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STAYING THE NIGHT: INTEGRATING HOME-SHARING PLATFORMS INTO THE HOSPITALITY INDUSTRY

❖ NOTE ❖

*Bryan Boccellr**

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I. INTRODUCTION

Home-sharing websites have changed the game when it comes to short-term living space rentals. Home-sharing, a concept once unheard of, has taken the world by storm since Airbnb first launched in 2009 and seems to be growing at a steady pace.¹ The amount of rental spaces available on Airbnb since it first launched has increased at an astounding rate—“Airbnb’s global inventory grew from 3,000 units in February 2009 to 2.3 million units — houses, condos, apartments — in 2016” and that has Airbnb at forty-five percent year-to-year total growth.² The quick growth rate can be attributed to the competitive pricing offered on hosting platforms compared with their

¹ Tom Rogan, *The Ridiculousness of New York’s Airbnb Ban*, OL (Oct. 25, 2016), <http://www.opportunitylives.com> [hereinafter Rogan].

² *Id.*

*J.D. Candidate, Class of 2018, University of Illinois College of Law.

hotel counterparts.³ With a tight budget for many travelers, saving on a place to stay is key.⁴ This booming sector of the economy, however, leaves many questions unanswered, specifically, how these short-term rental spaces will be regulated as part of the hospitality industry.

Part II of this Note will give a brief background on the history of short-term home-sharing rentals. Part III will outline the benefits that come along with these newfound rental spaces, and Part IV will discuss how to come to a middle ground that keeps hosts, renters, and those in the hotel industry content.

II. BACKGROUND

Home-sharing, as many startups nowadays, grew from very humble beginnings. It was 2007 and a pair of roommates living in San Francisco couldn't afford to pay their monthly rent.⁵ This led the pair to turn their loft into a living space that could accommodate three air mattresses. They knew there was a convention in town that weekend so they began taking reservations through what was then called airbedandbreakfast.com.⁶

Airbnb struggled during the first year or so, but eventually Paul Graham, a venture capitalist, noticed it and decided to invest.⁷ The company subsequently lined up more investors and began to build up its online presence into what exists present day: hosts in over 191 countries with upwards of three million listings.⁸

Throughout its almost decade in business, Airbnb and other home-sharing platforms have operated with minimal regulations. Airbnb originally "operated by trusting the government to turn a blind eye to their business model. And that expectation was well justified. Airbnb allows users to make a

³ Talia Avakian, *Here's where it's cheaper to book an Airbnb over a hotel room*, Business Insider (Feb. 18, 2016), <http://www.businessinsider.com/is-it-cheaper-to-airbnb-or-get-a-hotel-2016-2> [hereinafter Avakian].

⁴ Biz Carson, *How 3 guys turned renting an air mattress in their apartment into a \$25 billion company*, Business Insider (Feb. 23, 2016), <http://www.businessinsider.com/how-airbnb-was-founded-a-visual-history-2016-2/#it-started-with-an-email-joe-gebbia-sent-his-roommate-brian-chesky-an-idea-what-if-they-made-a-designers-bed-and-breakfast-complete-with-a-sleeping-mat-and-breakfast-it-was-a-way-to-make-a-few-bucks-almost-nine-years-later-that-idea-is-worth-25-billion-1>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *About Us*, Airbnb, <https://www.airbnb.com/about/about-us>.

little extra money renting their spare room or apartment to those on a budget. Both sides win.”⁹ There’s a third party in this business model that doesn’t win though: the hotel industry.¹⁰ With so many varying interests involved in this new sector of the hospitality industry, many cities and states seem to be at a loss as to how to regulate these newfound short-term rental spaces.¹¹

In New York, Governor Andrew Cuomo, signed a bill into law in 2016 that bans the advertisement of entire unoccupied apartments for less than 30 days. In San Francisco, Airbnb rentals are only permitted if the hosts are full-time residents and are registered with the city.¹² And in Santa Monica – likely the toughest regulations implemented on these short-term rentals up to date – requires the hosts to live in the property during the occupant’s stay, register for a business license, and collect a fourteen percent occupancy tax from the stay.¹³ Although the hotel lobby advocated for many of these regulations, there is the regulatory deficit in the home-sharing market in order to ensure a balance of interests between property owners, neighbors, customers, and the hotel industry.

Until Airbnb rolled out, the hotel industry had a monopoly-esque model in place that guaranteed them customers prior to home-sharing platforms hitting the market.¹⁴ If people were traveling, hotels were a one-stop shop for sort-term living rental. Sure, there are various options within the hotel industry ranging from hostels to luxury five star rooms, but they are almost always company-run locales. However, contrary to popular belief, sharing platforms are not leaving hotel rooms empty and cutting into profit margins.¹⁵ According to 7Park Data, a data collection agency, Airbnb customers are taking trips that they wouldn’t have otherwise taken.¹⁶ Despite this, however, Airbnb has managed to bring down hotel prices during peak

⁹ Rogan, *supra* note 1.

¹⁰ *Id.*

¹¹ Zaw Thiha Tun, *Top Cities Where Airbnb is Legal or Illegal*, Investopedia (Aug. 31 2015), <http://www.investopedia.com/articles/investing/083115/top-cities-where-airbnb-legal-or-illegal.asp>.

¹² *Id.*

¹³ *Id.*

¹⁴ Adrianna Jeffries, *Airbnb Takes On Hotels with Last-minute Booking*, The Verge (May 13, 2014), <https://www.theverge.com/2014/5/13/5709720/airbnb-retools-app-to-emphasize-last-minute-booking>.

¹⁵ *Id.*

¹⁶ 7Park Data, (2017), <http://info.7parkdata.com/airbnb-company-insights-in>.

times such as holidays or conventions.¹⁷ This has made the hotel lobby weary of Airbnb and they have begun campaign-after-campaign to try and derail it as it creeps into its market share.¹⁸ Since the concept of home-sharing is relatively new though, there is a lack of regulation throughout the country to help integrate this new short-term rental sector into the market.

III. HOME-SHARING: THE BENEFITS

Airbnb found a gap in the short-term rental marketplace. Its platform serves to connect consumers with suppliers, in a sense. By giving “individuals the opportunity to visit a place on an affordable budget, Airbnb assists the American right to pursue of happiness.”¹⁹ The hotel industry has spent much time and effort trying to thwart Airbnb’s rise, arguing that home-sharing services like Airbnb only lead to higher housing costs for consumers.²⁰ The American Hotel and Lodging Association (an organization with Marriott International, Hilton Worldwide and Hyatt Hotels as members) sees home-sharing as a threat and has taken steps to try and stop it in its tracks.²¹ From a consumer standpoint though, more competition in any market is generally a good thing because it drives down the cost of the product. Airbnb’s average prices in cities across the globe is usually cheaper than their hotel counterparts.²² A recent Merrill Lynch study found that

Airbnb’s listings are expected to increase by up to 50 percent in the coming year and make up 3.6 percent to 4.3 percent of lodging inventory by 2020. There are currently more travelers looking for rooms than there are rooms to house them, but that dynamic could change as soon as 2017, when there will be more room options, between hotels and Airbnb, than there is demand []. That means more competition for hotels and lower costs for consumers.²³

¹⁷ Katie Benner, Inside the Hotel Industry’s Plan to Combat Airbnb, *The New York Times* (April 16, 2017), <https://www.nytimes.com/2017/04/16/technology/inside-the-hotel-industrys-plan-to-combat-airbnb.html?mcubz=0> [hereinafter Benner].

¹⁸ *Id.*

¹⁹ Rogan, *supra* note 1.

²⁰ Benner, *supra* note 17.

²¹ *Id.*

²² Avakian, *supra* note 3.

²³ Samantha Shankman, Airbnb May Force Hotels to Lower Prices, <http://www.travelandleisure.com/articles/airbnb-lower-hotel-prices>.

Another benefit that home-sharing websites also bring with them is increased tax revenue for their cities and towns. Cities tend to institute hospitality taxes ranging from ten to fifteen percent, which amounts to a significant financial benefit for cities.²⁴ Problems arise, however, when hosts fail to pay the taxes owed on their revenue to local municipalities.²⁵ The hosts are “ultimately responsible for payment of this tax to the city regardless of whether it is collected from the transient or not.”²⁶ Airbnb took notice of this problem and recently began automatically charging the transient occupancy tax so as to keep governmental taxing agencies and the hotel lobby at bay.²⁷ It’s easy to see why the hotel industry has declared war against Airbnb as recently noted by The New York Times, “Hilton’s market capitalization is \$19 billion, and Marriott’s is \$35 billion” and investors currently value Airbnb at around \$30 billion if it were to go public.

Aside from its lower cost, Airbnb gives customers something hotels don’t have: a way to stay in comfortable, through well-located homes with amenities like kitchens and living rooms at what is frequently a discount from traditional hotels.²⁸ Amenities and rooms throughout most hotels are very uniform and lodgers know what to expect when they make a reservation.²⁹ Airbnb changes that; it provides more of an adventure for those who book their stay on the website.³⁰

In Chicago for example, there are a variety of rules and regulations currently in place that have been implemented as a result of the home-sharing industry. Section 4-14-020 of the Municipal Code regulates the registration requirements, which makes establishments keep records of their guests such as names, contact information, room number, and dates of accommodation.³¹ The city has also extended its Hotel Accommodation Tax onto home-sharing, which has helped to integrate the home-sharing market

²⁴ Ashley M. Peterson, *Sharing Space: To Counteract the Impact on Long-Term Rental Availability Various Jurisdictions Are Restricting the Ability of Homeowners and Tenants to Offer Short-Term Vacation Rentals*, Los Angeles Lawyer (January 2017) [hereinafter Peterson].

²⁵ *Id.*

²⁶ L.A., CAL., MUN. CODE Ch. II, Art. 1.7; Peterson, *supra* note 24.

²⁷ Peterson, *supra* note 24.

²⁸ Brian Solomon, *Airbnb And Hotels Need Each Other, They Just Don't Know It Yet*, Forbes (May 5, 2017), <https://www.forbes.com/sites/briansolomon/2017/05/05/airbnb-and-hotels-need-each-other-they-just-dont-know-it-yet/#fa10a4033e46> [hereinafter Solomn].

²⁹ *Id.*

³⁰ *Id.*

³¹ Municipal Code of Chicago, Sec. 4-14-020.

into the hotel industry.³² These are examples of how cities and municipalities have begun to build a bridge between the home-sharing and hotel industries. By leveling the playing field between these two competing forces, cities and other governmental institutions can help aid in the integration of home-sharing units into the short-term rental marketplace. There are some rules though, that don't necessarily apply to home-sharing units yet because of the difficulties associated in their implementation. These hospitality laws that regulate large-scale hotels are hard to administer on a micro-scale across the offerings on websites such as Airbnb.

IV. FINDING A MIDDLE GROUND: INTEGRATION

One possible solution to the many questions and problems that have arisen since the inception of the home-sharing market would be to better integrate it with the hotel industry. This solution would fill the current void of lacking regulations for these new rental spaces. If hosts and their short-term rental spaces were held to the same standards to which the hotel industry is held, they would keep standards set at what current regulations require. Initially this may impose a burden on the home-sharing market, but it would be beneficial in the long-run because it would allow for hosts to keep making a profit.

One interesting solution that has been proposed would be to make some hotels rebrand. If hotels were to "make their accommodations less of a commodity, there should be a place for them to be featured in search results on the growing Airbnb platform. Because, after all, Airbnb needs a supply of places to stay more than nearly anything else."³³ If hotels were to begin to advertise some of their units on the site it would then make for a greater supply of rental units.

Currently, legislators have only begun to tackle the issues that have risen as a result of this new home-sharing economy. The hotel lobby points to the fact that "Airbnb hosts often do not comply with rules imposed on hotels, like anti-discrimination legislation, local tax collection laws, and safety and fire inspection standards"³⁴ If it were possible to integrate these two competing markets into one with regulations that evened out the

³² Municipal Code of Chicago, Sec. 3-24-7520.

³³ Solomon, *supra* note 28.

³⁴ Benner, *supra* note 17.

competition, it would likely create a more uniform marketplace where consumers could choose between standard hotels and home-sharing options.

Critics of home rental sites argue that the presence of these rental spaces “remove affordable housing from the market by turning rentable apartments into unofficial year-round hotels, [and cause] a drop in supply [that] can mean higher rents for remaining apartments.”³⁵ Conversely, Airbnb notes that their website offers its hosts an economic lifeline to help them pay their bills, rent, or mortgages.³⁶ Though likely an unpopular regulatory solution, cities and states should make sure that they are taxing these home-sharing spaces, as they are standard hotel units so as to provide an equalizer among short-term rental spaces. As previously noted, Airbnb has begun to automatically charge taxes on their site when customers check out, so this taxation issue has begun to be addressed. State legislatures and local government councils, however, should enforce not only the same taxes on these home-sharing spaces, but also the same rules and regulation such as licensure and other local code requirements. Though, this may be initially burdensome on the home-sharing market, at the end of the day it is a business and hosts should abide by industry standards if they wish to make a profit. Another solution that some cities have already implemented would be to allow a space to become a home-shared space for only a certain amount of days throughout the year.

If the hotel industry hopes to not lose any more of its market share to home-sharing, they should start to take pages from Airbnb’s business model. Currently, the hotel industry is being clearly labeled as the “bad guy,” with Airbnb noting, “the hotel cartel is intent on short-sheeting the middle class so they can keep price-gouging consumers.”³⁷ States and cities alike must find a middle ground that keeps the many competing interests in this newfound sector of the hospitality industry at bay. If there was a better integration of these two clashing sectors of the short-term rental economy, with equal regulations and taxation, it would be beneficial for not only hosts and the hotel industry but consumers as well.

³⁵ Heather Kelly, *Why Everyone is Cracking Down on Airbnb*, CNN Tech (June 23, 2016), <http://money.cnn.com/2016/06/22/technology/airbnb-regulations/index.html>.

³⁶ *Id.*

³⁷ Benner, *supra* note 17.

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SPECTERS OF THE PRIVATIZED PUNISHMENT: EROSIONS OF CIVIL LIBERTIES IN JUVENILE PRISONS

❖ NOTE ❖

*Kelly Chen**

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I. INTRODUCTION

In February 2017, the Justice Department rescinded the directive under the Obama administration to phase out private prison contracts.¹ While the targeted prisons have been federal prisons for adults, there appears to be less public scrutiny on the privatization of state juvenile detention and correctional facilities. It is worthwhile to examine the legal state of juveniles in private prisons because their youth makes them particularly vulnerable to abuse and mistreatment and makes their incarcerated conditions uniquely problematic. This Note begins with examining the historical and

¹ Matt Zapotosky, *Justice Department will again use private prisons*, WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/world/national-security/justice-department-will-again-use-private-prisons/2017/02/23/da395d02-fa0e-11e6-be05-1a3817ac21a5_story.html?utm_term=.bfcac637b0f9.

*J.D. Candidate, Class of 2018, University of Illinois College of Law.

contemporary existence of juvenile private prisons. Then, this Note analyzes arguments that support and condemn the privatization of juvenile prisons, paying attention to policy and business implications. Furthermore, this Note examines constitutional issues that incarcerated youth face in private prisons, such as due process concerns and the propriety of governmental delegation of penal powers to the private sector, as reasons that support the closure of privatized juvenile prisons. Finally, this Note points out how the Missouri model of juvenile rehabilitation attempts to reform injustices characteristic of the private juvenile justice industry and why there should be enhanced support for progressive reform.

II. TROUBLED BEGINNINGS

Juvenile detention and correctional centers emerged as a response to the privatization of government welfare programs during the Reagan Era in the 1980s when the federal government began to contract with private prison companies.² In 1983, Corrections Corporation of America became the country's first private prison and today, nearly forty percent of all juvenile offenders are imprisoned inside private prisons.^{3,4} The rise of private juvenile prisons appears to be part of the larger trend from the 1970s of increased privatization of federal prisons to address bloated inmate populations and diminishing prison services.⁵ In Florida, all incarcerated youth reside in private prisons.⁶ State budgetary constraints incentivize governments to pursue privatized youth prisons, subsuming the welfare of imprisoned youth into the larger fiscal agenda.⁷ Nevertheless, private juvenile prisons have elicited negative criticism from the Departments of Justice in various states due to disconcerting treatment of imprisoned youth. Facilities from James Slattery's for-profit prison empire, Youth Services International, have encountered reports of youth fights arranged by prison staff in Maryland and, in Florida, authorities discovered failures to report prison riots, assaults, and

² Madison Pauly, *A Brief History of America's Private Prison Industry*, MOTHER JONES (July/August 2016), <http://www.motherjones.com/politics/2016/06/history-of-americas-private-prison-industry-timeline/>.

³ *Id.*

⁴ Chris Kirkham, *Prisoner of Profit*, HUFFINGTON POST (Oct. 22, 2013), <http://projects.huffingtonpost.com/prisoners-of-profit>.

⁵ *Id.*

⁶ Chris Kirkham, *Prisoners of Profit: Despite Widespread Abuse, Private Juvenile Jail Firm Expands Empire*, DEMOCRACY NOW (Oct. 23, 2013), https://www.democracynow.org/2013/10/23/prisoners_of_profit_despite_widespread_abus.

⁷ *Id.*

even sexual abuse against imprisoned youth.⁸ However, private youth prisons remain a characteristic feature of the contemporary penal landscape.

III. JUSTICE UNDER A PROFIT MOTIVE

Support for the privatization of juvenile prisons largely center-around economic pragmatism. First, private prisons aim to save the government money through replacing government red tape with private employees who may be cheaper to employ.⁹ For instance, private contractors charge reduced daily rates compared with public employees for managing youth correctional facilities.¹⁰ Likewise, an Arizona Department of Corrections study noted that private prisons saved an average of 13.6% in operational costs than public prisons.¹¹ The business goal is provide greater efficient use of labor compared to public prisons, as private prisons strive to use fewer guards to monitor inmates and are not mandated to follow civil service rules regarding monitoring staff and consequently utilize around one-third the administrative personnel.¹² The assumption is that private operators can manage juvenile prisons at a lower cost while maintaining or improving the quality of the facilities.¹³ Additionally, private juvenile prisons allegedly reduce costs in the construction and design stage. The lack of governmental red tape found in private prisons means that private juvenile prison companies can design, construct, and operate private prisons in less time compared to public-operated prisons,¹⁴ and, unlike public prisons, private companies are not burdened with purchasing restrictions and contracting quotas.¹⁵ Here, the underlying policy incentives for the government are to save money while increasing juvenile incarceration capacity and the policy incentives for private youth prison companies are to make a profit.¹⁶

As expected, many arguments exist against private juvenile prisons. In particular, private juvenile prisons suffer from dark histories of abuse, the neutral or negative net impact of private imprisonment on juvenile criminality, and long-term financial cost overlooked in short-term

⁸ Pauly, *supra* note 2.

⁹ Kevin Krajick, *Prisons for Profit: The Private Alternative*, State Legis., Apr. 1984, at 11.

¹⁰ *Id.*

¹¹ Alexander Volokh, *A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868, 1876 (2002).

¹² *Id.* at 1879.

¹³ *Id.* at 1870.

¹⁴ *Id.* at 1878.

¹⁵ Volokh, *supra* note 11.

¹⁶ Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 459 (2005).

perspectives on private prisons' economic success. Some scholars believe that inadequate staffing characteristic of private juvenile prisons is directly linked to increased violence against juvenile inmates.¹⁷ In general, private prisons employ fifteen percent fewer guards per inmate compared to public prisons, increasing the risk of danger to staff and inmates.¹⁸ Furthermore, a whistleblower lawsuit from the Idaho Department of Corrections specifically noted that the Department failed to properly ensure there was enough staff on duty pursuant to standard juvenile-to-staff ratio of 8:1 during the day and 24:1 at night, which jeopardized staff and inmate safety.¹⁹ The complaint additionally alleged that regular lack of staff supervision for the juveniles, including those with violent histories, created precarious prison conditions.²⁰ As a result, there were four times more violent incidents between guards and inmates than compared to in Idaho public youth correctional facilities.²¹ Moreover, a letter from the Idaho Department of Corrections to the Idaho Correctional Center warden for a private juvenile prison argued that the prison's systematic issues included the failure of guards to adopt proper behavioral modifications to stop violence; prison guards routinely committed simple battery against juveniles when they violently misbehaved, fostering a "violent culture without commensurate consequences."²²

The troubled history of violence against imprisoned youth raises a critical legal and business issue of accountability in private juvenile prisons. Public prison officials hold qualified immunity from civil liability when they perform discretionary functions, such as disciplining juvenile inmates, if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."²³ However, the Supreme Court held in *Richardson v. McKnight* that private prison officials do not qualify for this immunity, which raised the accountability for private

¹⁷ Stephen Pevar, *Is CCA Guilty?*, ACLU (Mar. 5, 2014), <https://www.aclu.org/blog/cca-guilty>.

¹⁸ Curtis R. Blakely & Vic W. Bumphus, *Private & Public Sector Prisons--A Comparison of Select Characteristics*, 68 FED PROB. 27, 29 (2004).^[1]^[2]^[3]^[4]^[5]^[6]^[7]^[8]^[9]^[10]^[11]^[12]^[13]^[14]^[15]^[16]^[17]^[18]^[19]^[20]^[21]^[22]^[23]^[24]^[25]^[26]^[27]^[28]^[29]^[30]^[31]^[32]^[33]^[34]^[35]^[36]^[37]^[38]^[39]^[40]^[41]^[42]^[43]^[44]^[45]^[46]^[47]^[48]^[49]^[50]^[51]^[52]^[53]^[54]^[55]^[56]^[57]^[58]^[59]^[60]^[61]^[62]^[63]^[64]^[65]^[66]^[67]^[68]^[69]^[70]^[71]^[72]^[73]^[74]^[75]^[76]^[77]^[78]^[79]^[80]^[81]^[82]^[83]^[84]^[85]^[86]^[87]^[88]^[89]^[90]^[91]^[92]^[93]^[94]^[95]^[96]^[97]^[98]^[99]^[100]^[101]^[102]^[103]^[104]^[105]^[106]^[107]^[108]^[109]^[110]^[111]^[112]^[113]^[114]^[115]^[116]^[117]^[118]^[119]^[120]^[121]^[122]^[123]^[124]^[125]^[126]^[127]^[128]^[129]^[130]^[131]^[132]^[133]^[134]^[135]^[136]^[137]^[138]^[139]^[140]^[141]^[142]^[143]^[144]^[145]^[146]^[147]^[148]^[149]^[150]^[151]^[152]^[153]^[154]^[155]^[156]^[157]^[158]^[159]^[160]^[161]^[162]^[163]^[164]^[165]^[166]^[167]^[168]^[169]^[170]^[171]^[172]^[173]^[174]^[175]^[176]^[177]^[178]^[179]^[180]^[181]^[182]^[183]^[184]^[185]^[186]^[187]^[188]^[189]^[190]^[191]^[192]^[193]^[194]^[195]^[196]^[197]^[198]^[199]^[200]^[201]^[202]^[203]^[204]^[205]^[206]^[207]^[208]^[209]^[210]^[211]^[212]^[213]^[214]^[215]^[216]^[217]^[218]^[219]^[220]^[221]^[222]^[223]^[224]^[225]^[226]^[227]^[228]^[229]^[230]^[231]^[232]^[233]^[234]^[235]^[236]^[237]^[238]^[239]^[240]^[241]^[242]^[243]^[244]^[245]^[246]^[247]^[248]^[249]^[250]^[251]^[252]^[253]^[254]^[255]^[256]^[257]^[258]^[259]^[260]^[261]^[262]^[263]^[264]^[265]^[266]^[267]^[268]^[269]^[270]^[271]^[272]^[273]^[274]^[275]^[276]^[277]^[278]^[279]^[280]^[281]^[282]^[283]^[284]^[285]^[286]^[287]^[288]^[289]^[290]^[291]^[292]^[293]^[294]^[295]^[296]^[297]^[298]^[299]^[300]^[301]^[302]^[303]^[304]^[305]^[306]^[307]^[308]^[309]^[310]^[311]^[312]^[313]^[314]^[315]^[316]^[317]^[318]^[319]^[320]^[321]^[322]^[323]^[324]^[325]^[326]^[327]^[328]^[329]^[330]^[331]^[332]^[333]^[334]^[335]^[336]^[337]^[338]^[339]^[340]^[341]^[342]^[343]^[344]^[345]^[346]^[347]^[348]^[349]^[350]^[351]^[352]^[353]^[354]^[355]^[356]^[357]^[358]^[359]^[360]^[361]^[362]^[363]^[364]^[365]^[366]^[367]^[368]^[369]^[370]^[371]^[372]^[373]^[374]^[375]^[376]^[377]^[378]^[379]^[380]^[381]^[382]^[383]^[384]^[385]^[386]^[387]^[388]^[389]^[390]^[391]^[392]^[393]^[394]^[395]^[396]^[397]^[398]^[399]^[400]^[401]^[402]^[403]^[404]^[405]^[406]^[407]^[408]^[409]^[410]^[411]^[412]^[413]^[414]^[415]^[416]^[417]^[418]^[419]^[420]^[421]^[422]^[423]^[424]^[425]^[426]^[427]^[428]^[429]^[430]^[431]^[432]^[433]^[434]^[435]^[436]^[437]^[438]^[439]^[440]^[441]^[442]^[443]^[444]^[445]^[446]^[447]^[448]^[449]^[450]^[451]^[452]^[453]^[454]^[455]^[456]^[457]^[458]^[459]^[460]^[461]^[462]^[463]^[464]^[465]^[466]^[467]^[468]^[469]^[470]^[471]^[472]^[473]^[474]^[475]^[476]^[477]^[478]^[479]^[480]^[481]^[482]^[483]^[484]^[485]^[486]^[487]^[488]^[489]^[490]^[491]^[492]^[493]^[494]^[495]^[496]^[497]^[498]^[499]^[500]^[501]^[502]^[503]^[504]^[505]^[506]^[507]^[508]^[509]^[510]^[511]^[512]^[513]^[514]^[515]^[516]^[517]^[518]^[519]^[520]^[521]^[522]^[523]^[524]^[525]^[526]^[527]^[528]^[529]^[530]^[531]^[532]^[533]^[534]^[535]^[536]^[537]^[538]^[539]^[540]^[541]^[542]^[543]^[544]^[545]^[546]^[547]^[548]^[549]^[550]^[551]^[552]^[553]^[554]^[555]^[556]^[557]^[558]^[559]^[560]^[561]^[562]^[563]^[564]^[565]^[566]^[567]^[568]^[569]^[570]^[571]^[572]^[573]^[574]^[575]^[576]^[577]^[578]^[579]^[580]^[581]^[582]^[583]^[584]^[585]^[586]^[587]^[588]^[589]^[590]^[591]^[592]^[593]^[594]^[595]^[596]^[597]^[598]^[599]^[600]^[601]^[602]^[603]^[604]^[605]^[606]^[607]^[608]^[609]^[610]^[611]^[612]^[613]^[614]^[615]^[616]^[617]^[618]^[619]^[620]^[621]^[622]^[623]^[624]^[625]^[626]^[627]^[628]^[629]^[630]^[631]^[632]^[633]^[634]^[635]^[636]^[637]^[638]^[639]^[640]^[641]^[642]^[643]^[644]^[645]^[646]^[647]^[648]^[649]^[650]^[651]^[652]^[653]^[654]^[655]^[656]^[657]^[658]^[659]^[660]^[661]^[662]^[663]^[664]^[665]^[666]^[667]^[668]^[669]^[670]^[671]^[672]^[673]^[674]^[675]^[676]^[677]^[678]^[679]^[680]^[681]^[682]^[683]^[684]^[685]^[686]^[687]^[688]^[689]^[690]^[691]^[692]^[693]^[694]^[695]^[696]^[697]^[698]^[699]^[700]^[701]^[702]^[703]^[704]^[705]^[706]^[707]^[708]^[709]^[710]^[711]^[712]^[713]^[714]^[715]^[716]^[717]^[718]^[719]^[720]^[721]^[722]^[723]^[724]^[725]^[726]^[727]^[728]^[729]^[730]^[731]^[732]^[733]^[734]^[735]^[736]^[737]^[738]^[739]^[740]^[741]^[742]^[743]^[744]^[745]^[746]^[747]^[748]^[749]^[750]^[751]^[752]^[753]^[754]^[755]^[756]^[757]^[758]^[759]^[760]^[761]^[762]^[763]^[764]^[765]^[766]^[767]^[768]^[769]^[770]^[771]^[772]^[773]^[774]^[775]^[776]^[777]^[778]^[779]^[780]^[781]^[782]^[783]^[784]^[785]^[786]^[787]^[788]^[789]^[790]^[791]^[792]^[793]^[794]^[795]^[796]^[797]^[798]^[799]^[800]^[801]^[802]^[803]^[804]^[805]^[806]^[807]^[808]^[809]^[810]^[811]^[812]^[813]^[814]^[815]^[816]^[817]^[818]^[819]^[820]^[821]^[822]^[823]^[824]^[825]^[826]^[827]^[828]^[829]^[830]^[831]^[832]^[833]^[834]^[835]^[836]^[837]^[838]^[839]^[840]^[841]^[842]^[843]^[844]^[845]^[846]^[847]^[848]^[849]^[850]^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prisons.²⁴ Nevertheless, the lack of public oversight for private juvenile prisons translates to more difficulty in ensuring a higher degree of accountability. Additionally, critics against for-profit juvenile prisons observe that private juvenile prisons are more likely to lead to heightened juvenile criminality. Since the main source of revenue for private juvenile prisons is the government, they depend on consistent incarceration of juvenile offenders in order to maintain their government contracts. This means tapping into a “continual supply of new clients (first time convicts) and a base of frequent dependable clients (recidivist convicts).”²⁵ This motivates private prison lobbyists to support mandatory sentencing policies and other high recidivism measures to sustain their cash flows.²⁶ For example, in 1998, private prison lobbyists donated over \$540,000 to 361 candidates in twenty-five states who supported higher criminal sentencing regimes and guidelines and eighty-seven percent of these recipients won their elections.²⁷

Moreover, private prison companies have faced ethical issues of corruption, as one private prison company in New York was found to have provided free chauffeur transportation for favored politicians for four unnoticed years and a private detention center in Pennsylvania was found to have paid two judges \$2.6 million over five years to reject pleas for lenient sentences and alternative sentencing arrangements.²⁸ This makes apparent that private interests conflate with public interests of the penal systems to support a for-profit empire where greater incarceration rates for juveniles endanger their safety in prison and endanger the safety of the public that absorbs the collateral impact of a greater reoccurrence of juvenile crime. The “tough on crime” positions that private prison companies advocate do not benefit society because they encourage longer, more frequent imprisonment of youth.²⁹ This means greater contact with dangerous, unhealthy conditions that damage prospects for post-release employment, great familial alienation, and higher likelihood of being incentivized to commit more crime after getting out.³⁰ Furthermore, the more juveniles in private prisons, the more the government has to spend on renewing existing contracts or forming more contracts with private prison operators. Thus, even though private juvenile

²⁴ *Richardson v. McKnight*, 521 U.S. 399, 412 (1997).

²⁵ Lucas Anderson, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PUB. CONT. L.J. 113, 127 (fall 2009).

²⁶ *Id.*

²⁷ *Id.* at 128.

²⁸ *Id.*

²⁹ *Id.* at 129.

³⁰ *Id.*

prisons may help stymie costs up front, they may actually incur greater long-term expenses for the government, making private incarceration of youth less economically practicable.

IV. PRIVATIZED INFRINGEMENT ON CIVIL LIBERTIES

Private juvenile detention centers should be phased out because they raise serious constitutional concerns that jeopardize the welfare of incarcerated American youth. On one hand, privatization of juvenile youth prisons strips the public power away from the government. For instance, the nondelegation constitutional doctrine prohibits the government from assigning certain powers away to private actors.³¹ Outsourcing the bulk of operational duties to private prisons raises the question of whether it implicates juvenile offenders' liberty interests, as incarceration is considered "among the most severe and intrusive manifestations of power the state exercises against its own citizens. When the state incarcerates, it strips offenders of their liberty and dignity and consigns."³²

The systematic rise of private juvenile prisons underscores how economic gain subverts traditional values of public accountability in the juvenile justice system. Due process clauses in the Fifth and Fourteenth Amendments indicate that the government cannot delegate discretionary government functions to industries where there is a direct financial stake when discretion is applied.³³ In the context of incarcerated youth, private prison officials exercise nearly the same broad discretion in the management of the lives of the incarcerated youth as do public prisons.³⁴ Private prison officials are able to discipline imprisoned juveniles with inherent discretion, carrying out the penal objectives of inherently governmental functions. However, unlike public prison officials, private officers may have direct financial stake in the substantial incarceration, such as company stock, which may unduly influence how they discipline juveniles and what penal outcomes they can produce from their interactions with imprisoned youth.³⁵ Thus, the welfare and due process rights of incarcerated youth are unfairly subjected to the discretionary whims of profit-minded operators.

³¹ *Id.* at 122–23.

³² Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 441–42 (2005).

³³ *Id.* at 122.

³⁴ *Id.*

³⁵ *Id.*

Essentially, the privatization of juvenile prisons points to a greater movement towards the privatization of State action, as “detention is a power reserved to the government, and is an exclusive prerogative of the state.”³⁶ Because of rampant lack of oversight, not only has private actors entered into the governmental sphere of penal operations, but they also have avoided many of the public oversight and regulations to which their public predecessors were subject.

On a procedural due process level, this means that there is a dearth of safeguards to ensure the fair treatment of the incarcerated.³⁷ For juvenile inmates, procedural due process implicates their fundamental interests in “life, liberty, or property.”³⁸ Since imprisonment affects their liberty interest, procedural due process requires procedural safeguards to exist to ensure their fair treatment; the amount of process due is evaluated through the comparative weight of the inmates’ and the government’s interests.³⁹ For example, in New Mexico, mandatory inspectors only come to private prisons twice a year, raising questions about whether there are enough safeguards.⁴⁰ Additionally, the tendency of private prison staff to impose harsh discipline against juvenile inmates may reflect the private prison’s financial interests in preserving a high occupancy rate, which would be inconsistent with the prisoners’ interests in legitimate treatment.⁴¹ Since juvenile inmates are provided limited to no counsel in disciplinary hearings in prison, it is often just their word against the guard, leaving problematic opportunity for unchecked bias or unfair treatment.⁴² Private prisons’ institutional stake in maximizing profits creates the risk of illegitimate influence on prisoners’ civil rights, as it invisibly animates the decisions and actions of private prison staff and the sentencing outcomes of juvenile inmates.

Furthermore, the troubling conditions in private juvenile prisons raise substantive due process concerns. On a substantive due process level, administrative decisions are evaluated for fundamental fairness and may not be arbitrary or capricious.⁴³ However, substantive due process concerns are mostly only recognized in the prison context when abuse is “readily

³⁶ *Medina v. O'Neill*, 589 F. Supp. 1028, 1038 (S.D. Tex. 1984).

³⁷ Douglas W. Dunham, *Inmates' Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475, 1482 (1986).

³⁸ *Id.*

³⁹ *Id.* at 1480.

⁴⁰ Joseph E. Field, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649, 642 (1987).

⁴¹ Dolovich, *supra* Note 32 at 520.

⁴² *Id.*

⁴³ Dunham, *supra* note 33 at 1482.

apparent,” with courts preferring to give deference to prison officials.⁴⁴ Moreover, substantive due process has historically experienced highly limited application in courts, as courts have rarely expanded the concept of substantive due process because “the guideposts for responsible decision-making in this uncharted area are scarce and open-ended.”⁴⁵ However, a South Carolina federal district court found that abusive conditions in juvenile prison violated the juvenile inmates’ substantive due process when prison staff regularly used harmful tear gas against the juveniles, failed to identify inmates in need for special education or create individualized education plans for identified inmates, and the prison food was often riddled with cockroaches.⁴⁶ Likewise, the increased occurrences of violence that juveniles in private prisons face at the hands of prison staff similarly violate juvenile inmates’ substantive due process right to safe confinement conditions. Without comprehensive data collection and thorough empirical investigation, alongside strategic litigation for courts to provide flesh to the skeletal definition of “substantive” due process, it remains difficult to know and ensure that the due process rights of incarcerated youth are properly preserved.

V. CONCLUSION

Nevertheless, an improved model for juvenile justice that may be adopted by private juvenile prisons is the Missouri juvenile justice corrections model that aims to provide the “least restrictive environment possible without compromising public safety.”⁴⁷ Under this innovative model, highly trained professionals provide consistent therapy in small community-based treatment centers near the juveniles’ homes, striving to value rehabilitation and individual accountability over punishment.⁴⁸ The shift from the goal of individual punishment towards improving the juvenile offender’s relationship to the community through local community service and therapy allow juvenile offenders a healthy positive space to be exposed to positive role models, caretaking practices and productive engagement with the broader society.⁴⁹ Most significantly, the holistic Missouri model reflects lower

⁴⁴ *Id.*

⁴⁵ *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992).

