages accordingly.¹⁷¹

Applying comparative fault in cases where the shipowner is partially at fault reflects the growing trend in other maritime cases.¹⁷² In *Reliable Transfer*,¹⁷³ the Supreme Court established the rule of comparative fault for ship collision cases. The fact that a vessel is primarily negligent does not justify its shouldering all the liability, nor should it excuse the slightly negligent vessel from bearing any liability at all.¹⁷⁴ The Supreme Court has also held that non-settling defendants' liability in an admiralty case should be calculated based upon the jury's allocation of proportionate responsibility.¹⁷⁵ Comparative fault also applies when a shipowner sues a maritime contractor for property damage.¹⁷⁶ Maritime law has also long applied to the rule of comparative fault in a seaman's unseaworthiness action against a shipowner.¹⁷⁷ Comparative fault principles, besides being applied in personal injury actions for unseaworthiness,¹⁷⁸ are utilized in Jones Act negligence actions;¹⁷⁹ in actions under the auspices of the Death on the High Seas Act;¹⁸⁰ in longshoremen suits against vessels under LHWCA section 905(b);¹⁸¹ and in maritime strict products liability actions.¹⁸² In summary, "comparative fault has long been the accepted risk-allocating principle under the maritime law, a conceptual body whose cardinal mark is uniformity,"¹⁸³ and the clear trend in maritime cases is to reject archaic all-or-nothing or other similarly arbitrary allotments of liability in favor of a system that divides damages on the basis of the relative degree of fault of the parties.¹⁸⁴

¹⁷¹ See *id.* at 502 ("[T]he concepts of active and passive negligence have no place in a liability system that considers the facts of each case and assesses and apportions damages among joint tortfeasors according to the degree of responsibility of each party").

¹⁷² *Id.*

¹⁷³ 421 U.S. 397, 411, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975).

¹⁷⁴ *Reliable Transfer*, 421 U.S. at 406.

¹⁷⁵ See *McDermott, Inc., v. AmClyde & River Don Castings, Ltd.*, 511 U.S. 202, 204, 114 S.Ct. 1461, 128 L.Ed.2d 148 (1994).

¹⁷⁶ See *Bosnor, S.A. de C.V. v. Tug L.A. Barrios*, 796 F.2d 776, 786 (5th Cir. 1986).

¹⁷⁷ See *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409, 74 S.Ct. 202, 98 L.Ed. 143 (1953); *Knight*

¹⁷⁸ See note 174, *supra*.

¹⁷⁹ See *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979); see *Yeates*, *supra* note 64, at 244.

¹⁸⁰ 46 U.S.C. §§ 761-766 (1982 & Supp. III 1985); see *Yeates*, *supra* note 64, at 244.

¹⁸¹ *Gay v. Ocean Transp. & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977); see *Yeates*, *supra* note 64, at 244.

¹⁸² *Lewis v. Timco, Inc.*, 716 F.2d 1425 (5th Cir. 1983).

¹⁸³ *Id.* At 1428.

¹⁸⁴ *Smith & Kelly*, 718 F.2d at 1030

VI. COMPARATIVE FAULT: A LOOK INTO THE FUTURE

Some courts have effected a merger, of sorts, of the two seemingly contradictory theories. In *Agrico*,¹⁸⁵ the Fifth Circuit held that the stevedoring contractor had breached its warranty of workman-like performance by negligently loading a barge which later capsized.¹⁸⁶ Despite the court's finding that the implied warranty had been breached, the court applied the principles of comparative fault and allocated to the stevedoring contractor only the percentage of damages attributable to its breach of the implied warranty (*i.e.* the court did not allow complete indemnity under the principles enunciated in *Ryan*).¹⁸⁷ *Agrico*, then, is a landmark case – making complete the merger of two heretofore competing frameworks: a breach of the *Ryan* implied warranty of workman-like performance constituting the fault necessary under the *Reliable Transfer* comparative fault scheme.¹⁸⁸

The Eleventh Circuit soon placed its seal of approval on the newly merged framework,¹⁸⁹ and went on to decide *Smith* based upon the new *Ryan/Reliable Transfer* framework.¹⁹⁰ In this case, a seaman was injured when he fell through an opening in one of the ship's hatch covers. He brought an action against the stevedoring contractor, which had unloaded cargo at the last port, and against the shipowner. The shipowner was dismissed on jurisdictional grounds; the stevedore settled with the seaman, but then filed action against the shipowner seeking damages in indemnity, contribution, and equitable subrogation. The shipowner counterclaimed for indemnity.¹⁹¹ The District Court held that the stevedoring contractor was not entitled to indemnity from the shipowner because he had breached his implied warranty of workman-like performance.¹⁹² The Eleventh Circuit, however, while acknowledging the continued existence of the implied warranty, declined to apply *Ryan* indemnity, suggesting instead that a breach of the implied warranty could constitute fault in the *Reliable Transfer* comparative fault regime:

We recognize that in the present context the notion of 'fault' must include more than negligence; it must also encompass non-negligent breaches of the shipowner's duty to maintain the vessel in a seaworthy conditions and of the stevedowner's warrant [sic] of workmanlike performance. Of course, our decision is inconsistent with any conclusion that the stevedore's warranty in any way relieves the vessel owner of his duty. Instead, fault must be determined by evaluating the degree to

¹⁸⁵ *Smith & Kelly*, 718 F.2d at 1030.

¹⁸⁶ *Id.* at 89-90.

¹⁸⁷ *Id.* at 93 (positing “[d]isputes between vessels and stevedores over damaged cargo are best accommodated by a straightforward application of the usual maritime comparative fault system. Proportional damages based on degrees of fault is now the general rule for damages in maritime property damages cases”).

¹⁸⁸ *Yeates*, *supra* note 64, at 232.

¹⁸⁹ *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069, 1075 (11th Cir. 1985)(adopting reasoning of *Agrico* and acknowledging proportional fault had been correctly applied to disputes between vessels and stevedores over cargo losses caused, in part, by negligent stowage of the cargo).

¹⁹⁰ *Smith & Kelly Co. v. S/S Concordia TADJ*, 718 F.2d 1022, 1984 A.M.C. 409, (11th Cir. 1983). For a more in depth discussion of these cases, *see Yeates*, *supra* note 64, at 232-233.

¹⁹¹ *Id.*

¹⁹² *Id.* at 1028.

which (a) each party breached its duty or was negligent, and (b) each party's breach or negligence caused the accident.¹⁹³

While this decision is well reasoned, the reality of the situation is that the most important consideration affecting commerce today is uniformity. Uniformity begets predictability of result, which in turn allows admiralty practitioners to advise their clients with certainty, and allows the parties to confidently negotiate their contractual terms, and to undertake proper risk management procedures. Thus, it appears the merged rule embraced by the Fifth and Eleventh Circuits is the better-reasoned wave for the future, in that it promotes equity, uniformity, and predictability in maritime law and commerce.

¹⁹³ *Id.* at 1030, N. 10.

DARAPRIM SPECIALTY DRUG PRICING: A CASE STUDY

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Abstract

This case study tells the story of a young, unconventional CEO who executed a perfectly legal, totally unregulated strategy to acquire both great wealth and significant enmity: purchasing an older, neglected, specialty drug (i.e. a drug that has successfully treated a chronic or difficult health condition), significantly increasing its price, and tightly controlling its distribution (Pollack, 2015). These specialty drugs are highly effective in treating disease, but the number of patients desperately needing the drug is modest and stable, making it less attractive for generic drug manufacturers to enter the market. Free from competition, the specialty drug manufacturer can set any price it wants for the specialty drug, wreaking havoc on patients suffering from the disease the drug is designed to cure and the physicians and medical institutions trying to heal them. The purpose of this case is to evaluate this business model and ascertain if it might be appropriate to permit the Food and Drug Association (FDA) to participate in the negotiation of price increases of these specialty drugs.

Turing Pharmaceuticals' pricing strategy for the drug Daraprim

Infectious Disease News broke the story on the September 17, 2015, succinctly capturing what happened: "A recent spike in the price of Daraprim and supply problems have raised concerns among health care providers, expert organizations and the media" (Muoio, 2015a, para. 1). Daraprim (known generically as pyrimethamine) is used to treat the parasitic disease toxoplasmosis that affects cancer and HIV patients who have compromised immune systems (Muoio, 2015a). Turing Pharmaceuticals acquired the drug on August 10, 2015, from Impax Laboratories, and immediately increased its price from \$13.50 to \$750 per tablet. This price increase dramatically raised the annual cost of treatment for toxoplasmosis to \$336,000 for patients weighing less than 132 pounds and \$634,500 for patients weighing more than 132 pounds, and, according to the vice chair of the HIV Medicine Association (an organization of

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medical professionals who practice HIV medicine), disproportionately injures the most vulnerable patients who lack insurance or face barriers to health care (Muoio, 2015a).

A significant shortage of supply also accompanied the price increase, crippling the ability of multiple hospitals to obtain pyrimethamine (Muoio, 2015a). Turing Pharmaceuticals admitted the price increase was attributable to its acquisition of Daraprim from Impax Laboratories (Muoio, 2015a). The more likely cause of the supply shortage was Turing Pharmaceuticals' decision to restrict distribution of the drug through a specialty pharmacy to prevent generic drug manufacturers from getting sufficient quantities of Daraprim to conduct the research studies needed to gain FDA approval of a generic version of Daraprim, as explained more fully below.

Alarmed by the shortage of Daraprim, the HIV Medical Association and the Infectious Diseases Society of America (a professional organization representing physicians, scientists and other health care professionals who specialize in infectious diseases) sent a letter protesting the price increase to Turing Pharmaceuticals (Muoio, 2015a). In response, Turing Pharmaceuticals acknowledged their concerns, claimed supply issues were corrected, and pledged to improve the care of patients with toxoplasmosis by developing an innovative treatment for the disease (Muoio, 2015a). This response was troubling to the HIV Medical Association and the Infectious Diseases Society of America, because pyrimethamine is well tolerated, remains effective in treating toxoplasmosis, and has minimal side effects. In short, the explanation for the price increase – funding research studies to find an alternate treatment for toxoplasmosis – was false. There was simply no need to develop an alternate treatment for toxoplasmosis (Muoio, 2015a).

Martin Shkreli: Turing Pharmaceuticals' unconventional CEO

The CEO of Turing Pharmaceuticals who engineered the Daraprim price increase was Martin Shkreli, a 32-year old entrepreneur, who “was raised in working-class Brooklyn, the son of Albanian and Croatian immigrants who worked as janitors” (Lukerson, 2015, para. 7). He dropped out of an exclusive Manhattan high school, and interned at a hedge fund and CNBC's Mad Money show (Smythe & Geiger, 2015, para. 9). He earned a B.A. degree at Baruch College in New York City, started two hedge funds, Elea Capital and MSMB Capital, which invested in biotech, and learned he could make a lot of money directly selling pharmaceutical drugs (Smythe & Geiger, 2015; Lukerson, 2015). In an earlier venture, his pharmaceutical company, Retrophin, purchased old, rarely used drugs and increased their prices, for example raising the price of a drug to treat kidney stones from \$1.50 per pill to \$30 (Lukerson, 2015).

Turing Pharmaceuticals' Daraprim price increase is not an unusual industry practice

Shkreli's price increase of Daraprim is not unusual in the pharmaceutical industry. As noted in *The New England Journal of Medicine*:

It seems that a new business model has emerged: companies are acquiring drugs in niche markets where there are few or no therapeutic alternatives in order to maximize their profits. Unlike new brand-name drugs, the patents of the drugs being targeted by this model expired years ago. These companies seem to have

no interest in adding value to the health care system by developing new drugs (Alpern, 2016).

There are abundant examples of the adoption of this new business model. Therapeutics acquired Cycloserine, used to treat multi-drug resistant tuberculosis, and increased its price from \$500 to \$10,800 for 30 pills. Marathon Pharmaceuticals purchased two heart drugs, Isuprel and Nitropress, in 2013, and quickly quadrupled their prices. Valeant Pharmaceuticals bought those same two drugs from Marathon and raised their prices by 525% and 212% respectively (Pollack, 2015). Mallinckrodt Pharmaceuticals purchased the drug Ofirmev used to treat pain and raised its price from about \$450 to \$1,020 per 24 vials. Horizon Pharma purchased the drug Vivovo used to treat pain and raised its price from about \$200 to \$1,678 per 60 tablets (Philosophers on Drug Prices, 2015). Jazz Pharmaceuticals purchased the drug Xylem, used to treat narcolepsy, from Orphan Medical in 2005, and “increased the price 29 percent each year since 2011.” (Klugman, 2015, para. 3). In another case, “Actor Gel - used for treating multiple sclerosis - dates from 1952 but in 2007, the price increased 1400% overnight and has been raised 19 times since then” (Klugman, 2015, para. 3).

