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Davis Journal of Legal Studies Editorial Staff

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Letter from the Editors-in-Chief

Dear Reader,

It is with great enthusiasm that we present to you *Davis Journal of Legal Studies: Volume III, Spring 2023*.

Davis Journal of Legal Studies (DJLS) was founded in June 2020 at the University of California, Davis. DJLS is a student-run publication committed to contributing to public legal scholarship, developing a community of undergraduate legal scholars, and creating opportunities in publication for undergraduate students.

We greatly appreciate the generous support from the University of California National Center for Free Speech and Civic Engagement and the Center's Executive Director, Michelle Deutchman. We would also like to acknowledge Kate Andrup Stephensen, advisor of the University Honors Program: thank you for your guidance, support, and encouragement throughout this project. We are also grateful to our contributors, who are a diverse group of students, for strengthening our undergraduate legal community. Finally, we must thank the *Davis Journal of Legal Studies* editorial staff for their shared commitment to this work. Our operations have grown substantially since Volume II with the creation of new executive positions and the expansion of our editorial team in size. It has been a pleasure and privilege to work with and watch this team grow throughout the development of Volume III.

The papers in this volume consist of undergraduate scholarship and research related to unresolved issues in the justice system and legal field, including emerging issues like artificial intelligence law and social media's role in legal cases, as well as long-standing issues relating to disability justice and international law. With the nuanced insights of these articles, we hope to broaden the discourse surrounding these and other current issues in the legal field.

Good reading,
Hunter Keaster & Emma Tolliver
Editors-in-Chief
Davis Journal of Legal Studies, Volume III: Spring 2023

Fiery Cross Reef

By Noreen Auyoung and Julia Shurman

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The Spratly Islands form an archipelago located in the South China Sea. This archipelago is home to an atoll that has been named Fiery Cross Reef. Due to the complex geopolitical and legal environment surrounding this vast body of water, ownership of various regions in the South China Sea are highly contested. As such, the permissibility of China's occupation and construction on Fiery Cross Reef and the other formations that comprise the Spratly Islands is unclear under international law. Through examining the findings and decisions of the United Nations Convention on the Law of the Sea and the Arbitral Tribunal, this paper clarifies the distinctions between which claims and actions taken in the South China Sea, particularly over the Fiery Cross Reef of the Spratly Islands, are lawful or still have yet to be determined.

Initial Dispute Over Fiery Cross Reef

China's occupation and actions in the South China Sea have spurred decades of controversy. Their disputes over territories and sovereignty rights have long plagued the region. China's occupation of Fiery Cross Reef exemplifies the legal ramifications of their actions. Since 1987, China has continuously built on the reef despite the Philippines and Vietnam also claiming sovereignty over it.[1] In July 2015, new evidence revealed China's modifications to the reef, including a 3,000-meter airstrip capable of supporting military aircraft.[2] These actions sparked

[1] Michael S. Chase and Benjamin Purser, "China's Airfield Construction at Fiery Cross Reef in Context: Catch-Up or Coercion?," *The RAND Blog*, August 11, 2015, accessed March 3, 2023, https://www.rand.org/blog/2015/08/chinas-airfield-construction-at-fiery-cross-reef-in.html.
[2] Chase and Purser, "China's Airfield," *The RAND Blog*.

outrage from countries, such as the Philippines and Vietnam, that saw these as abuses of international law and threats to the nearby territories in future conflicts. Designed to address conflicts and disputes over sovereignty, the United Nations Convention on the Law of the Sea (UNCLOS) facilitates negotiating tables and tribunals for its signatories. One such tribunal was formed in 2013 when the Philippines raised legal concerns regarding China's actions in the South China Sea.[3] The findings of this arbitration address the legality of China's actions on the Spratly Islands under the United Nations Convention on the Law of the Sea.

China's Militarization of Fiery Cross Reef

Fiery Cross Reef has prompted controversy in recent years as countries like the US and the Philippines critique China's apparent militarization of the territory.[4] Legally defined as a rock, Fiery Cross Reef is part of the Spratly Islands and multiple countries claim territorial sovereignty over the land feature.[5] Despite these claims, China currently occupies Fiery Cross Reef and has formed an artificial island on the rock. In late 2014, satellite imagery revealed that China had begun building an airstrip on the reef, prompting objections from the US, the Philippines, and Vietnam.[6] In response, China stated this construction would improve the working and living conditions of workers and pointed out other states that have airstrips in the Spratlys.[7] However, other states find China's reclamation efforts unsettling and view the runway as a strategic action to intimidate countries with claims in the South China Sea.[8] From a strategic

[3] PCA Case No. 2013–19 in the Matter of the South China Sea Arbitration before an Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People's Republic of China, Award, July 12, 2016, http://www.andrewerickson.com/wp-content/uploads/2016/07/PH-CN-20160712-Press-Release-No-11- English.pdf.
[4] Commentary, "Fiery Cross Reef and Strategic Implications for Taiwan," *Center for Strategic & International Studies*, December 10, 2014, accessed March 2, 2023, https://www.csis.org/analysis/fiery-cross-reef-and-strategic-implications-taiwan.
[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] *Id*.

standpoint, China's occupation of Fiery Cross Reef bolsters China's strength in the area and provides China with an advantage if conflict were to arise.[9] For instance, part of the outrage over the runway is because it is large enough to fit the military aircrafts that are currently in China's arsenal.[10] China built the runway nonetheless and has landed military jets since its construction.[11] Furthermore, it is believed that the rock can serve as an electronic surveillance base for China.[12] While China faces backlash from other states, the question remains whether these actions on Fiery Cross Reef are legal under international law.

United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea was first adopted in 1982 and the treaty has grown into the reigning authority on international matters regarding the sea.[13] While first created to address concerns such as territorial disputes and fishing conservation, the treaty has since evolved into customary international law.[14] Because it is now widely considered customary law, countries that have not signed, like the US, are still bound to the legal standards established in UNCLOS.[15] Included as one of the current 168 parties to the treaty, China has signed and ratified the convention.[16] As a party to UNCLOS, China is responsible for upholding the rules of the convention and adhering to decisions rendered by the arbitral tribunal. These

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[9] *Id*.
[10] Reuters Staff, "Chinese military aircraft makes first public landing on disputed island," *Reuters*, April 17, 2016, accessed April 24, 2023, https://www.reuters.com/article/southchinasea-china/chinese-military-aircraft-makes-first-public-landing-on-disputed-island-idUSL3N17L1M8.
[11] *Id*.
[12] Commentary, "Fiery Cross," *Center for Strategic & International Studies*.
[13] International Maritime Organization, "United Nations Convention on the Law of the Sea," *International Maritime Organization*, accessed April 24, 2023, https://www.imo.org/en/ourwork/legal/pages/unitednationsconventiononthelawofthesea.aspx#:~:text=The%20United%20Nations%20Convention%20on,the%20oceans%20and%20their%20resources.
[14] The Fletcher School of Law and Diplomacy, Tufts University, "Customary International Law and the Adoption of the Law of the Sea Convention," *Tufts*, accessed April 24, 2023, https://sites.tufts.edu/lawofthesea/chapter-one/.
[15] *Id*.
[16] "Law of the Sea," opened for signature December 10, 1982, *United Nations Treaty Collection* no. 6, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.

tables are necessary when parties have disputes, as seen with the 2013 accusations the Philippines brought against China. As was the case with those two states, these disputes are often settled through an arbitral tribunal—a group of unbiased individuals gathered to settle a disagreement. Signatories are legally bound to respect the decisions of these tribunals and acting against the rulings violates UNCLOS.

The Role of Exclusive Economic Zones

UNCLOS specifies the rules surrounding exclusive economic zones (EEZs). EEZs are areas in which the Coastal States have sovereignty and jurisdiction in a 200-nautical mile region for both their natural resources and certain economic activities.[17] In particular, Coastal States have specific "sovereign rights" as decreed in the United Nations Convention and jurisdiction over "the establishment and use of artificial islands, installations, and structures."[18] Based on how EEZs are defined in UNCLOS, "the EEZ is not a maritime zone of sovereignty but one of functionally limited rights and jurisdiction."[19] In turn, countries have certain jurisdiction over their EEZs, which includes building structures and artificial islands. However, limits exist and states cannot exert their sovereignty over the zones that conflict with other parts of the Law of the Sea.[20] Despite this, China claims a historical right to 90 percent of the South China Sea based on what they maintain as a historical precedent that was decided in 1947 after Japan's surrender in World War II.[21] Referred to as the nine-dash line, China's claim envelops several territories and maritime provisions. Within China's nine-dash line also lies the EEZs of countries such as

[17] "Exclusive Economic Zone," *United Nations,* accessed March 2, 2023, https://www.un.org/depts/los/convention_agreements/texts/unclos/part5.htm.
[18] Convention on the Law of the Sea, 1982.
[19] Valentin Schatz and Christian Wirth, "South China Sea 'Lawfare': Fighting over the Freedom of Navigation," *German Institute for Global and Area Studies (GIGA) Focus*, no. 5, (2020): 3, accessed April 28, 2023, https://www.jstor.org/stable/resrep27058.
[20] Convention on the Law of the Sea, 1982.
[21] Tom Philips, Oliver Holmes, and Owen Bowcott, "Beijing rejects tribunal ruling in South China Sea case," *The Guardian*, July 12, 2016, accessed March 2, 2023, https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china.

Vietnam, Malaysia, and the Philippines.[22] As a result, China's attempt to claim 90 percent of the South Pacific Sea through the nine-dash line often leads to conflicts with other countries.[23] This happened in 2013 when the Philippines argued against China's actions on Fiery Cross Reef and in the South China Sea. The Philippines' accusations resulted in a Tribunal that looked at the rights of the two states and whether China's behavior in the South China Sea violated sections of UNCLOS.[24]

The Permanent Court of Arbitration's Ruling

In 2016, the Permanent Court of Arbitration, an organization that resolves international disputes, released a ruling on this case. The Tribunal declared that China's nine-dash line lacks historical foundations and has no legal basis.[25] Despite being legally bound to UNCLOS, China rejects this decision, refusing to acknowledge the Tribunal ruling. China justifies its rejection by calling the findings "ill-founded" and stating that "the Chinese government and the Chinese people firmly oppose [the ruling] and will neither acknowledge it nor accept it."[26] China's persistent claim of 90 percent of the South China Sea and resumption of actions in areas like the Spratly Islands and the EEZs of other countries explicitly ignore the Tribunal ruling, violating the Law of the Sea. As such, China's continued nine-dash line claim breached UNCLOS and is therefore unlawful. Additionally, the Tribunal singles out China for specific environmental violations like their dredging method of constructing new land.[27] These violations destroy the reef habitat by chiseling away soil, rock, and coral, disturbing organisms such as fishes and

[22] *Id*.
[23] Philips, Holmes, and Bowcott, "Beijing rejects tribunal ruling," *The Guardian*.
[24] The Republic of the Philippines, 2016.
[25] Caitlin Campbell and Nargiza Salidjanova, rep., *South China Sea Arbitration Ruling: What Happened and What's Next?* (U.S.-China Economic and Security Review Commission, 2016), https://www.uscc.gov/sites/default/files/Research/Issue%20Brief_South%20China%20Sea%20Arbitration%20Ruling%20What%20Happened%20and%20What%27s%20Next071216.pdf.
[26] *Id*.
[27] The Republic of the Philippines, 2016.

larvae which inhabit Fiery Cross Reef.[28] Despite these violations, it remains ambiguous as to whether or not the construction of artificial islands or buildings on the Spratly Islands is lawful.

Analysis and Implications of the Tribunal

Nowhere in UNCLOS or the Tribunal's decision is it stated that China does not have sovereignty over Fiery Cross Reef. The Tribunal did not "address whether the actual occupation and construction activities of China on these islands are prohibited by UNCLOS."[29] The court was able to declare certain actions and occupations unlawful on the part of China because of other states' rights to EEZs. Fiery Cross Reef is not part of another country's EEZ, so UNCLOS has no specific provisions on "what activities states can undertake on disputed islands."[30] As that rock's sovereignty remains disputed, there is no explicit statement that makes China's construction projects unlawful beyond the environmental violations, the Tribunal notes. Accordingly, China's occupation and building on Fiery Cross Reef as a whole are not technically illegal, but they could lead to much larger problems in the future. International law remains unclear on this issue of a state building on a rock with disputed sovereignty claims, so it is premature to call this action by China on Fiery Cross Reef unlawful.

The Legality of China's Actions

Although many countries see China's exploits in the South China Sea as an illegal threat, China's occupation and construction on Fiery Cross Island is ultimately not unlawful. There is no legal basis for the accusations regarding China's actions and construction of airstrips on the rock if countries wanted to push the issue further with China. While there are other areas in which China is violating its responsibilities as a party to UNCLOS, building on Fiery Cross Reef is not

[28] The Republic of the Philippines, 2016.
[29] Tara Davenport, "Island-Building in the South China Sea: Legality and Limits," *Cambridge University Press*, February 16, 2018, accessed March 3, 2023.
[30] *Id*.

one of these illegal actions. China's situation is complicated and signifies a bigger issue in international laws of the sea since there are points of ambiguity that countries can exploit. Additionally, the controversy over Fiery Cross Reef suggests the need for further specification on state rights when occupying a disputed territory. For the issue to have a clear answer on China's legal right to construction on the rock, international law would need to specifically address the sovereignty of Fiery Cross Reef and/or the specific rules regarding disputed sovereignty. In turn, until further legal distinctions are formed, China can lawfully build on Fiery Cross Reef as long as it follows the other rules that are specified in UNCLOS.

References

Campbell, Caitlin, and Nargiza Salidjanova. “South China Sea Arbitration Ruling: What Happened and What's Next?” *U.S.-China Economic and Security Review Commission.* July 12, 2016. Accessed March 3, 2023. https://www.uscc.gov/sites/default/files/Research/Issue%20Brief_South%20China%20Sea%20Arbitration%20Ruling%20What%20Happened%20and%20What%27s%20Next071216.pdf.

Chase, Michael S., and Benjamin Purser. “China’s Airfield Construction at Fiery Cross Reef in Context: Catch-Up or Coercion?” The RAND Blog. Last modified August 11, 2015. Accessed March 3, 2023. https://www.rand.org/blog/2015/08/chinas-airfield-construction-at-fiery-cross-reef-in.html.

“China lands more civilian planes on Fiery Cross reef.” BBC News. Last modified January 7, 2016. Accessed March 3, 2023. https://www.bbc.com/news/world-asia-china-35249092.

Commentary. “Fiery Cross Reef and Strategic Implications for Taiwan.” Center for Strategic & International Studies. Last modified December 10, 2014. Accessed March 2, 2023. https://www.csis.org/analysis/fiery-cross-reef-and-strategic-implications-taiwan.

Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S.

Crawford, Jamie, Jim Sciutto, and Tim Schwarz. “U.S. protests after Chinese military jet lands on South China Sea island.” CNN. Last modified April 19, 2016. Accessed February 7, 2023. https://www.cnn.com/2016/04/18/politics/chinese-military-jet-lands-on-island/index.htm.

Davenport, Tara. “Island-Building in the South China Sea: Legality and Limits.” *Asian Journal of International Law* 8, no. 1 (2018): 76–90. doi:10.1017/S2044251317000145.

Duong, Huy. “Massive Island-Building and International Law.” Asia Maritime Transparency. Last modified June 15, 2015. Accessed February 7, 2023. https://amti.csis.org/massive-island-building-and-international-law/.

“Exclusive Economic Zone.” United Nations. Accessed March 2, 2023. https://www.un.org/depts/los/convention_agreements/texts/unclos/part5.htm.

International Maritime Organization. “United Nations Convention on the Law of the Sea.” International Maritime Organization. Accessed April 24, 2023. https://www.imo.org/en/ourwork/legal/pages/unitednationsconventiononthelawofthesea.aspx#:~:text=The%20United%20Nations%20Convention%20on,the%20oceans%20and%20their%20resources.

Kohl, Adam W. “China's Artificial Island Building Campaign in the South China Sea: Implications for the Reform of the United Nations Convention on the Law of the Sea.” *Dickinson Law Review* 122, no. 3 (2018). Accessed February 7, 2023. https://ideas.dickinsonlaw.psu.edu/dlr/vol122/iss3/8/.

Philips, Tom, Oliver Holmes, and Owen Bowcott. “Beijing rejects tribunal ruling in South China Sea case.” The Guardian. Last modified July 12, 2016. Accessed March 2, 2023. https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china.

Reuters Staff. “Chinese military aircraft makes first public landing on disputed island.” Reuters. Last modified April 17, 2016. Accessed April 24, 2023. https://www.reuters.com/article/southchinasea-china/chinese-military-aircraft-makes-first-public-landing-on-disputed-island-idUSL3N17L1M8.

The Fletcher School of Law and Diplomacy, Tufts University. “Customary International Law and the Adoption of the Law of the Sea Convention.” Tufts. Accessed April 24, 2023. https://sites.tufts.edu/lawofthesea/chapter-one/.

The Republic of the Philippines v. The People's Republic of China, 19 U.S. (July 12, 2016). Accessed April 24, 2023. https://pcacases.com/web/sendAttach/ 2086.

United Nations. "Law of the Sea." United Nations Treaty Collection. Accessed April 24, 2023. https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.

Wirth, Christian, and Valentin Schatz. "South China Sea "Lawfare":." In . N.p.: German Institute of Global and Area Studies (GIGA), 2020. http://www.jstor.org/stable/resrep27058.