⁴⁶ Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability and Public Safety*, 84 OR. L. REV. 1001, 1009 (2005).

⁴⁷ Ira M. Schwartz & Russel K. Van Vleet, *Center for the Study of Youth Policy, Incarcerating Youth: The Minnesota and Missouri Experiences* 10 (1996).

⁴⁸ *Id.* at 1004.

⁴⁹ *Id.* at 1069.

recidivism rates than traditional public or private detention centers and costs one-third less than the youth prisons in the surrounding eight states.⁵⁰ Cost-effective youth rehabilitation, such as the alternative Missouri model, serves as an important lesson that quality of penal services do not have to come at the cost of government money. The Missouri model meaningfully signifies how the pursuit for rehabilitative justice in the juvenile justice system can accommodate capitalist principles of economic feasibility and frugality.

⁵⁰ *Id.*

ILLINOIS BUSINESS LAW JOURNAL

COSMETICS REGULATIONS: LOOPHOLES IN THE FDA

❖ NOTE ❖

*Claire Chung**

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I. INTRODUCTION

As the public interest in well-being and life expectancy increases, the cosmetics industry has expanded. Recent trends show the industry moving towards anti-aging products created mainly from organic and natural ingredients.¹ These products, which combine cosmetics and pharmaceuticals,

¹ *The 5 top trends for the cosmetic market 2017-2018*, PENNELLIFARO (Feb. 20, 2017), <https://www.pennellifaro.com/en-ww/the-5-top-trends-for-the-cosmetic-market-2017-2018.aspx> (discussing the recent trends in the cosmetics industry).

*J.D. Candidate, Class of 2018, University of Illinois College of Law.

are commonly called “cosmeceuticals.”² Cosmeceuticals include skincare or makeup products that have medicinal or drug-like benefits, and their introduction has had a strong effect on the market.³ The increase in demand of cosmeceuticals makes their safety and validity of said beneficial effects more important. However, the common cosmeceutical product does not always satisfy the consumers’ expectation, and when coupled with safety concerns, lawsuits frequently arise. These lawsuits frequently allege deceptive labeling and marketing of the cosmetics products.

This Note begins by providing a background highlighting the common issues with American cosmetics and the differences of the current cosmetics regulations under the United States and the European Union (“EU”). Next, this Note will analyze the shortfalls of the regulations in the U.S., and assesses the legal and business issues associated with changing the current regulations in the U.S. to a standard similar with the EU system. Finally, this Note recommends that the U.S. should pass the Personal Care Products Safety Act to enhance the current regulatory scheme in the U.S., which will make it more aligned with EU policies.

II. BACKGROUND

Two of the most common lawsuits arising from the cosmetics industry result from deceptive labeling and marketing. For example, Neutrogena Corporation settled a class action for \$1.8 million brought under California's false advertising law alleging that its “clinically proven” anti-wrinkle cream had no advertised benefits.⁴ Also, Brazilian Blowout settled a class action lawsuit for \$4.5 million because its hair products emitted carcinogen formaldehyde, which is federally regulated. However, the Food and Drug Administration (“FDA”) was only able to issue warning letters to Brazilian Blowout and failed to remove its products from the shelves.⁵ Product registration and regulatory compliance are especially tricky for cosmeceutical

² Debra Spence, *Cosmeceuticals vs Cosmetics*, DEBRA SPENCE (<http://www.debraspencc.com/cosmeceuticals-vs-cosmetics/>). (last visited Jul. 9, 2017).

³ U.S. FOOD & DRUG ADMINISTRATION (Jul. 6, 2017), <https://www.fda.gov/cosmetics/labeling/claims/ucm127064.htm>.

⁴ *Chow v. Neutrogena Corp.*, No. 2:12-cv-04624 (C.D. Cal. May 25, 2012) (discussing Neutrogena recently agreed to settle a separate putative class action pending in the Northern District of California that claimed the company deceptively marketed and advertised six cosmetic cleansers as “natural” despite containing synthetic ingredients).

⁵ Andrew Martin, *Maker of a Hair-Straightening Product Settles Lawsuit*, N.Y. TIMES (Mar. 5, 2012), <http://www.nytimes.com/2012/03/06/business/brazilian-blowout-agrees-to-a-4-5-million-settlement.html>.

companies, as evidenced from the examples above because they must comply with the FDA's requirements for both cosmetics and drugs.⁶ Although injured consumers can bring civil class actions against the manufacturers to remedy their damages, there remains a concern that the FDA should not let dangerous or deceptively labeled products to be readily available to consumers who are unaware of such dangers and mislabeling.

In United States, the foremost common safety concern of the cosmetics industry is loose FDA regulation that has not been updated since 1938.⁷ Although Congress has shown an interest in updating the 80-year-old Act, which is hardly relevant to today's newly developed cosmetics, the FDA currently imposes very few restrictions on the cosmetics industry.⁸ In addition, the FDA has many more loopholes than what the public believes there to be. There are varying approaches on regulation across the U.S.'s state and federal level in comparison to how the EU regulates its cosmetics industry. The issues surrounding the FDA's regulation of the U.S. cosmetics industry, and a comparison of EU regulation will be discussed below.

III. ANALYSIS

A. EU-U.S. Comparison

The above-mentioned Neutrogena and Brazilian Blowout cases demonstrate that cosmetics products can be launched in the U.S. market without the products' labeling and safety being properly tested. In the United States, the Federal Food, Drug, and Cosmetic Act of 1938 (FDCA) granted broad authority to the Food and Drug Administration (FDA) to ensure that cosmetics are safe and accurately labeled, and the U.S. operates under the statute system to regulate the safety of cosmetics.⁹ The statute prohibits a few things, including: cosmetics containing poisonous or deleterious substances that "may render injuries to users under customary conditions of use;

⁶ Isabella Lacayo, *Getting the Wrinkles Out of Anti-Aging Products*, LAW 360 (Mar. 11, 2013) <https://www.law360.com/articles/420631/getting-the-wrinkles-out-of-anti-aging-products>.

⁷ Kate Samuelson, *Senators Propose Bill to 'Ensure the Safety of Cosmetics'*, MOTTO (May. 12, 2017) <http://motto.time.com/4777231/fda-bill-cosmetics-feinstein-collins/>.

⁸ Rachel Krause, *This New Bill Could Cause MAJOR Waves In The Beauty Industry*, REFINERY 29 (May 12, 2017, 4:30PM), <http://www.refinery29.com/2017/05/154260/fda-congress-personal-care-products-safety-act> [hereinafter Krause].

⁹ Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040 (1938), 21 U.S.C. §§ 301 et seq.

manufacturing or holding cosmetics under insanitary conditions; and use of labeling that contains false or misleading statements, fails to reveal material information, or omits required information.”¹⁰ The extent of the FDA’s regulation falls on the ‘adulterated or misbranded’ cosmetics being sold.¹¹

In comparison, the EU implemented the Cosmetics Directive in 1976 to regulate their cosmetics industry by setting guidelines for both the sale and marketing of cosmetics.¹² The original EU Cosmetics Directive required that cosmetics products “must not cause damage to human health when applied under normal or reasonably foreseeable conditions of use, taking account . . . the product’s presentation, its labeling, any instructions for its use and disposal as well as any other indication or information provided by the manufacturer”¹³

In 2013, the EU strengthened the regulation. The New Cosmetics Regulation replaced the Cosmetic Directive, and implemented an additional requirement for manufacturers. The additional protection requires manufacturers to take “immediate corrective measures” to rectify non-conformity with the regulation through product recalls, and the immediate notification of national regulators when a product presents a health risk. The recent change in 2013 went one step further than the U.S.’s FDA by prohibiting certain ingredients of cosmetics and adding a mandatory recall clause, whereas the FDA lacks such legal enforcement mechanisms to rectify the distribution of the problematic products in the market. The real meat of the New Cosmetics Regulation is that prior to marketing a cosmetics product, a manufacturer must assess the safety of the product, and establish a cosmetics product safety report.¹⁴ This pre-approval system is another fundamental difference from the regulatory paradigm in the U.S. In the U.S., the *modus operandi* is that it is safe until proven otherwise. In the EU, it is presumed unsafe unless proven otherwise.

¹⁰ 21 U.S.C. §§ 321(n), 361, 362 (2012).

¹¹ Kathleen Hou, *There Could Finally Be a Bill Regulating the Safety of Beauty Products*, THE CUT (May. 11, 2017) <https://www.thecut.com/2017/05/the-personal-care-products-safety-act-will-regulate-beauty.html>.

¹² *Cosmetics, Legislation*, EUROPEAN COMMISSION (Jul. 9, 2017) https://ec.europa.eu/growth/sectors/cosmetics/legislation_en; see also *Europe Leads the Way Toward Ending Animal Testing*, BORN FREE USA, (Oct. 20, 2005), <http://www.bornfreeusa.org/articles.php?p=449&more=1>.

¹³ Valerie J. Watnick, *The Missing Link: U.S. Regulation of Consumer Cosmetic Products to Protect Human Health and the Environment*, 31 PACE ENVTL. L. REV. 595, 628–29 (2014).

¹⁴ *Id.* at 629.

Furthermore, the U.S. has less stringent cosmetics safety regulations than the EU. In the U.S., the FDA requires only drugs and medical device manufacturers—not cosmetics manufacturers—to receive an approval before marketing to the public. Additionally, it does not have a legal authority to approve the cosmetics before being launched on the market except for the color additives.¹⁵ However, in the EU, the New Cosmetic Regulation attempts to phase out animal testing by banning (1) animal testing, (2) the marketing of animal tested cosmetics products, and (3) the importation of products that have been tested on animals.¹⁶

B. Changes in State Legislation

In an attempt to safeguard the safety of cosmetics, the FDA adopted a voluntary registration of cosmetics products and disclosure of ingredients of the products through the Voluntary Cosmetic Registration Program (VCRP). However, only one third of cosmetics companies participate in VCRP.¹⁷ Since the FDA lacks legal authority to approve the ingredients of the cosmetic products, consumers have to ultimately rely on manufacturer or distributor self-reporting and advertisement.¹⁸ Some states, such as California and Washington, enacted more restrictive legislations: the California Safe Cosmetics Act of 2005 (CSCA) and Children's Safe Products Act in Washington, that require cosmetics companies to report all toxic or carcinogenic ingredients in their products.¹⁹ Furthermore, cosmetics manufacturers and distributors do not have a legal incentive to strictly regulate the products' safety because FDA regulations do not have the

¹⁵ U.S. FOOD & DRUG ADMIN. (Jul. 6, 2017), <https://www.fda.gov/AboutFDA/Transparency/Basics/ucm194552.htm>; U.S. FOOD & DRUG ADMINISTRATION (Jul. 6, 2017) https://www.fda.gov/cosmetics/guidanceregulation/lawsregulations/ucm074162.htm#Does_FDA_approve;_Will_FDA_Get_New_Authority_to_Regulate_Cosmetics? BEVERIDGE & DIAMOND, P.C. (Jul. 5, 2012) <http://www.bdlaw.com/news-1386.html>.

¹⁶ *Cosmetics, Ban on Animal Testing*, EUR. COMM'N (Jul. 9, 2017) https://ec.europa.eu/growth/sectors/cosmetics/animal-testing_en.

¹⁷ 21 C.F.R. Parts 710, 720.; U.S. FOOD & DRUG ADMINISTRATION (Jun. 28, 2017), <https://www.fda.gov/cosmetics/registrationprogram/default.htm>; *Will FDA Get New Authority to Regulate Cosmetics?* BEVERIDGE & DIAMOND, P.C. (Jul. 5, 2012) <http://www.bdlaw.com/news-1386.html>.

¹⁸ U.S. FOOD & DRUG ADMINISTRATION, *Cosmetics Q&A: Why are cosmetics not FDA-approved?* (Oct. 5, 2016) <https://www.fda.gov/Cosmetics/ResourcesForYou/Consumers/ucm135709.htm>.

¹⁹ CAL. HEALTH & SAFETY CODE § 111792(a) (West 2006); WASH. REV. CODE ANN. § 70.240 (West 2008).

mandatory recall provision which exists in the EU's New Cosmetic Regulations to rectify the non-conformity with regulations. For all these reasons, the U.S. public has a false sense of security that so-called "FDA regulated" products are safe to use.

C. Attempts to Enhance the Cosmetics Regulations in the U.S. -
Personal Care Products Safety Act Proposal

Congress has been pushing to update the FDA by introducing multiple bills since 2008.²⁰ In 2015, the Personal Care Products Safety Act was introduced, which aimed to enhance the legal authority of the FDA in many ways, and now is currently referred to committee for further review.²¹ If enacted, the Act will make the cosmetics regulation in the U.S. more in line with the regulations of the EU by requiring recalls of dangerous products, ingredients disclosure, inspection of facilities and records, and labeling and warning. Although the entire cosmetics industry has been placing increasing priority on providing safe products and enhancing the regulations, there have been substantial pushback by mid and small-sized cosmetics manufacturers who are worried about the increased cost of research and product development to meet the higher standards.²² On the other hand, the bill is supported by consumer advocates and industry leading players such as Estee Lauder, L'Oréal, and Revlon, who already have capacity to meet the standard.²³ However, the outdated FDA regulation is and will be still in force until the Personal Care Products Safety Act proposal is passed.

IV. RECOMMENDATION

A. How the U.S. Regime Should Proceed

²⁰ *Personal Care Products Safety Act (2017)*, HANDCRAFTED SOAP & COSMETIC GUILD, <https://www.soapguild.org/handcrafters/advocacy/what-we-are-doing.php> (last visited Jul. 9, 2017) [hereinafter *Personal Care Products Safety Act*].

²¹ H.R. 2791, 115th Cong. (2017) <https://www.congress.gov/115/bills/hr2791/BILLS-115hr2791ih.pdf>; *Personal Care Products Safety Act*, *supra* note 20.

²² Whitney Frazier Watt, *Time for a Makeover: New Proposed Cosmetic Safety Legislation*, A.B.A., (2015) <https://www.americanbar.org/publications/litigation-committees/products-liability/practice/2015/time-for-makeover-newly-proposed-cosmetic-safety-legislation.html>; Katherine Corkill, *Safe Cosmetics and Personal Care Products Act Reintroduced for 2013*, PERSONAL CARE INFORMATION BASED ON SCIENTIFIC FACTS, <http://personalcaretruth.com/2013/04/safe-cosmetics-and-personal-care-products-act-reintroduced-for-2013/>.

²³ Krause, *supra* note 8.

Loose regulations of the FDA have let U.S. cosmetics companies get away with misleading consumers for years. The primary deterrent method of the FDA to harmful products has been sending a warning letter.²⁴ Disappointingly, the warning letter neither has the desired effect nor helps the public to challenge the FDA in court.²⁵ It is without question the current version of FDA regulation is outdated and in dire needs to be updated.

The cosmetics industry's self-reporting scheme, VCRP, was implemented to supplement the FDA's lack of legal authority. However, the manufacturers' lack of participation leaves the voluntary self-reporting scheme virtually ineffective. Not only are many of the harmful ingredients unreported, but the FDA also cannot require recalling the products even if reported unless it is proven in court that the products are improperly labeled, misbranded, unsafe, or violates the laws in other ways.²⁶

State regulators such as California now have tougher regulations than the FDA and are standing up for their own stringent regulations on cosmetics industry.²⁷ However, these independent regulations can deter cosmetics manufactures from marketing their products in these specific states due to their increased costs. Despite the efforts by state and federal legislation to supplement the FDA's legal authority, the ultimate lack of FDA authority in general increases the burden on consumers to keep themselves safe from dangerous products and to litigate civil lawsuits. Increases in litigation cause not only a tremendous cost to consumers but also to businesses to pay out settlements and judgments. The cost of litigation could have been saved with pre-market testing by the FDA to ensure safety.²⁸

B. Should the U.S. Adopt the EU Regulation?

²⁴ U.S. FOOD & DRUG ADMINISTRATION (May. 2, 2016), <https://www.fda.gov/iceci/compliancemanuals/regulatoryproceduresmanual/ucm176870.htm> (discussing that FDA's warning letter has been its primary means to establish a notice of the violation).

²⁵ Amity Hartman, *FDA's Minimal Regulation of Cosmetics and the Daring Claims of Cosmetic Companies That Cause Consumers Economic Harm*, 36 W. ST. U. L. REV. 53, 65 (2008).

²⁶ *Id.*

²⁷ *Supra* note 19.

²⁸ Baron & Budd, *Baron & Budd, P.C. Files Class Action in California against Makers of Brazilian Blowout Solution*, BARON & BUDD, (Nov. 8, 2010) <https://baronandbudd.com/news/baron-budd-p-c-files-class-action-in-california-against-makers-of-brazilian-blowout-solution/>.

As evident from the slow progress of regulatory reform, there is a lack of resources to effectively regulate the cosmetics safety in the U.S. at the EU standard or to halt entry of dangerous products into the United States at this stage.²⁹ However, the Personal Care and Products Safety Act draft has a lot in common with the New Cosmetics Regulation of EU. Changes towards a standard closer to the EU regulation reflects that the legislature, the Congressional committees, and public realize the need to strengthen the current FDA regulations. The U.S. will accept more stringent standards not through blindly adopting EU regulations, but through passing the Personal Care and Products Safety Act which is tailored to fit U.S. market and aligns with other countries.

Current changes in the globalization of cosmetics regulations seem likely to provide answers about whether the United States should adopt more stringent standards. The argument that the United States should accept more stringent standards used by the EU may prevail as several countries continue to work at developing a unified system as well as the Personal Care and Products Safety Act.³⁰

V. CONCLUSION

Currently, the FDA's regulatory regime suffers from abundant loopholes and weaknesses, preventing it from accomplishing its purpose to regulate cosmetics and protect the public health. The utmost priority of the U.S. public and cosmetics industry is to have the Personal Care Products Safety Act passed to change the regulatory landscape, protect the consumers' safety, and encourage cosmetics manufacturers to develop safer products. The U.S. is likely reaching a similar regulatory point with the EU through different routes, and the end result may be remarkably similar to the EU's framework.

²⁹ Kevin Freking, *FDA: Throw away Toothpaste Made in China*, WASHINGTON POST (June 2, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/06/01/AR2007060102053_pf.html. For example, a shipment of toothpaste made in China was found to contain an antifreeze ingredient, diethylene glycol, which can be poisonous. Although a shipment was found at the U.S. border before the product reached United States stores, two retail stores within the United States were found to be selling the contaminated product.

³⁰ Roseann B. Termini & Leah Tressler, *American Beauty: An Analytical View of the Past and Current Effectiveness of Cosmetic Safety Regulations and Future Direction*, 63 FOOD & DRUG L.J. 257, 272–73 (2008).

ILLINOIS BUSINESS LAW JOURNAL

IN CASE OF ERISA VIOLATION: EXHAUST THE EXHAUSTION REQUIREMENT

❖ NOTE ❖

*Niya Ge**

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I. INTRODUCTION

“There is no doubt about the centrality of ERISA's object of protecting employees' justified expectations of receiving the benefits their employers promise them.”¹ Yet when courts enforce additional procedural obstacles in the way of an employee's claim of statutory rights, it becomes, for these plaintiffs, a needless exercise in futility to ERISA's objective of individual protections.

¹ *Hitchcock v. Cumberland Univ.* 403(b) DC Plan, 851 F.3d 552, 560 (6th Cir. 2017).

*J.D. Candidate, Class of 2018, University of Illinois College of Law.

This Note argues that when a cause-of-action is based on a statutory breach, employee benefit plan participants and beneficiaries under ERISA should not be mandated to exhaust internal administrative remedies provided by the plan before filing suit in district court. The federal circuits are split on this issue. The proceeding section in Part II will first provide a brief background of the relevant ERISA provisions. Part III of this Note will address the rulings of the circuits falling on both sides of the issue, and contrasts the courts' rationales and considerations. This Note argues in Part IV that courts should decline to read an administrative exhaustion requirement into the statute. Not only does this align with the plain language and Congressional intent of ERISA, but it also promotes a more efficient recovery process for aggrieved participants and beneficiaries by eliminating the futile exhaustion requirement.

II. BACKGROUND

The Employee Retirement Income Security Act of 1974 (ERISA)² is a federal law that protects employees by setting minimum standards for most voluntarily established pension and health plans in private industry.³ The enforcement provisions of ERISA in Section 502(a)(1) provides participants and beneficiaries a “contract-based cause of action” to recover benefits, and enforce or clarify rights to future benefits under the terms of an employee benefit plan.⁴ Although ERISA does not expressly require exhaustion of administrative remedies before a participant may bring civil action, due to ERISA's provision for the administrative review of benefits,⁵ courts have unambiguously read an exhaustion requirement into the statute.⁶

² Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001–1461).

³ *ERISA*, U.S. DEP'T OF LABOR (2016), <https://www.dol.gov/general/topic/retirement/erisa> (last visited Jun 11, 2017).

⁴ *Hitchcock*, 851 F.3d at 560.

⁵ ERISA § 503 states:

In accordance with regulations of the Secretary, every employee benefit plan shall--

- (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and
- (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

Under 29 C.F.R. § 2560.503–1(b), ERISA § 503 is deemed to require that “[e]very employee benefit plan shall establish and maintain reasonable procedures governing the

The civil enforcement provision of ERISA in Section 502(a)(3) allows a participant, beneficiary, or fiduciary to bring an action in federal court for violations of ERISA or plan terms.⁷ However, where a cause-of-action arose from a statutory violation, ERISA does not provide guidance in regards to the necessity of administrative review.⁸ Considering an issue of first impression for the Sixth Circuit, the appellate court in *Hitchcock* reversed the district court's ruling and holds that plan participants and beneficiaries are not required to exhaust internal administrative remedies provided by the plan before filing suit in district court for a claim of statutory breach.⁹ With this decision, the Sixth Circuit joins the majority, including the Third, Fourth, Fifth, Ninth, Tenth, and the D.C. Circuits.¹⁰ The Seventh and Eleventh Circuits take the opposite position, and impose an exhaustion requirement.¹¹

III. ANALYSIS

A. FEDERAL CIRCUITS THAT REQUIRE ADMINISTRATIVE EXHAUSTION

Courts requiring exhaustion of administrative procedures before bringing suit in the federal courts have focused on the public policy rationale that “exhaustion support[s] the important public policy of encouraging private rather than judicial resolution of disputes under ERISA.”¹² The Seventh Circuit in *Lindemann* stated, in considering whether to “carve out an exception to the exhaustion requirement,” that “[t]hese [policy] advantages

filing of benefit claims, notification of benefit determinations, and appeal of adverse benefit determinations.”

⁶ *Hitchcock*, 851 F.3d at 560.

⁷ “A civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.” ERISA § 502(a)(3).

⁸ The administrative remedies provision of ERISA § 503 only applies to “any participant whose claim for benefits has been denied.” § 503.

⁹ *Id.* at 566–67.

¹⁰ See *Zipf v. AT & T*, 799 F.2d 889, 891–94 (3d Cir. 1986); *Smith v. Sydnor*, 184 F.3d 356, 364–65 (4th Cir. 1999); *Galvan v. SBC Pension Benefit Plan*, 204 Fed.Appx. 335, 338–39 (5th Cir. 2006); *Amaro v. Cont'l Can Co.*, 724 F.2d 747, 751–52 (9th Cir. 1984); *Held v. Mfrs. Hanover Leasing Corp.*, 912 F.2d 1197, 1204–05 (10th Cir. 1990); *Stephens v. Pension Ben. Guar. Corp.*, 755 F.3d 959, 966 (D.C. Cir. 2014).

¹¹ See *Lindemann v. Mobil Oil Corp.*, 79 F.3d 647, 649–50 (7th Cir. 1996); *Mason v. Cont'l Grp.*, 763 F.2d 1219, 1226–27 (11th Cir. 1985).

¹² *Lindemann*, 79 F.3d at 650.

outweigh a plaintiff's relatively minor inconvenience of having to pursue her claims administratively before rushing to federal court, and we note that we are not alone on this issue."¹³

In requiring a plan participant to exhaust administrative remedies first and declining to create a distinction between claims for benefits and claims based on statutory violations, the Seventh Circuit concluded that such a requirement more aligns with Congress' "apparent intent in mandating internal claims procedures found in ERISA [] to minimize the number of frivolous lawsuits, promote a non-adversarial dispute resolution process, and decrease the cost and time of claim settlements."¹⁴

Moreover, the court noted that an exhaustion prerequisite "enables plan fiduciaries to assemble a factual record which will assist a court in reviewing their actions."¹⁵ The Eleventh Circuit, in upholding a requirement for exhaustion of administrative remedies, states that such a requirement moreover "enhance[s] the plan's trustees' ability to carry out their fiduciary duties expertly and efficiently by preventing premature judicial intervention in the decision making process, and allow prior fully considered actions by pension plan trustees to assist courts if the dispute is eventually litigated."¹⁶

Essentially, in requiring administrative exhaustion, these circuits primarily favor resource considerations. Focusing on an attempt to reduce the strain on judiciary resources, enforcing exhaustion weaves out cases that may otherwise be resolved without resorting to litigation. Even for cases that do not come to a resolution, it would reduce the burden of trial courts by arriving with a more developed record. This is a contrastable different focus than circuits that have held opposite.

B. FEDERAL CIRCUITS THAT DO NOT REQUIRE ADMINISTRATIVE EXHAUSTION

In conferring statutory rights through ERISA, "Congress created [] statutory right[s] independent of any [contractual] rights."¹⁷ In rejecting to impose a requirement of administrative exhaustion, the Ninth Circuit noted that "ERISA action is to enforce statutory rights designed to protect the employees from actions which interfere with their attainment of eligibility for

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* (quoting *Makar v. Health Care Corp. of Mid-Atlantic*, 872 F.2d 80, 83 (4th Cir. 1989)).

¹⁶ *Mason*, 763 F.2d at 1227.

¹⁷ *Amaro*, 724 F.2d at 749.

those benefits.”¹⁸ As the court has acknowledged, enforcing an exhaustion requirement by holding otherwise:

would endanger the protection afforded employees by Congress’ enactment of ERISA . . . That protection then would become subject to elimination in the collective bargaining process. An ERISA claim could be defeated without the benefit of protections inherent in the judicial process. The ‘ready access to the Federal courts’ that ERISA was intended to provide would be eliminated.¹⁹

The Ninth Circuit moreover noted that where an ERISA cause-of-action is based on statutory violation, it should be in the hands of the court, and not of arbitrators appointed by the plan at issue.²⁰ Though arbitration and other such administrative procedures are competent and efficient, “the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land,”²¹ and arbitrators “lack the competence of courts to interpret and apply statutes as Congress intended.”²² Availability to the judicial process allows a plan participant to “avail themselves of liberal pretrial discovery,” that is not available in an administrative proceeding controlled by the plan trustees.²³

Even in instances, such as litigating disputing recovery of benefits, the administrative exhaustion requirement is void “when resort[ing] to the administrative route is futile or the remedy is inadequate.”²⁴ Affirming that following the administrative process is futile where the claim is based on an ERISA violation, the Sixth Circuit held that such claims are not required to exhaust administrative remedies.²⁵ In a claim based on statutory violation, it is a challenge to the legality of the plan, and “[a] challenge to the ‘legality’ of a plan’s amendment, rather than a challenge to the interpretation of an amendment, is futile because ‘if [p]laintiffs were to resort to the administrative process, [the plan administrator] would merely recalculate

¹⁸ *Id.*

¹⁹ *Id.* (quoting 20 U.S.C. § 1001(b) (2012)).

²⁰ *Id.*

²¹ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974).

²² *Amaro*, 724 F.2d at 750.

²³ *Id.*

²⁴ *Winterberger v. Gen. Teamsters Auto Truck Drivers & Helpers Local Union*, 162, 558 F.2d 923, 925 (9th Cir. 1977).

²⁵ *Costantino v. TRW, Inc.*, 13 F.3d 969, 975 (6th Cir. 1994).

their benefits and reach the same result.”²⁶ Thus, an “administrative hearing on this issue would be pointless, and . . . such a hearing could not lead to an appropriate remedy,”²⁷ and such an issue is “a question best suited for the courts to decide.”²⁸ Though the minority circuits’ considerations regarding issues of judicial resource preservation is a valid consideration, the focus of ERISA is, as it was created to be, for individual participant and beneficiary protection.

IV. RECOMMENDATION

Courts should not require a plaintiff to exhaust administrative procedures for an action based on ERISA violations. The text of ERISA is unambiguous in requiring that “[e]very employee benefit plan shall . . . afford a reasonable opportunity to any participant whose *claim for benefits* has been denied for a full and fair review.”²⁹ It was qualifying the requirement specifically to “benefit” related claims, due under 502(a)(1).³⁰ Meanwhile, Section 502(a)(3) is unrelated in allowing recovery for “any act or practice which violates any provision of this subchapter or the terms of the plan.”³¹ Thus, to not require administrative exhaustion prior to bringing a statutory violation claim in federal court is not to “carve out an exception,”³² but to decline to read into the statute, a requirement that is not there.³³ To forgo reading into the statute a requirement of administrative exhaustion where there is none is “consistent with the general principle of statutory construction that a court should not add language to an unambiguous statute absent a manifest error in drafting or unresolvable inconsistency.”³⁴

²⁶ *Hitchcock v. Cumberland Univ.* 403(b) DC Plan, 851 F.3d 552, 560 (6th Cir. 2017) (quoting *Costantino*, 13 F.3d at 975).

²⁷ *Costantino*, 13 F.3d at 975.

²⁸ *Hitchcock*, 851 F.3d at 562.

²⁹ ERISA § 503 (emphasis added).

³⁰ A dispute regarding recovery of benefits due under the plan is a cause-of-action under ERISA § 502(a)(1): “A civil action may be brought . . . to recover benefits due to him under the terms of his plan.”

³¹ ERISA § 502(a)(3).

³² *Lindemann*, 79 F.3d at 650.

³³ “[W]here a statute is complete and unambiguous on its face, additional terms should not be read into the statute.” *Emmert Indus. Corp. v. Artisan Assocs., Inc.*, 497 F.3d 982, 987 (9th Cir. 2007). “When there is ‘particularization and detail’ in a statutory scheme that Congress has created, a court should not add provisions that are not present in the scheme.” *Anderson v. United States*, 85 Fed. Cl. 532, 545 (2009).

³⁴ *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 590 (9th Cir. 1981).

Additionally, to create such a requirement from Section 503 would make its distinction that administrative procedures should be made available to “participant whose claim for benefits has been denied” meaningless. “It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”³⁵ If Section 503 was meant to apply participants seeking review no matter the basis of their claim, then it need not single out one such claim. A reading that applies Section 503 across the board thus renders certain parts of it superfluous, and that cannot be what Congress intended.³⁶

Moreover, as the Supreme Court has stated, the overarching policy consideration for the enactment of ERISA is a balance of two, often opposing, interests: “Congress’ desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place.”³⁷ Courts should not require plan participants and beneficiaries to run through futile administrative procedures when their claim is based on an infringement of statutory protection. To force claimants to be subjected to “minor inconvenience” by first going through futile administrative procedures when the issue is clearly one within the jurisdiction of, and best determined by the judiciary, is to deny individuals the protections ERISA. “Congress intended statutory rights to be enforced by the courts, not by plan administrators . . . Congress required plans to provide procedures to review claims for benefits, but did not require internal remedial procedures to embrace claims based on ERISA’s substantive guarantees.”³⁸

V. CONCLUSION

Although the Seventh and Eleventh Circuits have elected to mandate an administrative exhaustion prerequisite for claims based on statutory violation, courts should not enforce such a requirement. Where the claim is based on an issue of statutory interpretation, the issue is better left to the courts. Not reading a requirement into the statute where ERISA has not elected to

³⁵ *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

³⁶ “Absent clear congressional intent to the contrary, [the court] will assume the legislature did not intend to pass vain or meaningless legislation.” *Coyne & Delany Co. v. Blue Cross & Blue Shield of Virginia, Inc.*, 102 F.3d 712, 715 (4th Cir. 1996).

³⁷ *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

³⁸ *Stephens v. Pension Ben. Guar. Corp.*, 755 F.3d 959, 965 (D.C. Cir. 2014).

implement is consistent with the plain face of ERISA. Yet, to read a prerequisite is to add into ERISA provisions it does not include, effectively voiding the text of ERISA. Moreover, administrative procedures become futile where the sole issue to be determined is statutory interpretation. Thus, claimants are better off being able to bring suit in court directly rather than waiting through an administrative procedure just for procedure's sake.

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INTERNET SPEECH AS COMMERCE: TACKLING THE VIOLENT LEFT

❖ NOTE ❖

*Julian D. Jankowski**

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I. INTRODUCTION

On May 23, 2017 Professor Bret Weinstein of Evergreen State College faced a hostile confrontation with an organized gaggle of at least fifty

*J.D. Candidate, Class of 2019, University of Illinois College of Law.

students.¹ Weinstein faced outside of his classroom from those students angry racism accusations—almost outcries—and furious calls for his ouster.² Outside of these protests, Weinstein faced threats on his person for his mere presence on campus, such that the police advised him to remain off-campus long enough so that no harm would likely come to him.³

Far from being a sporadic event completely unforeseeable, the tempest in the teapot began brewing a year before the climactic burst that was the student confrontation with Weinstein.⁴ The impetuous beginnings lie in an assault committed by two black males upon an Olympia police officer, in which the officer shot both culprits.⁵ Though one of the wrongdoers became paralyzed from his assault on the officer, the court exonerated the officer from any wrongdoing, and convicted the troublemakers for the assault.⁶ Despite the wrongdoing by the men and apparent lack of wrongdoing by the officer, the university administration saw this as a call to action with the Equity Plan.⁷ Though the Equity Plan contained other elements, the diversity training constituted the most contentious element.⁸ Further, some Evergreen State College students claimed racism on the part of the college.⁹ These students expressed this sentiment through protest at college events.¹⁰

The reason Weinstein faced this outcry relates to the college's efforts to implement more diversity training.¹¹ Weinstein opposed the proposal out of a concern that it would lead to unqualified minority hires.¹² He also expressed a concern that this campus-wide focus on professor skin color would distract from the actual educational mission of the college.¹³ Further, Weinstein saw a collective, phantom-like search for racism where none existed in the overall Equity Plan.¹⁴ Specifically, he expressed that "[w]hen

¹ Katherine Long, *Long-Simmering Discord Led to Evergreen's Viral Moment*, SEATTLE TIMES (June 10, 2017, 7:06 PM), <http://www.seattletimes.com/seattle-news/education/discord-at-evergreen-state-simmered-for-a-year-before-it-boiled-over/>.

² *Id.*

³ See *id.* (explaining that the police advised Weinstein to otherwise dispose of himself elsewhere for up to two days).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ See *id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

one looks for racism in all things with a confirmation bias, one will find it, even where it is not.”¹⁵

All this culminated in an event held annually at Evergreen called “Day of Absence.”¹⁶ Normally, minorities would leave campus for the day—it was voluntary—to discuss race and equality issues.¹⁷ But in the most recent “Day of Absence,” Evergreen expressed that white students and faculty optionally leave the campus instead.¹⁸ Weinstein refused to leave the campus for the “Day of Absence.”¹⁹ Weinstein’s refusal to leave camps sparked the negative reaction from the students confronting Weinstein.²⁰

The incident at Evergreen State College, far from isolated, represents a dramatic example of the greater problem of prevailing campus culture and attitudes.²¹ These attitudes enter the society-at-large when removed from the college campus, which creates a propensity for these attitudes to spread. Such attitudes inherently stifle, and contrary to contributing to discourse, limit the scope of ideas deemed acceptable in society.²² This Note discusses limiting the prevalence of attitudes like those dramatically exhibited at Evergreen State College upon Professor Weinstein.²³ This requires an entire revamping, not only of the mainstream university culture, but also a restructuring of the internet landscape.

Part II provides background into the nature and depth of the more harmful attitudes on college campuses, and illustrates that these attitudes evince a systemic problem that cries for a solution. Part III proposes a solution to the problem, shows the derived source of power for the solution, and examines the constitutionality of the proposed solution. Part IV offers a recommendation, both in the proposed solution, and in implementing it.

II. BACKGROUND

Section A illustrates that multiple recent events on other college campuses have occurred to such an extent as to create publicity. Though not all of the

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *generally id.* (attributing a description of “political correctness run[ning] amok” in the Evergreen State College incident as “seem[ing] like a textbook case....”).

²² See *generally id.* (noting that Professor Weinstein received threats for refusing to leave campus for the “Day of Absence,” discussed *supra* Introduction).

²³ See *id.*

recent events have resulted in threats of violence or violence itself, all were sufficient for media publicity. Section B shows that the recent events share a common causal ideological root and its ties to the college environment. Section C focuses on the effects that this ideological root, expressed through recent events, has had on the world outside of college campuses generally, and the political climate particularly.

A. Recent Events

Subsection 1 discusses the lead-up to the most severe tensions at Berkeley. Subsection 2 delves into the protests at Berkeley. Subsection 3 focuses on problems within college administration.