Approved by the FDA in 1953, Daraprim cost only \$1 per tablet several years ago. Daraprim’s price rose sharply after it was acquired by GlaxoSmithKline. In 2010, Glaxo sold the U.S. marketing rights to Daraprim to CorePharma. Four years later, Impax Laboratories purchased CorePharma, and in August 2015, sold Daraprim to Turing Pharmaceuticals for \$45 million (half of the \$90 million it raised in its first-round financing). Significantly, prescription sales of Daraprim increased from \$667,000 in 2010 to \$6.3 million in 2011, even though the number of prescriptions (around 12,700) held steady. In 2014, prescription sales of Daraprim increased to \$9.9 million even though the number of prescriptions dropped to 8,821 (Pollack, 2015). The price increase implemented by Shkreli could increase revenues from sales of Daraprim to “tens or even hundreds of millions of dollars if use remains constant” (Pollack, 2015, para. 19).

Shkreli denied the price increase was an attempt to gouge patients and claimed it necessary to permit Turing Pharmaceuticals to remain in business (Boyer, 2015; Lukerson, 2015; Pollack, 2015), and that he should have raised the price even higher, because his investors “expect [him] to maximize profits” (Smythe & Geiger, 2015, para. 12).

Turing Pharmaceuticals promises to reprice Daraprim, but then doesn’t

Facing a barrage of publicity condemning the Daraprim price increase, Turing Pharmaceuticals announced plans to reprice Daraprim, stating: “Turing’s CEO Martin Shkreli has committed to adjusting the price of Daraprim, but there is no timetable as to when that will occur or at what price point” (Muio, 2015b, para. 2). One month later, when no price reduction was implemented, 152 health organizations and individuals signed an open letter asking Turing Pharmaceuticals to immediately lower the price of, and improve access to, Daraprim. The letter said: “Patients already affected by the failure of Turing Pharmaceuticals to act on its commitment include pregnant women, children, infants, people with HIV and others with compromised immune systems across the country” (Organizations want Turing to uphold, 2015, para. 2).

Turing Pharmaceuticals then promised to reprice Daraprim before the end of the year. That promise did not satisfy the Infectious Diseases Society of America and the HIV Medicine Association. They objected to the lack of transparency on the details of the price restructuring and Turing Pharmaceuticals' use of a controlled distribution of Daraprim through Walgreen's Specialty Pharmacy, which creates unreasonable hurdles for patients needing the medication (Turing Promises Daraprim Repricing, 2015, para. 5). Those objections went unheeded. While Turing Pharmaceuticals announced plans to provide hospitals with discounts up to 50%, it did not lower the list price for Daraprim (Turing Announces Hospital Discount, 2015). Nor did Turing Pharmaceuticals explain why it failed to keep its promise to lower the price of Daraprim.

Daraprim price increase attracts the interest of Congress

The House Committee on Oversight and Government Reform conducted a hearing on February 4, 2016, to obtain an explanation for the Daraprim price increases. Nancy Retzlaff, the chief commercial officer of Turing Pharmaceuticals, defended the price increases on the basis of ongoing research costs and various treatment discounts (House Committee Hearing, 2016). The Committee acknowledged that generic drugs can cost 80% to 85% less than their brand equivalents and have played an important role in health care by offering lower-cost alternatives. The Committee also determined the approval of generic drugs was significantly delayed because of a backlog of approximately 4,000 applications awaiting FDA action (Developments in the Prescription Drug Market, 2016).

The Senate Special Committee on Aging conducted a hearing on March 17, 2016, to investigate the Daraprim price increases. In her statement, Sen. Susan M. Collins (R-Maine), the Chair of the Committee, identified five components of the business model followed by Turing Pharmaceuticals to maximize its profits: (1) finding an off-patent treatment with no generic competitor; (2) confirming the drug's status as the "gold standard" treatment; (3) assuring the patient pool for the drug is small so as to reduce scrutiny and lower the incentive for other companies to produce generic versions; (4) establishing a closed distribution system or specialty pharmacy to control drug components and ensure an effective monopoly; and (5) enacting a substantial market price increase to maximize revenue (Muio, 2016). Howard Dorfman, then the former senior vice president and general counsel of Turing Pharmaceuticals, testified that he repeatedly objected to the Daraprim price increases, because they made the drug unavailable to vulnerable HIV and AIDS patients. He also noted that the company lacked any formal study protocol to research the "next generation" of toxoplasmosis therapy (Muio, 2016). Ron Tilles, interim CEO and Board Chairman of Turing Pharmaceuticals, defended the price increases as necessary to fund research into alternative treatment for toxoplasmosis, and claimed that two-thirds of Daraprim sales are to federal and state health programs that pay Turing Pharmaceuticals only one penny per pill (Muio, 2016).

The Senate Special Committee on Aging also heard testimony from Shannon Weston, a mother from North Carolina, whose infant daughter contracted congenital toxoplasmosis. Ms. Weston's insurance company denied her claim to cover the \$360,000 cost of providing Daraprim, causing her to feel hopeless and depressed at not being able to help her daughter. Fortunately, her local pharmacy obtained pyrimethamine (the generic term for Daraprim) and

compounded it into a serum at significantly less cost (Muoi, 2016). In addition, Adaora Adimora, M.D., professor of medicine and epidemiology at the University of North Carolina, Chapel Hill, and immediate past chair of the HIV Medicine Association, testified that, because physicians are unable to reliably and affordably obtain pyrimethamine for their patients, they have been forced to rely on pharmacists to compound pyrimethamine (Muoi, 2016). The compounding solution, however, is not a feasible alternative, because compounded drugs can only to be prescribed to individually identified patients consistent with federal and state compounded drug formulation laws (Imprimis Pharmaceuticals Announces, 2015, para. 2).

Barriers to development of generic pyrimethamine

As noted above, there is a significant backlog of approximately 4,000 applications requesting the approval of generic drugs (Silverman, 2016). Drug companies initiate the approval process for generic drugs by filing an “Abbreviated New Drug Applications (ANDAs): Generics.” Notably, about 1,800 ANDAs remain pending, because the pharmaceutical companies have not responded to the FDA’s request for additional information (Brennan, 2016). Further, the biggest reason for this backlog is the significant increase in the number of ANDAs filed. The average number of ANDAs filed in 2012 was 250; that average increased to 1,022 over the next four years. In short, the increased number in applications filed caused the FDA to fall behind. Notably, the FDA has recently made some progress in reducing the backlog, because Congress authorized the FDA to charge generic drug makers application fees, and the FDA has used those fees to increase the number of facilities inspected, especially those overseas, and to hire staff to speed the application process. Nonetheless, while the FDA reports progress in improving its approval process (Brennan, 2017; Silverman, 2016; Sullivan, 2017), the number of FDA approvals of ANDAs barely keeps pace with the increased number of ANDAs filed (Brennan, 2017).

In addition to the significant backlog of generic drug applications, the approval process for generic drugs employed by the FDA, while less rigorous than the approval process for new drugs, diminishes the chances generic drug manufacturers will produce generic substitutes for drugs like Daraprim, which do not have a significant patient pool. The FDA’s generic drug application process requires the applicants to “scientifically demonstrate that their product is bioequivalent (*i.e.*, performs in the same manner as the innovator drug)” (Abbreviated New Drug Application, 2016, para. 3). (An “innovator” drug is the initial drug containing a specific active ingredient approved for a designated use; it is the drug which generic drugs seek to replace.) This means the applicant must establish the generic drug reached the bloodstream in 24 to 36 healthy volunteers, thereby demonstrating the equivalent absorption of the generic drug. In other words, the same amount of the active ingredients get into the patient’s bloodstream in the same amount of time as the innovator drug (Abbreviated New Drug Application, 2016).

Furthermore, because drug companies like Turing Pharmaceuticals distribute their specialty drugs through a closed distribution system or specialty pharmacy, generic drug companies lack access to sufficient quantities of the drug to develop scientific evidence of the bioequivalence of the generic drug to the innovator drug (Muoi, 2016). Lacking any competition, drug companies like Turing Pharmaceuticals are free to set whatever price they like for the specialty drug. In his testimony before the above noted Senate Special Committee for the

Aging, Gerald Anderson, the director of the Center for Hospital Finance and Management at Johns Hopkins Bloomberg School of Public Health, noted that the best way to combat the pricing problem is to expedite the FDA approval process for generic drugs. Doing so, he noted, would bring drugs like Daraprim to the market in months rather than years and either discourage companies like Turing Pharmaceuticals from precipitously raising prices or minimize the time the drug company could exact exorbitant prices from patients (Mole, 2015).

Federal regulatory authority to control drug price increases

Neither the FDA nor the Federal Trade Commission (FTC), the two federal regulatory bodies most closely connected to the pharmaceutical industry, have authority to regulate the prices pharmaceuticals charge for their drugs. The FDA confirms its lack of authority on its website, where it states: “FDA has no legal authority to investigate or control the prices charged for marketed drugs” (Frequently Asked Questions, 2016, Q16). While the FTC does have authority to investigate and control the prices charged for marketed drugs, that authority is limited to antitrust surveillance of pharmaceutical services and products (Overview of FTC Antitrust, 2013). Because setting prices on specialty drugs does not constitute monopolization, an agreement not to compete, an agreement to fix prices, an agreement to obstruct innovation, or a tying arrangement, the FTC has no jurisdiction to investigate and control pharmaceutical companies’ prices for specialty drugs. Hence the power of pharmaceutical companies to set prices for their specialty drugs, in the absence of antitrust violation, is totally unregulated.

Role of Pharmaceutical Research and Manufacturers of America

The Pharmaceutical Research and Manufacturers of America (PhRMA) represents the leading research-based pharmaceutical companies in the United States. Its mission is to “conduct effective advocacy for public policies that encourage discovery of important new medicines for patients by pharmaceutical and biotechnology research companies” (Our Mission, 2016, para. 1). On March 10, 2016, PhRMA released its “policy solutions for delivering innovative treatments to patients” (Policy Solutions, 2016). In the “Modernizing Drug Discovery, Development and Approval” section of the document, PhRMA cites the significant backlog of ANDAs before the FDA and notes that “on average it currently takes over four years for the FDA to act on a single application” (Policy Solutions, 2016, p. 4). It also warns that, for “serious diseases or conditions in small patient populations, lack of availability of effective medicines with no remaining patent life or regulatory exclusivity, coupled with no or limited brand or generic competition, may constitute an important public health risk” (Policy Solutions, 2016). To combat these problems, PhRMA recommends that the reauthorization of the Generic Drug User Fee Act (GDUFA) should include additional steps to improve ANDA review efficiency, and that financial incentives such as tax credits or targeted grant programs be employed to encourage the development and manufacturing of generic drugs (Policy Solutions, 2016, p. 4).

PhRMA has endorsed the APEC Mexico City Principles for Voluntary Codes of Business Ethics in the Biopharmaceutical Sector (PhRMA Code, 2016; The Mexico City Principles, 2016). This document contains six guiding principles and addresses seventeen areas in which it seeks to ensure ethical practices are established.

While PhRMA's endorsement of the Mexico Principles is an admirable effort to promote ethical principles and practices and ensure ethical conduct in the pharmaceutical industry, it does not address the issue of sudden and substantial price increases of specialized drugs and the employment of a highly controlled distribution system. Nor do the major pharmaceutical companies address this issue in their mission/purpose/values statements. A review of the mission/purpose/values statements of the twenty-five largest pharmaceutical companies demonstrates that only two companies – AbbVie, headquartered in Chicago, Illinois, and Teva, headquartered in Petah Tikva, Israel – specifically address the issue of affordability of prescription drugs. AbbVie states: “we believe patients need access to quality and affordable medicines.” (Our Commitment to Access to Medicines, para. 1). Teva states: “[We are] committed to increasing access to high-quality healthcare for people across the globe, at every stage of life. We do this by developing, producing and marketing affordable generic drugs as well as innovative and specialty pharmaceuticals and active pharmaceutical ingredients” (Our Business, para. 2)

Unfortunately, Teva may not be firmly committed to its mission. On December 26, 2016, the attorney generals of 20 states accused Teva and five other pharmaceutical companies of reaching an agreement on sustaining market share, avoiding competition on price, and artificially maintaining high prices for a significant number of generic drugs (Thomas, 2016). Likewise, AbbVie, Inc. may not be totally committed to its mission of providing affordable prices. On September 8, 2014, the FTC filed a complaint in federal district court charging AbbVie, Inc. and its partner, Besins Healthcare, Inc., with filing baseless patent infringement lawsuits against potential generic competitors to delay introduction of lower priced versions of the testosterone replacement drug AndroGel, and, while the lawsuits were pending, of entering into an anticompetitive pay-for-delay settlement agreement with Teva Pharmaceuticals USA, Inc., to further delay generic drug competition (FTC Sues Pharmaceutical, 2014). The federal district court subsequently trimmed the FTC's delay suit against AbbVie, when it ruled Teva Pharmaceuticals did not violate federal antitrust law when it reached agreement with AbbVie to end a patent infringement lawsuit (Bultman, 2015).