The Art of AI: Addressing Legal Challenges in Content Generation

By Aaron Guerra

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Artificial Intelligence, or AI, has become one of the most prevalent topics in popular culture over a markedly short period of time. According to Google Trends, popular interest in AI skyrocketed in late 2022, coinciding with the release and discussion of several popular AI tools, primarily ChatGPT.[1]

According to Encyclopedia Britannica, AI is defined as "the ability of a digital computer or computer-controlled robot to perform tasks commonly associated with intelligent beings."[2] AI technologies are hyper-present in day-to-day life, ranging from virtual assistants that interpret human voices, to social media and algorithms used by streaming services that provide individualized recommendations. For the purposes of this paper, only certain AI functions will be examined, primarily those revolving around transformer language models that utilize natural language processing to produce either text or images. As AI technologies become more advanced and widely deployed, legal and regulatory issues regarding liability and intellectual property will become more common. This paper will examine two categories of publicly available AI systems, text and image generation platforms, and summarize the current and potential legal issues facing these systems.

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[1] Google Trends (n.d.). "Artificial Intelligence," May 18, 2023, https://trends.google.com/trends/explore?geo=US&q=%2Fm%2F0mkz&hl=en.
[2] "Artificial Intelligence | Definition, Examples, Types, Applications, Companies, & Facts | Britannica," February 16, 2023, https://www.britannica.com/technology/artificial-intelligence.

LLM AI and Text Generation

The 'GPT' in ChatGPT stands for Generative Pre-Trained Transformer and is a type of large language model that has gained significant attention and adoption in recent years. Transformers and large language models (LLMs) represent a new frontier in natural language processing (NLP), a division of computer science that focuses on "giving computers the ability to understand text and spoken words in much the same way human beings can."[3] Natural language processing is commonly found in voice-to-text or voice command softwares, including digital assistants on mobile devices and customer service chatbots.[4] However, the development and implementation of transformers has transformed this technology into a vastly more capable version.

At their core, transformers are a type of deep learning model that can analyze and process sequential data, such as language, with remarkable accuracy and speed.[5] Sequential data refers to the notion of words in a language being ordered in a common way that can be understood by machines studying these patterns billions of times. For example, the phrase 'I think' is often followed by the word 'that.' Transformers build on this principle by training LLMs using large datasets of text which enable the machinery to develop a complex and mathematical understanding of the intricacies and subtleties of language.[6] This allows them to generate text that is both fluent and contextually appropriate, even in complex and nuanced situations. One notable feature of transformers and LLMs includes their use of unsupervised learning mechanisms, a format of machine learning that allows for pattern recognition and model

[3] "What is natural language processing (NLP)?" IBM, accessed March 1, 2023, https://www.ibm.com/topics/natural-language-processing.
[4] *Id.*
[5] Ashish Vaswani, Noam Shazeer, Niki Parmar, Jakob Uszkoreit, Llion Jones, Aidan N. Gomez, Lukasz Kaiser and Illia Polosukhin, "Attention is All you Need," ArXiv abs/1706.03762 (2017).
[6] *Id*.

training without labeled data, which is often more difficult to come by and expensive to produce.[7]

Liability

One of the primary legal issues facing the use of AI and LLMs like ChatGPT is liability. As these systems become more advanced and capable of making autonomous statements, questions arise about who is responsible for the actions and decisions made by these systems. One particular framework through which to analyze the liability of online systems is Section 230 of the Communications Decency Act.[8]

Section 230 refers to the specific provision of the Communications Decency Act that regulates liability for online platforms and services. This rule prevents online platforms from being liable for user-generated content posted on their platforms, so long as they act in good faith to remove illegal content if and when they become aware of it.[9] However, the law makes particular stipulations about what is and is not considered user-generated content, and it remains undecided how AI and LLMs in particular would be defined in accordance with this statute.[10]

In particular, the regulation stipulates that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[11] The regulation further defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by

[7] Jacob Devlin and Ming-Wei Chang, "Open Sourcing BERT: State-of-The-Art Pre-Training for Natural Language Processing," Google AI Blog, November 2, 2018, https://ai.googleblog.com/2018/11/open-sourcing-bert-state-of-art-pre.html.
[8] Communications Decency Act of 1996. 47 U.S.C. § 230. (2012).
[9] Valerie C. Brannon and Eric N. Holmes, "Section 230: An Overview," *Congressional Research Service* (April 7, 2021): 2.
[10] *Id.*, 16.
[11] Communications Decency Act of 1996. 47 U.S.C. § 230. (2012).

libraries or educational institutions."[12] Finally, an "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[13] Under these definitions, it is possible to use the Section 230 framework to determine how LLMs would be categorized, as this would have important implications for the laws governing the content created. As LLMs have not yet been regulated, it remains undecided exactly which mechanisms or frameworks would be used to create these rules.

Assuming that LLM models are treated as an interactive computer service, and thus not liable under Section 230, these services would be treated similarly to YouTube, Google, or Instagram. These services primarily function to connect the user to content created by individuals other than the service provider, such as a corporate website or video. This may apply to the use of LLMs in certain scenarios, for example, if a user were to recommend a book from a given list or an appropriate mathematical formula for solving a problem. The argument can be made here that no content is truly being generated, and the LLM is acting as a service. However, for situations such as writing poetry or summarizing text, the model is better understood as an information content provider. As defined by the statute, a content provider need only generate information in part, which would align with the method that LLMs use to generate text outputs. As such, it is likely that in many contexts, a court would find that LLMs on the scale of input-output text generation would be information content providers, and thus not subject to Section 230 protection.

Indeed, Supreme Court Justice Neil Gorsuch recently stated that online artificial intelligence that generates "poetry" and "polemics [...] goes beyond picking, choosing,

[12] *Id*.
[13] *Id*.

analyzing, or digesting content. And that is not protected."[14] This quote, taken from a currently pending Supreme Court case reviewing the liability of YouTube and its recommendation algorithms, suggests that at least one justice believes that if reviewed, this model would not qualify for protection under Section 230.

There are costs and benefits to LLMs not being protected under Section 230. Possible benefits of being liable include accountability and an incentive for developers to create models that are accurate, inoffensive, and reduce liability risk. The lack of regulation of harmful content such as disinformation or hate speech on social media platforms protected by Section 230 has led legislators to push for stricter standards in recent years. Some individuals, including President Joe Biden, have suggested the removal of Section 230 entirely due to the liability protections it creates for tech companies.[15]

However, many legal scholars argue that the existence of Section 230 allowed for the development of the internet as it exists today, for better or worse, and to limit or restrict it could have unintended consequences. Stanford Law professor Evelyn Douek argued in a 2022 interview that the existence of Section 230 has mitigated risk for platforms and allowed for the vast diversity of content that is posted. She states that "the #MeToo movement, for example, might have played out very differently in a world where platforms took down any posts that even remotely looked defamatory."[16]

AI and Image Creation

Art generation models, such as DALL-E, Midjourney, or Stable Diffusion, use similar techniques as LLMs to create visual art. These models often provide multiple options, including

[14] Gonzalez v. Google, LLC, No. 18-16700 (9th Cir. 2021).
[15] The Editorial Board, "Opinion | Joe Biden Says Age Is Just a Number." The New York Times, January 17, 2020. https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html.
[16] Evelyn Douek, "Stanford's Evelyn Douek on What Section 230 is And Why it is Misunderstood," interview by Melissa De Witte, October 10, 2022, https://law.stanford.edu/2022/10/10/stanfords-evelyn-douek-on-what-section-230-is-and-why-it-is-misunderstood.

processing text or analyzing existing images to create entirely new or edited versions. The process of generating art typically begins with a random assortment of pixels that are then fed into the model as input. The model identifies descriptive cues from the text using a method similar to an LLM, or characteristics of the provided image such as shapes, colors, and textures.[17] Once the model has analyzed the initial input, it generates a new image by modifying and combining the features it has learned.[18] This process is repeated iteratively, with the model adjusting its parameters each time to produce an image that more closely matches the desired prompt.[19]

Similar to LLM, AI art generation models have the ability to learn from both labeled and unlabeled data. This means that they can be trained on large datasets of existing artwork, allowing them to learn the underlying patterns and styles of different artists or genres. This enables them to generate new artwork that is not only contextually appropriate but also stylistically consistent with the chosen genre or artist. While this ability allows for a great amount of freedom, this also creates the primary legal concern in relation to AI artwork.

Copyright Infringement

By the very nature of the training data used to create these models, legal controversy has been inevitable. Every model uses potentially different training datasets, which have different sources with varying levels of transparency on how the images were procured. Typically, web scraping of some form is involved, a process which involves "using technology tools for automatic extraction and organization of data from the Web for the purpose of further analysis of this data."[20] The conference paper providing this definition, titled "Legality and Ethics of Web

[17] Guodong Zhao, "How Stable Diffusion Works, Explained for Non-Technical People." Medium. April 4, 2023. https://bootcamp.uxdesign.cc/how-stable-diffusion-works-explained-for-non-technical-people-be6aa674fa1d.
[18] *Id*.
[19] *Id.*
[20] Vlad Krotov and Leiser Silva, "Legality and Ethics of Web Scraping," Americas Conference on Information Systems (2018): 2, https://doi.org/10.17705/1cais.04724.

Scraping," provides context on several potential legal issues regarding the topic and the use of data derived from web scraping. This section will use the lawsuit *Andersen et al. v. Stability AI Ltd. et al.* (2023) as a case study to understand the concerns that artists have with AI models and their ability to potentially infringe on copyrighted material.

In the complaint, three named Plaintiffs along with potentially innumerous class action members allege the direct and vicarious copyright infringement of their property, among other claims, against the creators of Stable Diffusion, a notably open source AI art model. This model was trained using various datasets provided by Large-Scale Artificial Intelligence Open Network (LAION), a German nonprofit that provides image machine learning datasets to the public free of charge.[21]

The complaint alleges that several of these datasets were composed by scraping images from "commercial image-hosting services," a claim rebuked by the LAION FAQ.[22] Rather, the dataset contains web links to images and the alt text provided with those images, a distinction that may be relevant in determining LAION's role in copyright infringement.[23] One textbook on data analysis cites *eBay v. Bidder's Edge* (2000) as a case curtailing scraper's rights, particularly on the provision of deep links such as those provided in LAION datasets, which point directly to a file stored on a page that prevents navigation through the page.[24]

The complaint further alleges that the damages caused by Stable Diffusion include the profit from the preparation and distribution of the images and market competition created by the images. These monetary damages manifest "as a result of Defendants' conduct" when imposters create art in the style of another artist and sell that product on marketplaces.[25] The complaint

[21] Andersen et al. v. Stability AI Ltd. et al., Docket No. 3:23-cv-00201 (N.D. Cal. Jan 13, 2023), 23.
[22] "FAQ | LAION," accessed March 1, 2023, https://laion.ai/faq.
[23] *Id*.
[24] Simon Munzert, Christian Rubba, Peter Meißner, Dominic Nyhuis, "Scraping the Web," in *Automated Data Collection with R*, (John Wiley & Sons, Ltd, 2015), 219 –294, https://doi.org/10.1002/9781118834732.ch9.
[25] Andersen et al. v. Stability AI et al., 32.

states that Stable Diffusion is "vicariously liable for any infringements committed by Imposters," a term referring to the liability when a superior party bears responsibility for actions committed by a subordinate or associate party.[26,27]

There are weaknesses to the argument presented by the plaintiffs, particularly in regard to the facts of how AI art models work. For example, the complaint refers to the idea of compressed copies several times, stating that the "AI Image products themselves [...] contain compressed copies of the copyrighted works they were trained on."[28] Similarly, in the factual allegations plaintiffs refer to Stable Diffusion as a "21st-Century Collage Tool."[29] This is at best a mischaracterization of the process used by AI models to create images, as described previously. Art models, like LLM models or any machine learning models, do not contain the data that they were trained on but rather a mathematical interpretation of that data which can be used for predictive purposes.

One assumed response to the claims made in the complaint involves the protections granted by the Fair Use Doctrine, which is specifically mentioned as an anticipated defense of the Defendant.[30] The Fair Use Doctrine states that reproduction of copyrighted work for purposes such as "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[31] The act puts forth a four-pronged analysis of whether a work is fair use or not, which includes consideration of the following factors:[32]

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[26] *Id*.
[27] "Vicarious Liability," LII / Legal Information Institute, accessed March 1, 2023, https://www.law.cornell.edu/wex/vicarious_liability.
[28] Andersen et al. v. Stability AI et al., 3.
[29] *Id*., 14.
[30] *Id.*, 11.
[31] Copyright Act of 1976. 17 U.S. Code § 107. (2011).
[32] *Id*.

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The first factor's inclusion of nonprofit use of the copyrighted work may suggest that due to LAION's status as a nonprofit organization, the data scraping itself may be protected under the Fair Use Doctrine. While Stability is not a nonprofit organization, OpenAI, the company that developed the DALLE and ChatGPT models, was previously a nonprofit and still maintains a nonprofit arm of the organization. This could potentially allow for leniency towards groups of this form. The third factor suggests applicability to the Fair Use Doctrine depending on how a court views the technology behind art models. The logic presented in the complaint, as previously described, alleges that not only do the models contain the images they were trained on, but each image product contains the true image as well. While this argument is factually untrue, there may be enough of an argument behind it to convince a court that the amount of the original image used in a generated image would prohibit the application of the Fair Use Doctrine. Finally, the fourth factor seems to suggest that the model would not be protected under the Fair Use Doctrine, following the logic provided in the complaint. While the plaintiffs do not provide concrete evidence of this occurring, it is easy to imagine this situation and the implications so-called 'fakes' could have on the market value of images created by the artist. As the case proceeds through the court, any or none of these arguments could be used by the defendant.

The Krotov and Silva paper on web scraping touches on the issue as well, suggesting that in addition to 'fair use,' "ideas cannot be copyrighted—only the specific form or representation of those ideas. So one can use copyrighted data to create summaries of copyrighted data."[33] This

[33] Krotov and Silva, "Legality and Ethics," 3.

argument would seem to apply to LLMs or AI art models, as the products created are summaries or wholly new products based on interpretations of copyrighted data.

There are strong arguments on both sides of the argument, and multiple existing legal standards that may apply towards how a court decides on this matter. In any case, *Andersen et al.* (2023) is unlikely to be the last legal assertion of damages caused by these models.

Conclusion

The development of AI technology has led to the emergence of two categories, among others, of publicly available AI systems: text and image generation. Through new technologies including transformers and deep learning, these models have proven to be incredibly powerful at generating content in their respective fields, but they also pose present and future legal challenges that need to be addressed. With regard to AI and LLM, assigning appropriate liability is a critical issue that requires careful consideration, given the impact it could have on accountability and the reduction of harmful content. The Section 230 of the Communications Decency Act may provide some level of protection, but it is undecided whether AI systems would be protected under the definition of interactive computer services. Similarly, the ability of AI to generate art in the style of other individuals has raised concerns about copyright infringement, data scraping, and the application of the Fair Use Doctrine. The recent case *Andersen et al.* highlights the legal battles that have begun over this technology and hints at where these issues may develop in the future. AI technologies are far from limited to the two select categories of content generation, and new applications are being discovered and implemented at a rate faster than legislators can keep up with. As AI technologies continue to advance, it will be essential to address the legal implications of their use and ensure that they are regulated in a manner that protects individual rights while allowing for continued innovation.

References

"Artificial Intelligence | Definition, Examples, Types, Applications, Companies, & Facts | Britannica," February 16, 2023. https://www.britannica.com/technology/artificial-intelligence.

The Editorial Board. "Opinion | Joe Biden Says Age Is Just a Number." *The New York Times*, January 17, 2020. https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html.

Brannon, Valerie C., and Eric N. Holmes. "Section 230: An Overview," April 7, 2021. https://crsreports.congress.gov/product/pdf/R/R46751.

Communications Decency Act of 1996. Pub. L. No. 104-104, Tit. V, 110 Stat. 133 (1996).

Devlin, Jacob, and Ming-Wei Chang. 2018. "Open Sourcing BERT: State-of-The-Art Pre-Training for Natural Language Processing." Google AI Blog. November 2, 2018. https://ai.googleblog.com/2018/11/open-sourcing-bert-state-of-art-pre.html.

Douek, Evelyn. "Stanford's Evelyn Douek on What Section 230 is And Why it is Misunderstood". Interview by Melissa De Witte, October 10, 2022. https://law.stanford.edu/2022/10/10/stanfords-evelyn-douek-on-what-section-230-is-and-why-it-is-misunderstood/.

"FAQ | LAION." Accessed March 1, 2023. https://laion.ai/faq.

Google Trends (n.d.). "Artificial Intelligence". May 18, 2023. https://trends.google.com/trends/explore?geo=US&q=%2Fm%2F0mkz&hl=en.

Krotov, Vlad, and Leiser Silva. "Legality and Ethics of Web Scraping," *Americas Conference on Information Systems*. 2018. https://doi.org/10.17705/1cais.04724.

LII / Legal Information Institute. "Vicarious Liability." Accessed March 1, 2023. https://www.law.cornell.edu/wex/vicarious_liability.

Munzert, S., Rubba, C., Meißner, P. and Nyhuis, D. "Scraping the Web." In *Automated Data Collection with R*, edited by Munzert, S., Rubba, C., Meißner, P. and Nyhuis, D, (John Wiley & Sons, Ltd, 2015), 219 - 294. https://doi.org/10.1002/9781118834732.ch9.