1. Protest Prelude

The recent uptick of college campus tensions most dramatically shown in Evergreen State College began late in 2014 with two complaints filed by a student, and four professors at Dalhousie University.²⁴ Both complained of a Facebook group's postings that contained sexual themes.²⁵ One post conducted a poll that asked, "[w]ho would you hate f**k?" with two options provided to any who would respond.²⁶ Another post displayed a photograph of a bikini-clad woman captioned, "[b]ang until stress is relieved or unconscious (girl)," with comments posted which responded to the post's theme.²⁷ A third post showed a photograph of a photograph with the photographic caption, "[d]oes this smell like chloroform to you?" again with comments consistent with the post's theme.²⁸

²⁴ See *id.*; The Canadian Press, *A Timeline in the Scandal Involving the Dentistry School at Dalhousie University*, CITY NEWS (Can.) (June 29, 2015, 7:00 PM), <http://www.citynews.ca/2015/06/29/a-timeline-in-the-scandal-involving-the-dentistry-school-at-dalhousie-university/>; *Dalhousie Facebook Posts 'Completely Unacceptable,' Says Professor*, C.B.C. NEWS (Can.) (Jan. 4, 2015, 4:19 PM), <http://www.cbc.ca/news/canada/nova-scotia/dalhousie-facebook-posts-completely-unacceptable-says-professor-1.2889231>.

²⁵ *A Timeline in the Scandal Involving the Dentistry School at Dalhousie University*, *supra* note 24; *Dalhousie Facebook Posts 'Completely Unacceptable,' Says Professor*, *supra* note 24.

²⁶ *Dalhousie University Probes Misogynistic Student 'Gentlemen's Club'*, C.B.C. NEWS (Can.) (Dec. 17, 2014, 12:00 AM), <http://www.cbc.ca/news/canada/nova-scotia/dalhousie-university-probes-misogynistic-student-gentlemen-s-club-1.2873918>.

²⁷ *Id.*

²⁸ *Id.*

Though Dalhousie University ultimately rejected the professors' complaint, the university accepted the student complaint.²⁹ The student complaint prompted the university to suspend all of the students it deemed participated in the relevant posts from clinics, and ultimately classes.³⁰ The university also barred from graduation until the suspension's termination.³¹ Thirteen dental students—the identities of which the university declined to reveal—received such suspensions.³² Dalhousie University President Richard Florizone considered the Facebook posts “unacceptable and deeply disturbing.”³³

Despite the university's response, the administration faced criticism in its handling of the issue.³⁴ The university faced pressure to inflict even more punishment up to and including expulsion.³⁵ An internet group threatened to reveal the suspended students' identities unless the university complied with its demands by a set deadline.³⁶ The group wanted expulsion, an investigation into the university's case handling, and a plan to eliminate what it called “systemic sexism” on the campus.³⁷ Protesters expressing disgust at the thirteen suspended students likewise wanted the students expelled and the university to address what it considered campus sexism.³⁸ The Dalhousie

²⁹ *A Timeline in the Scandal Involving the Dentistry School at Dalhousie University*, *supra* note 24.

³⁰ *Id.*

³¹ *Dalhousie Suspends 13 Dentistry Students from Clinic amid Facebook Scandal*, C.B.C. NEWS (Can.) (Jan. 5, 2015, 11:52 PM), <http://www.cbc.ca/news/canada/nova-scotia/dalhousie-suspends-13-dentistry-students-from-clinic-amid-facebook-scandal-1.2889635>.

³² *A Timeline in the Scandal Involving the Dentistry School at Dalhousie University*, *supra* note 24.

³³ *Dalhousie University Probes Misogynistic Student 'Gentlemen's Club'*, *supra* note 26.

³⁴ See generally *Dalhousie Dentistry Facebook Scandal Prompts Protest*, C.B.C. NEWS (Can.) (Jan. 5, 2015, 9:37 PM), <http://www.cbc.ca/news/canada/nova-scotia/dalhousie-dentistry-facebook-scandal-prompts-protest-1.2890052>, (noting that Dalhousie University received complaints over the posts since Summer 2014).

³⁵ See, e.g., Marieke Walsh, *UPDATED: Online Group Claiming to Be Anonymous Targets Dalhousie over Facebook Scandal*, GLOBAL NEWS (Can.) (Jan. 7, 2015, 12:29 PM), <http://globalnews.ca/news/1742713/online-group-claiming-to-be-anonymous-targets-dalhousie-over-facebook-scandal/>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Alison Auld & the Canadian Press, *Dalhousie University Suspends 13 Dentistry Students in Facebook Scandal*, TIMES COLONIST (Can.) (Jan. 5, 2015, 5:53 AM), <http://www.timescolonist.com/dalhousie-university-suspends-13-dentistry-students-in-facebook-scandal-1.1704474>.

Student Union used the incident to agitate for reforms that would take such incidents more seriously.³⁹

The university ultimately created a task force to identify perceived administrative problems and implement reform recommendations to avoid future problems.⁴⁰ Though the university eventually lifted the suspensions, Dalhousie required the dental students to participate with the women that felt negatively affected by the Facebook posts in a “restorative justice” program.⁴¹ Though the program, run by a professor from Dalhousie’s College of Law, superficially focused on how all parties contributed to the problems facing the university, the program details provided by both parties tell another tale.⁴²

The suspended students indicated that they had no idea that their posts would create an issue that created widespread news publicity, and further, stated that the posts failed to portray accurately their real-life-selves.⁴³ The women in question felt no offense to the posts that garnered the most media publicity.⁴⁴ Rather, they objected the idea that they used their feminine wiles to garner better grades.⁴⁵ One woman went so far as to say that “[w]e wanted to make sure that they knew they should never say it—ever.”⁴⁶ Through it all, the suspended students experienced suicidal thoughts and wide media scrutiny probing every possible angle of the incident at Dalhousie University.⁴⁷

A mere year later saw a more radical bent in demands from those who objected to university administration.⁴⁸ The protests at the University of

³⁹ See *Dalhousie Dentistry Scandal a Call to Action, Says Student Union*, C.B.C. NEWS (Can.) (June 30, 2015, 6:07 PM), <http://www.cbc.ca/news/canada/nova-scotia/dalhousie-dentistry-scandal-a-call-to-action-says-student-union-1.3133642>.

⁴⁰ See *id.*; *A Timeline in the Scandal Involving the Dentistry School at Dalhousie University*, *supra* note 24.

⁴¹ See *A Timeline in the Scandal Involving the Dentistry School at Dalhousie University*, *supra* note 24.

⁴² See Jennifer Tryon & Nick Logan, *Dalhousie Dentistry Students Break Silence on ‘Gentlemen’s Club’ Facebook Scandal*, GLOBAL NEWS (Can.) (May 22, 2015, 9:14 AM), <http://globalnews.ca/news/2010585/dalhousie-dentistry-students-break-silence-on-gentlemens-club-facebook-scandal/>.

⁴³ See *id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See *id.*

⁴⁸ Compare *id.*, with Jessica Chasmar, *University of Missouri Gets Tough with Protesters: ‘The Time for Demands Has Passed’*, WASH. TIMES (March 1, 2016),

Missouri-Columbia best illustrates this shift not only over time, but in a unity of place as well.⁴⁹ It began when the student government president alleged that persons in the back of a passing pick-up truck hurled racial slurs at him.⁵⁰ The student government president made this information known via Facebook, where he stated:

For those of you who wonder why I'm always talking about the importance of inclusion and respect, it's because I've experienced moments like this multiple times at THIS university, making me not feel included here.⁵¹

Though the university administration called this incident “totally unacceptable,” protests still occurred because of a dissatisfaction with the response.⁵²

Another race related incident further drew protester ire on the University of Missouri-Columbia campus: namely the disruption of a black-student “safe-space.”⁵³ Specifically, a drunken student reportedly used racial slurs during a Legion of Black Collegians meeting.⁵⁴ The club stated that “we were... made victims of blatant racism in a space that we should be made to feel safe.”⁵⁵ In response, a group called Concerned Student 1950 formed, which addressed the two incidents by creating a list of demands it presented to the university administration.⁵⁶ Initially, the university acted sympathetically to these concerns by mandating training for students and faculty on diversity and inclusion.⁵⁷

All this changed in the talks between the University System

<http://www.washingtontimes.com/news/2016/mar/1/university-of-missouri-gets-tough-with-protesters/>.

⁴⁹ Compare Michael Pearson, *A Timeline of the University of Missouri Protests*, C.N.N. (Nov. 10, 2015, 8:21 AM), <http://www.cnn.com/2015/11/09/us/missouri-protest-timeline/index.html> (“Missouri Chancellor R. Bowen Loftin, the top resident official on the Missouri campus, issues a statement deploring recent incidents of bias and discrimination. He calls them totally unacceptable.”), with Chasmar, *supra* note 48 (“The man hired to help ease racial tensions at the University of Missouri issued a strongly worded letter to student protesters last week, declaring that the time for demands, threats and arbitrary deadlines is over.”).

⁵⁰ Pearson, *supra* note 49.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *See id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *See id.*

President and Concerned Student 1950.⁵⁸ The talks occurred as a response to the protests, with Concerned Student 1950 requesting from the talks that its demands be met.⁵⁹ The group demanded the president's termination, his handwritten apology, and a "comprehensive racial awareness and inclusion curriculum . . . for all students, faculty, staff, and administration."⁶⁰ The group also demanded a ten percent increase in black faculty and staff, a plan to retain minority students and diversity programs, an increase in counseling funding, and an increase in funding for social justice programs.⁶¹ The talks ultimately failed with the president refusing Concerned Student 1950's demands.⁶² From here, tensions further escalated, and eventually culminated in the forced resignation of the University System President anyway.⁶³

The taunting, if not aggressive nature of the protests compounded the issues at the university, and set the groundwork for future issues at the university.⁶⁴ Black students who were engaged in protests against the administration became increasingly bold in their acts, even going so far as to threaten white students on account of their race.⁶⁵ The most radical of the sentiments can be effectively summarized in one post on Twitter:

#Mizzou black students need to stop protesting and start killing. The white supremacy made it clear they aint [sic] hearing it.⁶⁶

Even the less ominous protestor activity provided but scant consolation for the students trying to go about their daily lives.⁶⁷ Communications between two members of the university administration illustrated that:

⁵⁸ See *id.*

⁵⁹ See *id.*; see also Allison Colburn & Liv Paggiarino, *Stop Making Demands: Interim UM President, Diversity Chancellor to Concerned Student 1950*, COLUM. MISSOURIAN (Feb. 26, 2016), http://www.columbiamissourian.com/news/higher_education/chuck-henson-mike-middleton-suggest-concerned-student-end-demands/article_86bcba62-dc18-11e5-ac6b-8fecdf9531f5.html.

⁶⁰ Colburn, et al., *supra* note 59.

⁶¹ *Id.*

⁶² Pearson, *supra* note 49; see Colburn, et al., *supra* note 59.

⁶³ Pearson, *supra* note 49.

⁶⁴ See Jillian Kay Melchior, *Mizzou Records Show Students Feared Violence and Felt Targeted by Protesters*, NAT'L REV. (Apr. 20, 2016, 4:00 AM), <http://www.nationalreview.com/article/434260/mizzous-protesters-frightened-many-campus>; Colburn, et al., *supra* note 59.

⁶⁵ Melchior, *supra* note 64.

⁶⁶ *Id.*

⁶⁷ See *id.*

The protestors are willing to interrupt non-related events to protest. . . . Our concern is that the longer we wait to have...[a meeting]...[to address the situation], the more we risk violence. The longer we wait, the greater the risk of violence.⁶⁸

Protestor actions demonstrably affected other students, in that the non-minority students increasingly grew fearful of the protests, and made quiet administrative complaints accordingly.⁶⁹

Despite the president's resignation, this apparent victory for Concerned Students 1950 proved to be the group's zenith, with the nadir already forming, undermining the group's influence and clout.⁷⁰ On November 9, 2015, the same day as the president's downfall, Tim Tai, a photographer for the university newspaper, found himself covering a protest.⁷¹ *In media res* Melissa Click, a professor in the university's communications department ordered Tai to leave, and ordered the police to remove him from the protest area.⁷² In having the police remove Tai, she stated explicitly, "Hey, who wants to help me get this reporter out of here? I need some muscle over here."⁷³

Protests and other tensions continued on the campus for months after both the president's ouster and the photographer's removal by Click.⁷⁴ Because of Click's actions, the university placed her on suspension in January 2016, and terminated her employment in March.⁷⁵ Meanwhile, Concerned

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See Pearson, *supra* note 49; see also Colburn, et al., *supra* note 59; William Schmitt, *UM Curators Fire Melissa Click after Months of Controversy*, COLUM. MISSOURIAN (Feb. 25, 2016), http://www.columbiamissourian.com/news/higher_education/um-curators-fire-melissa-click-after-months-of-controversy/article_9651a958-dbee-11e5-98f0-67a0643587cb.html.

⁷¹ Schmitt, *supra* note 70; see Pearson, *supra* note 49.

⁷² Richard Pérez-Peña, *University of Missouri Fires Melissa Click, Who Tried to Block Journalist at Protest*, N.Y. TIMES (Feb. 25, 2016), https://www.nytimes.com/2016/02/26/us/university-of-missouri-fires-melissa-click-who-tried-to-block-journalist-at-protest.html?_r=0.

⁷³ *Id.*

⁷⁴ See Colburn, et al., *supra* note 59; Pérez-Peña, *supra* note 72; Pearson, *supra* note 49.

⁷⁵ Pérez-Peña, *supra* note 72; Tajha Chappellet-Lanier, *A Suspension for Melissa Click*, ATLANTIC (Jan. 28, 2016), <https://www.theatlantic.com/education/archive/2016/01/melissa-click-suspended-mizzou/432564/>.

Student 1950 increased its initial demands.⁷⁶ The group wanted the university to allow a student to expunge an entire semester's grades from an academic record if desired.⁷⁷ Concerned Student 1950 also pressed for a racial awareness workshop in academic and orientation programs.⁷⁸ The group also wanted the university to implement a hiring program that targeted black faculty, a diversity class prerequisite to graduation, and a new university "hate-crime" policy.⁷⁹ Further, Concerned Student 1950 additionally demanded 14 new psychologists or councilors at the university's counseling center, money for a new statue, and expansion of the university's black cultural center.⁸⁰ The demands—both old and new—also came with a new condition: a deadline for implementation.⁸¹

The university administration flatly rejected these revised demands.⁸² In the refusal, the interim vice-chancellor stated that "[i]f you sincerely want better relationships, the time for demands, threats and arbitrary deadlines is over—you don't need them."⁸³ Though this effectively halted the protests at the University of Missouri-Columbia, they already impacted the university.⁸⁴ In the aftermath, the university experienced "a very significant budget shortfall due to an unexpected sharp decline in first-year enrollments and student retention," according to the university's interim chancellor.⁸⁵ In total, the University of Missouri-Columbia faced a 1,500-student enrollment drop, and a thirty-two-million-dollar budget shortfall in the 2016-17 school year.⁸⁶

2. Protests at Berkeley

These protests however, pale in comparison to the recent protests at U.C. Berkeley.⁸⁷ The Berkeley College Republicans invited the writer and

⁷⁶ See Colburn, et al., *supra* note 59.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See Editorial Board, *Mizzou's Paying the Price for Lame Response to Racial Protests*, N.Y. POST (May 23, 2016, 7:58 PM) [hereinafter N.Y. POST ED. BD.], <http://nypost.com/2016/05/23/university-of-missouris-paying-a-price-for-its-lame-response-to-last-falls-racial-protests/>; Colburn, et al., *supra* note 59.

⁸⁵ N.Y. POST ED. BD., *supra* note 84.

⁸⁶ See *id.*

⁸⁷ Compare Berkeleyside Editors, *Chaos Erupts, Protesters Shut Down Yiannopolous Events, Banks in Downtown Vandalized*, BERKELEYSIDE (Feb. 2, 2017, 9:15 AM) [hereinafter

provocateur-extraordinaire Milo Yiannopoulos to speak at its on-campus sponsored event as part of Yiannopoulos's "Dangerous Faggot" tour.⁸⁸ Three hours before the event's planned start, protesters started their assembly outside of the event's planned venue.⁸⁹ The police already installed barricades outside the building perimeter in anticipation of protester violence.⁹⁰ The protests began peacefully enough, with protestors alleging Yiannopoulos's "fascism," and chants such as "[s]hame," serving as the most hostile reactions.⁹¹

Then nearly one hour thereafter, 150 protesters dressed in black with their faces concealed entered the fray.⁹² In their arrival to the protests, these new protesters carried black and communist-themed banners.⁹³ They came with the explicit intent to stop the event.⁹⁴ These protesters inflamed the protest's tone by throwing rocks, Molotov cocktails, and the police barricades, and shooting commercial grade fireworks at university buildings and businesses.⁹⁵ They also ignited lighting that created fireballs, which soared up to six feet into the air.⁹⁶ These protesters sustained this for nearly half-an-hour before Berkeley cancelled the Yiannopoulos event.⁹⁷

Though the violent protestors succeeded in stopping the Berkeley College Republicans event, the radical participants continued their violence.⁹⁸ Indeed, the victory served only to increase such impetuousness.⁹⁹ After the announcement, the protestors pitched refuse at the police, who returned paintball and pin fire.¹⁰⁰ Innocent bystanders sustained some injuries.¹⁰¹ One such person experienced injuries with a bicycle lock, and another with pepper spray.¹⁰²

Protesters Shut Down Yiannopolous Events], <http://www.berkeleyside.com/2017/02/02/chaos-erupts-protesters-shut-yiannopolous-events-banks-downtown-vandalized/>, with Pearson, *supra* note 49.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *See id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *See id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

Though the more civically-minded protesters cleaned some of the mess left behind by others, the protestors pressed harder to include more property damage.¹⁰³ The more radical protestors by this time moved away from the planned venue for Yiannopoulos's speech.¹⁰⁴ They toppled and ignited refuse disposals, and obstructed traffic.¹⁰⁵ They then scattered into the City of Berkeley, where they smashed windows of banks and other businesses and burned A.T.M.s to destruction.¹⁰⁶ As all these events transpired, the Berkeley Police, despite threats to the contrary, stood and did nothing to quash the violence.¹⁰⁷ Altogether, among all the events and the 150 militant protestors that committed the approximately \$100,000 in damages, the police arrested only one person.¹⁰⁸

Protestors in black also branched into other protests.¹⁰⁹ Across the country, supporters of President Donald J. Trump held rallies in various places across the country on the fourth of March.¹¹⁰ One of these rallies transpired on the campus at U.C. Berkeley, and like the Yiannopoulos event, this rally also took a turn toward violence where black-clad masked aggressors intervened.¹¹¹

The venue itself served as the cauldron, where a group of seventy-five Trump supporters confronted hundreds of anarchists and other opponents.¹¹² One of these opponents organized themselves under the name "By Any Means Necessary" (B.A.M.N.).¹¹³ This group and other anarchists joined in a

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Michael Bodley, *At Berkeley Yiannopoulos Protest, \$100,000 in Damage, 1 Arrest*, SFGATE (Feb. 2, 2017, 10:22 PM), <http://www.sfgate.com/crime/article/At-Berkeley-Yiannopoulos-protest-100-000-in-10905217.php>.

¹⁰⁹ See Cynthia Dizikes, *Arrests Made as Protesters Clash at Pro-Trump Rally in Berkeley*, SFGATE (Apr. 16, 2017, 3:45 PM), <http://www.sfgate.com/bayarea/article/Protesters-clash-at-pro-Trump-rally-in-Berkeley-11075595.php>.

¹¹⁰ See, e.g., Stephen Lam & Tim Branfalt, *In Day of Pro-Trump Rallies, California March Turns Violent*, REUTERS (Mar. 6, 2017, 10:26 AM), <https://www.reuters.com/article/us-usa-trump-supporters-idUSKBN16B0O8>.

¹¹¹ Compare *id.*, to *Protesters Shut Down Yiannopolous Events*, *supra* note 87.

¹¹² Lizzie Johnson, *Violence Erupts at Pro-Trump Rally in Berkeley*, S.F. CHRON. (Mar. 5, 2017, 11:16 AM), <http://www.sfchronicle.com/bayarea/article/Scattered-fist-fights-break-out-at-pro-Trump-10977508.php>.

¹¹³ Valerie Richardson, *Ten Arrested at March 4 Trump in Berkeley As Protesters Engulf Rally*, WASH. TIMES (March 5, 2017), <http://www.washingtontimes.com/news/2017/mar/5/ten-arrested-at-march-4-trump-in-berkeley-as-prote/>.

bareknuckle brawl between pro-Trump and other anti-Trump protesters.¹¹⁴ In this fight, protestors also swung signs and threw smoke bombs.¹¹⁵ Police confiscated metal pipes, bricks, two-by-four wooden planks, and baseball bats from protestors.¹¹⁶ The police also arrested ten persons.¹¹⁷ It is true that the police arrested one person for resisting arrest, and five for battery.¹¹⁸ The police further arrested the other four persons for assault with a deadly weapon; and one of these four held a dagger as the weapon of choice.¹¹⁹

The Berkeley protests on March 4 served to foreshadow and to forebode the successor protest six weeks later on April 15.¹²⁰ Both protests held similar elements in common, such as confiscated items, arrests and protester violence.¹²¹ But these elements, present in the previous protest, proved exacerbated in the April 15 protests.¹²² Further, these exacerbated elements begat new, worse elements not present in the March 4 Berkeley protest.¹²³

The police guarded the protest venue and delineated the venue limits with temporary orange netting.¹²⁴ The protest organizers intended the event to be a rally for Freedom of Speech, where prominent conservatives would speak to the target audience.¹²⁵ Organizations such as Antifa and B.A.M.N stormed the event.¹²⁶ This constituted a part of a greater concerted counter-protest effort under a coalition called “Defend the Bay! Bloc Party & Cookout.”¹²⁷ As evinced by this coalition’s Facebook page, the counter-protestors sought the explicit goal to impede and stop the Freedom of Speech Rally from transpiring.¹²⁸

¹¹⁴ Johnson, *supra* note 112.

¹¹⁵ *Id.*

¹¹⁶ Amy B. Wang, *Pro-Trump Rally in Berkeley Turns Violent As Protesters Clash with the President’s Supporters*, WASH. POST (Mar. 5, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/03/05/pro-trump-rally-in-berkeley-turns-violent-as-protesters-clash-with-the-presidents-supporters/?utm_term=.e14c32d202bb.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Compare *id.*, with Dizikes, *supra* note 109.

¹²¹ Compare Wang, *supra* note 116, with Dizikes, *supra* note 109.

¹²² Compare Wang, *supra* note 116, with Dizikes, *supra* note 109.

¹²³ Compare Wang, *supra* note 116, with Dizikes, *supra* note 109.

¹²⁴ Staff, *Free Speech Rally in Berkeley Results in Several Injuries, 20 Arrests*, DAILY CAL. (Apr. 17, 2017) [hereinafter DAILY CAL. STAFF], <http://www.dailycal.org/2017/04/15/free-speech-rally-berkeley-results-several-injuries-least-4-arrests/>.

¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

The night before the Freedom of Speech Rally, Berkeley police issued a notice that any attendees would have “implement[s] of riot” such as sticks, poles, pipes, eggs, and pepper spray confiscated if present on their person.¹²⁹ To this end, the police confiscated mace, pepper spray, bear spray, a stun gun, an axe handle, and a concrete-filled can, along with a cache of sticks, wooden dowel rods, and poles.¹³⁰ The police also confiscated knives, flagpoles, skateboards “and other blunt” instruments.¹³¹ Despite the warning and the itemized confiscation, the counter-protestors attempting to disband the Freedom of Speech Rally still managed to unleash their onslaught upon the rally-goers—armed with dangerous implements.¹³²

Organizations that sought to stop the protests threw fruit, shoes, soda cans and bottles at the protestors.¹³³ They also shot fireworks at the people attending the Freedom of Speech Rally.¹³⁴ Organizations such as B.A.M.N. broke through the orange netting and engaged in fist fighting with the rally attendees, which resulted in injuries.¹³⁵ Though the police reestablished a boundary between the rally-goers, and the protestors trying to stop the Rally for Freedom of Speech from occurring, bouts of shouting between the two groups still transpired.¹³⁶ Further, the barriers proved ineffective against anarchist disruptors—such as Antifa—who hoisted their red and black banners and clashed with the Rally for Freedom of Speech attendees.¹³⁷ Andrew Greenwood, Berkeley’s Chief of Police, reported that Antifa caused the protests to take the aggressive turn that created the violence that day.¹³⁸ Dan Mogulof, the Vice-Chancellor and Spokesman for U.C. Berkeley,

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Annie Sciacca, et al, *20 Arrested, 11 Injured in Trump-Related Rallies in Downtown Berkeley*, MERCURY NEWS (Apr. 16, 2017, 9:49 AM), <http://www.mercurynews.com/2017/04/15/berkeley-braces-for-planned-pro-anti-trump-rallies/>.

¹³² See, e.g., Dizikes, *supra* note 109.

¹³³ *Id.*

¹³⁴ *Id.*; Sciacca, et al., *supra* note 131.

¹³⁵ Dizikes, *supra* note 109.

¹³⁶ *Id.*

¹³⁷ See *id.*

¹³⁸ Emilie Raguso, *Berkeley Police Chief: ‘Our People Did Exactly What We Asked’ in April 15 Demo*, BERKELEYSIDE (Apr. 19, 2017, 8:53 PM) [hereinafter *Berkeley Police Chief*], <http://www.berkeleyside.com/2017/04/19/berkeley-police-chief-people-exactly-asked-april-15-demo/>.

shared a similar sentiment, stating in vulgar terminology that this type of protestor comes to disrupt violently.¹³⁹

These attitudes appear confirmed through protestor experiences.¹⁴⁰ A protestor demonstrating his support for Trump reported that a dozen persons in black masks surrounded him, beat him with sticks, and used pepper spray on him.¹⁴¹ Independent sources confirmed this.¹⁴² A peaceful left-wing participant's experience with political opposites provides a stark experiential contrast to the Trump supporter's experience.¹⁴³ The woman stated that she genuinely tried to engage with her political opposites in the protests, only to hear shouts from one protester exclaiming "Obama hates blacks," and another wishing rhetorically to ask her "why she hat[ed] white people."¹⁴⁴ Though she received a hostile reception, this remained the extent of her encounter with her political opposites before walking away with her body unmolested.¹⁴⁵

Protestors began moving out of the park by noon and fully moved into downtown Berkeley nearly two hours later.¹⁴⁶ Even before the protests fully relocated to downtown, the police believed that the protests created a sufficiently hostile climate to warrant a temporary closure of its downtown headquarters.¹⁴⁷ Though the protests did not create property damage downtown, local businesses temporarily closed their establishments, and local banks boarded up their A.T.M.s.¹⁴⁸ These fears proved well-founded: Berkeley's Chief of Police noted that their weapons removal system failed to confiscate all weapons due to undermanned protest checkpoints and protestors not entering the demarcated area.¹⁴⁹ This proximately permitted the previously mentioned protestor injuries to occur.¹⁵⁰

¹³⁹ Paige St. John & Shelby Grad, *How Berkeley Became Epicenter of Violent Trump Clashes*, L.A. TIMES (Apr. 16, 2017, 12:00 PM), <http://www.latimes.com/local/lanow/la-me-berkeley-trump-20170416-story.html>.

¹⁴⁰ See Paige St. John, *21 Arrested As Hundreds of Trump Supporters and Counter-Protesters Clash at Berkeley Rally*, L.A. TIMES (Apr. 15, 2017, 6:35 PM), <http://www.latimes.com/local/lanow/la-me-ln-berkeley-trump-rally-20170415-story.html>

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See *id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ DAILY CAL. STAFF, *supra* note 124.

¹⁴⁷ Dizikes, *supra* note 109.

¹⁴⁸ *Id.*; *Berkeley Police Chief*, *supra* note 138.

¹⁴⁹ *Berkeley Police Chief*, *supra* note 138.

¹⁵⁰ See St. John, *supra* note 140; *Berkeley Police Chief*, *supra* note 138.

The initial police placement of seventy officers proved insufficient to handle the protests that culminated in the violent spectacle in downtown Berkeley.¹⁵¹ The Berkeley police needed and requested assistance from the nearby Oakland Police Department.¹⁵² Oakland sent 180 officers which included squads, motorcycle officers, supervisors and commanders, and even a helicopter to help police in their own efforts.¹⁵³ Even with the additional support, the police failed to disperse the protests until more than two hours later.¹⁵⁴ The added resources did permit the Berkeley protests to target specific areas where protestors acted especially violent, and did eventually quell the situation.¹⁵⁵

The police chief officially reported that eight officers experienced protest-related injuries.¹⁵⁶ Unofficial reports from the police chief totaled between sixty to seventy injured officers.¹⁵⁷ These injuries included hearing loss from illegal explosives, pepper spray exposure, and even a knee injury.¹⁵⁸ The police arrested twenty-one persons in the protests and the immediate aftermath, and arrested another ten and issued fifteen further arrest warrants as of April 19, 2017.¹⁵⁹ Eleven protestors sustained injuries— one of whom experienced a stabbing injury—with seven requiring hospitalization.¹⁶⁰

The protest's highlight involved violence on a right-wing protestor by a philosophy professor.¹⁶¹ During the protests, one of the participants in the Free Speech Rally sustained a blow to the head from a U-shaped bicycle lock.¹⁶² This caught the attention of 4Chan.org users who congregate on the /pol/ message board on the website.¹⁶³ The /pol/ frequenters used video of a

¹⁵¹ See St. John, *supra* note 140; see generally *id.* (250 officers present in downtown Berkeley); *Berkeley Police Chief*, *supra* note 138 (the Oakland Police Department lent Berkeley's Police Department 180 officers for the downtown protests).

¹⁵² *Berkeley Police Chief*, *supra* note 138.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*; St. John, *supra* note 140.

¹⁶⁰ DAILY CAL. STAFF, *supra* note 124; St. John, *supra* note 140.

¹⁶¹ See generally, Emilie Raguso, *Police Arrest Eric Clanton after Bike Lock Assaults During Berkeley Protests*, BERKELEYSIDE (May 24, 2017, 11:33 PM) [hereinafter *Police Arrest Eric Clanton*], <http://www.berkeleyside.com/2017/05/24/berkeley-police-arrest-eric-clanton-bike-lock-assaults/>.

¹⁶² *Id.*

¹⁶³ *Id.*; Carter, *Antifa Terrorist Who Beat Trump Supporter in Head WITH BIKE LOCK Identified as Local Professor!*, GATEWAY PUNDIT (Apr. 20, 2017, 1:11 PM),

masked man using the bicycle lock on the protestor, then compared this with stills of a man wearing similar clothing and having a similar general appearance and physique at the protest.¹⁶⁴ They then used photograph-altering technology for facial recognition purposes, and compared both images to outside images of a philosophy professor teaching at Diablo Valley College called Eric Clanton.¹⁶⁵ Both images of the professor's matched the image of the man swinging a bicycle lock at the protestor.¹⁶⁶

The Berkeley police conducted an investigation into the incident which led to Clanton's arrest.¹⁶⁷ The investigation also yielded other evidence sufficient for charging Clanton for two separate assault counts.¹⁶⁸ All three assault victims in this affair sustained injuries to the head or neck from a bicycle lock.¹⁶⁹ Clanton's employer removed his bio from their webpage after his arrest.¹⁷⁰ As of May 24, the Berkeley Jail held Clanton, and the court planned Clanton's arraignment on May 26.¹⁷¹ The court set Clanton's bail at \$200,000.¹⁷²

Though the last of the four protests proved the mildest by comparison, it still did not pass without incident.¹⁷³ Rather, the events immediately preceding the protests illustrate political intrigue, not violence as the main propulsion vehicle.¹⁷⁴ The events leading into the protest occurred over the course of a week, as opposed to the overnight rising action from the protests on April 15.¹⁷⁵

U.C. Berkeley's College Republicans, Young America's Foundation and BridgeUSA all contributed in organizing an event where they planned on

<http://www.thegatewaypundit.com/2017/04/antifa-terrorist-beat-bloodied-trump-supporter-bike-lock-identified-professor-video/>.

¹⁶⁴ Carter, *supra* note 163.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Police Arrest Eric Clanton*, *supra* note 161.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Compare Susan Svrluga, William Wan & Elizabeth Dwoskin, *There Was No Ann Coulter Speech. But Protesters Converged on Berkeley.*, WASH. POST (Apr. 27, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/04/27/theres-no-speech-planned-but-protesters-are-converging-on-berkeley-today/?utm_term=.a4a56a1cf7fb, with Wang, *supra* note 116, and Dizikes, *supra* note 109, and *Protesters Shut Down Yiannopolous Events*, *supra* note 87.

¹⁷⁴ Svrluga, et al., *supra* note 173.

¹⁷⁵ Compare *id.*, with Wang, *supra* note 116.

having Ann Coulter speak to the event's audience.¹⁷⁶ The organizers set their event's date for April 27.¹⁷⁷ On April 19, the university administration cancelled the event, and informed the organizers of the cancellation.¹⁷⁸ The organizers pointed out that this cancellation came in the event that they, accepted concessions to the administration—such as an earlier start and end time—in order to hold the event.¹⁷⁹ Coulter offered similar concessions personally as well.¹⁸⁰ The university administration expressed a concern for violence, in light of the cancellation of the Yiannopoulos event as their proffered reason for cancelling.¹⁸¹ The university offered a May 2 slot, which Coulter rejected due to low turnout potential.¹⁸² However, because of the cancellation after proffering concessions, both the event organizers and Coulter alleged bad faith on U.C. Berkeley's administration's part.¹⁸³ Coulter stated of the cancellation that "I acceded to Berkeley's every silly demand (never made of [leftist] speakers). Called their bluff [and] they canceled anyway."¹⁸⁴

The cancellation initially deterred neither the organizers nor Coulter, as both expressed in no uncertain terms that the administration's cancellation constituted a prior restraint tantamount to restricting free speech.¹⁸⁵ The groups organizing the event indicated that they would explore legal options to compel U.C. Berkeley to permit the speech.¹⁸⁶ Even the American Civil Liberties Union—normally Coulter's political opposite—shared this perspective.¹⁸⁷ Coulter expressed that she expected U.C. Berkeley to

¹⁷⁶ Nanette Asimov, *UC Berkeley Orders Cancellation of Ann Coulter Speech*, SFGATE (Apr. 19, 2017, 7:37 PM) [hereinafter *Berkeley Orders Cancellation*], <http://www.sfgate.com/bayarea/article/UC-Berkeley-orders-cancellation-of-Ann-Coulter-11084299.php>.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Nanette Asimov, *Ann Coulter Rejects Cal Offer to Switch Date of Speech*, SFGATE (Apr. 21, 2017, 8:46 AM) [hereinafter *Ann Coulter Rejects Cal Offer*], <http://www.sfgate.com/education/article/UC-Berkeley-changes-plans-invites-Ann-Coulter-to-11087363.php>.

¹⁸³ *Berkeley Orders Cancellation*, *supra* note 176.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Natalie Orenstein & Frances Dinkelspiel, *Coulter Blames UC Berkeley for Cancellation of Her Talk*, BERKELEYSIDE (Apr. 26, 2017, 1:07 PM), <http://www.berkeleyside.com/2017/04/26/ann-coulter-says-uc-berkeley-radical-thuggish-institution-blame-cancellation-talk/>.

compensate her for damages for free speech restrictions.¹⁸⁸ Coulter expressed further defiance by expressing that she would speak on April 27 with or without university approval.¹⁸⁹

Some right-wingers—including some that planned the previous two rallies—so disliked that U.C. Berkeley cancelled Coulter’s speech that they planned an impromptu rally on the day Coulter planned to make her speech.¹⁹⁰ Some that attended the protest hoped to hear Coulter address them and other attendees.¹⁹¹ The International Socialist Organization responded by organizing an “Alt-Right Delete” counter-rally.¹⁹² In the middle of these activities, the U.C. Berkeley’s police force received intelligence reports that showed a prospect for violence if Coulter appeared on campus.¹⁹³

After the university claimed to have no safe venues available for the event, Young America’s Foundation pulled its support from the immediate event, but filed suit for the event cancellation.¹⁹⁴ The group echoed U.C. Berkeley in citing safety concerns as the reason for pulling its sponsorship.¹⁹⁵ Later, BridgeUSA cited similar concerns in pulling their support.¹⁹⁶ Coulter personally withdrew from any planned appearance at U.C. Berkeley thereafter.¹⁹⁷ Though Coulter did appear to have a safety concern, she felt that the support her former sponsors gave proved inadequate, to the point of betrayal.¹⁹⁸

The police indicated that it would manage whatever emerged from the protests in a different way than their apparently more lax approach than the

¹⁸⁸ *Berkeley Orders Cancellation*, *supra* note 176.