Maximizing profits and corporate social responsibility

Advocates of corporate social responsibility (CSR) believe “businesses should balance profit-making activities with activities that benefit society,” and “individuals and companies have to act in the best interests of their environments and society as a whole” (Corporate Social Responsibility, para. 17-18). Corporate social responsibility exists in many different forms: donations to charity, influencing government agencies and other companies to treat people and resources more ethically, investing in local communities, developing sustainable technologies, recruiting and hiring a diverse workforce, providing expanded maternity and paternity leave, sponsoring after-school programs, funding local clean-up campaigns, and more closely monitoring the activities of companies in the supply chain (Corporate Social Responsibility). Indeed, in 2010, the International Organization for Standardization released “ISO 26000 – Social Responsibility,” which recognizes that business organizations' social responsibility is increasingly being used as a measure of overall performance and gives guidance on “how businesses and organizations can operate in an ethical and transparent way that contributes to the

health and welfare of society” (ISO 26000, 2010, para. 2). That an ISO standard covering CSR has been released to guide business organizations on measuring and reporting overall CSR performance indicates how significantly the CSR movement has advanced and affected global business organizations.

Two CSR scholars have recently developed a model showing how CSR theories can be classified into four groups: (1) instrumental theories, (2) political theories, (3) integrative theories, and (4) ethical theories (Garriga & Mele, 2004). The first group assumes that the corporation is an instrument for wealth creation and that wealth creation is its sole responsibility. Only the economic dimension of the interactions between society and business is considered, and social activity is acceptable only if it is consistent with wealth creation. Corporations can consider, and satisfy the interests of, its stakeholders, provided doing so maximizes the shareholder value. Hence corporate philanthropy and support of social activities are acceptable if they generate profits (Garriga & Mele, 2004).

The second group focuses on connections and interactions between business and society and permits the corporation to engage in social activities and accept social duties and rights if doing so preserves the social power of the corporation. Corporations must use their social power responsibly; if they do not do so, they will lose it. Exercising social power permits corporations to respond to the demands of constituency groups and fulfill the social contract between business and society (Garriga & Mele, 2004).

The third group contends that business depends on society for its existence, and must respond to and integrate social demands, which are viewed as the way society interacts with business. Because responding to social demands confers the mantle of legitimacy and prestige on the corporation, business must scan the environment to identify and respond to social demands to retain and enhance its social legitimacy, acceptance and prestige (Garriga & Mele, 2004).

The fourth group focuses on the ethical requirements that reinforce the relationship between business and society and employs normative stakeholder theory to determine the right thing to do or how to achieve a good society. Stakeholders are those with a legitimate interest in the corporation’s activities, and all stakeholders merit consideration for their own sake, not merely for advancing the interest of the corporation or its shareholders. Corporations are required to be attentive to the needs of the various stakeholders and to balance those needs with the needs of the company’s shareholders. Doing so requires corporations to have a normative core of ethical principles, such as Kantian principles, Rawls’ principles of justice, universal human rights, sustainable development, and the common good of society (Garriga & Mele, 2004).

Drug company malfeasance and patient groups’ perceptions of pharmaceutical industry

Turing Pharmaceuticals sudden and deleterious price increase of Daraprim is certainly not an isolated example of pharmaceutical industry malfeasance. In his article entitled “Restoring the Pharmaceutical Industry’s Reputation,” Mark Kessel, chairman of the Foundation for Innovative New Diagnostics, identifies eleven instances between January 2009 and February

2014 in which the U.S. Department of Justice imposed multi-million and multi-billion dollar fines on pharmaceutical companies for illegal marketing, misleading advertisements directly targeting consumers, off-label drug promotion, sales of drugs with known safety risks, and allegations of price fixing and kickbacks in violation of the False Claims Act and the Federal Food, Drug & Cosmetic Act.

Exposure of these harmful activities has resulted in a significant decline in the reputation of the pharmaceutical industry. In 2012, only 34% of the patient groups surveyed thought the pharmaceutical industry's reputation was "Excellent" or "Good," the lowest scores recorded since the survey was initiated in 2011. In 2013, that percentage increased to 34.5%; in 2014, 39.0%, and in 2015, 44.7%, the increases being attributed to the "major pharma companies . . . new strategies to expand their patient centricity" (The Corporate Reputation of the Pharmaceutical Industry, 2016, para. 5). While patient group ratings of the reputation of the pharmaceutical industry have improved, the fact remains that about 55% of the patient groups surveyed think pharmaceutical companies' reputations are less than good. This poses a problem for pharmaceutical companies, because, as Kessel (2014, para. 15) notes, unless the pharmaceutical industry "[refurbishes] its image as an innovative industry searching for cures," pharma will remain "in the crosshairs of regulators."

Of particular concern to Kessel is the immense pressure placed on pharmaceutical companies "to meet Wall Street quarterly earnings expectations. Indeed, today's companies are measured on how well their stock performs and boards of directors incentivize management accordingly to meet Wall Street's demands. The needs of patients are secondary." This causes patients to believe pharmaceutical companies are "focused on improving their earnings rather than the lives of patients." Further the "high price of drugs is a problem increasingly blamed on the pharmaceutical industry," "the burden of high drug costs" is unsustainable for the healthcare system, and "an increasingly strident group of physicians, legislatures and pharmacy benefit managers" question whether the cost of drugs is reasonable. (Kessel, 2014, p. 983-990).

Discussion Questions

- 1. Identify the major stakeholders who are directly and indirectly affected by Martin Shkreli's sudden and dramatic price increase for Daraprim and briefly describe how they are affected by the price increase.**

Sudden and dramatic price increases for Daraprim and other specialty drugs has an adverse and direct effect on almost everyone in the pharmaceutical supply chain. Patients are charged higher drug prices and co-pays. Health plans must absorb higher drug prices. Physicians must search for more reasonably priced alternatives and deal with anxious patients. Like physicians, pharmacies dispensing the drugs also must search for alternative medications; unlike physicians, pharmacies have to pay higher prices to acquire the drugs and receive inadequate reimbursements at lower prescribed rates. That means pharmacies will also have to renegotiate their reimbursement agreements or pass the cost to patients. Pharmacy Benefit Managers and consultants hired to forecast pricing trends face increased difficulty to do so

correctly. Pharmaceutical manufacturers face greater scrutiny from the government which demands they justify their prices. Perhaps the only stakeholder affected directly and beneficially is Turing Pharmaceuticals, whose revenues are substantially increased by the higher prices.

Stakeholders indirectly affected include Turing Pharmaceuticals' employees, creditors and investors. The augmented profits earned from the drug price increases lead to larger bonuses for the employees, greater security for the creditors, and enhanced value of the shareholders' investment in Turing Pharmaceuticals.

2. Martin Shkreli justified his Daraprim price increase as a necessary step to keep Turing Pharmaceuticals in business and to meet his shareholders' expectations that he "maximize profits." Please explain how that justification fits into the framework of corporate social responsibility.

As indicated in the case, advocates of corporate social responsibility (CSR) recognize that business organizations should balance profit making activities with activities that benefit society. Doing so develops positive relationships with stakeholders, enhances the perceived value of the company's performance, boosts the company's reputation, and improves society. Shkreli's justification of the Daraprim price increase was to maximize profits for the shareholders. While he concedes he underestimated the ensuing "blowback," he said "of course" he would raise Daraprim's price again, noting the price increase "has stuck" and generated increased revenue (Hopkins, 2016).

At first blush, Shkreli's defense of the drug price increase appears to be significantly out of step with the prevailing view of CSR. Upon closer examination, however, Shkreli's justification may fall within Garriga and Mele's first group of CSR theories, under which (1) corporations are supposed to maximize wealth creation, (2) social activities or considerations are irrelevant unless they are consistent with wealth creation, and (3) stakeholder interests are considered only if doing so maximizes shareholder value. (Garriga & Mele, 2004). Perhaps Shkreli is a CSR advocate after all.

Sadly, Shkreli seems to have overlooked the precept that engaging in CSR is acceptable in order to maximize profits. By moderating the price of Daraprim, Shkreli might have been able to sustain even greater wealth accumulation over a longer period of time and to discourage generic pharmaceutical companies from entering the arena through legitimate means. Unfortunately, Shkreli also appears to have overlooked the nuances of groups 2-4. He ignored the need to protect the social power of Turing Pharmaceuticals. He neglected to recognize and fulfill the social contract obligations of Turing Pharmaceuticals. He failed to incorporate basic, normative ethical principles into his governance model. He certainly illustrates the shortcomings of the first group of social responsibility theories.

Indeed, research findings indicate clearly: (1) that pharmaceutical company engagement in CSR can add value to pharmaceutical company's performance regardless of the company's

size; (2) that pharmaceutical company management should regard CSR as an investment which can reap benefits for the company over time; and (3) pharmaceutical companies should promote their social, economic and environmental contributions in their discussions with stakeholders (Min, Desmoulins-Lebeault, & Esposito, 2017).

(3) Do the activities of Turing Pharmaceuticals in suddenly and dramatically raising the price of Daraprim constitute the antithesis of marketing and corporate social responsibility?

The activities of Turing Pharmaceuticals highlight the absence of a fully adopted marketing concept in the pharmaceutical industry. When there is no competition or where demand exceeds supply, firms have the tendency to price at the maximum that the market will allow. Essentially, when monopolies or oligopolies exist the marketing concept slips out the door. Indeed, it is an “anti-marketing” concept when shareholder wealth is increased at the expense of satisfying customer needs. In a firm adopting the marketing concept, the satisfaction of consumer needs is the means to achieve shareholder wealth. However, that only occurs when there is competition and product supply exceeds consumer demand. As Philosophy Professor Chris MacDonald noted, “the market of life-saving pharmaceuticals is not a ‘normal’ one, structurally let alone ethically,” because the ability to pay is “influenced by regulators, insurance companies, charitable foundations, and so on.” Hence, a “given price might be neither good nor bad, ethically speaking.” Rather, the pricing system as a whole warrants assessment, because the notion of free markets, which permit sellers to charge what the market will bear, is not easily superimposed on the complex market of selling life-saving drugs” (Philosophers on Drug Prices, 2015).

In the case of life-saving pharmaceuticals, this “pricing strategy” is made worse, because the consumer and the payer tend to be two different parties. If the third-party payer does not demand lower prices, then the drug companies engage in the kind of price gouging carried out by Turing Pharmaceuticals. Pharmaceuticals have embraced promotion and product development, branding, and distribution. But pricing is the area in which they linger behind, often choosing pricing strategies that are ethically questionable. Unless transparency or industry-monitored guidelines are adopted, the response to this behavior has traditionally been government intervention through regulation or forced competition. In short, pricing activities such as those committed by Turing Pharmaceuticals is a pre-cursor to industry self-regulation or government intervention.

Notably, however, a more limited pricing question is posed by this case: whether the government should have authority to consider affordability of the niche drugs identified by World Health Organization (WHO) as potential targets for opportunistic companies using the business model of sudden and significant price increases on established, effective, and profitable drugs. These drugs lack therapeutic alternatives, target conditions that contribute to high morbidity and even mortality, are produced by one or few manufacturers, and exist in a market that offers little incentive for new entrants. (Alpern, 2016). By authorizing the FDA to

participate in the negotiation of price increases for these niche drugs, the government can conduct a controlled experiment to measure the actual financial impact on pharmaceutical companies and determine whether affordability can serve as a viable component of drug pricing. Moreover, doing so will protect the most vulnerable patients, including (a) immigrants, refugees, and people of low socioeconomic status who do not have access to insurance or public programs and hence lack access to drugs are used for topical or opportunistic infections; and (2) patients who need pyrimethamine, albendazole and cycloserine, and other anti-infective medications which have also had dramatic price increases, and two drugs, praziquantel, used for schistosomiasis and other parasitic infections, and flucytosine used for cryptococcal meningitis. Critically, 17 anti-infective medications on WHO's list are produced by three or fewer manufacturers and have no therapeutic equivalents. Seven of those drugs treat tuberculosis, while others treat leprosy, strongyloidiasis, malaria or Chagas' disease. All are likely candidates for significant price increases, which will disproportionately affect vulnerable populations in the United States. (Alpern, 2016).

As noted in the case, two CSR scholars have recently developed a model showing how CSR theories can be classified into four groups: (1) instrumental theories, (2) political theories, (3) integrative theories, and (4) ethical theories (Garriga & Mele, 2004).