Vaswani, Ashish, Noam M. Shazeer, Niki Parmar, Jakob Uszkoreit, Llion Jones, Aidan N. Gomez, Lukasz Kaiser and Illia Polosukhin. "Attention is All you Need." ArXiv abs/1706.03762 (2017)

Zhao, Guodong . 2023. "How Stable Diffusion Works, Explained for Non-Technical People." Medium. April 4, 2023. https://bootcamp.uxdesign.cc/how-stable-diffusion-works-explained-for-non-technical-people-be6aa674fa1d.

Tort Doctrine on the Law of Dental Malpractice

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Dentistry is evolving, oral disease patterns are changing, and a more educated and health-conscious population is willing to spend more money on advanced dental treatments. Due to advancements in the clinical sciences, dentists are now able to perform various specialized dental treatments, which have altered traditional dental procedures. From a legal liability perspective, the complexity of these treatments raises the possibility that dentists may provide care below acceptable standards. The purpose of this review is to introduce general readers to the basic concepts of dental malpractice law within the auspices of the tort doctrine, while also raising patient awareness of legal rights, reducing dental litigation, and improving public welfare.

Introduction

Dental malpractice litigation has increased in the past few years; as patients become conscious of their rights, they are more likely and willing to bring lawsuits against their dentists. A recent study suggests that dental malpractice suits have risen. In fact, 11.2 percent of malpractice payments in the United States are against dentists,[1] while the number of malpractice payments against non-dentist health professionals has fallen.[2] Furthermore, there is limited

[1] R. P. Nalliah, "Trends in US Malpractice Payments in Dentistry Compared to Other Health Professions – Dentistry Payments Increase, Others Fall," *British Dental Journal* 222, no. 1 (January 2017): 36–40, https://doi.org/10.1038/sj.bdj.2017.34.
[2] *Id.*

knowledge available about trends and insights in dental malpractice lawsuits. One reason for this is that these cases still make up a minority of medical malpractice cases. With such high stakes and trends of increasing cases, comprehensive legal studies on the matter are critical.

Dental malpractice is defined as any omission by a dental professional during the treatment of a patient that diverges from norms or standards of care in the dental community and causes damage to the patient. Current dental malpractice law originates in nineteenth century English common law.[3] Common law is the legal system established through court rulings, as opposed to laws formed solely from legislative statutes or executive orders. In the United States, dental malpractice law is under the jurisdiction of states: the structure and rules of law that oversee it have been established through decisions on lawsuits filed in state courts. Thus, dental malpractice law varies across jurisdictions, but maintains basic and similar legal standards. In addition, statutes passed by state and federal legislatures, such as the 1946 Federal Tort Claims Act, have further influenced the framework of dental malpractice laws.

The consequences of dental malpractice can be severe, ranging from physical and emotional distress to permanent disfigurement or even death. Therefore, it is important to give dental malpractice the same level of attention as other forms of medical malpractice. The legal principles that apply to cases of medical-related malpractice are similar to those that apply to dental malpractice,[4] but there are also significant differences between the two fields. One of the most notable differences is that the role of a dentist is much more multifaceted than that of a physician, as they must often conjointly serve as a surgeon, anesthesiologist, and radiologist. As a surgeon, a dentist must perform delicate and intricate procedures within the mouth, a small and confined area, while also ensuring that the patient is adequately anesthetized and comfortable. In

[3] Stuart M Speiser, *The American Law of Torts* (Thomson West, 1986).
[4] Louis J Regan, *Doctor and Patient and the Law* (C.V. Mosby Company, 1956).

addition to surgical procedures, dentists must also interpret X-rays and other diagnostic images, which are crucial in making an accurate diagnosis and treatment plan. Misinterpreting these images can lead to incorrect diagnoses or treatments, which can have serious consequences for the patient. Furthermore, dentists often administer anesthesia to patients, which requires a high level of expertise and attention to detail. Failure to properly administer anesthesia can lead to serious complications, such as respiratory or cardiac arrest. The complexity and diversity of tasks increase the likelihood of mistakes occurring during dental procedures, making dentists more susceptible to error.

Another difference is that the medical and dental professions are regulated by different authorities. Both have different training, licensing, and accreditation requirements. This suggests that dental malpractice cases require different legal considerations than medical malpractice cases given the unique nature of dental procedures. Dental malpractice and medical malpractice may share many similarities, but there are also significant differences that justify separate legal considerations for these types of cases.

Common Law of Tort Doctrine

"Tort" is the medieval Latin word for "wrong and injustice," and tort law is a rule of law that creates and provides remedies for civil wrongs.[5] Tort doctrine is the rule of law solely pivoting on interpersonal wrongs, principally between private parties. Distinct from the law of contractual duties, tort liabilities are not a voluntary quid pro quo (a reciprocal exchange of benefits or services, whereby each party agrees to provide something of value to the other in return for a corresponding benefit or service). They are also distinct from the law regarding criminal wrongs. In the case of criminal wrong, the standard of proof is "beyond a reasonable

[5] G Edward White and Inc Ebrary, *Tort Law in America : An Intellectual History* (Oxford ; New York: Oxford University Press, 2003).

doubt"; the plaintiff must demonstrate that the defendant has satisfied each of the requirements of the tort action that is more probable than not. Beyond that, the state or federal government are not necessarily a part of the tort action. In the United States, tort cases are heard before civil juries, and most of the time, tort suits are settled before reaching trial.[6] Tort law protects people's physical integrity and health from intentional or omissive harm; it protects their mental health and integrity from intentional harassment or violation and negligent infliction of psychological damage; it protects people's reputation from defamation; it ensures that people are free from unwarranted publicity (right to privacy) and false imprisonment; and it protects the integrity of property from intrusions like unauthorized use, damage, and trespassing (land). The law derived from tort doctrine partakes two fundamental issues of law and ethics in civil life: how people should treat each other and who is liable when damage occurs.

Tort Law in Dental Malpractice

The etymology of "malpractice" is rooted in the Latin words "male" and "praxis," which together indicate "bad, incorrect application." Malpractice is described as the improper, deficient practices of a professional that occur during the exercise of their duties. The World Medical Association defines malpractice as "injury caused to a patient due to a healthcare provider's failure to adhere to the standard of care, the lack of expertise, or improper and careless delivery of the treatment."[7] Malpractice in dentistry refers to improper procedures carried out by dental professionals that cause damage to the patient. Although the legal definition of dental malpractice differs in different jurisdictions, it typically relates to problems arising from neglect, misdiagnosis, or delayed diagnosis or treatment in dentistry.

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[6] Arthur Ripstein, "Theories of the Common Law of Torts," ed. Edward N. Zalta, *Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, 2022).
[7] "World Medical Association Statement on Medical Malpractice," WMA, accessed January 6, 2023, https://www.wma.net/policies-post/world-medical-association-statement-on-medical-malpractice/.

Applying the tort doctrine to dental malpractice cases is meant to ensure that the involved parties reach a settlement via extensive negotiation and concessions without a jury trial. The vast majority of lawsuits involve the patients suing their dentist for bodily damage purportedly caused by negligence. The injured patient must prove that their dentist was negligent and that this conduct resulted in harm in order to have the standing to file a lawsuit. More specifically, three legal components must be established to have standing.[8] First, a duty of care between the provider and the patient must have been established. Second, an actual violation of said duty must have occurred. Third, harm must have resulted from the violation. If the jury ruling favors the plaintiff, the compensatory damages often account for economic and noneconomic losses (pain and mental distress).

In the eyes of many dentists, one of the most unpalatable elements of dentistry is the possibility of being sued for malpractice. The fear of being sued forces dentists to practice defensive decision making, such as recommending diagnostic tests or dental treatment that are not necessarily the best option for the patient but would protect the dentist in a lawsuit.[9] This defensive method raises the cost of a visit and encourages overtreatment in dentistry. Overtreatment refers to a situation in which a patient receives more medical or dental treatment than necessary or appropriate for their condition. However, patients regularly incur financial loss, pain, and emotional distress due to dentists' omissions. In the dentistry field, it is commonly considered that the possibility of legal sanctions encourages providers to be more cautious and invest in safety. These contrasting opinions clash when a lawsuit is filed.

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[8] B. Sonny Bal, "An Introduction to Medical Malpractice in the United States," *Clinical Orthopaedics and Related Research* 467, no. 2 (November 2008): 339–47, https://doi.org/10.1007/s11999-008-0636-2.
[9] M. Sonal Sekhar and N Vyas, "Defensive Medicine: A Bane to Healthcare," *Annals of Medical and Health Sciences Research* 3, no. 2 (2013): 295, https://doi.org/10.4103/2141-9248.113688.

Duty of Care

In negligence cases, the pivotal question revolves around the potential breach of duty of care by dentists, which tort doctrine scrutinizes through the lens of actions a reasonable individual would undertake in analogous circumstances. The standard dentist-patient relationship is a contractual duty. Even if the dentist invites people to seek his service, the dentist is not legally required to accept them as her or his patients. Regardless of one's values or professional ethics, the law does not force the dentist to accept the patients just because she or he is licensed to practice dentistry.[10] The law imposes obligations on the dentist and the patient only if the invited individual has been accepted as a patient.[11] The dentist then affirms, directly or by implication, that she or he possesses professional knowledge and competence and will exercise care in using their skill and knowledge to achieve the clinical objective for which she or he is engaged. In addition, once the relationship is formed, the dentist is obligated to provide services until they are no longer required or until the patient is discharged.

It would be unreasonable to expect a dentist to provide immaculate treatment and neglect the patient's own behavior. Consequently, according to the contributory negligence doctrine, individuals have a duty to exercise reasonable care for their own safety and well-being.[12] When a plaintiff fails to fulfill this duty, they are deemed to have contributed to the harm they have experienced. Simply put, it is the patient's responsibility to provide an accurate medical history, alert the dentist of any unanticipated occurrences during treatment, and indicate whether she or

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[10] Tvedt v. Haugen, 70 N.D. 338, 294 N.W. 183, 132 A.L.R. 379 (N.D. 1940); Findlay v. Board of Sup'rs of County of Mohave, 72 Ariz. 58, 230 P.2d 526 (Ariz. 1951).

[11] Stevenson v. Yates, 183 Ky.196, 208 S.W. 820 (Cal. App. 1919); Summerour v. Lee, 104 Ga.73, 121 S.E.2d 80 (Ga. Ct. App. 1961); Allison v. Blewitt, 348 S.W.2d 182 (Tex. Civ. App. 1961); Engle v. Clark, 346 S.W.2d 13 (Ky. App. 1961); see also Ohio Rev. Code, §§ 4715.01-4715.99, which is exemplary of the majority of the states' codes on this subject.

[12] Chubbs v. Holmes, 150 A. 516 (Conn. 1930); "Contributory Negligence or Assumption of Risk as a Defense in Actions against Physicians or Surgeons for Malpractice," 50 A.L.R.2d 1043 (1954); Donathan v. McConnell, 193 P.2d 819 (Mont. 1948).

he comprehends a proposed treatment. These responsibilities may play a role in defenses with contributory negligence or acceptance of risk, but they may also be relevant in assessing the dentist's performance.

Once a dentist-patient relationship has been established, some responsibilities take effect. If the duties of care are not satisfied, whether by omission or intention, and someone is hurt directly due to the dentist's breach of duty, the dentist is liable. The duty of care for the dentist is straightforward. The dentist must possess the updated knowledge and competence in the region in which she or he practices, and the dentist must apply that knowledge and skill as a reasonably sensible dentist would in the same community.[13] This is in favor of the dentist since there is a presumption that the dentist possesses and employs the required knowledge and abilities. The plaintiff bears the burden of proving that the dentist lacked the expertise or did not employ it appropriately. In states that demand ongoing education for dental society membership or re-licensure, there is a legally questionable inference that the dentist may lack the required knowledge and skills if the dentist fails to complete the continuing education courses. It is simpler to demonstrate that the dentist did not employ the anticipated knowledge and ability than to demonstrate that he did not possess them.

The Standard of Care

Standard of care is what standard a professional would use and what a reasonable person would do. A few examples of some common cases that violated the standard of care would be where there is some known procedure that is not done—such as failure to sterilize or irrigate a socket after extraction of a tooth—the injury due to the negligent use of an instrument, or the dentist drilling through someone's tongue instead of their tooth. In tort doctrine, customary

[13] Henry A. Collett, "Dental Malpractice: An Enormous and Growing Problem," *The Journal of Prosthetic Dentistry* 39, no. 2 (February 1978): 217–25.

practice is the standard of care in dental malpractice cases, and proving compliance with it typically nullifies the plaintiff's claim. Within the paradigm of customary practice, dentists are held to the standard of a reasonable practitioner in their field. Customary behavior is not conclusive in most tort cases, although it can be used to determine if a defendant behaved inappropriately.[14]

In recent years, courts' approaches to evaluating allegations of negligence have clearly shifted in favor of using the test of the standard of care provided nationwide rather than the community test-legal principle that assesses whether the conduct in question would be deemed reasonable and appropriate by an ordinary person within the relevant community. A case in point is *Sanderson v. Moline* (1972), in which the Washington State Court of Appeals reversed the trial court's judgment that the trial court improperly utilized the locality rule to establish the standard of care. A patient in Spokane County filed a malpractice suit against his dentist, alleging that his dentist failed to diagnose and treat their periodontal disease properly. The dentist's attorney falsely convinced the trial court that the expert witness within the Spokane area was where the patient could establish the only standard of care relevant to the case. Thus, the jury charge was prejudicial to the patient by dismissing the value of the patient's expert witness, who did not come from the Spokane area. The Appellate court reasoned that the Washington Supreme Court, in the far-reaching decision of *Pederson v. Dumouchel* (1967), abandoned the locality rule as it then existed in this jurisdiction:

> The "locality rule" has no present-day vitality except that it may be considered as one of the elements to determine the degree of care and skill which is to be expected of the average practitioner of the class to which he belongs. A qualified medical or dental practitioner should be subject to liability, in an action for negligence, if he fails to

[14] "Dental Malpractice," Justia, last reviewed October 2022, https://www.justia.com/injury/medical-malpractice/dental-malpractice/.

> exercise that degree of care and skill that is expected of the average practitioner in the class to which he belongs, acting in the same or similar circumstances.[15]

This rule gave the court a guideline when determining the standard of care: geographic boundaries should not be a limitation.[16]

Another crucial factor in a dental malpractice case is the standard for specialists. It is not a sign of a lack of empathy to refer patients to a dental specialist when providing treatment. It shows extreme caution and professionalism to refer patients to dental specialists who are better at delivering the necessary care. A referral also indicates that the dentist is not capable of legally providing such treatment for the patient. For example, asthma patients are sent to pulmonologists for specialized care. After visiting the specialist, the patients must continue visiting their primary care provider or family physician. In dentistry, the same principle holds. A general dentist might refer a patient to an endodontist to discuss the possibility of root canal treatment when the patient is suffering from pain but does not want the tooth extraction. Dental malpractice claims may emerge from a dentist's inability to refer patients who need care outside the scope of their training, experience, or expertise. Concerns arise when more dental procedures are carried out by dentists who are not trained, experienced, or licensed.

A specialist is held to the same standards as other dental specialists who practice in a related or identical community. For example, an oral surgeon must present the superior skills and knowledge he represents to the public as holding. In contrast, a general dentist is not required to acquire and use the knowledge and skills of third-molar (wisdom teeth) extraction like an oral surgeon would.

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[15] Pederson v. Dumouchel, 72 Wn.2d 73, 431 P.2d 973 (Wash. 1967).
[16] Sanderson v. Moline, 7 Wn. App. 439, 499 P.2d 1281 (Wash. App. 1972).

Rule of Law on Proof

The heart of a dental malpractice lawsuit consists of four essential components. The first is establishing whether the duty of care that existed resulted from a patient-dentist relationship. Typically, it is simple to identify whether or not this relationship exists. Then, the dentists must perform a high standard of care for their patients. This entails the safety protocols that a dentist would have followed while caring for a patient within the same professional community. The plaintiff will need an expert witness—unless the negligence was egregious—to demonstrate this facet. The expert needs to be knowledgeable about the particular kind of procedure that relates to the claim. The third part of the claim, known as breach and causation, will also require the expert's opinion. Any action (or inaction) by the dentist that deviates from the standard of care is referred to as a breach. If the dentist had not violated the duty of care, there would have been no harm to the patient; this inference process is known as causation. Damage is the final component of the claim, and it relies significantly on how much the patient was harmed. The jury tends to award damages to patients sympathetically if the patients took high medical costs to treat their malpractice injuries. The patients may also be rewarded for non-economic harms like pain and mental distress; therefore, they should assess the severity of the injuries with an attorney before bringing litigation to determine whether it is worthwhile considering the potential legal cost.

Preponderance of the Evidence

The preponderance of the evidence is the evidentiary standard in a burden of proof analysis. When the party with the burden of proof persuades the fact-finder (either the judge or the jury) that there is a more than 50 percent possibility that the claim is true, the burden of proof is considered to have been satisfied under the preponderance test. In *Karch v. Karch* (2005), the Superior Court of Pennsylvania ruled that "preponderance of the evidence means that one side of

an argument has more convincing evidence than the other side. It's like tipping a scale slightly in favor of one side, showing that their evidence is stronger and more persuasive."[17] Also, in *Barbour v. Mun. Police Officers' Educ. & Training Comm'n* (2012), the Commonwealth Court of Pennsylvania ruled that a "preponderance of the evidence is such evidence as leads a fact-finder to find a contested fact to be more probable than its nonexistence. It is also within the exclusive province of the Commission, as a fact-finder, to determine the witnesses' credibility and resolve any conflicting evidence."[18] In these cases, the plaintiff usually sues the defendant for financial loss due to damage, injury, and medical bills caused by the tort action.