¹⁸⁹ *Id.*

¹⁹⁰ Elliott C. McLaughlin, Holly Yan & Carma Hassan, *Berkeley Protests: No Ann Coulter, but Demonstrators Gather*, C.N.N. (Apr. 27, 2017, 10:14 PM), <http://www.cnn.com/2017/04/27/us/berkeley-ann-coulter-canceled-speech-protests/index.html>; Orenstein, et al., *supra* note 187.

¹⁹¹ See Berkeleyside Editors, *Pro-Trump ‘Free-Speech’ Rally Draws Hundreds for Peaceful Protest Downtown*, BERKELEYSIDE (Apr. 27, 2017, 4:19 PM) [hereinafter *Pro-Trump ‘Free-Speech’ Rally*], <http://www.berkeleyside.com/2017/04/27/pro-trump-free-speech-rally-draws-hundreds-peaceful-protest/>.

¹⁹² McLaughlin, et al., *supra* note 190.

¹⁹³ Natalie Orenstein, *UC Berkeley Students Protest April 27 Arrest and Heavy Police Presence*, BERKELEYSIDE (Apr. 28, 2017, 3:31 PM), <http://www.berkeleyside.com/2017/04/28/uc-berkeley-students-protest-april-27-arrest-heavy-police-presence/>.

¹⁹⁴ Orenstein, et al., *supra* note 187.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ McLaughlin, et al., *supra* note 190; Orenstein, et al., *supra* note 187.

planned Yiannopoulos event.¹⁹⁹ Specifically, the police indicated that it held a low tolerance for protestor violence.²⁰⁰ Prior to the protests, the U.C. Berkeley and City of Berkeley police forces worked together to prepare a broad workable plan to keep any violent outburst and incidents at a minimum.²⁰¹ In addition, the police prohibited items such as baseball bats and projectiles, and kept Antifa protestors away from the protest.²⁰²

The protests themselves did have some minor incidents: the police arrested seven persons, and confiscated numerous weapons.²⁰³ The “Alt-Right Delete” protest effectively proceeded as a news conference where the International Socialist Organization expressed its hope to oppose the right wing.²⁰⁴ Though some Trump-supporters dressed in protective armor, the supporters engaged at times with political opponents and others in a largely civil manner, and certainly without any reported violence from them.²⁰⁵ Even some nearby high school students and faculty engaged with the Trump-supporting protestors.²⁰⁶ Though other left-wing protestors showed their presence in the late morning and into the afternoon, Antifa failed to appear during this time in the day.²⁰⁷ Antifa first appeared at about four in the afternoon.²⁰⁸ By then, most of the protestors left the scene, and the right-wingers that organized the event encouraged those that remained to leave.²⁰⁹ Though the environment remained tense, the protests mostly ended by six in the evening.²¹⁰ The police ended their activity related to the demonstration and resumed normal operations about ten minutes after nine on that evening.²¹¹

Though protest such as those prompted by U.C. Berkeley’s cancellation of Coulter’s speech exemplify tensions in college, sexual harassment allegations pose this challenge too.²¹² The strains impressed through the

¹⁹⁹ See Orenstein, et al., *supra* note 187.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Svrluga, et al., *supra* note 173.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Orenstein, *supra* note 193.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*; Svrluga, et al., *supra* note 173.

²¹⁰ Svrluga, et al., *supra* note 173.

²¹¹ Orenstein, *supra* note 193.

²¹² See *id.*; David French, *A Suicide in Texas*, NAT’L REV. (Apr. 12, 2017, 5:32 PM), <http://www.nationalreview.com/article/446681/thomas-klocke-suicide-texas-university-student-commits-suicide-after-being-accused>.

tension only increase when conflicting accounts muddy waters and confuse outsiders to such an interpersonal situation as to the matter's truth.²¹³ Such tension delves into the almost farcical when the conflicting account in question involves something as mundane as pure speech.²¹⁴

3. Administrative Issues

This background led to the untimely demise of a graduate-school-aspirant Thomas Klocke by his own hand in 2016, with one credit required for graduation.²¹⁵ Nicholas Watson, a gay student at the University of Texas-Arlington, alleged that Klocke typed "gays should die" into his laptop on a web browser.²¹⁶ Klocke supposedly felt prompted to type this during a class discussion about privilege.²¹⁷ Watson averred that he typed "I'm gay" on his own laptop in response to Klocke.²¹⁸ Watson then claimed that Klocke, while mockingly yawning and under his breath, said "[w]ell, you're a faggot."²¹⁹ Watson expressed in his allegations that he told Klocke to leave the class.²²⁰ Watson further averred that Klocke told him in response that "[y]ou should consider killing yourself."²²¹

Klocke presented a diametrically opposite version of events.²²² Klocke stated that Watson approached him unprompted, sat beside him, addressed

²¹³ See Jonathan Turley, *Opinion: Obama's legacy is hurting college students across America*, THE HILL (Apr. 17, 2017, 3:00 PM), <http://thehill.com/blogs/pundits-blog/education/329130-how-americas-colleges-caved-to-the-feds-and-sacrificed-students>; Bradford Richardson, *Father Files Lawsuit against Late Son's College*, WASH. TIMES (Apr. 12, 2017), <http://www.washingtontimes.com/news/2017/apr/12/wayne-klocke-files-lawsuit-against-university-of-a/>.

²¹⁴ See Keith Griffith, *Student's Father Sues Texas University Claiming 'Harsh Punishment' for 'Unsupported' Sexual Harassment Claims against His Son Led to His Suicide*, DAILY MAIL (Apr. 13, 2017, 3:58 PM), <http://www.dailymail.co.uk/news/article-4410100/Thomas-Klocke-suit-claims-harassment-probe-led-suicide.html#ixzz4p2UUkS00>; French, *supra* note 212.

²¹⁵ See Jason Silverstein, *University of Texas-Arlington Student Committed Suicide after School Unfairly Punished Him for Sex Assault Claim: Suit*, N.Y. DAILY NEWS (Apr. 13, 2017, 11:43 AM), <http://www.nydailynews.com/news/national/texas-college-student-killed-accusation-suit-article-1.3051681>; Richardson, *supra* note 213.

²¹⁶ Richardson, *supra* note 213.

²¹⁷ Griffith, *supra* note 214.

²¹⁸ Richardson, *supra* note 213.

²¹⁹ French, *supra* note 212; Richardson, *supra* note 213.

²²⁰ Richardson, *supra* note 213.

²²¹ *Id.*

²²² See, eg., *id.*

him by name, and called him “beautiful.”²²³ Klocke wrote on his laptop “stop—I’m straight,” according to his statements to college administration officials.²²⁴ Klocke’s statements indicate that Watson said “I’m gay” in response.²²⁵ Klocke noted that Watson continued staring at him, which prompted him to type “stop” in his laptop again.²²⁶ Klocke’s story illuminated that Watson moved away from Klocke to another classroom seat, eventually.²²⁷

After class, Watson told his class professor his version of events, and the professor referred Watson to student services.²²⁸ Watson did not use the university’s student services.²²⁹ Instead he told his version of events to an administrator who he knew personally: Heather Snow, the university’s Vice-President of Student Affairs and the Dean of Students.²³⁰ Snow helped Watson draft his complaint against Klocke, and did not refer the case to the university’s Title IX coordinator.²³¹ Indeed, no one informed the Title IX coordinator of the case during the investigation.²³² Instead, Snow assigned the case to Daniel Moore, the university’s Associate Director of Academic Integrity.²³³

Upon receiving the complaint, Moore wasted no time in barring Klocke from attending the same class as Watson and entering the building where the class took place.²³⁴ Additionally, Moore forbade Klocke from even talking to the students in that class, whether directly, through an intermediary or otherwise, while permitting the same for Watson.²³⁵ Additionally, Klocke received no information as to the specific nature of the charge, the charges against him, or who made the allegations against him.²³⁶ Moore only told Klocke in the immediate aftermath of Watson’s allegations that his alleged actions constituted potential “involve[ment] in an alleged violation of the University Student Code of Conduct.”²³⁷ In fact, Moore levied two student

²²³ See Griffith, *supra* note 214.

²²⁴ See *id.*

²²⁵ See *id.*

²²⁶ See *id.*

²²⁷ See *id.*

²²⁸ French, *supra* note 212; Richardson, *supra* note 213.

²²⁹ Richardson, *supra* note 213.

²³⁰ Griffith, *supra* note 214; Richardson, *supra* note 213.

²³¹ Richardson, *supra* note 213.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Turley, *supra* note 213; French, *supra* note 212; Richardson, *supra* note 213.

²³⁶ Richardson, *supra* note 213.

²³⁷ *Id.*

conduct code violation charges against Klocke, and summoned him to a hearing to address the charges levied against him.²³⁸ Moore reportedly barred Klocke from bringing his attorney father to the hearing as his counsel.²³⁹

Klocke reportedly denied all the allegations made by Watson at the hearing where he first heard of the allegations.²⁴⁰ The only witness at the hearing reportedly heard the words “I think you should leave,” but no other substantive fact beyond this.²⁴¹ A report stated that both Snow and Moore acknowledged that they lacked evidence to levy punishment on Klocke.²⁴² Despite this, the Moore and Snow reportedly found Klocke guilty of harassment against Watson.²⁴³ Though he could participate in outside group projects, the administration prohibited him from attending any live classes.²⁴⁴ More directly, Moore placed Klocke on disciplinary probation according to reports—something that negatively impacts employment and graduate school prospects.²⁴⁵ Six days elapsed from the original allegations to the final punishment.²⁴⁶ Klocke committed suicide a week thereafter.²⁴⁷

A year after these events, Wayne Klocke, Thomas Klocke’s father and an attorney, filed charges against the University of Texas-Arlington and Watson.²⁴⁸ The father alleged in his suit that the university inflicted “swift and harsh punishment” for “bare, unsupported” harassment allegations made by Watson in order “to preserve the appearance of their leadership” in matters relating to gender and sex.²⁴⁹ Though the university said that it followed all proper protocols, the suit further alleges that the false charges placed upon Klocke because he stood as an “accused male aggressor.”²⁵⁰ It also states that the sanctions and charges created “such embarrassment, rage, frenzy, and mental or emotional anguish and pain [upon Klocke] that he took his own life.”²⁵¹

²³⁸ *Id.*

²³⁹ French, *supra* note 212.

²⁴⁰ Richardson, *supra* note 213.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ French, *supra* note 212.

²⁴⁵ *Eg.*, Richardson, *supra* note 213; accord, Turley, *supra* note 213.

²⁴⁶ Turley, *supra* note 213.

²⁴⁷ *Id.*

²⁴⁸ See Griffith, *supra* note 214; Richardson, *supra* note 213.

²⁴⁹ Griffith, *supra* note 214.

²⁵⁰ Silverstein, *supra* note 215.

²⁵¹ Griffith, *supra* note 214.

Though Klocke's suicide appears a dramatic, extreme example of on-campus tensions, battles over Halloween costumes serve as an exemplar of the campus battleground culture as well.²⁵² Further, students like Klocke are not the only group that fall prey to the tenuous college climate.²⁵³ Administrators that deviate from the politically correct 'party line' face problems to where fellow administrators and students threaten the administrator's employment if not the administrator physically.²⁵⁴ Nicholas and Erika Christakis, administrators at Yale University, faced this fate in 2015.²⁵⁵

Yale University's Intercultural Affairs Committee in October 2015 distributed an email to its student body that encouraged avoiding "culturally unaware and sensitive" costumes out of fear of offending minority students.²⁵⁶ The email delineated guidelines that called for avoiding costumes that featured blackface, feathered headdresses, or turbans.²⁵⁷ At least thirteen administrators contributed to the guideline's and email's creation.²⁵⁸

The email reportedly frustrated a number of students, to the point where these students levied complaints about the email to Mrs. Christakis.²⁵⁹ This prompted her to write her own email on behalf of the frustrated students.²⁶⁰ In the email, she acknowledges that there existed a possibility that certain costume choices carried offensive connotations.²⁶¹ However, she made a bigger point that far too often, costume choices carry no intent at causing offense.²⁶² She drew analogies from her preschool teaching experiences of a little girl dressing as Mulan, and offered a comparison of an eight-year-old versus an eighteen-year-old dressing as Tiana the Frog Princess.²⁶³ Mrs.

²⁵² Compare Richardson, *supra* note 213, with Conor Friedersdorf, *The New Intolerance of Student Activism*, THE ATL. (Nov. 9, 2015) [hereinafter *The New Intolerance of Student Activism*], <https://www.theatlantic.com/politics/archive/2015/11/the-new-intolerance-of-student-activism-at-yale/414810/>.

²⁵³ Compare Richardson, *supra* note 213, with *The New Intolerance of Student Activism*, *supra* note 252.

²⁵⁴ Compare Richardson, *supra* note 213, with *The New Intolerance of Student Activism*, *supra* note 252.

²⁵⁵ See *The New Intolerance of Student Activism*, *supra* note 252.

²⁵⁶ Liam Stack, *Yale's Halloween Advice Stokes a Racially Charged Debate*, N.Y. TIMES (Nov. 8, 2015), <https://www.nytimes.com/2015/11/09/nyregion/yale-culturally-insensitive-halloween-costumes-free-speech.html>.

²⁵⁷ *Id.*

²⁵⁸ *The New Intolerance of Student Activism*, *supra* note 252.

²⁵⁹ Stack, *supra* note 256.

²⁶⁰ *Id.*

²⁶¹ *The New Intolerance of Student Activism*, *supra* note 252.

²⁶² *Id.*

²⁶³ *Id.*

Christakis indicated from this point that a large degree of individual intent factors into the equation of a Halloween costume's offensiveness.²⁶⁴ This, she expressed, led to a slippery slope that she "prefer[ed] not to cross."²⁶⁵ She further indicated that she "[could not] defend [her "Halloweenish standards"] anymore than [administrators] could defend [theirs]."²⁶⁶

Mrs. Christakis also questioned the guidelines wisdom: she asked, "Is there no room anymore for a child or young person to be a little bit obnoxious . . . a little bit inappropriate or provocative or, yes, offensive?"²⁶⁷ She then turned to an accusatory tone in her email in stating:

American universities were once a safe space not only for maturation but also for a certain regressive, or even transgressive, experience; increasingly, it seems, they have become places of censure and prohibition. And the censure and prohibition come from above, not from yourselves! Are we all okay with this transfer of power? Have we lost faith in young people's capacity—in your capacity—to exercise self-censure, through social norming, and also in your capacity to ignore or reject things that trouble you?²⁶⁸

The email proved a spark that set alight the student body in a pitch over more than merely Halloween costumes, but upon race issues generally.²⁶⁹ Students immediately called for Mrs. Christakis's resignation.²⁷⁰ These active resignation calls also extended to Mr. Christakis by virtue of relation and proxy.²⁷¹ Mrs. Christakis later recalled that the original outcry proved more severe than originally reported: she reported that administrators and deans, along with students called for her and her husband's resignation.²⁷² Almost

²⁶⁴ See *id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ See Rahel Gebreyes, *Yale Student Explains Why Students Were Offended By Halloween Costumes Email*, HUFF. POST (Nov. 12, 2015, 2:59 PM), http://www.huffingtonpost.com/entry/yale-student-halloween-costumes-christakis_us_5644baa8e4b045bf3dedfe1e; *The New Intolerance of Student Activism*, *supra* note 252.

²⁷⁰ *The New Intolerance of Student Activism*, *supra* note 252.

²⁷¹ See *id.*

²⁷² Compare Erika Christakis, *My Halloween Email Led to a Campus Firestorm—and a Troubling Lesson about Self-Censorship*, WASH. POST (Oct. 28, 2016), <https://www.washingtonpost.com/opinions/my-halloween-email-led-to-a-campus-firestorm-->

one thousand students, administrators and deans altogether called for her and her husband's ouster.²⁷³ These calls also extended to their removal from their campus home.²⁷⁴

Mrs. Christakis further noted that some persons who viewed her email disdainfully went further than merely calling for her firing.²⁷⁵ Some wanted her and her husband to make an apology for any "unintended racial insensitivity."²⁷⁶ In this regard, Mrs. Christakis indicated she had no objection to this.²⁷⁷ Rather, Mrs. Christakis winced at the notion that she should make a complete disavowal for her expression of her ideas over Halloween costumes.²⁷⁸ She also indicated some also wanted to have advance warning whenever she appeared in Yale's dining hall "so that students accusing me of fostering violence wouldn't be disturbed by the sight of me."²⁷⁹

This context set the stage for Mr. Christakis to experience public beratement and humiliation by a group of over one hundred students who felt aggrieved by Mrs. Christakis's email.²⁸⁰ Mr. Christakis not only held a faculty position at Yale, but also served as the head of a Yale residence hall, or a "Master."²⁸¹ In his confrontation with this group, Mr. Christakis gave his full, undivided attention to the crowd, but to one student in particular, because she occupied Mr. Christakis's attention the most.²⁸² That student asserted that he needed to make a place of comfort and home for the students because his job required it.²⁸³ Mr. Christakis disagreed, and explained that his position required him to create an intellectual space.²⁸⁴ The student lividly responded to Mr. Christakis that:

If that is what you think about being a master you should step down! It is *not* about creating an intellectual space! It is *not*!

and-a-troubling-lesson-about-self-censorship/2016/10/28/70e55732-9b97-11e6-a0ed-ab0774c1eaa5_story.html?utm_term=.302dc4cfc12b, with *The New Intolerance of Student Activism*, *supra* note 252, and Stack, *supra* note 256.

²⁷³ Christakis, *supra* note 272.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*; *The New Intolerance of Student Activism*, *supra* note 252.

²⁸¹ *The New Intolerance of Student Activism*, *supra* note 252.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *See id.*

Do you understand that? It's about creating a home here. You are not doing that!²⁸⁵

The student concluded by telling Mr. Christakis, "You should not sleep at night! You are disgusting!"²⁸⁶ Mrs. Christakis noted that in that vulgarity-laced exchange—which constituted a small part of a greater two-hour long exchange—several of the one hundred students made explicit threats against her husband.²⁸⁷ Four deans witnessed this exchange and the threats that accompanied it, and none of the deans or anyone else did anything to stop or rebuke the threats.²⁸⁸

In addition, some students began a petition that formally called for both Mr. and Mrs. Christakis' resignations.²⁸⁹ The petition targeted the Christakis in stating:

You ask students to 'look away' if costumes are offensive, as if the degradation of our cultures and people, and the violence that grows out of it is something that we can ignore....[W]e were told to meet the offensive parties head on, without suggesting any modes or means to facilitate these discussions to promote understanding.²⁹⁰

This petition garnered signatures from students, alumni, and even select few Yale faculty members.²⁹¹ These tensions continued into graduation, where some graduating Yale students, clearly hostile to Mr. Christakis, refused to receive their diploma from Mr. Christakis.²⁹² These events prompted both Mr. and Mrs. Christakis to resign from their administrative positions after the graduation commencement.²⁹³ Though Mr. Christakis

²⁸⁵ *Id.*

²⁸⁶ Conor Friedersdorf, *The Perils of Writing a Provocative Email at Yale*, THE ATL. (May 26, 2016) [hereinafter *The Perils of Writing a Provocative Email at Yale*], <https://www.theatlantic.com/politics/archive/2016/05/the-peril-of-writing-a-provocative-email-at-yale/484418/>.

²⁸⁷ Christakis, *supra* note 272; *The New Intolerance of Student Activism*, *supra* note 252.

²⁸⁸ Christakis, *supra* note 272.

²⁸⁹ *The Perils of Writing a Provocative Email at Yale*, *supra* note 286.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

retained his position as a professor, Mrs. Christakis opted against further teaching at Yale.²⁹⁴

B. Common Ideological Roots

All the incidents mentioned in the previous section possess at least some radically left-wing identitarian political motivation.²⁹⁵ Dalhousie University published a report in the aftermath of its dentistry scandal which detailed what it saw as problems in the university.²⁹⁶ The independent report stated that through allowing the dental students involved to express themselves in the way they did, the dental school permitted "sexism, misogyny, homophobia and racism" to run rampant.²⁹⁷ The report went even further in stating that this incident illustrated that the dentistry faculty permitted all of this, culturally in the College of Dentistry.²⁹⁸ The report also noted that "[g]iven the number, the duration and the range of people who told us about them, [the allegations] cannot be dismissed as isolated."²⁹⁹ The report's tone became encapsulated in their claim that "[o]ne alumnus said that dentistry lived in a 'time warp,' oblivious to social progress that has rendered some behaviour unacceptable."³⁰⁰

The report's language mirrors what the Gender & Women's Studies Department at Dalhousie University teaches to its students, and garnered a full endorsement from Dalhousie's Student Union.³⁰¹ The Gender &

²⁹⁴ *Id.*

²⁹⁵ Compare *Timeline in the Scandal Involving the Dentistry School at Dalhousie University*, *supra* note 24, and *Dalhousie University Probes Misogynistic Student 'Gentlemen's Club'*, *supra* note 26, with Melchior, *supra* note 64, and *Protesters Shut Down Yiannopolous Events*, *supra* note 87, and Wang, *supra* note 116, and *Berkeley Police Chief*, *supra* note 138, and Orenstein, et al., *supra* note 187, and French, *supra* note 212, and *The New Intolerance of Student Activism*, *supra* note 252.

²⁹⁶ *Dalhousie Dentistry Report: University Had Culture of 'Misogyny, Homophobia and Racism'*, C.B.C. NEWS (Can.) (Jun. 29, 2015, 1:58 PM), <http://www.cbc.ca/news/canada/nova-scotia/dalhousie-dentistry-report-university-had-culture-of-misogyny-homophobia-and-racism-1.3131522>.

²⁹⁷ *Id.*; see *A Timeline in the Scandal Involving the Dentistry School at Dalhousie University*, *supra* note 24; *Dalhousie Facebook Posts 'Completely Unacceptable,' Says Professor*, *supra* note 24.

²⁹⁸ *Dalhousie Dentistry Report: University Had Culture of 'Misogyny, Homophobia and Racism'*, *supra* note 296.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Dalhousie Dentistry Scandal a Call to Action, Says Student Union*, *supra* note 39; *Dalhousie Dentistry Report: University Had Culture of 'Misogyny, Homophobia and Racism'*, *supra* note 296; *What will I learn?*, DALHOUSIE U. GENDER & WOMEN'S STUD.

Women's Studies Department states that among other things, students learn from its departmental faculty:

[H]ow aspects of gender, race, class, sex, age, sexual orientation, and health contribute to complex social relationships—and all too frequently, to injustice and discrimination.³⁰²

The department took the scandal seriously enough to host a forum with the Dalhousie Student Union at the climax of the scandal.³⁰³

One participant, Judy Haiven, proposed as a remedy to the dentistry scandal, that all media events hosted in or by the university must include at least one female, non-emcee member.³⁰⁴ She also put forth the idea that all athletes who involved themselves in what she considered misogyny receive a six-month suspension from the university, including suspension from being on-campus.³⁰⁵ She further proposed that any public official that committed any misogynistic act toward a woman must write an open letter of apology.³⁰⁶ She also expressed that she require that women always have the opportunity to speak first.³⁰⁷ In her remarks, she also thanked the student union, particularly the executive board, for all their advocacy in advancing a resolution favorable to the panel in the dentistry scandal.³⁰⁸

The Dalhousie Student Union in the heat of the dentistry scandal expressed wholehearted support for the female dentistry students that complained about the Facebook posts.³⁰⁹ As such, the student union fully endorsed the findings of the report.³¹⁰ In this endorsement, the union stated that it “showcase[d] . . . that this is not just a problem within the faculty of dentistry. It's a problem with the entire institution. It's not a case-by-case basis, it's not one bad apple, it's a whole institution.”³¹¹ This language closely

DEP'T (last visited Aug. 8, 2017),
<https://www.dal.ca/academics/programs/undergraduate/gws/what-will-I-learn.html>.

³⁰² *What will I learn?*, *supra* note 301.

³⁰³ See Dalhousie Student Union, *Dalhousie Forum on Misogyny*, YOUTUBE (Jan. 15, 2015), <https://www.youtube.com/watch?v=iDKIHqYG92E>.

³⁰⁴ *Id.*

³⁰⁵ See *id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ See *Dalhousie Dentistry Scandal a Call to Action, Says Student Union*, *supra* note 39.

³¹⁰ See *id.*

³¹¹ *Id.*

reflects the report, and the Gender & Women's Studies Department's general education mission.³¹²

The students that protested on campus found their motivation in expressing opposition to what they categorized as misogynistic Facebook posts.³¹³ The protest organizer felt appalled at the university's willingness to give the dental students accreditation.³¹⁴ All the students involved stated a preference for the university to inflict harsher, swifter punishment on the dental students.³¹⁵

Anti-fascists, or Antifa, does not exist as a formal organization, but rather serves as an identifier or label.³¹⁶ In this vein, Antifa expresses an interest in protecting Hispanic and black persons, women, trans-people, Muslims, illegal aliens, and L.G.B.T.Q. community members.³¹⁷ The members claim opposition to fascism and Nazism.³¹⁸ Those that identify with Antifa define fascism as a political position that they perceive opposes a group they express an interest in protecting.³¹⁹

This bears a resemblance to the reasons a student group from Pomona College wanted to have the university revoke a speaking engagement from someone that believed the Ferguson riots encouraged an urban crime wave.³²⁰ The group described the speaker as:

[A] fascist, a white supremacist, a warhawk, a transphobe, a queerphobe, a classist, and ignorant of interlocking systems of domination that produce the lethal conditions under which oppressed peoples are forced to live.³²¹

³¹² Compare *id.*, with *Dalhousie Dentistry Report: University Had Culture of 'Misogyny, Homophobia and Racism'*, *supra* note 296, and *What will I learn?*, *supra* note 301.

³¹³ *Dalhousie Dentistry Facebook Posts Prompt Rally at School*, C.B.C. NEWS (Can.) (Dec. 19, 2014, 10:41 PM), <http://www.cbc.ca/news/canada/nova-scotia/dalhousie-dentistry-facebook-posts-prompt-rally-at-school-1.2879111>.

³¹⁴ *Id.*

³¹⁵ See *Dalhousie Dentistry Facebook Scandal Prompts Protest*, *supra* note 34.

³¹⁶ See Andrew Beale & Sonner Kehrt, *Behind Berkeley's Semester of Hate*, N.Y. TIMES (Aug. 4, 2017), https://www.nytimes.com/2017/08/04/education/edlife/antifa-collective-university-california-berkeley.html?_r=0.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ See *id.*; Ian Tuttle, *The Roots of Left-Wing Violence*, NAT. REV. (June, 5, 2017, 4:00 AM), <http://www.nationalreview.com/article/448275/antifa-protest-donald-trump-roots-left-wing-political-violence>.

³²⁰ See Tuttle, *supra* note 319.

³²¹ *Id.*

These attitudes mirror the attitudes of the protesting students at the University of Missouri and Yale University and those critical of the dental students at Dalhousie University.³²² However, as Ian Tuttle noted in his writings, Antifa distinguishes itself fundamentally from this type of student by committing to a willingness to use violence as a means to achieve goals.³²³

Deriving these facts, Antifa members interpret an attack on one minority group as an attack on all of them, or an us-versus-them mentality.³²⁴ Antifa sees Trump and those aligned with Trump as among those that attack at least one of the minorities that it wishes to protect.³²⁵ In Antifa's eyes, that makes Trump and his political allies fascists.³²⁶ Antifa members became more concerned after Trump's victory in the 2016 Presidential Election.³²⁷ Because Trump won the U.S. Presidency through America's free speech electoral system, Antifa believes that outcries in favor of free speech serve as a way for fascism to gain a foothold.³²⁸ Because of this, Antifa sees this institution as co-opted by fascists, which therefore legitimizes the use of violence.³²⁹ Though Antifa's members generally avoid social media, Antifa chapters use the internet to express political views and to inform the Antifa community of events it plans to disrupt.³³⁰

B.A.M.N. expresses a similar proclivity to violence.³³¹ Yvette Felarca, a leader of B.A.M.N., took some credit for her and her group's actions in shutting down the Yiannopoulos speech.³³² In an interview with Tucker Carlson, Felarca justified shutting down the event in saying that Yiannopoulos "should not be able to speak in public to spread his racist, misogynistic and homophobic lies."³³³ Felarca explicitly defended her use of violence as a means to achieve that end.³³⁴ She has also said, apparently

³²² Compare *id.*, with Melchior, *supra* note 64, and Pearson, *supra* note 49, and Gebreyes, *supra* note 269, and Dalhousie Forum on Misogyny, *supra* note 303.

³²³ See Tuttle, *supra* note 319.

³²⁴ See Beale, et al., *supra* note 316; Tuttle, *supra* note 319.

³²⁵ Beale, et al., *supra* note 316.

³²⁶ See *id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ See *id.*

³³¹ Compare *id.*, with Frances Dinkelspiel, *Rage against Yvette Felarca Mounts after Fox News Interview*, BERKELEYSIDE (Feb. 14, 2017, 2:01 PM) [hereinafter *Rage against Yvette Felarca Mounts*], <http://www.berkeleyside.com/2017/02/14/rage-yvette-felarca-mounts-fox-news-interview/>.

³³² *Rage against Yvette Felarca Mounts*, *supra* note 331.

³³³ *Id.*

³³⁴ *Id.*

categorizing “racis[m], misogyny[] and homophobi[a]” with facism in the same way as Antifa does, that “[t]here is no free speech for fascists.”³³⁵

Felarca and B.A.M.N. previously demonstrated their political proclivities.³³⁶ Future B.A.M.N. members, Felarca included, held membership in a group that superficially interested itself in abortion rights in the 1980s.³³⁷ In practice, these members tried to use this group as a front to create a worker’s revolution, and discuss such wider issues to that end.³³⁸ Felarca and others founded B.A.M.N. in 1995 as a way to promote affirmative action.³³⁹ Chris Thompson, a writer that had first-hand knowledge of the activist left-wing, noted that the group seemed a front for the Trotskyist party, the Revolutionary Worker’s League.³⁴⁰ This point and members’ previous rhetoric fits with the some Antifa members’ communist ideology.³⁴¹ B.A.M.N. also has a reputation of attracting violent black-bloc protestors such as Antifa, wherever it goes in protesting efforts.³⁴²

From the start, B.A.M.N. engaged in disruptive if not outright violent behavior towards others that wished to protest.³⁴³ In an extreme early instance, a group member during a demonstration snuck behind a speaker, and fought the speaker for microphone possession, while exclaiming that militant action fast approached.³⁴⁴ B.A.M.N. also commonly, coincidentally scheduled a venue for a rally at the exact same time and place as another group, then proceed to confront other venue-goers, and even police.³⁴⁵

³³⁵ Compare *id.*, with Frances Dinkelspiel, *Yvette Felarca to Return to Berkeley Classroom Today*, BERKELEYSIDE (Nov. 2, 2016, 9:00 AM) [hereinafter *Yvette Felarca to Return to Berkeley Classroom Today*], <http://www.berkeleyside.com/2016/11/02/yvette-felarca-to-return-to-berkeley-classroom-today/>, and Beale, et al., *supra* note 316.

³³⁶ See Chris Thompson, *Class Struggle*, EAST BAY EXPRESS (Apr. 20, 2001), <https://www.eastbayexpress.com/oakland/class-struggle/Content?oid=1065288&showFullText=true>.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ Compare *id.*, with Beale, et al., *supra* note 316.

³⁴² See Beale, et al., *supra* note 316; Dianne Emmett, *Op-ed: BAMN’s protest plans calculated to cause violence*, BERKELEYSIDE (Dec. 14, 2014, 6:52 PM), <http://www.berkeleyside.com/2014/12/14/op-ed-bamns-protest-plans-calculated-to-cause-violence/>.

³⁴³ See Thompson, *supra* note 336.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

Students in that time often complained that B.A.M.N., among other problems, liked engaging in “race-baiting.”³⁴⁶

B.A.M.N. members at one point also took over a group that committed themselves solely to opposing an anti-gay marriage proposal in that time called Prop 22.³⁴⁷ Upon taking over, the B.A.M.N. members passed motions calling for a revolutionary worker’s movement, which frustrated other members—including the two founding members—to the point where they departed.³⁴⁸ One political activist in that time stated of B.A.M.N. members that “[t]hey’re just weird, like a cult.”³⁴⁹ This served as a harbinger for Robert Jacobsen’s petition calling for Felarca’s firing from her schoolteacher job.³⁵⁰ Jacobsen cited an open letter by a former B.A.M.N. member, and commented that “They recruit impressionable young people, isolate them from their family and friends, and indoctrinate them with their violent ideology That’s practically ‘Cult 101.’”³⁵¹ B.A.M.N. also engaged in these same takeover tactics in the Oakland Teacher’s Union, beginning with some B.A.M.N. members becoming teachers.³⁵² This continued with B.A.M.N. members in the union increasing internecine political activity where other union members merely wished to occupy themselves with the job of teaching.³⁵³ Eventually, the Federal Bureau of Investigation published a document that identified B.A.M.N. as a campus organization “involved in terrorist activities” in 2005.³⁵⁴

Thomas Klocke’s suicide on account of the disciplinary problems created by his college’s administration serve as an extreme example in college administrative disciplinary policy problems.³⁵⁵ Jonathan Turley, a law professor at George Washington University, noted that part of the administrative overreach comes from pressure placed by President Obama’s

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ Compare *id.*, with Max Cherney, *Petition to Fire Berkeley Teacher Garners 500 Signatures*, BERKELEYSIDE (July 14, 2016, 1:00 PM), <http://www.berkeleyside.com/2016/07/14/petition-to-fire-berkeley-teacher-garners-500-signatures/>.

³⁵¹ Cherney, *supra* note 350.

³⁵² Thompson, *supra* note 336.

³⁵³ *Id.*

³⁵⁴ Kris Turner, *Local Terrorist Activity Suspected*, THE ST. NEWS (Aug. 30, 2005), <https://web.archive.org/web/20060530134437/http://www.statenews.com/article.phtml?pk=31230> (original link extant).

³⁵⁵ See French, *supra* note 212; Richardson, *supra* note 213.

Department of Education (D.O.E.).³⁵⁶ The D.O.E.'s "Dear Colleague" letter from 2011 noted that "schools would need to curtail due process protections on the right to representation, the standard of proof, and other basic rights," in order to achieve equality.³⁵⁷ This included the right to confront witnesses under penalty of universities losing federal funds.³⁵⁸

Turley summarized his observations of the Obama-era policy by noting that:

As a result, the Obama administration substituted honest efforts to investigate claims of sexual harassment with an approach that borders on a type of Vietnam body count culture, measuring success by the rate of conviction.³⁵⁹

To add insult to injury, Turley noted that if the claims in Klocke's father's suit prove true, then the University of Texas-Arlington failed to meet even the levels of due process protection under the Obama administration.³⁶⁰ David French, a lawyer and writer, put a human face to this problem by noting that:

During my own legal career, I've worked with students who've experienced many of the same things that Thomas Klocke's family claims that he experienced. I've represented students whose parents were barred from disciplinary meetings, leaving them to face the wrath of administrators alone. I've seen students exploit existing relationships with administrators to achieve favorable outcomes in campus controversies. And I've also seen the speed and authority with which universities will respond to complaints by members of favored progressive victim groups.

But there's something else I've seen. I've seen the cost imposed on students accused of misconduct—the fear and the stress as they feel like their reputations, their careers, and their dreams are vanishing before their very eyes. When they're in the middle of the battle, and an entire school seems set

³⁵⁶ See Turley, *supra* note 213.

³⁵⁷ See *id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ See *id.*; Richardson, *supra* note 213.

against them, it can be hard to maintain perspective and to see through to the other side.³⁶¹

French concludes by noting in accordance with his experiences that:

Lawsuits are filling courtrooms from coast to coast, men and women face terrifying on-campus witch hunts, and the ideological and financial incentives are pushing universities to shove aside students' and professors' unalienable rights to meet the impossible demands of unreasonable campus radicals.³⁶²

Though these do not necessarily translate to violence, views such as those that Antifa and B.A.M.N. hold about minorities carry prevalence among academics, as shown in peer-reviewed studies.³⁶³ One example comes from *Social Science & Medicine*, where the authors describe "whiteness and capitalism in the [United States]" and how the privileges of both can affect white persons' health.³⁶⁴ An abstract to a paper published by *Qualitative Inquiry*, and written by Shawn E. Edmonds, presented without further comment, states that:

The massacre at the Pulse nightclub in Orlando, Florida, impacted the lives of queer people across the world. As a gay White male living hundreds of miles from the horrific events, I was intimately connected with the aftermath through social media, blogs, and news reports. Through autoethnographic exploration of three distinct text-based digital conversations in the days following the massacre, I reflect on the ways that virtual and nonvirtual communication intra-acted to produce and mediate powerful emotional moments. As a performative

³⁶¹ French, *supra* note 212.