The fourth group focuses on the ethical requirements that reinforce the relationship between business and society and employs normative stakeholder theory to determine the right thing to do or how to achieve a good society. Stakeholders are those with a legitimate interest in the corporation's activities, and all stakeholders merit consideration for their own sake, not merely for advancing the interest of the corporation or its shareholders. Corporations are required to be attentive to the needs of the various stakeholders and to balance those needs with the needs of the company's shareholders. Doing so requires corporations to have a normative core of ethical principles, such as Kantian principles, Rawls' principles of justice, universal human rights, sustainable development, and the common good of society (Garriga & Mele, 2004).

Requiring drug manufacturers of medications included on the WHO list to consider affordability and authorizing the government to regulate price increases to insure affordability in establishing the prices for those drugs is certainly consistent with the fourth group. The proposal protects patients desperately needing those drugs and requires drug companies to advance the interests of those patients for their own sake, not merely for advancing the interest of the pharmaceutical companies. By focusing on patients needing WHO listed drugs as a vulnerable stakeholder and balancing their needs with the needs of the pharmaceutical companies' shareholders, the normative ethical principles, such as those utilized in fifth discussion question will effectively become pharmaceutical companies' core ethical principles. Furthermore, research demonstrates that corporate social responsibility adds value to corporate financial performance and should be viewed as a long-term investment and that corporate social responsibility programs should be implemented regardless of company size, because investing in stakeholder management creates positive relationships which improve reputation and profitability (Min, 2017).

- 4. The case study notes that neither the FDA nor the FTC, the two federal regulatory bodies most closely connected to the pharmaceutical industry, has authority to regulate the prices pharmaceuticals charge for their drugs. Do you recommend that such authority be given to either the FDA or the FTC? Explain briefly. Alternatively, do you recommend that the Federal government should have authority to consider affordability of the niche drugs identified by WHO?**

A variety of arguments and solutions have been advanced both in support and in opposition to the imposition of price controls on drugs. Jared Bernstein, a senior fellow at the Center on Budget and Policy Priorities, argues that in health economics the pursuit of profits is at odds with maximizing social benefits, because economic incentives compel drug companies to pursue drugs that generate the most profits rather than the drugs patients need the most. To solve this problem, Bernstein argues, an expanded National Institutes of Health should undertake pharmaceutical research or subsidize private research so that the ensuing patents are public goods in the public domain and price gouging is eliminated. Windfall rewards can be awarded to scientists who develop the most beneficial medicines in order to insure the incentive to innovate is not stifled (Bernstein, 2016).

Darius Lakdawalla, the Quintiles Professor of Pharmaceutical Development and regulatory innovation in the School of Pharmacy at the University of Southern California, argues that imposing price controls on drugs will stifle the introduction of new drugs, because the financial incentive to develop new drugs is diminished. Lakdawalla claims that, if the U.S. Government starts to negotiate prices like other governments do, drug prices will fall 20%, but innovation will fall even more, depriving patients of life saving medications and increasing premature mortality. In short, he says, pushing down drug prices will save little and cost dearly (Lakdawalla, 2015)

Neera Tanden, the president of the Center for American Progress, and Maura Calsyn, its director of health policy, argue that, in order to reduce drug prices, the government should require drug companies either to reinvest a minimum percentage of revenues in research and development or contribute the shortfall to the National Institutes of Health. Doing so will remove the incentive for drug companies to enhance their revenues by charging excessive prices for drugs, particularly those, like Daraprim, which have been on the market for decades (Tanden & Calsyn, 2015).

Paul Howard, a senior fellow and director of health policy at the Manhattan Institute, cites two studies in support of his argument that imposing price controls on drugs will dampen innovation and hurt patients. He advocates private negotiation – such as that undertaken in the Medicare Part D drug program - as a more effective tool in obtaining lower drug prices (Howard, 2015)

Dean Baker, an economist and the co-director of the Center for Economic and Policy Research, argues that giving drug companies patents on drugs that are essential to individuals' health or lives causes people to pay roughly twice as much for drugs than people in other wealthy countries pay. This does not result in better care, he claims; rather, it merely forces people to pay more for the same drugs. He likens this system to firefighters negotiating their pay for extinguishing a fire in a home with family members inside: it produces much worse fire service and many more wealthy firefighters. He recommends ending patent protection for drug companies and doubling or tripling spending on the National Institutes of Health. That solution, he claims, will fund research costs upfront and result in reasonably priced drugs. (Baker, 2016).

Hence it appears that the experts are sharply divided on the issue of imposing price controls on drugs. Those opinions, however, do not address a more limited question posed by this case: whether the government should have authority to consider affordability of the niche drugs identified by WHO as potential targets for opportunistic companies using the business model of sudden and significant price increases on established, effective, and profitable drugs. These drugs lack therapeutic alternatives, target conditions that contribute to high morbidity and even mortality, are produced by one or few manufacturers, and exist in a market that offers little incentive for new entrants. (Alpern, 2016). By authorizing the FDA to participate in the negotiation of pricing for these niche drugs, the government can conduct a controlled experiment to measure the actual financial impact on pharmaceutical companies and determine affordability is a viable component of drug pricing.

5. Determine whether the practice of pharmaceutical companies to seize control of specialty drugs and then dramatically increase their prices is ethical or unethical under the following ethical theories: Act Utilitarianism, Rule Utilitarianism, Kant's Rights Theory and Rawls' Theory of Justice.

It is not clear whether or not Turing Pharmaceuticals' decision to dramatically increase the price of Daraprim from \$13.50 to \$750 per tablet passes ethical muster. Shkreli's price increase would be deemed unethical under the theory of Act Utilitarianism, if it harms patients, their families and treating physicians, and all of the companies in the drug supply line identified in the response to question (1) above, and those harms clearly outweigh any short-term benefits to Turing Pharmaceuticals and its executives, creditors and shareholders. On the other hand, if the benefits to all those affected by the sudden price increase to Daraprim outweigh the detriments produced by the price increase – for example, by enabling Turing to develop a blockbuster drug to successfully treat cancer or multiple sclerosis – then the price increase for Daraprim may be deemed moral. In short, while drug price increases do not support past R&D efforts, if the price increase enables the drug companies to engage in current and future R&D to develop new and highly effective drug treatments, the price increase may be deemed ethical.

Similarly, permitting pharmaceutical companies to abruptly and significantly raise the price of specialty drugs may or may not be a rule of conduct that produces the greatest amount of good for those affected. If sudden and significant price increases is a rule of conduct that

produces the greatest amount of good for all those affected, then that rule of conduct should be followed and the price increases should be allowed. On the other hand, if sudden and significant price increases is not a rule of conduct that produces the greatest amount of good for all those affected, then Turing Pharmaceuticals' sudden price increase for Daraprim is deemed unethical under Rule Utilitarianism.

Under Kant's first categorical imperative, the universalizability and reversibility principle, permitting pharmaceutical companies to abruptly and significantly raise the price of specialty drugs does not appear to be an acceptable universal practice to the players in the pharmaceutical industry. Pharmaceutical companies with expiring patents may approve of the practice, but generic pharmaceutical manufacturers likely do not. Further, Turing Pharmaceutical executives and members of their families would likely disagree with other drug companies' engaging in price gauging by foisting sudden and substantial drug price increases on drugs they need.

Similarly, by raising the price of Daraprim suddenly and significantly, Turing Pharmaceuticals likely flunks Kant's second categorical imperative, the means only test. Turing Pharmaceuticals coercively treats patients as a means only, because they desperately need the medication to treat life threatening illnesses and are forced to pay the increased price for Daraprim. Likewise, Shkreli lied about the need for the price increase. Shkreli claimed Turing Pharmaceuticals needed the profits to fund research into an alternative drug to treat toxoplasmosis, but the company lacked any formal study protocol to research the toxoplasmosis therapy. Deception, like coercion, violates the means only principle.

Shkreli's engagement in price gauging and deception likely violates Rawls' Equal Liberty and Difference principles, because he denies patients a fundamental right to life saving medication and disrupts the distribution of benefits to patients with significant needs. On the other hand, if the price increases support the development of blockbuster drugs to cure cancer of multiple sclerosis, successfully bringing those drugs to market may maximize the rights of other patients to life saving medication.

Under Rawls' veil of ignorance theory, not knowing what position the participants and affected parties may occupy when the veil is removed, permitting pharmaceutical manufacturers to have unfettered power to suddenly and significantly raise prices on specialty drugs does not appear to be an acceptable practice, unless the price increase leads to the development and availability of successful and blockbuster drugs to treat and cure more significant medical problems. In short, the strategy of suddenly and significantly raising prices on specialty drugs by pharmaceutical companies certainly does not appear to be ethical under Kant's categorical imperatives but may be deemed to be ethical under Rawls' Equal Liberty and Veil of Ignorance principles.

6. The case study demonstrates that the PhRMA code of conduct fails to address the practice of seizing control and raising prices of specialty drugs. Please explain

whether or not you think the PhRMA code of conduct should be amended to address this issue.

While individual pharmaceutical companies can certainly address the issue of affordability of drugs in their mission/purpose/values statements (although almost all do not), it is less clear that addressing the issue in professional codes of conduct or ethical codes will actually diminish the practice of sudden and significant price increases of specialty drugs. While ethics codes have sometimes been effective in guiding and shaping the conduct of professionals in organizations, both in the public and private sectors, “the public is most familiar with corporate ethics failures: Enron, Boeing, and WorldCom in the U.S. [and] Parmalat and Global Crossing in Europe (Gilman, 2005, p. 34).” PhRMA’s code of conduct fails to address either the affordability of drugs or the practice of seizing control and raising prices of specialty drugs, because PhRMA’s central mission is to represent the leading research-based pharmaceutical companies, some of whom engage in the practice. Indeed, rather than addressing either issue, PhRMA recommends that the FDA should reduce the backlog of ANDAs by improving efficiency of the review process and providing financial incentives to encourage the development of generic drugs. This approach appears to be consistent with its mission of conducting effective advocacy for pharmaceutical and biotechnology research companies.

Conclusion

This case study addresses a highly profitable practice in the pharmaceutical industry: gaining ownership of an older, off-patent drug, which effectively treats a disease affecting a relatively small but stable group of patients, tightly controlling the drug’s distribution and thereby making it difficult for competitors to gain FDA approval of generic equivalents, and dramatically increasing the drug’s price. While this practice is legal and escapes FDA and FTC regulatory authority, the case provides an excellent opportunity for students to apply key ethical principles – act and rule utilitarianism, Kant’s categorical imperatives, and Rawls’ equal liberty, difference and veil of ignorance principles – to form an independent judgment about the morality of the practice.

Significantly, PhRMA, which represents the leading research-based pharmaceutical companies in the United States, has addressed the issue of generic drug approval, recognizes it constitutes an important public health risk, and recommends reforms to improve the approval process. Notably, however, while the professional code of the pharmaceutical industry – the APEC Mexico City Principles for Voluntary Codes of Business Ethics in the Biopharmaceutical Sector – addresses seventeen areas in which it seeks to ensure ethical practices, it fails to address the issue of drug affordability. Nor do the mission/purpose/value statements of all but two of the world’s largest pharmaceutical manufacturers. Indeed, given the legal actions instituted against those two companies by the FTC and states attorney generals, their commitment to drug affordability is questionable. Hence, the pharmaceutical industry is left with a significant challenge: reforming the problem of specialty drug pricing and controlled distribution through its professional codes of conduct by enhancing the level of cooperation among adopters, their sense of urgency, and their willingness to comply with the codes.

It is imperative that pharmaceutical companies resolve the crucial issue of affordability if only to restore the confidence of patient groups in the pharmaceutical industry and its reputation and thereby avoid governmental intervention. Drug companies are already under significant pressure to add greater transparency to its drug pricing practices (Pollack, 2015), and House Democrats recently announced a sweeping investigation of the pharmaceutical industry's pricing practices for brand-name drugs to treat diseases including cancer, diabetes, kidney failure and nerve pain (A.P., 2019).

The business model of suddenly and dramatically increasing prices of well established and effective drugs may form an appropriate vehicle to empower the federal government to address affordability. These drugs have already been developed and have been proven effective. They have a substantial though not a blockbuster market, and are profitable. Further, these niche drugs have been identified on the WHO Model List of Essential Medicines, are finite, lack therapeutic alternatives, target conditions that contribute to high morbidity and even mortality, are produced by one or few manufacturers, and exist in a market that offers little incentive for new entrants. In short, these drugs can be targeted to implement the WHO recommendation that they "be available within the context of functioning health systems at all times in adequate amounts . . . and at a price the individual and the community can afford." (Alpern, 2016). By authorizing the FDA to participate in the negotiation of price increases for these niche drugs, the government can conduct a controlled experiment to measure the actual financial impact on pharmaceutical companies and determine affordability is a viable component of drug pricing.