After both parties have presented their evidence during a trial, the judge rules on the presented facts. The jury resolves the remaining issues, including whether the defendant is at fault and, if so, how much damages the plaintiff should be awarded. The plaintiff must demonstrate the aforementioned factors using the more likely than not method to establish liabilities. However, plaintiffs often struggle to meet this standard.

Expert Witness

The American Dental Association Principles of Ethics and Code of Professional Conduct (ADA Code) states, "dentists may provide expert testimony when that testimony is essential to a just and fair disposition of a judicial or administrative action."[19] The expert witness is a crucial part of most dental malpractice lawsuits. Dental experts who can attest to the standard of care the defendant should have adhered to are the most common in this situation. The testimony of an expert can be very helpful in persuading the court to rule in the plaintiff's favor. First, experts can give precise and succinct testimony regarding the relevant standard of care. Second, they can

[17] Karch v. Karch, 2005 PA Super 342, 885 A.2d 535 (Pa. Super. 2005).
[18] Barbour v. Mun. Police Officers' Educ. & Training Comm'n, 52 A.3d 392 (Pa. Commw. 2012).
[19] American Dental Association, *Principles of Ethics and Code of Professional Conduct*, 2020.

assist the jury in comprehending the defendant's departure from that standard. Third, they can discuss how the plaintiff's injuries related to the degree of that deviation. An experienced attorney is usually able to choose good expert witnesses for the plaintiff.[20]

The plaintiff in a malpractice case needs expert testimony to support her or his allegations of negligence and proximate causation before she or he can bring the problem to a jury for judgment. The expert must inform the jury of the standard in the defendant's professional community and apply the profession's standards to the facts. Then, the jury can determine whether the defendant violated her or his duty of care.[21] It is essential that the expert, in a professional case, explains to the fact-finders what the duty of the case was and how it was breached.[22] For instance, the jury is aware that one should not run a red light; however, they might not know the standard practice for a dentist to perform a root canal therapy, so the three steps apply. The sacred role of the expert witness is to vindicate the dental profession's standard of care and ethics.

Res Ipsa Loquitur

The legal concept of res ipsa loquitur is Latin for "the fact itself speaks" or "the fact speaks for itself."[23] The patient must provide evidence that the dentist violated the standard of care in order to demonstrate a duty breach. The exact interpretation of the standard of care varies by jurisdiction and can be difficult to apply to each specific case. The term refers to the treatment that a reasonable dentist in a similar situation would have given her or his patient. Extraction of the wrong tooth is an apparent breach of duty that "speaks for itself."

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[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] "Res Ipsa Loquitur," n.d. Biotech.law.lsu.edu, accessed May 12, 2023, https://biotech.law.lsu.edu/books/lbb/x132.htm.

Some violations of the standard of care are so evident that expert testimony is not necessary. For example, a patient visits a dentist for a tooth extraction. However, after the surgery, the patient experiences severe pain and difficulty breathing. Further examination reveals that a dental instrument has been inadvertently left inside the patient's mouth, lodged near the throat. The patient suffers from complications due to this incident. In this case, the patient may rely on res ipsa loquitur to argue that the presence of the dental instrument left inside the mouth is an event that would not occur in the absence of negligence. The facts of the case speak for themselves, and it can be reasonably inferred that the dentist's negligence caused the patient's injury. While the patient may still need to provide evidence to support their claim, the doctrine of res ipsa loquitur shifts the burden of proof to the defendant (the dentist), who must now provide an explanation or evidence to rebut the presumption of negligence.

In such circumstances, the trial is shortened. The court will likely grant a summary judgment to the movant, or the jury can easily move on to awarding damages because the violation of duty is evident.[24] When res ipsa loquitur is an available doctrine, there is no need for the plaintiff to put forth expert testimony to sustain his burden of proof: when "the fact speaks for itself," the plaintiff is assured that the jury will consider his case. In *Whetstine v. Moravec* (1940), an action at law for personal injury damages was alleged to have been caused by the defendant's negligence in permitting the root of a tooth to pass into the plaintiff's right lung while extracting the teeth of the plaintiff.[25] The plaintiff visited the defendant to have his teeth pulled. While extracting the plaintiff's teeth under general anesthesia, the defendant fractured several of the patient's teeth. Unbeknownst to the defendant and the plaintiff, a part of the tooth's roots slipped into the patient's lung. The moment the plaintiff left the clinic, he felt terrible chest

[24] *Id.*
[25] Whetstine v. Moravec, 228 Iowa 352, 291 N.W. 425 (Iowa Sup. 1940).

pain. The patient's lung underwent an X-ray, but nothing was found. After the extraction, the patient had severe discomfort and coughing for nine months. One day, the plaintiff coughed out a tip of the root from his lung. The appellate court reversed the trial court ruling that erred in ordering a summary judgment in favor of the defendant. The court asserted that the concept of res ipsa loquitur applied in the malpractice case; therefore, expert testimony was not necessary. It is common sense that when a tooth or its root is extracted, neither usually enters the trachea and subsequently the lungs. This incident happens quite infrequently. In the eyes of the court, this incident was so uncommon that there was a high likelihood of negligence just by virtue of it happening.[26]

Application of the Standard of Care in Dental Specialties

In the realm of dental practice, the concept of varying standards of care emerges as a critical factor in understanding the intricacies and unique expectations associated with different dental specialties. There are twelve specialties recognized by the American Dental Association (ADA) and the National Commission on Recognition of Dental Specialties and Certifying Board (NCRDSCB): Dental Anesthesiology, Dental Public Health, Endodontics, Oral and Maxillofacial Pathology, Oral and Maxillofacial Radiology, Oral and Maxillofacial Surgery, Oral Medicine, Orofacial Pain, Orthodontics and Dentofacial Orthopedics, Pediatric Dentistry, Periodontics, and Prosthodontics.[27] These specialties require additional knowledge and training after the completion of dental school. This may include a residency, a master's degree, or a doctorate (PhD or MD). Since dental school offers rotations for the specialties in the dental school clinical

[26] *Id.*
[27] "Dental Specialties," CDA, October 2022, https://www.cda.org/Home/Public-Health/Careers-in-Oral-Health/Dental-Specialties.

training, in some states, general dentists can perform some of the same services that a specialist offers.[28]

To properly understand the dentist's legal duty, a study must be conducted of how the malpractice hazards and standard of care are applied to certain dental specialties. Endodontics provides a particularly illustrative example. Endodontics, as a specialized branch of dentistry focusing on the diagnosis and treatment of dental pulp and periapical tissue, inherently carries a high risk for dental malpractice cases.

Endodontics

Clinical endodontic surgeries involve highly technique-sensitive procedures. Endodontic-related cases in various specialties of dentistry witness the most frequently filed malpractice claims.[29] This is due to the fact that endodontic treatment procedures involve operative and surgical procedures using a variety of medications and techniques. Endodontic procedural malpractice can refer to preoperative errors (misdiagnosing, intraoperative errors, root canal treatment errors, pulp chamber perforations, anatomical injury and nerve damage caused by hypochlorite accidents) and postoperative errors (infections due to error, abnormal bleeding, tooth cracks, improper referral to specialists (endodontists or medical physicians), improper prescription of medication, paresthesia, and leaving the fractured instruments in the patient's gum or teeth).[30]

In an analysis of 650 endodontic-related malpractice lawsuits in the United States from 2001 to 2021, 86.6 percent of the defendants were general dentists, 43.75 percent of the cases favored the plaintiff, 55.2 percent of the cases favored the defendant, and 1.04 percent of the

[28] *Id.*
[29] Alrahabi, M., Zafar, M. S., and Adanir, N., "Aspects of Clinical Malpractice in Endodontics," *European Journal of Dentistry* 13, no. 3 (July 2019): 450–458, https://doi.org/10.1055/s-0039-1700767.
[30] *Id.*

cases were settled without going to trial.[31] The court rulings that favored the plaintiffs regarded allegations involving root (root canal and cementum) perforation, failure to use a rubber dam, root canal treatment performed on the wrong tooth, and paresthesia caused by infections. Plaintiffs who alleged postprocedural cases had a notably higher winning rate than non-postprocedural cases. 77.08 percent of the litigations consisted of intraprocedural malpractice claims. In this study, plaintiffs won 75 percent of the litigation attributed to postprocedural infections.[32] Failure of the dentist to abide by the standard of care and surgical protocols is the main cause of malpractice suits. The paper indicates that in 72.7 percent of cases the court rules in favor of the plaintiff, which indicates a high proportion of the cases the dentists failed to rebuke the allegations against them.[33]

Failure to use a rubber dam may result in the ingestion of endodontic instruments, which constitutes malpractice and potentially technical assault. S. C. Barnum invented the rubber dam in 1862.[34] The rubber dam enabled the dentist to work in an aseptic field and apply gold foil and mercury restorations for dental fillings. The rubber dam's most crucial function in endodontic surgeries is to avoid the ingestion and aspiration of tooth debris and root canal tools and provide a field free of saliva and microbes. In a joint survey conducted by the Veterans Administration Hospital in San Francisco and Loyola University Dental School in Chicago, "37.00% dentists never or rarely apply the rubber dam for endodontic surgeries, 20.00% applied it occasionally, and 43.00% always applied it."[35] A notable number of dentists continue to forgo the use of rubber dams, resulting in a marked increase in the ingestion or aspiration of dental instruments,

[31] King-Jean Wu et al., "Endodontic Malpractice Litigations in the United States from 2000 to 2021," *Journal of Dental Sciences* (November 2022), https://doi.org/10.1016/j.jds.2022.11.008.
[32] *Id.*
[33] *Id.*
[34] Louis I. Grossman, "Prevention in Endodontic Practice," *The Journal of the American Dental Association* 82, no. 2 (February 1971): 395–96, https://doi.org/10.14219/jada.archive.1971.0052.
[35] Robert E. Going and Vincent J. Sawinski, "Frequency of Use of the Rubber Dam: A Survey," *The Journal of the American Dental Association* 75, no. 1 (July 1967): 158–66, https://doi.org/10.14219/jada.archive.1967.0187.

such as reamers, files, and broaches, over the course of the twenty-first century.[36] Survey results indicate that the primary reason for not using rubber dams is convenience. However, rubber dams can be applied quickly and can facilitate smoother procedures due to the absence of saliva. It is important for dental professionals to carefully consider the benefits of using rubber dams, as they can effectively minimize risks to patients and protect practitioners from potential malpractice litigation.[37]

To highlight the potential legal repercussions of procedural errors, it's important to consider real-world cases. In the case of *Magos v. Feerick (*1996), the dentist was found liable for a dental malpractice allegation due to his patient's root perforation caused by his error.[38] The plaintiff went to the defendant (a general dentist) for damaged tooth repair. The defendant performed root canal therapy and cemented the tooth with permanent crowns. Shortly after the visit, the plaintiff began experiencing pain and discomfort in the gums above where the crowns were cemented. According to the plaintiff's testimony, "the pain and discomfort included swelling, bleeding, and discoloration of the gums accompanied by a foul odor."[39] However, the defendant only suggested the plaintiff massage her gums and rinse her mouth with Listerine mouthwash. Due to the continued discoloration of her gums and pain, the plaintiff visited another dentist who discovered that she had open margins surrounding the permanent crown. Soon, the dentist discovered that both front teeth had been perforated at the root under the gumline. The appellate court reversed the trial court ruling, the judgment was entered in favor of the plaintiff in her dental malpractice allegation, and damages were awarded.[40]

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[36] *Id.*
[37] *Id.*
[38] Magos v. Feerick, 690 So.2d 812 (La.App. 3 Cir. 1996).
[39] *Id.*
[40] *Id.*

In the case of *Rorick v. Silverman* (2015), the dentist was liable for the malpractice allegation caused by his straying from the standard of care and leaving a piece of a broken tool in the patient's tooth.[41] The defendant negligently performed dental work for the plaintiff. The plaintiff alleged that the defendant performed root canal treatment on her and that she "began to experience headaches and also experienced tooth decay and infections with these same teeth and eventually lost two of these teeth."[42] She then received treatment from another dentist, who found that her symptoms stemmed from the defendant's negligent performance of root canal treatment. The defendant had not completed the root canal treatment completely or correctly according to the standard of care and had left a piece of a file in one of her teeth. After her treatment with the new dentist, the plaintiff no longer suffered from the headaches she had suffered over the previous eleven years. The court's judgment was entered in favor of the plaintiff in her dental malpractice allegation, and damages were awarded.[43]

With a high level of technique sensitivity, endodontics is the most involved specialty in dental malpractice litigations.[44] Patients who are dissatisfied with a service tend to initiate legal lawsuits. According to reports, pain after root canal treatment affects 9.6 to 12 percent of patients.[45] Thus, probably 10 percent of patients who undergo root canal treatment are potential plaintiffs. In the present study published on European Journal of Dentistry, 55.5 percent of endodontic litigation favored dentists in the US.[46] General dentists refer complicated cases to

[41] Rorick v. Silverman*,* Case No. 1:14-cv-312 (S.D. Ohio Dec. 22, 2015).
[42] *Id.*
[43] *Id.*
[44] Alice Aquino Zanin, Lara Maria Herrara, and Rodolfo Francisco Haltenhoff Melani, "Civil Liability: Characterization of the Demand for Lawsuits against Dentists," *Brazilian Oral Research* 30, no. 1 (2016), https://doi.org/10.1590/1807-3107bor-2016.vol30.0091.
[45] N. Polycarpou et al., "Prevalence of Persistent Pain after Endodontic Treatment and Factors Affecting Its Occurrence in Cases with Complete Radiographic Healing," *International Endodontic Journal* 38, no. 3 (March 2005): 169–78, https://doi.org/10.1111/j.1365-2591.2004.00923.x.
[46] King-Jean Wu et al., "Endodontic Malpractice Litigations in the United States from 2000 to 2021," *Journal of Dental Sciences* (November 2022), https://doi.org/10.1016/j.jds.2022.11.008.

endodontists and treat them carefully to avoid paresthesia, root canal perforation, and infections. Dentists should always diagnose and treat patients correctly, share the procedure plan with the patient, and use rubber dams routinely and in a timely manner to prevent malpractice claims.[47]

Conclusion

This review aims to give readers a general understanding of dental malpractice within tort doctrine. Contemporary tort doctrine relating to malpractice has developed in accordance with the principles of English common law. Court rulings, interpretations of law, and legislation have contributed to developing dental malpractice litigation frameworks. Most cases analyzed in this review demonstrate that dentists need more knowledge about malpractice and related legal regulations. The practical way to reduce dental malpractice and the subsequent lawsuit is to make dentists aware of their legal, administrative, professional, and ethical duties of care, and to implore them to reflect those duties in their practice. Dentists should strengthen their professional skills, learn healthcare laws, and update their clinical practices through continuous education. Constant communication with other dental professionals within the same community can help them ensure the standard of care. Given the complex state of dentistry, additional legal studies will be required to address dental malpractice.

[47] Mothanna Alrahabi, Muhammad Sohail Zafar, and Necdet Adanir, "Aspects of Clinical Malpractice in Endodontics," *European Journal of Dentistry* 13, no. 03 (July 2019): 450–58, https://doi.org/10.1055/s-0039-1700767.

References

Alrahabi, Mothanna, Muhammad Sohail Zafar, and Necdet Adanir. “Aspects of Clinical Malpractice in Endodontics.” *European Journal of Dentistry* 13, no. 03 (July 2019): 450–58. https://doi.org/10.1055/s-0039-1700767.

American Association of Oral and Maxillofacial Surgeons. “Dental Students.” Accessed January 6, 2023. https://www.aaoms.org/education-research/dental-students.

American Bar Association Profile of the Legal Profession. “Demographics.”Accessed January 6, 2023. https://www.abalegalprofile.com/demographics.php.

American Dental Association. *Principles of Ethics and Code of Professional Conduct*, 2020.

Bal, B. Sonny. “An Introduction to Medical Malpractice in the United States.” *Clinical Orthopaedics and Related Research* 467, no. 2 (November 2008): 339–47. https://doi.org/10.1007/s11999-008-0636-2.

California Dental Association. “Dental Specialties.”Accessed January 6, 2023. https://www.cda.org/Home/Public-Health/Careers-in-Oral-Health/Dental-Specialties.

Collett, Henry A. “Dental Malpractice: An Enormous and Growing Problem.” *The Journal of Prosthetic Dentistry* 39, no. 2 (February 1978): 217–25. https://doi.org/10.1016/s0022-3913(78)80025-0.

Ekici, Ömer. “Opinions of Oral and Maxillofacial Surgeons Related to Dental Malpractice.” *Turkiye Klinikleri Journal of Medical Ethics-Law and History* 28, no. 3 (2020): 354–64. https://doi.org/10.5336/mdethic.2020-74035.

Epstein, Joel B., James J. Sciubba, Tammera E. Banasek, and Linda J. Hay. “Failure to Diagnose and Delayed Diagnosis of Cancer.” *The Journal of the American Dental Association* 140, no. 12 (December 2009): 1494–1503. https://doi.org/10.14219/jada.archive.2009.0100.

G. Edward White, and Inc Ebrary. *Tort Law in America : An Intellectual History*. Oxford; New York: Oxford University Press, 2003.

Going, Robert E., and Vincent J. Sawinski. “Frequency of Use of the Rubber Dam: A Survey.” *The Journal of the American Dental Association* 75, no. 1 (July 1967): 158–66. https://doi.org/10.14219/jada.archive.1967.0187.