³⁶² *Id.*

³⁶³ See generally, @RealPeerReview, TWITTER, <https://twitter.com/RealPeerReview> (last visited Aug. 9, 2017), for examples shown in academic paper abstracts. While this Twitter account devotes itself to facially absurd, peer-reviewed literature generally, enough research in fields of feminism, race, sexuality, and the like overlaps in the mind of the account's administrator to feature the papers.

³⁶⁴ Jennifer Malat, Sarah Mayorga-Gallo, David R. Williams, Abstract: *The Effects of Whiteness on the Health of Whites in the USA*, SCI. DIRECT (first published July 3, 2017), <http://www.sciencedirect.com/science/article/pii/S0277953617304100> (last viewed Aug. 9, 2017).

work told in three(ish) acts, I contextualize these conversations in the fears, desires, and frustrations of my lived experience.³⁶⁵

Hannah Partis-Jennings described in her paper the relation between a marine convicted of an Afghan insurgent's murder, and a line that he spoke to that insurgent while killing him, from Shakespeare's play, *Hamlet*.³⁶⁶ Partis-Jennings then relates these back to "access to military masculinity; the banishing of the feminine; and a process of mediation, performance, and interpretation."³⁶⁷

Heidi M. Gansen wrote in her literature published in *Sociology of Education* that teachers in preschool construct gendered identities among preschoolers.³⁶⁸ Gansen found that these teachers at times disrupt the preschoolers' sexual identities that they wish to construct for themselves—and occasionally resist such constructions.³⁶⁹ Preschoolers express these gendered attitudes in their play, and reproduce it in "peer interactions."³⁷⁰ Gansen made these findings after analyzing "ethnographic data" from nine classrooms for a ten-month period.³⁷¹

Academics exert influence over their students through their social interactions to a point where the student adopts some or all of the academic's worldview.³⁷² Edward Ward, then a student at DePaul University, stands as such an example.³⁷³ Ward experienced an objectively difficult freshman year,

³⁶⁵ Shawn E. Edmonds, Abstract: *Connected to Orlando: An Autoethnography in Three(ish) Acts*, SAGE J. (first published July 25, 2017), <http://journals.sagepub.com/doi/abs/10.1177/1077800417718293?journalCode=qixa> (last viewed Aug. 9, 2017).

³⁶⁶ Hannah Partis-Jennings, Abstract: *Military Masculinity and the Act of Killing in Hamlet and Afghanistan*, SAGE J. (first published July 13, 2017), <http://journals.sagepub.com/doi/abs/10.1177/1097184X17718585?journalCode=jmma> (last viewed Aug. 9, 2017).

³⁶⁷ *Id.*

³⁶⁸ Heidi M. Gansen, Abstract: *Reproducing (and Disrupting) Heteronormativity: Gendered Sexual Socialization in Preschool Classrooms*, 90 SOC. OF EDUC. 255, <http://journals.sagepub.com/doi/abs/10.1177/0038040717720981> (last visited Aug. 9, 2017).

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² See, e.g., Donyae Lewis, *From Homeless to Leader*, Student Eyes State Office, THE DEPAULLA (Feb. 16, 2016), <http://depaulliaonline.com/2016/02/14/homeless-to-leader-edward-ward-move/>.

³⁷³ See *id.*

which included a spiral into a suicidal depression after a breakup with a girlfriend.³⁷⁴ One of his professors, Valerie Johnson, saw his struggles, and steered him in a direction that allowed him to focus on self-improvement.³⁷⁵ By all accounts, Johnson's mentoring and influence helped Ward become more civic-minded, engage in volunteerism and the community at-large, allow education to refine him, and focus on becoming a better man.³⁷⁶

Unfortunately, Ward, with some fellow academic colleagues, felt it necessary to interrupt an event hosted on campus by the DePaul College Republicans.³⁷⁷ The group made Milo Yiannopoulos their guest speaker for the evening.³⁷⁸ The event at first progressed as planned before Ward and his associates stormed the stage, and disrupted the event to the point where they stopped it.³⁷⁹ Ward stated that he refused to "apologize for refusing to allow a racist, bigot to spew his hatred on DePaul's campus," or "for shutting the event down."³⁸⁰ In a later interview, Ward said that he felt physically threatened by Yiannopoulos's speech, and said that he accepted free speech, but not hate speech.³⁸¹ Johnson backed Ward's disruption of the Yiannopoulos event and affirmed his perspective that the event exhibited "bigotry."³⁸²

C. Effects beyond the University Environment

In affirming narrowly-tailored remedial racial diversity state university admissions policies, Justice O'Connor wrote in *Grutter v. Bollinger* that:

[N]umerous studies show that student body diversity promotes learning outcomes, and "better prepares students

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ Emma Krupp, Kirsten Onsgard & Matthew Paras, *Protesters Shut Down Yiannopoulos Speech*, THE DEPAULIA (May 24, 2016), <http://depauliaonline.com/2016/05/24/depaul-protesters-shut-down-yiannopoulos/>.

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ Interview by Lukas Mikelionis, Reporter, Heat Street, with Edward Ward (May 25, 2016).

³⁸² Allum Bokhari, *Meet Valerie Johnson, The Radical Professor Indoctrinating DePaul's Black Students*, BREITBART (May 25, 2016), <http://www.breitbart.com/milo/2016/05/25/meet-radical-professor-indoctrinating-depauls-black-students/>.

for an increasingly diverse workforce and society, and better prepares them as professionals.” [citations omitted]

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. [citations omitted] What is more, high-ranking retired officers and civilian leaders of the United States military assert that, “[b]ased on [their] decades of experience,” a “highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security.” [citation omitted] The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. [citation omitted] At present, “the military cannot achieve an officer corps that is *both* highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.” [citation omitted] (emphasis in original) To fulfill its mission, the military “must be selective in admissions for training and education for the officer corps, and it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting.” [citation omitted] (emphasis in original)³⁸³

Grutter demonstrates clearly that both corporate business and government have certain employment demands, and that both fulfill these employment demands by hiring students after graduation from college.³⁸⁴ When students accept these jobs from areas of government or big business, they contribute not only their labors, but their ideas also—their experiences and what they learned in college.³⁸⁵

Recently, Google involved itself in an imbroglio over an initially internal memo which leaked to the outside world, and received coverage in

³⁸³ *Grutter v. Bollinger*, 123 S. Ct. 2325, 2340 (2003).

³⁸⁴ *See id.*

³⁸⁵ *See id.*

the news.³⁸⁶ James Damore, a Google engineer, wanted to address a problem that he saw in Google's culture: a strong, stifling left wing bias that valued diversity and gender equity to a point of morality.³⁸⁷ Damore began by noting from the start that he favored diversity and gender equality, but noted that Google had a policy of affirmative discrimination against white males in its pursuit of these goals.³⁸⁸ He suggested in his memorandum that Google address gender parity problems by creating more executive positions that accommodate camaraderie traits—a trait more common among females, he noted.³⁸⁹ He further maintained that the culture at Google, and how it treats ideas that run counter to the company mainstream, that:

While Google hasn't harbored the violent leftists protests that we're seeing at universities, the frequent shaming... in our culture has created the same silence, psychologically unsafe environment.³⁹⁰

He also noted that this mentality comes from an empathy for the perceived downtrodden minorities—that Google's culture embraced to the point of blocking out other options.³⁹¹ He also noted in a footnote that the oppressor-oppressed dynamic bore similarities to and had origins in Marxist theory.³⁹² Damore explained that Google puts itself in danger as a company for this because conservatives possessed traits that Google's current mainstream lacked.³⁹³

Google issued a formal initial response within hours of the memorandum's public publication from its Vice-President of Diversity, Integrity & Governance, Danielle Brown.³⁹⁴ She condemned the memorandum as offensive to women and minorities.³⁹⁵ Google also fired

³⁸⁶ See Kate Conger, *Exclusive: Here's The Full 10-Page Anti-Diversity Screed Circulating Internally at Google [Updated]*, GIZMODO (Aug. 5, 2017, 7:25 PM), <http://gizmodo.com/exclusive-heres-the-full-10-page-anti-diversity-screed-1797564320>.

³⁸⁷ *Id.*; see Samantha Schmidt, 'I'm Not a Sexist': Fired Google Engineer Stands Behind Controversial Memo, WASH. POST (Aug. 10, 2017, 7:15 AM), https://www.washingtonpost.com/news/morning-mix/wp/2017/08/10/im-not-a-sexist-fired-google-engineer-stands-behind-controversial-memo/?utm_term=.94b509d4b843.

³⁸⁸ See Conger, *supra* note 386.

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ See *id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

Damore for “advancing harmful gender stereotypes” in contravention of Google’s company rules.³⁹⁶ Further, some fellow ex-associates leaked internal Google postings where Google employees stated their intention to create a blacklist for those who opposed Google’s diversity programs.³⁹⁷ In the aftermath, Damore, reiterated that Google’s virulent left-wing culture of the nature revealed in his memorandum, stating that the workplace culture made right-wingers conceal their true views.³⁹⁸ YouTube’s chief, Susan Wojcicki, invoking her own daughter’s emotions, thought it a tragedy that new generation had exposure to Damore’s views.³⁹⁹ Google owns YouTube as one of its properties.⁴⁰⁰

Google also owns AdSense, a company that distributes advertisements within YouTube videos within its terms and service conditions.⁴⁰¹ The British Government, and a number of companies, such as A.T.&T., Verizon, Audi, Toyota and McDonald’s began an advertisement boycott on Google, AdSense and YouTube.⁴⁰² The governing bodies cited concerns that YouTube and AdSense showed their advertisements on content containing hate speech— such as white nationalism, homophobia, and sexism—and terrorist advocacy.⁴⁰³

Google responded by conducting a full review of how it blocked and allowed advertisements on YouTube videos, which lasted two months.⁴⁰⁴ At the conclusion, Google announced that AdSense would no longer target an entire website, and shifted to targeting web pages.⁴⁰⁵ Under the website-

³⁹⁶ Daisuke Wakabayashi, *Contentious Memo Strikes Nerve Inside Google and Out*, N.Y. TIMES (Aug. 8, 2017), <https://www.nytimes.com/2017/08/08/technology/google-engineer-fired-gender-memo.html>.

³⁹⁷ *Id.*

³⁹⁸ Schmidt, *supra* note 387.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ James Titcomb, *Google Promises Stricter Control over Advertising Network*, THE TELEGRAPH (U.K.) (May 15, 2017, 5:01 AM) [hereinafter *Google Promises Stricter Control*], <http://www.telegraph.co.uk/technology/2017/05/15/google-promises-stricter-control-advertising-network/>.

⁴⁰² *Id.*; Nick Statt, *AT&T and Verizon Pull Ads from Google and YouTube over Hate Speech*, THE VERGE (Mar. 22, 2017, 6:09 PM), <https://www.theverge.com/2017/3/22/15029214/att-verizon-google-youtube-pull-ads-boycott-hate-speech>; Lara O’Reilly, *Google Responds to YouTube Advertiser Boycott: ‘We Can Do a Better Job’*, BUS. INSIDER (Mar. 17, 2017, 6:12 AM), <http://www.businessinsider.com/google-responds-to-youtube-ad-boycott-we-can-do-a-better-job-2017-3>.

⁴⁰³ Statt, *supra* note 402.

⁴⁰⁴ O’Reilly, *supra* note 402.

⁴⁰⁵ *Google Promises Stricter Control*, *supra* note 401.

targeting regime, Google indicated a reluctance to halt AdSense revenues to sites that signed a terms of service agreement unless the site committed repeated violations of terms of service.⁴⁰⁶ In the new page-targeting regime, Google's Director of Sustainable Ads, Scott Spencer noted that "[p]age level action lets us be more surgical on how we take policy action. We can do so more quickly because we don't need a certain number...."⁴⁰⁷ Though Google appeared to change the policy to placate its advertising partners, it did gain revenues to \$24.8 billion dollars in April, in the heat of the boycott.⁴⁰⁸ Google's 67.5% market share holding as of March 2014 only adds to the impression of largess.⁴⁰⁹

YouTube recently changed how it identified and remove what it classifies as inappropriate video content.⁴¹⁰ YouTube noted that it placed an increased reliance on robots flagging videos.⁴¹¹ The robots flagged more than three-quarters of the removed videos "before receiving a single human flag."⁴¹² YouTube also announced that it implemented a search engine system which contained trip wires for certain keywords.⁴¹³ If a word in the search engine matches any "sensitive keywords," the search engine directs the user to videos designed to counteract "extremist messages."⁴¹⁴ Further, YouTube also created an entire separate video state for certain flagged videos that do not violate YouTube's Terms of Service, but contain what it terms "controversial religious or supremacist content."⁴¹⁵ YouTube plans on preventing monetization through AdSense of these videos, disabling comments, and ratings, and blocking the video from ever featuring on YouTube's main page.⁴¹⁶ As of August 2017, YouTube holds the second-most active users on

⁴⁰⁶ See *id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ See *id.*

⁴⁰⁹ *comScore Releases March 2014 U.S. Search Engine Rankings*, COMSCORE (Mar. 2014) [hereinafter *March 2014 U.S. Search Engine Rankings*], <http://www.comscore.com/Insights/Press-Releases/2014/4/comScore-Releases-March-2014-U.S.-Search-Engine-Rankings> (last visited Aug. 10, 2017).

⁴¹⁰ See *An Update on Our Commitment to Fight Terror Content Online*, YOUTUBE OFFICIAL BLOG (Aug. 1, 2017), <https://youtube.googleblog.com/2017/08/an-update-on-our-commitment-to-fight.html>.

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ See *id.*

its social media website with one-and-a-half billion users worldwide.⁴¹⁷ Only Facebook tops this with its over two billion active users.⁴¹⁸

Twitter represents another platform that exhibits signs of silencing opinions it deems unsavory.⁴¹⁹ Twitter did this at one time to the race realist figure Richard Spencer by suspending his account; though his content delved into racism, his post contained nothing otherwise objectionable.⁴²⁰ Twitter also did the same to Kassy Dillon, a conservative columnist.⁴²¹ Twitter engaged in a prolonged battle with Milo Yiannopoulos, where it initially de-verified his account, then suspended it altogether after he sent his Twitter followers to poke fun at the actress Leslie Jones.⁴²² The President Trump's son, Eric Trump, accused Twitter of censorship after it obscured a tweet because it contained sensitive content.⁴²³ The tweet covered a story featured on the Drudge Report that covered the monthly job reports.⁴²⁴ Further, during arguments in a state social media case, Justices Kennedy, Alito, Kagan and Ginsburg all indicated a willingness to regard social media as a public square, and subject to free speech jurisprudence.⁴²⁵ Alexa ranks Twitter as the twelfth most visited site in the world and eighth in the United States.⁴²⁶ Statistica notes that Twitter has the tenth-most active users for August 2017 at 328 million.⁴²⁷

⁴¹⁷ *Most Famous Social Network Sites Worldwide As of August 2017, Ranked by Number of Active Users (in Millions)*, STATISTICA [hereinafter *August 2017 Most Famous Social Network Sites Worldwide*], <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (last visited Aug. 11, 2017).

⁴¹⁸ *Id.*

⁴¹⁹ Compare Conger, *supra* note 386, with David Frum, *Twitter's Misbegotten Censorship*, THE ATL. (Nov. 16, 2016), <https://www.theatlantic.com/politics/archive/2016/11/twitter-censorship-will-only-empower-the-alt-right/507929/>.

⁴²⁰ Frum, *supra* note 419.

⁴²¹ Rudy Takala, *Move over Milo: Twitter Bans Another Conservative Journalist*, WASH. EXAM'R (July 25, 2016, 11:42 AM), <http://www.washingtonexaminer.com/move-over-milo-twitter-bans-another-conservative-journalist/article/2597565>.

⁴²² See Frum, *supra* note 419.

⁴²³ Ali Breland, *Eric Trump Accuses Twitter of Censorship*, THE HILL (Aug. 4, 2017, 3:56 PM), <http://thehill.com/policy/technology/345377-eric-trump-thinks-twitter-censored-him>.

⁴²⁴ *Id.*

⁴²⁵ Mark Grabowski, *Twitter's Censorship May Be Unconstitutional*, WASH. EXAM'R (Mar. 14, 2017, 8:00 AM), <http://www.washingtonexaminer.com/twitters-censorship-may-be-unconstitutional/article/2617261>.

⁴²⁶ *twitter.com Traffic Statistics*, ALEXA, <http://www.alexa.com/siteinfo/twitter.com> (last visited Aug. 11, 2017).

⁴²⁷ *August 2017 Most Famous Social Network Sites Worldwide*, *supra* note 417.

Facebook's operations in Silicon Valley operates in a way that suggests a serious desire and means for expansion.⁴²⁸ In describing efforts at buyouts and copying competitor social media products and features, *Vanity Fair* noted that:

Facebook has been carefully targeting Silicon Valley upstarts, cataloging potential rivals in an internal database and leveraging its massive user base to neutralize any that begin to pose a threat [to them].⁴²⁹

Facebook engaged in mood manipulation research by manipulating the Trending News feed to input happy and sad stories, and a lack of stories to study about the user mood effects.⁴³⁰ Though the study told of only a small shift in Facebook's aggregate users' mood, the study clearly demonstrated a shift, and the large user numbers suggested a measurable numeric impact.⁴³¹ The study also possibly underestimated emotive impacts, as the computer systems observing user emotions lumped false positives into true negative messages, and *vice versa*.⁴³² Facebook's head and founder, Mark Zuckerberg also noted that his company has research for telepathy technology for Facebook ongoing.⁴³³

The C.O.O. of Facebook, Sheryl Sandberg, advocates for revamping an entire business structure to ensure gender and racial parity.⁴³⁴ Specifically, she states that:

⁴²⁸ See Maya Kosoff, *Is Mark Zuckerberg Killing Silicon Valley?*, VANITY FAIR (Aug. 10, 2017, 4:00 PM), <https://www.vanityfair.com/news/2017/08/mark-zuckerberg-competition-silicon-valley>.

⁴²⁹ *Id.*

⁴³⁰ Robinson Meyer, *Everything We Know About Facebook's Secret Mood Manipulation Experiment*, THE ATL. (June 28, 2014), <https://www.theatlantic.com/technology/archive/2014/06/everything-we-know-about-facebooks-secret-mood-manipulation-experiment/373648/>.

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ James Titcomb, *Mark Zuckerberg Confirms Facebook Is Working on Mind-Reading Technology*, THE TELEGRAPH (U.K.) (Apr. 19, 2017, 8:09 PM) [hereinafter *Facebook Is Working on Mind-Reading Technology*], <http://www.telegraph.co.uk/technology/2017/04/19/mark-zuckerberg-confirms-facebook-working-mind-reading-technology/>.

⁴³⁴ Sheryl Sandberg, *Sheryl Sandberg: Pay Gap Holds Us All Back*, U.S.A. TODAY (Apr. 4, 2017, 5:02 AM), <https://www.usatoday.com/story/opinion/2017/04/04/pay-gap-women-equal-sheryl-sandberg-column/99954086/>.

Businesses should conduct pay audits by gender and race and ensure fairness in hiring and promotions. They can do this by putting in place clear and consistent criteria, training managers to spot gender bias in their decision making, and tracking outcomes to make sure they're not systematically passing up women or rating them more harshly.⁴³⁵

Sandberg also expressed concern that in order to close what she perceives as a "wage gap," there needs to be parity among the sexes in promotions.⁴³⁶ She has stated that Facebook practices all of the forgoing proposals "for many years."⁴³⁷ This analysis which Google also expresses within the workplace culture prompted Damore to speak out about the problems that this culture brings in his memorandum.⁴³⁸

Facebook employees also manipulated the platform's trending news section, but unlike researcher manipulation, these employees engaged in active, blatant censorship.⁴³⁹ *Gizmodo* described the typical employee manned at the trending news section, called "curators," as:

[A] small group of young journalists, primarily educated at Ivy League or private East Coast universities, who curate the "trending" module on the upper-right-hand corner of the site.⁴⁴⁰

Some curators who spoke on the condition of anonymity revealed that Facebook's trending news section did not operate as a body that merely allowed news stories to rise and fall on the platform organically.⁴⁴¹ Rather, the curator's supervisors told these curators and other curators to suppress content covering stories that had a right-wing bent or interest, such as the

⁴³⁵ *Id.*

⁴³⁶ See David Brancaccio, *Sheryl Sandberg: 'We All Deserve Equal Pay'*, MARKETPLACE (Apr. 4, 2017, 5:42 AM), <https://www.marketplace.org/2017/04/04/business/sheryl-sandberg-lean-interview>.

⁴³⁷ See *id.*; Sandberg, *supra* note 434.

⁴³⁸ Compare Brancaccio, *supra* note 436, and Sandberg, *supra* note 434, with Conger, *supra* note 386.

⁴³⁹ Compare Michael Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative News*, GIZMODO (May 9, 2016, 9:10 AM), <http://gizmodo.com/former-facebook-workers-we-routinely-suppressed-conser-1775461006>, with Meyer, *supra* note 430.

⁴⁴⁰ Nunez, *supra* note 439.

⁴⁴¹ *Id.*

I.R.S. scandal with Lois Lerner.⁴⁴² These curators also noted that their supervisors also wanted to inject stories into the trending news section that otherwise would not rise organically that had a left-wing bent or interest, such as a Black Lives Matter protest.⁴⁴³ Though Facebook claimed that an internal non-independent investigation revealed no such manipulation, the curators had notes in their possession of what stories they blocked that bolstered their story.⁴⁴⁴

Ideological concerns which criticize attitudes perceived as expressing anti-minority sentiments appear more prevalent in Western Europe than in the United States, expressed through Google's attitudes.⁴⁴⁵ In a northern English city called Rotherham, a court of law convicted eight Pakistani men of numerous rape, grooming, indecent assault, and false imprisonment of teenage girls from a white working class background.⁴⁴⁶ In the shadow of the trial, the British government published a report that showed that the police refused to investigate reports coming from the victims of these crimes, in the face of D.N.A. evidence and other credible evidence.⁴⁴⁷ The report cited an internal culture and political pressure from Rotherham's left-wing council of not appearing racist toward Pakistanis as the reason why the police refused to investigate credible reports.⁴⁴⁸ Further, news reports note that this type of 'anti-racist' culture remains firmly in place in Rotherham and elsewhere in the United Kingdom.⁴⁴⁹

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ Compare Josh Halliday, *Rotherham: Eight Men Jailed for Sexually Exploiting Teenage Girls*, THE GUARDIAN (U.K.) (Nov. 4, 2016, 9:42 PM), <https://www.theguardian.com/uk-news/2016/nov/04/rotherham-child-sexual-exploitation-eight-men-jailed>, with Schmidt, *supra* note 391.

⁴⁴⁶ Halliday, *supra* note 445.

⁴⁴⁷ Adam White, *Three Girls: what really happened in the Rochdale sex abuse scandal?*, THE TELEGRAPH (U.K.) (July 3, 2017, 6:28 PM), <http://www.telegraph.co.uk/tv/0/three-girls-does-start-really-happened-rochdale-sex-abuse-scandal/>; Safraz Manzoor, *The England That Is Forever Pakistan*, N.Y. TIMES (Sept. 15, 2014), <https://www.nytimes.com/2014/09/16/opinion/multiculturalism-and-rape-in-rotherham.html>.

⁴⁴⁸ Manzoor, *supra* note 447.

⁴⁴⁹ See Mail Online Reporter, *Is Telford the New Rotherham? Horrific Reports of Widescale Grooming and Abuse in Town Dubbed Britain's 'Child Sex Capital'*, THE DAILY MAIL (Aug. 27, 2016, 6:43 PM), <http://www.dailymail.co.uk/news/article-3761809/Is-Telford-new-Rotherham-Horrific-reports-widescale-grooming-abuse-town-dubbed-Britain-s-child-sex-capital.html#ixzz4pTMjIQUZ>; Nick Gutteridge, *Rotherham Abuse Scandal: Horrific Reality of 'Industrial Scale' Child Grooming Revealed*, THE DAILY EXPRESS (Aug. 10, 2016,

III. ANALYSIS

The problems illustrated in the previous section definitively come from a virulent strain of left-wing ideology that implements implicitly an oppressor-oppressed model to guide its common goals and actions.⁴⁵⁰ Left-wingers who do not subscribe to these general parameters, however, do not represent the problem.⁴⁵¹ Accordingly, this ideology becomes distinct and delineable from the greater left-wing.⁴⁵² The ideology perceives the oppressors as the white male, and the oppressed as any non-white and any woman.⁴⁵³ These attitudes permeate throughout corporate culture, particularly in technology companies that control large shares of their markets, universities and academia, and even areas of the federal government itself.⁴⁵⁴ The fact that these attitudes found a deeper foundation abroad suggests, and this culture of protest motivated by this ideology confirms, that the possibility of the United States falling prey to this ideology's throes.⁴⁵⁵ Such is the threat that this grouping of people—the Violent Left—to United States citizens, that it demonstrates “an actual problem in need of solving.”⁴⁵⁶

To this end, this Note proposes:

- First, That Congress pass, pursuant to its War Powers,⁴⁵⁷ and the President sign into law the following provisions which shall remain in effect for five years:
 1. A prohibition of any educational institution instructing its student body on theories implementing an oppressor-oppressed model using race, sex, gender, orientation, and the like or successor theories.
 2. A grant of federal funds totaling ten percent of total gross company revenues or one-hundred-million

3:50 PM), <http://www.express.co.uk/news/uk/697583/Rotherham-abuse-scandal-child-grooming-gangs-industrial-scale-victims-CSE>.

⁴⁵⁰ See Conger, *supra* note 386; Beale, et al., *supra* note 319.

⁴⁵¹ See Conger, *supra* note 386; Beale, et al., *supra* note 319.

⁴⁵² See Conger, *supra* note 386; Beale, et al., *supra* note 319.

⁴⁵³ See Conger, *supra* note 386; Beale, et al., *supra* note 319.

⁴⁵⁴ See *Grutter*, 123 S. Ct. at 2340; Conger, *supra* note 386; Beale, et al., *supra* note 319; Edmonds, *supra* note 365; Turley, *supra* note 213; French, *supra* note 212.

⁴⁵⁵ See, e.g., Beale, et al., *supra* note 319; Halliday, *supra* note 445.

⁴⁵⁶ See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011).

⁴⁵⁷ See U.S. CONST. art. I, § 8, cl. 11.

dollars (whichever is greater) to any video or social media platform accessible via the internet that modifies its algorithmic formulae to discourage theories implementing an oppressor-oppressed model using race, sex, gender, orientation, and the like or successor theories.

3. A federal tax credit to video content creators that make content in opposition to theories implementing an oppressor-oppressed model using race, sex, gender, orientation, and the like or successor theories at a rate of two dollars per minute of video played by a viewer other than the content creator, where such video airtime can be demonstrated to the Internal Revenue Service.
- Second, That Congress pass, pursuant to its Spending Powers,⁴⁵⁸ and the President sign into law, a measure that requires that a learning institution refrain from maintaining indoctrinal courses and coursework as a condition for remaining eligible for future federal teaching and research grants. Religious learning institutions and courses are exempt from this provision within the context of instruction of its own religious practices.

The proposal accounted for Justice Jackson's concurring analysis in *Youngstown* where he made the observation that executive power reaches its apex when exercised with Congressional approval.⁴⁵⁹ In such circumstances, courts only strike down such an act when it reaches beyond the federal government's authority.⁴⁶⁰

With this stated, *Brown* requires that a restriction on speech "must be actually necessary to the solution," in order for such a law to pass strict scrutiny.⁴⁶¹ In this context, the Supreme Court's admonishment, that "[i]t is rare that a regulation restricting speech because of its content will ever be

⁴⁵⁸ See U.S. CONST. art. I, § 8, cl. 1.

⁴⁵⁹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 72 S. Ct. 863, 870–71 (1952) (Jackson, J., concurring).

⁴⁶⁰ *Id.*

⁴⁶¹ *Brown*, 131 S. Ct. at 2738; see also U.S. CONST. amend. I ("Congress shall make no law...abridging the freedom of speech....").

permissible,” cannot go unnoticed.⁴⁶² The *Playboy* case also stated explicitly that strict scrutiny applied in content-based regulations, regardless of whether the regulation amounted to a ban, or merely an increased burden in expressing the speech.⁴⁶³ Thus, where a compelling government interest exists, the government must normally adopt the more narrowly tailored policy as an alternative to the policy pursued by the government if a narrower option exists.⁴⁶⁴ “[S]ituations presenting some grave and imminent danger the government has the power to prevent” provides a possible outlet for content-based restrictions, though remains “most difficult for the government to prevail.”⁴⁶⁵

Also, because the proposal touches and concerns the internet, the newest form of communications and commercial intercourse, it must conform to the bounds of the Commerce Clause.⁴⁶⁶ *Lopez* requires that legislation regulate the use of channels or commodities in interstate commerce, protect an instrument or thing in such commerce, or otherwise “substantially affect” such commerce to conform to these bounds.⁴⁶⁷ Courts subject such power’s exercise to a rational review test.⁴⁶⁸ Accordingly, the court strikes down such laws only when no logical reason for a law facially appears or attaches from an offer of proof, or inordinately infringes on fundamental rights.⁴⁶⁹

The exercise of the spending power must attach in pursuit of “the general welfare,” and bear a relation to a federal interest.⁴⁷⁰ If this power places conditions on a State to receive funds, these conditions “must [attach] unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.”⁴⁷¹ Further, Congress cannot use the spending power to entice States to commit to an independently unconstitutional enterprise.⁴⁷²

⁴⁶² See *United States v. Playboy Entm’t Grp., Inc.*, 120 S. Ct. 1878, 1889 (2000).

⁴⁶³ *Id.* at 1886.

⁴⁶⁴ See *id.*

⁴⁶⁵ *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 514 (1991) (Kennedy, J., concurring).

⁴⁶⁶ See U.S. CONST. art. I, § 8, cl. 3.

⁴⁶⁷ *United States v. Lopez*, 115 S. Ct. 1624, 1630 (1995); see U.S. CONST. art. I, § 8, cl. 3.

⁴⁶⁸ *United States v. Carolene Products Co.*, 58 S. Ct. 778, 783 (1938).

⁴⁶⁹ *Id.* at 783, 783 n.4.

⁴⁷⁰ *South Dakota v. Dole*, 107 S. Ct. 2793, 2796 (1987).

⁴⁷¹ *Id.*

⁴⁷² *Id.* at 2798.

Most of the proposal implicates War Powers that allow more in the exercise of federal power than otherwise.⁴⁷³ Even so:

[The war power is] a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.⁴⁷⁴

Nonetheless, so long as it falls within the scope of the needed powers, the war power implicates speech restrictions.⁴⁷⁵ Further, economic emergencies may also permit powers under the Commerce Clause that would otherwise not be permitted.⁴⁷⁶

Section A applies the case law to the educational institution prohibitions in the context of the War Power and Freedom of Speech. Section B implements the Commerce and Spending Powers case law upon the federal fund grant to the online-media-platforms, and the per-minute-tax-credit-for-content-creators provisions. Section C uses Spending Powers jurisprudence on the anti-indoctrination provision.

A. The War Power & the Free Speech Restrictions Provisions

The Supreme Court's general normal standard for speech outside of war and emergency contexts presents itself in *Brandenburg* where punishment cannot attach for speech unless it creates "imminent lawless action."⁴⁷⁷ Nothing in this opinion will change *Brandenburg's* core standard inasmuch as it applies in all contexts outside of war.⁴⁷⁸ But protestor violence emerging from speech of the type concerned here receives its propellant as to basic premises from corners of society ranging from academia, to the internet.⁴⁷⁹ This problem remains entrenched without an end in sight, without

⁴⁷³ See U.S. CONST. art. I, § 8, cl. 11; *Korematsu v. United States*, 65 S. Ct. 193, 195 (1944).

⁴⁷⁴ *United States v. Maviglia*, 52 F. Supp. 946, 947 (D.N.J. 1943).

⁴⁷⁵ See, e.g., *Schenck v. United States*, 39 S. Ct. 247, 249 (1919); but c.f., *Brandenburg v. Ohio*, 89 S. Ct. 1827, 1832 (1969) (Douglas, J., concurring) ("Though I doubt if the 'clear and present danger' test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace.").

⁴⁷⁶ See *Wickard v. Filburn*, 63 S. Ct. 82, 89–91 (1942).

⁴⁷⁷ See *Brandenburg*, 89 S. Ct. at 1830.

⁴⁷⁸ *Id.*

⁴⁷⁹ See, e.g., Beale, et al., *supra* note 319; Nunez, *supra* note 442; Lewis, *supra* note 376.

government addressing this problem in a meaningful way.⁴⁸⁰ This situation creates an emergency sufficient to warrant using the War Power; for without this vigilance, the nation risks total subversion.⁴⁸¹ Such a warrant, combined with the War Power's use necessitates a different standard from *Brandenberg*, for this power contains the power to levy a successful defense.⁴⁸²

The original standard applicable to speech in *Schenck*, which required that the speech's content must pose a "clear and present danger" for evils that Congress sought to prevent, found first application in an emergency context.⁴⁸³ The defendant created, printed and distributed pamphlets to military men called to arms to defend the United States during the First World War for the purpose of causing obstruction of war efforts and insubordination.⁴⁸⁴ For this, the trial court tried and convicted him for a violation of the Espionage Act.⁴⁸⁵ The Supreme Court upheld his conviction unanimously, and in doing so, noted that:

When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured⁴⁸⁶

The Supreme Court applied this standard in contexts outside of war, but in situations where the perceived climate and act proved so severe that the "clear and present danger" standard applied in such an emergency context.⁴⁸⁷ The *Dennis* court faced a defendant that tried to organize a communist society into a political party, and have that party topple the United States government, through advocacy.⁴⁸⁸ The trial court convicted the defendant of the charges based upon that broad fact pattern.⁴⁸⁹ The Supreme Court applied Judge Hand's formulation of "clear and present danger," which took the

⁴⁸⁰ See *Grutter*, 123 S. Ct. at 2340; Conger, *supra* note 386; Beale, et al., *supra* note 319; Edmonds, *supra* note 365; Turley, *supra* note 213; French, *supra* note 212.

⁴⁸¹ Compare *Dennis v. United States*, 71 S. Ct. 857, 895 (1951) (Jackson, J., concurring), with *Grutter*, 123 S. Ct. at 2340, and Conger, *supra* note 386; Beale, et al., *supra* note 319, and Edmonds, *supra* note 365, and Turley, *supra* note 213, and French, *supra* note 212.

⁴⁸² Compare *Brandenberg*, 89 S. Ct. at 1830, with *Korematsu*, 65 S. Ct. at 197–98 (Frankfurter, J., concurring).

⁴⁸³ See *Schenck*, 39 S. Ct. at 249.

⁴⁸⁴ *Id.* at 248.

⁴⁸⁵ *Id.* at 247–48.

⁴⁸⁶ *Id.* at 249.

⁴⁸⁷ See *Dennis*, 71 S. Ct. at 861–62, 867–68.

⁴⁸⁸ *Id.* at 861–62.

⁴⁸⁹ *Id.*

“gravity of the evil” sought and subtracted from it the evil’s “improbability.”⁴⁹⁰ The court praised this interpretation as the most inclusive one available.⁴⁹¹ Through this application, the Supreme Court affirmed the defendant’s conviction.⁴⁹²

The case at hand does not project a perfect analog to *Dennis*: there exists no discernable, concerted effort to topple the government in the case at bar.⁴⁹³ However, there does exist mutual interests between multiple factions that create a real propensity toward a similar result.⁴⁹⁴ Such a result appearing more prevalently in the United Kingdom only adds weight to this concern.⁴⁹⁵ The severity of the case at bar certainly creates more of a societal danger than handing out some pamphlets to the troops telling them not to fight.⁴⁹⁶

Applying the Hand formulation in *Dennis*,⁴⁹⁷ adherents of the ideology concerned seek to have their beliefs enshrined throughout American society.⁴⁹⁸ Whether by legitimate means or otherwise in the context of emergency remains irrelevant: the most radical among these ranks produce an evil result—the curtailment of the rights of others.⁴⁹⁹ Further, the goal not only has a real probability of success: to some extent, the adherents already succeeded.⁵⁰⁰ The improbability of success renders itself lessened when the United Kingdom’s police situation allows itself to elucidate its transmission into ideological success.⁵⁰¹

⁴⁹⁰ *Id.* at 867–68.

⁴⁹¹ *Id.* at 868.

⁴⁹² *Id.* at 871.

⁴⁹³ Compare *id.* at 868–69, with *Grutter*, 123 S. Ct. at 2340, and *Conger*, *supra* note 386, and *Beale, et al.*, *supra* note 319, and *Edmonds*, *supra* note 365, and *Turley*, *supra* note 213, and *French*, *supra* note 212.

⁴⁹⁴ Compare *Dennis* at 868–69, with *Grutter*, 123 S. Ct. at 2340, and *Conger*, *supra* note 386, and *Beale, et al.*, *supra* note 319, and *Edmonds*, *supra* note 365, and *Turley*, *supra* note 213, and *French*, *supra* note 212.