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MILLENNIALS IN FAMILY FIRMS: SUCCESS FACTORS, ENHANCING FIRM ATTRACTIVENESS, AND THE CHANGING ROLES OF SUCCESSORS

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ABSTRACT

This qualitative study is based on interviews with family businesses that have members of the Millennial Generation in development or leadership positions. Since we found multiple positive managerial characteristics for Millennials, we suggest that they may be well suited for family business leadership which allows them to have more influence and voice in decisions than in other types of organizations. Important factors for the success of Millennials as successors in family firms include commitment to family firm values, knowledge of the family business operations, the opportunity to apply their technological expertise, and a strong relationship with a mentor. Factors that may enhance the attractiveness of family firms for Millennials include: the practice of participative leadership, fostering teamwork, a company culture of optimism, a flexible/informal workplace, and community service activities. Finally, we identified four roles for Millennials as they grow and develop in the firm: (1) Novice, (2) Apprentice, (3) Decision Maker, and (4) Successful Successor.

INTRODUCTION

Much attention has been focused on the Millennial Generation in the workplace. This most recent generation to enter the workforce is composed of individuals born between 1980 and 2000. They are called Millennials because of their birth near the new millennium and their rise to adulthood in an almost entirely digital age (Kaifi, Nafei, Khanfar, & Kaifi, 2012). Howe and Strauss (2000) coined the term Millennials (Balda & Mora, 2011). As no generation before, Millennials have been influenced by computer and information technology and are also characterized by a greater acceptance of non-traditional families and values (Smith & Nichols, 2015). Following Generation X (born from 1965 to 1979), this new generation of leaders is young and referred to as Generation Y. However, little is known about Millennials as managers and leaders, especially in the context of family businesses. Scholars have addressed the strengths and weaknesses of Millennials (Hershatter & Epstein, 2010; Calk & Patrick, 2017; Walker, Sweet, & Morgan, 2016; and Weirich, 2017). This generation may need special management

skills, as it is possible that Millennials may be managing five generations in the workplace, including Traditionalists (born before 1946), Baby Boomers (born 1946 to 1965), Generation Xers (born 1966 to 1979), Millennials (born 1980 to 2000), and Generation Zers (born 2001 to present) (DeVaney, 2015; The Atlantic, 2018).

Dominant work values for millennials include confidence, financial success, team orientation, and loyalty to both self and relationships. In contrast, work values of the Traditionalists comprise the qualities of hard work, conservative, conforming, and loyalty to the organization. Baby boomers value success, achievement, ambition, dislike of authority, and loyalty to the career. Generation Xers value work/life balance, dislike rules, are team-oriented, and are loyal to relationships (Robbins, & Judge (2016).

Millennials face unique challenges as they transition from high school and/or college student to family firm worker to family firm manager. Family firm leaders should learn about Millennials and attempt to understand this important generation in the context of managing a diverse workforce with multiple generations. Specifically, we investigate the questions: “What are the success factors for Millennials as family firm successors?” “How can family firm leaders make their organizations attractive for Millennials as successors?” and “What roles do Millennials play as successors in family firms?”

In examining Millennials in family businesses, we found that these individuals possess positive managerial characteristics, which help them to grow and develop as managers. These characteristics may enable Millennials to have more influence and voice in family businesses than in non-family corporate organizations. We used a case study approach, examining 12 family firms with Millennials involved in developmental or leadership positions through detailed interviews with firm leaders. Of the 31 individual respondents, 16 were Millennials. The transcribed interviews were analyzed through an iterative grounded theory approach. Glaser and Strauss (1967, p.1) originally described grounded theory as “the discovery of theory from data – systematically obtained and analyzed in social research.” However, grounded theory is not an excuse to ignore the literature (Suddaby, 2006). We followed Suddaby (2006), as we performed our study with a working knowledge of the family business literature. Important contributions of this study are: (1) identifying four success factors for Millennials as successors in family firms, (2) identifying five factors favored by Millennials and enhancing the attractiveness of the family firm to them, (3) a typology of Millennials’ roles in family firms, and (4) three propositions.

LITERATURE REVIEW

Much research has been conducted regarding managerial challenges with this new generation (Meola, 2016; Stewart, Oliver, Cravens, Oishi, 2017). However, little research has been conducted on millennials as managers. Early research predicted the Millennial Generation would be significant, as it is the largest generation to enter the workforce since the Baby Boomer generation (DeVaney, 2015). In the next section, we examine current theory concerning positive factors, problems, and managing Millennials in the workforce, and then succession and successors in family businesses.

Positive Factors for Millennials in the Workforce

Studies on the Millennial Generation report that the use of computer technology and social networking are integral parts of their lives (Lancaster & Stillman, 2002; Balda & Mora, 2011). Hershatter and Epstein (2010) believed that Millennials possess valuable technological skills that may provide the organization with useful social media experiences. Research has reported that this generation is well educated (Crumpacker & Crumpacker, 2007). In another study, Millennials were described as more technologically savvy, better educated, ethnically diverse, adept at social networking, and having a greater desire to engage in socially responsible activities than previous generations (Bannon, Ford, & Meltzer, 2011).

Research also found that millennials may place value on positive reinforcement, diversity, and autonomy (Lancaster & Stillman, 2002). Calk and Patrick (2017) found that Millennials appeared to be more positive and collaborative than previous generations. Meister and Willyerd (2010) reported that the Millennial generation places a high value on the following: teamwork, personal productivity, self-management, personally fulfilling work, and having a social conscious.

Problems with Millennials in the Workforce

Walker, Sweet and Morgan (2016) attempted to determine if a relationship exists between the generational category and job hopping, citing conflicting opinions about this issue. Results of the study showed that Millennials are more likely to job hop than Baby Boomers or Generation Xers. Therefore, challenges exist for organizations to discover methods to retain talented Millennials.

Another study reported that a potential problem with Millennials in the workplace is that this generation holds to more individual values, rather than the organization's needs (Rosenzweig, 2010). Twenge, Campbell, & Hoffman (2010) reported that leisure time is perceived to be very important to this generation. Therefore, it is possible that this value may carry over into the workplace and thus affect variables such as job satisfaction, job involvement, and organizational commitment.

On the negative side, studies have reported that Millennials lack important skills, such as communication and decision making (Crumpacker & Crumpacker, 2007). Further, Weirich (2017) described this generation as being entitled, narcissistic, self-interested, unfocused, or lazy, while Myers and Sadaghiani (2010) reported that Millennials have been depicted as self-centered, unmotivated, disrespectful, and disloyal. Millennials are also known for preferring casual dress at work, such as blue jeans instead of business suits. They also have a propensity to wear nose rings or other body piercings and tattoos, which older generations may not prefer (Miller, Hodge, Brandt, & Schneider, 2013). A 2010 Pew survey showed that nearly 40% have at least one tattoo as compared to 15% of Baby Boomers.

Managing Millennials in the Workforce

Meola (2016) perceived great challenges for organizations as the large numbers of Millennials come into the workplace. The Millennial generation is almost as large as the Baby Boomer Generation and 30% larger than Generation X (DeVaney, 2015). Some of the challenges for organizations include building relationships and understanding the Millennials' motivation. Meola (2016) reported that their motivations were at the social, self-esteem, and self-actualization levels. Millennials prefer flexible jobs, maintaining work-life balance, and developing close personal relationships (Balda & Mora, 2011).

Walker, Street, and Morgan (2016) found that career satisfaction, teamwork, flexibility, and workforce diversity are important to this generation. Therefore, challenges exist for organizations to discover methods to retain talented Millennials. According to Walker, Sweet and Morgan (2016), organizational leaders need to encourage loyalty and improve job satisfaction and organizational commitment factors for Millennials, which may be a different experience than with previous generations

Calk and Patrick (2017) recommended that organizations should promote a collaborative, team-based work environment, as well as challenging and meaningful work. In contrast, another study mentioned Millennials in an "uncharitable light" and analyzed the Millennial Generation and the nature of organizational and workplace culture (Stewart, Oliver, Cravens, & Oishi, 2017) and suggested that changes should be made in performance evaluation methods to include a greater variety of characteristics and traits.

Meola (2016) suggested that different types of training be given to Millennials. This author suggested that older managers (Baby Boomers and Generation Xers) are having trouble building relationships with Millennial employees and understanding their motivation to work. Training focused on helping managers to work with Millennials may increase retention rates for organizations, decrease costs, as well as build loyalty when they buy into the organizational goals and values. Twenge *et al*, (2010) found that the Millennial Generation does not like to be controlled. Research suggests they are a more independent generation and want a "say so" in the work environment and clear guidelines to ensure their success. (Twenge, *et al*, 2010; Hershatter & Epstein 2010).

Succession and Successors in Family Firms

Family firm succession is typically a long process, rather than an event, and involves intergenerational changes in management and ownership (Handler, 1994; Steier & Miller, 2010). For successors, exposure at a young age to the company allows successors to learn about the people and processes involved (Ward, 1987). The process typically starts in childhood with after school part-time work and is highlighted by the entry of successor(s) into the family business at a lower level of management and later the ascension of potential successors to the leadership of the firm. The process allows potential successors to be groomed for many years to accept their responsibilities to carry on the family firm (Longenecker & Schoen, 1978). Succession has been compared to a relay race in which trust and mutual respect are keys to success (Dyck, *et al*,

2002). The predecessor must give up power, and the successor(s) must exhibit both the ability and desire to take control of the firm (Dyer, 1986).

The person most responsible for the continuity of the family business may be the predecessor, since this person must possess the desire to transfer the business to the next generation (Barnes & Hershon, 1989). Although control of the succession process may still reside mainly with the predecessor generation, the readiness of successors is also important (Brun de Pontent, Wrosch, & Gagne, 2007). An interested and capable successor is necessary for succession to occur (Birley, 2002). A good working relationship between the predecessor (incumbent) and the successor(s) is vital to any transfer of power (Cabrera-Suarez, De Saa-Perez, & Garcia-Almeida, 2001). The relationship between the predecessor and successor in the family firm is important, but this central relationship must also have the support of the whole family. Siblings should be accommodated and agree upon their positions either inside or outside the management of the firm (Handler, 1990).

The predecessor must delegate authority and allow the successor(s) to make decisions and mistakes (Handler, 1990). The successor(s) must demonstrate the necessary skills, performance, and experience for leading the firm (Barach, Gantisky, Carson, & Doochin, 1988; Barach & Gantisky, 1995). The successor(s) need a thorough training regimen to acquire firm specific knowledge and to develop one's capabilities (Morris, Williams, Allen, & Avila, 1997). Furthermore, the successor(s) must be willing and fully committed to the process (Barach & Gantisky, 1995).

One major challenge in the succession process is the need for the successor to acquire the predecessor's knowledge of the business in order to maintain and improve the performance of the firm (Cabrera-Suarez, De Saa, & Garcia-Almeida, 2001). Parents often serve as mentors or teachers in the succession process (Aronoff & Ward, 1991; Dyer, 1986). Whether or not the mentor is a parent, successors benefit greatly in their development by working with a mentor (Goldberg, 1996). Key attributes for successors in the family firm include commitment to the business and integrity (Chrisman, Chua, & Sharma, 1998). Further, successful succession involves the positive performance of the firm after the change in leadership, as well as the satisfaction of stakeholders with the process (LeBreton-Miller, Miller, & Steier, 2004).

In summary, there is a theoretical foundation concerning positive factors and challenges for Millennials in the workforce, as well as succession in the family businesses. However, a gap in the literature exists in that the development of the new generation of Millennials as successors in family firms is not clearly understood. We affirm that Millennials are developing into leaders in family firms in large numbers, and we assert that Millennials have unique contributions to make to family firms and that it is incumbent on family firm leaders to understand this rising generation. We seek to add to the evidence about Millennials in family firms and examine their development to become next generation leaders.

METHOD

Case Study Approach

Using the case-study approach is appropriate for explaining ‘how’ and ‘why’ events occur (Eisenhardt, 1989; Yin, 2009). The investigator may purposively choose cases which may replicate or extend a theory (Eisenhardt, 1989). Further, critical cases may be examined to prove their major findings or confirming or disconfirming cases (Siggelkow, 2007). This qualitative method may also select cases that illustrate applicable concepts. Finally, this qualitative research method may be useful in generating new theory. (Patton & Applebaum, 2003).

Development of Questions

The questions were carefully developed with input from other studies to expand the characteristics and challenges of the Millennial Generation and designed to obtain open-ended answers. The instrument was organized into the following sections: history and general information, challenges, leadership style, and others. Interviewing took place during 2016-2017.

Selection of Participants

We received assistance in selecting respondents from local business leaders, chambers of commerce, university colleagues, friends, acquaintances, alumni, and students. We contacted approximately 30 family firms to ascertain if the companies met the following requirements: (1) multi-generational family involvement, (2) a Millennial family member in a leadership position, and (3) willingness to participate. We also visited many websites and other media sources to determine if Millennials were in the family firm. Then, we collected data for over a year.