Graskemper, Joseph P. “Dental Law in the United States of America.” Forensic and Legal Dentistry (November 2013): 89–98. https://doi.org/10.1007/978-3-319-01330-5_14.

Grossman, Louis I. “Prevention in Endodontic Practice.” *The Journal of the American Dental Association* 82, no. 2 (February 1971): 395–96. https://doi.org/10.14219/jada.archive.1971.0052.

J. M. Powis Smith. *The Origin and History of Hebrew Law*. Clark, New Jersey.: Lawbook Exchange, 2005.

Justia. “Dental Malpractice.” Last reviewed October 2022. https://www.justia.com/injury/medical-malpractice/dental-malpractice/.

Kiani, Mehrzad, and Ardeshir Sheikhazadi. “A Five-Year Survey for Dental Malpractice Claims in Tehran, Iran.” *Journal of Forensic and Legal Medicine* 16, no. 2 (February 2009): 76–82. https://doi.org/10.1016/j.jflm.2008.08.016.

Nalliah, R. P. “Trends in US Malpractice Payments in Dentistry Compared to Other Health Professions – Dentistry Payments Increase, Others Fall.” *British Dental Journal* 222, no. 1 (January 2017): 36–40. https://doi.org/10.1038/sj.bdj.2017.34.

Polycarpou, N., Yuan-Ling Ng, David Canavan, D. R. Moles, and Kishor Gulabivala. “Prevalence of Persistent Pain after Endodontic Treatment and Factors Affecting Its Occurrence in Cases with Complete Radiographic Healing.” International Endodontic Journal 38, no. 3 (March 1, 2005): 169–78. https://doi.org/10.1111/j.1365-2591.2004.00923.x.

Regan, Louis J. *Doctor and Patient and the Law*. C.V. Mosby Company, 1956.

Ripstein, Arthur. “Theories of the Common Law of Torts,” edited by Edward N. Zalta. *The Stanford Encyclopedia of Philosophy* (Summer 2022). https://plato.stanford.edu/entries/tort-theories/#pagetopright.

Sekhar, MSonal, and N Vyas. “Defensive Medicine: A Bane to Healthcare.” *Annals of Medical and Health Sciences Research* 3, no. 2 (2013): 295. https://doi.org/10.4103/2141-9248.113688.

Sfikas, Peter M. “Statute of Limitations Precludes Dental Malpractice Claim.” *The Journal of the American Dental Association* 137, no. 5 (May 2006): 668–69. https://doi.org/10.14219/jada.archive.2006.0265.

Speiser, Stuart M. *The American Law of Torts*. Thomson West, 1986.

Studdert, David M., and Mark A. Hall. “Medical Malpractice Law — Doctrine and Dynamics.” *New England Journal of Medicine* 387, no. 17 (October 2022): 1533–37. https://doi.org/10.1056/nejmp2201675.

World Medical Association. “World Medical Association Statement on Medical Malpractice.” Accessed January 6, 2023. https://www.wma.net/policies-post/world-medical-association-statement-on-medical-malpractice/.

Wu, King-Jean, Sung-Chih Hsieh, Cheng-Ning Yang, Yi-Wen Chen, Chao-Lun Lai, Ting-Ju Lai, and Mark Yen-Ping Kuo. “Endodontic Malpractice Litigations in the United States from 2000 to 2021.” *Journal of Dental Sciences* (November 2022). https://doi.org/10.1016/j.jds.2022.11.008.

Zanin, Alice Aquino, Lara Maria Herrera, and Rodolfo Francisco Haltenhoff Melani. “Civil Liability: Characterization of the Demand for Lawsuits against Dentists.” *Brazilian Oral Research* 30, no. 1 (2016). https://doi.org/10.1590/1807-3107bor-2016.vol30.0091.

Double Jeopardy, It's Complicated: The Intricacies of Dual Sovereignty, Due Process, and Legislative Intent

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In its current state, the constitutional principle of double jeopardy fails to uphold its guarantee to protect citizens from multiple prosecutions and continues to undermine victims' rights. Analyzing the United States Supreme Court case law from *Whalen v. United States* (1980) and *Gamble v. United States* (2019), I aim to show the legal inconsistencies in the application of the US Constitution's double jeopardy clause. Additionally, I will evaluate legislative intent, which is relevant in shaping how double jeopardy is understood in the United States. Finally, this essay concludes with recommendations for improving the existing double jeopardy clause by evaluating the United Kingdom's existing appeals systems and proposing a similar model for the US.

The Double Jeopardy Clause

The double jeopardy clause, as written in the Fifth Amendment of the Constitution, states that a person "shall not be twice put in jeopardy of life or limb."[1] The maxim aims to protect a person from being tried for the same crime after having already been acquitted. The Supreme Court has determined that 'jeopardy' attaches when a jury is sworn in or when a judge begins to hear evidence.[2]

[1] "Constitution of the United States: Analysis and Interpretation," Congress.gov, accessed May 15, 2023, https://constitution.congress.gov/browse/essay/amdt5-3-1/ALDE_00000858/.
[2] Green v. United States, 355 U.S. 184 (1957).

Case Law

Whalen v. United States (1980)

In the initial case brought against Thomas Whalen, Whalen was charged for rape and murder in the District of Columbia. Under D.C. law, "rape and killing a human being in the course of any six specified felonies, including rape, are separate statute offenses."[3] The district court convicted Whalen of two separate offenses, and he was sentenced to twenty years to life for murder in the first degree and fifteen years to life for rape. Whalen petitioned for an appeal, arguing that the rape sentence should be nullified because the separate offense of rape had already been merged with the felony murder sentence—violating his double jeopardy rights. The District of Columbia Court of Appeals held that Congress and D.C. law authorized the consecutive sentences; the appeal was denied.[4]

The Supreme Court reversed this holding. The Supreme Court referenced *Blockburger v. United States* (1932) and the resulting Blockburger test, which determines if two offenses are, indeed, separate. According to the Blockburger test, for a crime to qualify as two separate offenses, each offense must "require proof of a fact which the other does not."[5] In 1973, after consistently using the Blockburger test's rule of statutory construction, the requirement of proof of differentiating facts was written into the District of Columbia Code.[6] Per the Blockburger test, rape cannot be a separate charge in the Whalen case because, to prove murder during the course of a rape, the court must first prove all of the elements of rape. The Supreme Court determined that—due to a lack of differentiating elements of proof—the initial sentencing for both rape and

[3] Whalen v. United States, 445 U.S. 684 (1980); See D.C. Code § 22-2401 (1973).
[4] *Id.*
[5] Blockburger v. United States, 284 U. S. 299 (1932).
[6] D.C. Code § 23-112 (1973).

murder violated Whalen's double jeopardy protections since it resulted in him being charged for the crime of rape twice.[7]

In addition, the Court found that the lower courts' violations of double jeopardy amounted to a violation of the separation of powers.[8] The Blockburger test, as incorporated into D.C. Code, predates *Whalen* by a decade and provides a definitive legal precedent of legislative intent when determining the use of consecutive sentences. The lower court blatantly "exceeded its own authority" by ignoring the legislature's intent regarding sentencing as written in the D.C. Code.[9]

Gamble v. United States (2019)

After Terance Gamble was pulled over for an alleged broken headlight, the police officer claimed the car smelled of marijuana and declared he had probable cause to search Gamble's vehicle. Upon searching the car, the officer found a loaded handgun. Gamble had been previously convicted of robbery which, because of its classification under Alabama law as a crime of violence, prohibited Gamble from possessing a firearm. Gamble pleaded guilty to possession of a firearm and was convicted for the offense in the state of Alabama. Shortly after his conviction, a federal prosecutor charged Gamble with possession of a firearm under the felon-in-possession statute for the same act of firearm possession. Gamble appealed on the grounds that he was tried twice for the same offense, which would violate his double jeopardy rights.

The district court dismissed Gamble's appeal and the United States Court of Appeals for the Eleventh Circuit affirmed. The Court of Appeals held that double jeopardy protections were

[7] *Whalen*, 445 U.S. 684.
[8] *Id.*
[9] *Id.*

not violated because each sovereign[10] has the right to prosecute under its own, separate statutes under the doctrine of dual sovereignty.[11] It held that "offenses are defined by law, and each law is defined by a sovereign," meaning that even though it's the same 'crime,' it qualifies as separate offenses.[12] The Court of Appeals found that the language of double jeopardy supports this conclusion.

Despite double jeopardy maintaining that a person should not be tried twice for one offense, the Court of Appeals ruled that offenses are not defined by acts but rather by laws. According to this interpretation of double jeopardy and dual sovereignty, both the state of Alabama and the federal government, as independent sovereigns, have the right to prosecute Gamble.[13] Therefore, the same act can qualify as multiple offenses, even without the presence of differentiating facts.

Comparing *Whalen* and *Gamble*

In *Whalen* (1980), the Supreme Court held that determining a separate offense mandated that each statute (or offense) must require one element of proof that the other does not; otherwise, it violates double jeopardy. In *Gamble* (2019), the legal precedent was established that offenses are defined in laws by sovereigns, so, under dual sovereignty, separate state and federal sovereigns charging a suspect for the same act does not violate double jeopardy. Subsequently, US law determines that there must be an element of separation between statutes, but simultaneously holds that different sovereigns can charge a suspect under identical statutes since each sovereign operates independently.

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[10] Adam Adler, "Dual Sovereignty, Due Process, and Duplicative Punishment: A New Solution to an Old Problem," The Yale Law Journal (2014), https://www.yalelawjournal.org/pdf/e.448.Adler.483_f8zed3jx.pdf.
[11] United States v. Lanza, 260 U.S. 377 (1922).
[12] *Gamble*, 139 S. Ct. 1960.; See *Moore v. Illinois*, 434 U.S. 220 (1977).
[13] "Amendment 5: Dual Sovereignty Doctrine," LII / Legal Information Institute, Cornell Law School, accessed May 15, 2023, https://www.law.cornell.edu/constitution-conan/amendment-5/dual-sovereignty-doctrine.

The Supreme Court acknowledges the importance of recognizing that, if two statutes have the same burden of proof, they cannot qualify as separate offenses. However, if the same act violates the legal codes of two different sovereigns, even if they have the same burden of proof, it is not the same offense and, therefore, not protected under double jeopardy. This interpretation of the word "offense" is currently questionable and contradictory.

Legislative Intent, Due Process, and the Rights of Victims

If the Supreme Court maintains, under their definition of "offense," that dual sovereignty is a special exception and does not violate double jeopardy, it should be noted that dual sovereignty still violates the separation of powers because dual sovereignty allows a "defendant [to] receive a [judicial] punishment that is inconsistent with the intent of the legislature, as indicated by statute."[14] The Constitution governs the decision of sentencing, stating that the courts should "impose a sentence sufficient, but not greater than necessary"[15] to advance Congress' interests in punishment. Congress has indicated through precedent that the minimum and maximum sentence necessary for an act should be based on the advancement of Congress' interests, not the sovereigns'. Congress further outlines the importance of "avoid[ing] unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[16] In cases where dual sovereignty is applied, a person could face double the maximum sentence compared to someone who was not prosecuted under dual sovereignty. This violation of the separation of powers leads to a violation of due process because "fundamentally, 'due process' meant that the government may not interfere with established rights without legal authorization and according to law."[17]

[14] Adam Adler, "Dual Sovereignty, Due Process, and Duplicative Punishment: A New Solution to an Old Problem."
[15] 18 U.S.C. § 3553(a).
[16] 18 U.S.C. § 3553(a).
[17] Chapman, Nathan S. "Separation of Powers as Ordinary Interpretation," Yale Law Journal 121, no. 6 (2012): 1672–1731, accessed May 15, 2023, https://openyls.law.yale.edu/bitstream/handle/20.500.13051/10006/46_121YaleLJ1672_May2012_.pdf?sequence=2.

Sentencing statutes state that "whoever is guilty of an assault shall be punished by imprisonment for not more than twenty years"[18] and that "a person convicted of burglary shall be imprisoned not more than fifteen years."[19] The first statute makes no mention of the word "offense"; rather, it states "an assault." In situations of ambiguity within a statute and instances when legislative intent is unclear, the canons of construction set forth guiding rules that should be followed by the courts when deciphering legislative intent. The relevant canon of construction in this circumstance is the fourth canon: when the language is not clear and a particular term is not precisely defined, the court is to give the term its "ordinary meaning."[20] Using the ordinary meaning has been understood as using the dictionary definition to define the term within the statue.

When defining the word 'an' using its ordinary meaning, the dictionary states that it is "the form of the indefinite article used before words beginning with a vowel sound," the indefinite article being 'a.'[21] 'A' is then defined by the dictionary as "used with units of measurement to mean one such unit" or "one single; any."[22] 'An' is therefore just 'a' for when the word starts with a vowel. Using these definitions to define the term should lead to the statute being interpreted as discussing punishment for a singular act, or an act of "one such unit."

It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[23] Unfortunately, the judiciary overlooks this definition and disregards legislative intent in favor of states' rights and dual sovereignty. Not only has the judiciary chosen to allow dual sovereignty to outweigh double jeopardy and the Court's own rulings, but the Court's allowance of dual

[18] 18 U.S.C. § 113 (2012).
[19] VT. STAT. ANN. tit.13, § 1201(2013).
[20] See *BP American Products Company v. Burton*, 549 U.S. 84 (2006).
[21] "Definition of AN," Merriam-webster.com, 2019, https://www.merriam-webster.com/dictionary/an.
[22] "Definition of A," Merriam-webster.com, 2019, https://www.merriam-webster.com/dictionary/a.
[23] *Davis v. Michigan Department of Treasury*, 489 U.S., 803, 809 (1989).

sovereignty misinterprets the legislative intent of sentencing statutes. Thus, even if dual sovereignty does not violate double jeopardy, it most certainly violates individuals' rights to due process and the separation of powers.

One of the most troublesome applications of dual sovereignty can be found in *Heath v. Alabama* (1985).[24] After Larry Heath hired two men to kill his wife, who kidnapped her from her home in Alabama and left her body in Georgia, Heath was prosecuted in Georgia and pleaded guilty to malice murder and a life sentence on the grounds that he would be spared the death penalty.[25] Throughout Alabama and Georgia's separate investigations, the two states cooperated with each other.[26] After Heath pleaded guilty to the murder in Georgia, he was charged with murder during a kidnapping in Alabama.[27] Alabama obtained a conviction and sought the death penalty, after Heath had already pleaded guilty in Georgia to avoid the death penalty.[28] Almost thirty years prior to *Heath* (1985), *Green v. United States* (1957) held that "the underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense."[29] In *Green*, the Court determines that states should not have the unfettered ability to retry someone for a crime. Yet, a state can try a person for a crime that a different state has already tried and convicted a person for. Dual sovereignty, then, violates due process and the separation of powers by ignoring legislative intent and sentencing individuals to twice the maximum sentence that is outlined in the statute.

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[24] *Heath v. Alabama*, 474 U.S. 82 (1985).
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] Green v. United States, 355 U.S. 184. (1957) See United States v. Jorn, 400 U. S. 470, 400 U. S. 479 (1971); Price v. Georgia, 398 U. S. 323, 398 U. S. 326 (1970).

Due process also guarantees a person's right to a speedy trial, and those who are convicted are allowed to appeal based on new evidence. Yet, speedy trials seem to leave victims no right to a fair trial, as they have no ability to appeal an acquittal even with new evidence. Double jeopardy was invented to provide a "finality of the law," but there is no such finality around conviction. If a person feels he or she was wrongly convicted, they are able to ask for an appeal to be granted a possible retrial. Subsequently, every guilty verdict could be subject to an appeal.

Double jeopardy is an unbalanced approach to justice, which assumes that there is no injured party when there is a wrongful acquittal. It is a question of justice when allowing a wrongfully acquitted individual to roam free, as it is to put an innocent person in jail.

Double Jeopardy and the United Kingdom's Criminal Justice Act of 2003

In 2003, the United Kingdom (UK) overhauled its justice system through the Criminal Justice Act. Part 10 is titled "Retrials for Serious Offenders" and outlines a system of appeals that allows double jeopardy protection to be overridden.[30] The system outlines the appeal process and the burden of proof necessary to successfully petition for a retrial when a defendant receives an acquittal.

To begin the appeal process, the prosecutor will need to obtain permission from the Director of Public Prosecutions to file an appeal. If granted, the prosecutor then files an appeal to overturn a previous acquittal and initiate a new trial. The appeal must indicate fulfillment of Section 78 requirements and be found to be in the public's best interest. Section 78 outlines the "new and compelling" standard of evidence to determine if the new evidence warrants a retrial.

[30] "Part 10 -Retrials for Serious Offenders," Legislation.gov.uk, accessed May 15, 2023, https://www.legislation.gov.uk/ukpga/2003/44/part/10.; See also "Criminal Justice Act 2003 Explanatory Notes," Legislation.gov.uk, accessed May 15, 2023, https://www.legislation.gov.uk/ukpga/2003/44/notes/division/4/10?view=plain.

Under Section 78.2, "new" evidence is any evidence that "was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related)."[31] Section 78.3 outlines that evidence is "compelling" if "(a) it is reliable, (b) it is substantial, and (c) in the context of the outstanding issues, it appears highly probative of the case against the acquitted person."[32] The Criminal Justice Reform Act allows for only one appeal on behalf of the prosecution.[33]

The UK recognized in 2003—two decades ago—that double jeopardy protections needed to be updated. The Criminal Justice Act of 2003 created a circumstance in which the system could be reformed. The US constitution's maxim of double jeopardy was borrowed from English Common Law; updating it, as the UK has, is necessary.