⁴⁹⁵ Compare *Mail Online Reporter*, *supra* note 449, and *Halliday*, *supra* note 445, with *Grutter*, 123 S. Ct. at 2340, and *Conger*, *supra* note 386, and *Beale, et al.*, *supra* note 319, and *Edmonds*, *supra* note 365, and *Turley*, *supra* note 213, and *French*, *supra* note 212.

⁴⁹⁶ Compare *Schenck*, 39 S. Ct. at 247–48, with *Grutter*, 123 S. Ct. at 2340, and *Conger*, *supra* note 386, and *Beale, et al.*, *supra* note 319, and *Edmonds*, *supra* note 365, and *Turley*, *supra* note 213, and *French*, *supra* note 212.

⁴⁹⁷ *Dennis* at 869.

⁴⁹⁸ See *Grutter*, 123 S. Ct. at 2340; *Conger*, *supra* note 386; *Beale, et al.*, *supra* note 319; *Edmonds*, *supra* note 365; *Turley*, *supra* note 213; *French*, *supra* note 212.

⁴⁹⁹ See *Grutter*, 123 S. Ct. at 2340; *Conger*, *supra* note 386; *Beale, et al.*, *supra* note 319; *Edmonds*, *supra* note 365; *Turley*, *supra* note 213; *French*, *supra* note 212.

⁵⁰⁰ See *Grutter*, 123 S. Ct. at 2340; *Conger*, *supra* note 386; *Beale, et al.*, *supra* note 319; *Edmonds*, *supra* note 365; *Turley*, *supra* note 213; *French*, *supra* note 212.

⁵⁰¹ See *Mail Online Reporter*, *supra* note 449; *Halliday*, *supra* note 445.

Curtailing this type of speech to places outside of the proposal's targeted areas allow a more searching scrutiny of these ideas in a way not currently provided now.⁵⁰² In doing so, the proposal otherwise keeps the rights of all unmolested. This addresses the university situation.

B. Spending Powers As Applied to Online Platforms

The free speech arguments use substantially the same fact pattern.⁵⁰³ Accordingly the arguments that allow the curtailment of speech in educational settings permit it on online platforms.⁵⁰⁴ Thus, the online provisions pass constitutional muster if Congress holds such power to pass such provisions under the Commerce Clause and the Spending Clause.⁵⁰⁵

Major internet companies produced online platforms that generate much in the way of information that many persons use and visit.⁵⁰⁶ Two billion people actively use Facebook alone.⁵⁰⁷ One-and-a-half billion actively use YouTube; another over 300 million people use Twitter.⁵⁰⁸ Google by far dominates the remainder of the search engine market by boasting more than two-thirds of the entire search engine market share.⁵⁰⁹ AdSense's distribution of advertisements to YouTube video makers helps contribute in Google's \$24.8 billion take for April 2017 alone.⁵¹⁰

This commercial and monetary largess allows for a finding that the worldwide web, at minimum, "substantially affects commerce" on its face—the minimum requirement under *Lopez*.⁵¹¹ The policy touches and concerns no fundamental rights besides the speech question previously addressed.⁵¹² Accordingly, a logical relation for the policy, whether facially obvious or

⁵⁰² See generally *Grutter*, 123 S. Ct. at 2340; Conger, *supra* note 386; Beale, et al., *supra* note 319; Edmonds, *supra* note 365; Turley, *supra* note 213; French, *supra* note 212.

⁵⁰³ See *supra* Part III, Section A.

⁵⁰⁴ See *id.*

⁵⁰⁵ See *Lopez*, 115 S. Ct. at 1630; *Dole*, 107 S. Ct. at 2796; *Carolene Products*, 58 S. Ct. at 783, 783 n.4.

⁵⁰⁶ See, e.g., *August 2017 Most Famous Social Network Sites Worldwide*, *supra* note 417.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

⁵⁰⁹ *March 2014 U.S. Search Engine Rankings*, *supra* note 409.

⁵¹⁰ See *Google Promises Stricter Control*, *supra* note 401.

⁵¹¹ Compare *August 2017 Most Famous Social Network Sites Worldwide*, *supra* note 417, and *March 2014 U.S. Search Engine Rankings*, *supra* note 409, and *Google Promises Stricter Control*, *supra* note 401, with *Lopez*, 115 S. Ct. at 1630.

⁵¹² See *supra* Part III, Section A.

proffered, suffices to meet constitutional muster under the Commerce Clause.⁵¹³

The spending under this proposal seeks to maneuver largess away from the heavily centralized giants of Google, Facebook, YouTube, and Twitter.⁵¹⁴ The proposal creates two outlets for doing just this. First, the provisions create financial incentives for currently existing, much smaller competitors to cooperate with government. Second, the provisions offer an incentive for individuals to enter the market, and target the centralized giants' market share. The provisions conform to Chief Justice Roberts's admonition that a law does not "compel[] individuals to become active in commerce by purchasing a product," because the product in question already exists.⁵¹⁵ Further, the provisions correspond to eroding what clearly amounts to a monopoly, given the market share and money flowing through these entities alone.⁵¹⁶ The Supreme Court long ago considered this a constitutionally valid power that conforms to a perfectly rational reason for Congress to intervene in economic matters.⁵¹⁷ This permits a finding of full *Lopez* compliance for these provisions under the Commerce Clause.

The facts mentioned also permit compliance under *Dole*.⁵¹⁸ The company facts show a clear federal interest in pursuit of "the general welfare."⁵¹⁹ As mentioned before, no other constitutional violation apparently

⁵¹³ *Carolene Products*, 58 S. Ct. at 783.

⁵¹⁴ See *August 2017 Most Famous Social Network Sites Worldwide*, *supra* note 417; *March 2014 U.S. Search Engine Rankings*, *supra* note 409; *Google Promises Stricter Control*, *supra* note 401.

⁵¹⁵ Compare *August 2017 Most Famous Social Network Sites Worldwide*, *supra* note 417, and *March 2014 U.S. Search Engine Rankings*, *supra* note 409, and *Google Promises Stricter Control*, *supra* note 401, with *N.F.I.B. v. Sebelius*, 132 S. Ct. 2566, 2587 (2012) [hereinafter *Obamacare I*] (Roberts, C.J., opinion).

⁵¹⁶ See *August 2017 Most Famous Social Network Sites Worldwide*, *supra* note 417; *March 2014 U.S. Search Engine Rankings*, *supra* note 409; *Google Promises Stricter Control*, *supra* note 401.

⁵¹⁷ See *Standard Oil Co. of New Jersey v. United States*, 31 S. Ct. 502, 519 (1911).

⁵¹⁸ Compare *August 2017 Most Famous Social Network Sites Worldwide*, *supra* note 417, and *March 2014 U.S. Search Engine Rankings*, *supra* note 409, and *Google Promises Stricter Control*, *supra* note 401, with *Dole*, 107 S. Ct. at 2796, 2798.

⁵¹⁹ Compare *August 2017 Most Famous Social Network Sites Worldwide*, *supra* note 417, and *March 2014 U.S. Search Engine Rankings*, *supra* note 409, and *Google Promises Stricter Control*, *supra* note 401, with *Dole*, 107 S. Ct. at 2796.

exists.⁵²⁰ Because the entities in question are companies and not State governments, the requirements for States do not apply.⁵²¹

C. Spending Powers in Learning Institutions

The anti-propaganda provision implicates itself here. The fact patterns that applied in the other sections apply substantially here.⁵²² The provisions specifically avoid the only other constitutional concern—an Establishment Clause question—by exempting religious institutions from this provision within the scope of its religious practices.⁵²³ Accordingly, because the provisions carry the possibility of implicating some state-run universities, the sole inquiry questions whether the conditions:

[Attach] unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.⁵²⁴

The provision's purpose foresees a time after the other provisions lapse, and rather rewards state university that avail itself to anti-propaganda measures by contributing toward university coffers. The state university always has the option to refuse the funding, and requires an affirmative choice on the university's part to gain the funding. Thus, the provision conforms to *Dole's* previously mentioned admonition with regard to the federal government's relation to the States, and therefore passes constitutional scrutiny.⁵²⁵

IV. RECOMMENDATIONS

There may be a risk of certain governmental sectors that show hostility to the provisions or otherwise refuse to enforce them.⁵²⁶ Strict enforcement of

⁵²⁰ See *Dole*, 107 S. Ct. at 2798; *supra* Part III, Section A.

⁵²¹ Compare *August 2017 Most Famous Social Network Sites Worldwide*, *supra* note 417, and *March 2014 U.S. Search Engine Rankings*, *supra* note 409, and *Google Promises Stricter Control*, *supra* note 401, with *Dole*, 107 S. Ct. at 2796.

⁵²² See *supra* Part III, Sections A–B.

⁵²³ See generally U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

⁵²⁴ See *Dole*, 107 S. Ct. at 2796. This concern does not apply to private universities, and as such, the provisions pass constitutional muster as to private universities. See *Id.* at 2796, 2798; *supra* Part III, Sections A–B.

⁵²⁵ See *Dole*, 107 S. Ct. at 2796.

⁵²⁶ See, e.g., Turley, *supra* note 213.

espionage laws allows a counteraction of this potential problem.⁵²⁷ An analog to espionage similar to the type in *Korematsu* for non-government civilians permits more stringent enforcement, and should attach to the enforcement state.⁵²⁸ An administrative task force within the Department of Justice and corresponding executive orders for the provisions permit its enforcement on the ground in universities and in the corresponding internet companies create an avenue for a civilian enforcement analog.

To enforce the provisions designed to remove this ideology most effectively, the executive needs to provide oversight over the courses and materials taught to college pupils. To that end, pursuant to the provisions, all universities would need prior governmental approval before it could teach a particular course or materials, or a corresponding deviance from an original course syllabus. For this, a board of censors in the Department of Education working in tandem with the Department of Justice task force shall peruse any submitted course syllabus, materials or amendment therein. This board would outlive this purpose to enforce the tax credit university provisions for participating universities, and enforce this provision in a similar manner to the ideological removal provisions.

In order to ensure best that internet media and video platforms that avail themselves of the federal funds from algorithm modifications, the government must require such platforms to claim and prove compliance. Thus, if a company fails to claim this, it shall receive no funds. Government can determine compliance by keeping federal officers in the headquarters where the company employees make algorithm modifications. Government can also use spy resources to delve into the company's algorithmic programming to ensure compliance. Government can cross-reference this by having other employees search for content relating to the ideology in question, or its opposition. YouTube, for example, already has the ability to so program its algorithms this way, because it currently programs its algorithms to target content its corporate culture finds repugnant.⁵²⁹

Similar procedures could be used to ensure compliance among participating content makers. Though the number of content makers would likely prove too great to have a federal officer check every single one, the government could still provide additional space on tax forms to ensure compliance for the subsidy. The content maker would then use this additional space to provide channel and video information, including the title

⁵²⁷ See, e.g., *id.*

⁵²⁸ See *Korematsu*, 65 S. Ct. at 216–17.

⁵²⁹ See *An Update on Our Commitment to Fight Terror Content Online*, *supra* note 410; Schmidt, *supra* note 387.

for the channel and applicable videos and the corresponding web link. From here, federal authorities would cross-check this information with duplicate claims from others—which would require further investigation—and spy resources to ensure the truth of the claimant's production claims. This includes checking the video's content and the creator's public claims to ensure against subversion and for conflict against the ideology in question. Any irregularities would warrant further governmental investigation.

V. CONCLUSION

Protestors at universities, such as those belonging to Antifa and B.A.M.N.—a number of which are students—promote a culture of violence at universities. Faculty and administration encourage this by promoting a world view that touches, concerns and fosters violence. This ideological culture also contributes to a culture of silence among dissenters which hinders or disables the normal discourse of ideas expected in a healthy environment. This culture of violence and silence corrode political society by hindering the normal flow of communicative discourse. Thus, these cultures must cease with all haste. Accordingly, the federal government should halt all instruction and class material distribution fueling this culture consistent with the foregoing policy prescriptions in this Note.

Internet search engine companies, and social media and video platforms share blame in abetting this culture of silence and violence. These companies promote similar views in their corporate culture, and act upon these views by removing income sources from dissenters, and hindering political opposition from promoting its message through such services' use. The size of these corporations ensure an economic and therefore political ideological monopoly.

Offering financial subsidies to such platforms helps to remedy the ideological problems in three ways. First, the companies in question receive a financial incentive to reform their behavior and remove any bad actors from their corporations that would hinder this goal. Second, competing and otherwise lesser companies receive support necessary to offer themselves as competition and an alternative to the companies in question. This allows competitors to grow and ensure a fairer market distribution balance. Third, people that want to offer an alternative to the corporations in question now have a financial means of doing so. This provides an additional check on these corporations' monopoly, and provides yet another outlet for an erosion of a monopoly. Thus, the federal government should offer such subsidies consistent to those offered within this Note.

Offering financial subsidies to video content creators allows a parallel benefit created on search engine and media platform companies to exist

among content creators. However, there also exists a collateral benefit of promoting content that promotes an ideological perspective hostile to the one dominant on universities and these corporate realms. This encourages a multiplier effect, promotes a repulsion from this ideology in question, and helps entrench a counter-culture of sorts. Further, the five year limit on all the War Powers provisions serves to prevent the ideological opposite from becoming violent, and instead permits a more even playing field that discourages violence in the future. As such, the federal government should create such subsidies consistent to those offered within this Note.

In a similar vein, the interest in removing ideological entrenchment from the universities exists to promote a freer campus environment for those that wish no harm or ill-will. Accordingly, the anti-propaganda measures exist in the interest of preventing other such future problems. This provision allows the government to stem any such overwhelming ideological tide to entrench itself into campus propaganda in classwork. This permits a more permanent de-escalation. Therefore, the federal government should permit such a subsidy consistent with the foregoing policy prescriptions in this Note.

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EQUATING CYBERTRAVEL WITH PHYSICAL TRAVEL: THE KEY TO PRESERVING A BORDERLESS INTERNET WITHOUT VIOLATING U.S. COPYRIGHT LAW

❖ NOTE ❖

*Michal Nowicki**

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I. INTRODUCTION

“We’re sorry, this content is not available outside of Canada. If you believe you received this message in error please contact us.”¹ The above text is an example of an error message displayed when Internet users try to access geographically restricted web content from outside the authorized viewing territory. Website operators restrict access to digital content geographically for several reasons, including to promote targeted advertising, to comply with local

¹ CBC TV, <http://watch.cbc.ca/shows/> (last visited May 22, 2017).

*J.D. Candidate, Class of 2018, University of Illinois College of Law.

laws and regulations, to prevent financial fraud, and, in the case of online streaming services like Netflix, to protect the intellectual property rights of content licensors.² Not surprisingly, Internet users frequently bypass these restrictions by employing a variety of methods designed to trick websites into thinking that the user is accessing them from a different country or region. Since governments do not yet specifically regulate the circumvention of geoblocks, its use has become a legal grey area,³ particularly where its purpose is to gain access to copyright-restricted content.

This Note examines the legality of cybertravel—the use of technological measures to trick a website into believing that the user is accessing it from a different location—for the sole purpose of accessing copyright-restricted web content not offered in the user’s physical location. In so doing, it focuses exclusively on the circumventor’s direct liability under the Digital Millennium Copyright Act (DMCA).⁴ Concluding that such geo-dodging violates § 1201, it urges courts to exempt cybertravel from the DMCA by equating it with physical travel. Part II provides background information on geolocation tools and the techniques used to circumvent them. Part III discusses the DMCA and explains why its plain language supports extending it to cybertravel. Part IV recommends that courts not apply the DMCA to cybertravel because cybertravel is analogous to physical travel in all material respects, and the right to travel internationally is implicitly protected by the Fifth Amendment to the United States Constitution. This Note argues that while the ordinary meaning of § 1201 of the DMCA supports extending it to copyright-evading cybertravel, the DMCA should not apply to cybertravel because an Internet traveler should be treated the same as a physical traveler, meaning that the law of his or her virtual location should apply to any geolocation evasion activity.

II. BACKGROUND

A. Geoblocking and Geolocation Tools

² See generally Marketa Trimble, *The Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 567, 586–90 (2012) (discussing these and other uses of geolocation).

³ Michelle Edelman, *The Thrill of Anticipation: Why the Circumvention of Geoblocks Should be Illegal*, 15 VA. SPORTS & ENT. L.J. 110, 111 (2015).

⁴ 17 U.S.C. § 1201 (2012). This Note does not address other, less controversial uses of cybertravel, such as to display advertisements from another region, or to access mobile or online banking from outside the user’s home country, nor does it analyze potential third-party liability for any copyright infringement.

Geoblocking is defined as “limiting the user's access to digital content, by the content distributor, based on the user's geographical location.”⁵ It functions as “an extension of digital rights management (DRM) that enables a copyright holder to control access to his work and control the release of content.”⁶ Traditional geolocation methods can be divided into three categories: self-reporting, Internet Protocol (IP) geolocation, and timing and distance-based techniques.⁷ As its name suggests, the self-reporting method asks the user to “report” their location.⁸ Examples of self-reporting mechanisms include location fields in an online registration form and dropdown menus listing countries which, when activated, take the user to the country-specific page of a website based on the user's selection.⁹ While self-reporting is sufficient for tailoring advertising or “facilitating convenient content” (e.g., pricing in local currency), it is inadequate for enforcement because users can easily misrepresent their location by choosing an option that does not correspond to their physical location.¹⁰ Moreover, if the website relies on cookies stored on the user's computer to track the user's location, the computer's future relocation will not update the reported location information.¹¹ Consequently, self-reporting tools are rarely used to prevent copyright infringement.¹²

By contrast, IP geolocation is used most frequently to enforce copyright holders' territorial rights.¹³ IP addresses are “numeric strings tied to a computer or other device accessing the Internet.”¹⁴ They are analogous to physical mailing addresses in that “they allow for accurate transmittal and receipt of data.”¹⁵ When a device accesses the Internet, it announces its IP address, thereby allowing others to geolocate it.¹⁶

Like self-reporting mechanisms, IP geolocation is presently incapable of pinpointing the user's precise physical location. Nevertheless, it can normally

⁵ Tal Kra-Oz, *Geoblocking and the Legality of Circumvention*, 57 IDEA: J. FRANKLIN PIERCE FOR INTELL. PROP. 385, 388 (2017).

⁶ Edelman, *supra* note 3, at 112.

⁷ Jerusha Burnett, *Geographically Restricted Streaming Content and Evasion of Geolocation: The Applicability of the Copyright Anticircumvention Rules*, 19 MICH. TELECOMM. & TECH. L. REV. 461, 465 (2012).

⁸ *Id.*

⁹ Trimble, *supra* note 2, at 592–93.

¹⁰ Burnett, *supra* note 7, at 466; Trimble, *supra* note 2, at 593.

¹¹ Burnett, *supra* note 7, at 466.

¹² *See id.*

¹³ Kra-Oz, *supra* note 5, at 389.

¹⁴ Burnett, *supra* note 7, at 466.

¹⁵ Trimble, *supra* note 2, at 594.

¹⁶ *Id.* at 596.

provide a “ballpark estimation of the user’s location.”¹⁷ This identification of the user’s approximate location is sufficient for copyright enforcement because most geoblocked content is not further restricted within national borders.¹⁸

There are two basic types of time-based geolocation tools. First, a website operator can use code to request time of day, which will, at a minimum, give it the user’s computer’s time zone.¹⁹ Alternatively, a website operator can measure the time necessary to receive a reply from the host or study the path taken to reach the host.²⁰ Finally, with the advent of smartphones, and the resulting emergence of mobile apps, some streaming services now geolocate subscribers using the GPS receivers built into their mobile devices.²¹

Website operators create virtual borders for several reasons.²² In the video streaming context, they do so because their license agreements with copyright holders, such as film studios and television stations, require them to protect the copyright holders’ exclusive right to control access to copyrighted content.²³ For example, under U.S. copyright law, the copyright holder has the exclusive right, subject to several exceptions, to “reproduce,” “prepare derivative works based upon,” “distribute,” and to “perform “and “display” publicly,” the copyrighted work.²⁴ Section 1201 of the DMCA, discussed in Part III, enforces this right.

B. Geolocation Evasion Tools

Internet users employ various methods to circumvent IP-based geoblocks. Trimble divides these methods into two categories: “self-sustained” and mainstream.²⁵ Self-sustained solutions are so named because they facilitate cybertravel through equipment owned by the user directly, or by the user’s

¹⁷ Kra-Oz, *supra* note 5, at 389.

¹⁸ *Id.*

¹⁹ Burnett, *supra* note 7, at 468.

²⁰ *Id.* at 469.

²¹ See Kra-Oz, *supra* note 5, at 388–89.

²² See *supra* note 2 and accompanying text.

²³ See Edelman, *supra* note 3, at 110 (noting that “[m]edia companies, and film studios in particular in the U.S., make a large part of their profits on a timed-window release system: movies come out in theatres before they are available to rent, before they are available to stream. This timed release includes a geographic component: movies (theatrical, home video, or streaming) are made available in some countries before others to allow for the effectiveness of ad campaigns, to tailor to the specific tastes of different markets, and to license content by territory.”)

²⁴ 17 U.S.C. § 106 (2012).

²⁵ Trimble, *supra* note 2, at 600–01.

friends or relatives in a foreign country.²⁶ As Trimble explains, these tools enable an Internet user to access remotely a computer located anywhere in the world, thereby taking advantage of its Internet connection and foreign IP address.²⁷ Mainstream tools include dial-up connections to internet service providers in foreign countries,²⁸ software and web-based proxy servers,²⁹ virtual private networks (VPNs) (some of which specialize in cybertravel to specific countries),³⁰ and Domain Name Service (DNS) proxy services like Unblock-US, which are designed to unblock specific websites.³¹ Although each geolocation tool operates differently, all of the above-mentioned tools make it appear as though the user is accessing geoblocked content from within the authorized territory by rerouting the user's Internet connection through a server in that territory.

III. ANALYSIS

The DMCA outlaws the circumvention of technological measures used to prevent unauthorized access to copyrighted material. It provides, in pertinent part, "No person shall circumvent a technological measure that effectively controls access to a work protected under [U.S. copyright law]."³² The DMCA defines circumvention of a technological measure as "to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner."³³ While one could otherwise argue that § 1201(a)(1)(A) does not cover cybertravel to evade copyright-motivated geoblocking because currently-used geolocation tools do not "*effectively* control access" to copyrighted works, given that it is "fantastically easy" to thwart geolocation tools,³⁴ the statute clarifies that "a technological measure 'effectively controls access to a work' if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the

²⁶ *Id.* at 601.

²⁷ *Id.* at 600–01.

²⁸ *Id.* at 601.

²⁹ *Id.* at 602.

³⁰ *Id.* at 603.

³¹ Edelman, *supra* note 3, at 115.

³² 17 U.S.C. § 1201(a)(1)(A) (2012).

³³ 17 U.S.C. § 1201(a)(3)(A) (2012).

³⁴ Trimble, *supra* note 2, at 599.

work.”³⁵ Consequently, the DMCA very likely covers copyright-infringing cybertravel.

A. Plain Language of the DMCA

Although there is no judicial precedent in the United States as to whether the DMCA’s direct anticircumvention provision encompasses copyright-infringing cybertravel,³⁶ a court would very likely conclude that it does, based on the plain language of § 1201(a)(1)(A). As Edelman correctly observes, geoblocking satisfies the statutory definition of a “technological measure” because “the detection of the location of the IP address of someone trying to gain access to a streaming provider is an ‘application of information’ that allows a streaming provider to control access to the work of the copyright holder.”³⁷ More specifically, geoblocking constitutes a “technological measure” protecting the copyright holder’s exclusive right to “distribute” copies of the copyrighted content to the public under 17 U.S.C. § 106.³⁸ Moreover, as explained above, the argument that geoblocking does not “effectively” control access to the restricted content because geolocation evasion tools are ubiquitous is unconvincing due to the low statutory “effective control” threshold.³⁹ Finally, the circumvention element is satisfied most easily, as DNS proxy services like Unblock-US not only offer the ability to “bypass” geoblocks, but are designed precisely and exclusively for that purpose.⁴⁰ Thus, if a U.S. court were to apply § 1201(a)(1)(A) of the DMCA, it would very likely conclude that it covers copyright-infringing cybertravel.

B. Exceptions to § 1201(a)(1)(A)

Although § 1201(a)(1)(A) is subject to several exceptions, none of them likely applies to copyright-infringing cybertravel. For instance, while the statute empowers the Librarian of Congress to exempt specific circumvention

³⁵ 17 U.S.C. § 1201(a)(3)(B) (2012); *see also* 321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085, 1095 (N.D. Cal. 2004) (rejecting the argument that a technological measure cannot be considered effective if its countermeasures are ‘widely available on the Internet’).

³⁶ Edelman, *supra* note 3, at 116. The only on-point case, *TVB Holdings, Inc. v. Tai Lake Commc’ns*, No. CV12-09809, 2013 WL 6417330 (C.D. Cal. Oct. 1, 2013), settled prior to judgment on the merits. Edelman, *supra* note 3, at 116 n.36.

³⁷ *Id.* at 118.

³⁸ *Id.*

³⁹ *See supra* note 35 and accompanying text.

⁴⁰ *Id.* at 119.

activities that “adversely affect,” or will likely “adversely affect” within the next three years, a user’s ability to “make noninfringing uses” of the types of copyrighted works in question,⁴¹ none of the exemptions currently in force address cybertravel; most, though not all, relate to compatibility with assistive technology used by the disabled, or to software interoperability.⁴² Other statutory exceptions, such as the exemptions for “nonprofit libraries, archives and educational institutions,”⁴³ “law enforcement, intelligence, and other government activities,”⁴⁴ interoperability-driven “reverse engineering,”⁴⁵ permitted “encryption research,”⁴⁶ and “permissible acts of security testing”⁴⁷ are much narrower and fall even farther outside the scope of geolocation evasion.

The only statutory exception that could potentially shield geolocation evaders from direct liability for copyright infringement under the DMCA relates to the protection of “personally identifying information” (PII) but even that exception is highly problematic.⁴⁸ Under this exception:

Notwithstanding the provisions of subsection (a)(1)(A), it is not a violation of that subsection for a person to circumvent a technological measure that effectively controls access to a work protected under this title, if—

(A) the technological measure, or the work it protects, contains the capability of collecting or disseminating personally identifying information reflecting the online activities of a natural person who seeks to gain access to the work protected;

(B) in the normal course of its operation, the technological measure, or the work it protects, collects or disseminates personally identifying information about the person who seeks to gain access to the work protected, without providing conspicuous notice of such collection or dissemination to such person, and without providing such person with the capability to prevent or restrict such collection or dissemination;

⁴¹ 17 U.S.C. § 1201(1)(B)–(C) (2012).

⁴² Burnett, *supra* note 7, at 476.

⁴³ 17 U.S.C. § 1201(d) (2012).

⁴⁴ 17 U.S.C. § 1201(e) (2012).

⁴⁵ 17 U.S.C. § 1201(f) (2012).

⁴⁶ 17 U.S.C. § 1201(g) (2012).

⁴⁷ 17 U.S.C. § 1201(j) (2012).

⁴⁸ 17 U.S.C. § 1201(i) (2012).

(C) the act of circumvention has the sole effect of identifying and disabling the capability described in subparagraph (A), and has no other effect on the ability of any person to gain access to any work; and

(D) the act of circumvention is carried out solely for the purpose of preventing the collection or dissemination of personally identifying information about a natural person who seeks to gain access to the work protected, and is not in violation of any other law.⁴⁹

The “and” at the end of subparagraph (C) indicates that all four elements must be satisfied to successfully invoke the PII exception. The Federal Trade Commission has traditionally defined PII as “information that can be linked to a specific individual including, but not limited to, name, postal address, email address, Social Security Number, or driver’s license number.”⁵⁰ While Jerusha Burnett acknowledges that not all geolocation tools are sufficiently precise to facilitate the collection of PII,⁵¹ she argues that since most websites collect other information about their visitors in addition to their location, the “aggregated” data may “suffic[e] to identify an individual.”⁵²

While Burnett’s conclusion may be correct, it is ineffective for protecting an Internet user’s right to travel in cyberspace for several reasons. First, it is unclear whether courts may consider data in the “aggregate” in determining whether such data suffices to identify an individual, or whether the user’s IP address must be capable of doing so alone. If the latter is true, Internet users who wish to stream geoblocked content unavailable in their country will not be able to rely on the PII exception because while IP geolocation tools are accurate enough to enforce national and even regional geoblocks,⁵³ they are too imprecise to reveal the user’s identity. This is especially true if the user accesses the websites from a shared network, whether it be from a private computer used by other members of their household, or from a public device at work, in a library, or at an Internet café. Therefore, while some geolocation tools may allow a website operator to discover the user’s identity by tracing their IP address to their Internet Service Provider, thereby satisfying subparagraph (A), many streaming services, especially ones available for free and without

⁴⁹ 17 U.S.C. § 1201(i)(1) (2012).

⁵⁰ Burnett, *supra* note 7, at 482.

⁵¹ *Id.* at 482–83.

⁵² *Id.* at 483.

⁵³ See *supra* notes 19–20 and accompanying text.

registration in the authorized viewing territory, might not actually collect PII, in which case subparagraph (B) is not met. Most important, though, even if a website operator can collect PII and in fact does so, it can easily defeat future § 1201(i) claims by providing clear notice to its visitors that it gathers their personal information.

IV. RECOMMENDATION

Since § 1201(a)(1)(A) of the DMCA very likely prohibits international cybertravel to access services like Netflix, and since none of its exceptions offer a reliable escape route, the key to preserving a borderless Internet is to take geolocation evasion outside the DMCA by treating cybertravel the same as physical travel: at least for copyright infringement liability purposes.⁵⁴ Under this approach, the cybertraveler would be subject to the law of their virtual location with regards to their online activity while using a geolocation evasion tool, just as a physical traveler is subject to the criminal law of the jurisdiction where he or she commits a crime. Thus, for example, a German resident accessing the U.S. version of Netflix from Germany via a VPN or DNS proxy could not be held liable for direct copyright infringement under the DMCA because he would be deemed within U.S. borders at the time of the act, where access to U.S. Netflix is lawful.

Although courts might be reluctant to adopt such a radical approach because it ignores the intellectual property interests of copyright holders, the argument for equating cybertravel with physical travel has constitutional and international support. In *Kent v. Dulles*, the Court recognized an implied constitutional right to travel internationally.⁵⁵ There, the plaintiffs' request for a U.S. passport was denied because of their affiliation with the Communist Party.⁵⁶ Without ruling on the constitutionality of the applicable regulation, the Court held that "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment."⁵⁷ In doing so, it explained:

Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a

⁵⁴ Cf. Trimble, *supra* note 2 at 572 (limiting this argument to cybertravel for non-infringing reasons). Trimble does not, however, advocate for treating all forms of cybertravel the same as physical travel.

⁵⁵ 357 U.S. 116, 125 (1958).

⁵⁶ *Id.* at 117–20.

⁵⁷ *Id.* at 125.

livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. . . . Freedom of movement also has large social values. Foreign correspondents and lecturers on public affairs need first-hand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. Students equip themselves for more fruitful careers in the United States by instruction in foreign universities. Then there are reasons close to the core of personal life—marriage, reuniting families, spending hours with old friends.⁵⁸

Although some of the values associated with freedom of movement cited in *Kent* are irrelevant to cybertravel, others, such as unique business and educational opportunities, apply to cybertravel and physical travel alike.⁵⁹ For example, under European Union (EU) law, a member state may not refuse to register, within its borders, a branch office of a company formed under the laws of another member state, solely because it finds that the branch office structure intends to escape unfavorable national laws.⁶⁰ In *Centros*, two Danish citizens living in Denmark wanted to set up a private limited liability company in Denmark.⁶¹ However, Danish law required a minimum capital investment of DKK 200,000 — the equivalent of approximately \$30,000 — to form a new private limited company.⁶² To avoid this obstacle, the partners registered their business in the United Kingdom, which had no minimum capital requirement.⁶³ They then applied for a branch office in Denmark.⁶⁴ The company did no business in the UK,⁶⁵ and a friend of the owners agreed that his home would constitute the company's registered office in the UK.⁶⁶ The Danish Trade and Companies Board rejected the company's application for a branch office because it concluded that its owners sought to circumvent Danish law by establishing a principal office, not a branch, in Denmark.⁶⁷ The

⁵⁸ *Id.* at 126–27.

⁵⁹ Trimble, *supra* note 2, at 641.

⁶⁰ Case C-212/97, *Centros Ltd. V. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-01459, ¶ 30.

⁶¹ *Id.* ¶ 2.

⁶² *Id.* ¶ 7.

⁶³ *Id.* ¶ 3.

⁶⁴ *Id.* ¶ 6.

⁶⁵ *Id.* ¶ 7.

⁶⁶ *Id.* ¶ 3.

⁶⁷ *Id.* ¶ 7.

company subsequently sued the Board under EU law to compel it to register a Danish branch office. The European Court of Justice (ECJ) held that “[T]he fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment” guaranteed by Articles 52 and 58 of the Treaty on the Formation of the European Union.⁶⁸ The court importantly clarified that “it is immaterial that the company was formed in the first Member State only for the purpose of establishing itself in the second, where its main, or indeed entire, business is to be conducted.”⁶⁹

Although EU cases do not bind American courts, the ECJ’s decision in *Centros* rests on the same broad legal grounds as *Kent*, and both cases support equating cybertravel with physical travel. While the two cases have been decided under the laws of two fundamentally different legal systems, both *Kent* and *Centros* recognize freedom of movement across borders as an inalienable right. Specifically, *Kent* does so in the context of international travel, whereas *Centros* accomplishes this in the context of international commerce. The fact that Denmark and the UK are both EU members does not defeat the analogy because even though both countries must comply with EU laws, they each still have their own national laws regulating domestic businesses, laws which control whenever they do not conflict with EU law.

Just as American and European entrepreneurs are free to register their businesses wherever they please, Internet users should be allowed to cybertravel so that streaming services and geolocation evasion services can continue to prosper. While there are no reliable estimates of how many streaming service subscribers use VPNs, restricting cybertravel would likely increase piracy,⁷⁰ because cybertravelers would no longer be able to access many of the territorially-restricted websites they visit today. As a result, the grey market for geolocation evasion we have now would likely turn into a black market for copyright-protected content. If governments allow such a black market to develop, it will become difficult, if not impossible, to eliminate it, since illegal activity is generally more difficult to monitor and control than semilegal conduct. Moreover, geolocation evasion services, especially DNS proxy providers like Unblock-US, would suffer or even go out of business. However,

⁶⁸ *Id.* ¶ 29.

⁶⁹ *Id.* ¶ 17.

⁷⁰ See Julia Greenberg, *For Netflix, Discontent Over Blocked VPNs is Boiling*, WIRED.COM (Mar. 7, 2016, 7:00 AM), <https://www.wired.com/2016/03/netflix-discontent-blocked-vpns-boiling/> (warning that Netflix’s crackdown on VPN usage may lead to piracy).

treating cybertravel the same as physical travel would prevent these problems because Internet users would be able to continue satisfying their thirst for entertainment through legitimate streaming services like Netflix, since they would have no need to resort to websites that have no right to broadcast the content to anyone. At the same time, VPN and proxy DNS providers would enjoy the same (if not greater) profits they make today.

Equating cybertravel with physical travel would also create new cultural and educational opportunities. First, bypassing Internet geoblocks allows emigrants to watch television shows from their native country not otherwise available for viewing in their new country, thereby enabling them to keep up with cultural changes in the same way they would if they physically visited that country. Likewise, an individual studying a foreign culture need not travel abroad to do so because he or she can gain valuable information from streaming documentaries, live events, and other geographically-restricted content from that country. In both situations, cybertravel is often preferable over physical travel because it is less costly and less time-consuming; VPN and DNS proxy subscribers pay a fraction of the price of a plane ticket, while rerouting one's Internet connection through a foreign server is instantaneous, compared with international physical travel, which lasts several hours.

Finally, equating cybertravel with physical travel would help restore a borderless Internet. As Trimble explains, the Internet was originally designed as a "decentralized network" without territorial boundaries.⁷¹ The U.S. Department of Defense admired this design because "such an architecture was more likely to withstand an enemy attack."⁷² Today, however, the Internet no longer functions as a borderless medium, in part due to widespread geoblocking worldwide. While making geolocation evasion easier or eliminating geoblocking altogether would not remove all territorial borders because governments regulate Internet usage in other ways, it would constitute a major step in that direction.

Restoring a borderless Internet would benefit cybertravelers in two important ways. First, it would promote free speech. Since cybertravelers would gain access to a global media market without fear that their favorite streaming service may someday block their VPN or proxy, they would be exposed to a wider variety of viewpoints. This increased exposure would give them opportunities to form new opinions, which they would be entitled to share with others. Second, since most geolocation evasion tools encrypt the user's Internet connection in addition to concealing their IP address, cybertravelers would enjoy greater privacy.