Also, interviews were conducted with this generation plus other family members and/or managers who had worked with them. Firms from different industries participated in the study. Table 1 shows demographic characteristics of the 12 companies according to type of industry, age of firm, number of employees, and estimated annual sales volume.

The respondent businesses ranged in age of firm from 13 to 68 years with an average of 30 years in existence. The number of employees in the family firm ranged from 4 to 120 with an average of 39 employees. Estimated annual sales of these family firms ranged from \$1 million to \$29 million with an average estimate of \$5.8 million. The generations of family participation were two or three generations as shown in Table 1.

Data Collection

In order to reach firms committed to the family business organization structure, we searched for established family firms as opposed to start-up companies. An exploratory interview was conducted with a family member to determine if the respondent firm qualified for the study

Firm	Type of Industry	Age of Firm	No. of Employees	Estimated Sales (\$M)
1	Bistro/Restaurant	31	15	\$1
2	Boating (Sales and Repair)	42	16	\$10
3	Carpet Cleaning and Restoration	17	6	\$2
4	Convenience Store & Gasoline	19	32	\$8
5	Construction	20	12	\$2
6	Health Food	26	120	\$5
7	Insurance Agency	13	4	\$1
8	Jewelry	39	11	\$2.5
9	Lawn Service and Restaurant	31	100	\$6.1
10	Paper and Cleaning Materials	40	98	\$29
11	Restaurant (Seafood and Steak)	68	50	\$1.5
12	Shoe Repair	17	6	\$1

as multigenerational family firms with at least one Millennial family member involved in the business. The Millennial respondent in the family had to be 37 years or younger.

We followed a semi-structured interview process, using a list of elicitation questions which were open-ended and concerned the characteristics and challenges of the Millennial member(s) in the family business. We conducted interviews individually with 31 respondents, including Millennial family members, family firm owners, and other employees in the family businesses. We recorded and transcribed each interview as shown in Table 2. Our study had Internal Review Board approval from the authors' university, and all respondents were advised of confidentiality. We preceded each interview with a careful reading of the respondent company's website and relevant online information. Observations and documents about each company were collected but were considered supplemental in nature.

FINDINGS AND PROPOSITIONS

In this section, we report on three areas of findings: (1) a model of factors for the success of millennials as successors in family firms, (2) a model of factors that enhance the attractiveness of family firms for Millennials, and (3) a typology of four roles that Millennials play as they grow and develop in the firm (Novice, Apprentice, Decision Maker, and Successful Successor). We also provide propositions to clarify our findings.

Factors for the Success of Millennials as Successors in Family Firms

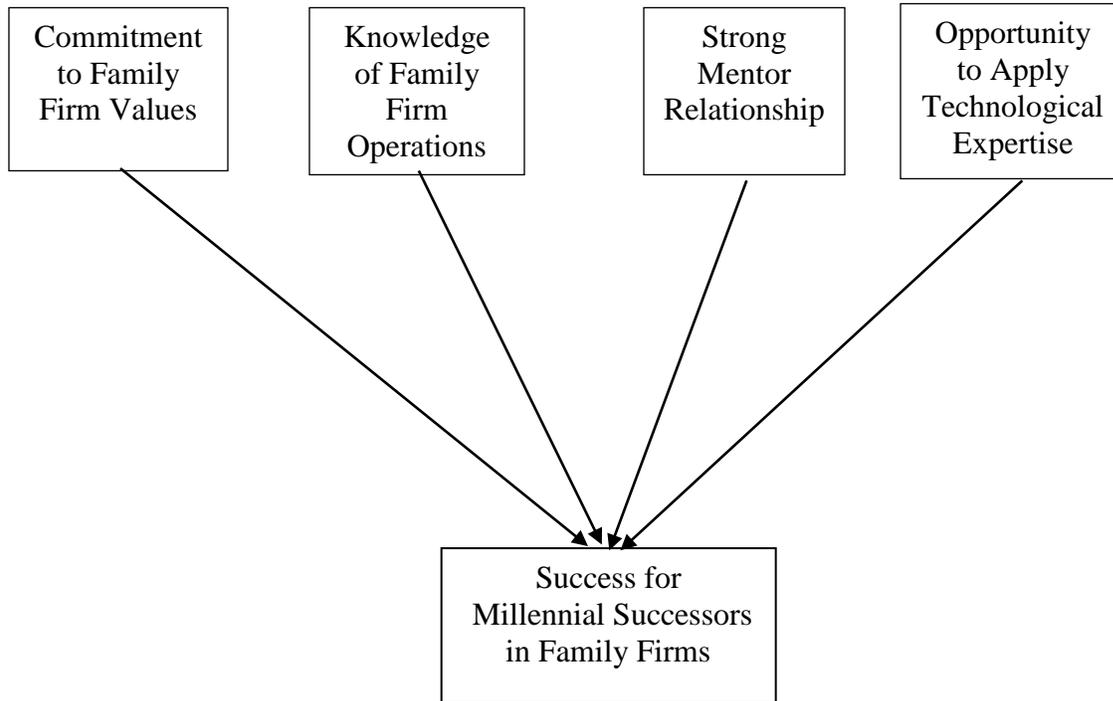
Repeatedly, our respondents reported several critical characteristics for success for Millennials as successors in family firms, including the following: a commitment to family firm

values, knowledge of family firm operations, a strong relationship with a mentor, and the opportunity to apply their technological expertise (See Figure 1). In terms of success as successors, we refer to a status in which Millennial family firm members are willing, prepared, and able to assume a leadership role in the family firm.

Table 2
Respondents according to Generation and Family Position

Family Firm	Respondent(s)	Generation	Family Position	Family Business Generation
1	A	Millennial	Granddaughter	3rd
	B	Baby Boomer	Grandmother	1st
2	A	Millennial	Daughter, sister	3rd
	B	Millennial	Son, brother	3rd
3	A	Millennial	Daughter, sister	2nd
4	A	Millennial	Son	2nd
	B	Generation X	Father	1st
5	A	Millennial	Son	2nd
	B	Baby Boomer	Father	1st
6	A	Millennial	Son	2nd
	B	Baby Boomer	Father	1st
7	A	Millennial	Daughter, sister	2nd
	B	Millennial	Son, brother	2nd
	C	Generation X	Mother	1st
8	A	Millennial	Brother, son, grandson	3rd
	B	Millennial	Sister, daughter, granddaughter	3rd
	C	Generation X	Daughter, mother	2nd
	D	Baby Boomer	Grandfather, father, husband	1st
	E	Baby Boomer	Grandmother, mother, wife	1st
9	A	Millennial	Son, brother	2nd
	B	Millennial	Daughter, sister	2nd
	C	Baby Boomer	Father, husband	1st
	D	Baby Boomer	Mother, wife	1st
10	A	Millennial	Daughter	2nd
	B	Baby Boomer	Father	1st
	C	Generation X	Non-family manager	None
11	A	Millennial	Daughter	3rd
	B	Baby Boomer	Mother	2nd
	C	Baby Boomer	Non-family manager	None
12	A	Millennial	Son	2nd
	B	Baby Boomer	Father	1st

Figure 1
Model of Factors for the Success of Millennials as Successors in Family Firms



Commitment to Family Firm Values

First, the respondents recognized the significance of commitment to shared family firm values in order to enhance the growth and development of Millennials from novices to successful successors in the family firm. Important family firm values reported by the respondents were hard work, honesty, fairness, loyalty, and concern for the customer, employees, and community.

For example, at Company 10, Respondent A, (alternatively Respondent 10A), who was a Millennial stated:

If you come in and work and learn all the jobs, you will be mobile throughout the organization, and you will do well here. The philosophy is to work yourself up in the company--hard work is the important thing.

At Company 6, Respondent A echoed his father’s values regarding fairness and honesty:

If you treat people right, they will treat you right. That is our biggest thing...we are open and honest. If we don’t know the answer, we are not going out there and lie to them. That will get you a sale only one time... We treat people with respect.

When asked what her family firm values were, a Millennial, Respondent 7A replied:

Good customer service and just being fair if we are helping clients. I will call another insurance company we do not represent sometime, just to help the customers. I even called a friend who works there to get them a better rate. They say, thank you so much.

A young seafood restaurant manager, Respondent A at Company 11 mentioned the importance of customers and community in response to our question about family firm values:

Treat all your customers the same no matter what. Do not cheat your customers. We always used to say that we made good homemade food for a fair price. I think that is on our menus. Treat your employees well. Do not serve anything that you think is sub-par. Care for your community.

At Company 2, Respondent A, who was a young woman manager, believed customer satisfaction is the key to operating a business:

Make sure the customer is happy and when someone walks through the door, they can tell in the first three minutes if they are welcome, "Hi, thank you, we appreciate you." You have to treat them well when they come in. I greet them. This is a man's business. I want to make them feel welcome.

Respondent 3A echoed the theme of family values as reflected in customer service: *We treat people like we want to be treated. We try to give honest service. We recently found that a competitor charges for the soap if you want your carpet cleaned. My mom cooks breakfast every morning for our technicians. My dad believes if you don't eat a big breakfast and eat big lunch, you will go to sleep and are worthless the rest of the day. If you eat a big breakfast, you can skip lunch, you will be great and keep going. We want to treat our customers the way we want to be treated.*

Knowledge of Family Firm Operations

Next our respondents explained the importance of gaining an understanding of the operations of their family firm, from preparing food at Company 1 and 11, to making sales at Company 2, 4, 6, 7, 8, and 10, to performing services at Company 3, 9, and 12, to making products at Company 5. The knowledge of the means of acquiring revenue and making a profit were considered essential to the development of Millennials as successors.

For example, a young man who grew up in the business, Respondent 6A, and is a manager of a health food store, stated: "Since I grew up in the business, I got a head start on everybody else. At 10, I could do what everyone else could do at 18." A Millennial, Respondent 12A, explained the importance of the actual work in his family's shoe repair business:

So, my dad is the owner, and I am his primary helper. I am the only one who does any work (shoe repair) besides my dad. My dad does most of the repairs like rips or tears that need to be stitched. He does most of the soles and heels, but I do some of that as well... I do like the work. I like recoloring and restoring shoes. I like the before and after and how much changes I have made.

Respondent 8A, a Millennial respondent, explained what he did for the jewelry store: "I repair jewelry, make jewelry, rings, and pendants. I like it. I have enjoyed making stuff; it is easier on the body than out there in the construction business where I worked before."

Strong Relationship with a Mentor

Another important factor reported by our respondents in the success of Millennials as successors in the family firm was building and maintaining a strong relationship with a mentor. By working closely with mentors, Millennial successors gain important knowledge of the operations of the family firm. In our respondent firms, a family member, such as a father, mother, or grandparent, often served in the role of mentor.

Respondent 10A, a Millennial third generation owner-manager, expressed the following about her father's role as a mentor to her:

My father has been a good mentor, very patient, and very encouraging. He has let me make some of my own mistakes within reason. There was a point I wanted to make a decision. We had a manager who worked with the company for 35 years and we had to let him go just because of his resistance to change. There was a decision that he wanted, and I wanted the complete opposite decision. My dad went along with my choice, and it ended up being the right decision by a billion miles.

Respondent 10A, a Baby Boomer second generation family business owner, serving as a mentor to his daughter, stated the following about his daughter:

She is COO right now. She is very intuitive, aggressive, and entrepreneurial. Her background and mine are in sales. I am transitioning out of the business and she is coming in. Her personality and mine are similar but different from my dad. She also is smart.

Respondent 1A, a Baby Boomer respondent, explained her role as a mentor to her Millennial granddaughter at the bistro restaurant:

I am just here to help. I have already done that. I will answer questions if they need me, but they are usually smart enough to figure it out. My granddaughter is a leader. She changed the menu, and I let her do what she wants.

Because of the excellent training and strong mentorship provided by her mother, Respondent 7A, a Millennial successor in the insurance business, stated:

Customers automatically trust me because I am the daughter. They will call and ask: "May I speak to the daughter?" Another employee would have to work hard to get in such a position.

Respondent 8A, a Millennial son, explained about working with his mentor father in the family shoe repair business:

I have learned a lot from my dad. We both gain a lot working together. In turn, he knows that he can trust me and lets me work by myself. He does not worry about me taking money or not doing what I am supposed to do. I think it helps build our relationship because we get to spend more time together.

Opportunity to Apply Technological Expertise

A major difference from previous generations is that Millennials, on average, possess far greater technological skills. One way that Millennials can give back to their predecessors in the

family firm is to apply their technological knowledge and expertise that members of the next generation often possess. Giving Millennials the opportunity to apply their knowledge in areas, such as social media and computer technology, aids the family firm and affirms that members of this generation are valuable assets to the family firm. By allowing Millennials to fully participate in the management of the family firm, predecessors reap the rewards they have sown as mentors.