Recommendations: Grand Juries and Retrial Appeals

The United States criminal justice system can be modeled more closely to the UK's post-Criminal Justice Act of 2003 to better uphold the maxim of double jeopardy. In this model, the appeals process would start with a grand jury process of indictment; new evidence would then be submitted to a jury of the accused's peers.[34] During the grand jury trial, the prosecution would present all new evidence to the jury, who would then determine if the evidence presented warrants a retrial. Granted that the new evidence permits a retrial, the accused will be retried.

Justice should not be based on technicality, and injustice should not be tolerated because of judicial misinterpretation of the Constitution. Double jeopardy has been unsuccessful in protecting people from multiple prosecutions. Dual sovereignty has allowed states to subject a person to multiple trials, directly in conflict with one's double jeopardy protections. This is not

[31] Criminal Justice Act of 2003: Part 10 Section 78.2.
[32] Criminal Justice Act of 2003: Part 10 Section 78.3.
[33] "Part 10 -Retrials for Serious Offenders."
[34] "Grand Jury Terms of Service," U.S. District Court, Central District of California, accessed May 15, 2023, https://www.cacd.uscourts.gov/jurors/grand-jury-terms-service.

an argument against dual sovereignty; rather, it is an evidence-based criticism of double jeopardy as it is currently understood by the courts. Double jeopardy reform would allow us to clarify the language and processes that uphold the clause as an important maxim, which would, hopefully, address circumstances in which an individual is tried twice for the same crime. The issues related to double jeopardy must be recognized to ensure that double jeopardy is not misconstrued and that it does, indeed, protect individuals from being twice put in jeopardy.

References

Adler, Adam J. “Dual Sovereignty, Due Process, and Duplicative ... - Yale Law Journal.” The Yale Law Journal. 2014. https://www.yalelawjournal.org/pdf/e.448.Adler.483_f8zed3jx.pdf.

“Amendment 14.S1.3 Due Process Generally - Constitution Annotated | Congress.Gov.” Constitution Annotated. Accessed May 26, 2023. https://constitution.congress.gov/browse/essay/amdt14-S1-3/ALDE_00013743/.

“Amendment 5: Dual Sovereignty Doctrine.” Legal Information Institute. Accessed May 26, 2023. https://www.law.cornell.edu/constitution-conan/amendment-5/dual-sovereignty-doctrine#fn8amd5.

Criminal Justice Act of 2003: Part 10 Section 78.2.

Criminal Justice Act of 2003: Part 10 Section 78.3.

Chapman, Nathan S. “Due Process as Separation of Powers - Yale Law Journal.” The Yale Law Journal. Accessed May 26, 2023. https://www.yalelawjournal.org/pdf/1080_y4sioof3.pdf.

Chapman, Nathan S. “Separation of Powers as Ordinary Interpretation,” Yale Law Journal 121, no. 6 (2012): 1672-1731. Accessed May 15, 2023. https://openyls.law.yale.edu/bitstream/handle/20.500.13051/10006/46_121YaleLJ1672_May2012_.pdf?sequence=2.

"Gamble v. United States." Harvard Law Review, Vol. 133. Accessed May 26, 2023. https://harvardlawreview.org/print/vol-133/gamble-v-united-states/#footnote-14.

"Grand Jury Terms of Service." U.S. District Court, Central District of California. Accessed May 25, 2023. https://www.cacd.uscourts.gov/jurors/grand-jury-terms-service.

Merriam-webster.com. “Definition of A.” 2019. https://www.merriam-webster.com/dictionary/a.

Merriam-webster.com. “Definition of AN.” 2019. https://www.merriam-webster.com/dictionary/an.

"National Institute of Justice Research Report: DNA Evidence Basics." Office of Justice Programs, National Institute of Justice. Accessed May 26, 2023. https://www.ojp.gov/pdffiles1/nij/grants/233981.pdf.

"Part 10 - Retrials for Serious Offenders." Legislation.gov.uk. Accessed May 26, 2023. https://www.legislation.gov.uk/ukpga/2003/44/part/10.

Fairness in the Court of Public Opinion

By Audrey Mechali

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While social media has given a platform for individual voices to be heard and amplified, it has also created a place where public opinion can be manipulated. This review examines several cases in which social media played a large role in a trial or verdict. The *Cameron Herrin v. the State of Florida* (2022) case demonstrates that public opinion can be driven by inappropriate reasoning. Additionally, the *People of the State of Colorado v. Rogel Aguilera-Menderos* (2019) case shows that an outpour of public opinion on social media can interfere with the judicial process by convincing them to change their decision. Finally, the *John C. Depp, II v. Amber Laura Heard* (2022) case suggests that losing a case in the court of public opinion can be even more damaging to one's career and livelihood than the consequences assigned by the judge or jury. These examples provide insight into the power of public opinion in judicial proceedings. Overall, this review underscores the need for an alternate approach to address the role of public opinion in the legal system. Such an approach may require better regulation of social media platforms and perhaps legislation to maintain a balance between satisfying public opinion and ensuring the fairness of judicial procedure.

The emergence of social media has completely revolutionized American society by changing the ways that humans interact with each other. Social media is relatively new within the scope of human history, and, thus, legislation has failed to encompass all aspects of social media usage that pose a risk to people or to society. With the technological landscape evolving so quickly, consistently adapting laws to this changing landscape

remains a challenge.

The use of social media has skyrocketed since the start of the COVID-19 pandemic. Worldwide, the number of monthly active Facebook users in 2019 was 2.45 billion, but, by December 2020, it rose to over 2.8 billion monthly active users.[1] As of December 2022, there are 302.35 million Americans regularly using social media, which translates to roughly 90 percent of the total population of the United States.[2] Facebook is the most widely used social media platform with approximately 74.2 percent of Americans using it.[3] According to the International Telecommunications Union, approximately 40 percent of the world's population and an estimated 76 percent of people in developed countries are regular social media users.[4] The ubiquitousness of social media allows the voices of individuals from all across the country and the world to be shared and amplified in a common space.

Policies regarding social media usage, such as censorship of certain forms of speech on social media platforms, have recently become a widely discussed issue. There is an emerging conflict between people seeking to maintain social media platforms as a medium for unrestricted free speech, and others who want social media spaces to remain more closely controlled by moderating hate speech, misinformation, and other types of harmful speech. In fact, since Elon Musk's acquisition of the Twitter platform, there has been a notable increase in hate speech.[5] This is most likely due to Musk removing nearly all content moderation, including that for hate speech, from the platform.

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[1] Facebook, "Facebook Reports Fourth Quarter and Full Year 2020 Results," investor.fb.com, January 27, 2021.
[2] Daniel Ruby, "Social Media Users — How Many People Use Social Media in 2022," demandsage, January 4, 2023.
[3] *Id.*
[4] Smriti Agrawal, "SOCIAL MEDIA and CRIMES: AN ENTANGLED RELATIONSHIP," The Daily Guardian, September 27, 2021.
[5] Sheera Frenkel and Kate Conger, "Hate Speech's Rise on Twitter Is Unprecedented, Researchers Find," *The New York Times*, December 2, 2022, sec. Technology, https://www.nytimes.com/2022/12/02/technology/twitter-hate-speech.html.

In the past, most free speech lawyers spent decades advocating for freedom from regulation and uncensored free speech to guarantee the protections granted under the First Amendment. However, the development of social media has made one individual's words more impactful than ever before. A recent study conducted by Pew Research showed that approximately 62 percent of the American population gets their news primarily from social media.[6] As such, many lawyers now argue in favor of regulations limiting speech on social media platforms.[7] Speech on social media refers to tweets, posts, images, videos, and anything else an individual or organization posts to a social media account and is often used by citizens to convey personal beliefs, attitudes, and opinions. This type of speech cannot be censored by the government due to the First Amendment; however, social media platforms are run by private companies. Private companies can legally censor speech on their platforms.[8]

Although regulating speech on social media is a controversial issue, evidence suggests that social media can be a breeding ground for propaganda and misinformation if not properly regulated. Absent regulations, social media does not communicate whether an image, video, or story is real or staged, and public opinion can quite easily be manipulated via misinformation to promote an unsavory agenda. For instance, Senate reports confirmed that during the 2012 and 2016 presidential elections, the Russian government spread entirely fabricated information and conspiracy theories using platforms such as Facebook, Instagram, and Twitter in a deliberate attempt to weaken the United States.[9] As a result, without regulations, abuse of social media can threaten the foundations of democratic societies.

An emerging legal issue is the role that social media can have in damaging the

[6] Mark A. Cohen, "Law in the Age of Social Media," Forbes, 2023.
[7] *Id.*
[8] 47 U.S. Code § 230.
[9] Sara Brown, "MIT Sloan Research about Social Media, Misinformation, and Elections," https://mitsloan.mit.edu/ideas-made-to-matter/mit-sloan-research-about-social-media-misinformation-and-elections, October 5, 2020.

sanctity of legal procedure. Due to the prevalence of individuals getting information in bite-size pieces through social media, public opinion is not generally a fair assessment, given that they may not consider all facts and information relevant to the case. There is a great risk that these unfair assessments may infiltrate our legal system, which means our legal system must now determine how much weight to place on public opinion in trials and legal procedure.

Social media has been used as a tool to address injustices in the legal system by raising awareness and inciting public demand for change. Yet the social media-consuming public may not be fully informed. For instance, some individuals solely support a particular stance based on the views of their favorite celebrity. Therefore, it is not necessarily fair for public opinion to impact sentences and sentencing when there is a disconnect between what the public knows of a case, and the court's assumption of how informative their opinion is.

Public opinion can incite change through inappropriate justification for crimes. In 2022, a petition amassed over 28,000 signatures to reduce the sentence of twenty-one-year-old defendant Cameron Herrin, sentenced to twenty-four years in prison for two counts of vehicular homicide.[10] In 2018, the then eighteen-year-old engaged in a street racing activity in Tampa, Florida, which led to the death of Jessica Reisinger-Raubenolt and her infant daughter, Lillia. In his speed race, Herrin reached speeds as high as 106 miles per hour on public roads.[11] A TikTok video showing Herrin's reaction to learning of his twenty-four-year prison sentence went viral, and his fans were upset. #JusticeForCameron became a trending topic on TikTok, with thousands of people demanding a shorter sentence, often citing the defendant's appearance as the reason why. In under one month, there were over 100,000 tweets about

[10] Karishma Rao, "Who Is Cameron Herrin? Petition to Free TikTok Star, Sentenced to 24 Years in Prison, Receives More than 25,000 Signatures," 2021, www.sportskeeda.com.
[11] *Id.*

"Justice for Herrin."[12] Supporters commented on TikTok videos claiming that the defendant was "too cute to go to prison" or that "he looks innocent, he doesn't deserve it."[13] Pragmatically, good looks are not a factor considered in the legal system when determining a defendant's sentence. For individuals on social media to suggest that Herrin should receive a reduced sentence, citing only his appearance as justification, shows insufficient reasoning and inappropriate considerations. Insufficient evidence and flawed reasoning call into question the reliability of public opinion and whether it has any merit in the judicial system. While the effect of this petition on Herrin's sentence was negligible, the significance of this public outcry indicates that public opinion can be swayed by improper reasoning and, thus, may not be conducive to our judicial system.

Herrin's case is not the only example of a social media frenzy related to a legal case. On April 25, 2019, Rogel Aguilera-Menderos was driving a truck full of lumber on the freeway in Denver, Colorado when his brakes failed. The prosecution argued that the driver made a series of poor decisions by failing to take reasonable steps to minimize the danger, such as by speeding and not taking an available runaway truck ramp along the highway.[14] Aguilera-Menderos crashed the truck into several cars, resulting in the deaths of four people. After refusing several plea deals and going to trial, a jury found the defendant guilty on twenty-seven counts, including charges of vehicular homicide and vehicular manslaughter.[15] Colorado state law requires that all sentences for each count be served consecutively, not concurrently. As a result, the twenty-six-year old defendant was sentenced to 110 years in prison. Immediately after his sentencing, the public turned to social media to demand a reduced sentence. An online petition demanding

[12] *Id.*
[13] *Id.*
[14] Lanie Cook, "Truck Driver's 110-Year Sentence Dramatically Cut Down," https://pix11.com/news/truck-drivers-110-year-sentence-dramatically-cut-down-after-mill, December 30, 2021.
[15] *Id.*

Aguilera-Menderos's sentence be reduced was signed by over 4.5 million people.[16] The hashtag #JusticeForRogel became widely used on social media. This petition and subsequent posts on social media raising awareness on this case claimed that his sentence was not warranted due to lack of malicious intent. The public cited Aguilera-Menderos's clear driving and criminal record, along with clean drug tests to support their argument. As a result of the public outcry, Colorado Governor Jared Polis granted clemency to Aguilera-Menderos and reduced his sentence to only ten years in prison. Aguilera-Menderos will be eligible for parole in December 2026.

Aguilera-Menderos's case opens the door to the reality that public opinion can, in certain cases, modify a jury's opinion. The jury in this case determined that the prosecution proved the defendant's guilt on each count beyond a reasonable doubt. It would therefore be unlawful and potentially undemocratic to undermine the jury's verdict simply because people who are not fully educated about the case disapprove of the outcome. Individuals must also look at the precedent that this case sets for future trials in which the public disagrees with the verdict. While the governor granting clemency is a channel that can compromise the fairness of jury decisions, it is not the only means of doing so. This case sets the precedent that in future cases where the public disagrees with the verdict, especially vehicular homicide and manslaughter cases, public outcry has enough validity to overturn the jury's verdict. One must then consider the possibility that the public could support the release of someone who has intentionally committed horrendous crimes.

Additionally, this precedent is problematic because public opinion is difficult to directly measure. What is the threshold of public support needed to overrule a court's sentence? If Aguilera-Menderos's petition had only gotten one million signatures, would that still have been enough to get his sentence reduced? Two million? There is no clear threshold, which makes this issue rather difficult to ensure equal treatment for all, a principle that the justice system

[16] *Id.*

prioritizes.

The amount of public interest in a case can also determine which cases are investigated thoroughly. Prominent South Carolina attorney Alex Murdaugh was recently convicted of having intentionally shot and murdered his wife and son at his home estate. When taking the stand at his televised trial, Alex Murdaugh confessed to lying about his alibi and misusing funds but denied killing anyone.[17] Nonetheless, the jury in this case found the evidence convincing enough to convict Murdaugh on two counts of murder. Following the trial, public pressure led to reopening investigations into people previously associated with the Murdaugh family who seemed to experience suspicious deaths. For instance, Stephen Smith's death in 2015, a classmate of Alex Murdaugh's son Buster, was classified as a hit-and-run.[18] Following Murdaugh's murder trial, public pressure has prompted the exhumation of Smith's body to reopen the investigations due to suspicions that Murdaugh may have also been responsible for Smith's death.[19] The case of Gloria Satterfield, the Murdaugh family housekeeper who died falling down the stairs at the Murdaugh estate in 2018, is also being reopened due to public pressure after Murdaugh's guilty verdict.[20] This suggests that public opinion can influence which cases are investigated by government authorities. Here, public pressure driven by rumors of Murdaugh's involvement in Smith's and Satterfield's deaths reopened investigations into these previously closed cases.[21]

Therefore, the popularity of social media can strongly affect the legal system's ability to uphold laws. In both criminal and civil cases, judges and juries are not allowed to conduct outside research on a case. Juries, in cases heavily covered by the media, will oftentimes be

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[17] Bill Chappell, "A Jury Finds Disbarred Lawyer Alex Murdaugh Guilty in the Deaths of His Wife and Son," https://www.npr.org/2023/03/02/1160581579/alex-murdaugh-murder-trial-verdict, March 2, 2023.
[18] Jacey Fortin, "The Timeline of the Investigation Stretches Back Years before the Killings.," https://www.nytimes.com/2023/01/25/us/murdaugh-murder-trial-timeline.html, January 25, 2023.
[19] Bailee Hill, "Public Demands Answers in Suspicious Death of Buster Murdaugh's Classmate after Father Alex's Conviction,"https://www.foxnews.com/media/public-demands-answers-suspicious-death-buster-murdaughs-classmate-after-father-alexs-conviction, March 5, 2023.
[20] *Id.*
[21] *Id.*

sequestered or instructed not to check social media platforms to avoid outside biases from entering the courtroom. The prevalence of social media makes it difficult to find impartial juries that have not been exposed to outside information. Simply knowing the public's opinion for a case can be enough to bias the jury and, consequently, the verdict. It is crucial that social media's role in our society stays out of the courtroom. The interference of social media in legal proceedings can also cause inequality by creating inconsistencies and exceptions; there are individuals with cases similar to Aguilera-Menderos whose sentences were not reduced. Social media amplifies public opinion and can undermine the fairness of legal proceedings.

Moreover, while someone may win a case in court, losing in the court of public opinion can be much more damaging. One of the most widely publicized recent cases was *John C. Depp, II v. Amber Laura Heard* (2022), also known as the "TikTok Trial."[22] This was a public trial that took place from April 11, 2022, to June 1, 2022. Actor Johnny Depp filed suit against ex-wife Amber Heard for defamation, claiming that an op-ed she wrote—in which she heavily insinuated that Depp had physically abused her during the time of their marriage—cost him his role as the lead actor in the *Pirates of the Caribbean* franchise. Depp sued for $50 million in damages, and Heard countersued for $100 million in damages.[23] The live stream of the trial was watched by millions, with approximately 3.5 million people tuning in for the verdict announcement live.[24] Throughout the trial, people on social media showed clear support for Depp.[25] In cases involving domestic abuse in heterosexual relationships, public support typically falls on the woman's side as 85 percent of domestic violence victims are women.[26]

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[22] Anna Pilgrim, "Depp v. Heard and the Court of Public Opinion," https://www.standrewslawreview.com/post/depp-v-heard-and-the-court-of-public-opinion, July 3, 2022.
[23] *Id.*
[24] Frederick Penney, "A Defamation Case to Remember: Statistics from the Record-Breaking Depp v. Heard Trial," https://www.penneylawyers.com/news/a-defamation-case-to-remember-statistics-from-the-record-breaking-depp-v-heard-trial/, June 16, 2022.
[25] *Id.*
[26] "11 Facts about Domestic and Dating Violence," DoSomething.org, 2015.