⁷¹ Trimble, *supra* note 2, at 675.

⁷² *Id.* at 676.

Although equating cybertravel with physical travel would harm copyright holders of geoblocked content, copyright holders could explore other avenues to offset their lost profits. For instance, instead of staggering releases, as many film studios do today, they could focus more on attractive advertising techniques to increase revenue. Additionally, the copyright owners of international live sporting events could appeal to their viewers' personal preferences. For instance, many Americans prefer foreign, English-language broadcasts of the Olympics over local coverage because NBC, the network with exclusive rights to stream the Olympics in the United States, constantly interrupts its broadcasts with commercials.⁷³ Content owners could take advantage of this flaw by advertising available commercial-free options. In both scenarios, content owners would relinquish the right to control access to their works, but their losses could be minimal, while consumers would have greater access to digital content.

V. CONCLUSION

While it remains “fantastically easy” to fake one’s virtual location,⁷⁴ the future of cybertravel to access copyrighted, geoblocked content is questionable because of anticircumvention laws like the DMCA. The ordinary meaning of the DMCA supports extending the statute to geolocation evasion because geoblocking qualifies as a “technological measure” implemented to control access to a copyrighted work, because it meets the “effective control” statutory threshold, and because copyright-infringing cybertravel occurs precisely to circumvent geoblocking.⁷⁵ However, since U.S. courts have not yet had the opportunity to so construe the DMCA, cybertravelers seeking to stream geographically-restricted content from outside the authorized viewing area still have hope. To protect their interests, courts and legislatures should treat cybertravel the same as physical travel. As discussed above, this recommendation has legal support.⁷⁶ While this proposal may upset content

⁷³ See Harriet Alexander, *NBC Criticized for “Worst Ever” Olympic Coverage in America*, THE TELEGRAPH (Aug. 10, 2016, 11:47 PM), <http://www.telegraph.co.uk/olympics/2016/08/10/nbc-criticised-for-worst-ever-olympic-coverage-in-america/> (noting that there were five commercial breaks in the first thirty minutes of NBC’s broadcast of the 2016 Summer Olympics opening ceremony); JENNI RYALL, *The NBC Olympics Coverage Is a Total, Commercial-Filled Nightmare*, MASHABLE.COM (Aug. 5, 2016), http://mashable.com/2016/08/05/nbc-olympics-fail/#pFELV_T_umqJ (encouraging Americans to watch British or Australian coverage of the Olympics).

⁷⁴ See *supra* note 34 and accompanying text.

⁷⁵ See *supra* Part III.

⁷⁶ See *supra* Part IV.

owners because it limits their ability to control access to their works, the commercial, educational, and cultural benefits of allowing cybertravel outweigh any harm to copyright holders, since content owners can adapt by adjusting their advertising campaigns to take advantage of the additional business cybertravel could bring to them. Moreover, lawful cybertravel would constitute a major step towards reviving a borderless Internet. In light of these considerations, governments should encourage cybertravel.

ILLINOIS BUSINESS LAW JOURNAL

TOEING THE LINE: IVANKA TRUMP AND JARED KUSHNER'S POSSIBLE CONFLICTS OF INTEREST AS FEDERAL EMPLOYEES

❖ NOTE ❖

*Elizabeth Rice**

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I. INTRODUCTION

Federal employees are required to follow certain ethical standards of conduct, including managing their business and financial assets to prevent any conflicts of interest in the course of their government employment.¹ With so many of President Trump's appointees to federal positions holding large amounts of business-related and financial assets, there is a definite possibility of these assets becoming problematic conflicts of interest for these appointees.² Ivanka Trump, President Trump's daughter, and Jared Kushner, her husband, have been made federal employees but still hold significant

¹ *Employees Entering Government*, U.S. OFF. OF GOV'T ETHICS (Mar. 31, 2017), <https://www.oge.gov/web/oge.nsf/Resources/Employees+Entering+Government>.

² Eliza Newlin Carney, *A White House Without Rules*, MOYERS & CO. (Mar. 17, 2017), <http://billmoyers.com/story/white-house-without-rules/>.

* J.D. Candidate, Class of 2019, at the University of Illinois College of Law.

financial and business-related assets.³ It is possible that these assets will result in conflicts of interest as the two perform their duties as federal employees.⁴ This Note will explore conflicts of interest more generally in Section II, a more specific analysis of conflict of interest as applied to Ivanka Trump and Jared Kushner in Section III, a recommendation for avoiding these potential conflicts of interest in Section IV, and will conclude in Section V.

II. BACKGROUND

Government employees are expected to adhere to certain ethical standards during the course of their employment.⁵ Because government employees are expected to legislate or act in areas that will affect business or financial matters, it is important that they remain impartial. Ethics laws in this area require that government employees achieve impartiality by removing themselves from any attachments that may cause a conflict of interest.⁶ When entering government employment, an employee or officer is expected to divest himself or herself of any business or financial holdings that might be affected by that employee's government actions, and resign from positions in any organizations that may be influenced by the employee's government actions.⁷ In some cases, even members of the employee's household will have to relinquish these interests.⁸ For example, if the wife of a federal employee who heads the EPA owns an alternative fuel source company which could benefit from the federal employee's influence over the EPA, she may be required to divest her company.⁹ Potential problems arise where government employees don't rid themselves of these assets and ties.¹⁰ The continued possession of these interests not only presents an ethical dilemma, but can also lead to the commission of a criminal offense.¹¹ 18 U.S.C. § 208, a criminal statute, governs conflicts of interests involving the business and financial interests of a federal employee:

³ Eric Lipton & Jesse Drucker, *Trump Couple, Now White House Employees, Can't Escape Conflict Laws*, N.Y. TIMES (Apr. 1, 2017), https://www.nytimes.com/2017/04/01/us/politics/ivanka-trump-jared-kushner-conflicts-business-empire.html?_r=0.

⁴ *Id.*

⁵ *Do It Right*, U.S. DEP'T OF JUSTICE (Sept. 4, 2014), <https://www.justice.gov/jmd/do-it-right>.

⁶ *Supra* note 1.

⁷ *Id.*

⁸ *Id.*

⁹ *See Id.*

¹⁰ *Id.*

¹¹ *Id.*

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest--

Shall be subject to the penalties set forth in section 216 of this title [18 USCS § 216].¹²

The statutory language defining the offense has been made purposefully broad, containing terms that cover as many possible violations as possible.¹³ The effect of these strings of terms is to prohibit any activity done as a government employee or officer, which would affect any financial interest of or related to the offender. The statute covers all federal government employees and officers, with a few notable exceptions. For example, the president is an executive branch employee, but is not covered by this statute.¹⁴ Other exceptions include the vice president, federal judges, and members of congress.¹⁵ The penalties for those engaging in conduct detailed in 18 U.S.C. § 208 include up to one year in prison and fines of up to \$50,000 per violation or the amount of money which the person offered or received for the prohibited conduct, depending on

¹² 18 U.S.C. § 208 (2017).

¹³ *United States v. Nevers*, 7 F.3d 59, 62 (5th Cir. 1993).

¹⁴ Lauren Carroll, *Giuliani: President Trump Will Be Exempt From Conflict-Of-Interest Laws*, POLITIFACT (Nov. 16, 2016, 11:00 AM), <http://www.politifact.com/truth-o-meter/statements/2016/nov/16/rudy-giuliani/giuliani-president-trump-will-be-exempt-conflict-i/>.

¹⁵ *Id.*

which amount is greater.¹⁶ Those who willfully engage in such conduct may be sentenced to up to five years in prison in addition to the aforementioned fines.¹⁷

Government employees who are unwilling to fully divest themselves of their assets have a few options to avoid commission of a crime under Section 208.¹⁸ They may choose to contain their business and financial holdings in a qualified trust, which must meet certain requirements.¹⁹ In both types of qualified trusts, the employee retains ownership of those assets contained in the trust, but those assets are no longer under his or her direct control or influence.²⁰ In a qualified blind trust, the employee effectively sells his or her assets and the money is reinvested into a portfolio of new assets, of which the employee knows no details.²¹ In a qualified diversified trust, the employee places their assets into a portfolio, which is diversified to the point where no one asset contained within will be seen as posing a conflict of interest.²² An employee may also be recused from the matter which conflicts with their assets, rather than divesting them.²³ When recused, the employee simply does not take part in the matter. Recusal is a viable option to remedy a conflict of interest, unless the matter involved is so central or critical to the employee's role in government that they could not possibly perform their job due to the need to recuse themselves.²⁴ In rare cases, the conflict of interest will be waived.²⁵ Generally, waiver is only an option in situations where the employee is not exempt from the statute, and divestiture and recusal are not viable options.²⁶

Business-related conflicts of interest have recently become a subject of concern, as many of President Trump's employees and appointees hold substantial financial and business-related assets.²⁷ The President's own assets would put him at risk for many potential conflicts of interest, if Section 208

¹⁶ 18 U.S.C. § 216 (2017).

¹⁷ *Id.*

¹⁸ *Do It Right*, *supra* note 5.

¹⁹ *Resolving Conflicts of Interest*, U.S. OFF. OF GOV'T ETHICS, <https://oge.gov/web/oge.nsf/Resources/Resolving+Conflicts+of+Interest>.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Newlin Carney, *supra* note 2.

applied to him.²⁸ The assets held by Ivanka Trump and Jared Kushner are especially problematic.²⁹ Ms. Trump now serves as an assistant to the President, and Mr. Kushner, a senior advisor to the President.³⁰ Now that the Ms. Trump and Mr. Kushner are federal employees, Section 208 applies to them.³¹ Whether these assets will result in criminal conflicts of interest and charges pursuant to the statute remains to be seen, and this issue will be a main topic of discussion in this Note.

III. ANALYSIS

Simply put, commission of an offense under 18 U.S.C. § 208 involves the following four elements:

- (1) "an officer or employee of the executive branch of the United States Government" (2) "participates personally and substantially as [***16] a Government officer or employee" (3) "in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter" (4) in which he knows he has a financial interest.³²

A study of several instances where a government employee has been indicted for violating Section 208 offers a clearer picture of what constitutes a business or financial conflict of interest. In *United States v. Nevers*, the defendant was an executive branch employee working as a trade specialist for the International Trade Division and was indicted under Section 208.³³ The court found that, as a government employee, he knowingly participated in a matter involving a prospective International Trade Division client that had been recommended by a company in which he knew his wife had a financial interest.³⁴ Defendant was convicted under Section 208(a).³⁵ In *United States v. Selby*, the defendant was an official at a government agency and was convicted under Section 208

²⁸ Jeremy Venook, *Donald Trump's Conflicts Of Interest: A Crib Sheet*, THE ATLANTIC (Jun. 9, 2017), <https://www.theatlantic.com/business/archive/2017/06/donald-trump-conflicts-of-interests/508382/>.

²⁹ Lipton & Drucker, *supra* note 3.

³⁰ *Id.*

³¹ *Id.*

³² 636 F.3d 630, 636 (D.C. Cir. 2011).

³³ 7 F.3d 59, 62 (5th Cir. 1993).

³⁴ *Id.* at 62–63.

³⁵ *Id.* at 63.

for knowingly recommending use of software made by a company for which her husband worked as a salesman, by promoting additional use of the product, and by taking part in the decision-making process on federal contracts or matters in which her husband had a financial interest.³⁶ The defendant in *United States v. Stadd* served as the interim Assistant Administration to the National Aeronautics and Space Administration (“NASA”) and the head of a consulting firm whose clients included the GeoResources Research Institute at Mississippi State University.³⁷ The *Stadd* defendant was involved in NASA’s decision to allocate \$12 million of a \$15 million congressional earmark to research, of which the aforementioned Research Institute received almost \$10 million.³⁸ The defendant knew he had a financial interest in this matter, and therefore, the court convicted him under Section 208.³⁹ In *United States v. Irons*, the court convicted defendant, an Education Program Officer for the Department of Health Education and Welfare (“HEW”), after finding he had committed several acts violating Section 208 while involved in negotiating a contract between HEW and a company in which he had a personal financial interest.⁴⁰

Ivanka Trump and Jared Kushner have been appointed to serve as federal employees by President Trump.⁴¹ The ethics laws governing senior officials in the executive branch require that new employees submit public finances, as well as assets and interests outside of the government, in order to identify potential conflicts of interest.⁴² Because of this, Ivanka Trump’s and Jared Kushner’s assets are on record and are known to the public.⁴³ Ms. Trump and Mr. Kushner, hold assets valued at least \$240 million and up to \$700 million between them.⁴⁴ Ivanka Trump’s company, a brand touting clothing and accessories that bears her name, is worth more than \$50 million.⁴⁵ Ms. Trump

³⁶ 557 F.3d 968, 971 (9th Cir. 2009).

³⁷ 636 F.3d 630, 632 (D.C. Cir. 2011).

³⁸ *Id.* at 637.

³⁹ *Id.* at 638.

⁴⁰ 640 F.2d 872, 872–875 (7th Cir. 1981).

⁴¹ Lipton & Drucker, *supra* note 3.

⁴² *Public Financial Disclosure*, U.S. OFF. OF GOV’T ETHICS, <https://www.oge.gov/web/oge.nsf/Public%20Financial%20Disclosure>.

⁴³ *Jared Kushner And Ivanka Trump Worth Up To \$700M In Combined Assets*, FOX NEWS (Apr. 1, 2017), <http://www.foxnews.com/politics/2017/04/01/jared-kushner-and-ivanka-trump-worth-up-to-700m-in-combined-assets.html>.

⁴⁴ Rebecca Ballhaus et al., *President Trump’s Advisors Made Big Money, Disclosures Show*, WALL ST. J. (Mar. 31, 2017, 11:33 PM), <https://www.wsj.com/articles/trump-adviser-steve-bannon-earned-at-least-1-4-million-last-year-1491008430?mg=id-wsj>.

⁴⁵ *Jared Kushner And Ivanka Trump Worth Up To \$700M In Combined Assets*, *supra* note 41.

also retains a stake in her father's Trump International Hotel, worth between \$5 million and \$25 million.⁴⁶

The assets that Ivanka Trump retains could potentially cause conflicts of interests in the course of her government employment, despite efforts to avoid such problems. Instead of selling her company or divesting it into a blind trust, Ms. Trump has chosen to step away from its day to day operations, leaving her top executive, Abigail Klem, in charge.⁴⁷ The assets of the company have been placed in a trust overseen by her husband's family, called the Ivanka M. Trump Business Trust.⁴⁸ It is unknown how much control Ms. Trump maintains over her company per this arrangement, but she still receives payments from her business holdings.⁴⁹ Even more problematic is the fact that Ms. Trump has been involved with international leaders from countries where her company does business since becoming a federal employee.⁵⁰ Ms. Trump sat beside Chinese President Xi Jinping at a dinner on April 6th, 2017, and on the very same day obtained three trademarks that would allow her brand to sell merchandise in China.⁵¹ These trademarks give Ms. Trump the exclusive right to sell her merchandise to a market of 1.4 billion people in China.⁵² These are exactly the sort of situations that might violate Section 208.⁵³ Ms. Trump's stake in her father's hotel is also concerning because members of foreign governments or organizations might stay there in order to gain the President's influence.⁵⁴

While Jared Kushner has divested a large portion of his assets, he still retains some business and financial holdings, which could pose ethical issues.⁵⁵

⁴⁶ David Smith, *Ivanka Trump And Jared Kushner Retain Property Assets While In White House*, THE GUARDIAN (Apr. 1, 2017, 5:18 PM), <https://www.theguardian.com/us-news/2017/mar/31/ivanka-trump-jared-kushner-financial-disclosure>.

⁴⁷ Rachel Abrams, *Despite A Trust, Ivanka Trump Still Wields Power Over Her Brand*, N.Y. TIMES (Mar. 20, 2017), <https://www.nytimes.com/2017/03/20/business/despite-trust-ivanka-trump-still-wields-power-over-her-brand.html?action=click&contentCollection=Politics&module=RelatedCoverage®ion=Marginalia&pgtype=article>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Lindsey Rupp & Caleb Melby, *Your Guide To Ivanka Trump's Potential Conflicts Of Interest*, BLOOMBERG POLITICS (Apr. 26, 2017, 4:00 AM), <https://www.bloomberg.com/news/articles/2017-04-26/being-ivanka-trump-brings-ethical-legal-pitfalls-quicktake-q-a>

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Smith, *supra* note 44.

⁵⁵ *Id.*

Kushner reportedly resigned from seats in more than 260 organizations and advisory boards and sold off more than fifty-eight businesses or investments in order to ready himself to take his position as a federal employee.⁵⁶ He chose to divest these assets based on the advice of his own lawyers, and that of the Office of Government Ethics.⁵⁷ While he retains some of his real estate assets, his lawyers believe that these holdings will not pose an ethical dilemma in the course of his employment, and that any conflicts will be easy to handle or avoid.⁵⁸ Another potential conflict could arise when it comes to Kushner's debts, including as much as \$25 million in liabilities to Deutsch Bank, a major lender to both the Trump and Kushner families' real estate ventures, and \$5 million in liabilities between Kushner and his father to Israel Discount Bank.⁵⁹ The debts Kushner holds at these international banks could pose problems because the interest of these banks could supersede the interest of the Trump Administration, causing conflicts for Kushner as he tries to perform his duties.⁶⁰

IV. RECOMMENDATION

It is possible that Ivanka Trump and Jared Kushner could avoid conflicts of interest by recusing themselves from any issues that could affect their assets. However, because Ms. Trump assists President Trump in international matters, her recusal from all matters involving countries where her company sells products may make it very difficult for her to perform her duties. The same problems exist with Mr. Kushner's real estate holdings. Because of his role as senior advisor to the President, he will encounter matters related to his assets to the point where recusal will not be a viable option if he is to continue to perform his duties as an executive branch employee. In order to best avoid conflicts of interest that would violate Section 208, Ivanka Trump and Jared Kushner would be advised to divest any and all of the business and financial assets mentioned above. The couple could simply sell their problematic assets, or contain them in either a qualified diversified trust or a qualified blind trust run by someone else. This would be the most effective way to prevent criminal conflicts of interest involving the couple's business and financial holdings.

IV. CONCLUSION

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Jared Kushner And Ivanka Trump Worth Up To \$700M In Combined Assets*, *supra* note 41.

⁶⁰ *Id.*

Although Ivanka Trump and Jared Kushner's assets may lead to conflicts of interest during the course of their tenure as federal employees, it is possible that they can avoid these ethical problems. Through recusal or divesting their assets, the couple will likely be able to prevent any violations of Section 208 while performing their respective duties as federal government employees.

ILLINOIS BUSINESS LAW JOURNAL

NET NEUTRALITY: INDIVIDUAL PRIVACY AT RISK

❖ NOTE ❖

*Jason Shultz**

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I. INTRODUCTION

Under President Obama's administration, the Federal Communications Commission (FCC) imposed regulations on internet service providers (ISPs) to prevent practices that harmed the open internet.¹ Following the change in regulations, ISPs sued in federal courts and lost with the courts holding that the FCC acted reasonably in the reclassification.² In March 2017, Congress used the Congressional Review Act and reversed Obama-era internet protections.³ This change allows the FCC to reclassify ISPs and changes the

¹ Protecting and Promoting the Open Internet, 30 F.C.C. Rcd. 5601 (2015).

² U.S. Telecomms. Ass'n v. Fed. Comm'n's Comm'n, 825 F.3d 674 (D.C. Cir. 2016).

³ S.J. Res. 34, 115th Cong. (2017).

way they are regulated.⁴ ISPs may be allowed to sell customer data and charge companies for equal bandwidth on their networks. This is the latest development of the net neutrality debate that has been of concern for over a decade. The issue is whether internet customers should be provided unrestricted access to the internet and be allowed to safely browse without their data being sold.

Part II of this Note provides a history of net neutrality and how the debate has carried on since the formation of the internet. This includes a history of how data is viewed under the U.S. Constitution and how the government has regulated ISPs. Part III analyzes why internet customers sought regulation of ISPs, what the regulations were intended to do, and what the internet will look like now that the protections have been rolled back. Finally, Part IV of this Note provides recommendations as to why ISPs should be regulated and what the regulations should impose.

II. BACKGROUND

Courts have ruled that speech on the internet is protected under the First Amendment.⁵ The First Amendment states that Congress can pass no law abridging the freedom of speech.⁶ However, data is not necessarily speech and has not been afforded the same protections.⁷ The United States District Court for the Western District of Washington has ruled it is a violation of the First Amendment for the U.S. government to ask internet retailers for customer information.⁸ In 2010, Amazon.com filed a suit against the North Carolina Department of Revenue for requesting data for all customer sales in North Carolina.⁹ The United States District Court for the Western District of Washington held there must be a compelling reason to justify the government's request for customer data from retailers.¹⁰ It also held that the First Amendment protects online customers from having the content of purchases disclosed to the government.¹¹

⁴ *What is Net Neutrality*, ACLU (June 2017), <https://www.aclu.org/feature/what-net-neutrality>.

⁵ Josh Blackman, *What Happens if Data is Speech?* 16 U. Pa J. CONST. L. HEIGHTENED SCRUTINY 25 (2014).

⁶ U.S. CONST. amend, I.

⁷ Blackman, *supra* note 5, at 25.

⁸ *Amazon.com LLC v. Lay*, 758 F. Supp. 2d 1154 (W.D. Wash. 2010).

⁹ *Id.* at 1159.

¹⁰ *Id.* at 1154.

¹¹ *Id.* at 1167.

Courts have generally found no expectation of privacy in internet communications.¹² Similar to a letter, an email is out of the sender's control once it is sent.¹³ The email can be forwarded and the sender cannot have an expectation that the communication will be private.¹⁴ But there is more data available that can be collected through cookies. Cookies contain information about what a person views online and are passed from web servers to browsers during visits to websites.¹⁵ Through cookies, internet users leave a trail of websites they have accessed.¹⁶ These cookies are used to create personalized visits to websites including personalized ads.¹⁷

Originally, ISPs were not treated as utilities or common carriers.¹⁸ This allowed ISPs to operate free from the rules by which other utilities must abide.¹⁹ The chairman of the FCC during President Clinton's administration, William Kennard, wanted to keep the internet free from government regulation.²⁰ In 2002, the FCC solidified that ISPs would not be treated as utilities and classified them under Title I of the Communications Act of 1934.²¹

The Communications Act of 1934 gave the FCC the power to regulate telephone companies.²² Under Title I of the Communications Act, the FCC does not have the power to regulate consumer devices intended for the receipt of radio communications when the devices are not engaged in the process of radio transmission.²³ Interpreting the Communications Act, in 2005, the United States Supreme Court held that ISPs were information carriers and not subject to the common carrier rules.²⁴ This same holding affirmed the Telecommunications Act of 1996, which exempts ISPs from common carrier regulation by the FCC.²⁵

¹² Mitchell Waldman, *Expectation of Privacy in Internet Communications*, 92 A.L.R. 5th 15 (2001).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ IND. U. KNOWLEDGE BASE, <https://kb.iu.edu/d/agwm> (last visited June 19, 2017).

¹⁶ *Online Tracking*, F.T.C., <https://www.consumer.ftc.gov/articles/0042-online-tracking> (last visited June 18, 2017).

¹⁷ *Id.*

¹⁸ Marguerite Reardon, *Net Neutrality: How We Got From There to Here*, CNET (Feb. 24, 2015, 4:00 AM), <https://www.cnet.com/news/net-neutrality-from-there-to-here/>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² 74 AM. JUR. 2D *Telecomms.* § 12 (2017).

²³ *Id.*

²⁴ *National Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

²⁵ *Id.*

In 2015, under President Obama, the FCC released the Open Internet Order.²⁶ This order set up the rule that ISPs are treated as common carriers and subject to Title II of the Communications Act.²⁷ This granted the FCC broad authority to regulate ISPs in the same way they regulate other telephone utilities.²⁸ These rules for ISPs were intended to increase customers' privacy protection as they imposed restrictions on how their data could be used.²⁹ Under these rules, consumer data has been used by companies like Google and Facebook to target ads based on a person's browsing history.³⁰ Under the rules proposed in 2015, ISPs would be required to have customers' consent to track and sell browsing data.³¹

In 2017, under President Trump, Congress voted to roll back the Obama-era protections for consumers.³² Congress used the Congressional Review Act to undo the regulations that were created under President Obama.³³ These protections prevented ISPs from gathering, storing and selling customers browsing data, app usage, location and more.³⁴ The language of the joint resolution is summarized as follows:

This joint resolution nullifies the rule submitted by the Federal Communications Commission entitled "Protecting the Privacy

²⁶ Thomas B. Norton, *Internet Privacy Enforcement After Net Neutrality*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 225, 227.

²⁷ In the matter of Protecting & Promoting the Open Internet 30 F.C.C. Rcd. 5601 (2015).

²⁸ Elizabeth D. Lauzon, *Construction and Application of Communications Act of 1934 and Telecommunications Act of 1996 – United States Supreme Court Cases*, 32 A.L.R. Fed 2d 125 (2008).

²⁹ Mike Snider, *ISPs Can Now Collect and Sell Your Data: What to Know About Internet Privacy Rules*, USA TODAY (Apr. 4, 2017, 9:19 AM), <https://www.usatoday.com/story/tech/news/2017/04/04/isps-can-now-collect-and-sell-your-data-what-know-internet-privacy/100015356/>.

³⁰ *Id.*

³¹ Brian Feldman, 'Sorry, ISPs Are Trying to Do What?' *What to Know About Congress's New Internet-Privacy Rollback*, NYMAG.COM (Mar. 28, 2017, 5:55 PM), <http://nymag.com/selectall/2017/03/why-congress-is-dismantling-the-fccs-internet-privacy-rules.html>.

³² S.J. Res. 34, 115th Cong. (2017).

³³ Richard S. Beth *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, CONG. RES. SERV. (Oct. 10, 2001), <https://www.senate.gov/CRSpubs/316e2dc1-fc69-43cc-979a-dfc24d784c08.pdf>.

³⁴ Brian Fung, *What to Expect Now That Internet Providers Can Collect and Sell Your Web Browser History*, WASH. POST: THE SWITCH (Mar. 29, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/03/29/what-to-expect-now-that-internet-providers-can-collect-and-sell-your-web-browser-history/?utm_term=.24ebae52efa0.

of Customers of Broadband and Other Telecommunications Services." The rule published on December 2, 2016: (1) applies the customer privacy requirements of the Communications Act of 1934 to broadband Internet access service and other telecommunications services, (2) requires telecommunications carriers to inform customers about rights to opt in or opt out of the use or the sharing of their confidential information, (3) adopts data security and breach notification requirements, (4) prohibits broadband service offerings that are contingent on surrendering privacy rights, and (5) requires disclosures and affirmative consent when a broadband provider offers customers financial incentives in exchange for the provider's right to use a customer's confidential information.³⁵

This change now gives the ISPs, themselves, the ability to sell user data.³⁶ For customers, this is significant since they pay the ISPs for access to the internet.³⁷ Under these new regulations, customers are unable to access the internet without having their data sold unless the ISP chooses not to sell customer data.³⁸

III. ANALYSIS

The vote to repeal Obama-era net neutrality rules favors ISPs, and the companies purchasing customer data, but not the American people, or any other users of the internet. This decision also removes the FCC's power to regulate ISPs as they are no longer classified as common carriers under Title II of the Communications Act.³⁹ Now ISPs can sell customer browsing data without consent.⁴⁰ This is different from Facebook or Google collecting and selling your data.⁴¹ Prior to the new FCC rules, a customer could choose to avoid certain websites that they believed tracked browsing data or sold

³⁵ S.J. Res. 34.

³⁶ Snider, *supra* note 29.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Reardon, *supra* note 18.

⁴⁰ Thomas Fox-Brewster, *Now Those Privacy Rules Are Gone, This Is How ISPs Will Actually Sell Your Personal Data*, FORBES (Mar. 30, 2017 9:40 AM), <https://www.forbes.com/sites/thomasbrewster/2017/03/30/fcc-privacy-rules-how-isps-will-actually-sell-your-data/#4b73ca2a21d1>.

⁴¹ Snider, *supra* note 29.

customer data. Now, all customer data is for sale since it is the internet providers who can collect and sell data.⁴²

Part A analyzes why ISPs want to operate without regulations. Part B explores why regulations were created under the Obama administration. Part C concludes with why these regulations were recently rolled back and what this means for internet customers and the ISPs.

A. Why ISPs Want in on Data Sales

Prior to ISPs' classification to Title II under the Communications Act, they could not be regulated as common carriers by the FCC.⁴³ Originally, ISPs could choose how customers accessed the internet and the download speed of certain websites.⁴⁴ Many early network neutrality activists pushed for an open internet that would allow users to determine how the internet would be used.⁴⁵ However, ISPs were free to block users from accessing competitors' websites.⁴⁶ They were not governed by the same anti-monopoly rules by which traditional telephone companies are governed.⁴⁷ ISPs were also not regulated as to what they could do with customer data.⁴⁸ During the early days of the internet, online data was not treated as private by the courts; the internet was still in its infancy and the level of personal information online was less significant.⁴⁹

In the 2000's, the debate of net neutrality showed why ISPs wanted to avoid the higher regulations that accompany a Title II classification under the Communications Act. In 2005, the CEO of AT&T, Ed Whitacre, said that Google was freeloading on his company's infrastructure.⁵⁰ This is directly against what net neutrality activists at the time desired. For AT&T to want to charge a company to have access to its customers would make the internet a restricted place. But for ISPs who have a duty to shareholders to make a profit, they have an enormous interest in avoiding any net neutrality rule: not because net neutrality would not create jobs, but because ISPs would be allowing other companies to access their customers. This type of mentality does little for ISPs' customers as they will likely want access to whatever websites customers choose

⁴² *Id.*

⁴³ 47 U.S.C §§ 151 et seq.

⁴⁴ Reardon, *supra* note 18.

⁴⁵ Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141 (2003).

⁴⁶ *Id.*

⁴⁷ 47 U.S.C §§ 151 et seq.

⁴⁸ Protecting and Promoting the Open Internet, 30 F.C.C. Rcd. 5601 (2015).

⁴⁹ Reardon, *supra* note 18.

⁵⁰ *Id.*

to access. Customers however have little choice into the ISP they can use, and they have little ability to shop for a better ISP.⁵¹ In many markets, customers have access to one or two ISPs.⁵² If an ISP chooses to restrict the websites their customers can access, the customers can do little other than complain.

B. Why Obama-Era Protections Upset ISPs

ISPs want to have the same ability to sell customer data as Facebook, Google, and other internet companies. Facebook has a large interest in selling customer data as it generates a large profit.⁵³ There is a large difference in how these companies collect customer data from how ISPs collect customer data. Customers choose to use websites such as Facebook and Google. Customers do not have to use these websites if they disagree with how they use their data. However, ISPs collect significantly more data than a single internet company can collect. ISPs are collecting data on everything their customers do while online and customers pay for this ability. Customers do not have a choice to give them data unless they choose to not access the internet.

During the Obama administration, the FCC enacted regulations that would protect internet users and allow the FCC to impose more restrictions on ISPs.⁵⁴ There were also proposed regulations that would force ISPs to receive consent from customers in order to sell customer data.⁵⁵ All of the regulations that were proposed under the Obama administration took the power to sell customer data away from the ISPs. This left the customer data market exclusive to the websites that customers chose to visit. Another part of the regulations was to affirm ISPs' classification under Title II of the Communications Act. The United States Court of Appeals, District of Columbia Circuit affirmed that the FCC acted reasonably in the reclassification of ISPs.⁵⁶ Congress's use of the Congressional Review Act allows the FCC to reclassify ISPs under Title I and remove regulations.⁵⁷

⁵¹ Jon Brodtkin, *US Broadband: Still No ISP Choice for Many, Especially at Higher Speeds*, ARS TECHNICA (Aug. 10, 2016, 10:43 AM), <https://arstechnica.com/information-technology/2016/08/us-broadband-still-no-isp-choice-for-many-especially-at-higher-speeds/>.

⁵² *Id.*

⁵³ Alex Hern, *Facebook Is Making More and More Money From You. Should You be Paid For It?*, THE GUARDIAN (Sep. 25, 2015 5:29 AM), <https://www.theguardian.com/technology/2015/sep/25/facebook-money-advertising-revenue-should-you-be-paid>.

⁵⁴ Protecting and Promoting the Open Internet, 30 F.C.C. Rcd. 5601 (2015).

⁵⁵ *Id.*

⁵⁶ *U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674 (D.C. Cir. 2016).

⁵⁷ Feldman, *supra* note 31.

C. What Trump's Changes Mean for ISPs and Customer Data

ISPs are incentivized to sell customer data for revenue. As Congress and the FCC choose to roll back protections that were created under the Obama administration, it reduces the regulation of ISPs. Now companies no longer have to treat customer data with the privacy restrictions of the Communications Act as the FCC no longer is required to regulate telecommunication companies as common carriers.⁵⁸

The new chairman of the FCC, Ajit Pai, was a former corporate counsel for Verizon.⁵⁹ He worked for Verizon during a time when it was not subject to the regulations created under the Obama administration. Since taking over as chairman of the FCC, Ajit Pai has expressed an interest in abolishing the net neutrality rules and would like to see ISPs voluntarily commit to net neutrality.⁶⁰ This is likely why President Trump appointed him as chairman of the FCC as he fits the President's commitment to empowering business and reducing overall regulations.⁶¹

President Trump expressed a focus on being pro-business and reducing regulations in the United States.⁶² He is committed to bringing jobs to the United States.⁶³ This is why President Trump is in favor of rolling back these protections as he has said it will allow ISPs to invest more in their infrastructure.⁶⁴ However, according to an interview with Verizon's current general counsel, Verizon was never slowing its investment in infrastructure under the stricter Obama regulations.⁶⁵

⁵⁸ S.J. Res. 34, 115th Cong. (2017).

⁵⁹ FCC, <https://www.fcc.gov/about/leadership/ajit-pai> (last visited June 18, 2017).

⁶⁰ Jon Brodtkin, "Unenforceable": How voluntary Net Neutrality Lets ISPs Call the Shots, ARS TECHNICA (Apr. 11, 2017), <https://arstechnica.com/tech-policy/2017/04/unenforceable-how-voluntary-net-neutrality-lets-isps-call-the-shots/>.

⁶¹ See Klint Finley, *Trump's FCC Pick Doesn't Bode Well for Net Neutrality*, WIRED (Jan. 23, 2017, 5:16 PM), <https://www.wired.com/2017/01/trumps-fcc-pick-signals-end-net-neutrality-efforts/>.

⁶² Andrew Soergel, *CEOs Bullish on Trump's Pro-Business Agenda*, U.S. NEWS (Mar. 14, 2017, 2:11 PM), <https://www.usnews.com/news/articles/2017-03-14/ceos-bullish-on-trumps-pro-business-agenda>.

⁶³ *Id.*

⁶⁴ Ted Johnson, *President Trump Touts New Charter Investments, Including Commitments Made Last Year*, VARIETY (Mar. 24, 2017, 11:22 AM), <http://variety.com/2017/biz/news/donald-trump-charter-communications-new-hires-1202015535/>.

⁶⁵ Jon Brodtkin, *Title II Hasn't Hurt Network Investment According to the ISPs Themselves*, ARS TECHNICA (May 16, 2017), <https://arstechnica.com/information->

IV. RECOMMENDATION

People have a right to free speech protected by the First Amendment of the Constitution.⁶⁶ This protection should extend to the information regarding a user's browsing history and their digital footprint. When ISPs are able to sell user data without restriction, customers are left with no way to access the internet without fear of being followed. Internet customers have little-to-no choice of how they can access the internet. When customers pay for access to the internet and then have their trail of clicks, searches and websites visited sold by their ISP, they are essentially paying to have their information sold. If ISPs are allowed to sell data, internet consumers can no longer choose to avoid websites that will sell browsing data. Even the most security conscious consumer cannot avoid the sale of their browsing data, except through extreme measures such as an offshore VPN that blocks ISPs from tracking data. The internet has become a utility just as phone lines were when the Communications Act was passed in 1934. Telecommunication companies can intrude on customer privacy if left unregulated.

The FCC should not reverse the Obama-era rules of internet privacy. Internet activists have urged individuals to comment against the FCC's proposed deregulation.⁶⁷ While President Trump may have an interest in giving businesses access to consumer data, it is not in the best interest of the people. By empowering the major telecommunication companies, Congress has limited the power of small businesses to enter the marketplace. When the large companies are allowed to limit what online content is accessible and allowed to sell browsing data, Congress and the FCC have allowed the creation of a privately managed Big Brother. People should have a right to use the internet without it being controlled by the ISPs from whom they purchase access. People should not be forced to use certain websites just because they are owned by the service providers.

Removing protections that ensured an open internet will also limit open competition and limit choices to just what an ISP offers to customers. ISPs have little incentive to provide full speed access to companies like Netflix or Hulu when they offer similar content through their services. If the FCC roles back net neutrality protections now that Congress has repealed the law requiring the protections to be in place, internet customers will have little or

technology/2017/05/title-ii-hasnt-hurt-network-investment-according-to-the-isps-themselves/.