For example, Respondent 5A, a Millennial son, introduced important technological advances to the construction business. He explained as follows:

All of this, including the digital information, online access, website, and emails I have set up, was a culture shock for my dad. He is so used to having his own way for a long time. It is all new to him. My dad had to learn to step back and say whatever you think is best for the business. He trusts me, but before I do anything, I still communicate with him. I talk to him about what I want to do and why and how it is going to benefit us. So far, he is seeing that the marketing and advertising on the website are good for us. He has seen the business skyrocket in the past year and a half.

Respondent 1B, a grandmother, indicated her granddaughter was an asset regarding technology as she purchased a new management information system: “She bought new software, uses social media, and spearheaded our new website.” Respondent 7A, another Millennial family firm manager, indicated the following:

We have a Facebook page and customers go there. I recommended this to my mom. I noticed that Facebook is easier than the Web. People will google us. I post something and within minutes, I get immediate calls. I will share and promote the company. People will mention my name and go into Facebook.

Respondent 10C, a non-family manager, commented about the female Millennial who is now the Chief Operating Officer (Respondent 10A): “We have a new web page and a new software system.” The new COO described the situation as follows:

We are becoming a web-based company. The industry will fall behind if we don't focus on that. Since the launch of our website, actually we are the most progressive industrial distributor in our segment. People in our industry are only investing in B to B ecommerce, and we are making ours easy and friendly.

Similarly, Respondent 12A, a Millennial son at the shoe repair business, explained as follows:

My sister and I did a Facebook page, and I am the one that answers all the questions from the customers. They send us pictures sometimes. We have really good reviews on our Facebook page. So, a lot of customers come in and say that they came to us because they saw us online.

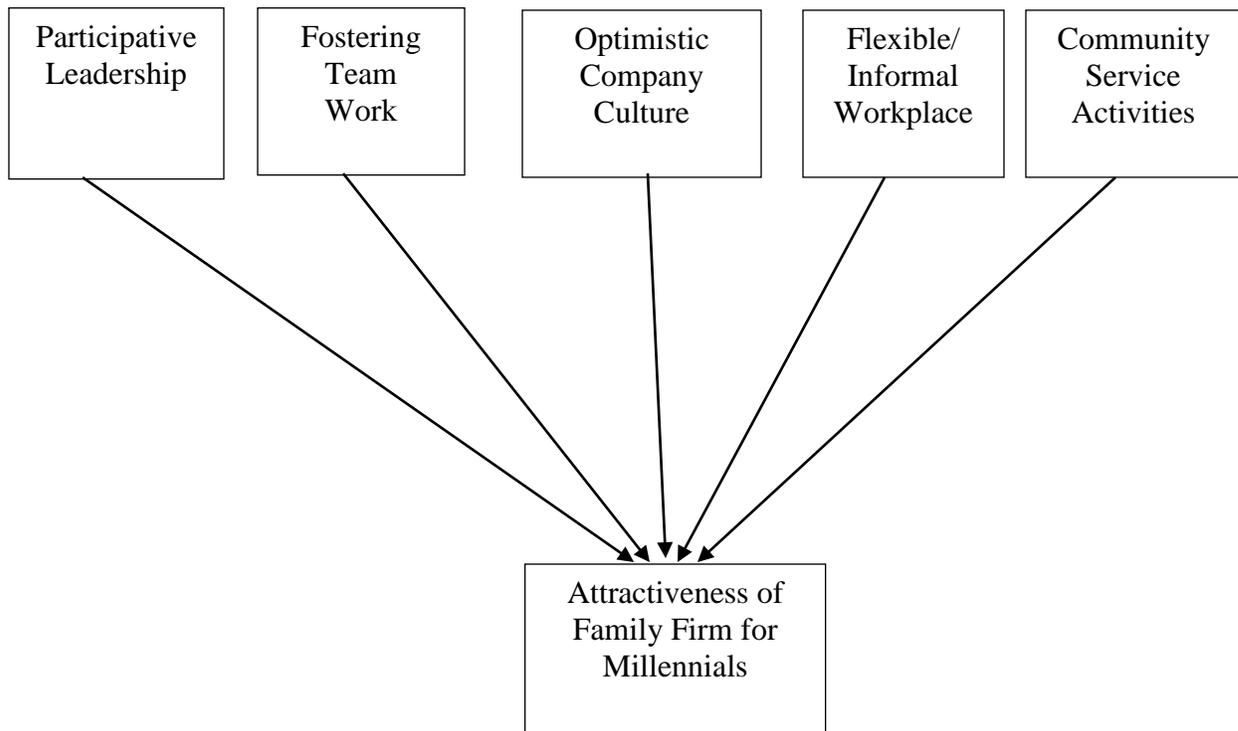
The evidence provided above leads us to propose the following.

Proposition 1: Important factors for the success of millennials as successors in family firms include commitment to family firm values, knowledge of family firm operations, a strong relationship with a mentor, and the opportunity to apply technological expertise.

Factors that Enhance the Attractiveness of Family Firms for Millennials

In a thorough analysis of the interview data provided by our respondents, we observed a two-way street in family firms. Factors for Millennials to grow and develop are on the first side of the street, and the venue of predecessors to enhance the attractiveness of family firms for Millennials is on the second side. Here, we address our second research question: “How can family firm leaders make their organizations attractive for Millennials as successors?” We found five factors that may enhance the attractiveness of family firms for Millennials: participative leadership, fostering teamwork, an optimistic company culture, a flexible/informal workplace, and community service activities shown in Figure 2. These five factors represent differences in preferences between Millennials and previous generations.

Figure 2
Factors that Enhance the Attractiveness of Family Firms for Millennials



Participative Leadership

The Millennial respondents in our study repeatedly expressed a preference for a leadership style in which they themselves and other employees as well were allowed a voice in decision making and leadership of the family firm. This leadership style may be described as democratic, employee focused, or participative leadership.

Concerning leadership style, Respondent 10A, a Millennial family firm manager, expressed:

We use a democratic leadership style. Every employee would tell you that they have confidence to ask for forgiveness, rather than permission. They have the confidence to make decisions. We don't have meetings. If we have something to say, we say it. We have a little discussion. We deal with it.

Respondent 10C, a non-family manager, described the above Millennial family-firm manager at Company 10 as a participative leader as follows:

We had a general manager before Respondent 10A who was very autocratic and intimidated employees. Respondent 10A is different from that, and she is more participative in her leadership style. She delegates some but knows what everyone is doing.

Respondent 6A, a Millennial family manager, recalled the following about using a relaxed leadership style that focuses on empowering employees:

My leadership style is laid back, and I delegate a lot. With the system we have now, we trust our employees and have low turnover and empower employees more. I had rather pay our managers a little more money to watch the products themselves. They have to do the ordering and get paid more to do that. We try and let employees make the decision. If something is priced wrong, they can take care of it. We try to empower employees to make decision.

Respondent 4A, another Millennial family manager at a chain of convenience stores and gasoline stations, expressed a similar philosophy about paying employees better:

We pay our employees pretty good and not \$7 or \$8 per hour, so they may find a way to feed themselves. If you pay them \$10 or \$11 per hour, they will show up and work. My manager has been here six years. Everyone gets Christmas bonus checks, and my dad takes them out for a free meal.

Respondent 1A, a Millennial family manager at a restaurant, expressed the following concerning the importance of good relationships with employees:

It is very important to have a good relationship with employees. Your employees are your backbone. If the employees are uncomfortable or unhappy, the customers see this. The old saying, the customer is always right, okay. Where they are spending their money, people are passionate about it...they can go anywhere. Restaurants are surrounding me.

Fostering Teamwork

Our respondents frequently mentioned a preference for teamwork, as opposed to working alone in the family business. The preference for teamwork flows logically from a participative leadership framework. Fostering teamwork shows that leaders are inclusive of followers, and employees are not pitted against each other seeking raises and/or promotions.

For example, Respondent 4A, a Millennial convenience store/gasoline family manager, stated the following:

If your employees are divided, they do not work as a team. When your employees are divided, you will have issues. Everything is teamwork. If your employees are not united, then you have a problem.

Respondent 6A, the Millennial family manager at the health food stores, asserted the following opinion about teamwork:

I am not big on managers who are authoritative. I have been trying to train a couple of our guys how to be a manager at the other stores. You are a team--nobody likes someone who just gives commands. You ask them. If one of your team members suffers, we all suffer. Each store is a team.

Respondent 1A, the Millennial family manager at the bistro restaurant, made the following comments concerning the importance of teamwork:

If we are not a team, we would not be successful. We come up with new ideas all the time. Someone else's idea can open your mind to thinking completely different. I think that is the beauty of being open. Some bosses say, "This is just the way it is." Unfortunately, that does not help the employee grow with the company

Respondent 7C, the Generation X owner-manager, set the tone of teamwork for the insurance agency with the following statement:

We are a team. I tell them (Millennial daughter and son). We are like a motor. It doesn't matter how beautiful the car is and the how expensive the motor is. If the little battery that is cheap does not work, nothing works in this car. We are a team...If something is not working; I ask them "What do you think?"

Optimistic Company Culture

In keeping with current research on Millennials in the workplace, the majority of the respondent Millennial family firm managers perceived themselves to be optimistic, in principle, and often more optimistic than previous generation family firm leaders. For example, at Company 1, the Millennial granddaughter of the family firm owner stated: "I am extremely optimistic. In the book, Discover Your Strengths, my strength was optimism." At Company 4, the Millennial son of the family firm owner remarked: "I am optimistic...probably more than my father." At Company 6, another Millennial son of the health store owner stated, "I am very optimistic...probably more so than others in the company."

Because many Millennials consider themselves to be optimistic, it follows that they would prefer to work at a family business characterized by an optimistic and positive company culture. In order to induce Millennials to join the family firm and retain them, an optimistic company culture makes sense. For example, the family firm owner at Company 7, the insurance agency, expressed: "I am more optimistic. One office was fine for me, but now we have two offices." The optimism of the Company 7 owner-manager, leading to an optimistic company culture, is partly responsible for the successful expansion to a second office. Also, in a difference of opinion from his son, the owner-manager of Company 4, the convenience store and gas station, stated: "I am more positive than my son is." When optimism pervades multiple

generations in a family firm, such a company will be desirable for Millennial family firm members.

Flexible/Informal Workplace

Millennials are well known for their informality in the workplace, which is reflected in the way they dress and act. The Millennial respondents in this study echoed these sentiments in the family business setting, placing value on flexibility for family time at home and leisure activities. At Company 6, because of strongly held religious faith, the company closes on both Saturday and Sunday, which is a rare occurrence in today's competitive retail environment. The Millennial health food store family manager commented on the policies of his family firm:

People like to work for us. We are closed on the weekend, and people have time with their families. We are not pushy with our employees, and they are not pushy with the customers. It is sort of a circle. If you treat your employees right, they will treat customers right. We have a low turnover rate compared to other companies. Employees don't want to leave us.

Not only is Company 6 closed on weekends (both Saturday and Sunday), but the leaders of the company treat their employees very well. The Millennial family manager explained: "We have fun at work. We crack a lot of jokes...we are not too serious. We try to have a relaxed environment. We try to give employees as much leeway as possible. If they need to take a day off, it is fine with me."

Respondent 1A, the bistro restaurant, the Millennial family manager explained: "It is a big deal to have a relationship with my employees. All are part-time. I strive to make my employees happy. I strive to make them happy and that exudes to the customer." Also, at Company 1, the owner-manager who is the grandmother of the Millennial family manager added the following:

We are extremely informal. I wish I were not so informal. We have a good time, but it is important to get things done. We were more formal in the past. We do things together with employees. Today we had a Valentine's party...we celebrate everyone's birthday. We do a Christmas party, so they know they are appreciated by their boss and each other. It brings comradery in the workplace.

Respondent 2A, the Millennial family manager, remarked on the company's informality within limits: "I like to be relaxed, but there are rules...no athletic shorts. If you have to think about it and should you wear it to work, just don't wear it. We try not to have many rules—we are not big on that."

Community Service Activities

Many of the Millennial respondents often made statements about the importance of community service. Wanting to do good work in the community and helping others is very important to Millennials in the broader workplace, and this trend appears to carry into family businesses as well. Being able to directly impact their community through service and choosing

how to do this service appears to be very important for Millennials, and family businesses are an excellent vehicle for this. For example, at Company 4, the convenience store and gasoline station, the Millennial son of the owner described his own community service as follows:

I go to the Boys and Girls Club and Autistic Club. One of the things I learned from this is that we should not be too upset in life. There is nothing we are going through compared to what those kids are going through. Imagine the beauty of life we have. But you go into a room full of kids and they punch you in the face and don't even know they hurt you. It teaches you patience. There is more to life than someone breaking your iPad.

Respondent 1A, the Millennial family manager reported the following:

We have done multiple things. I have donated to organizations and people in need. Also, we are part of the Chamber of Commerce. I work with the Parks and Recreation Department throughout the year, and I am involved as much as I can.