However, as this trial developed, the public heard testimony from many sources who testified that Heard was faking her injuries and even claimed that she was the abuser in the relationship.[27] These testimonies helped shift public support away from Heard and onto Depp.

At the close of the case, the hashtag #IStandWithAmberHeard only had about 8.2 million views, whereas #JusticeForJohnnyDepp had reached over 21 billion views.[28] Clips, video compilations, and memes at Heard's expense from the trial had spread across social media by the time the case closed. Even if Heard had won the case, her image in the public eye was completely destroyed. For someone who makes her living as an actress, any serious reputation damage can be career ending. Heard's role in the *Aquaman* franchise has since been canceled after a petition amassed over 4.6 million signatures on Change.org to remove Heard from the *Aquaman* series.[29] In this trial, the jury sided with Depp, awarding him $15 million in damages. In the court of public opinion, Depp was widely supported and by the end of the trial, about 68 percent of Americans had a favorable perception of Depp.[30] Heard claimed that she plans to appeal the verdict, and while she may be granted such an appeal, the court of public opinion certainly will not.

Overall, this suggests a need for an alternate approach to addressing the impact of public opinion in the legal system. Better regulation of social media platforms may decrease the amount of misinformation online and lead to more reliable reasoning for public opinion. A clear line should be drawn, perhaps by legislation, to determine the situations when it is appropriate for public opinion to interfere with or overrule judicial decisions. Regardless of the verdicts

[27] Andrea Rice and Jennifer Chesak, "5 Domestic Abuse Experts on the Johnny Depp-Amber Heard Trial,"https://psychcentral.com/news/johnny-depp-amber-heard-mutual-abuse-experts-weigh-in#Depp-v.-Heard:-Domestic-abuse-experts-weigh-in, April 28, 2022.
[28] Frederick Penney, "A Defamation Case To Remember: Statistics From The Record-Breaking Depp v. Heard Trial."
[29] Deron Dalton, "DC Fans Petition for Amber Heard to Be Recast in 'Aquaman 2,' While Johnny Depp's Supporters Push for His Return to 'Pirates of the Caribbean,'" https://www.pennlive.com/life/2022/05/dc-fans-petition-for-amber-heard-to-be-recast-in-aquaman-2-while-johnny-depps-supporters-push-for-his-return-to-pirates-of-the-caribbean.html, May 5, 2022.
[30] Anna Pilgrim, "Depp v. Heard and the Court of Public Opinion."

decided in court, the decision in the court of public opinion carries its own consequences. While one has a right to a fair trial in our legal system, there is no guarantee that they will be granted a fair trial in the court of public opinion.

References

47 U.S. Code § 230.

Deron Dalton. “DC Fans Petition for Amber Heard to Be Recast in ‘Aquaman 2,’ While Johnny Depp’s Supporters Push for His Return to ‘Pirates of the Caribbean.’” pennlive, May 5, 2022. https://www.pennlive.com/life/2022/05/dc-fans-petition-for-amber-heard-to-be-recast-in-aquaman-2-while-johnny-depps-supporters-push-for-his-return-to-pirates-of-the-caribbean.html.

DoSomething.org. “11 Facts about Domestic and Dating Violence,” 2015. https://www.dosomething.org/us/facts/11-facts-about-domestic-and-dating-violence.

Agrawal, Smriti. “SOCIAL MEDIA and CRIMES: AN ENTANGLED RELATIONSHIP.” The Daily Guardian, September 27, 2021. https://thedailyguardian.com/social-media-and-crimes-an-entangled-relationship.

Brown, Sara. “MIT Sloan Research about Social Media, Misinformation, and Elections.” MIT Sloan. MIT Sloan School of Management, October 5, 2020. https://mitsloan.mit.edu/ideas-made-to-matter/mit-sloan-research-about-social-media-misinformation-and-elections.

Chappell, Bill. “A Jury Finds Disbarred Lawyer Alex Murdaugh Guilty in the Deaths of His Wife and Son.” NPR, March 2, 2023. https://www.npr.org/2023/03/02/1160581579/alex-murdaugh-murder-trial-verdict.

Cohen, Mark A. “Law in the Age of Social Media.” Forbes, 2023. https://www.forbes.com/sites/markcohen1/2016/11/27/law-in-the-age-of-social-media/?sh.

Cook, Lanie. “Truck Driver’s 110-Year Sentence Dramatically Cut Down.” PIX11, December 30, 2021. https://pix11.com/news/truck-drivers-110-year-sentence-dramatically-cut-down-after-mill.

Facebook. “Facebook Reports Fourth Quarter and Full Year 2020 Results.” investor.fb.com, January 27, 2021. https://investor.fb.com/investor-news/press-release-details/2021/Facebook-Reports-Fourth-Quarter-and-Full-Year-2020-Results/default.aspx.

Fortin, Jacey. “The Timeline of the Investigation Stretches Back Years before the Killings.” The New York Times, January 25, 2023, sec. U.S. https://www.nytimes.com/2023/01/25/us/murdaugh-murder-trial-timeline.html.

Frenkel, Sheera, and Kate Conger. “Hate Speech’s Rise on Twitter Is Unprecedented, Researchers Find.” The New York Times, December 2, 2022, sec. Technology. https://www.nytimes.com/2022/12/02/technology/twitter-hate-speech.html.

Hill, Bailee. “Public Demands Answers in Suspicious Death of Buster Murdaugh’s Classmate after Father Alex’s Conviction.” Fox News, March 5, 2023. https://www.foxnews.com/media/public-demands-answers-suspicious-death-buster-murdaughs-classmate-after-father-alexs-conviction.

Penney, Frederick. “A Defamation Case to Remember: Statistics from the Record-Breaking Depp v. Heard Trial.” Penney & Associates - Personal Injury Lawyers, June 16, 2022. https://www.penneylawyers.com/news/a-defamation-case-to-remember-statistics-from-the-record-breaking-depp-v-heard-trial/.

Pilgrim, Anna. “Depp v. Heard and the Court of Public Opinion.” StAndrews Law Review, July 3, 2022. https://www.standrewslawreview.com/post/depp-v-heard-and-the-court-of-public-opinion.

Rao, Karishma. “Who Is Cameron Herrin? Petition to Free TikTok Star, Sentenced to 24 Years in Prison, Receives More than 25,000 Signatures.” www.sportskeeda.com, 2021. https://www.sportskeeda.com/pop-culture/who-cameron-herrin-petition-free-tiktok-star-sentenced-24-years-prison-receives-25-000-signatures-fans.

Rice, Andrea, and Jennifer Chesak. “5 Domestic Abuse Experts on the Johnny Depp-Amber Heard Trial.” Psych Central, April 28, 2022. https://psychcentral.com/news/johnny-depp-amber-heard-mutual-abuse-experts-weigh-in#Depp-v.-Heard:-Domestic-abuse-experts-weigh-in.

Ruby, Daniel. “Social Media Users — How Many People Use Social Media in 2022.” demandsage, January 4, 2023. https://www.demandsage.com/social-media-users/.

Wrong Answers: State Bar Moral Character Applications, Disability Rights Law, and the Legal Field's Mental Health Question

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The state moral character application is a required component of a bar applicant's application to practice law in a given state. The majority of states have at least one question on their respective bar association's moral character evaluation that makes an inquiry into the mental health of the applicant. The legal standing of "the mental health question" is a contentious issue within the legal community, evident by the investigations into and legal arguments surrounding the legitimacy of the question. Through a lens of disability rights law, this article analyzes two cases of litigation pertaining to questions on state bar moral character evaluations related to the applicant's mental health: the 2014 Department of Justice investigation of the Louisiana State Bar and the 2016 Florida Supreme Court advisory opinion. Finally, recommendations derived from reviewing the litigation are offered, proposing either institutional-level legal advocacy or amending national policy to address the legal field's "mental health question."

State Bar Moral Character Application

Definition

The moral character application is required for individuals seeking to practice law in a given state.[1] It is one of three requirements for an individual to practice law, in addition to the

[1] "The State Bar of California," www.calbar.ca.gov, accessed October 9, 2021.

Multistate Professional Responsibility Examination (MPRE) and a state's bar exam.[2] The California State Bar defines "good moral character" as including (but not limited to): "honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the law, and respect for the rights of others and the judicial process."[3]

The moral character application consists of a number of questions pertaining to one's background, criminal history if applicable, and civil actions in order to assess the character of a bar applicant prior to their application to a state bar.[4] A positive moral character determination by the state bar is required in order to practice law in said state; therefore, failing to receive a positive moral character determination disqualifies an applicant from applying to the state bar. The purpose of the moral character application, as defined by the Conference for Bar Examiners, "is [to ensure] the protection of the public and the system of justice . . . The public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their lawyers."[5]

The Moral Character Application in Practice

Applicants submit a written moral character application to the state bar. All questions on the application must be answered in order for the application to be deemed complete; an investigation by the state bar is conducted after submission to ensure accuracy.[6] The burden of proof of requisite moral character is upon the bar applicant.[7] The responsibility of full disclosure is the applicant's responsibility. If an applicant is unsure about whether to disclose or omit an

[2] Hadar Aviram,"Moral Character: Making Sense of the Experiences of Bar Applicants with Criminal Records," *SSRN Electronic Journal* (2019): 5, https://doi.org/.
[3] "The State Bar of California."
[4] *Id.*
[5] National Conference of Bar Examiners and American Bar Association: Legal Education and Admissions to the Bar, "Comprehensive Guide to Bar Admission Requirements National Conference of Bar Examiners American Bar Association Section of Legal Education and Admissions to the Bar" (2021): 7.
[6] Hadar Aviram, 6.
[7] *Id.*

item in their moral character application, state bars tend to encourage disclosure.[8] Bar examiners that review moral character applications are instructed to "exhibit courage, judgment, and moral stamina in refusing to recommend applicants who lack adequate general and professional preparation or who lack moral character and fitness."[9]

The Moral Character Application's Mental Health Question

The bar associations of thirty-nine states and Washington, D.C. include one or more questions referencing the mental health status of an applicant.[10] Mental health questions asked by state bar associations can be categorized into four distinct classifications: mental health diagnosis, previous and current treatment for mental health, mental health as a defense or explanation for actions and behavior, and whether there has been previous placement under a conservatorship.[11]

Eleven states and Washington D.C. use the mental health questions drafted by the National Conference of Bar Examiners (NCBE): Hawaii, Louisiana, Montana, New Mexico, North Carolina, North Dakota, Oklahoma, South Dakota, Vermont, West Virginia, and Wyoming.[12] The NCBE questions are as follows:

- Diagnosis: "Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner? Note: 'Currently' means recent enough that the condition or impairment could reasonably affect your ability to function as a lawyer."[13]

[8] *Id.*, 5.
[9] National Conference of Bar Examiners and American Bar Association: Legal Education and Admissions to the Bar, 7.
[10] American Bar Association, "Mental Health Character & Fitness Questions for Bar Admission," www.americanbar.org, December 6, 2022.
[11] *Id.*
[12] *Id.*
[13] *Id.*

- Treatment: "Are the limitations caused by your condition or impairment reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program?"[14]

- Defense/Disciplinary Action: "Within the past 5 years, have you asserted any condition or impairment as a defense, in mitigation, or as an explanation for your conduct in the course of any inquiry, any investigation, or any administrative or judicial proceeding by an educational institution, government agency, professional organization, or licensing authority; or in 10 connection with an employment disciplinary or termination procedure?"[15]

States that choose not to adopt all three questions drafted by the NCBE either adopt some of the NCBE questions or draft their own questions. Some of the questions included in other state bars include, but are not limited to:

- Diagnosis: "Within the past 5 years, have you been treated for. . .schizophrenia or any other psychotic disorder, a bipolar disorder, or major depressive disorder, that has impaired or could impair your ability to practice law? If your answer is 'yes,' please (i) identify each condition for which you received treatment or had a recurrence, (ii) state the beginning and end dates of any treatment (or state 'present' if no end date); (iii) state the name and address of each professional who treated you; and (iv) identify any medication that was prescribed to you during treatment. Please direct each treating professional to provide any information or records that the Board may request regarding treatment, which includes, without limitation, hospitalization."[16] (Florida)

- Diagnosis: "Are you currently, or have you been within the last five years, (a) diagnosed with or (b) treated for any of the following: Schizophrenia or any other psychotic disorder, delusional disorder, bipolar or manic depressive mood disorder, antisocial personality disorder, or any other condition which significantly impairs your behavior, judgment, understanding, capacity to recognize reality, or ability to function in school, work, or other important life activities? (If you are uncertain of a diagnosis, it is your responsibility to check with your treating health care professional.)"[17] (Kentucky)

- Treatment: "Within the past two years, have you. . .discontinued treatment or medication for a condition that at any time impaired your ability. . .?"[18] (Minnesota)

- Treatment: "Within the past five (5) years, have you sought or been directed to seek treatment for your conduct or behavior?"[19] (Virginia)

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*

The remaining states that do not consider a candidate's mental health status in evaluating their fitness are Arizona, Illinois, Iowa, Maryland, Massachusetts, Michigan, Mississippi, New York, Pennsylvania, Tennessee, and Washington.[20]

The historical argument states use to support their usage of questions pertaining to mental health on the state bar is that the questions are necessary to identify applicants that may lack the fortitude to be an attorney. States maintain that attorneys who tend to receive ethical complaints typically suffer from issues stemming from poor mental health or substance abuse issues.[21] This position is often refuted by legal professionals, academics in the legal field, and mental health professionals, who argue that there is a lack of evidence that a diagnosis affects one's ability to serve as an attorney.[22]

The 2014 Department of Justice Investigation into the Mental Health Question

Basic Facts

In January 2011, the Judge David L. Bazelon Center for Mental Health Law—henceforth referred to as the Bazelon Center—filed an administrative complaint with the United States Department of Justice (DOJ) against the Supreme Court of the State of Louisiana, Louisiana Committee on Bar Admissions, and Louisiana Office of Disciplinary Counsel.[23] The complaint was filed on behalf of an attorney granted "conditional admission" to practice law in the state of Louisiana based on her answers to the mental health questions on the Louisiana State Bar moral

[20] *Id.*
[21] Holcombe, Madeline, "Law Students Say They Don't Get Mental Health Treatment for Fear It Will Keep Them from Becoming Lawyers. Some States Are Trying to Change That," CNN, February 29, 2020.
[22] Judge David L. Bazelon Center for Mental Health Law, "Bar Examiners Screening for Mental Illness Violates the ADA," 2013.
[23] "Louisiana Bar Conditional Admissions | Bazelon Center for Mental Health Law," Judge David L. Bazelon Center for Mental Health Law, accessed December 30, 2022.

character application.[24] The complaint was filed with the Disability Rights Section of the Civil Rights Division of the DOJ.[25]

The complaint holds that the Louisiana bar has engaged in a patterned practice of "routinely imposed conditional admissions" on applicants with mental health diagnoses, despite a lack of evidence that their mental health would interfere with the applicants' ability to practice law.[26] The complaint asks the DOJ to "[s]ecure an end to Louisiana's pattern and practice of subjecting individuals with mental illness to conditional admissions based solely on a diagnosis of mental illness."[27]

While the investigation was initiated by a single administrative complaint, the Bazelon Center filed an additional complaint pertaining to the same issue but on behalf of a different individual. The complaint initiated an investigation pursuant to Title II of the Americans with Disabilities Act and Sections 504 of the Rehabilitation Act.[28]

Relevant Laws

Americans with Disabilities Act of 1990

The Americans with Disabilities Act (ADA) is a federal civil rights law that defines prohibited discrimination against individuals with disabilities. Under the ADA, a disability is considered to be a:

1. "a physical or mental impairment that substantially limits one or more of the major life activities of such individual,"[29]
2. "a record of such an impairment,"[30] or
3. "being regarded as having such an impairment."[31]

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[24] *Id.*
[25] *Id.*
[26] "Redacted Title II Complaint," Judge David L. Bazelon Center for Mental Health Law, January 2011, 6.
[27] *Id.,* 7.
[28] Louisiana Bar Conditional Admissions | Bazelon Center for Mental Health Law."
[29] 108th Congress, "Americans with Disabilities Act of 1990 (Original Text) | U.S. Equal Employment Opportunity Commission," 1990, www.eeoc.gov.
[30] *Id.*
[31] *Id.*

The ADA consists of five titles, and each title specifies requirements for different agencies and organizations: employment, public (state and local government) services, private (business) services open to the public, telecommunications, and miscellaneous provisions.[32]

Regarding the administrative complaint, the relevant title is Title II: Public Services. "Public Services" consists of all programs, activities, and services of state and local governments; it holds that they must provide people an equal opportunity to benefit from and participate in all programs, activities, and services.[33] Under section § 35.130 of Title II, a local and state government may not "deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service."[34]

Rehabilitation Act of 1973

The Rehabilitation Act is a federal law that prohibits discrimination against individuals with disabilities in federally funded programs and activities.[35] It primarily consists of rights, access, and protections for individuals with disabilities. The relevant section, Section 504, states that "no qualified individual with a disability in the United States shall be excluded from, denied the benefits of, or be subjected to discrimination under any program or activity which receives Federal financial assistance."[36] It enshrines the rights of individuals with disabilities to participate in and have access to programs, benefits, and services.