⁶⁶ U.S. CONST. amend, I.

⁶⁷ INTERNET-WIDE DAY OF ACTION TO SAVE NET NEUTRALITY, <https://www.battleforthenet.com/july12/> (last visited July 29, 2017).

no choice when it comes to how they can access a tool that was meant to empower them to access more data.

V. CONCLUSION

It is unfortunate that the regulations that were proposed by the FCC under President Obama have been rolled back before they were allowed to go into effect. Internet consumers should be treated the same way as telephone users and other communications utilities. Using the internet should neither force people to give away their right to privacy, nor should it allow ISPs to choose what websites their customers can access. The new direction of the FCC, under chairman Ajit Pai, is dangerous to individual privacy. The FCC wants to reduce regulations and empower ISPs to sell customer data and potentially restrict access to the internet. ISPs should be considered common carriers and people's access to the internet is at risk if the FCC continues to reduce net neutrality protections.

ILLINOIS BUSINESS LAW JOURNAL

LIQUID ALOHA: A CASE ON BEER BREWED ON THE SHORES OF THE HAWAIIAN ISLANDS OR THE BANKS OF THE BIG MUDDY

❖ NOTE ❖

Joe Yeoman*

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I. INTRODUCTION

Three tan, shirtless men and a woman, wearing bright yellow, paddle near the beach, a wave crashing over their backs.¹ Beyond the ocean, a beach

¹ See *Big Wave Golden Ale*, KONA BREWING CO., <http://konabrewingco.com/blog/beers/big-wave-golden-ale/> (last visited July 28, 2017); *Craft Beers*, SUPERIOR BEVERAGE, http://www.superiorbeverage.net/beer_type/craft-beers/#prettyPhoto (last visited July 28, 2017); *Kona Brewing Co. Big Wave Golden Ale 6 Pack*, HYVEE, <https://www.hy-vee.com/grocery/PD21904899/Kona-Brewing-Co-Big-Wave-Golden-Ale-6-Pack> (last visited July 28, 2017); *New labels will show not all Kona Brewing*

gradually shifts into a mountain.² The scene is framed by island foliage, including blue orchids and palm trees.³ Above the scene, the packaging reads “Brewing *Liquid Aloha* since ’94.”⁴ This is the packaging for a six-pack of Kona Brewing Co. Big Wave Golden Ale.⁵ The image is printed on every side of the package, and every bottle.⁶ The bottle also includes the Kona Brewing Co. logo: a gecko.⁷ The islands of Hawaii almost float on the top of the brown glass, rainbow-ing the words “Liquid Aloha.”⁸ The colors of the box include an oceanic teal-blue juxtaposed with whites, greens, yellows. All colors that one might associate with Hawaii.⁹ In the liquor aisle of a grocery store, it pops out as the taste of an island.¹⁰

On the bottom of the box, it reads that Kona Brewing Co. is located in Kona, Hawaii.¹¹ Kona Brewing was created by a father and son pair, that wanted to create “fresh local island brews local island brews made with spirit, passion and quality.”¹² Kona’s website claims that the company has a desire to protect the Hawaiian environment, and that Kona’s headquarters is where the brewery was original founded on Hawaii’s biggest island.¹³ Even the handle of the box exclaims “Catch a Wave!”¹⁴

On the side of each bottle, written vertically, is a list of the locations of Kona, HI; Portland, OR; Woodinville, WA; Portsmouth, NH; and Memphis, TN.¹⁵ Where is the Big Wave Golden Ale brewed? On the beaches of Hawaii or the banks of the Mississippi river in Memphis?

On Feb. 28, 2017, Sara Cilloni and Simone Zimmer, along with their lawyer Aubry Wand, filed a class action lawsuit against Craft Brew Alliance,

Co. beer is made in Hawaii, PACIFIC BUSINESS NEWS (Nov. 27, 2012 3:03 PM), <https://www.bizjournals.com/pacific/blog/2012/11/new-labels-will-show-not-all-kona.html>.

² *See id.*

³ *See id.*

⁴ *See id.*

⁵ *See id.*

⁶ *See id.*

⁷ *See id.*

⁸ *See id.*

⁹ *See id.*

¹⁰ *See id.*

¹¹ *See id.*

¹² *About Us*, KONA BREWING CO., <http://konabrewingco.com/about/> (last visited Aug. 27, 2017).

¹³ *Id.*

¹⁴ *See* KONA BREWING CO., *supra* note 1; *see also supra* text accompanying note 7.

¹⁵ *See id.*

Inc. (CBA), the corporate owners of Kona Brewing Company.¹⁶ The complaint alleges that “[t]hrough false and deceptive advertising, Craft Brew intentionally misleads consumers into believing that Kona Brewing Company beer (a brand of Craft Brew) is a local beer made in Hawaii. In actuality, the beer is made in the continental United States.”¹⁷ The Plaintiffs continue to claim that consumers purchased the beer because they reasonably believed that the beer was brewed in the Hawaiian Islands, and as such, they have suffered an economic injury.¹⁸ Among other things, the Plaintiffs are looking for restitution or any other equitable relief, along with expenses and attorneys’ fees.¹⁹

The purpose of this Note is to explore the merits of *Cilloni v. Craft Brew Alliance, Inc.* Part II of this Note explores the background of the case (Section A), Kona Brewing, and Craft Brew Alliance (Section B). Part III analyzes the merits of the case (Section A), and the arguments Craft Brew Alliance will use to dismiss the case (Section B). Part IV proposes an outcome for the case.

II. BACKGROUND: *CILLONI V. CRAFT BREW ALLIANCE*

A. The Lawsuit: A Six-Pack of Claims

The lawsuit alleges that CBA violated California’s False Advertising Law (FAL), Consumer Legal Remedies Act (CLRA), Unfair Competition Law (UCL), breached the express warranty, negligently misrepresented, and was unjustly enriched.²⁰ They claim that “consumers purchased Kona Brewing Co. beer because they reasonably believed—based on Craft Brew’s advertising and labeling—that this beer originates from Hawaii.”²¹ Overall, the plaintiffs are arguing that “Craft Brew intentionally misleads consumers into believing that Kona Brewing Company beer is a local beer made in Hawaii,” instead of being brewed in Oregon, Washington Tennessee, or New Hampshire.²² The complaint continues that for CBA and Kona to maximize profits, CBA has capitalized on the brand image of Hawaii.²³ Down to the name, the entire

¹⁶ Complaint at ¶ 1, *Cilloni v. Craft Brew Alliance, Inc.* No. 5:17-cv-01027 (N.D. Cal. filed Feb. 28, 2017).

¹⁷ *Id.* ¶ 1.

¹⁸ *Id.* ¶ 4.

¹⁹ *Id.* ¶¶ 4, 5.

²⁰ *Id.* ¶ 5.

²¹ *Id.* ¶ 4.

²² *Id.*

²³ *Id.* ¶ 20

brand image of Kona floats on the images of Hawaii, and CBA uses Hawaii's popularity to sell beer, so the complaint alleges.²⁴

Plaintiffs claim that Hawaii is a powerful brand image, and that using the cool island breezes of the islands, CBA profits unjustly.²⁵ Because of these images, consumers are, allegedly, willing to pay a premium for Hawaiian products.²⁶ The Plaintiffs claim that they reasonably believed that the beers were brewed in Hawaii, and then imported into the continental United States.²⁷ This was a main factor in purchasing the product.²⁸

For Count I through III, Plaintiffs rely on three California state laws: FAL, CLRA, and UCL.²⁹ FAL makes it unlawful for any "corporation . . . to make or disseminate or cause to be made or disseminated . . . which is untrue or misleading and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading."³⁰

The CLRA makes a series of enumerated methods of unfair competition illegal in California, including using "deceptive representations or designations of geographic origin in connection with goods or services."³¹ It also prohibits "[a]dvertising goods or services with intent not to sell them as advertised."³² Finally, the UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising."³³

The other claims in the case are that CBA breached an express warranty, negligently misrepresented their product, and were unjustly enriched.³⁴ For an express warranty, the "Craft Brew issued an express warranty that these brands of beer were in fact made in Hawaii."³⁵ For negligent misrepresentation, CBA knew or should have known their representations were false, and then did nothing to correct the misrepresentation.³⁶ For unjust enrichment, because CBA was deceptive, "Plaintiffs and Class members have suffered a detriment while Craft Brew has received a benefit."³⁷

²⁴ *Id.*

²⁵ *Id.* ¶ 82.

²⁶ *Id.* ¶ 83.

²⁷ *Id.* ¶ 90.

²⁸ *Id.*

²⁹ *Id.* ¶ 5.

³⁰ Cal. Bus. & Prof. Code § 17500 (1998) (the dissemination can include "any other manner or means whatever, including over the Internet, any statement. . .").

³¹ Cal. Civ. Code § 1770(a)(4) (2017).

³² Cal. Civ. Code § 1770(a)(9) (2017).

³³ Cal. Bus. & Prof. Code § 17200 (1992).

³⁴ Complaint, *supra* note 16, ¶ 147.

³⁵ *Id.* ¶ 134.

³⁶ *Id.* ¶ 138.

³⁷ *Id.* ¶ 146.

The class that the plaintiffs are looking to create included anyone who purchased something from Kona Brewing in the previous four years.³⁸

B. Craft Brew Alliance and Kona Brewing: Waves of Paradise

Kona Brewing was founded in 1994 by a father and son team, on Kailua-Kona.³⁹ Their first beer was shipped around Hawaii in February of 1995.⁴⁰ Currently, Kona brews 12,000 barrels of beer annually on Kailua-Kona⁴¹, or the equivalent of 310,000 gallons of beer.⁴² The company sold more than one million cases of beer in Hawaii in 2014.⁴³

Four main Kona beers can be found in all 50 states, and 26 countries: Longboard Island Lager, Big Wave Golden Ale, Fire Rock Pale Ale, and Castaway IPA.⁴⁴ The tagline of each beer is thematically expressive of Hawaii and Hawaiian living.⁴⁵ For the Longboard Island Lager, the website pays homage to Waikiki Beach, “Longboard surfing in the shadow of Diamond Head has been a tradition for over 100 years at Waikiki beach. Our Longboard Lager pays tribute to this grand history.”⁴⁶ The bottle label shows a scene of two tan people on longboards, enjoying the waves in front of a beach, with a mountain scape behind them.⁴⁷ For the Fire Rock Pale Ale, “[t]he power and copper glow of molten lava flowing to the sea from the Big Island’s Kilauea Caldera is evoked in our Fire Rock Pale Ale.”⁴⁸ The bottle label shows a scene of a tan women watching lava flow down a mountain scape into the ocean below, complete with steam where lava meets ocean.⁴⁹ Some of the other beer names include Wailua Ale, Koko Brown, Pipeline Porter, Black Sand Porter,

³⁸ *Id.* ¶ Class.

³⁹ *Press Kit*, KONA BREWING CO. (2011), <http://konabrewingco.com/wp-content/blogs.dir/2/files/2011/05/PressKit.pdf>.

⁴⁰ *Id.*

⁴¹ KONA BREWING CO., *supra* note 12.

⁴² *Brewery*, KONA BREWING CO., <http://konabrewingco.com/brewery/> (last visited Aug. 27, 2017).

⁴³ *Brands*, CRAFT BREW ALLIANCE, <http://craftbrew.com/brands/> (last visited Aug. 27, 2017).

⁴⁴ KONA BREWING CO., *supra* note 12.

⁴⁵ *Complaint*, *supra* note 16, ¶ 19.

⁴⁶ *Longboard Lager*, KONA BREWING CO., <http://konabrewingco.com/blog/beers/longboard-lager/> (last visited Aug. 27, 2017).

⁴⁷ *Id.*

⁴⁸ *Fire Rock Pale Ale*, KONA BREWING CO., <http://konabrewingco.com/blog/beers/fire-rock-pale-ale/> (last visited Aug. 27, 2017).

⁴⁹ *Id.*

Hula Hefeweizen, Old Blowhole Barley Wine, Lavaman Red Ale, Oceanic Organic Saison, and Big Island Ginger Beer.⁵⁰

In 2007, Kona Brewing was the 24th largest craft brewery in the United States, based on production.⁵¹ “In 2016, Kona grew sales to retailers by 17%; its growth alone was larger than 90% of the growth of all craft breweries.”⁵² In 2017, it is considered the 10th largest craft brewery.⁵³ According to the complaint, Kona brewing shipped 154,700 barrels in 2014 and 168,200 barrels in 2015.⁵⁴ For 2015, that would have been equivalent to 27 million twelve-ounce bottles.⁵⁵

For 52 weeks, ending in Feb. 25, 2017, Kona sold forty-nine million dollars of beer (retail sales).⁵⁶ This accounted for 1.7% of the total share of the craft beer market.

Kona joined CBA in 2010, eventually becoming CBA’s largest brand.⁵⁷ Currently, Kona owns nine percent of CBA’s stock. Kona Brewing does produce most of its beer in the continental United States, in a partnership with CBA.⁵⁸ The beer is mostly brewed and bottled in Portland, Oregon, Woodinville, Washington, Memphis, Tennessee, and Portsmouth, New Hampshire.⁵⁹

CBA was founded in 2008, when two Northwest breweries merged.⁶⁰ Their brands include Red Hook, Widmer Brother Brewing, Omission, Square Mile Cider Co, and Resignation Brewery.⁶¹ The company promotes itself as having more than three decades of craft beer experience, being able to guide its brands through the beer landscape, and “meet the increasing consumer

⁵⁰ *Our Award Winning Beers*, KONA BREWING CO., <http://konabrewingco.com/news/awards/> (last visited Aug. 27, 2017).

⁵¹ KONA BREWING CO., *supra* note 39.

⁵² *2016 Annual Report*, CRAFT BREW ALLIANCE (2016), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NjYzMzAyfENoaWxkSUQ9MzcwNjUyfFR5cGU9MQ==>.

⁵³ *Investor Presentation*, CRAFT BREW ALLIANCE (Mar. 2017), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MzQxMzM5fENoaWxkSUQ9LTF8VHlwZT0z&t=1&cb=636009106603206278>.

⁵⁴ Complaint, *supra* note 16, ¶ 17.

⁵⁵ *Id.*

⁵⁶ CRAFT BREW ALLIANCE, *supra* note 53.

⁵⁷ *Id.*

⁵⁸ Complaint, *supra* note 16, ¶ 74.

⁵⁹ *Id.*

⁶⁰ *About*, CRAFT BREW ALLIANCE, <http://craftbrew.com/about/> (last visited Aug. 27, 2017).

⁶¹ *Brands*, CRAFT BREW ALLIANCE, <http://craftbrew.com/brands/> (last visited Aug. 27, 2017).

demand for authentic local brews.”⁶² CBA’s corporate goal is to be a leader in brewing and branding craft beers.⁶³ CBA has targeted a consumer trend to move toward “authentic, local, artisanal” beers.⁶⁴

CBA states on their website that “[t]he Hawaii born and Hawaii-based craft brewery prides itself on brewing the freshest beer of exceptional quality, closest to market.”⁶⁵ To make the “freshest beer,” CBA uses the brewers in Portland, Woodinville, Portsmouth, and Memphis to brew and bottle Kona.⁶⁶

CBA has a long-standing partnership with Anheuser-Busch, where Anheuser-Busch acts as a wholesaler and distributor for the CBA brands, including Kona Brewing.⁶⁷ Anheuser-Busch has a thirty-two percent ownership stake in CBA.⁶⁸ CBA publicly trades on Nasdaq.⁶⁹ For a 52-week range, ending on June 18, 2017, CBA’s stock was up roughly 90%, with a range of \$7.50 to \$22.40.

III. ANALYSIS: FERMENTATION TIME

This is not the first time that a beer company has been sued for “misleading” the public.⁷⁰ Anheuser-Busch has been sued for Leffe not being brewed by monks, for Beck’s being made in St. Louis and not Germany, and for Kirin Ichiban not being brewed in Japan.⁷¹ Walmart and MillerCoors were accused of creating a craft beer that isn’t made in a craft brewery.⁷² MillerCoors was taken to court over water; Coors Light is not always brewed with ice-cold Rocky Mountain stream water, as their advertisements claim.⁷³

⁶² CRAFT BREW ALLIANCE, *supra* note 60.

⁶³ CRAFT BREW ALLIANCE, *supra* note 53.

⁶⁴ *Id.*

⁶⁵ CRAFT BREW ALLIANCE, *supra* note 60.

⁶⁶ *Craft Brew Alliance, Inc.*, NASDAQ, Aug. 5, 2015, <http://secfilings.nasdaq.com/filingFrameset.asp?FilingID=10843167&RcvdDate=8/5/2015&CoN%20ame=CRAFTB%CC%88REWA%CC%88LLIANCE%E2%80%B2I%CC%88NC.&FormType=10-Q&View=orig>.

⁶⁷ CRAFT BREW ALLIANCE, *supra* note 53.

⁶⁸ *Id.*

⁶⁹ NASDAQ, *supra* note 66.

⁷⁰ Nick Hines, *7 Time Big Beer Was Sued for Misleading the Public*, VINEPAIR, <https://vinepair.com/articles/7-times-breweries-sued-misleading-labels/> (last visited Aug. 27, 2017).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

Red Stripe was sued because their beer was brewed in Pennsylvania, and not the easy-going island of Jamaica.⁷⁴

As is typical in these beer misrepresentation cases, the defendant brewer's first litigation move is to file for a Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP).⁷⁵ FRCP 12(b)(6) states that a defendant can assert a defense that the plaintiff made a "failure to state a claim upon which relief can be granted."⁷⁶ If the motion is granted, most of these beer lawsuits disappear into long-forgotten blog posts; if the motion is denied, the brewer typically settles the claim.⁷⁷ For the standard of review, a claim does not require a "detailed factual allegations," but "[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do."⁷⁸ The district court will be generally limited to the four corners of the complaint, and the court will accept the non-moving party's facts as true, while construing the complaint in the non-moving party's favor.⁷⁹ The complaint must contain enough factual allegations "to raise a right to relief above the speculative level."⁸⁰

Essentially, Celloni will need to provide enough facts in their complaint that shows Kona Brewing misled consumers, and that the complaint should continue. Once a court determines the factual allegations, it will typically employ the "reasonable consumer test."⁸¹ Under the Reasonable Consumer Test, a plaintiff must show that the public is likely to be deceived by beer company.⁸² For Celloni, because the complaint uses California law, the California Supreme Court has interpreted the reasonable consumer to be protected from false advertising and advertising, while true, actually misleads or has a likelihood to mislead the public.⁸³ However, statements that are "puffery" are not misrepresentations, and are instead considered assertions of

⁷⁴ *Red Stripe sued over misleading 'Jamaican' beer claims*, FOX NEWS (Aug. 4, 2015), <http://www.foxnews.com/food-drink/2015/08/04/red-stripe-sued-over-misleading-jamaican-beer-claims.html>

⁷⁵ *Id.*

⁷⁶ FED. R. CIV. P. 12(b)(6).

⁷⁷ Bill Hogan, *Beer Money: \$20M Settlement in Lawsuit over Beck's Packaging*, CHI. TRIB. (Oct. 20, 2015, 3:04 PM), <http://www.chicagotribune.com/business/ct-becks-misleading-packaging-20151020-story.html>

⁷⁸ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

⁷⁹ *Marty*, 43 F. Supp. 3d at 1338.

⁸⁰ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

⁸¹ *Marty*, 43 F. Supp. 3d at 1342.

⁸² See *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 938 (9th Cir. 2008).

⁸³ *Leoni v. State Bar*, 39 Cal.3d 609, 626 (1985).

brand superiority.⁸⁴ Overall, it's a tough litigation needle to thread for Celloni, as they need to state enough factual allegations to pass an *Iqbal* test, then show that a reasonable consumer would be deceived, and finally, rebut any claims by Kona that the branding is puffery.

By examining the case law and weighing the merits of *Cilloni v. Craft Brew Alliance*, the District Court should not dismiss the case outright. The District Court will do an analysis of the FRCP 12(b)(6) motion to dismiss, the Reasonable Consumer Test, and whether the language used is puffery. The Court should then conclude that the Plaintiffs have met their burden.

A. A Beer Brewed on the Banks of the Mississippi Instead of the Rhine

Cilloni v. Craft Brew Alliance most closely tracks *Marty v. Anheuser-Busch*.⁸⁵ In *Marty*, Anheuser-Busch (AB) was sued, in a class action suit, over the Beck's Beer, and AB's Motion to Dismiss was denied.⁸⁶ The plaintiff's alleged that they purchased Beck's "in reliance on representations contained on the packaging and Beck's history of being an imported beer from Germany."⁸⁷ The plaintiffs alleged that AB misrepresented the brewing location on the beer's packaging, specifically that they were consuming a beer brewed from Germany.⁸⁸ The beer is brewed in St. Louis, Missouri.⁸⁹

First, the descriptions and showings of the product, labeling, and messaging was enough to pass an *Iqbal* and *Twombly* test.⁹⁰ The court mainly focused on the language on the packaging, and how the wording was displayed.⁹¹ From there, the court weaved in the Reasonable Consumer Test. The court found that "[b]ased on the allegations in the Amended Complaint and because the "Product of USA" disclaimer is blocked by the carton, the Court finds that the allegations . . . are sufficient to conclude that a reasonable consumer may be misled to believe that Beck's is an imported beer brewed in Germany."⁹² A Beck's bottle and the packaging contained the words "Originated in Germany," "German Quality," and "Brewed Under the

⁸⁴ Cook, Perkiss and Liehe, Inc. v. Northern Cal. Collection Serv., Inc., 911 F.2d 242, 246 (9th Cir. 1990).

⁸⁵ See *Marty*, 43 F. Supp. 3d at 1333.

⁸⁶ *Id.* at 1335.

⁸⁷ *Id.* (quotations omitted).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 1340.

⁹¹ *Id.*

⁹² *Marty*, 43 F. Supp. 3d at 1342.

German Purity Law of 1516.”⁹³ The words “Product of USA, Brauerei Beck & Co., St. Louis, MO.” were printed on the bottom of every carton, and on every bottle in a small, white font over a metallic label.⁹⁴ The label was further obscured by the carton.⁹⁵ The only way to find the brewery’s location would require that a consumer physically open the packaging and examine each bottle.⁹⁶ The court held that a reasonable consumer is not expected to remove a product from its outer packaging to ascertain the product’s true origin.⁹⁷

The district court also found that that AB did not sufficiently alert the consumer where the beer was brewed when it printed “Product of USA, Brauerei Beck & Co., St. Louis, MO.” on the label.⁹⁸ Even though the label has the words “St. Louis, MO.,” it did not include any indication that this is where the beer was brewed.⁹⁹ If a consumer looked under the carton, he or she would have found specific information on the brewery’s location.¹⁰⁰ Ultimately, the court decided it would be unreasonable for a consumer to pick up a carton, look underneath it, before deciding if the beer was brewed in Germany or not.¹⁰¹

Finally, AB argued that the term “German Quality” was mere puffery, and should not be included under the state consumer protection law.¹⁰² AB argued that “German Quality” amounted to mere puffery, and did not constitute false advertising.¹⁰³ The court characterized specific, quantifiable statements about the product as the opposite of puffery, and thus, the statements could be used to show a false advertising claim.¹⁰⁴ For puffery, the statement cannot be taken in a vacuum and must be viewed in the context of the entire marketing scheme.¹⁰⁵ The court viewed the language in conjunction with “(1) other statements on cartons of Beck’s, (2) allegations of the defendant’s overall marketing campaign and its efforts to maintain Beck’s brand identity as a German beer and (3) Beck’s German heritage including its 139-year history

⁹³ *Id.* at 1340.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 1341.

⁹⁷ *Id.* at 1341.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 1342.

¹⁰³ *Id.* (quoting *Edmundson v. Procter & Gamble Co.*, 537 Fed.Appx. 708, 709 (9th Cir. 2013)).

¹⁰⁴ *Id.*

¹⁰⁵ See *Gerber Prod. Co.*, 552 F.3d at 939 n. 3.

of being brewed in Germany.”¹⁰⁶ Ultimately, AB’s puffery argument failed, along with its motion to dismiss.¹⁰⁷

AB had another settlement with Kirin over the brand’s marketing as being brewed in Japan, when in actuality it was brewed in Virginia.¹⁰⁸ Like Becks, Kirin was originally brewed in another country, before being acquired by AB.¹⁰⁹ After which, the beer sold in the United States was made in the United States, even though the label did not include messaging that indicated a brewery location.¹¹⁰ Again like Becks, the bottle included the brewery location that would have been hidden unless a consumer pulled the bottle out of the box.¹¹¹ The original suit claimed that the beer’s marketing violated the Florida Deceptive and Unfair Trade Practices Act.¹¹² As part of the settlement, AB has agreed to include the statement that the beer was “[b]rewed under Kirin’s strict supervision by Anheuser-Busch in Los Angeles, CA and Williamsburg, VA.”¹¹³

Taken together, both cases represent beers that were originally brewed in a foreign location, originally imported into the United States, and eventually purchased by an America corporation (AB). Then, most likely to save money, AB began producing the beer domestically, while making minor alterations to the packaging to indicate the change. Meanwhile, consumers went on believing they were buying a German or Japanese beer, when they were actually drinking a Missourian and Virginian beer. Only on the beer label was reality of the product revealed. This mirrors the facts presented in *Cilloni*.

B. The Cool Islands Tastes of Jamaica in Pennsylvania

On the other side of the brewery location debate, the court in *Dumas v. Diageo PLC* granted the motion to dismiss Aaron Dumas’s complaint that Red Stripe misled consumers into buying a Jamaican beer that is actually brewed in Pennsylvania.¹¹⁴ The defendant made a FRCP 12(b)(6) motion that “should be granted only where a plaintiff’s complaint lacks a ‘cognizable legal theory’

¹⁰⁶ *Marty*, 43 F. Supp. 3d at 1342.

¹⁰⁷ *Id.*

¹⁰⁸ Courtney Jorstad, *Kirin Beer False Advertising Class Action Settlement*, TOP CLASS ACTIONS, Jan. 23, 2015, <http://topclassactions.com/lawsuit-settlements/closed-settlements/48064-kirin-beer-false-advertising-class-action-settlement/>

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* (internal quotations omitted).

¹¹⁴ *Dumas v. Diageo PLC*, No. 15CV1681 BTM(BLM), 2016 WL 1367511, at *1 (S.D. Cal. Apr. 6, 2016).

or sufficient facts to support a cognizable legal theory.”¹¹⁵ The defendant’s main support for dismissing the complaint was that “no reasonable consumer would be misled by the statements made on the Red Stripe packaging and labeling.”¹¹⁶ Under California law, the UCL, FAL, and CLRA, all of which are claimed in the Kona case, are determined by the reasonable consumer standard.¹¹⁷ The court used this standard and dismissed *Dumas*.¹¹⁸

Typically, a deceptive business practice is a question of fact that cannot be decided on a motion to dismiss.¹¹⁹ “[T]here are ‘rare situations’ where it is appropriate to grant a motion to dismiss based on review of the advertisement or product packaging itself.”¹²⁰ For Red Stripe, the court found that the twelve and six-pack containers had “Jamaican Style Lager” and “Taste of Jamaica” printed prominently on the side of packaging.¹²¹ The bottom of the packaging included that the beer was “[b]rewed and bottled by Red Stripe Beer Company Latrobe, PA.” The court boiled the case down to the only facts being the words “Jamaica” and “Jamaican” appear on Red Stripe’s packaging.¹²² This was not enough to support a conclusion that a reasonable consumer would be confused with the product’s origin.¹²³

The court also distinguished itself from *Marty*.¹²⁴ The court made the distinction that “The Taste of Jamaica” was different than “Originated in Germany.”¹²⁵ “Originated in Germany” is a reference to a place of origin. This was then echoed by the use of the “German Purity Law.”¹²⁶ A reasonable consumer could see this and think this is where the beer was born.¹²⁷ Whereas “Taste of Jamaica” is more of an aspirational slogan on what the beer should taste like.¹²⁸

In *Parent v. MillerCoors LLC*, Evan Parent sued MillerCoors over the beer Blue Moon misrepresenting itself as a “craft beer,” and that it is engaged in

¹¹⁵ *Id.* at *2 (citing *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988)).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at *3.

¹²⁰ *Id.*

¹²¹ *Id.* (emphasis added).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at *5.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

misleading customers.¹²⁹ MillerCoors' motion to dismiss under FRCP 12(b)(6) was ultimately granted by the court.¹³⁰

In the complaint, the plaintiff pointed to three internet advertisements using "Artfully Crafted" as misleading, and the court found that the advertisements were non-actionable puffery.¹³¹ Typically, puffery is non-actionable because it is generalized, vague, and unspecified language, and not a factual representation.¹³² The advertisements described how the beer originated from an independent brewery, which the plaintiff contended made it seem like the brewery was still independently owned.¹³³ However, in these advertisements, the words "craft beer" were never used.¹³⁴

The descriptions of "Artfully Crafted" is different than descriptions that obfuscate the true location of the beer's origin. "Artfully Crafted" is closer to "Jamaican Style." For Kona Brewing, "Artfully Crafted" is similar to "Liquid Aloha." *Parent's* case falls apart because the plaintiff's argument rests on a consumer being confused by "Artfully Crafted." For Kona, the consumer is inundated with imagery, language, and details about Hawaii.

IV. RECOMMENDED OUTCOME

The Northern District of California should follow *Marty* and deny CBA's motion to dismiss the complaint, allowing the case to continue. First, the District Court's *Twombly* and *Iqbal* analysis will show that the complaint is not just a series of accusations.¹³⁵ Under *Iqbal*, the complaint needs to be more than a series of formulaic labels and needs to include some factual allegations that move the complaint from speculative to plausible.¹³⁶ In Cilloni's complaint, there are uses of formulaic labelling. For example, a form of "misrepresentation" is used eighteen times.¹³⁷ "Unlawful" fifteen times.¹³⁸

¹²⁹ *Parent v. MillerCoors LLC*, No. 3:15-CV-1204-GPC-WVG, 2016 WL 3348818, at *1–2 (S.D. Cal. June 16, 2016).

¹³⁰ *Id.* at *5.

¹³¹ *Id.* at *6.

¹³² *Vitt v. Apple Computer, Inc.*, 469 Fed. Appx. 605, 607 (9th Cir. 2012) (The language "mobile," "durable," "portable," "rugged," "reliable," "high performance," and "high value" constituted puffery.)

¹³³ *Parent*, No. 3:15-CV-1204-GPC-WVG, 2016 WL 3348818, at *6.

¹³⁴ *Id.*

¹³⁵ See Complaint, *supra* note 16.

¹³⁶ *Iqbal*, 556 U.S. at 678.

¹³⁷ See Complaint *supra* note 16.

¹³⁸ See *id.*

“Deceptive” twelve times.¹³⁹ “Fraud” five times.¹⁴⁰ This language could be interpreted as labels against CBA, compared to a factual allegation. They are not facts. However, the complaint does build on these labels by describing the content of CBA’s marketing strategy.¹⁴¹

One of the main examples is by highlighting Kona Brewing’s packaging. The language on the packaging contains:

The waves in Hawaii are legendary. In the winter months, the island's north and west coasts see big waves that often climb to 40 feet, with huge curls of white water breaking just off shore. This is just one reason why surfers, body boarders, paddlers and those of just willing to watch from the beach make this pilgrimage. There is no other place on earth like Hawaii. The north shore of Oahu gets all the attention (as it should), but the waves at Makaha are just as sweet. This is the place where the first surf competition in Hawaii was held in 1954 and continues to attract world class pros to ride the giants of winter surf.¹⁴²

This is Big Wave Golden Ale’s description. The complaint describes every beer label and packaging. They describe CBA’s business model, and Kona Brewing’s profitability.¹⁴³ The complaint also states where the beer is brewed.¹⁴⁴ Overall, these factual allegations should be enough for the District Court to move to the next step.

Next, the District Court should turn their attention to the Reasonable Consumer Test, and find that a reasonable person would think that a beer from Kona Brewing was brewed in Hawaii. Everything on the exterior of the packaging points to the beer being imported from the Hawaiian Islands, all the way down to the brewery name: Kona Brewing. After pulling a bottle from the

¹³⁹ See *id.*

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² *Id.* ¶ 34.

¹⁴³ *Id.* ¶¶ 16–18 (“Craft Brew’s Chief Executive Officer, Andy Thomas, stated in a May 4, 2016 publication on Craft Brew’s website that “solid second quarter performance” in 2016 reflects, at least in part, “significant progress in strengthening our topline by sustaining Kona’s remarkable growth ...”).

¹⁴⁴ *Id.* ¶ 74. (“Portland, Oregon, Woodinville, Washington, Memphis, Tennessee, and Portsmouth, New Hampshire. . .”).

packaging, a consumer can see in small, vertical lettering on the side of the bottle: “KONA BREWING COMPANY CO KONA HI · PORTLAND, OR · WOODINVILLE, WA · PORTSMOUTH, NH · MEMPHIS, TN. FRESH, RESPONSIBLE, ALWAYS ALOHA.”¹⁴⁵ The vertical lettering means that a consumer must flip the bottle on its side to read.¹⁴⁶ The labeling does not specify exactly where that specific beer was brewed, or even that those locations are breweries. There is nowhere else on the packaging that lets the consumer know where the beer might have been brewed.¹⁴⁷ Only on Kona Brewing’s website can it be found that “[u]nder strict guidance, Kona Brewing Company also produces its bottled beer and mainland draft beer in Portland, Oregon, Woodinville, Washington, Memphis, Tennessee, and Portsmouth, New Hampshire, as part of its partnership with Craft Brew Alliance Inc.”¹⁴⁸

This is directly analogous to Beck’s beer in *Marty*.¹⁴⁹ Like Beck’s, Kona Brewing uses the language of the importing place, while obscuring the actual brew locations.¹⁵⁰ Finally, as the district court in *Marty* stated, “A reasonable consumer is not required to open a carton or remove a product from its outer packaging in order to ascertain whether representations made on the face of the packaging are misleading.”¹⁵¹ Kona Brewing’s labeling can also be contrasted with that of Red Stripe in *Dumas*.¹⁵² Unlike Red Stripe, Kona Brewing does not include the phrase “Hawaiian Style beer.”¹⁵³

Third, CBA is going to argue that the text of Kona Brewing’s marketing is mere puffery. The District Court here should follow the Beck’s analysis, where the district court found that “Germany Quality” was not puffery. All the depictions of Hawaii on Kona Brewing’s packages should also not be considered puffery. Since puffery cannot be taken in a vacuum, all the content pointing toward the beer being brewed in Hawaii. For example, the Longboard Island Lager’s label reads, “A spirited, crisp and refreshing brew, Longboard Island Lager is a smooth ride all the way in. Thirst’s up! Waikiki Beach in Honolulu is the birth place of longboard surfing. Kona Brewing pays tribute to this iconic place with our own Longboard Island Lager.”¹⁵⁴ If a consumer

¹⁴⁵ *Id.* ¶ 64.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* ¶ 65.

¹⁴⁸ *Id.* ¶ 74.

¹⁴⁹ *Marty*, 43 F. Supp. 3d at 1341.

¹⁵⁰ *Marty*, 43 F. Supp. 3d at 1341; Complaint, *supra* note 1, ¶ 74.

¹⁵¹ *Marty*, 43 F. Supp. 3d at 1341.

¹⁵² *Dumas*, No. 15CV1681 BTM(BLM), 2016 WL 1367511, at *1.

¹⁵³ See Complaint, *supra* note 1.

¹⁵⁴ *Id.* ¶ 25 (internal quotation omitted).

picks up a package and reads the bottom of the Longboard Island Lager, they will see “Longboard surfing in the shadow of Diamond Head has been a tradition for over 100 years at Waikiki beach. Our Longboard Island Lager pays tribute to this grand history.”¹⁵⁵ All of this language is amounts to more than the puffery found in “Artfully Crafted.” Instead, it is the same thing as “German Quality.” The language evokes a beer brewed in Hawaii, and not in Portsmouth, New Hampshire.

Kona’s beer, sold in six and twelve-packs, are marketed and sold to make the reasonable consumer think he or she is buying a Hawaiian beer.

V. CONCLUSION

Overall, a motion to dismiss should be denied because Kona Brewing’s bottles and packages are most closely analogous to Beck’s in *Marty v. Anheuser-Busch*. The packaging is meant to evoke a Hawaiian island brew, crafted for a thirsty surfer that can be purchased at a grocery store in Champaign, Illinois. The point of the packaging is to make consumers think they are enjoying a bit of Hawaii, much like Beck’s masquerading as a German beer. Kona Brewing intentionally excluded the breweries’ locations on the exterior of their packaging, and they should have known that a reasonable consumer would look at the packaging and crave imported beer from Hawaii.

¹⁵⁵ *Id.* ¶ 26.