Other respondents mentioned many different charitable and community service projects. At Company 12, the Millennial son stated: "My dad does support community causes. He is selective on what he supports. He does support Hispanic programs. He gives scholarships to community college students." At Company 3, the Millennial daughter responded: "We do support military activities such as Wounded Warriors. One of our technicians is in the National Guard. He is gone on some weekends. We support the Shriners and ring the bell for the Salvation Army." At Company 6, the Millennial son stated: "We support mainly church-related activities, and we donate to local charities, such as the food bank.

The evidence provided above leads us to propose the following.

Proposition 2: Important factors that will enhance the attractiveness of family firms for Millennials include participative leadership, fostering teamwork, an optimistic company culture, a flexible or informal workplace, and community service activities

A Typology of Millennials' Roles as Successors in Family Firms

We have described differences regarding success factors for Millennials as successors in family firms and factors that enhance the attractiveness of family firms for Millennials. Early in the data collection processes, we noticed changes and differences among the generation of Millennials as family business managers. We observed growth and development of Millennials as successors in the respondent family firms and noted differences among individuals concerning their stage of development. These four stages include from their entry into the family firm until the time that they replaced their predecessors as leaders of the family firm. As we iteratively studied our interview data, we found that the following four types fit the respondents in our study and label the types as: (1) Novice, (2) Apprentice, (3) Decision Maker, and (4) Successful Successors as described in Table 3. Among the 16 Millennial respondents, we found two Novices, five Apprentices, six Decision Makers, and three Successful Successors.

Respondent	Initial Role	Years in Firm
1A	Manager/Decision Maker	10
2A	Manager/Decision Maker	13
2B	Manager/Decision Maker	12
3A	Successful Successor	17
4A	Worker/Apprentice	3
5A	Manager/Decision Maker	10
6A	Manager/Decision Maker	10
7A	Worker/Apprentice	6
7B	Novice/Beginner	2
8A	Worker/Apprentice	3
8B	Novice/Beginner	1
9A	Manager/Decision Maker	12
9B	Worker/Apprentice	4
10A	Successful Successor	15
11A	Successful Successor	15
12A	Worker/Apprentice	6

Novice. The Novice may alternatively be described as a beginner, helper, order taker, subordinate, or trainee. In our study, the Novice was a son, daughter, grandson, or granddaughter who has recently entered the family firm and has less than a year or two of experience. The Novice lacks authority and ownership and basically is concerned with entry level duties, such as office work, light bookkeeping, stocking shelves in a retail store, or greeting customers. This individual has no authority over other employees and basically does what the owners and managers tell him/her to do. In this study, Respondents 7B and 8B were Novices.

For example, Respondent 7B characterized his role in the family insurance firm as follows: "My mom (Respondent 7C) asked if I wanted to enter the business and I said yes. As far as managing, my sister (Respondent 7A) does that. We all have the authority, but I just do whatever I am told to do. I think that my mom knows what she is doing. We all put our opinions out, but mom makes the final decision."

Respondent 8B explained that she was just starting out in the jewelry business: "I am just learning the business, and it is hard. There is a lot going on. I thought I would just show people some jewelry, but they ask hard questions".

Apprentice. Through hard work and diligence, the Apprentice has become knowledgeable of the family firm and participates in the core operations of the company, such as producing goods and services and/or selling the firm's products. He/she desires to learn the business. The five Apprentice respondents in this study had between three and six years of experience at their family firm.

For example, Respondent 12A explained his Apprentice position at the family shoe repair business.

My dad is the owner, and I am his primary helper. My older sister works there sometimes, mainly to help with customers. I am the only one who does any shoe repair work besides my dad. I do almost all the shoeshines that come through the shop. My dad does most of the repairs like rips or tears that need to be stitched...I do like the work. I like recoloring and restoring shoes. I like the before and after and how much change I have made.

At Company 8, Respondent A described his role as a worker/apprentice at his grandparents' jewelry store:

My grandparents make the call. I don't have much say-so here. I am pretty easy going. I never planned to go into the jewelry business, but after listening to my grandfather, I thought it would be a great opportunity to spend time with him and learn something.

Decision Maker. The Decision Maker has become an important leader in the firm. He/she has transitioned from being a typical employee (Novice) and Apprentice (learning the business) to having an active role in the management and leadership of the family business. The six Decision Makers in this study managed stores or offices in family firms and were part of the top management team although not CEOs.

For example, Respondent 6A, who is becoming the manager of his father's new health food store stated: "I have made decisions on what goes in the new store and advertising. I will be in charge, but I will run some things by my dad."

Respondent 5A has begun to make important, although seemingly small, changes in the family construction business. He explained as follows:

Yes, I try to make us look more professional. My dad would buy those little invoice things from Home Depot or Walmart and hand write them and give them to the customer, but now I have professional invoices and professional estimates that I put on my QuickBook and email to the customer.

Successful Successor. The Successful Successor is recognized as the new controlling owner of the family business, having transitioned through the steps of Novice to Apprentice to Decision Maker. Three Successful Successors are Respondent 3A, Respondent 10A, and Respondent 11A. They averaged over 15 years of experience in the family firm, often starting at a very young age while still in school. After an accident at Company 3, but due to proper legal preparation, Respondent 3A was able to step up into family firm leadership. She recalled, "My dad had a plane wreck two years ago. He signed a power of attorney to me if anything happened—it happened in his own plane."

At Company 10, Respondent 10B has planned his retirement and is turning over the leadership of the copy paper and cleaning supplies company to his daughter, Respondent 10A. The father stated: "I am transitioning out of the business, and she is coming in." The daughter explained as follows: "My dad and I jointly run the business, but functionally I am the CEO...I have now been the CEO for four months by myself. I was in sales, and then I was the COO, but now I am in charge of everything as the CEO." At Company 11, the business was closed for about a year, and then mother and daughter opened a new business as partners with the daughter taking the lead role.

The evidence from the typology of Millennials leads us to propose the following:

Proposition 3: Potential Millennial successors will go through four stages of development in the family firm, progressing from Novice to Apprentice to Decision Maker to Successful Successor as they grow and develop.

DISCUSSION

Our models of success factors for Millennials as successors, factors that enhance the attractiveness of family firms for Millennials, and typology of Millennials' roles in family firms are worthy of further comment. We believe that our models and typology contribute to a better understanding of Millennials as successors in family firms. We conclude with some comments concerning our study's limitations and suggest some ideas for future research.

First, we comment on the model of factors for success of Millennials as successors in family firms. The four factors include: (1) commitment to family firm values, (2) knowledge of family-firm operations, (3) strong mentor relationship, and (4) opportunity to apply their technological expertise. The first three factors relate to the family firm literature. The most important characteristics for successors are commitment to the family firm and integrity (Chrisman, Chua, & Sharma, 1998; Sharma & Rao, 2000). In our study, commitment to family firm values, such as honesty, integrity, and fair treatment of employees and customers stood out, thus confirming the literature as the foremost factors for the success of Millennial successors. The second most important success factor was knowledge of family firm operations, which aligns with Cabrera-Suarez, De Saa, and Garcia-Almeida, (2001), who argued the importance of passing company knowledge from one generation to the next. To accomplish this task, successors need a thorough training process (Morris, Williams, Allen, & Avila, 1997) to which they are committed (Barach & Gantisky, 1995). Our third factor was a strong relationship with a mentor as part of the training process. In alignment with Aronoff and Ward (1991), Dyer (1986), and Goldberg (1996), the mentor may be a close family member, such as a father, mother, grandfather, or grandmother, or a non-family firm leader. The fourth factor was the opportunity to apply technological expertise. This factor associates with the literature on Millennials in the workplace (Balda & Mora, 2011; Hershatter & Epstein, 2010). Our respondents were eager to apply computer technology and communication skills that they had developed either individually or in educational contexts, such as college.

Second, we remark on our model of factors that enhance the attractiveness of family firms for Millennials. The factors for this model are participative leadership, fostering teamwork, an optimistic company culture, a flexible/informal workplace, and community service activities which relate to the Millennials in the workplace literature. Here, we provide suggestions for family firm practitioners to contribute to the success of their Millennial family firm members by adopting some strategies. The first factor was a preference for participative or democratic or employee-centered leadership. This desire may emanate from the Millennials' dislike of being controlled or the desire to have input in decision making in the workplace (Twenge 2009; Hershatter & Epstein 2010). The second factor of fostering teamwork flows from the concept of participative leadership and giving a voice to participants. Millennials highly value teamwork

(Meister & Willyerd, 2010; Walker, Street, & Morgan, 2016). The third value of optimism in the family firm arises from the Millennials' preference for a positive work environment (Calk & Patrick, 2017). The fourth factor regarding the desire for a flexible and informal workplace relates to the millennials' penchant for informal attire (Miller, Hodge, Brandt, & Schneider, 2013) and their preference for flexible jobs and maintaining work-life balance. The fifth factor involves community service activity and reports that Millennials have a greater desire to engage in such activity than previous generations (Bannon, Ford, & Meltzer, 2011).

Third, we comment on the typology of Millennials' roles as successors in family firms. In keeping with the family firm succession literature, we noted that the respondents in our study were at different stages in their development as successors from the time of their entry into the family firm until they ultimately replaced their predecessors as leaders of the family firm. We labelled the four types as (1) Novice, (2) Apprentice, (3) Decision Maker, and (4) Successful Successor. In many family firms, the succession process actually begins when the successors are children in school even before entering the family firm (Ward, 1987). A highlight of the process is when the potential successor enters the family firm (Longenecker & Schoen, 1978). We refer to successors in this stage as Novices. As the potential successors develop their work skills through training programs and learn about the procedures of the family firm (Morris, Williams, Allen, & Avila, 1997), we refer to them as Apprentices. As predecessors allow the successors to make decisions and mistakes (Handler, 1990) and they grow to acquire the needed skills, performance, and experience to lead the firm (Barach, Gantisky, Carson, & Doochin, 1988; Barach & Gantisky, 1995), we refer to them as Decision Makers. Finally, the predecessor must give up power as the successors exhibit the ability and desire to lead the family firm and a transfer of management and ownership occurs. Thus, Successful Successors accede to the top of the family firm.

LIMITATIONS AND FUTURE RESEARCH

Although this study provides interesting insights into the success factors of Millennials as successors in family firms and factors that may enhance the attractiveness of family firms for Millennials, limitations do exist for our research. We recognize that cultural variations around the world may restrict the application of our study. For example, we cannot comment on Millennial successors in countries where civil rights are greatly limited by law or custom. This study also may not translate to countries with cultures that do not have access to recent advances in communication technology. Further, as is common in qualitative research, we recognize limitations concerning sample size. It would be beneficial to have participants from a greater variety of industries in the study as well. We do not claim to have covered all aspects of Millennial successors in family firms, but we view our study as part of an incremental development of understanding in this research stream.

Future studies should continue to investigate Millennials in the context of family firms, as there are few, if any, studies of this nature to our knowledge. Researchers may study Millennials as workers, managers, successors, and leaders in family firms as these roles change over time. Retrospective insights from qualitative studies and longitudinal studies are needed to learn more

about the Millennial generation. Additionally, since this study was designed to be exploratory in nature, future research efforts using surveys with a large sample size should be considered. Studies probing the relationships between Millennials and Baby Boomers or Generation Xers in family firms would greatly benefit practitioners and scholars alike. Further studies on Millennials in family firms are needed in different cultural settings, either inside the United States (such as in the Hispanic, Asian, or African-American subcultures) or in other developed or developing countries. Studies concerning the changes in the roles of women in family firms from one generation to the next may also provide important insights.

CONCLUSION

Using a qualitative case study approach and grounded theory analysis of 12 United States family firms, we examined the questions: “What are the success factors for Millennials as family firm successors?” “How can family firm leaders make their organizations attractive for Millennials as successors?” and “What roles do Millennials play as successors in family firms?” Important contributions of this study include findings (1) four success factors for Millennials as successors in family firms, (2) identifying five factors that enhance the attractiveness of family firms for Millennials, (3) a typology of Millennials’ roles as successors in family firms, and (4) three propositions.

A major challenge for family firm leaders is coordinating and directing multiple generations with different values. This paper sheds light on important variables which may affect the development of Millennials as successors. Further, it is imperative to guide and direct this new generation of leaders. Family firms may be very conducive to the Millennials’ success due to the flexibility inherent in family firms and the long-term management approach. Also, these potential successors have the proximity to top management with an emphasis on personal and family relationships. Practitioners should recognize that the Millennial generation may be a valuable asset to family firms and may be very influential in organization decision making. It is well within the power of family firm leaders to make nimble adjustments to enhance the experience of Millennials within their businesses, as well as foster an environment in which Millennials may be extremely effective.

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