Investigation and Findings

In March 2011, federal prosecutors within the Disability Rights Section of the DOJ launched an investigation against the Louisiana Supreme Court and bar officials regarding the

[32] "Introduction to the Americans with Disabilities Act," ADA.gov, November 18, 2022.
[33] *Id.*
[34] "Americans with Disabilities Act of 1990 (Original Text) | U.S. Equal Employment Opportunity Commission."
[35] Employer Assistance and Resource Network for Disability Inclusion (EARN), "Rehabilitation Act of 1973 (Rehab Act)," n.d., askearn.org.
[36] "CA Department of Rehabilitation," n.d., www.dor.ca.gov.

administrative complaint by the Bazelon Center that alleged that Title II of the ADA had been violated.[37] In addition to the two individuals who had complaints filed for them by the Bazelon Center, five other individuals who had previously been affected by the mental health questions were identified and interviewed by the DOJ.[38]

In February 2014, the DOJ concluded their investigation and found that the practice of admission based on answers to and the evaluation of the Louisiana bar moral character application's mental health questions "discriminate[d] against individuals on the basis of disability."[39] This finding was based on the DOJ's conclusion that the evaluation and practice of admission based on answers to the questions was "based on [disability] stereotypes and assumptions" and were not necessary to assess the applicants' fitness to practice law.[40]

The Louisiana Supreme Court was ultimately found to be in violation of Title II of the ADA. The questions were determined by the investigation to subject people with disabilities to additional burdens and be ineffective in identifying unfit applicants.[41] These questions were considered to be unnecessary by the DOJ when evaluating an applicant's fitness to become an attorney because questions related to applicant conduct on the Louisiana moral character application were deemed sufficient for determining fitness.[42] The DOJ also found that these questions are "likely to deter applicants from seeking counseling and treatment for mental health concerns, which fails to serve the Court's interest in ensuring the fitness of licensed attorneys."[43]

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[37] Jocelyn Samuels and U.S. Department of Justice, Civil Rights Division, "The United States' Investigation of the Louisiana Attorney Licensure System pursuant to the Americans with Disabilities Act CDJ No. 204-32M-60, 204-32-88, 204-32-89)," February 5, 2014.
[38] *Id.,* 3.
[39] *Id.,* 2.
[40] *Id.*
[41] *Id.*, 18.
[42] *Id.,* 19–20.
[43] *Id.,* 23.

The DOJ investigation additionally found that processes related to the use of the mental health questions on the Louisiana moral character application violated the ADA. Specifically, the Louisiana Supreme Court imposed undue and unfounded burden onto applicants with disabilities by requiring further investigation of applicants who answered affirmatively to the mental health questions, discriminating against applicants by awarding conditional admissions based primarily on mental health diagnosis as opposed to behavior and conduct, and failing to protect applicant confidentiality.[44] The Louisiana Admission Committee violated the ADA by imposing "intrusive and onerous conditions of admission upon applicants with disabilities" that made employment as an attorney more difficult and required a costly and undue financial burden in the form of an independent psychiatric evaluation.[45]

Settlement

In August 2014, the Louisiana Supreme Court and the DOJ reached an agreement and settled the case.[46] The agreement holds that the Louisiana State Bar must refrain from asking "unnecessary and intrusive questions about bar applicants' mental health diagnosis or treatment" and must stop imposing conditional admission to the bar on the basis of an applicant's mental health diagnosis or treatment.[47] Applicants will only share their mental health history should they wish to use it as an explanation for prior conduct.[48] Additionally, the court was instructed to pay a total of $200,000 to compensate the seven individuals involved in the DOJ investigation and who were determined to be affected by the Louisiana bar mental health moral character questions.[49] Despite the settlement agreement, the Louisiana Supreme Court denied that they

[44] *Id.,* 27–28.
[45] *Id.,* 28.
[46] David Lee, "Louisiana Supreme Court Settles with USA," August 19, 2014, www.courthousenews.com.
[47] "Settlement Agreement between the United States of America and the Louisiana Supreme Court," August 14, 2014, archive.ada.gov.
[48] *Id.*
[49] *Id.*

discriminated against bar applicants; it maintains that it did not discriminate against applicants with disabilities or violate Title II of the ADA.[50]

Subsequent Litigation and Current Legal Standing

The current legal standing of mental health questions, as determined by the DOJ in their 2014 letter to the Louisiana state bar, rests on application of the questions. The practice of admission on the basis of answers to the mental health questions was found to be in violation of the ADA; it was not the question itself that was in violation.[51] The way that the mental health questions were applied by the Louisiana State Bar violated the ADA. This explains why other states are still permitted to ask questions about mental health.

It is a common misconception that the DOJ found that the violation was because of the questions themselves, as opposed to the application and evaluation of the answers to the mental health questions; the legal application of the ADA is often incorrectly understood. Since the state bar is a licensing agency that is part of the government and not a business, it falls under Title II of the ADA.[52] Asking about mental health conditions violates Title III—which states the requirements of private services, such as businesses—of the ADA.[53] However, state bar agencies are not private businesses and are, therefore, beholden to different standards; these standards—stated in Title II of the ADA—permit government agencies and public services to ask about the mental health conditions of an individual.

This is evident in subsequent litigation following the 2014 DOJ investigation. In 2016, a plaintiff in Florida filed a suit against the Florida State Board of Bar Examiners, arguing that the Board had violated the ADA by asking questions pertaining to the applicant's mental health.[54]

[50] David Lee, "Louisiana Supreme Court Settles with USA."
[51] Jocelyn Samuels and U.S. Department of Justice, Civil Rights Division.
[52] "Americans with Disabilities Act of 1990 (Original Text) | U.S. Equal Employment Opportunity Commission."
[53] *Id.*
[54] Jim Rosica, "Mental Health Questions on Florida Bar Application Are Discriminatory, Suit Says," Florida Politics - Campaigns & Elections. Lobbying & Government, October 25, 2016.

The Florida Supreme Court found in their advisory opinion that the Board asked questions that were "limited and focused," did not apply the mental health questions in a discriminatory way, and evaluated the answers to the mental health questions in a manner that complied with the ADA.[55] The Florida Supreme Court denied the plaintiff's motion and confirmed the findings of the 2014 DOJ investigation: the application of and evaluation of answers to the mental health questions can result in the violation of Title II of the ADA, but asking a question pertaining to mental health conditions does not.[56]

Ultimately, the current standing holds that it is legal for a state bar to inquire into the mental health diagnosis and treatment of an individual, and it becomes illegal when the inquiry results in discriminatory actions taken by a state bar.

Recommendations

Based on the circumstances created by the current legal processes, there are two primary forms of addressing the mental health question: through legal institution advocacy or through legal amendment.

Legal Institution Actions and Reform

Measures of reform taken by legal institutions may provide a means to address the mental health question. While many may believe that the primary legal institution that should engage in advocacy is the American Bar Association, the legal institution that would be the most effective reformer is the National Conference of Bar Examiners.

In 2015, shortly after the finalization of the settlement between the DOJ and the Louisiana state bar, the American Bar Association published a report and adopted a policy urging state bar associations "to eliminate from applications required for admission to the bar any

[55] Supreme Court of Florida, "Supreme Court of Florida, Case No. SC20-850," 2021.
[56] *Id.*

questions that ask about mental health history, diagnoses, or treatment and instead use questions that focus on conduct or behavior that impairs an applicant's ability to practice law in a competent, ethical, and professional manner."[57] However, as the majority of state bar associations include one or more questions referencing the mental health status of an applicant, this policy was not binding and did not result in a change regarding mental health questions for moral character applications in a majority of states.[58]

A more effective legal institution to enact policy for the purpose of reform is the National Conference of Bar Examiners (NCBE). The NCBE is a legal institution that assists admission authorities at different state bar associations, courts, the legal education community and law schools, and prospective attorneys and provides legal assessments, services, research, investigations, resources, and programs.[59] The NCBE holds that they "actively work to eliminate any aspects of our exams that could contribute to performance disparities among different groups."[60] Opponents of the mental health questions would disagree that the NCBE succeeds in this work due to the promotion of their drafted mental health questions and the fact that mental health questions drafted by the NCBE are currently used in moral character applications in eleven states and Washington, D.C.

If the NCBE were to declare that they no longer recommend state bar associations ask questions regarding an applicant's mental health history and request that states no longer use their drafted questions related to the mental health diagnosis, history, and treatment of an applicant, states using the NCBE-drafted mental health questions would have to remove those

[57] Frederick Vars, "Dangerous and Discriminatory: Mental Health Questions on Bar Applications," www.jurist.org, September 9, 2022, https://www.jurist.org/commentary/2022/09/frederick-vars-mental-health-questions-bar/.
[58] American Bar Association, "Mental Health Character & Fitness Questions for Bar Admission."
[59] National Conference of Bar Examiners, "About NCBE," NCBE, accessed January 12, 2023, https://www.ncbex.org/about/.
[60] National Conference of Bar Examiners, "Diversity, Fairness, and Inclusion," NCBE, accessed January 12, 2023, https://www.ncbex.org/about/diversity-fairness-and-inclusion/.

questions accordingly. This may lead to states removing questions pertaining to an applicant's mental health entirely rather than drafting their own replacement questions.

Additionally, if the NCBE were to produce a policy similar to the American Bar Association's policy regarding the discouragement of mental health questions on state bar moral character applications, there would be alignment on the viewpoint held about mental health questions by important legal institutions. The American Bar Association and the NCBE are the two most prominent legal institutions in America; if they both held similar stances on the mental health question, members of the legal field may take cues from these institutions and reevaluate whether mental health questions should be included on moral character applications. As a widely accredited legal institution that has a history of promoting the mental health question, action by the NCBE has the potential to propose a resolution regarding the conflict of the mental health question.

Legal Amendment

Conversely, legal amendment may prove to be an efficient and effective means to resolve the legal field's mental health question. The policy subject to amendment would be the Americans with Disabilities Act. The ADA Amendments Act of 2008 was signed to clarify the definition of disability under the ADA.[61] While this would be considered a legal amendment to the ADA, it was signed into law as its own policy.[62]

To address the mental health question, a policy could amend the ADA to apply the same protection requirements regarding inquiry into mental health conditions listed in Title III for private businesses to Title II for government agencies and services. If this were to become policy,

[61] U.S. Equal Employment Opportunity Commission, "ADA AMENDMENTS ACT OF 2008 | U.S. Equal Employment Opportunity Commission," www.eeoc.gov, September 25, 2008, https://www.eeoc.gov/statutes/ada-amendments-act-2008.
[62] Joseph Sassi, "Important Changes to the 'Americans with Disabilities Act,'" 2008, https://hr.uconn.edu/wp-content/uploads/sites/1421/2020/03/Important-Changes-to-the-ADA.pdf.

government agencies—and therefore state bar associations—would be violating the ADA if they were to ask about the mental health conditions of applicants. By passing an act amending the ADA to provide the same mental health inquiry protections by both private and public institutions, the issue surrounding the mental health question would be resolved. The legal standing of the question would be made unambiguous across the nation because the amending act would make it clear that mental health questions on moral character applications would violate federal law.

Conclusion

Despite the controversy surrounding the mental health question—particularly in the last decade—the majority of bar associations still include some form of mental health question on their moral character applications required for admission to the state bar. The 2014 investigation and 2016 opinion suggest that the mental health question could emerge as a major legal issue subject to significant litigation in the near future.

In spite of the emergence of the controversy, the legal standing of the mental health question is widely misunderstood. The language and scope of the ADA only protects against improper application and evaluation of the answers to mental health questions on state bar moral character applications; it does not protect against the questions being asked to begin with.

To resolve the issues surrounding the mental health question and to protect prospective lawyers with disabilities pertaining to their mental health, there seem to be two potential solutions, either that:

I. The National Conference of Bar Examiners, as a prominent American legal institution:
    A. Rescinds their former support of the mental health question in state bar moral character applications,
    B. Opposes the usage of their drafted mental health questions for state bar moral character applications,

C. Writes a formal policy modeled after the American Bar Association's policy discouraging the usage of mental health questions in moral character applications; or,

II. An act be passed to legally amend the Americans with Disabilities Act in order to apply the Title II mental health inquiry protections granted to individuals by private institutions to Title III, resulting in mental health inquiry protections being granted to individuals by government agencies, public services, and state and local offices.

Ultimately, the current landscape of state bar questionnaires creates a situation in which prospective attorneys with mental health diagnoses and treatments are made to feel that they only have wrong answers to the mental health question.

References

108th Congress. “Americans with Disabilities Act of 1990 (Original Text) | U.S. Equal Employment Opportunity Commission.” www.eeoc.gov, 1990. https://www.eeoc.gov/americans-disabilities-act-1990-original-text.

ADA.gov. “Introduction to the Americans with Disabilities Act,” November 18, 2022. https://www.ada.gov/topics/intro-to-ada/.

American Bar Association. “Mental Health Character & Fitness Questions for Bar Admission.” www.americanbar.org, December 6, 2022. https://www.americanbar.org/groups/diversity/disabilityrights/resources/character-and-fitness-mh/.

Aviram, Hadar. “Moral Character: Making Sense of the Experiences of Bar Applicants with Criminal Records.” *SSRN Electronic Journal* 43, no. 4 (2019). https://doi.org/10.2139/ssrn.3440387.

archive.ada.gov. “Settlement Agreement between the United States of America and the Louisiana Supreme Court,” August 14, 2014. https://archive.ada.gov/louisiana-supreme-court_sa.htm.

Employer Assistance and Resource Network for Disability Inclusion (EARN). “Rehabilitation Act of 1973 (Rehab Act).” askearn.org, n.d. https://askearn.org/page/the-rehabilitation-act-of-1973-rehab-act.

Holcombe, Madeline. “Law Students Say They Don’t Get Mental Health Treatment for Fear It Will Keep Them from Becoming Lawyers. Some States Are Trying to Change That.” CNN, February 29, 2020. https://www.cnn.com/2020/02/23/health/law-school-bar-exam-mental-health-questions/index.html.

Judge David L. Bazelon Center for Mental Health Law. “Bar Examiners Screening for Mental Illness Violates the ADA,” 2013. http://www.bazelon.org/wp-content/uploads/2017/03/Louisiana-Press-Release-6.20.13.pdf.

Judge David L. Bazelon Center for Mental Health Law. “Louisiana Bar Conditional Admissions | Bazelon Center for Mental Health Law.” Accessed December 30, 2022. http://www.bazelon.org/louisiana-bar-conditional-admissions/.

Judge David L. Bazelon Center for Mental Health Law. “Redacted Title II Complaint,” January 2011. http://www.bazelon.org/wp-content/uploads/2017/03/Redacted_Title_II_Complaint.pdf.

Lee, David. “Louisiana Supreme Court Settles with USA.” www.courthousenews.com, August 19, 2014. https://www.courthousenews.com/louisiana-supreme-court-settles-with-usa/.

National Conference of Bar Examiners. “About NCBE.” NCBE. Accessed January 12, 2023. https://www.ncbex.org/about/.

National Conference of Bar Examiners. “Diversity, Fairness, and Inclusion.” NCBE. Accessed January 12, 2023. https://www.ncbex.org/about/diversity-fairness-and-inclusion/.

National Conference of Bar Examiners, and American Bar Association: Legal Education and Admissions to the Bar. “Comprehensive Guide to Bar Admission Requirements National Conference of Bar Examiners American Bar Association Section of Legal Education and Admissions to the Bar,” 2021.

Rosica, Jim. “Mental Health Questions on Florida Bar Application Are Discriminatory, Suit Says.” Florida Politics - Campaigns & Elections. Lobbying & Government., October 25, 2016. https://floridapolitics.com/archives/225441-florida-bar-application-discriminatory/.

Samuels, Jocelyn, and U.S. Department of Justice, Civil Rights Division. “The United States’ Investigation of the Louisiana Attorney Licensure System pursuant to the Americans with Disabilities Act CDJ No. 204-32M-60, 204-32-88, 204-32-89),” February 5, 2014.

Sassi, Joseph. “Important Changes to the ‘Americans with Disabilities Act,’” 2008. https://hr.uconn.edu/wp-content/uploads/sites/1421/2020/03/Important-Changes-to-the-ADA.pdf.

Supreme Court of Florida. “Supreme Court of Florida, Case No. SC20-850.” 2021.

The State Bar of California. “Moral Character Determination Guidelines,” n.d. Accessed December 30, 2022.

The State Bar of California.“The State Bar of California.” www.calbar.ca.gov. Accessed October 9, 2021. https://www.calbar.ca.gov/Admissions/Moral-Character.

U.S. Equal Employment Opportunity Commission. “ADA AMENDMENTS ACT of 2008 | U.S. Equal Employment Opportunity Commission.” www.eeoc.gov, September 25, 2008. https://www.eeoc.gov/statutes/ada-amendments-act-2008.

Vars, Frederick. “Dangerous and Discriminatory: Mental Health Questions on Bar Applications.” www.jurist.org, September 9, 2022. https://www.jurist.org/commentary/2022/09/frederick-vars-mental-health-questions-bar/.

www.dor.ca.gov. “CA Department of Rehabilitation,” n.d. https://www.dor.ca.gov/Home/RehabilitationAct.

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